PRINCE EDWARD ISLAND
LABOUR RELATIONS BOARD

File No. 97-048

Decision No.

IN THE MATTER OF AN APPLICATION FOR CERTIFICATION PURSUANT TO SECTION 54(1) OF THE PRINCE EDWARD ISLAND LABOUR ACT, R.S.P.E.I. 1988, Cap. L-1,

BETWEEN:

CONSTRUCTION AND GENERAL LABOURERS UNION, LOCAL NO. 1077

APPLICANT

AND

CAMERON MASONRY LTD.

RESPONDENT

Counsel for the Applicant — **J. Gordon MacKay, Q.C.**
Counsel for the Respondent — **Derek D. Key**

BACKGROUND

On October 17, 1997 the Board received an Application for Certification from the Construction and General Labours Union and General Workers in Construction, Industrial and Commercial, Local Union No. 1077 (the "Union"), to certify all employees of Cameron Masonry Ltd. working as labourers, bricklayers helpers, forklift operators, mixer operators, stocker and scaffolding erectors in the province of Prince Edward Island, but excluding foremen and those above the rank of foremen, pursuant to section 54 of the *Labour Act*.

Based on the information before the Board on review of this application, the question was raised as to who exactly was the employer of the employees in question, namely, either Cameron Masonry or the general contractor for the particular project in Borden Carleton, Fitzgerald and Snow. Accordingly, the Respondent was contacted and requested to provide the Board with particulars as to its list of employees. Mr. Derek Key, solicitor for the Respondent, replied to the Board by letter dated December 8, 1997. David Cameron, the representative of the Respondent company, submitted that the group of employees named in the application are in fact employees of Fitzgerald and Snow and were only loaned to his company in order to complete his subcontracting work on schedule. A letter was also received by the Board from Mr. Harry Snow, president of Fitzgerald and Snow, providing his comments respecting the employment of these employees and supporting the position of Mr. Cameron in this regard.

On December 29, 1997, the Board also received correspondence from Mr. John P. Rose, Business manager of the applicant Union, indicating that employees Donald Noonan and David MacDougall were members of the Union and classed as bricklayers helpers. It was his position that these individuals were hired by Fitzgerald and Snow for the project in question. Mr. Rose alleges that these two individuals did not in fact do any work for Fitzgerald and Snow but rather worked directly for Cameron Masonry during the entire project. Mr. Rose also stated that Pat Peters, a bricklayers helper, was transferred from Cameron Masonry's payroll to Fitzgerald and Snow's payroll in September of 1997.

Based on the foregoing, the Board determined that it would be appropriate for it to call a hearing in order to make further investigations into this application to properly determine if the application meets the requirements set out in section 54(1) of the Act. A hearing before the Board was called and held at 9:30 am. on February 6, 1997. The Board consisting of Janice MacCallum, Chair, Judy Goodwin and Brendon McGinn, heard the evidence presented by both the Applicant Union and the Respondent company.

ISSUE

The crux of this hearing was to determine the employer of the group of employees listed in the Union's application for certification.

THE LAW

In order for a Union to be certified as the bargaining agent for a group of employees, those employees must be employed by the employer named in the application. It is incumbent upon a trade union to show that the employees which it seeks to represent are in fact the employees of the respondent company (Adams, *Canadian Labour Law*, 1985 at 283). This onus is also clearly stated in section 54 of the Act.

In *York Condominium Corp.*, [1977] OLRB Rep., Oct. 645, the Ontario Labour Relations Board concluded that the following factors are to be considered in determining the employer in a particular case:

1. The party exercising direction and control over the employees performing the work;
2. The party bearing the burden of remuneration;
3. The party imposing the discipline;
4. The party hiring the employee;
5. The party with the authority to dismiss the employee;
6. The party who is perceived to be the employer by the employee;
7. The existence of an intention to create the relationship of employer and employee.

This criteria was subsequently analysed in the *Sutton Place Hotel* decision of the OLRB ([1980] OLRB Rep. Oct. 1538) and it was concluded that while all of these criteria are indeed important to consider, no single factor could be determinative, but rather the ultimate test is the exercise of fundamental control over the employees. "In a word, to find the seed of fundamental control is generally to find the employer for the purposes of the *Labour Relations Act*." (1552-1553).

THE FACTS

The evidence presented to the Board indicates that both Donald Noonan and David MacDougall were hired by Fitzgerald and Snow on referral from the Union. Dean Paynter, an employee and foreman of Fitzgerald and Snow, contacted Mr. Noonan and advised him of the job and instructed Mr. Noonan to proceed to the job site in Borden Carlton where he would report to David Cameron of the Respondent company. The referral slip of Mr. David MacDougall, submitted into evidence as Exhibit A-2, also indicated that he should report to Dean Paynter at the project site.

When Mr. Noonan arrived on the job, he was instructed by David Cameron that he would be performing the duties of a bricklayers helper. Mr. MacDougall reported directly to Mr. Cameron and knew he was there to perform bricklayers helper work for David Cameron. Mr. Noonan stated that he felt Mr. Cameron to be his main boss and that as far as he was concerned he was hired to be a bricklayers helper. Both Mr. Noonan and Mr. MacDougall stated that their respective pay cheques were drawn on the account of Fitzgerald and Snow, that these cheques were delivered to each of them by David Cameron. Mr. Noonan stated that he reported to Mr. Cameron each day, that Mr. Cameron sent him home each day including rainy days, that once the job was done he did not go to work for Fitzgerald and Snow or any other contractor. Mr. MacDougall stated that once Mr. Cameron was finished with the bricklayers helper job, Fitzgerald and Snow provided him with one week of general labourer's work.

