



IN THE MATTER OF APPLICATIONS FOR CERTIFICATION

BETWEEN:

**CANADIAN UNION OF PUBLIC EMPLOYEES,
LOCAL 5003**

APPLICANT

AND:

EASTERN SCHOOL DISTRICT

RESPONDENT

AND:

PRINCE EDWARD ISLAND TEACHERS FEDERATION

INTERESTED PARTY

AND:

BETWEEN:

**CANADIAN UNION OF PUBLIC EMPLOYEES,
LOCAL 5010**

APPLICANT

AND:

WESTERN SCHOOL BOARD

RESPONDENT

AND:

PRINCE EDWARD ISLAND TEACHERS FEDERATION

INTERESTED PARTY

GLEN S. GALLANT

COUNSEL FOR THE APPLICANTS

RON MACLEOD

COUNSEL FOR THE RESPONDENTS

MICHELE DORSEY

COUNSEL FOR THE INTERESTED PARTY

DECISION

Background

On June 29, 2010, the Canadian Union of Public Employees Local 5003 filed an Application with the Prince Edward Island Labour Relations Board (hereinafter the “Board”) seeking to be certified as the bargaining agent for all people employed as Teacher Substitutes by the Respondent Eastern School District, save and except those excluded by the *Labour Act, R.S.P.E.I.* 1988, Cap.

L-1. The Application is Board Application 10-007. Together with the Application for Certification in Form 1, various other documents were filed with the Board including a list of duly elected officers, names of the members in good standing, minutes of the organizational meetings, a temporary charter, CUPE Constitution and copies of the applications for membership.

On July 7, 2010, the Canadian Union of Public Employees Local 5010 filed an Application with the Board seeking to be certified as the bargaining agent for all people employed as Teacher Substitutes by the Respondent Western School District, save and except those excluded by the *Labour Act*, supra. The Application is Board Application 10-008. Together with the Application for Certification in Form 1, various other documents were filed with the Board including a list of duly elected officers, names of the members in good standing, minutes of the organizational meetings, a temporary charter, CUPE Constitution and copies of the applications for membership.

On July 19, 2010, the Board received a Reply from the Eastern School District to CUPE Local 5003's Application for Certification. Attached to the Reply at Appendix 'A' was a list purporting to be all the unlicensed substitute teachers who were actively employed with the Eastern School District at any point during the 2009/10 school year. This list provided three columns, containing the name of the teacher, his/her payroll number, and the end date of the pay period in which the teacher was last actively employed.

On August 4, 2010, counsel for both Applicants sent correspondence to the Board's Chief Executive Officer, advising that the Applicants and Respondents were attempting to resolve the issues, and requested that the Board hold the matters in abeyance for a short while. Counsel for the Applicants advised that he would advise the Board's Chief Executive Officer as to whether a hearing before the Board would be necessary. The Board approved the Applicants' request to hold the Applications in abeyance, and the Board's Chief Executive Officer advised counsel for the Applicants and Respondents of this decision by letters dated August 11, 2010.

On September 14, 2010, counsel for the Applicants sent an email to the Board's Chief Executive Officer, advising that a hearing of the Applications was necessary.

On November 26, 2010, the Board received a Reply from the Western School Board to CUPE Local 5010's Application for Certification. Attached to the Reply at Appendix 'A' was a list purporting to be all the unlicensed substitute teachers who were actively employed with the Western School Board at any point during the 2009/10 school year. This list provided three columns, containing the name of the teacher, his/her payroll number, and the end date of the pay period in which the teacher was last actively employed.

A hearing of both of the Applications was scheduled for March 29-30, 2011. However, a representative of the Applicants' emailed the Board's Chief Executive Officer on March 17, 2011 to advise that the Applicants' chief witness would be unavailable to attend the hearing and that the Applicants wished to reschedule the hearing. In light of the foregoing, the Applicants and Respondent consented to the hearing being rescheduled to October 24-26, 2011.

The hearing commenced on October 24, 2011 and continued on December 1, 2011.

