



Labour and Employment Board

IR-032-13

IN THE MATTER OF THE *INDUSTRIAL RELATIONS ACT*

**AND IN THE MATTER OF AN APPLICATION FOR A DECLARATION
TERMINATING BARGAINING RIGHTS**

BETWEEN:

Peter Sinclair on behalf of a group of employees.

Applicant,

- and -

United Brotherhood of Carpenters and Joiners of America, Local 1386

Respondent,

- and -

Acadian Construction (1991) Ltd.

Employer,

- and -

Saint John Construction Association Inc.
Moncton Northeast Construction Association Inc.

**Accredited Employers'
Organizations.**

AND

IR-034-13

IN THE MATTER OF A COMPLAINT OF UNFAIR PRACTICE

BETWEEN:

United Brotherhood of Carpenters and Joiners of America,
Local 1386

Complainant,

- and -

BEFORE: G.L. Bladon
Alternate Chairperson

APPEARANCES:
For the Union: *David Mombourquette,
Thomas J. Burke, Q.C. and Rebecca Butler*
For the Intervener: *Jamie Eddy and Jessica Bungay*
For the Petitioner: Peter Sinclair (personally)

DATES OF HEARING: December 5, 6, 2013, April 22, 23, 24, 2014
May 15, 16, 2014, June 2, 9, 2014, written
submissions completed July 4, 2014

DATE OF DECISION: July 17, 2014

REASONS FOR DECISION

1. These matters concern an Application to Terminate Bargaining Rights filed by Peter Sinclair pursuant to ss. 23(2) and 42(1) of the *Industrial Relations Act* (the “Act”) and a consequent Complaint filed by the Brotherhood of Carpenters and Joiners of America, Local 1386 (the “Union”), alleging violations of ss. 3(1) and 3(3) of the Act by Acadian Construction (1991) Ltd. (“Acadian”, “the company”) and Sinclair. The Application and the Complaint were heard together on consent.

The Petitioners Evidence

Peter Sinclair

2. Peter Sinclair (“Sinclair”), who was unrepresented by counsel at this hearing, circulated the Petition that was filed in support of the Application. It contains eight signatures of employees expressing their desire not to be represented by the United Brotherhood of Carpenters and Joiners of America, Local 1386.

3. Sinclair testified that he obtained his journeyman status as a Red Seal carpenter in 1987. He was hired by Acadian Construction (“Acadian”) as a “Working Foreman” in June of 2011. In that capacity he was dispatched daily to small projects and warranty issues. He sometimes works alone and sometimes with a crew. “I move around quite a bit”, he said. Sinclair also performed a coaching/mentoring role working with young carpenters and apprentices. He would sign off on the work they performed with him in

their books.

4. In the spring of 2012, Sinclair took on additional responsibilities as the Sites Operations Coordinator or “Site Operations Manager” as he described himself on his business card. This responsibility included i) the coordination of manpower for the various ongoing commercial construction projects of Acadian; ii) helping “with the safety side”, performing the Employer’s monthly on-site inspections in conjunction with “the safety lady”; and iii) organizing the storage facilities used by Acadian for their tools and equipment such as heaters, fans and scaffolding.

5. On June 11, 2013, Sinclair asked to be relieved of those additional responsibilities because of initially unspecified health and personal issues. He said he reverted to his previous position as a “Working Foreman...more on the tools”.

6. Sometime in early July 2013, he said he and the carpenters were told by Andrée Savoie, the Acadian Managing Partner and Director of Sites and Human Resources, that they would “have to join the union and attend the union meeting”. Sinclair said he was surprised to learn that Acadian was a unionized company. He, despite working in construction since 1984, had never been a union member.

7. Sinclair and two others met with Debbie Romero, the Union Representative, and signed union cards on July 11, 2013. However, Sinclair said, “I had a sick feeling. I felt uneasy, trapped”. He thought there must be “other options”. He explained his uneasiness

saying he and the others, who were asked to sign union cards by the company, thought that there would be a lack of work for them as unionized employees in the Moncton area.

8. With the help of his sister-in-law, Paula Frost (“Frost”), “who was computer savvy”, Sinclair obtained information “from the web” on how to go about filing a petition and making an application to decertify the union. He had the petition form printed off the “LabourWatch.com website” which he then circulated among his fellow employees after working hours and off-site on July 15, 2013. He completed the Application with the assistance of Frost and sent it from Staples by courier to the office of the Labour and Employment Board on July 18, 2013.

9. Sinclair said he did not retain counsel to assist him until the Union filed the Complaint in this matter on August 14, 2013. Counsel’s retainer appears to have been limited to the preparation of the Reply to the Complaint, as Sinclair attended this hearing alone, advising that his relationship with the lawyer had ended.

10. In cross-examination, Sinclair said he was paid at an hourly rate based on \$60,000 per year or \$45.00 per hour on a nine hour, five day workweek. He was not paid overtime. His regular pay then was \$1,272.00 per week. His remuneration was not increased when he took on the additional responsibilities in the Spring of 2012, nor was it decreased when he was released from those responsibilities in the Spring of 2013.

11. When Sinclair was the Sites Operations Coordinator, he had access to an office

which, he said, he used infrequently and which he shared with others.

12. Sinclair acknowledged that he had a Facebook page which was set up by his wife on which he is currently described as “Operations Coordinator at Acadian Construction”. Sinclair himself arranged for a link to the LinkedIn page where he is currently described as “Site Operations Coordinator, March 2012 – Present (1 year 9 months), Site Supervisor, Acadian Construction, June 2011 – March 2012 (10 months)”.

13. Sinclair has a company email account which he used regularly as the Operations Coordinator but, while he still retains the account, he uses it less today, having given up the Coordinator responsibilities.

14. Sinclair has a company cell phone, company vehicle and a company gas card. He drives the vehicle to and from work which he does not consider personal use, but, when he does use it personally, he pays for the gas. He does not have a log book wherein he differentiates between personal and company use.

15. When asked about the release from the Coordinator’s responsibilities, he said he had nothing in writing from the company reflecting that change, but that an email went out from the company to so advise the company managers and the workforce. Sinclair said he did not print out a copy of the email.

16. When Sinclair met with the Union Representative Romero on July 11, 2013, he was made aware that as a Working Foreman he would earn \$4.00 more per hour than carpenters and, in fact, it appears that his wages increased as a Union member. Sinclair enjoyed a health benefit package with Acadian which was only available to Site Supervisors and above. The Union offered a similar health package after a three month waiting period, but Sinclair did not inquire whether the Acadian plan would continue during the waiting period.

17. Sinclair was cross-examined specifically on the Decertification Application which was prepared by Sinclair and Frost at the same time as the Petition. He was taken through the Application paragraph by paragraph. Sinclair acknowledged that despite a reference to sections of the *Industrial Relations Act* in the Application, he did not know what the *Industrial Relations Act* was. In fact, that response applied to all information contained in the Application except the number of employees in the described bargaining unit. Sinclair said that Jean Babineau did not sign with the Union as he was a Site Supervisor. Sinclair said he signed as a Working Foreman on the instructions of Andrée Savoie. It was at this point that he revealed that Frost was getting additional assistance from a lawyer whose name, apparently, Sinclair does not know. He said he did not use that lawyer to respond to the Complaint because he “did not want to get the family further involved”.

18. The cost of Sinclair’s involvement beginning with the Petition and continuing through the preparation of the response to the Complaint by a lawyer was paid personally

by Sinclair. He did not request contribution from his fellow petitioners.

