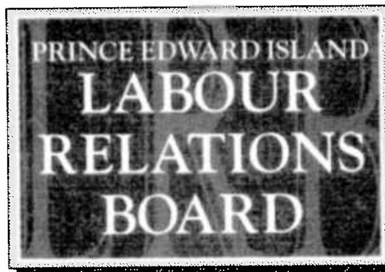


File No. 97-027

Decision No.

IN THE MATTER OF THE APPLICATION FOR RECONSIDERATION OF A DECISION MADE BY THE PEI LABOUR RELATIONS BOARD - MAJORITY OF EMPLOYEES OF PERRIN'S CLINTON VIEW LODGE - NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW CANADA),

BETWEEN:

MAJORITY OF EMPLOYEES OF PERRIN'S CLINTON VIEW LODGE LIMITED

APPLICANTS;

AND:

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW CANADA)

RESPONDENT.

Counsel for Applicants: **John K. Mitchell**
Representative of Respondent: **Thomas A. Barron**

BACKGROUND

The Applicant has applied for a reconsideration of a previous decision of the PEI Labour Relations Board dismissing an application for revocation of the Certification Order 04-96 issued by the PEI Labour Relations Board ("the Board") on February 5, 1996 to the Respondent, CAW Canada.

DECISION

ISSUE #1

The Board has determined that the first issue it must address is whether the Board accepts jurisdiction to hear this reconsideration application.

Section 4(1) of the Labour Act and section 18 of the Regulations permits the Board, if it considers it advisable to do so, to entertain an application to reconsider any previous decision made by the Board if it appears the Board made a decision in ignorance of some material fact, or by reason of some technical irregularity or if there is good reason for the Board in doing so.

The Board feels that in this instance there would be a perception of unfairness if the Applicant was not given the opportunity to address its concerns respecting the previous decision of the Board. In the original hearing, the issue of the arbitration period being a period closed for applications for revocation was addressed by the Respondent in its Reply filed with the Board, as well as in its summation presented at the hearing and at Tab 2 in its Case Law References submitted to the Board at the close of the original hearing. The Applicant did not address the issue during the hearing. Having considered all the factors surrounding the previous hearing, the Board has therefore agreed to allow it the opportunity to do so now.

The Respondent has submitted to the Board that it should not hear this present reconsideration application since so doing would be contrary to the principles set out and relied upon in the previous decision of the Board, being File No. 96-008, *CAW Canada v. Perrins Clinton View Lodge*. The Board has reviewed this decision and has determined that this case can easily be distinguished on its facts from the present application before the Board. Case No. 96-008 cites the decision of the Ontario Labour Relations Board in the matter of *Service Employees' International Union, Local 183 v. K-Mart Canada Limited (Peterborough) v. Group of Employees* as providing the guiding principles in reconsideration applications. The Board accepts these general principles however the Board does not consider entertaining this application as a contravention of section 18 of the Regulations or the principles of natural justice. The Board sees no prejudice to the Respondent in reopening this case. In fact, the Board feels that it would be contrary to the rules and principles of natural justice if it did not entertain this reconsideration application.

The Board has therefore accepted jurisdiction to entertain this reconsideration application and conducted the hearing and heard submissions by both parties on June 18, 1997.

ISSUE #2

In its previous decision, the Board concluded that section 41(6) of the Act is mandatory in that it left the Board with no choice but to dismiss the application for revocation until the arbitration process was completed. Having now heard the submissions of both parties, and reconsidering its own decision, the Board must now determine if its previous decision on this point shall stand.

At the outset, the Board states that the law previously relied upon in its original decision, in addition to the excerpts from *Ontario Labour Relations Board Law and Practice*, Sack & Mitchell (1985) submitted by the Respondent, was primarily the Labour Act itself. The Board appreciates that the law in this area is scarce and therefore looks to the principles surrounding similar Ontario decisions for guidance. The Board certainly acknowledges that the legislation in Ontario is clearly different than the PEI legislation, however the Board feels that the principles and rationale are similar. In reaching its previous decision the Board attempted to make sense of the PEI Labour Act with essentially little to no guidance from the available case law.

