File No. 99-018

Decision No. 00-003

IN THE MATTER OF AN APPLICATION UNDER SECTIONS 12 AND 13 OF THE ACT

and

IN THE MATTER OF AN APPLICATION UNDER SECTION 10 OF THE LABOUR ACT

BETWEEN:

CONSTRUCTION AND GENERAL LABOURERS AND GENERAL WORKERS IN CONSTRUCTION, INDUSTRIAL AND COMMERCIAL LOCAL UNION NUMBER 1077

APPLICANT/RESPONDENT

AND:

DIAGNOSTIC CHEMICALS LIMITED

RESPONDENT/COMPLAINANT

COUNSEL FOR THE APPLICANT/RESPONDENT **J. GORDON MACKAY, QC**

COUNSEL FOR THE RESPONDENT/COMPLAINANT **JOHN K. MITCHELL, QC**

DECISION

Background

An Application for Certification pursuant to Subsections 12 and 13 of the *Labour Act, R.S.P.E.I. 1988, Cap L-1,* and Section 3 of the *Labour Act Regulations* was filed by the Applicant Union on 16 December 1999. In Paragraph 6 of its Application, the Applicant describes the unit of employees of the Respondent that it claimed to be appropriate for collective bargaining as being "all those employees of the respondent working as labourer's, as chemical operators,

chemical technologists, process operators maintenance personnel, including working foremen or team leaders but excluding those above the rank of foreman or teamleader in the Province of Prince Edward Island."

The Reply/Intervention to Application for Certification was filed by the Respondent on 14 January 2000.

Also filed with the Board was an Unfair Labour Practice Complaint by the Respondent, Diagnostic Chemical Limited, on 14 January 2000. The Reply to the Unfair Labour Practice complaint was filed by the Construction and General Labourers and General Workers in Construction, Industrial and Commercial, Local Union 1077 on 4 February 2000.

The hearing of the matter was originally scheduled for 11, 12 and 13 April 2000. At the hearing on 11 April 2000, the Board heard two motions. The first motion was to consolidate the Application for Certification by the Applicant Union and the Unfair Labour Practice complaint by the Respondent Employer. The second motion was a motion on the part of the Respondent/ Complainant, Diagnostic Chemicals Limited, to adjourn the matter to the 10 and 11 May 2000. Upon hearing brief submissions from both counsel, the Board granted both motions.

The hearing of the consolidated matters was conducted on 10 and 11 May 2000 and 1, 2 and 3 August 2000.

<u>**Cases Considered**</u>

1. ***Construction & General Labourers Union, Local 1077 v. Padinox Inc.*** PEILRB, 26 Apr 1996;

2. ***Service Employees International Union,*** [1991] OLRB, Rep Feb 267, at para 11;

3. ***Marriott Corporation v. Labour Relations Board,*** [1989] 73 Nfld. & PEIR 173;

4. ***International Association of Heat & Frost Insulators and Asbestos Workers, Local 31 v. Guildford Ltd,*** PEILRB, 23 Jan 1996;

5. ***United Brotherhood of Carpenters & Joiners of America, Local 1338 v. D & E Agencies Ltd.*** PEILRB, 12 Apr 1989;

6. ***Alex D. Henry,*** [1977] OLRB, Rep 288;

7. ***Trim Trends Canada,*** [1986] OLRB, Rep Sept 1312;

8. ***Leon's Furniture,*** [1982] OLRB, Rep Mar 404;

9. ***National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada) v. Central Farmers Co-Operative Association Ltd doing business under the firm name and style of Island Food Centres (Respondent) and The United Food and Commercial Workers' International Union (Intervenor),*** PEILRB, 1 Mar 1989;

10. *United Food and Commercial Workers Local 1252 (In Trusteeship) v. Lobster Specialties Limited*, PEILRB, 13 Jul 1990;

11. *Canadian Paperworkers Union Local 167 v. Schurman Industries (A Division of Schurman Enterprises Ltd) and the United Brotherhood of Carpenters and Joiners of America, Local 1338 (Under Supervision) v. Canadian Paperworkers Union, Local 167 and Rick Roberts*; PEILRB, 16 May 1991;

