Application No. 92-024

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

RE: APPLICATION FOR CERTIFICATION
RE: Appropriate Unit; Majority of Employees

BETWEEN:

CONSTRUCTION AND GENERAL LABOURERS UNION, LOCAL 1079-A

APPLICANT

AND:

GULF ISLAND PEAT MOSS CO., INC.

RESPONDENT

****

COUNSEL FOR THE APPLICANT: **J. GORDON MacKAY**

COUNSEL FOR THE RESPONDENT: **STEPHEN McKNIGHT**

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BACKGROUND OF APPLICATION:

1. An Application for Certification, on behalf of the Applicant, (hereinafter referred to as "the Labourers Union"), was filed with the Labour Relations Board (hereinafter referred to as the "Board") on July 10, 1992. Together with Form 1, the Labourers Union filed a list of officers, membership evidence and receipts, a constitution of the Labourers' International Union of North America, a Charter of the Labourers Union, and a list of people

wishing the Labourers Union be certified as their bargaining agent.

2. The Chief Executive Officer of the Board set July 31, 1992 as the terminal date and sent notice of the application to the Applicant and the Respondent on July 13, 1992.

3. No interventions were received from any of the employees of the Respondent by the terminal date, although a petition from the employees opposing the Application for Certification was received on August 4, 1992; however, the Respondent itself did file a Reply to the Application for Certification by facsimile on July 31, 1992, followed up with the original being received by the Board on August 6, 1992. In its Reply, the Respondent indicated that there were 16 employees in its employ on July 10, 1992, the date the application was filed, of which 15 were appropriate for collective bargaining. The Respondent objected to the application for certification on several grounds, the relevant ones being outlined as follows:

(a) The Respondent does not believe that a majority of the employees of the Respondent wish the Applicant to be certified as bargaining agent on their behalf.

(b) The Applicant Union is not an appropriate bargaining agent in that the majority of the Respondent's employees on July 10, 1992 carried out non-labouring functions.

4. A panel was struck by the Chair of the Board and it met to review the application on August 13, 1992. At that time, it was determined that further information was necessary so the Board through its Chief Executive Officer on August 13, 1992 requested various information from the Respondent's solicitor,namely:

"1. A copy of the letter of lay-off given to the employees of Gulf Island Peat Moss Co. Ltd. in late June or early July, 1992.

2. A list of employees who were given this letter.

3. The period of time the lay-off lasted.

4. If and when the employees were rehired.

5. The names of the employees who were rehired.

6. A list of employees who were employed on July 8, 1992.

7. A list of employees who were employed on July 9, 1992."

5. The Respondent replied to the Board's request by correspondence dated August 21, 1992 and received by the Board on August 28, 1992, which stated in part the following information;

(a) A new plant, a state of the art peat packing facility employing significant robotics and mechanization, is located on what is colloquially known as the new bog, while the `old plant', located on the old bog, is an antiquated facility whose equipment had long since fulfilled its useful life.

(b) Peat for which orders existed was coming from the old bog and was transported to the new plant where it was packaged and stockpiled for later shipment.

(c) Excessive rains characterized that period of time from the end of June until well into July, 1992.

(d) A letter dated July 6, 1992 was forwarded by the President of the Respondent from North Carolina by facsimile to "All Gulf Island Employees", which letter was purportedly received by twenty six (26) employees and which stated in part:

"It is with regret that I have to inform you that we will be shutting down the operation. Because of the bad weather, we are unable to harvest the peat; likewise, we are unable to continue baling at this time because of quality control concerns, i.e. heavy bales. Until such time as I myself can come to Gulf Island and oversee the quality control and we experience several days of fair weather, all employees of Gulf Island, excepting the office staff, will not be required to come to work. You

will be called when you are required."

(e) A memorandum dated July 7, 1992 addressed to "All Employees of Gulf Island Peat Moss Co." from the President of the Respondent stated in part:

> "Since we do not have orders for more peat from the new bog, harvesting and baling will be suspended until such time when firm orders are received. Also, because of the bad weather we need to lay off some of you. I am sorry about this, but matters are beyond my control".

