PROVINCE OF NEW BRUNSWICK

New Nouveau Brunswick

Labour and Employment Board

IR-036-03

IN THE MATTER OF THE INDUSTRIAL RELATIONS ACT

AND IN THE MATTER OF AN APPLICATION FOR CERTIFICATION

BETWEEN:

Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 406

Applicant,

- and -

Les Aliments Bonté Foods Limited
Dieppe, New Brunswick

Respondent,

- and -

Douglas Biggar, *et al*

Group of Opposing Employees.

ORDER

WHEREAS Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 406 does, by application filed on April 11, 2003, seek certification as bargaining agent for a unit of employees of Les Aliments Bonté Foods Limited, Dieppe, New Brunswick, pursuant to the provisions of the *Industrial Relations Act*;

AND WHEREAS, a hearing was held at the offices of the Board on July 2, 2003 wherein all affected were given an opportunity to make full representations before the Board;

AND WHEREAS, pursuant to the said application and the representations of the parties, the Board does determine:

a) That the Applicant, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 406, is a trade union for the purpose of section 1(1) of the Act;

b) That the unit hereinafter described as agreed to by the parties and sanctioned by the Board, is appropriate for collective bargaining; and

c) That the Statement of Desire is not a voluntary expression of the wishes of the employees signatory to it, and is dismissed;

d) That the majority of employees in the unit were members in good standing or did select the trade union to be bargaining agent as of May 1, 2003, the time determined by the Board pursuant to paragraph 126(2)(e) of the Act as the time in which such membership or support is to be determined on an application for certification pursuant to section 14(1) of the Act;

NOW, THEREFORE, the Labour and Employment Board does hereby CERTIFY Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 406 to be the bargaining agent for the following unit of employees:

> **"All full-time and regular part-time employees of Bonté Foods Limited, 11 Industrial Street, Dieppe, New Brunswick, E1A 2B9, save and except supervisors, clerical employees, casual employees and those persons excluded by the *Industrial Relations Act*."**

The Board's Reasons for Decision are attached.

Issued at Fredericton, New Brunswick, this 22nd day of July 2003.

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GEORGE P. L. FILLITER
CHAIRPERSON
LABOUR AND EMPLOYMENT BOARD

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Applicant,

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Les Aliments Bonté Foods Limited
Dieppe, New Brunswick

Respondent,

- and -

Douglas Biggar, *et al*

Group of Opposing Employees.

BEFORE: George P. L. Filliter
Chairperson

APPEARANCES:

For the Applicant: *Barbara J. Cooper*
For the Respondent: *G. Robert Basque, Q.C.*
For a group of opposing employees: *George R. Richmond, Q.C.*

DATE OF HEARING: July 2, 2003

DATE OF DECISION: July 22, 2003

REASONS FOR DECISION

1. This matter is an Application for Certification by the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 406 (hereinafter referred to as the "Applicant") with respect to a bargaining unit of employees of Les Aliments Bonté Foods Limited (hereinafter referred to as the "Respondent"). The Application was filed on April 11, 2003 and the hearing was convened on July 2, 2003.

2. At the commencement of the hearing, the parties advised they had reached agreement on the description of the bargaining unit. The Board determines it is a unit appropriate for collective bargaining and makes the necessary amendment to conform to its usual language as follows:

> "All full-time and regular part-time employees of Bonté Foods Limited, 11 Industrial Street, Dieppe, New Brunswick, E1A 2B9, save and except supervisors, clerical employees, casual employees and those persons excluded by the *Industrial Relations Act*."

3. The documentary evidence filed with the Board indicated that there were 55 employees named by the employer on the Schedules, of which two employees were to be deleted as a result of the 30/30 rule traditionally accepted by this Board. One of the issues before the Board was a challenge raised in correspondence from the solicitor for

the Applicant dated April 30, 2003 with respect to six of the remaining 53 employees on the Schedules. The Applicant filed membership evidence with respect to employees within the bargaining unit that indicated support in excess of 50%.

4. A Statement of Desire in opposition to the within Application, oftentimes referred to as a petition, was filed with the Board prior to the terminal date, which statement included 28 signatures of employees within the bargaining unit. In its decision in *Re Brunswick Chrysler Ltd.*, [1999] N.B.L.E.B.D. No. 41, the Board outlined circumstances in which it will inquire into the voluntariness of a Statement of Desire in opposition to an Application for Certification. Vice-Chair Kuttner stated as follows:

> "In short, on an Application for Certification, the Board inquires into the voluntariness of a petition only if its effect would be to reduce the integrity of membership evidence submitted from greater than 50 percent to less than 50 percent of the employees in the bargaining unit for whom bargaining rights are sought. Otherwise the voluntariness of the petition is presumed and becomes a factor in the exercise of the Board's discretion and powers under sections 14 and 40 of the Act."