12. *International Union of Operating Engineers, Local 902 v. Schurman Supply (Charlottetown Branch) and Certain Employees of Schurman Supply (Charlottetown Branch) (Intervenor);* PEILRB, 24 Jun 1988;

13. *OPSEU v. Royal Ottawa Health Care Group/Services de Sante Royal Ottawa;* [1993], OLRB, Rep. 664;

14. *National Automobile , Aerospace, Transportation and General Workers Union of Canada (CAW - Canada) v. Allied Signal Aerospace Canada;* PEILRB, 1 Feb 1999;

15. *CUPE v. Hospital for Sick Children*, [1985] OLRB, Rep 266;

16. *CJA, Local 3054 v. Horizon Poultry Products Inc*, [1998], OLRB, Rep 208;

17. *United Brotherhood of Carpenters & Joiners of America v. Gwell Investments Ltd*, OLRB, 18 Oct 1971;

18. *United Steel Workers of America v. Usarco Limited and Group of Employees (Objectors)*, [1967] OLRB, Rep Sept 526;

19. *IWA Canada v. Timberjack Inc*, [1992] OLRB No. 486;

20. *Carpenters Local v. Labour Relations Board and the Papermakers Union,* [1990] 2 P.E.I.R. 18;

21. *APM Construction Inc v. Construction and General Labourers' Union, Local 1077 and the Labour Relations Board of Prince Edward Island*, [1988] 1 P.E.I.R. 345 (P.E.I. S.C.T.D., Jenkins J., 20 May 1998);

22. *APM Construction Ltd v. Construction and General Labourers' Union, Local 1077 and Labour Relations Board of Prince Edward Island,* [1999] 1 P.E.I.R. 345 (P.E.I. S.C.A.D., Carruthers C.J. P.E.I., Mitchell and McQuaid, JJ.A., 12 January 1999.)

Statutes Considered

Labour Act, R.S.P.E.I . 1988, Cap L-1;
Labour Act Regulations, R.S.P.E.I. 1988, Cap L-1;

Texts Considered

Black's Law Dictionary (4th edition) pages 1222 and 1400

Preliminary Matters

There were two preliminary matters raised by counsel.

Mr. Mitchell moved a challenge to this Board's jurisdiction to conduct a hearing. In summary, it was a challenge to the jurisdiction of the Board in terms of do we have "initial jurisdiction" and there are some 8 points raised by Counsel for the Respondent in that regard.

The Board has considered all of the cases submitted by Counsel as well as another case out of the Appeal Division decided in 1990, the Carpenters Local v. the LRB and the Papermakers Union, [1990]2 PEIR 18. The CEO provided the parties with a copy of the Board decision in that regard and the Board has also considered the Appeal Division decision. That decision, issued on September 28th, 1990, is the second in what the Board will refer to as the trilogy of cases that the Board has relied on.

The first is the Marriot Corporation v. the LRB in a 1989 case before the P.E.I. Supreme Court Trial Division and included at Tab 5 of the pre-hearing brief submitted by Mr Mitchell on behalf of the Respondent. The Board points out that at paragraph 3, page 174, the then-solicitor for the Board had conceded the Board was "without jurisdiction when it entered upon the hearing of the purported application of the Union and indicated that he would consent to the issuance of an order that had been applied for. The appropriate order will issue accordingly without any accompanying order for costs". What follows in the rest of that decision is *obiter dicta* but very instructive *obiter dicta* as it has been referred to and often cited and often followed, both in the Board decisions that have been submitted by counsel and later referred to in other decisions coming out of the Court itself. There is a very heavy onus on this Board from the very outset of a proposed application coming before it and a duty of the Board to be fully cognizant of its duty in this regard and of the vigilance required of it in order to acquire initial jurisdiction. Initial jurisdiction as opposed to overall jurisdiction to embark on a hearing of the merits of the case.