(f) Twenty-seven (27) people purportedly received the memorandum dated July 7, 1992.

(g) Seventeen (17) people were laid off from Gulf Island Peat Moss Co. Inc. between July 3, 1992 and July 14, 1992.

(h) Five (5) employees were rehired between July 20, 1992 and August 15, 1992.

(i) Twelve (12) employees actually worked July 8, 1992, and eleven (11) employees actually worked July 9, 1992. Four (4) employees did not work on either of those dates but were still considered to be employed by the Respondent.

6. The panel convened to hear the matter on September 15, 1992, which hearing was continued on October 5, 1992 and November 16, 1992. Briefs were to be filed by the parties by December 3, 1992.

LAW AND DECISION

Timeliness

7. The first issue that the Board must satisfy itself about concerns whether or not the Application for Certification is timely. Section 12 of the **Labour Act, R.S.P.E.I. 1988, Cap. L-6** (hereinafter referred to as the **Labour Act**) prescribes the times

when a Union may properly apply to be certified as the bargaining agent for a unit of employees. In the present situation, as there was no trade union previously certified for these employees and there was no Collective Agreement in place, the application could be made at any time.

Requirements for Certification

8. Section 13 of the Labour Act, supra, prescribes the requirements to be satisfied before a union may properly be certified as the bargaining agent for a unit of employees. Those requirements are that the organization be a trade union, the unit be appropriate for collective bargaining and that a majority of the employees desire the union to be certified. Only upon these factors being satisfied, can the Board certify the trade union as the bargaining agent for the employees in the unit.

Trade Union Status

9. Having stated the foregoing, the Board must concern itself with whether or not the Labourers Union is a trade union within the meaning of the Labour Act, supra. Trade union is defined in Subsection 7(1)(m) of the Labour Act, supra, to mean:

> "Any organization of employees formed for 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."

10. The definition contained in Section 7(1)(m) of the Labour Act, supra, clearly indicates that there are two prerequisites that must be satisfied before trade union status is acquired. First, the union must be an organization of employees and secondly, the union's purposes must include the regulation of relations between employers and employees.

11. The Board has found the comments outlined in Ontario Labour Relations Board Law and Practice by Sack and Mitchell

(Butterworths, Toronto; 1985) to be pertinent. In that text at pages 126-127, it is stated:

> In order to establish its status as a trade union within the meaning of the Act, when it is required to do so, an applicant must satisfy the Board that it is an organization of employees formed for purposes that include labour relations. In order to do so, it must establish that it is a viable organization with a duly adopted constitution and duly elected officers, who can act on behalf of the organization.

12. The first point noted by Sack and Mitchell in Ontario Labour Relations Board Law and Practice is that it must be employees who join together to regulate labour relations. The clear intent of this provision is to ensure that there is no employer involvement and that it is employees who are joining together to regulate their own affairs. There is nothing contained in the evidence, either oral or written documentation, that would lead the Board to conclude that management was in any way involved in the formation of the Labourers Union.

13. Turning to the second point noted by Sack and Mitchell in Ontario Labour Relations Board Law and Practice, namely, the purpose for which the employees joined together, the Board is convinced that one of those purposes was to regulate labour relations. This conclusion is readily apparent when the Board reviews the membership evidence that was provided by the Labourers Union. This evidence is filed for the Board's own use and is not available to the Respondent. A portion of each document that the employees in question signed states as follows:

> ...
>
> I hereby apply for membership in Local Union _____ of the Labourers' International Union of North America, and authorize its representative to represent me in negotiating a Collective Labor Agreement with my Employer.
>
> ...

14. Collective bargaining is defined in Section 7(1)(m) of the Labour Act, supra, to mean "negotiation with a view to the conclusion of a collective agreement or the renewal or revision

thereof, as the case may be". The Board is satisfied that the regulation of labour relations would be at the forefront.

15. Having stated the foregoing, the Board finds that the second branch of the test has been satisfied and the Labourers Union is a trade union within the meaning of Subsection 7(1)(m) of the Labour Act, supra.

