

File No. 98-028

Decision No.

IN THE MATTER OF THE UNFAIR LABOUR PRACTICE COMPLAINT

BETWEEN:

**CANADIAN UNION OF PUBLIC
EMPLOYEES, LOCAL 1174**

COMPLAINANT

AND:

TOWN OF KENSINGTON

RESPONDENT

**Legal and Legislative Representative for Applicant:
Counsel for Respondent:**

**Susan D. Coen
Paul J.D. Mullin, Q.C.**

DECISION

BACKGROUND

An Unfair Labour Practice Complaint was filed by the Complainant on November 9, 1998. It was complained that the "The Employer has delayed negotiations and has retracted its proposals which has been the basis of negotiations, substituting for them significantly different proposals." Included with the Complaint was a chronology of events from February 5, 1997 through to and including October 16, 1998.

By letter dated November 18, 1998, the Respondent through its Legal Representative, Paul J.D. Mullin, filed a Reply to the Complaint.

By a facsimile transmission, Susan D. Coen submitted excerpts from the Canadian Labour Law, 2nd Edition, by the Honourable George W. Adams, Q.C., submitting that the excerpt summarized the principles then cited some of the cases on the issue. On January 8, 1999, Counsel for the Respondent acknowledge receipt of the facsimile, however, questioned whether the text supports the Complainants position.

The Hearing was conducted on January 19 and 20, 1999 in Charlottetown.

STATUTES CITED

Labour Act R.S.P.E.I. 1998, Cap. L-1 , Section 10

AUTHORITIES

George Adams, Canadian Labour Law (second edition), pp. 10-91 to 10-113; Canadian Union of Public Employees v. Labour Relations Board (Nova Scotia) and Digby Municipal School Board, Nova Scotia Federation of Labour, Intervener (1983), 83 CLLC par. 14,069 (S.C.C.); Canadian Union of Public Employees, Local 2569 v. Santa Maria Senior Citizens Home Inc. (1994), 95 CLLC par. 220-040 (Sask. L.R.B.); Glass Molders, Pottery, Plastics and Allied Worker, Local 371 v. Barber Industries (1989), 89 CLLC par. 16,024 (Alta. L.R.B.); Ontario Nurses' Association (Complainant) v. The Board of Health of Haliburton, Kawartha, Pine Ridge District Health Unit and H.E. Good (Respondents), [1977] Ont. L.R.B. Rep. 65; Re Alberta Union of Provincial Employees, Local 103, Complainant and VS Services Ltd., Respondent. [1986] Alta. L.R.B.R. 235 (Alberta Labour Relations Board); Allsco Building Products Ltd. And United Food and Commercial Workers International Union, Local 1288P (unreported, September 22, 1998, New Brunswick labour and Employment Board); Allsco Building Products Ltd. V. United Food and Commercial Workers International Union, Local 1288P (unreported, October 16, 1998, new Brunswick Court of Queen's Bench, Trial Division); Re Fotomat Canada Limited and United Steelworkers of America, [1981] 1 Can. L.R.B.R. 381 (Ont. L.R.B.); Re International Woodworkers of America Local 1-207, Applicant and Zeidler Forest Industries Ltd. Respondent, [1987] Alta. L.R.B.R. 31 (Alberta L.R.B.); Retail Clerks International Union, Local 1979 v. Wilson Automotive (Belleville) Ltd. (1980), 81 CLLC par. 16,067 (Ont. L.R.B.); Retail Clerks International Union, Local 409 v. Northwest Merchants Ltd. (1983), 83 CLLC par. 16,055 (Ont. L.R.B.); Royal Oak Mines Ltd. V. Canadian Labour Relations Board and Canadian Association of Smelter and Allied Workers, Local 4 (1996), 96 CLLC par. 210-011 (S.C.C.); St. Joseph's Hospital (Guelph) et al. v. Edwards et al. And Canadian Union of Public Employees et al. v. St. Joseph's Hospital (Guelph) et al. (1976), 76 CLLC par. 16,026 (Ont. L.R.B.); United Cement, Lime and Gypsum Workers International Union v. Westroc Industries Ltd. (1981), 81 CLLC par. 16,093 (Ont. L.R.B.); Ontario Labour Relations Board Law and Practice, Sack and Mitchell (Butterworths, 1985) - extracts; Aro Equipment of Canada Limited, 57 CLLC par. 18,096; Radio Shack, [1979] OLRB Rep., Dec. 1220; Tech Corporation Limited, [1982] OLRB Rep., July 1064; DeVilbiss (Canada) Limited, [1976] OLRB Rep., Mar. 49; Fashion Craft Kitchens Inc., [1979] OLRB Rep., Oct. 967; Pine Ridge District Health Unit, [1977] OLRB Rep., Feb. 65; The Toronto Jewellery Manufacturers' Association, [1979] OLRB Rep., July 719; Rolph-Clark-Stone Packaging, [1980] OLRB Rep., Jan. 93.

PRELIMINARY MATTERS

Jurisdiction of the Board

The Counsel for the Respondent requested that the Board remove the Complaint and dismiss it on the grounds that the Board has no jurisdiction to award the remedy sought. It was submitted that to grant the remedy the Board would in fact be imposing a collective agreement. It was argued the Board does not have that authority to impose a penalty on the Town.