The court goes on to say that sections 2 and 3 of the *Regulations* are mandatory and unless they are complied with the Board would have no jurisdiction to enter upon a hearing. It is incumbent upon the Board, or the CEO, to examine all documents presented for filing to ensure there is not only full compliance with the *Regulations* but also the persons signing proposed applications in fact hold the offices they purport to hold and are acting within their constitutional authority.

In chronological order, the next case in the trilogy is that of the United Brotherhood of Carpenters and Joiners of America, Local 1338, under supervision v. LRB of PEI and the Canadian Paperworkers Union, supra. It was decided by Chief Justice Carruthers and Justices Mitchell and McMahon. Basically, in that case, there were 3 arguments attacking the assumption of jurisdiction of the Board of the application in question. It was alleged that there was no copy of the local charter filed, there was no copy of the by-laws filed, and the cards were obtained during a closed period and the Court went on to deal with each of those issues.

The Court held that there was no specific requirement in the *Act* or *Regulations* to file the *Charter*, and, in page 6 of the decision, it states that the Respondents, Canadian Paperworkers Union, (CPU), has filed the material upon which it relies to establish its right for certification and the Board would have to determine whether the respondent CPU is a trade union.

This Board interprets the Court's decision to mean that this is a question which goes to the merits of the case and one which the Board will decide after the parties have presented their evidence and made their submissions on the application. It is not a matter which goes to the Board's initial jurisdiction.

Also, in looking at the second point, relating to a copy of the by-laws, the Court again states, at page 8 of that decision:

"I am of the opinion that the Board could satisfy itself that this documentation was sufficient for the purpose of the initial jurisdiction. It would have then to determine at the conclusion of the hearing whether the filed documentation was in fact sufficient to enable the Board to grant the application. I do not agree with the appellant's submissions that this decision has to be made before the actual start of the hearing so as to give the Board initial jurisdiction."(emphasis added)

Similarly, on the third point, which relates to cards being obtained during a closed period, the Court again held that this does not attack the initial jurisdiction of the Board either. At page 10 of the decision, Chief Justice Carruthers concludes with the remarks:

"I would caution counsel that the concept of initial jurisdiction for a preliminary question as it is often called; has not been given a very wide scope by the Supreme Court of Canada and would refer you to the comments of former Chief Justice Dickison in Jackmain v. Attorney General of Canada, [1978],2 SCR 15 at page 29 and the words of the present Chief Justice Lamer in Dennis Blanchard v. Control Data Canada Ltd, supra, page 491.

The next case in the trilogy is the PEI Supreme Court Trial Division decision in APM Construction Inc v. Construction and General Labourers Union, Local 1077 and the LRB of PEI. [1998] 1 P.E.I.R. 345.

At paragraph 12 on page 350 of the decision, the Court states:

"It is a prerequisite for the Board assuming jurisdiction that the Trade Union file the materials listed in Regulation 3(2). The statutory filing requirements are mandatory. Fulfilment of these statutory requirements is a jurisdictional question which is reviewable by the court on the standard of correctness. In this case, the record shows that the Board received the required material which accompanied the Trade Union's application.

Once the listed material is before the Board which purports to satisfy the statutory requirement, then the Board has some latitude, within the scope of acting reasonably in the circumstances, to adjudicate on the sufficiency of the materials and determine whether the application is made in accordance with the *Regulations*. I follow the approach taken and the opinion expressed by Campbell J., United Brotherhood of America, Local 1388 [sic] v. Canadian Paperworkers Union, Local 167 (1990) 81 Nfld and PEI Reports, 40 and PEISCTD, at 53; (affd on appeal, supra,)regarding the distinction to be made between judicial review between the requirement that material be filed which purports to meet the final requirements, which is jurisdictional issues such that those requirements must be met, and the

sufficiency of the filed materials, which is a matter for consideration within the Board's jurisdiction, and the consequent difference in standard of review regarding the associated Board determinations. In that regard, the present case is distinguishable from those cases relied upon by an employer in which a Board was held itself or was held by a reviewing court to be without jurisdiction because specified material was not filed as required by the statutes.