Both Mr. Noonan and Mr. MacDougall stated that they would have expected Mr. Cameron to discipline them if discipline was required, but it was not an issue during this project. Mr. Noonan also stated in cross examination that he did work with Dean Paynter prior to this project, that he had been an employee of Fitzgerald and Snow in the past, that Fitzgerald and Snow did his deductions for payroll and union dues, that Donald Waite, an employee of Fitzgerald and Snow, was the shop steward for this job and that he would see Mr. Waite if he had any problems, although he did not have any problems.

Donald Waite also presented evidence to the Board. Mr. Waite was the shop steward for the project and was employed by Fitzgerald and Snow. The Collective Agreement regulating the bricklayers helper employment with Fitzgerald and Snow during the project was submitted as

Exhibit A-3. Article 5.02 of the Agreement states as follows:

> 5.02 The unionized employer shall have the right to subcontract work. When subcontracting Labourer's work the unionized employer shall make this contract part of their contract with the subcontractor, provided the Union can supply capable and competent employees.

As well, pursuant to the Collective Agreement, the employer, Fitzgerald and Snow, would be responsible for all union dues deductions and would be subject to liability if such were not remitted as required.

Mr. John Rose, business manager for the Union, testified before the Board and confirmed the subcontracting procedure covered by the Collective Agreement. Mr. Rose stated that it is the obligation of Fitzgerald and Snow, as the general contractor to ensure that Union members were used for the job, therefore it was not unlikely that the request for workers came to the Hiring Hall through Fitzgerald and Snow. Mr. Rose stated that this arrangement between Fitzgerald and Snow and the Respondent Cameron Masonry was indeed a unique situation.

David Cameron, representative of the Respondent company, testified that on the application date of October 17, 1997, his company did not employ any of the three bricklayers helpers listed in the application, with the exception that he did employ Pat Peters in the past for non-unionized work.

It is Mr. Cameron's position that it was agreed as between he and Mr. Harry Snow of Fitzgerald and Snow that when the bid of Cameron Masonry for the contract was submitted to Mr. Snow, Fitzgerald and Snow would supply the labourers for him and he was satisfied with this. Mr. Cameron then stated this is when he was provided with workers Noonan, MacDougall and Peters.

It was Mr. Cameron's position from the outset that he did not feel he was the employer of these individuals and he had no authority over them in terms of the fundamental issues such as firing, discipline, payment, etc. Mr. Cameron stated he felt that if at any time during the job, Fitzgerald and Snow required any of the three men, they would be removed from their duties as bricklayers helpers without any consent or input from him. Mr. Cameron stated that it was his understanding that Donald Waite was the shop stewart for the three individuals. Mr. Cameron had his own employees on the job and they worked hours different from these three men. Mr. Cameron agreed that he did have the day to day supervision of the men, but that his authority ended there. Should there have been a problem with any of these men, Mr. Cameron stated that he would have had to refer the matter to Harry Snow.

In cross examination, Mr. Cameron stated that he did not include the cost of the three unionized bricklayers helpers work as part of his bid submitted for the job, but that his own bricklayers helpers were included in the bid. The cost of the three men was ultimately deducted from the contract price Fitzgerald and Snow owed Mr. Cameron for the job.

Mr. Cameron stated that he did not realize that his contract with Fitzgerald and Snow was in fact subject to the Collective Agreement.

Harry Snow testified that the three individuals in question were, in his opinion, employees of Fitzgerald and Snow. His company provided the individuals to the Respondent company and when the job was completed, Mr. Noonan was laid off and Mr. MacDougall and Mr. Peters continued to work for Fitzgerald and Snow in another capacity. Mr. Snow confirmed that Mr. Cameron's evidence that Mr. Cameron had only day to day supervision of the men and that he had no authority to discipline them or otherwise.

Mr. Snow stated that he did not review the Collective Agreement with Mr. Cameron, but simply advised him that they would have to abide by it. He stated that Cameron Masonry did ultimately bear the responsibility of remuneration of the employees as their cost was deducted from the contract price paid to Cameron Masonry by Fitzgerald and Snow.

Mr. Snow indicated that Donald Waite was the only shop stewart in the project site and that, in his opinion, these three employees regarded him as their shop stewart. Mr. Waite is an employee of Fitzgerald and Snow and it was never Mr. Waite's job to be responsible for anyone else's employees except those of Fitzgerald and Snow.

DECISION

In considering each of the factors set out in York Condominium Corp. and applying them to the facts of this case, the Board concludes that the evidence before it does not clearly point to one party or the other as being the employer. The Board is of the opinion that on applying these factors to the evidence, there are two acceptable yet opposing interpretations that can be made of the evidence.

The Board is of the opinion that the "fundamental control" test is a subjective test and that this issue is only resolved by looking at the facts particular to this case. The Board feels that the fundamental control test confirms that, indeed, the seven criteria set out in the York Condominium Corp. case are important factors and should be considered, but that ultimately, and coupled with using these seven factors, each case must be considered on its own merits. Essentially the Board must determine the employer based on the evidence presented to it in each case.

Accordingly, the Board is not satisfied on the evidence before it that the Respondent company is the employer of the group of employees listed in the application. The Board is of the opinion that the applicant Union has not presented evidence sufficient to establish Cameron Masonry Ltd. as

the employer of the listed group of employees and it is therefore the majority decision of the Board to dismiss this certification application made pursuant to section 54(1).

Janice L. MacCallum
Vice Chair

Brendon McGinn
Member

I, the undersigned member of the Board, hereby dissent to the foregoing decision of the Board.

Judy Goodwin
Member

THIS DECISION made by the Labour Relations Board on this 12th day of May, 1998, and issued under the hand of its Chief Executive Officer.

Roy J. Doucette
Chief Executive Officer