Statutes Considered

Labour Act and Regulations, R.S.P.E.I. 1988, Cap L-1
School Act, R.S.P.E.I. 1988, Cap. S-2.1

Texts Considered

Adams, *Canadian Labour Law* (2nd ed.)
Sack, Mitchell, Price, *Ontario Labour Relations Law and Practice* (3rd ed.)

Evidence

Documents Contained in the Board File

Board Application No. 10-007 (Eastern School District)

1. Letter dated June 29, 2010 from Applicant with attachments
2. Letter dated July 13, 2010 from Applicant with additional membership evidence
3. Reply in Form 5 and supplementary documents from Respondent received on July 19, 2010.
4. Letter dated July 20, 2010 from Applicant with additional membership evidence
5. Letter dated August 4, 2010 from Counsel for the Applicant
6. Email correspondence dated September 14, 2010 from Applicant's counsel
7. Written submissions of the Applicant dated November 8, 2010 received November 9, 2010
8. Book of Authorities of the Applicant received October 17, 2011
9. Written submissions of the Respondent received October 20, 2011
10. Written submissions of the Applicant received October 24, 2011
11. Book of Exhibits of the Applicant received October 24, 2011
12. Book of Legislation of the Applicant received October 24, 2011
13. Application for Standing as an Interested Party of the Intervener received October 24, 2011
14. Book of Submission of the Intervener filed by the Intervener received November 28, 2011
15. Statutory Declaration of Yvette Blanchard dated November 1, 2011 received November 2, 2011
16. Letter dated November 4, 2011 from counsel for the Interested Party
17. Letter dated November 18, 2011 from Board CEO to counsel for the parties
18. Letter dated November 22, 2011 from Board CEO to counsel for the parties
19. Email dated November 22, 2011 from counsel for the Applicant to the Board's Chief Executive Officer
20. Email dated November 22, 2011 from counsel for the Respondent to the Board's Chief Executive Officer
21. Email dated November 24, 2011 from counsel for the Interested Party to the Board's Chief Executive Officer
22. Written submissions dated November 25, 2011 filed by the Interested Party

Board Application No. 10-008 (Western School Board)

1. Letter dated July 7, 2010 from Applicant with attachments
2. Letter dated July 20, 2010 from Applicant with attachments
3. Letter dated August 4, 2010 from Counsel for the Applicant
4. Email correspondence from Applicant's counsel dated September 14, 2010
5. Written submissions of the Applicant dated November 8, 2010 received November 9, 2010
6. Reply in Form 5 from Respondent received on November 26, 2010.
7. Book of Authorities of the Applicant received October 17, 2011
8. Written submissions of the Respondent received October 20, 2011
9. Written submissions of the Applicant received October 24, 2011
10. Book of Exhibits of the Applicant received October 24, 2011
11. Book of Legislation of the Applicant received October 24, 2011
12. Application for Standing as an Interested Party of the Intervener received October 24, 2011
13. Book of Submission of the Intervener filed by the Intervener received November 28, 2011
14. Statutory Declaration of Ron Taweel dated November 1, 2011 received November 2, 2011

15. Letter dated November 4, 2011 from counsel for the Interested Party
16. Letter dated November 18, 2011 from Board CEO to counsel for the parties
17. Letter dated November 22, 2011 from Board CEO to counsel for the parties
18. Email dated November 22, 2011 from counsel for the Applicant to the Board's Chief Executive Officer
19. Email dated November 22, 2011 from counsel for the Respondent to the Board's Chief Executive Officer
20. Email dated November 24, 2011 from counsel for the Interested Party to the Board's Chief Executive Officer
21. Written submissions dated November 25, 2011 filed by the Interested Party

Decision

On October 24, 2011, the Board commenced the hearing of these Applications.

Consolidation

The first matter before the Board was the issue of consolidating the two Applications for Certification. Pursuant to the powers granted to the Board by virtue of section 21 of the *Labour Act* Regulations, R.S.P.E.I. Cap. L-1, the Board determined that it would be necessary and expeditious to consolidate the two Applications for Certification. The parties consented and accordingly, the hearing continued.