I note, in passing, that I do not intend this analysis to be interpreted to preclude a Board, acting reasonably, from determining in similar circumstances that materials filed as insufficient, such that would conclude it does not have jurisdiction to entertain an application for certification. Provided a Board is acting within its jurisdiction, it has a right to decide rightly or wrongly within the range of reasonableness without being disturbed on judicial review. In the circumstances, s. 4(2) of the *Labour Act* has full privative effect. See also Adams Canadian Labour Law (2d ed) 2nd edition, at p 4 - 8.

In my opinion, the Board was entitled within its jurisdiction to receive and consider all of the mentioned documentation as being from the Trade Union and to treat the discrepancy as a technical irregularity without consequence which did not affect its jurisdiction."

That briefly, is the law as the Board sees it. The Board will not go into any great depth in distinguishing each of the Labour Board cases cited and relied upon. The Trial Division and the Appeal Division decisions take precedence over that jurisprudence. The Board has considered those decisions and feels comfortable in relying upon the law as has just briefly been outlined.

Turning to the summary of issues in this case, the first issue raised is set out in paragraph 10(2)(a) of the Reply and dealt with the officers signing the application being officers of LIUNA Local 1077 and not of Construction and General Labourers and General Workers in Construction, Industrial and Commercial Local Union 1077.

The APM Appeal Division decision at paragraph 10, dealt with a name irregularity. It was seen as being simply that, an irregularity, and in the circumstances of that case and again in the circumstances of this case, the parties weren't materially mislead by that. The Court would decide that issue on the same basis as was decided in that case; that it is an irregularity but not fatal to the jurisdiction of this Board.

The second point raised, in the Reply, paragraph 10(2)(b), was with respect to an allegation of a failure, given certain provisions of the Union's constitution, to comply with regulations requiring a concurrent filing of a list of officers. The members considered that argument and reached the conclusion that the evidence declared on the Form 1 filed is sufficient, is in keeping with established Board practice as submitted by Counsel for the Applicant, and the Board does not see that as being anything fatal to our initial jurisdiction over the matter.

The third point raised was set out in paragraph 10(2)(c) of the Reply. The record will show that the constitution had been filed and is date-stamped December 16th, and therefore it was filed concurrently.

The fourth point alleged there was no evidence of an appointment of a trustee. The Board has considered the evidence, in particular the letter filed with Form 1, and the reference in that letter to previous correspondence, to the appointment of Mr Joseph Mancinelli, by the general president, Arthur A. Coia, dated October 7, 1999. The Board is prepared to accept, on the basis of that evidence, that there was an appointed Trustee and the letter filed appoints two officers which is in keeping with the constitution of the Union. The Board has not been presented with any evidence to contradict that, and is prepared to accept it.

Similarly, with regards to the fifth issue that was raised, the point of there being no evidence that the named officers held office at the time because of a review being required throughout their term, the Board holds that the appointment is made on the 23rd of November 1999. The application was filed on December 16th, and the Board took particular note of the second sentence in the first paragraph of the letter of November 23rd 1999 "...in order to ensure the continuance of successful day to day operations in the period of trusteeship, and further to the authority extended to me by the General President, Arthur A. Coia in his correspondence of October 7, 1999..." It is assumed that the filing of Applications for Certification would certainly be in the purview of the day to day operations of the local in question. Some of the membership evidence, which obviously the Respondent is not a party to, indicates that cards were signed in that immediate time period. The Board holds that it would fall in the purview of ongoing business of the Local. This point, as well, does not attack the initial jurisdiction of the Board.

The sixth point was that there was no specific evidence as to the delegation of power by Mr. Mancinelli. Again, the Board feels that this is in the nature of the ongoing business of the Local in question and the officers were duly appointed and the Board doesn't feel that there is a requirement for a specific delegation of that power.

The document attached to the Application as Exhibit "B" was the seventh point raised as to it not being a proper list of the elected officers. The panel is of the opinion that what has taken place is that Exhibit " B" to Form 1, while refers to and is adhering to that wording which is used in Board forms, it was prepared on a word processor. That wording is used because that is what the Board's form says, and we again don't see that as being fatal to the application nor the Board's jurisdiction.