Appropriate Unit

16. The Board must also be satisfied that the Unit is appropriate for collective bargaining before it can issue a Certification Order. This is one of the areas on which there was some dispute in that the Respondent felt only a few individuals were performing labouring functions.

17. Having heard the evidence and submissions, the Board has satisfied itself that the unit is appropriate for collective bargaining. That unit is the unit of employees applied for, namely, all employees of the Respondent working as labourers, press operators, loader operators, ditchers, working field foremen, farm tractor operators and working plant foremen in the Province of Prince Edward Island, excluding non-working foremen, office staff, and those above the rank of foreman.

Majority Support

18. The final issue the Board must concern itself with by virtue of the Legislation is majority support. This one of the areas which the Respondent questioned and, in fact, a great deal of the evidence dealt with this issue and specifically whether or not certain individuals were laid off by the Respondent prior to the date of application, and whether or not they were employees on the relevant date.

19. As noted previously, the Reply filed on behalf of the Respondent indicated the unit applied for by the Labourers Union consisted of sixteen (16) employees on July 10, 1992; however, the

number of membership cards submitted by the Labourers Union were greater in number than the number of employees the Respondent had indicated that it had in its employ on July 10, 1992.

20. It became readily apparent to the Board that a significant number of employees of the Respondent had been, or appeared to have been, laid off prior to the date the Labourers Union filed the application and upon further investigation, prior to the date they had applied for membership in the Labourers Union.

21. The Board asked Counsel for the parties to address the narrow issue as to who was an employee on the relevant date. Counsel for the Labourers Union felt that evidence needed to be adduced in relation to this matter and relied on Section 9(2) of the Labour Act, supra, which states as follows:

> "9.(2) No person ceases to be an employee within the meaning of this Part by reason only of his ceasing to work as the result of a lockout or lawful strike or by reason only of dismissal contrary to this Part or to a collective agreement."

22. In light of the arguments that were adduced on behalf of the Labourers Union, the Board felt it was necessary to hear evidence in relation to this matter and proceeded to hear evidence and argument.

23. As a preliminary matter, Counsel for the Labourers Union sought to submit two (2) additional membership cards that were not filed with the Board by the terminal date. On October 5, 1992, the Board made an oral ruling that it would deal with that issue later.

24. After hearing argument in relation to the issue of whether or not the Board will accept the two membership cards filed after the terminal date, the Board has determined not to accept this evidence. The cards were forwarded to the Board on December 3, 1992 and the Board was advised that the cards were signed after July 10, 1992, the date the Application for Certification was filed. Furthermore, there is no indication that membership dues were paid and, accordingly, the Board will not consider these two

cards.

25. Turning to the central issue surrounding majority support, the Board heard evidence from various individuals regarding the circumstances of the lay-off. Essentially, the evidence heard by the Board can be summarized as follows:

(a) On July 6, 1992, an undated document was circulated to see who was interested in forming a union (Exhibit A-1). On the same date, the employees located at the new plant and new bog were told not to leave until the shop foreman came out to see them, at which time, the employees received the letter from the Respondent's President dated July 6, 1992 (Exhibit A-2).

(b) Everett McNally, an employee since the mid 1980's, who worked at the new plant felt the letter of July 6, 1992 meant a lay-off because of the weather conditions and that he would be recalled when required. On July 10, 1992, he received his Record of Employment (Exhibit A-3) together with the letter dated July 7th (Exhibit A-4) and his cheque. Mr. McNally still considered himself an employee of Gulf Island, although he did indicate, on October 5, 1992, that he had no expectation he would be recalled during the 1992 year.

(c) Millie Myers, a tractor operator, who had been employed for approximately four (4) years, received the July 6, 1992 letter on that date. On July 10, 1992, she received the letter of July 7, 1992 (Exhibit A-4) together with her Record of Employment and Amended Record Of Employment (Exhibits A-6 and A-7). She was subsequently rehired and laid off, and she had never been laid off previously. She expected to be recalled and was, in fact, recalled to work. Mrs. Myers believed she was an employee of Gulf Island.