In its present submissions, the Applicant refers to the decision of the Ontario Labour Relations Board in *Birchcliff Nursing Home*. *Birchcliff* deals with the Ontario Labour Relations Act as well as the Hospital Labour Disputes Arbitration Act ("HLDA Act"), the latter of which there is no comparable legislation in PEI. In *Birchcliff*, the parties had been unsuccessful at the conciliation stage and the application for termination was made while the parties were in the process of setting up an arbitration board as they were required to do under the HLDA Act. Section 9 of that Act clearly states that the Labour Relations Board has no jurisdiction to hear the application for termination at that time since the period is closed until the arbitration process is complete. The procedure is different than permitted under the Labour Relations Act since under the HLDA Act, the right to strike has been replaced with compulsory arbitration and therefore the appointment of a conciliation officer operated to bar an application for termination until certain conditions stipulated in the Labour Relations Act have been met.

The Applicant in this instance submits that since our PEI legislation does not have a section similar to section 9 in the HLDA Act, any Ontario case law in this regard should not be followed.

The Applicant also submits the decision of the Ontario Labour Relations Board in *Nel-Gor Castle Nursing Home*. *Nel-Gor* also dealt with section 9 of the HLDA Act. Again, the Ontario Board confirmed that the timeliness of an application for termination is assessed by reference to section 9 of this Act. This compliance with the closed period set out in section 9 is stated to be notwithstanding the procedure set out in the Labour Relations Act. The HLDA Act applies to employees employed by a "hospital" within the meaning of the HLDA Act (which includes nursing homes). Essentially employees working in a nursing home are deprived the traditional avenues of striking normally afforded to other parties, therefore requiring a different structure for this aspect of the collective bargaining process. *Nel-Gor* confirms the decision in *Birchcliff* that the period for a termination application is closed in cases falling under the HLDA Act until the arbitration process is finished.

The Applicant is certainly correct in submitting that there is no equivalent in our legislation to section 9 the HLDA Act in Ontario. We have no outright statutory bar in our jurisdiction and the Applicant submits that it is up to the PEI legislature to provide one. Until that occurs, the Applicant submits that the period is open for a revocation application once the ten month period as set out in section 12 of the Act has passed and no collective agreement has been established by the parties.

Certain sections of the Act, more particularly sections 12(3), 20 and 41(6), are clearly confusing as they are mandatory sections which do not on their face appear to work together. The Board must now attempt to reconcile these sections so as to achieve consistency.

Having considered the foregoing, the Board feels that section 41(6) of the PEI Labour Act is indeed mandatory but it may not necessarily preclude the granting of an application or hearing of an application for revocation under section 20 or the employees' rights under section 12(3).

If the revocation application is heard and granted during the period when the arbitration process is established under section 41(6), then the process will be moot since no one will come to the bargaining table if the Respondent is no longer certified. But if the revocation is not granted, then the arbitration process that has been established by the Minister may be utilized. This appears to be the only way these sections can work together within the legislation without offending employee rights under section 12(3) and section 20.

Notwithstanding this determination, the Board strongly recommends an amendment to the legislation to prevent confusion such as this in the future. If such legislation was in place, the Board would conclude that in the situation where there is an application for revocation under section 20, the arbitration process is not yet completed, there is no collective agreement in place and the employees in question are prohibited from the right to strike, then the period should be closed to any revocation applications until the arbitration process is completed. The Board feels that the Applicant is therefore indeed correct in that until the Legislature places a statutory bar to such revocation applications while the arbitration process is still alive then the opportunity exists for parties such as the Applicant to succeed on similar applications.