The final point - the parties have asked for an interpretation of subsection 3(2) of the *Regulations*, particular reference was made to a couple of phrases out of that section, in particular "filing concurrently" and "shall include." In the instant case, the Board is cognizant of its duty to determine that the mandatory requirements of subsections 2 and 3 of the *Regulations* have been met. The Board is satisfied entirely that the Form 1 filed on December 16th 1999 by two officers of the applicant Construction and General Labourers and General Workers in Construction, Industrial and Commercial Union, Local Union 1077, the requirements of Section 2 of the *Labour Act Regulations* have been met.

With respect to subsection 3(2) of the *Regulations*, the Board has been asked for its interpretation of that section and this panel of the Board is of the belief that the subsection must be read in its entirety with no special significance attached to individual phrases in the whole text of that subsection. As the court decisions have made so abundantly clear, the requirements listed are mandatory, the applicant who omits a component of the list of documents does so at the peril of having the Board rule it lacks "initial" jurisdiction. This panel believes that the applicant is free to file documentation in addition to that which is listed. The filing of Form 1 applications and

supporting documentation must occur concurrently. Such filing, of course, is subject to the provisions of the *Regulations* allowing for amendment and subject as well to the "latitude" of the Board within "the scope of acting reasonably in circumstances" to adjudicate the sufficiency of material to determine whether an application is made in accordance with the *Regulations* - again a paraphrasing from Mr. Justice Jenkins' decision in the APM case.

In conclusion, on the matter of the Respondent/Complainant's challenge to jurisdiction, the Board has reviewed the materials filed and has concluded that the mandatory requirements of Sections 2 and 3 of the *Regulations* have been met. This Board is, therefore, of the belief that it is possessed of the initial jurisdiction as required and is prepared to embark on a hearing.

Mr MacKay moved the Amendment of the Application pursuant to section 26 of the *Labour Act Regulations* to include as part of the application the letter of Arthur A Coia; General President of the Labourers' International Union of North America addressed to Local Union 1077, its Officers and Members, PO Box 85, Charlottetown, PEI C1A 7K2, re: Local Union 1077, Charlottetown, PE, Canada, Notice of Imposition of Trusteeships dated October 7, 1999. This Board granted this motion.

Evidence

Entered into evidence as Exhibit A/R-1 was a printed copy of the 17 slides from the Internet Web Site of Diagnostic Chemicals Limited. A composite exhibit of three pages consisting of the one-page memorandum from Dale Zajicek and a two-page letter from J. Regis Duffy, President and Chairman of the Board of Directors of Diagnostic Chemicals Limited was entered into evidence as Exhibit A/R-2. The letter of 3 December 1999 from Dale Zajicek, Production Manager, Diagnostic Chemicals Limited, to all employees in Bio-Chem Centre was entered as Exhibit A/R-3.

An unsigned letter bearing the heading Sunday, November 18, 1999 was submitted as Exhibit R/C-1. Exhibit R/C-2 was a composite exhibit of a set of 25 letters of Diagnostic Chemicals Limited, one bearing the date of October 27, 1999 and the remaining 24 bearing the date of November 1, 1999 and signed by Regis Duffy, President and Chairman of the Board of Diagnostic Chemicals Limited. A full-colour glossy brochure entitled "Diagnostic Chemicals Limited, Elevating Chemistry to a Fine Art" was entered into evidence as Exhibit R/C-3. A two-page document showing the newspaper article "Union head investigated over money allegations" by Ron Ryder, The Guardian, dated February 2, 2000 was submitted as Exhibit R/C-4.

The Board heard testimony from Scott Doncaster, Operations Manager; Lloyd MacDonald, Union Organizer and Business Agent and Secretary/Treasurer of Local 1077; Mr. David Clinton, Chemical Process Operator; Mr. David Fletcher, Chemical Process Operator; Mr. Gordon Rogers, Vice-President, Finance and Corporate Systems; and Mr. Dale Zajicek, Production Manager.