19. Sinclair said that Site Supervisors met with Andrée Savoie, the Human Resource Manager; David Savoie, the Director of Project Managers; and Regan Steeves, the Director of Business Development and Estimating. At those meetings a variety of topics were discussed which included control and minimization of costs, labour cost throughout the projects, making maximum use of labour, keeping the projects on schedule, attendance of the crew, and the reduction of injuries.

20. Sinclair did not produce his time sheets or daily reports as requested. He understood the Employer would provide that material. He does not keep a personal log book.

21. Sinclair said the company cell phone, which he said he received as a Working Foreman, was used to contact Project Managers, Supervisors, the office and suppliers when he was the Site Operations Manager. He continues to use the company cell phone as a Working Foreman. He says his personal calls are to be taken off, but he said he did not know how the company would allocate those calls as he has not been asked to check the phone records.

22. In response to a question from counsel for the Employer, Sinclair said there was no job description for his position as Sites Operations Coordinator from the spring of 2012 to

June of 2013. He was paid an hourly rate; overtime was banked informally and not paid out. During this time, Sinclair had his carpenter's belt with him and worked on the tools approximately 15 to 20% of the time – especially if there was commercial door hardware work to be done in which he had some considerable background.

23. As Sites Operations Coordinator, his responsibilities included ordering materials for the job sites, organizing the sub-trades and scheduling them for the next day, regulating the storage facilities for the tools and equipment, doing the associated paperwork, conducting safety inspections as directed by Rachelle LeBlanc, the Safety Coordinator, and communicating with Project Managers concerning change orders, budget and coordination in general. He did not have any disciplinary power, nor did he hire, fire, promote or demote the employees.

24. As a Working Foreman, Sinclair said his duties were to lay out the work to be done that day for his crew of carpenters and/or labourers, answer questions from the younger members of the crew, supervise them with respect to their trade and work with them on the tools. He had no responsibility, again, to hire, fire, promote or discipline the employees, nor did he have overtime authorization powers or authority to schedule vacation time.

25. Sinclair acknowledged he had described himself as the Site Operations Manager on one business card in his own handwriting, but that the company never provided him such a card.

26. In the spring of 2013, because of his health and personal circumstances, he requested a release from his coordination or Site Operations responsibilities. He returned to his role as a Working Foreman because working on the tools, he felt, was good therapy. Interestingly, there was no decrease in his wage rate. This change of responsibility is reflected in an email of July 9, 2013 written by Andrée Savoie, see Exhibit 12.

27. Sinclair said other employees such as Tim MacIntosh and Steve Lajoie used the company trucks and gas cards in a similar manner as he does.

28. Following the instructions of Andrée Savoie, Sinclair signed with the Union on July 11, 2013 at a worksite on Edinburgh Street in Moncton. There, he and two other employees met with the Union organizer, Romero. They were told, Sinclair said, that if they wished to continue to work for Acadian, they would have to join the Union. Sinclair indicated he was a Working Foreman and was advised that he was entitled a wage rate above the carpenters' rate. He said that he has subsequently paid his union dues including the arrears and remains a member in good standing with the Union.

The Union's Evidence

Debbie Romero

29. Romero is the Union Director of Organizing for Atlantic Canada.

30. In late May or early June 2013, following a meeting between Andrew Dawson, the union provincial Manager, and Andrée Savoie, Romero was asked to “facilitate the outstanding issues” between Acadian and the Union; *i.e.*, there was an outstanding grievance and the Union had a concern about Acadian’s hiring practices.

31. Following an exchange of emails, Savoie provided Romero with a list of eight employees whom she suggested Romero sign up: 4 journeymen, 3 apprentices and Sinclair, “journeyman and working foreman”. Romero met with Sinclair and the 7 others on July 11, 2013. The Acadian employees paid the usual \$2.00 and joined the Union. Sinclair inquired of his wage rate as a Working Foreman and was told that he would be entitled to a rate of \$3.00 per hour greater than a journeyman carpenter in accordance with the collective agreement. Otherwise, neither he nor his companions expressed any concern about joining the Union. On July 13, 2013, Romero, as a result of comments made to her in the Union office, began to have concerns about Sinclair’s status. Romero checked the internet, Facebook, spoke to other employees and obtained Sinclair’s business card on which he described himself as “Site Operations Manager”. Romero said she signed the Acadian employees as members of the Union based on Savoie’s direction, believing that they would all be carpenters, carpenter apprentices or working foremen. By signing Sinclair, she felt she had been “duped” into signing a member of management. Sinclair filed the decertification application on July 18, 2013.

32. Romero said that the Union continues to receive union dues from Sinclair through the Employer notwithstanding that the Union viewed him as management. It was a matter, she said, to be cleaned up following these proceedings. In this context she noted that the Employer, on the wage payment of July 27, 2013, wrongly deducted the death benefit cost from Sinclair's cheque. That amount, according to the Collective Agreement, is to be paid by the Employer on behalf by the Employee.

Andrew Dawson

33. Dawson is the provincial Manager for the Atlantic Canada Regional Council of Carpenters, Millwright and Allied Workers.

34. In the late summer of 2012, Dawson became concerned with what he perceived as considerable amount of construction work being done by Acadian and the absence of corresponding remittances to the Union in accordance with the construction association Collective Agreement. On September 26, 2012, a grievance was filed by the Union alleging Acadian was using non-union members in contravention of the Collective Agreement with the Moncton Northeast Construction Association of which Acadian is a member. This grievance was referred to Expedited Arbitration and dates were set for the hearing.

35. Prior to the hearing, Dawson was contacted by Andrée Savoie who requested a meeting with him. The meeting, described by Dawson as positive, took place May 15,

2013. Dawson said the parties reached agreement that Acadian would use Union members and would identify certain employees who, as carpenters, would be accepted by the Union. The parties “would go forward from there and forget about the past”.

36. Accordingly, the Expedited Arbitration dates were cancelled. Dawson assigned Romero to sign up the Acadian employees. On May 21, 2013, Savoie’s email to Dawson reads, in part:

“We appreciate the trust being put into our relationship.”

Dawson testified that that statement did not “come to mean what I thought it meant because upon signing the identified carpenters, we received a decertification application”.

Jean-François Boulay

37. Boulay was initially hired by Acadian as a carpenter in 2006. He progressed to Foreman in 2007 and then worked as a Site Superintendent from 2008 or 2009 until 2012. At that time he said he quit, but he conceded that the Employer had suspended him for one week for theft. He disputed the Employer’s view of his conduct that gave rise to the suspension. There was no criminal investigation into the matter.

38. Boulay met Sinclair in 2010 or 2011. Sinclair was then a Site Superintendent for whom Boulay worked briefly at the Subway project in Moncton. He did not see Sinclair work on the tools during his time on that job site.

39. Around January 2012, Boulay was advised in an email that Sinclair's status had changed. Sinclair was now responsible for the allocation of labour and equipment to all Acadian work sites and Sinclair was in charge of safety. Boulay said that if he had problems with the men on his crew, he would speak to Sinclair. The crew would speak to Sinclair concerning time off and vacation time, but Boulay conceded he did not know if Sinclair had decision-making authority. He noted Sinclair took over an office in the company's premises at 200 Champlain Street in Dieppe that had previously been occupied by the former manpower coordinator. Boulay said he saw Sinclair using the office 10 or 12 times. He said that there was no name on the office door.

40. Boulay was present on the BCR Medical Building job site when he said his brother, Guillaume, was terminated by Sinclair. However, in cross-examination he agreed that he was 20 feet away from the meeting between his brother and Sinclair and could not hear what was said between them. He did observe that following the meeting between Sinclair and his brother, Guillaume immediately left the job site and has not returned to Acadian.