Interested Party / Adjournment

A preliminary matter was raised by the Prince Edward Island Teachers' Federation (hereinafter the "PEITF" / "Interested Party"). Counsel for the PEITF, for the limited purpose of standing, requested that the PEITF be granted status at the hearing as an "Interested Party". Counsel filed a written application requesting standing on behalf of the PEITF which was supported by the Affidavit of Patrick MacFadyen, the Deputy General Secretary of the PEITF.

The PEITF stated it was the only authorized bargaining agent for instructional personnel as they are defined in the *School Act*, R.S.P.E.I. 1988 Cap. S-2.1. The Affidavit of Mr. MacFadyen further stated that the PEITF had been aware that the Applicants had filed Requests for Certification with the Board; however, the PEITF was of the understanding that efforts had been made between the Applicant and the Respondent to resolve the matter of certification of substitute teachers without the necessity of the hearing. Mr. MacFadyen outlined in his affidavit that he had only become aware of the dates set for hearing of these applications the week prior or the PEITF would have made these submissions at an earlier time.

Counsel for the PEITF argued that the PEITF had a direct interest in the outcome of the matter because one of the issues before the Board was the determination of whether substitute teachers were to be included in the class of "instructional personnel" as defined in the *School Act*, supra, as opposed to the provisions of the *Labour Act*. Specifically, section 7(2) of the *Labour Act* states as follows:

For the purposes of this Part, no person shall be deemed to be an employee
(a) who is a member of the architectural, dental, engineering, legal
or medical profession entitled to practice in Prince Edward Island
and employed in a professional capacity, and instructional
personnel as defined in the School Act, R.S.P.E.I. Cap S-2.;
(emphasis added)

The PEITF was seeking standing as an interested party and if standing was granted, the PEITF was seeking an adjournment to retain and instruct counsel to prepare for the issues on the main hearing before the Board.

The Applicants opposed the application of the PEITF for standing as an interested party. Counsel for the Applicants argued that the issue of jurisdiction was not one of importance for the PEITF, that it was clear that the PEITF was governed under completely different legislation, ie, the *School Act*, supra, and that there was no legislative overlapping between the terms of the *School Act*, supra, and the terms of the *Labour Act*, supra. Counsel further argued that the parties should not be prejudiced by delay at the request of the PEITF, and that the passing of time could have a detrimental effect on the parties.

Counsel for the Respondent took no position on either the application of the PEITF to be granted standing as an interested party or the issue of an adjournment.

Upon consideration of the application made by the PEITF and the submissions of counsel for the PEITF and counsel for the Applicants, the Board determined that in light of subsection 3(12) of the *Labour Act*, supra, the Board has a duty to hear from all interested persons. Subsection 3(12) of the *Labour Act* states as follows:

(12) The Board shall determine its own practice and procedure but shall give full opportunity to all interested persons to present evidence and to make representations and the Board may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as are considered advisable, and, without limiting the generality of the foregoing, it may prescribe what evidence shall constitute proof that an employee wishes a trade union to be certified as bargaining agent on his behalf.

The language in the legislation is not permissive but mandatory. Subsection 22(3) of the *Labour Act Regulations* states:

22(3) Subject to the Act and these regulations, in any proceedings before it, the Board shall afford an opportunity to all interested parties either to present oral or written evidence or make oral or written representations on matters at issue as the Board deems advisable in the circumstances.

Again, there is no debate whether the Board may afford an interested party an opportunity. The Board shall afford an opportunity to interested parties to be heard. The question then is whether or not the PEITF is an interested party such that it should be given the opportunity to be heard.

Upon review of the issues before the Board and the evidence of Patrick MacFadyen and the submissions of counsel, the Board found that the PEITF is an interested party. The issues before the Board do concern the interpretation of the relevant provisions of the *School Act*, as well as the *Labour Act*. Accordingly, the PEITF was granted status as an interested party.

On the issue of the adjournment, the Board refers to the provisions of the *Labour Act*, and in particular, subsection 25(1) of the *Labour Act Regulations*, which states:

25(1) The Board may, if it thinks it advisable in any circumstances, adjourn any hearing for such length of time and to such place and upon such terms as it thinks fit.