The Board agrees with the principle as stated by the Ontario Labour Relations Board in the *Nel-Gor* decision at p. 1015:

> The scheme of the [Hospital Labour Disputes Arbitration] Act, therefore, is designed to ensure that the parties will have a collective agreement. If a termination application could interrupt the process which is designed to ultimately establish a collective agreement between the parties, the scheme and purpose of the Act would be frustrated.

ISSUE #3

Since the Board has determined that the revocation application can be made under the existing legislation, it must proceed to consider the merits of this application as submitted and presented originally to the Board on February 6 and 7, 1997, along with the submissions made at the present hearing in this regard.

Before revoking certification of such trade union, the Board must be satisfied that the application is made on a timely basis and that a majority of such employees no longer wish the union to act on their behalf.

Section 20 of the Act permits any employee in a unit for which a trade union has been certified as bargaining agent to apply for the revocation of certification of the bargaining agent, provided that this application is made at any time after the ten month period from the date of certification.

The Respondent union was certified to act as the bargaining unit for the employees of Perrins Clinton View Lodge on February 5, 1996. The application for revocation was filed by the Applicant employees on December 6, 1996, thereby qualifying as a proper application made on a timely basis.

The revocation application dated December 6, 1996 submitted in this regard represents that approximately 70% of the employees of Perrins Clinton View Lodge signed the petition indicating that they wish the Respondent's certification to be terminated. On its face, therefore, termination appears to be the wish of the majority of the employees.

Having determined the foregoing, the Board does, however, have a discretion to deny such an application if it is not satisfied that this petition or application was signed voluntarily by all employees who executed it.

In *Canadian Labour Law*, Adams (1985), at p. 442, the principles are outlined by a British Columbia decision:

> In *Kootenay Savings Credit Union* [[1978]1 Can.L.R.B.R. 40], the Board summarized its jurisprudence on decertification as follows: the Board would grant decertification where the application was timely and (a) a majority of the employees in the unit no longer wished the union to represent them; (b) there had been no employer interference of the kind likely to distort the true character of the employees' wishes; and (c) granting of decertification would not impinge upon or offend another section of the Code or policy arising out of the Code.

Instances which were considered to be determinative to conclude that the employer has been involved in the application or petition for revocation are set out in *Ontario Labour Relations Board Law and Practice*, Sack and Mitchell (1985) at p. 298 and include:

> .... whether the employees were subjected to intimidation and coercion, whether the actions of the employer created a climate which made voluntary expression by employees unlikely, whether there was an atmosphere tainted by fear of management influence so as to prevent employees from freely expressing their views, or simply whether employees would reasonably believe that their failure to sign would come to the attention of management, or would logically have assumed that management would have supported the petition.

It must be born in mind that proof that the revocation application is not the true wish of the employees must be very clear and evident, since such an application is not made impulsively by employees. As stated by Sack and Mitchell at p. 299:

> Although the Board must be satisfied in both certification and termination applications that petitions are voluntary, since in termination applications the employees' change of heart is not immediate as it is in certification applications, and because as a practical matter there may be many reasons for the employees' change in views, the Board is less inclined in termination applications to draw inferences adverse to voluntariness than it is in certification proceedings.

The Board must therefore ensure that the application before it represents a reliable expression of employee wishes, reasonably free from any influence of the employer. To this end, the Board has reviewed all evidence and previous submissions made by both parties and the evidence presented by numerous witnesses.

EVIDENCE OF KAY MARK

It was the Applicant Kay Mark's evidence that the signatures in support of the revocation application were obtained by her predominantly at her home over a period of time prior to its filing with the Board on December 6, 1996. Nothing was contained in her evidence to suggest that the employer had a hand in the coordination of these signatures.

Ms. Mark did indicate that in May of 1996 she and others used the employer's photocopier located in the office of the Director of Nursing to make copies of letters from a number of employees being sent to the union requesting the return of their union membership cards (Exhibit R-6). Ms. Mark testified that the office was locked and the door was unlocked for them by Sherry Cole. Ms. Mark stated that Sherry Cole is her PCA supervisor and speculated that she may have a direct line to management. Sherry Cole confirms in her evidence that she is the PCA supervisor. This is a bargaining unit position.