In the circumstances herein, there is an overlap between the membership evidence submitted in support of the Application for Certification and that filed by the employees in opposition, the effect of which would be to reduce the integrity of the membership evidence submitted from greater than 50 percent to less than 50 percent of the employees in the bargaining unit. Therefore the Board must inquire into the voluntariness of the Statement of Desire.

5. The Respondent operates a food manufacturing facility in Dieppe, New Brunswick and is a member of a conglomerate of food manufacturing, producing and marketing companies. The plant in question manufactures a large number of varied food products including pizza sauces, donair/gyro beef products, soups, pizza shells, cookie dough, pita bread, bagels and so forth. These products are sold across Canada and into the United States of America and as such the plant is subject to two regulatory regimes. In order to ship across boundaries within Canada, they are a federally inspected plant subject to the strict regulatory regime of the Canadian Food Inspection Agency. Additionally, because the company markets within the United States of America, they have subjected themselves to an internal regime known as H.A.C.C.P. which stands for Hazardous Analysis Critical Control Points. These two regulatory regimes resulted in the development of specialized and advanced quality assurance processes that caused the company to employ three individuals who oversee the schemes which positions are referred to by the employer as either Quality Assurance/Research & Development Support (QA/R&D Support) or Hazardous Analysis Critical Control Points Support (HACCP Support) (hereinafter collectively referred to as "Quality Assurance officers").

6. Mr. Douglas Biggar, the representative of a group of employees opposed to the application (hereinafter referred to as the "petitioner"), is employed as a Quality Assurance officer by the Respondent. Mr. Biggar gave evidence before this Board that prior to being made aware that an Application for Certification had been filed, he received written communication from his employer indicating that "active discussion"

concerning a union representing its staff may be taking place. This information came as a result of receiving what Mr. Biggar referred to as a "slip" from Claude Pothier, President of Bonté Foods, dated April 8, 2003 and marked as Exhibit #1 in this hearing. This document stated as follows:

> "It has come to management's attention that there is an active discussion about acquiring a union to represent the staff. All employees have the right to decide for themselves whether to form a union. In order to make the best decision, employees need as much accurate information as possible.
>
> We support the employees' rights to make informed decisions and offer the enclosed series of questions and answers. We obtained the information from the web site www.labourwatch.com. The union organizing the current membership drive may also have a web site with pertinent information.
>
> **Do not assume that a vote will take place at a later date. A union can be certified immediately if the union gets enough members at the initial membership card drive and a union application can be rejected if there are insufficient members.**
>
> All employees should get involved whether you are for a union or oppose it. If you do not become involved now, a decision could be made without you – a decision that could affect your future rights.

Attached to this slip was a document obtained from a website entitled www.labourwatch.com entitled "Frequently Asked Questions – New Brunswick" and marked as Exhibit #2. The Table of Contents included the following points:

> "Why is the union interested in me?
>
> What are my rights?

How do unions organize?

What should I consider when deciding whether to sign a union card or not?

What if the union solicits me at home?

What if I have signed a union card but don't support the union?

What does signing a union card mean?

How much will joining a union cost me?

Will I get a vote on whether there is a union or not?

What can I do to support or oppose a union?

What if I just don't care?

Can we "try the union out" for a few months?

What can the union guarantee?

What will happen, if the union is certified?

What is in a collective agreement?

What do union dues get used for?

What about strikes and lockouts?

What about union politics?

What will happen, if the union is decertified?

How do I decertify a union?"

7. Mr. Biggar testified that once he was aware of the fact that an Application for Certification had been filed, that being after the "green form" (the Board's Notice to Employees) had been posted at the worksite, he recalled the "slip" provided to him by his

employer and went on the internet and downloaded from the labourwatch website a document entitled, "Petition for Cancellation of Union Membership", which statement read as follows:

> "The petition will serve to notify you that we do not wish to be members of Local 406, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union or have the union represent us as relates to Bonté Foods Ltd. Those of us who have already signed a union membership card wish to cancel our membership."

Mr. Biggar testified that he inserted the underlined portions.

8. Mr. Biggar's evidence was that he circulated the above petition. The first three signatures on the petition were obtained at the workplace during working hours. Most of the other signatures were obtained in the parking lot of the employer. Mr. Biggar testified that he would approach employees while at the plant during their break and ask them, "If a petition were to be circulated would you be interested in signing it?", and if they were he would arrange to meet them in the parking lot on the next break.