41. As a Site Superintendent, Boulay was responsible for larger projects employing a greater number of men and sub-trades. He reported to Andrée Savoie or David Savoie or Regan Steeves. He had a company truck, a gas card and cell phone. He did not have a job description. He says the Site Superintendent would meet with the owners, Andrée and David Savoie, about every six months. "Changes in the industry, the company's progress, and expectations were discussed". It was a kind of information meeting on how the

company was doing. There was no discussion of discipline or hiring policy at these meetings.

Pierre-Luc Doucet

42. Doucet worked for Acadian as an apprentice carpenter from March 2010 to February of 2013. He first met Sinclair in 2011 on the Wesleyan Church job site in Moncton. Sinclair was the Site Superintendent. During that time he did not see Sinclair work “on the tools”. He did see Sinclair work with the tools at the Subway job but only odd jobs “at crunch time”.

43. Doucet said Sinclair’s responsibilities changed on the departure of another employee and Sinclair then became responsible for the overall allotment of manpower, equipment, the organization of the site, and safety. The safety “piece” was subsequently removed when another employee, Rachelle LeBlanc, was hired for that purpose.

44. Doucet dealt solely with Sinclair with respect to his employment at Acadian. He approached Sinclair for time off – usually a matter of one to three days – and he would receive an immediate response from Sinclair. Sinclair did not check with anyone else. Sinclair would be contacted if Doucet was sick. Sinclair advised Doucet of the site Doucet was to attend and when to change from one site to another.

45. Doucet testified that in early 2013, he was working for Acadian in Truro, Nova Scotia at an Irving Retrofit project. In February of 2013, the Acadian employees stopped working on the Irving project, yet the job was not finished. Doucet and the other employees were told that they would not be returning to Truro the following week, as expected, but work would be found for them in Moncton. Over the weekend, Doucet contacted Sinclair, who sent him to work on the following Monday at a job site for Midland Transport in Moncton. There, he said, he was presented with paperwork by the Project Manager which he did not understand and refused to sign. When he subsequently spoke to Sinclair, he was told that there was no more work available. Sinclair offered Doucet a temporary layoff which Doucet accepted. Doucet contacted Sinclair about a week or two later because he noticed that his former colleagues were working. Sinclair said he would get back to Doucet with respect to further employment and, subsequently, sent Doucet a text asking Doucet to return his punch keys and harness and “going forward they would not need me in the future”.

46. In cross-examination, Doucet was asked if Sinclair was ever involved in the hiring process. Doucet recalled an instance when he encountered Sinclair at the Champlain Mall when Sinclair said he was waiting to do an interview with a prospective carpenter or labourer.

47. Doucet received a business card from Sinclair identifying Sinclair, in Sinclair’s handwriting, as the “Site Operations Manager”.

48. Doucet said that Sinclair did his annual performance review. When the issue was pursued in cross-examination, he said he could remember a private conversation about his performance in the company truck with either Sinclair or Sinclair's predecessor, Doucette.

49. In cross-examination, attention was directed to the terminology "Foreman", "Working Foreman", and "Site Superintendent". Doucet said there was a progression from working foreman to site superintendent. Doucet testified that the term "working foreman" was never used on the job site in reference to Sinclair. Doucet said he did not see a difference between Foreman and a Site Superintendent. Sinclair was the Site Superintendent or Foreman until he took on additional responsibilities and then Sinclair "was to do everything".

50. Finally, Doucet mentioned an occasion when Sinclair came to the job site, had a conversation with Boulay's brother, Guillaume, and following that conversation Guillaume Boulay left the workplace never to return to Acadian.

The Petitioner in Reply

51. By way of reply to the evidence led by the Union, Sinclair denied that he had authority to grant requests for vacation leave or even a day here and there. He said: "I would have checked with the Project Manager". Sinclair also denied he conducted interviews for prospective employees. He said he had no recollection of meeting Doucet at the Champlain Mall and saying he was waiting to interview a potential worker. Sinclair

said he might have met with someone to collect a resume.

52. As to Guillaume Boulay, Sinclair met with him to request the return of his job clock. He said he did not terminate Guillaume Boulay's employment. He went on to say he did not think he told Guillaume Boulay to turn in his keys nor did he think he told him to leave the work site.

53. And finally, Sinclair said he had no recollection of offering Doucet the option of a layoff. He said he was just delivering the message that the Project Manager had indicated to him that there was no further work for Doucet in the Moncton area.

The Employer's Evidence

Andrée Savoie

54. Savoie is the Managing Partner and Director of Sites and Human Resources for Acadian. The human resource responsibility requires daily oversight of employee benefits, recruitment and discipline. The Safety Coordinator, the Site Supervisors and the Working Foremen report directly to her (Exhibit 30). Acadian is engaged in commercial and light industrial construction with 45 to 50 employees, comprising engineers, engineering technicians, carpenters, labourers, working foremen, site supervisors and accounting/clerical staff. On average 10 to 12 projects of varying sizes are ongoing at any one time.

55. The Union was certified on April 18, 2001. The bargaining unit includes carpenters, carpenters' apprentices and working foremen. Initially relations between the Company and the Union were difficult, but on August 24, 2001, the parties entered into an agreement entitled "Minutes of Settlement" which, in part, provided that the Company could use non-union carpenters for Durafoam work, framing and for projects of less than a week's duration. Essentially, the Union was only interested in protecting drywallers, according to Savoie. Acadian employees were subsequently excluded from signing union cards and this exclusion extended to new hires. Since the Agreement, relations with the Union improved considerably. Any issues arising between the Union and the Company were resolved by agreement with the parties respecting the Minutes of Settlement. Between 2003 and 2013, Acadian paid dues for union members employed from time to time in the total amount of \$65,472.69.

56. In September of 2012, a grievance was filed by the Union, now headed by Andrew Dawson, alleging Acadian was employing non-union carpenters in contravention of the collective agreement between the Moncton Northeast Construction Association and the Union. The Company was taken aback as it had been acting in compliance with the 2001 agreement. In an effort to resolve the grievance, Savoie and Regan Steeves, the Director of Development and Estimating, met with Dawson on May 15, 2013. Dawson said he had never seen the 2001 settlement agreement and wanted compliance with the existing collective agreement with the Construction Association. Savoie agreed to have her carpenters, including working foremen, join the union on the understanding that the

grievance would be withdrawn and on July 9, 2013, Savoie sent an email to Romero with a list of eight carpenters. Sinclair's name appeared on the list as the sole working foreman.

57. Savoie told her employees that if they wanted to continue to work with Acadian, they would have to join the Union. She said there was no option involved.

58. Savoie and Romero met subsequently to discuss the administration of the new union members and at the time Romero said the company had to pay an initiation fee for each new member of \$475.00. This was resolved by lesser payment by the company to a charity supported by the Union. Romero also sought a pension contribution for the eight new union members from the company but this, apparently, was not pursued. Remittances by the company to the Union have been made faithfully since the effective date of July 8, 2013.

59. Savoie said she first learned of the decertification application on July 22, 2013 through a conference call while attending a construction association – union bargaining session. Dawson angrily “threw it out there”. On her return to the office, the formal documents from the Board were on her desk. Savoie testified that she was unaware of the Petition being circulated among the carpenters and, in fact, did not know what a Petition was.

60. Savoie said Sinclair joined Acadian as a Working Foreman in the spring of 2007. He has a certain expertise in doors and their hardware and that, together with his general

experience in the construction industry, would complement the Acadian construction team. Sinclair was expected to spend the majority of his time doing carpentry work and assisting apprentices, particularly with doors and the related hardware. He was to report to the Project Manager and Andrée Savoie depending upon the subject matter. Sinclair's supervising responsibilities were limited to assigning tasks, obtaining the required tools for the site and assisting the apprentices with their log books and experience. He had no authority to hire, fire, promote or discipline.