(d) Douglas MacArthur an employee of Gulf Island for about

four (4) years who worked at the old bog received the letter of July 6, 1992 (Exhibit A-2) from Darren Marshall, but was advised that the old bog was going to continue to operate and that he was not laid off.

(e) Edward Allison Myers, a working foreman at the new bog was employed by the Respondent for six or seven years. On July 6, 1992, he was presented with the letter (Exhibit A-2) by Glen McNevin at approximately 6:00 p.m. Mr. Myers was the individual who was circulating the document to determine how many people were in favour of joining a union (Exhibit A-1). On July 10, 1992, he received his Record of Employment (Exhibit A-8) together with the letter of July 7, 1992 (Exhibit A-3) and his cheque. Mr. Myers filed for unemployment insurance benefits on July 13, 1992 which was effective July 5, 1992 (see Exhibit A-9). Mr. Myers felt he was still an employee of the Respondent.

(f) Allan Lloyd George MacIsaac, an employee of the Respondent for approximately (3) three years, was not laid off and he continued to work at the old bog for the summer of 1992. He indicated that there was a finer peat coming from the old bog. He described a large loader that was purchased for loading wagons. Essentially, the large new loader, (Exhibit R-1), could load a wagon in five minutes as opposed to fifteen to twenty minutes with the old one. Mr. MacIsaac indicated he never received the letter of July 6, 1992, although he had seen the letter before. Mr. MacIsaac indicated there had never been a layoff of this magnitude before and he understood that the lay-off was not going to effect the old bog.

(g) Glen Wallace McNevin, an employee since approximately 1986, was a foreman at the new plant. Mr. McNevin testified that the weather conditions were bad during

1992 in that the peat was wet and heavy. He indicated that the peat coming out of the old bog was the peat that is shipped to Japan and is often referred to as "Japanese Peat". He indicated that the old bog could keep operating as they could continue to stockpile the peat. Mr. McNevin was not surprised when the old plant shut down as it was obsolete, not efficient and the machinery was slow and rusty. Mr. McNevin indicated that he had seen the document (Exhibit A-1) on July 6, 1992 and had signed it. Mr. McNevin spoke with the President of the Respondent, Mr. Enders, on July 6, 1992 but he did not advise Mr. Enders about the fact that people were not happy with the pay raises, working conditions or the fact that Exhibit A-1 was being circulated. Mr. McNevin testified that Mr. Enders indicated that he would be forwarding a letter which was to be delivered to the field crew at the new bog and baling crew at the new plant. Mr. McNevin delivered the July 6th letter to all employees located at the new bog and the new plant, although Mr. McNevin and Mr. Perry continued to be employed.

(h) In prior years, Records of Employment had never been received until the end of the season.

(i) All Records of Employment submitted in evidence indicated that there was a shortage of work.

26. The entire issue comes down to whether or not the individuals who signed cards for membership in the Labourers Union were employees on July 10, 1992, the date the Application for Certification was made to the Board.

27. As the Board is in place to regulate relations between employers and employees, it does not need to be reiterated that an applicant must demonstrate to the Board that it represents the employees of an employer. The individuals in question were not

physically working for the Respondent on the date the application was made so the Board must ask itself, can they be considered employees within the meaning of our legislation?

28. Employee is defined in Section 7(1)(h) of the Labour Act, supra, to mean

> "a person employed to do skilled or unskilled manual, clerical or technical work, and includes police constables appointed under the *Police Act* R.S.P.E.I. 1988, Cap. P-11, employed by or for any city, town, community, or other person, or employed by a board, commission or agency of, or a corporation, controlled by a city, town, community or other person and also includes persons employed as security police, but does not include persons referred to in subsection (2)".

29. Generally speaking, when applications are made to the Board, there is no dispute about the fact that individuals, applying to have a union declared as an exclusive bargaining agent, would be employed by the company in question. In the present case, the situation became slightly clouded in that on July 6, 1992, certain persons were given a copy of a letter (Exhibit A-2) addressed to "All Gulf Island Employees" and which indicated that all employees except the office staff would not be required to come to work and that they would be called when they were required. The oral evidence adduced in relation to this was that the letter was not distributed to all employees but rather was distributed to at least all employees working at the new bog and at the new plant. Subsequent to receiving the letter of July 6, 1992, on July 10, 1992, certain individuals received Records of Employment together with the letter of July 7, 1992, (Exhibit A-3) which made mention of the word "lay-off".