9. There were initially three issues before the Board. The first issue was the description of the bargaining unit; however, after consultation the parties were able to come to an agreement on wording and it has been accepted by this Board. The two remaining issues are as follows:

(1) Is the Statement of Desire or Petition voluntary?

(2) Are the employees employed as Quality Assurance officers members of management, and by application of the *Industrial Relations Act*, excluded from the bargaining unit?

Issue #1 **Is the Statement of Desire or Petition voluntary?**

10. The Applicant takes the position that the Statement of Desire, as circulated by Mr. Biggar, was not voluntary and was not isolated from management influence or interference and, therefore, there was a question as to the *bona fide* intention of the employees who had signed the petition. The basis of the argument of the Applicant was firstly, that Mr. Biggar had obtained the information concerning the wording of the Statement of Desire from a website that had been provided to him by management and, therefore, there was employer interference or involvement in the origination of the Statement of Desire; secondly, Mr. Biggar's position as a Quality Assurance officer was so closely associated with management that there was the perception that the Statement of Desire was not voluntary; thirdly, that the Statement of Desire was circulated during working hours on company premises; and finally, the Applicant submits that there was no evidence provided to establish a credible reason for the change of heart of employees who signed the Statement of Desire.

11. Counsel for the petitioner on the other hand submitted that the evidence meets the stringent standard adopted by this Board and submitted there was absolutely no evidence of managerial influence or interference in the origination, circulation, execution or

delivery of the Statement of Desire. Counsel for the Respondent similarly argued that there was no evidence to indicate management influence or interference in the origination, circulation, execution or delivery of the Statement of Desire.

12. The fundamental issue with respect to the Statement of Desire is its voluntariness. The petitioner bears the onus to establish that the origin and circulation of the Statement of Desire is free from management participation. If successful, the expression of the wishes of those employees who signed the Statement of Desire will be considered by the Board in circumstances where there is an overlap (See *Re Quality Control Council and Trispec* (IR-013-95), and *Brunswick Chrysler Ltd., supra).*

13. The law in determining whether or not a petition is voluntary was originally articulated by this Board in the case of *Metropolitan Stores*, [1979] N.B.L.L.C. 189 where then Chairman Graser stated:

> "This Board has always taken the position with respect to Statements 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 intention of the employees and their true desires. This has been a policy respecting the onus of proof required by this Board over many years."

This articulation of the law has withstood the test of time, both before this Board and other provincial Labour Boards. In *Re Quality Control Council and Trispec, (supra)* the Board stated:

"27. That statement was made within the context of an application for termination of bargaining rights but the same care in establishing the *bona fides* of the intentions of employees and their true desires has always characterized the Board's consideration of statements of desire filed in support of an application for certification. The rationale behind this heightened concern of labour tribunals in such cases was long ago articulated by the Ontario Labour Relations Board in *Pigott Motors (1961) Ltd.* 63 CLLC para. 16,264 as follows:

> "The *Labour Relations Act* contains detailed provisions designed to protect the rights of employees to become members of, and to select or reject a particular or any trade union as their collective bargaining agent and to bargain collectively or individually with their employer. It is an important function and duty of this Board under the legislation to be circumspect and vigilant to see that these rights are preserved and not made illusory.
>
> There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of these facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interest and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason, and because the Board has discovered in a not inconsiderable number of cases, that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence in a form and of a nature which will provide some reasonable assurance that a document, such as a petition, signed by employees purporting to express opposition to the certification of a trade union truly and

> accurately reflects the voluntary wishes of the signatories. (See for instance, the *Sinnott News Case*, CCH Canadian Labour Law Reporter, 1955-59, Transfer Binder 16,114 at p. 12, 209, and the *Fleck Manufacturing Ltd.* case, CCH Canadian Labour Law Reporter, vol. 1, 16,236, at p. 13,201). In seeking this assurance, the Board draws no distinction between documents which purport to express a desire on the part of employees to resign from the union and those which purport merely to express opposition to the applicant as their collective bargaining agent. In other words, for this purpose, it does not seek to distinguish between the two matters of membership and representation."