61. In the spring of 2012, Sinclair's duties changed as he became the "Site Operations Manager", Savoie said, in addition to his Working Foreman responsibilities. His job description, dated May 2012 (Exhibit 7), added three areas of responsibility; (i) assisting the Safety Coordinator to do on-site safety inspections; (ii) coordinating manpower for Acadian based on information received from the Project Managers and (iii) coordinating the larger tools and equipment of Acadian which were shared across various worksites. Savoie said Sinclair had no scheduling authority but he would gather the manpower needs from the Project Managers, figure out the allotment and communicate the consequent assignments; however, Savoie also said that the Project Managers had the actual decision-making authority as to who would go where and when.

62. In August of 2012, Sinclair developed a health problem which Savoie thought might be stress-related. He was off work for a week in August of 2012. Subsequently, personal issues arose and his health again suffered. Savoie began to consider relieving him

from the three additional responsibilities over those of a working foreman. On June 20, 2013, Savoie and Sinclair met to discuss his personal situation. Sinclair's letter to Savoie of July 21, 2013, reflects a request to do more hands-on work which he thought would be therapeutic. In June of 2013, Savoie drafted a job description for a Working Foreman (See Exhibit 11) removing the responsibilities for safety and a coordination of manpower, tools and equipment from Sinclair's shoulders. This material change was communicated to the workplace by an email dated July 9, 2013 which reads in part:

From: Andrée Savoie
Sent: July-09-13 6:14 p.m.

...

This message is to advise all of you that for the next foreseeable future, Peter Sinclair will be working on sites as a site super.

Acadian has a good problem, after a slow start this year, we now have too many projects starting and we are short site supers. Also, several of you are taking vacation time and we wish to honor our commitment to be able to let you all take these planned vacations days that are coming up. The addition of Mark Smith is a great help, thank you Mark! This week, we made an offer to a good candidate but we were not successful.

After careful thought, we have decided to transition Peter back to full time sites. Peter has accepted this to help out the team. We are extremely busy with smaller hands on jobs and need to pull through on our promises to our clients. Peter's background and experience will fill a big void on sites. This change means all of you will be affected in the sense that we will be without a dedicated Safety, Labor and Manpower Coordinator. We will need everyone to do a little bit more in order to make this possible. Peter's responsibilities will be distributed to several people until further notice.

Manpower coordination – David will be leading this (with the support of Rachelle), please direct any requests or needs to David, copy Rachelle to keep her in the loop.

Tools & Equipment – Rachelle will be keeping tabs on things, but we will need all of you to be more independent, you will need to gather what you need with your own resources, keep Rachelle copied on all exchanges (Rachelle, maybe

you wish to clarify the best way to keep everything in order via a separate email alter)

Safety – Rachelle will be leading inspections scheduling and performing as many as she can on her own. She will rely on Kimber & Tucker for this that she can't fulfill.

To make things a little more complicated, Rachelle is on vacation tomorrow until Friday, back on Monday. Peter is already assigned to a job that starts tomorrow. We will do our best to keep things rolling.

Thank you all in advance for your help and cooperation, we know we can do it, we have a strong team! Contact me if you need anything.

Andrée Savoie
Director and Managing Partner

63. Savoie testified that Sinclair was never considered a Non-Working Foreman. He had no authority to hire, fire or discipline. He simply communicated the manpower assignments determined by the Project Managers. Directing the work of other employees was not part of his job description. Savoie said he was never given the job title of "Site Operations Manager" but rather his title, for the approximate one year period was "Sites Operations Coordinator".

64. Counsel for the Union did not cross-examine Savoie.

Jason Bland

65. Bland joined Acadian as an apprentice carpenter. He has been with the company for 13 years and has been promoted through the ranks from a carpenter to Working Foreman to Site Superintendent in approximately 2009. His responsibilities as Site

Superintendent include planning the job, planning for and organizing the sub-trades, scheduling and forecast scheduling, *i.e.*, developing a job timeline, coordinating the manpower needed and overseeing safety. He said he was responsible for everyone – usually 5 to 10 individuals – on the site as he supervises the sub-trades, the carpenters, including the Working Foreman, and the labourers. Only 5% of his time is spent on the tools. Bland reports to the Project Manager.

66. Bland said he met with counsel for the company in advance of this hearing and reviewed the documents surrounding his activities on July 18, 2013. As a result, he was able to testify that he worked with the carpenter Paul Williams on July 18, 2013 at the Contini Warehouse project. Bland assisted Williams to do the remaining doweling and construction of forms for the concrete columns yet to be poured.

67. Bland, who considered himself management, said he worked with Sinclair who was not a Site Supervisor but a Working Foreman which he defined as a carpenter that runs the smaller jobs.

68. In cross-examination, Bland said he had a company vehicle, wore a white hat, served as the contact if a government inspector appeared on site and was a Supervisor for the purposes of *Occupational Health and Safety Act*. He earned \$82,000 a year. He places or fields 20 to 50 phone calls per day. He said that company policy discourages phone use on the job by the carpenters who are not given a company phone. He rates the carpenters working for him on an annual basis upon request from the office. His disciplinary

authority extends to issuing a written warning to his workers.

69. Bland said he was made aware of Sinclair's reduction of responsibilities because the emails usually sent by Sinclair were now being sent by David Savoie.

70. Bland testified that Sinclair told him the carpenters had applied for decertification and that they had signed union cards, although Sinclair did not say that the company had instructed the carpenters to do so.

Shawn Côté

71. Côté, a Civil Engineering Technologist, joined Acadian in 2007 as the Senior Project Superintendent. He said "Senior" is in the context of his responsibilities for the larger and more complex jobs. His job description (Exhibit 42) was received in January of 2012 following a reorganization with the assistance of a consultant.

72. Côté's description of his responsibilities match those offered for the Site Superintendent by Bland. Côté said, however, that he did not do any physical work with the tools. Côté would discipline up to a written warning but he had no part in the recruitment or termination of an employee. He considers himself low level management earning \$87,000 annually.

73. When Côté was alerted that he would be expected to testify at this hearing, he checked his records (copies of Exhibits 43, 44 and 45) together with photos he took to mark the progress of the job. Consequently, he was able to say on July 18, 2013, the date of this application, he was working on the Pepsi project. He observed Luc Gallant hanging joists in the electrical room and subsequently installing the plywood for the floor above the electrical room.

74. Côté knew Sinclair as a Working Foreman who was assigned additional duties which included (i) assisting Rachelle LeBlanc with the overall safety responsibilities and (ii) coordinating manpower and tools for the benefit of the Site Supervisors. He subsequently became aware that Sinclair moved to smaller projects to focus more on the actual job. For labour/manpower, Côté was told to see David Savoie or Rachelle LeBlanc.

75. Côté testified in cross-examination that Sinclair's additional duties did not come with an additional title; and, in fact, Côté had never heard of Sinclair being described as the Site Operations Manager. He said that he, Côté, might be on the phone 60 to 70 times a day on the larger projects; and while carpenters were not expected to use their phone on the job, a Working Foreman might have quite a few calls during the course of a day but not as many as 60 or 70.

76. Côté agreed that the timesheets would be used by a Working Foreman.

77. Côté was made aware of the decertification application because he was required to

post information about it from the Board on the job site. Gallant told him that the carpenters had signed union cards which Côté found “a little surprising as the guys were treated well...”.