30. The central issue argued by the Labourers Union was that the events of July 6, 1992 were, in essence, a "lockout" and were brought about as a result of the employees of the Respondent attempting to become members of a trade union. It was submitted that Section 9(2) of the Labour Act, supra, stated that the persons do not cease to be employees due to the fact that there was a lockout. Lockout is defined in Section 7(k) of the Labour Act,

supra, as including "the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, done to compel or induce his employees, ... to refrain from exercising any rights or privileges under this Part ... ".

31. As this issue of whether employees have been locked out, laid off or not physically working does not appear to have been addressed previously, the Board has reviewed the authorities that the parties have provided. The Board finds the comments in Britco Structures Ltd. and United Brotherhood of Carpenters and Joiners of America, Local No. 1928, (1984) 5 CLRBR (NS) 352 (Labour Relations Board of British Columbia) to be helpful. In this case, the Board stated at pages 364-365:

> " From our consideration of *Western Canada Steel*, BCLRB No. 79/75, [1976] 1 Canadian LRBR 25, and the *Glen River Industries (Delta) Limited, supra*, and the provisions of the *Labour Code*, we have concluded that, only in very exceptional circumstances, will an individual who has previously worked for an employer but who has been laid off, be found to be an employee for the purposes of an application to represent unorganized employees who are not covered by a collective agreement. Such exceptional circumstances might occur where it can be established that there really does exist a continuing, tangible felt relationship between the individual and the employer. That relationship must be established at the date of the lay-off and it must be shown to be a continuing one during the period of the lay-off. We reject Counsels' submissions that the appropriate date to consider whether such a relationship exists is just before the employee is recalled to work."

32. In Britco Structures Ltd. and United Brotherhood of Carpenters and Joiners of America, Local Nos. 1928, 2861 and 2076 (1983), 4 CLRBR (NS) 59 (Labour Relations Board of British Columbia), the Board stated at page 67 in relation to whether or not employees who were laid off could vote in a representation vote:

> " A similar principle has been expressed somewhat differently by the National Labour Relations Board. In *D.H. Farms Co.*, (1973), 206 NLRB 111, that Board expressed the opinion that voting eligibility in a representation contest depends upon `a reasonable expectancy of recall' which hinges upon a number of

> objective factors such as the employer's past experience, its future plans, and the circumstances of the layoff, including what the employees were told as to the likelihood of recall. This decision has recently been affirmed by the National Labour Relations Board in *Allstate Manufacturing Co. Inc.* (1978), 236 NLRB 155.
>
> In our view, these approaches enunciate the principle to which the Board should adhere: upon a consideration of a number of factors, the Board must be satisfied that there is such a tangible felt relationship between the individuals under consideration and the employer, that there is a reasonable expectancy on the part of the employer and the individual that he will be recalled. ... We are not persuaded that the mere hope that each of these individuals had of regaining employment with the employer at some future date is sufficient to preserve their `employee' status for such periods of time. For these reasons, we conclude that these five individuals are not employees as of the date of the locals' application for certification."

33. Relating the above noted comments of the British Columbia Labour Relations Board in the Britco case (1983), the evidence before the Board is that the past experience of the Respondent was that there would be days when individuals would not report to work but that there had never been a layoff of this magnitude previously. There is no collective agreement in force between the Respondent and the Labourers Union and, accordingly, there are no rights of recall between the parties. With regard to the expectation of the employees regarding returning to work, the three employees who testified indicated that they expected to be recalled. While this may have been their expectation, the Board has heard no evidence as to the expectations of the other employees involved in the layoff. As well, the Board has before it the evidence relating to the introduction of a new mechanized plant to process the peat and, also, the introduction of new specialized equipment (Exhibits R-1 and R-2) that is considerably more efficient than the equipment previously used by the Respondent and which allows the Respondent to operate with less manpower.