Issues

There are two main issues which the Board must consider and decide. The first is the matter of Unfair Labour Practices alleged by the Employer against the Applicant Union. The second issue is whether the Applicant Union is entitled to be certified as bargaining agent for the employees in the Unit set forth as appropriate for collective bargaining purposes.

Decision

The Board has very carefully considered all of the evidence presented and arguments advanced in support of each of the two Applications before it in this matter.

In regards to the Unfair Labour Practice complaint, the Board has turned its attentions to the provisions of Section 10(2)(e) of the *Labour Act* which reads:

> (2) No employee, trade union of person acting on behalf of a trade union shall
>
> . . .
>
> (e) use coercion or intimidation of any kind with a view to encouraging or discouraging membership in or activity in or for a trade union or labour organization. R.S.P.E.I. 1974, Cap. L-1, s.9; 1990, c.27, s.1; 1994, c.32, s.18 {*eff.*} Jan. 5/95.

It is the belief of this Board that the contents of the letter entered into evidence as Exhibit R/C-1 cannot be attributed to the Applicant/Respondent Union. In the circumstances of this case, the Board is not prepared to find that the Applicant/Respondent engaged in Unfair Labour Practices and, therefore, the Board cannot grant the remedies sought by the Respondent/Complainant respecting its application under Subsection 10 of the *Labour Act*.

On the matter of the Application for Certification, there was a great need for debate on the matter on what is the appropriate bargaining unit. There was a great deal of evidence submitted and arguments advanced in regards to this central issue. It was only after the hearing of all of the evidence and considering of all the arguments advanced that the Board could reach a conclusion as to how many employees there were in the appropriate bargaining unit. It was on the basis of the evidence of all of the witnesses for each of the parties to the Application that the Board has been able to reach a conclusion.

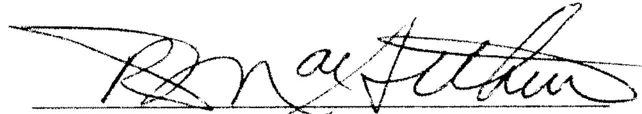
Upon the review of all this evidence, the Board has decided that, given even the lowest common denominator in terms of the specific number of the employees in the Unit, that the Applicant Union does not in fact have the majority of support among those employees eligible for inclusion in that Unit. Given this conclusion, the provisions of Subsection 13(3) of the *Labour Act* are not met in this instance and the Application for Certification cannot be granted.

The matter of a request of the Respondent/Complainant for a time bar has been considered in light of the provisions on Section 13(7) of the *Act* which read:

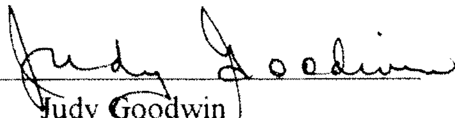
"If the board is not satisfied that the applicant trade union is entitled to be certified under this section, it shall dismiss the application and may designate the length of time that must elapse before the same applicant may make a new application."

The Board is of the opinion that, in all of the circumstances of this case, there exists no basis on which it should exercise its discretionary power to issue a time bar.

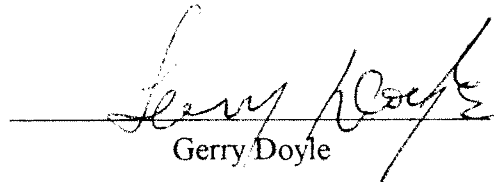
The Board rules accordingly.



Robert R. MacArthur
Chair

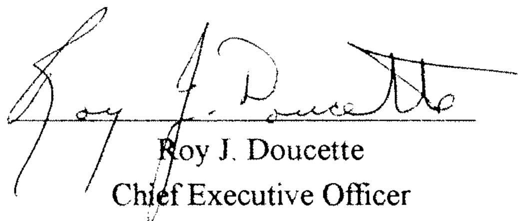


Judy Goodwin
Member



Gerry Doyle
Member

This Decision made by the Prince Edward Island Labour Relations Board on 2 October 2000 and issued under the hand of its Chief Executive Officer on 2 October 2000.



Roy J. Doucette
Chief Executive Officer