78. Côté recalled one instance where the Company convened a meeting of Site Supervisors, which included Working Foremen and Sinclair, at which they were directed “not to go into overtime with the Union employees”.

Thomas Hicks

79. Hicks is a fourth year apprentice carpenter who has been with Acadian continuously since July of 2012. He reports to Andrée or David Savoie or the Site Superintendent on the larger jobs.

80. Hicks testified that a Working Foreman was a carpenter who may have more knowledge of the job and consequently will give guidance to the apprentices as he works alongside them. In contrast to Site Superintendents, the Working Foreman is not management. The Site Superintendent coordinates and plans the entire job. He has some “slight” authority over Hicks in that he knows what “I need to be doing and assigns my work”.

81. Having seen the timesheets which he signed for July 18, 2013 in advance of the hearing (See Exhibit 48), Hicks was able to say that he worked at Maillet Transport, Phase 2, in Bouctouche on July 18, 2013. His work on that day involved hanging door frames for

5½ hours and then he spent an 1½ hours with the labourer removing wall insulation.

82. Hicks said he was not happy about having to sign a union card but it was “pretty much sign or find another job”. He said he did not want to sign a union card, but he did not want to leave Acadian.

83. Hicks testified he spoke to Andrée Savoie last month about his appearance at this hearing and was told he was needed to say what he was doing on July 18, 2013. He was also told that there was an issue as to whether Sinclair was a Working Foreman. Hicks agreed in cross-examination that he was opposed to the union and supported efforts to get rid of the union.

84. Hicks worked with Sinclair on three occasions on smaller jobs – usually after-the-fact warranty work. He said Sinclair would work with the tools but occasionally picked up materials where needed. Hicks never heard about the “Sites Operations Coordinator” title. Hicks acknowledged Sinclair had a company truck, a company phone and wore a white hat. Sinclair made sure that Hicks’ job was done properly and that Sinclair “might have to watch safety issues”.

85. Hicks learned of the decertification application shortly after he signed with the Union on July 11, 2013. He said he met with Sinclair at a Tim Horton’s franchise where

Sinclair explained the decertification process, but Sinclair did not say that he (Sinclair) did not want the Union “directly”. Hicks said that when he worked on the three occasions with Sinclair, Sinclair was not on the phone but working alongside him.

Peter Sinclair

86. The Company chose to call Sinclair to return to the witness box as part of the Employer’s case. Sinclair said, when he was in the witness box testifying in support of the Petition which he presented, that he could not recall what he was doing on July 18, 2013. On the Friday preceding the continuation of this hearing on Thursday, May 15, 2014, Sinclair met with counsel for the Company who showed Sinclair the timesheets (Exhibits 49, 50, 51, 52, 53 and 54). Sinclair said these documents refreshed his memory such that he recalled working on three job sites on July 18, 2013. From 7 a.m. to 8:30 a.m. he worked with Tim MacIntosh, cutting and placing the backing for cabinets and TV screens at the Price Waterhouse project. From 8:30 am. to 9:30 a.m. he worked on the Mary Brown project trowelling concrete placed by other carpenters. From 9:30 a.m. to 10:30 a.m. he finished the weather stripping and cleaned up the door hardware on the 222 Edinburgh Street project, he then returned to the backing work at Price Waterhouse.

87. When asked if he supervised on July 18, 2013, Sinclair replied “not on that day”, yet the daily timesheet (Exhibit 49) shows, and Sinclair agreed, he entered his time (7.5 hrs) under the column for supervisory work on the Mary Brown job. Sinclair said he was instructed to do so by the Project Manager, Mary Lou Savoie. Sinclair testified in cross-

examination that he was not doing supervisory duties that day. He said he was on the tools, but agreed that he made 35 phone calls on July 18, 2013.

88. The Company wide email of July 9, 2013 indicates that “for the next foreseeable future” Sinclair “will be working on sites...”. However, Sinclair said the release of his additional 2012-2013 responsibilities was a gradual thing – “They didn’t just throw a switch”.

89. As to the execution of the Petition, Sinclair said he “told the guys what I found online” and that “they could willingly sign or not. The document says you don’t want to be in the Union. It is completely your choice”. They all wanted to sign.

Interim Ruling

90. Upon the completion of the Union’s case, counsel for the Employer asked counsel for the Union about the scope of the argument the Union counsel intended to pursue. Upon receiving a response, counsel for the Employer elected not to call any evidence. Union counsel then began his final argument, and as he outlined the structure of that argument, counsel for the Employer rose to complain that such a structure was beyond the scope of the argument earlier indicated by Union counsel. Counsel for the Employer sought to withdraw his decision not to call any evidence. Union counsel objected. Based on the premise that all relevant evidence should, in the final analysis, be before the Board, the Board ruled that the Employer’s counsel misunderstood the Union’s counsel intent in terms of his final argument and permitted the Employer to proceed to call whatever

relevant evidence he considered appropriate.

91. When the Employer's counsel called his third witness, the Union Counsel again objected arguing that the Employer's counsel was limited by the Board's earlier ruling to lead evidence only with respect to employees working on July 18, 2013. The Board indicated that the original ruling was made in a context of a misunderstanding between counsel and that the Board was treating the matter as if the original decision by the Company's counsel not to call evidence had not taken place. Consequently, there would be no limitation placed on the evidence that the Employer counsel might choose to call at this juncture.

92. Union counsel restated his objection and asked that it be noted in this decision.

POSITION OF THE PARTIES

The Union

93. The Union notes that an Application to Terminate Bargaining Rights under s. 23(2) of the *Act* requires the Board to determine the number of employees working in the trade on the date of the application, in this case July 18, 2013.

94. The Union seems to suggest that this evidence must be led by the petitioning employees. Here, that evidence did not come from that source, but rather was led by the Employer after the formally unrepresented petitioner Sinclair had closed his case. And this

evidence, over the Union's objections, came about as a result of a misunderstanding by the Employer as to the intended scope of the Union's argument. [Assuming the role of the intervenor extends to supporting and bolstering the position of the petitioners in this type of proceeding, then the evidence which is unquestionably relevant, should be before the Board.]

95. The Union's major argument lay in the circumstantial evidence of the Employer's conduct, which it said tainted the Application and, thereby, should cause it to fail. See *Re Beirsto*, [1994] N.B.I.R.D. No. 22, *Re Landry*, [2000] N.B.L.E.B.D. No. 60.

96. That circumstantial evidence consisted of a number of factors including the circulation of the Petition itself by Peter Sinclair who was, the Union said, while perhaps not part of management, seen by the employees as somebody within the confidence of management – *Re Landry, supra*, at paragraph 25. Sinclair, in the year preceding the application, in the company's words, was the "Sites Operations Coordinator". Sinclair described himself as a Site Operations Manager. In that capacity, he organized and dispatched the company's labour force in conjunction with the Project Managers. He managed the company's shared equipment and storage facility and he performed safety inspections along with the Safety Inspector, Rachelle LeBlanc. The Union says he was involved in the economic lives of the employees and cites the examples of Doucet who said that his sole employee/employer contact was with Sinclair and that it was Sinclair who

gave him the layoff option. It was also Sinclair who delivered the Notice of Termination to Guillaume Boulay.

97. Sinclair had a company email address, a presence on the company staff information sheet, a company truck, a gas card, a company cell phone, he wore a white hat, and he was the “go to” person on sites, as Project Managers were not on site on a regular basis. Sinclair reported to Andrée Savoie, the managing partner, as did the Project Managers and Site Superintendents.

98. The Union submitted that Sinclair’s daily responsibilities in terms of supervising his crew and managing the work site under his control matched those of Site Superintendent Côté who described himself as a low level manager. Sinclair recorded his time as a Supervisor and attended Site Supervisor meetings.