The Board was well aware of the parties' desire to have the matter heard and proceed without delay. However, the Board was concerned that all relevant and necessary evidence on the issues be presented to it. The Applicants had requested adjournments in the past, to which the Respondent had agreed and the Board had granted. A further adjournment of a short time period would not seriously prejudice the Applicants and the Respondent took no issue with the request for an adjournment.

Accordingly, in light of all of the above, the Board granted an adjournment of the hearing. By agreement of all parties, the hearing was set to reconvene on December 1, 2011.

Information Received by the Board following Commencement of the Hearing

On November 2, 2011, the Board received two Statutory Declarations from the Respondents:

1. The Declaration of Yvette Blanchard, the Manager of Human Resources of the Eastern School District, which purported to attach a list of "certified substitute teachers employed by the Eastern School District during the 2009-2010 school year".
2. The Declaration of Ron Taweel, the Director of Human Resources of the Western School Board, which purported to attach a list of "certified substitute teachers employed by the Western School Board during the 2009-2010 school year".

Following a careful review by the Board of these two Statutory Declarations, the Board determined that the lists attached to the Declarations of Yvette Blanchard and Ron Taweel contained both the "certified" and "non-certified" substitute teachers employed by the Eastern School District and Western School Board during the 2009-2010 school year. The distinction of "certified" substitute teachers and "non-certified" substitute teachers is in reference to the classification of teachers according to the terms of the *School Act*.

At the Board's request, the Board's Chief Executive Officer sent a letter to counsel for all parties on November 18, 2011, advising that the Board had received the foregoing Statutory Declarations, that the Board had compared the lists attached to the Declarations with both the lists attached to the Respondents' Replies and the membership evidence filed by the Applicants, and that the Board had identified several issues which the Board wished the parties to be aware of. These issues related to differences between the lists attached to the two Declarations noted above and the lists attached to the Replies to the Applications for Certification, as well as certain irregularities in the membership evidence. The letter stated in part:

As noted above, the Affidavit of Yvette Blanchard had attached to it a list of "certified" and "non-certified" substitute teachers employed by the Eastern School District during the 2009-2010 school year (which list is hereinafter referred to as the "Blanchard List"). The Blanchard List indicates that there were 548 substitute teachers in the Eastern School District during the 2009-2010 school year, of which:

- 295 were identified as "certified" substitute teachers, and
- 253 were "non-certified" substitute teachers.

The Board has compared the Blanchard List with the list of unlicensed substitute teachers which was attached to the Reply filed by the Eastern School District on July 19, 2010 (hereinafter referred to as the "ESD Reply List") and with the membership cards filed with the Board by the Applicant, CUPE Local 5003. From this review, the Board noted as follows:

- *There are at least eleven teachers who were identified on the Blanchard List as "non-certified" substitute teachers, who were not included on the ESD Reply List of unlicensed substitute teachers;*
- *There are at least two teachers who were included in the ESD Reply List of unlicensed substitute teachers, who were not included on the Blanchard List of certified and non-certified teachers;*
- *There are a number of teachers who were identified on the ESD Reply List of unlicensed substitute teachers who were identified on the Blanchard List as "certified" substitute teachers;*
- *The ESD Reply List indicated that there were 247 unlicensed substitute teachers during the 2009-2010 school year, whereas the Blanchard List filed on November 2, 2011 list indicates that there were 253 "non-certified" substitute teachers during the 2009-2010 school year and 295 "certified" substitute teachers;*
- *A significant number of the membership cards (in excess of 20%) filed by the Applicant, are of persons who are not named as being substitute teachers employed by the Eastern School District in the 2009-2010 school year, on either the ESD Reply List or on the Blanchard List;*
- *Of the membership cards filed by CUPE Local 5003, the membership cards include both "non-certified" substitute teachers and "certified" substitute teachers; and*
- *There were a number of irregularities in the membership cards filed with the Board, including:*
 - *The blank space in "On behalf of the Union, I hereby accept this application and acknowledge receipt of \$ ___ as payment of the initiation fee" not filled in;*
 - *The blank space in "I, the undersigned: ... iii) hereby tender \$ ___ as payment of the initiation fee" not filled in;*
 - *The Union representative's signature is undated; and*
 - *The local specified on the membership card is not the Applicant CUPE Local 5003.*