The Board has concluded that it feels the application for revocation was in fact initiated and coordinated by employee, Kay Mark, without any evidence of influence or encouragement by the employer. The Board notes that the revocation application dated December 6, 1996 followed picketing by a group of employees who were not in favour of the union, which action took place after a union meeting in March of 1996, written requests by a number of employees for the return of their union membership cards in May of 1996 and a formal request to the Board for a revocation application to be heard before the expiry of the ten month period prescribed by section 20 and 12(3) of the Act.

The Board was presented with evidence and concluded that the employer indeed showed a real hostility toward the union. The evidence of Sharon Chisolm is particularly useful on this point.

EVIDENCE OF SHARON CHISOLM:

Sharon Chisolm was an employee of the Lodge at all relevant times and testified that she was the driving force behind getting the union into the workplace and is now a member of the union and sits on the bargaining committee, having been elected at that meeting of March 10, 1996. In August of 1996 Ms. Chisolm had many meetings with Mrs. Geraldine Perrin to discuss shift changes. Ms. Chisolm acknowledged that there were often shift changes but during this particular time she felt the shift changes were all having a direct impact on the union supporters in particular. Ms. Chisolm stated that Mrs. Perrin denied that anyone was being picked on but that the changes were needed. Ms. Chisolm stated that she advised Mrs. Perrin that a statutory freeze was in effect and she responded that Ms. Chisolm had no right to tell her how to run her business.

Ms. Chisolm testified that during a meeting with Tracy Perrin, the daughter of Mr. and Mrs. Perrin and acting Assistant Administrator, around September of 1996, Tracy Perrin was very upset and told Ms. Chisolm that the union was not at the Lodge until a contract was signed and that they were never signing one. Ms. Chisolm told her that the union had been at the Lodge since February of 1996. Tracy Perrin responded by saying that there was no union until a contract was signed and if the union ever did get in by some chance, then they would simply sell the place and everyone would be out of work.

Evidence was also presented by the Respondent that suggested the employer was not approaching the bargaining table in good faith. Although the Board acknowledges that this alone would not bar an application by employees for revocation, it does reflect on the overall collective bargaining process and the employer's attitude toward the union. It became quite clear to the Board from the evidence of employee Linda Lewis that the employer representative, Mr. Robert Ganeau, was not in the least being professional or reasonable in his dealings with the union committee and was not making any reasonable efforts to come to the bargaining table with the union in any sort of a timely basis.

Ms. Lewis testified that it was her opinion and the opinion of the bargaining committee for the employees that the employer was simply dragging its heels until December 6, 1996 when the ten month period to have an agreement in place would be expired and an application could be made for revocation of the certification order.

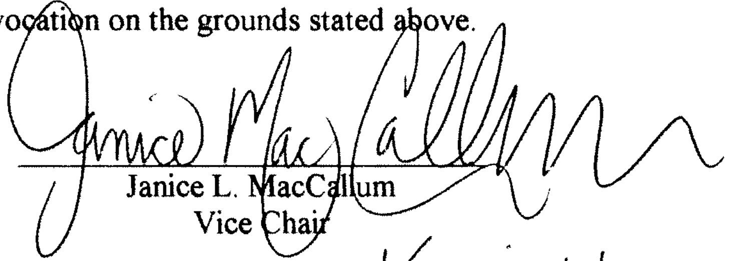
The Board wishes to state that the evidence presented to it has demonstrated to the Board that the actions and behaviour of the employer since the certification application was made by the Respondent in 1995 has indeed been deplorable.