34. The Board finds that a tangible felt relationship between the Respondent and the individuals who were laid off as outlined

in the Britco case (1984) has not been established. Even if it could be said that the relationship existed on July 6, 1992, the date of layoff, the Board finds that there was not sufficient evidence to demonstrate a continuing relationship during the period of layoff.

35. The Board has reviewed the case of Re Gordon Riley Transport Ltd. and Board of Industrial Relations of Alberta et al (1957), 13 D.L.R. (2d) 375 (Alta. S.C.) and finds that the case is distinguishable from the facts before this Board. In the Gordon Riley case, the legislation indicated that persons who were employees immediately before the application were deemed to be employees within the meaning of the Act. The Alberta Supreme Court held that employees immediately before the application included those on temporary layoff because of Provincial road bans. In the case before this Board, our legislation is not similar to that in place in Alberta and there is no indication that the layoff on July 6, 1992 was temporary in that a number of the individuals who were laid off had not returned to work.

36. The Board has also considered the case of Port Alberni Fish Company (1976) Ltd. and Fishermen (U.F.A.W.U), [1980] B.C.L.R.B. 56-06 (British Columbia Labour Relations Board). There, there had been 76 women laid off at a herring roe processing plant the day prior to the Application for Certification being filed. The Board held that it was not persuaded that the employer laid off the employees in the manner it did in order to affect the composition of the bargaining unit.

37. The three (3) employees who testified before the Board and who had received their Records of Employment on July 10, 1992, indicated they still continued to believe they were an employee of the Respondent. However, the two (2) employees who had not been recalled, indicated that they had not talked to any of the principals involved in the Respondent company to determine if they would be recalled. Before the Board could make a finding that

there was a reasonable expectation of recall, the Board would require more evidence. Specifically, the Board would need to see that the employee had made some inquiries in this regard as a reasonable expectation of recall must be based on a reasonable belief.

38. The Board finds that on July 6, 1992, there occurred an indefinite layoff with no legal rights of recall on the part of the employees, nor was there a continuing tangible felt relationship between the Respondent and the individuals laid off. Further, no membership cards had been signed by any of the individuals prior to July 6, 1992.

39. Finally, the Board recognizes the situation that the former employees of the Respondent find themselves in. However, the Board cannot say that upon the evidence it heard that the reason for the layoff on July 6, 1992 was as a result of the employees seeking to become members of a union. The Board could not, in all good conscience, make the leap to the conclusion that there were no business reasons for the layoff or that a lock out occurred.

40. Based on the evidence and the facts presented, the Board finds that the twelve employees who were laid off on July 6, 1992 do not fall within the meaning of the definition employee. Accordingly, any membership cards that may have been signed by any of those twelve individuals will not be considered.

41. The Board finds that on July 10, 1992, the relevant date, there were sixteen (16) employees in the employ of the Respondent (fifteen excluding office staff). Of those individuals who were employees, the Labourers Union did not represent a majority.

42. The Board has not considered the petition of the employees opposing the Application for Certification on the grounds that it was submitted after the terminal date and there was no evidence given to the Board in relation to the circulation of the

document.

43. During the course of the hearing, it was pointed out that there was no indication on the membership cards signed by the individuals as to who the employer of those individuals was. In the future, the Board hopes that the membership cards or applications will be filled out in such a manner to indicate to the Board whom the employer is.

CONCLUSIONS:

44. Having stated the foregoing, the Board finds as follows:

(a) the Application for Certification is timely;

(b) the Labourers Union is a trade union;

(c) the unit is appropriate for collective bargaining; and

(d) there is no majority support.

45. Accordingly, the Board dismisses the application for certification.

This decision of the Labour Relations Board was made this 29th day of December, A.D. 1992 and issued under the hand of its Chief Executive Officer.

Roy J. Doucette

ROY J. DOUCETTE
CHIEF EXECUTIVE OFFICER

PANEL:

M. Lynn Murray : Chair
Jean-Marc Gallant: Member
Judy Goodwin : Member