The above noted letter also stated:

As noted above, the Affidavit of Ron Taweel had attached to it a list of "certified" and "non-certified" substitute teachers employed by the Western School Board during the 2009-2010 school year (which list is hereinafter referred to as the "Taweel List"). The Taweel List indicates that there were 284 substitute teachers in the Western School Board during the 2009-2010 school year, of which:

- *107 were identified as "certified" substitute teachers, and*
- *177 were "non-certified" substitute teachers.*

The Board has compared the Taweel List with the list of unlicensed substitute teachers which was attached to the Reply filed by the Western School Board on November 26, 2010 (hereinafter referred to as the "WSB Reply List") and with the membership cards filed with the Board by the Applicant, CUPE Local 5010. From this review, the Board noted as follows:

- *There are at least twenty-one teachers who were identified on the Taweel List as "non-certified" substitute teachers, who were not included on the WSB Reply List of unlicensed substitute teachers;*
- *There are at least three teachers who were included in the WSB Reply List of unlicensed substitute teachers, who were not included on the Taweel List of certified and non-certified teachers;*
- *There are a number of teachers who were identified on the WSB Reply List of unlicensed substitute teachers who were identified on the Taweel List as "certified" substitute teachers;*
- *The WSB Reply List indicated that there were 160 unlicensed substitute teachers during the 2009-2010 school year, whereas the Taweel List indicates that there were 177 "non-certified" substitute teachers during the 2009-2010 school year and 107 "certified" substitute teachers;*
- *A significant number of the membership cards (approximately 10%) filed by the Applicant, are of persons who are not named as being substitute teachers employed by the Western School Board in the 2009-2010 school year, on either the WSB Reply List or on the Taweel List;*
- *Of the membership cards filed by CUPE Local 5010, the membership cards include both "non-certified" substitute teachers and "certified" substitute teachers; and*
- *There were a number of irregularities in the membership cards filed with the Board, including:*
 - *The blank space in "On behalf of the Union, I hereby accept this application and acknowledge receipt of \$ ___ as payment of the initiation fee" not filled in;*
 - *The blank space in "I, the undersigned: ... iii) hereby tender \$ ___ as payment of the initiation fee" not filled in;*
 - *The Union representative's signature is undated or is incomplete because it is not in the form d/m/y;*
 - *The applicant's signature on the membership card is not dated; and*
 - *The local specified on the membership card is not the Applicant CUPE Local 5010.*

On November 22, 2011, the Board's Chief Executive Officer received an email from counsel for the Applicants, requesting disclosure of the "two employee lists (one list for each school board) with respect to the 2009-2010 school year."

On November 22, 2011, the Board's Chief Executive Officer received an email from counsel for the Respondents consenting to the Board releasing "the updated lists to all parties at this point in the process."

On November 24, 2011, the Board's Chief Executive Officer received an email from counsel for the Interested Party. Counsel for the Interested Party objected to the release of the employee lists and stated in part:

While we certainly appreciate the pragmatic approach of allowing CUPE an opportunity to evaluate their application before next weeks hearing, we do have some concerns and are therefore unable to consent to this release.

Counsel for the Interested Party noted that it wanted to have an opportunity to speak to the jurisdictional questions as to whether or not the *Labour Act* applied to the substitute teachers, and submitted that the Interested Party would argue that the Respondents are not "employers" within the meaning of the *Labour Act*, supra, that the definition of "employee" in the *Labour Act*, supra, excludes substitute teachers, and that the proposed bargaining unit is not appropriate for certification as it would result in the bargaining unit being in violation of a Prince Edward Island Teachers' Federation Memorandum.

The Board considered the Applicants' request for disclosure of the "two employee lists (one list for each school board) with respect to the 2009-2010 school year" to be a request for disclosure of the lists attached to the Declarations which were received by the Board on November 2, 2011, and the Board was prepared to render a decision on this request at the recommencement of the hearing scheduled for December 1, 2011.