On the Complainants behalf, Ms. Coen argued that the case law supported the position that the resumption is at the point broke off. She argued that the remedy sought was neither punitive, a breach in the *Canadian Charter of Rights or Freedoms*, there was not a lack of rational connection and neither did the remedy contradict the objects and purposes of our legislation. The Board adjourned to consider the issue of jurisdiction on the basis of the submissions of Counsel. It was the finding of the Board that it did have jurisdiction over the

matter before it. There was a Complaint filed in the required form. The remedy sought may or may not be granted. The fact that the Complainant has stated its request for a remedy which may or may not be granted does not, at this juncture, rob the Board of its jurisdiction over the matter simply on grounds of the nature of the remedy sought. The Board is of the opinion that the Respondent's motion could not be granted. There are substantive issues that must be addressed.

Ambit of the hearing

It was then moved by the Counsel for the Respondent that the ambit of this hearing focus on the events from April 30, 1998 onward. The Complainant disputed this motion. Again the Board adjourned to consider the respective submissions from Counsel. Upon reconvening the Board ruled that the Respondent had admitted in its reply a substantial number of the facts set out in the original Complaint. There was basically a settlement in February of 1998 in regards to the set of facts pre-dating that settlement. The Board found that these matters are a matter of record.

Further the Board found these matters were withdrawn by agreement of both parties. On this basis, on the Respondent's motion to limit the ambit of the consideration of matters, post-dating February 1998, was granted.

ISSUES

The first issue to be decided by this Board is whether the respondent, employer, has engaged in unfair labour practices as anticipated by Section 10 of the Labour Act R.S. PEI., Cap. L-1. If it is established that the employer has engaged in unfair Labour practices, the Board must then decide if the Complainant is entitled to the remedy sought.

CONCLUSION

The Board has had the benefit of a comprehensive review of the course of events which have transpired between the parties in relation to the negotiations. The Board has also had the benefit of very capable submissions made on behalf of both parties in relation to these two key issues.

The evidence clearly establishes that the negotiations between the respective parties have been fraught with difficulties. In fact, this is the second Unfair Labour Practice Complaint laid by the complainants. The initial complaint was withdrawn by mutual consent late in 1997 or early 1998.

Both parties are in agreement with the record that there was one session of negotiation held on May 21, 1998. However, it is the Board's understand that the events that led to and transpired from that one session of negotiations have caused the Complainant to file and the Respondent to defend this complaint of unfair labour practices. The complainant takes the position that the Respondent has delayed negotiations and the retraction of the original proposals and substitution therefore of significantly different proposals constitute unfair labour practices.

In this Board's reading of the authorities provided by both of the parties, in particular the texts Canadian Labour Law, 2nd Edition, by George Adams, Ontario Labour Relations Board Law and Practice, Zack and Mitchell (Butterworths), (1985) and the Supreme Court of Canada decision Royal Oak Mines Ltd. vs. Canadian Relations Board and Canadian Association of Smelter and Allied Workers. Local 4 (1996), 96 CLLC par. 210-011 (S. C. C), the parties owe

each other a duty to bargain in good faith. It is this Board's belief that the triggering factor in the exercise of the Board's discretionary power to intervene in the bargaining process would have to be a finding of "bad faith" on the part one of the parties. In respect to our Legislation, the relevant provisions would be Section 10(1)(e) of the Labour Act which reads:

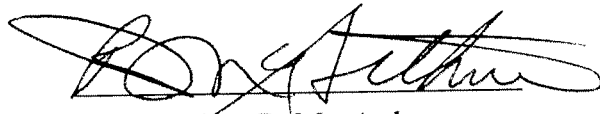
"10(1) No employer or employers organization or any other person acting on behalf of the employer or employers organization shall
(e) fail or refuse to bargain collectively in accordance of this Act;"

and then at Section 22 (a), which reads in part "...to meet and commence to bargain collectively and shall make every reasonable effort to conclude a collective agreement."

The Board further holds that the legal burden of proof in the case, such as that before it here, alleging unfair labour practices lies on the party making those allegations.

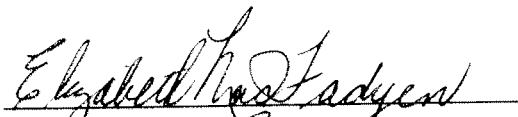
The complainant has filed a substantial amount of evidence and testimony before this Board in regards to the validity of its' complaints. However, it is this Board's considered opinion that the evidence presented does not satisfy the burden of proof set by the Legislative requirements and judicial authorities presented by the parties.

In its examination of the actions of the employer in this matter in regards to either the subjective "bad faith" test or the objective all-reasonable efforts test, the Board must conclude that, while the actions of the employer might be characterized as "hard bargaining", these actions should not be considered to be of the nature that would attract the intervention of this Board to invoke its powers under Section 11(3) of the Act. The Board finds that the Respondent was not in contravention of the provisions of the Act and cannot therefore grant the remedy sought by the Complainant.



Robert R. MacArthur

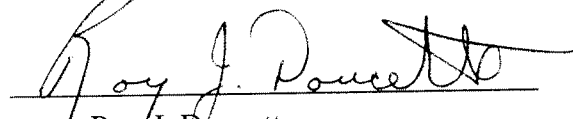
Chair



Elizabeth MacFadyen, Member

Gerry Doyle, Member

THIS DECISION made by the Labour Relations Board on this 10th day of March, 1999 and issued under the hand of its Chief Executive Officer.



Roy J. Doucette
Chief Executive Officer