99. And while the three additional responsibilities taken on in the spring of 2012 were removed in the spring of 2013, for which official notice was given on July 9, 2013, the changeover occurred over a period of time such that the phone records for July 2013 reflect a number of phone calls consistent with his multiple responsibilities during the 2012/2013 year and, furthermore, Sinclair’s timesheets indicated he was doing supervisory work through the week ending July 13, 2013 (Exhibit 60).

100. The Union points out that Sinclair admitted he knew nothing of the decertification process yet within seven days, July 11 to 18, 2013, he (i) signed a union card (July 11,

2013) although he had been previously unaware that the Company was unionized, (ii) communicated with and obtained signatures on the Petition (July 15, 2013), and (iii) filed a pristine Application to Terminate Bargaining Rights with the Board on July 18, 2013. The Union asks the Board to draw an inference that without some planning ahead of time, this could not have been accomplished without management collusion.

101. It is this circumstantial evidence that allows the Board to draw the inference that this Application was tainted by the conduct of the Employer, conduct reinforced with vigor throughout the course of this hearing by counsel for the Employer who, practically speaking, presented not only the position of the Employer but the case for the Petitioner as well.

102. To the Complaint, the Union says the same circumstantial evidence demonstrates the Employer's anti-union animus and constitutes interference with the Union's right to represent its membership contrary to ss. 3(1) and 3(3) of the *Act*.

The Company

1. Management interference?

103. Counsel for Acadian submitted that as the Intervenor in a decertification application instituted by a member of the bargaining unit, the company is entitled to support and reinforce the Application, and it may defend the Complaint in which it is a named party.

104. The company argues that the threshold issue of the number of employees in the bargaining unit has been settled by the Board's Order of October 1, 2013. There the Board, in ordering a pre-representation vote and the sealing of ballots, determined "that there was no question that the application for the termination of bargaining rights is, on its face, supported by not less than 40% of the employees in the bargaining unit". Consequently, the remedy sought is the counting of the votes which the Employer urges the Board to do. [This preliminary "on its face" finding by the Board does not preclude the board hearing the matter from considering evidence going to the level of support enjoyed by the applicant seeking to decertify.]

105. The Company submits that the real issue before the Board is whether Sinclair is part of management or perceived by the employees as part of management. In this context, the Company, while acknowledging that some formal factors may suggest that Sinclair is management, the true test is what is happening in the day to day goings on in the workplace. The Union's evidence on this issue, the Company suggests, was limited to two witnesses – Boulay and Doucet, neither of whom were working for the company on the date of Application. In fact, Boulay left under a cloud of suspicion of theft in 2012. Doucet was laid off in February of 2013.

106. The majority of the evidence demonstrated that Sinclair was an hourly employee who was paid or banked overtime. In his capacity as a Working Foreman or Sites

Operations Coordinator, he had no authority to hire, fire, promote or discharge employees – the acid test of management responsibility. He worked on the tools 30/35% of the time and only supervised the younger carpenters in terms of their production work. See *Re Acadian Construction (1991) Ltd.* [2001] N.B.L.E.B.D. No. 30. There, the working foremen whose job duties included organizing of the site, including the sub-trades, organizing crews, material delivery, related paperwork and working on the tools as required, were to be included in the bargaining unit because they do not “perform managerial functions as those are understood under the *Act*”. See the *Thunder Bay (City) v. CUPE, Local 187*, [1991] O.L.R.B. Rep. August 1121; *Ontario Utility Foreman’s Association v. Borough of Etobicoke (Hydro Electric Commission)*, [1981] O.L.R.B. Rep. January 38; *Re Highland Valley Copper*, [1998] B.C.L.R.B.R.D. No. 289; *Re Saskatchewan Liquor and Gaming Authority*, [1997] S.L.R.B.D. No. 68; *Re United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 213 and ServFirst Corp.*, [2010] N.B.L.E.B.D. No. 27 *Re United Brotherhood of Carpenters and Joiners of America, Local 1386 and Milestone Construction and Development Corporation*, [2007] N.B.L.E.B.D. No. 27; *International Union of Painters and Allied Trades v. Blastco Corp.*, 2002 CanLII 28111 (ONLRB)

107. The Company argues that if Sinclair is compared to Côté and Bland as Site Supervisors, one finds that they are paid an annual salary of about \$20,000 in excess of that earned by Sinclair and rarely (5%), if ever, work on the tools. Site Supervisors have all the responsibilities of a Working Foremen and, in addition, address quality control

matters, monitor the progress of the job, supervise Working Foremen, and do performance reviews.

108. Acadian says Hicks' evidence (who worked with Sinclair on two occasions in July of 2013) accurately reflects Sinclair's job and the fact that he was viewed as a Working Foreman. This is furthered by the fact that Sinclair joined the Union July 11, 2013 and remains a member in good standing of the Union, from whom union dues are deducted regularly. Based on these factors, the Company says Sinclair cannot be seen to be management and thus the petition cannot be found to have been influenced by management.

Voluntariness

109. The Company argues that the evidence demonstrates that the signing of the Petition was voluntary. It points to the undisputed fact that both the Company and Union told the carpenters, including Sinclair, that they had no option but to sign union cards and become members of the Union. It was this compulsion coupled with an uneasy, trapped feeling and a sense that union work for carpenters in the Moncton area was scarce, that caused the carpenters to look for another option beyond joining the Union. Hence the recourse to the Internet initiated by Sinclair, the subsequent signing of the Petition on July 15, 2013 and the filing of this Application to Terminate Bargaining Rights on July 18, 2013. The Company says there was no evidence whatsoever before this Board of a "reasonable possibility" of employer involvement which would taint the voluntariness of the origin,

circulation, delivery and execution of the Petition. See *Fortis Properties Corp. v. United Steelworkers of America, Local 1-306*; [2007] N.B.J. No. 68 (NBCA); *Brown v. the UFCW, Local 1228P*, [1986] N.B.I.R.D. No. 4, *Re APEX Services Inc.*, [2003] N.B.L.E.B.D. No. 22; *Re Gaddess Industrial*, [2013] N.B.L.E.B.D. No. 12; *Re MPM Construction Inc.*, [2009] N.B.L.E.B.D. No. 5; *Re Grandview Civil Contractors Ltd.*, [1999] N.B.L.E.B.D. No. 80; *Re Centro Mechanical Inc.*, [1996] O.L.R.B.D. No. 3178.

110. The Company submits that the remedy requested is the counting of the representation vote, which is consistent with the notion of industrial democracy as it was articulated by the Board in *Re Fundy Masonry Ltd.*, 1997 N.B.L.E.B.D. No. 1.

111. As to the Complaint, the Company argues again that there is no evidence to support any of the allegations of misconduct set out in paragraph 15 of the Complaint.

112. I am troubled by the aggressive position taken by counsel on behalf of the Employer throughout this matter. As counsel for the Union pointed out, counsel for the Employer essentially conducted the case for the termination of bargaining rights such that the petitioner did not need a lawyer. And to be fair, Mr. Eddy, on behalf of the Employer made no bones about it. In particular, the Employer called the evidence to establish that the employees who signed the petition were at work in the carpentry trade on the date of

the Application after the Petitioner had closed his case.