On December 1, 2011, counsel for the Applicants was asked if he still had need of the employee lists. Counsel for the Applicants advised he did not.

Request to Withdraw the two Applications for Certification

On December 1, 2011, Counsel for the Applicants advised the Board that the Applicants were requesting permission to withdraw the two Applications for Certification.

Counsel for the Applicants advised that this request had come about primarily as a result of the Board's request for clarification of the list of names contained in the Applications for Certification as well as the employee lists attached to the Statutory Declarations of the Respondents which were filed with the Board on November 2, 2011. Counsel for the Applicants advised that

upon review of the evidence filed in support of the Applications for Certification, the Applicants had concerns regarding deficiencies in the evidence, and felt the proper course of action would be to seek to withdraw the Applications for Certification. Counsel for the Applicants further advised the Board that he had had several discussions with opposing counsel regarding the question of withdrawing the two Applications for Certification.

Counsel for the Respondents acknowledged that discussions had occurred and that he was aware of the Applicants' intention. Counsel for the Respondents advised that the Respondents would consent to the request to withdraw the two Applications for Certification.

Counsel for the Interested Party advised that discussions had occurred among the parties and the Interested Party did not oppose the Applicants' request to withdraw the two Applications for Certification.

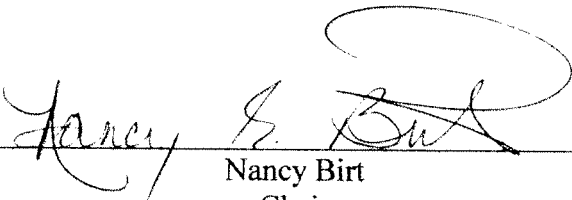
In consideration of the request by the Applicants to withdraw, the Board is mindful of the Board's overriding role to establish harmonious labour relations in the province as well as to protect the interests of the employees who may be affected by the Applications for Certification and the subsequent request by the Applicants to withdraw those very Applications for Certification.

An Application for Certification requires a comparison of the Union's membership evidence with the Employer's list of employees. This comparison is fundamental to the determination of whether the Application for Certification will be granted and whether the Union will ultimately be certified as the bargaining agent for the proposed bargaining unit. As referenced above, the Board spent a great deal of time reviewing the material that had been filed, both in support and in Reply to the Applications for Certification before it, and in particular, the membership cards filed by the Applicants, as well as the employee lists provided by the Respondents. It was clear to the Board that the information provided to the Board was not complete. The Board expects the parties to provide comprehensive and complete information. Had that information been provided to the Board initially, this matter would likely have been resolved much earlier.

The Board is cognizant of the fact that there are a substantial number of substitute teachers in the province whose future options of being unionized or not are of great concern to them. However, as was set out in the Board's correspondence to counsel, the accuracy and completeness of the information before the Board was questionable.

The Applicants who filed the Applications for Certification have requested that they be withdrawn. The Respondents and the Interested Party each consent to the request for withdrawal of the two Applications for Certification.

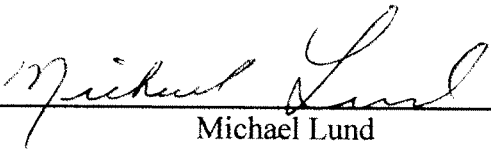
Given the concerns that have previously been expressed by the Board in relation to the materials filed as outlined in the correspondence from the Chief Executive Officer to the parties dated November 18, 2011 and in accordance with the Board's exclusive jurisdiction as set out in the *Labour Act*, the Board grants the Applicants' request to withdraw the Applications for Certification that were filed in Board File No. 10-007 involving the Eastern School District and Board File No. 10-008 involving the Western School Board.



Nancy Birt
Chair




John Cormier
Member



Michael Lund
Member

This decision made by the Prince Edward Island Labour Relations Board on the 14th day of March, 2012, and issued under the hand of its Chief Executive Officer on the 15th day of March, 2012.



Shawn Shea
Chief Executive Officer