On a thorough review of this evidence, the Board notes a substantial amount of evidence of employer activity in and out of the workplace against the union prior to the certification date of February 5, 1996. While this evidence indeed lays the foundation for the Respondent's case, evidence must also be present of the employer's hand in the revocation application itself and therefore it is evidence respecting employer influence after the certification date that is most relevant to the revocation application.

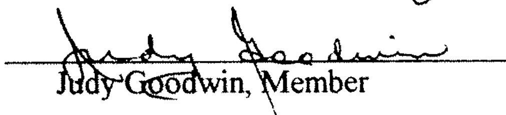
Based on the evidence, the Board must conclude that the Respondent has failed to prove its case to the Board that the employer actually participated in or coordinated the present application for revocation made by the employees. Although the Board has stated that it feels the management's behaviour has been completely out of line in many instances, mere employer hostility toward the union is not in itself improper and should not result in the employees being penalized. There is no firm evidence that the employer participated in the origination or circulation of the revocation application, but rather the evidence presented respecting the obtaining of signatures, suggests that the signatures were obtained outside the workplace. No evidence was presented to counter the evidence of 70% of the employees signing the application indicating to the Board that there appears to be a real desire among the employees for this revocation application.

In summary, therefore, based on the totality of the evidence, the Board feels that the Respondent has fallen short of proving by its evidence that the employer was involved in or was meddling with the present revocation application.

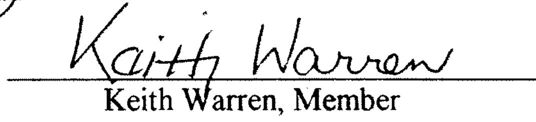
The Board, therefore, having reconsidered its previous decision, is of the unanimous decision to grant the Application for Revocation on the grounds stated above.



Janice L. MacCallum
Vice Chair

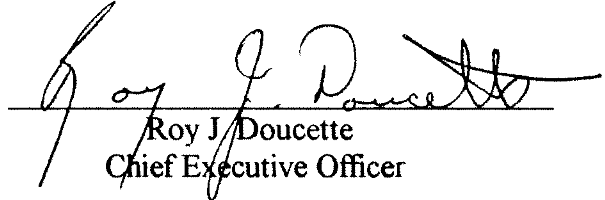


Judy Goodwin, Member



Keith Warren, Member

THIS DECISION made by the Labour Relations Board on this 9th day of September, 1997, and issued under the hand of its Chief Executive Officer.



Roy J. Doucette
Chief Executive Officer

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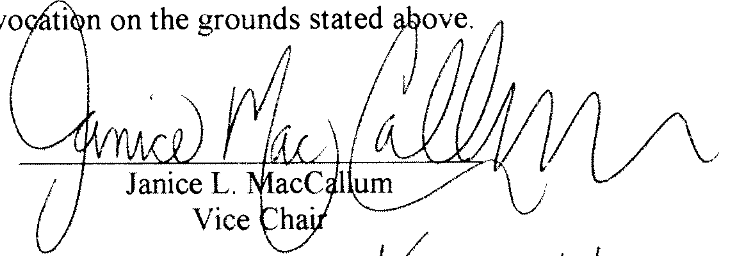

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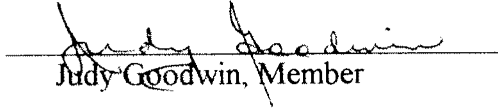

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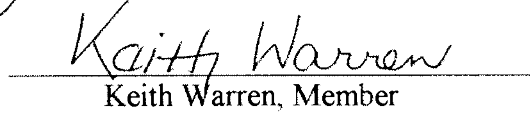

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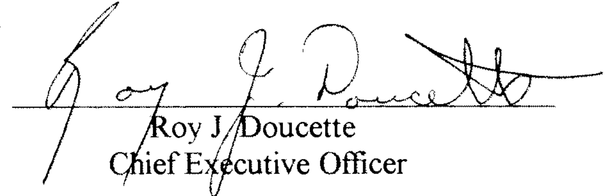

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