113. In this respect, I am mindful of the comments of the New Brunswick Court of Appeal in *Fortis Properties Corp. v. USWA* (2007), 312 N.B.R. (2d) 227 at para. 23:

Most of the issues raised by the respondents, as outlined earlier in these reasons, are premised on a fundamental misunderstanding with respect to the purpose of voluntariness hearings. The best way to explain that purpose is to explain what the hearings are not about. They are not proceedings to determine whether on a balance of probabilities the employer was involved in the subsequent withdrawal of union support. ***They are not hearings which pit the union against the employer.*** This explains why those employers who elect to participate in a voluntariness hearing are designated as “interveners” before the Board. Moreover, the winner is not the one who is best able to cobble together sufficient evidence to establish employer misconduct. Rather, they are proceedings in which the Board has to decide whether the subsequent withdrawal of union support is “tainted” by employer/management involvement. Obviously, this is a much lower threshold than the civil standard of proof and, without putting words into the Board’s mouth, one that seems to mirror the threshold of “reasonable possibility” that is so often applied in other contexts. ***As well, the Board insists that the onus of proof is on the employees to establish that they have voluntarily withdrawn support for the union or the certification application (the individual respondents in this case).*** The oft quoted decision of the Board in *Trispect Technical Services Ltd., Re*, [1995] N.B.L.E.B.D. No. 23, quoting from the Board’s decision in *Metropolitan Stores (MTS) Ltd. v. R.W.D.S.U., Local 1065* (1979), N.B.L.L.C. 189, forms part of the analytical framework:

“This Board has always taken the position with respect to Statement of Desire or petitions filed by employees that they must be proved to have been freely and voluntarily originated, circulated, executed and delivered isolated from management influence or interference so that there is no question of the bona fides of the intentions of the employees and their true desires. This has been a policy respecting the onus of proof required by this Board over many years.”

[Emphasis added]

This is an observation that I make as a result of this case and does not bear upon the

ultimate disposition of the matter.

ANALYSIS AND DECISION

The Chronology

- 18 April 2001 - The Union was certified by the Board to represent “All employees of Acadian Construction (1991) Ltd., Dieppe, New Brunswick, engaged in carpenters work in the Province of New Brunswick save non-working foremen, those above the rank of non-working foremen and those excluded by the *Industrial Relations Act*”.
- 24 August 2001 - The Union and the Company sign Minutes of Settlement (Exhibit 29) essentially permitting the Company to use non-union workers except for drywallers. The collective agreement with the Moncton Northeast Construction Association provides:

ARTICLE 4 HIRING

4.1 The Employer agrees to hire and continue to employ only members of the Union in good standing with Local Union 1386.

The Employer agrees to communicate the names of carpenters, apprentices, foremen and/or tradesmen employed to the Local Union by fax (1-506-452-1060)

- 26 September 2012 The Union files a grievance alleging “Non-union members employed on union construction site”.
- 15 May 2013 Representatives of the Company, Andrée Savoie and Regan Steeves, meet with Andrew Dawson, the Union Representative, to discuss resolution of the grievance. The Company agrees to have its carpenters, including the working foremen, join the Union.
- 9 July 2013 6:14 pm Andrée Savoie emails the Company management team that Sinclair will work “for the next foreseeable future” as a “site super”. [Ex. 13, p.1]
- 9:21 pm Andrée Savoie emails union rep Romero setting out names of eight

- carpenters or apprentices who will meet with the Union. Peter Sinclair is identified as “Journeyman and working foreman”. [Ex 23, p.4]
- 11 July 2013 Union rep Romero meets with seven carpenters/apprentices who signed union cards.
- 15 July 2013 Eight Acadian employees sign a Petition indicating their opposition to the union. Sinclair’s cell phone records reflect calls to those signing the Petition beginning on July 12, 2013.
- 18 July 2013 Sinclair files the Application to Terminate Bargaining Rights with the Labour Board.
- 13 August 2013 The Union files a complaint alleging violations of ss. 3(1) and 3(3) of the *Act* with the Labour Board.
- Para. 5 (H) of the Complaint reads: “Local 1386 asserts that Acadian Construction agreed to comply with the collective agreements as a ruse to make its employees eligible to make an application for decertification and that it put forward Peter Sinclair as a Working Foreman so that Sinclair could organize the decertification application. Sinclair acted on behalf of Acadian Construction in portraying himself to the union as a Working Foreman so that he could obtain membership in Local 1386 and file the decertification application”.

114. Where an employee files an Application for a Declaration Terminating Bargaining Rights supported by a Petition pursuant to ss. 23(2) and 42(1) of the *Act*, the employee/petitioner faces an onus to satisfy the Board that the petition is free from employer influence. As the Board observed in *Re Fortis (supra)* at paragraph 36: “The slightest hint of employer involvement in the origination, circulation and execution of the employees’ petitions filed in support of application seeking termination of bargaining rights is fatal to their validity”. And further in *Fortis*, the New Brunswick Court of Appeal said that the “slightest taint” test “seems to mirror the ‘reasonable possibility’ test which is

a much lower threshold than the civil standard of proof’.

115. Peter Sinclair testified that he learned of the opportunity to bring a decertification application from an Internet search by his sister-in-law Paula Frost. Frost is an IT Manager with Maritime Textile. Sinclair said he went to her because she was “computer savvy”. Frost, who did not testify, provided Sinclair with the appropriate forms – the blank Petition and the completed Application for Termination of Bargaining Rights. Sinclair said “I know there was a lawyer involved whose name I don’t know”; that individual was not identified at this hearing.

116. It is important to appreciate that the printing out of the Petition document to be signed by the employees opposing the union is achieved essentially by the click of a mouse. The Application form, on very much the other hand, is a more sophisticated legal document requiring information including the name and address of the union, the name and addresses of the employers’ organizations, a description of the bargaining unit, the relevant sections of the *Industrial Relations Act* applicable to a decertification application in the construction industry, and the dates of expiration of the current collective agreement(s). Sinclair conceded that he did not know anything about the *Industrial Relations Act*, nor the collective agreements. This, of course, begs the question: who did? Frost did not testify. The assisting lawyer did not testify. Certainly the Employer had the pertinent material and, as a member of the Employer’s bargaining team in the concurrent collective agreement negotiation, it would be at the forefront of Andrée Savoie’s mind.

Consequently, the Board has before it an Application signed by Sinclair based on information he did not have, prepared by his sister-in-law with the assistance of a lawyer whose identification the Petitioner says he does not know.

117. The application to decertify a union, which in this case has been in place since 2001, is serious. The steps taken to terminate the rights of the union to represent the employees of such a company should therefore be clear and transparent and not shrouded in mystery as is the case here. This raises the question of the breath of the Board's examination into voluntariness. Is the Board limited to an examination of the circumstances surrounding the origination, circulation, execution and delivery of the petition document alone as counsel for the intervenor argues; or is the Board, in determining the true wishes of the members of the bargaining unit, free to examine all of the circumstances surrounding the application to terminate bargaining rights which includes the origin not only of the petition but of the application document as well, as the Union submits?

118. The resolution of this question is not essential to the disposition of this matter. However, the Board notes that the *Act* permits any employee in the bargaining unit to *apply* for decertification. The process is initiated by filing an application document in the prescribed form (50-1796) which must be supported by a Statement of Desire or Petition indicating that not less than 40% of the employees in the bargaining unit oppose the union. The two documents, the Application and the Petition, are integral to the decertification

process.

119. Furthermore, the Board takes a "cautious approach to decertification applications"

"This is in keeping with the overall thrust of Canadian Labour Legislation, which has been shaped to further the institution of free collective bargaining within the context of a free market economy, good industrial relations having been declared by parliament 'to be in the best interest of Canada ensuring a just share of the fruits of progress to all'. See *Saint John Ship Building, a division of Irving Ship Building Inc. and United Brotherhood of Carpenters and Joiners of America, Local 1840*, [2003] N.B.L.E.B.D. No. 42 at para. 27.

I, at least, am of the view that limiting the Board's investigation into the voluntariness to the petition document in isolation runs contrary to the spirit of the legislation and its surrounding jurisprudence.

120. The Employer argues that Sinclair was a Working Foreman, who for a period of time (Spring 2012 - Spring of 2013) took on three additional responsibilities – the coordination of labour, the monitoring of equipment and storage facilities and safety responsibilities. He obtained the title "Sites Operations Coordinator, Working Foreman". He was formally relieved of these added duties on July 9, 2013 when he returned to his responsibilities, Sinclair says, as a Working Foreman. What Sinclair did as an Acadian employee is critical to the disposition of this matter. In considering the voluntariness of the Petition, the Board is concerned "about involvement not only by a person who is managerial, but also by a person who is regarded by employees as managerial or in the confidence of management". See *Re Landry, supra*, at para. 25.

121. The evidence indicates that Sinclair works on the tools from time to time and, in fact, filled in, on the Irving Retrofit job in Truro, Nova Scotia, for an absent carpenter for a brief period of time. But the preponderance of the evidence also indicates Sinclair's responsibilities were much broader - particularly in the year immediately preceding this application - with trappings consistent with those of Site Supervisor set out in the Union's argument, see paragraphs 96 through 99. Sinclair designated his working hours as a "Supervisor" on Company worksheets most of the time. With his added responsibilities, he coordinated the Company's entire labour force scheduling employees in conjunction with Project Managers. He was responsible for looking after and coordinating the Company's equipment and storage facilities, and he worked closely with the Safety Coordinator and conducted safety inspections when necessary. These responsibilities had not come to an end before this Application other than the formal advice to that effect on July 9, 2013. For example, the date this Application was made, Sinclair made 55 cell phone calls. The number of calls from July 2 through July 18, 2013 is roughly consistent, and significantly similar in number to those Côté, an acknowledged Site Supervisor, said he would make.

122. Sinclair described himself on his Facebook page as "Operations Coordinator at Acadian Construction". On LinkedIn under the heading "experience", this listing appears "Site Operations Coordinator, Acadian Construction, March 2012 – present (1 yr 9 mos)"; "Site Supervisor, Acadian Construction, June 2011 – Mar 2012 (10 mos)". There is no mention of "Working Foreman". Even more telling and consistent with Sinclair's self-

description is an email of July 9, 2013 from Managing Partner and Director of Sites and Human Resources, Andrée Savoie, to senior personnel at Acadian. She writes in the first sentence: “This message is to advise all of you that for the next foreseeable future, Peter Sinclair will be working on sites as a *Site Super*” [Emphasis added]. In this respect both Côté and Bland, acknowledged Site Supervisors, said they consider themselves part of management and it was their evidence that they could discipline employees up to a written warning. If Savoie is taken at her word, then all the responsibilities listed in the job description of Site Supervisor (Ex. 42) would apply to Sinclair.

123. On this point, it is noteworthy that when Sinclair was relieved of his additional responsibilities, those responsibilities were assumed by senior personnel: the labour organization component was assumed by David Savoie, the Director of Project Managers; the safety, storage and equipment responsibilities were assumed by Rachelle LeBlanc – the Safety Coordinator. It would then seem a reasonable inference that the devolved duties were significant in terms of the Company’s operations.

124. Finally, there is the email of Andrée Savoie of July 9, 2013 at 6:14 p.m. under the subject heading “A change in our site team”. (Full text at para: 62). In that email to Acadian personnel, the first sentence indicates that Sinclair will work in the future as “Site Super”. On the same day, Savoie emails Romero, the Union Organizer, at 9:38 in the evening with the list of Acadian employees who are to sign with the union. The full text of the email reads:

From: Andree Savoie AndreeSavoie@acadianconstruction.com
Date: Tue, 9 Jul 2013 21:38:07+0000
To: Debbie Romero (dromero@acrc.ca) <dromero@acrc.ca>
Subject: Thursday

Hi Debbie,

Further to our conversation today I checked out our work assignments and everyone is quite spread out. I was wondering if we can try to get the guys signed up in a different way. To start, we have 7 guys and 1 girl that we believe qualify for membership. They are either ticketed tradesman or apprentices going through the apprenticeship program.

The guys (and girl) are:

1. Paul William – journeyman
2. Luc Gallant – journeyman
3. Terri Mallet – journeywoman (not sure if it's a word, but I am proud to say that Terri is a woman)
4. Tim MacIntosh – journeyman
5. Peter Sinclair – journeyman and working foreman
6. Thomas Hicks – apprentice, block 2 completed
7. Steve Lajoie – apprentice, block 1 completed
8. Jolin Thibodeau – apprentice, just completed CCNB, working towards block 1

We have a good problem in the sense that we are all of a sudden very busy, and I hesitate to get all of them travelling to a meeting. Could I propose the following? Could you send my Payroll Leader Stéphanie Quesnel whatever forms or paperwork you need completed and she can handle that for you? Based on the names above you may have some of this already since they may already be a member, just let Stéphanie know what you need from each one of them. Then on Thursday, if you are agreeable, I can arrange for you to meet with the crews at the various job sites.

Please let me know if this works for you as it would really help us with some of the timelines we are working towards.

Thank you,

Andrée Savoie
Director and Managing Partner
Directrice et partenaire gestionnaire

In the email to the Union, Savoie described Peter Sinclair as “journeyman and working foreman”. In terms of Sinclair’s function, these two emails, sent approximately 3½ hours

apart, are obviously inconsistent when viewed in the context of this Application. This inconsistency is duplicitous and contributes to the inference of employer involvement in the decertification process. It also impacts negatively not only on the credibility of Savoie, but on Sinclair, Bland and Côté who were listed recipients of the 6.14 p.m. email and yet maintained at this hearing that Sinclair was a working foreman. Furthermore, the company's attempt to disguise Sinclair's role is reflected in the Schedule A filed by the Company in this proceeding in which Sinclair's "Occupational Classification" is listed simply as "Journeyman Carpenter".

125. Consequently, evidence of the manner in which Sinclair portrayed himself to the employees of Acadian and to the general public, his presence in the workplace with his multiple responsibilities, particularly in the year immediately preceding this Application, and the designation by the company of Sinclair as a "Site Super" on July 9, 2012 – three days before Sinclair began seeking support for his Decertification Application - indicates that while Sinclair was not a management employee, he would have been perceived as being within the confidence of management by the Acadian employees. (*Re Landry, supra*). As a result, the Board is not satisfied that the Petitioner met the onus upon him to demonstrate that the Petition is free from the reasonable possibility employer involvement. The Application for a Declaration for the termination of bargaining rights is dismissed.

126. As to the Complaint brought by the Union against the Employer, the evidence of the Employer's conduct discussed in the foregoing, and particularly in paras. 56, 57 and

124, satisfied the Board that the Employer interfered with the Union's representation of the employees contrary to s. 3(1) of the *Act*. Andrée Savoie's conduct in representing to the Acadian workforce that Sinclair will work as a "Site Super" and representing to the Union on the same day that he was a "journeyman and working foreman" justifies an inference of anti-union animus sufficient, when taken with Savoie's involvement throughout, to warrant a violation of s. 3(3) of the *Act*. See *W. J. Beairsto Co. Ltd.*, *supra* at para. 43. As a remedy, the Board directs the Employer, and any person acting on its behalf, to cease and desist from such conduct.

Dated at Fredericton, New Brunswick, this 17th day of July 2014

G.L. BLADON
ALTERNATE CHAIRPERSON
LABOUR AND EMPLOYMENT BOARD