And see as well *Baltimore Air Coil Inter American Corporation* [1982] OLRB Rep. 1387 (Oct.) at 1406 f. Indeed, the Ontario Board has gone so far as to hold even in the absence of evidence of management participation or involvement in a petition that a credible reason for the 'change of heart' which it expresses must be forthcoming to discharge the onus of proof that it is voluntarily grounded and expresses the true desires of the employees signatory. See *Cooper Corrugated Containers Ltd.* [1983] OLRB Reo, 1786 (Nov.). The jurisprudence of our own Board on the necessity of establishing employee volition where statements of desire have been filed is most recently reviewed in re *Dany Tardif* (IR-011-95, unreported decision issued 2 June 1995).

...

32. On the basis of the foregoing evidence, the Board finds that it must reject the statements of desire filed. To be established as indicative of the voluntary wishes of the employees, such statements must be isolated from management influence or interference from the moment of origination through to circulation, execution and delivery to the Board. There is no question but that in the case of both employees, 'the responsive nature of [their] relationship with [the] employer', their 'natural desire to want to appear to identify ... with the interest and wishes of [the] employer' made both 'obviously peculiarly vulnerable to influences' which operated 'to impair or destroy the free exercise of [their] rights under the Act' – see *Pigott Motors supra.* In the case of Scribner the Board sees such influence in the telephone discussion he had with Dodd in

> which Dodd made it clear that the Respondent company was intent on remaining non-union and that Scribner was, upon reading the notice to employees, to take the appropriate action – and none too subtle hint that he cooperate in frustrating the application for certification. The Board views Scribner's self-perception as a managerial employee – a perception not beforehand particularly evident given his continued union activities – to date from this exchange with Dodd. In the case of Mace, it is difficult to accept his statement that he had determined to oppose the application for certification prior to his discussion with Scribner as that is the occasion on which he received notice it had been made. It is equally clear that the formulation and drafting of his Statement of Desire was done together with Scribner who by this time identified himself to Mace as managerial and was perceived by Mace to be so. It is that perception strengthened by Scribner's own self-description as managerial which is fatal to the *bona fides* of the statement of desire filed by Mace, undermining its integrity as revealing his true desires. As the Board has noted in *Re W.J. Beairsto Co. Ltd.* (1995) 24 CLRBR (2d) 161, "The slightest hint of employer involvement in the origination, circulation and execution of employee petitions ... is fatal to their validity' [p. 181]. Here, improper employer involvement has been established. Accordingly, the Board rejects both statements of desire here filed. Neither, in its view, is free from the taint of managerial influence and interference."

14. The relevant section of the *Industrial Relations Act* is:

> "3(5) Nothing in this Act shall be deemed to deprive an employer or an employers' organization, or a person acting on behalf of an employer or employers' organization, of freedom to express his or its views so long as he or it does not exercise that freedom in a manner that is coercive, intimidating, threatening or intended to unduly influence any person."

15. It is important to review the facts in detail with respect to determining the voluntariness of the Statement of Desire. Mr. Pothier, the President of Bonté Foods, testified that his correspondence of April 8, 2003 was circulated by him approximately eight days prior to any actual knowledge of an Application for Certification being filed. Mr. Pothier explained that the purpose of this letter was to introduce his employees to various alternatives as it relates to whether or not to join a union. However, in addition to the letter, Mr. Pothier acknowledged that he attached a document downloaded from the labourwatch.com website.

16. Although the final determination as to the neutrality of the labourwatch.com website is still an issue to be determined by this Board, it is noted that there has been no jurisprudence within Canada that is determinative of this issue. Undoubtedly, in due course, this Board or some other Board within Canada will be faced with determining the neutrality of the site but only after appropriate evidence and argument are presented. The only case referred to by counsel for the Respondent in support of his general contention that the website is neutral is the case of *The Brick Warehouse Corp.*, [2002] B.C.L.R.B.D. No. 309 where Vice-Chair Pylypchuk stated:

> "While the information on the website is neutral *from the perspective of conveying information which is readily available in the Code, the Regulations and the Board Rules, or from the Labour Board's Information Officer* ***it is not pristine in its neutrality from the perspective that it is apparently limited to offering a countervailing view to what information an organizing union may be prepared to give employees."***

This is the only statement with respect to the neutrality of the website, and it is not conclusive in the view of this Board.

17. However, despite the fact that the neutrality of the labourwatch.com website has yet to be decided, this Board notes that within the document circulated to the employees by the employer and marked as Exhibit #2, there was a direct hyperlink to a blank petition, or Statement of Desire, within the portion of the document entitled "What if I have signed a union card but don't support the union?". It is from this hyperlink that Mr. Biggar testified that he obtained his petition, or Statement of Desire, which he filed on behalf of a number of employees who purported to object to the existence of the union. Having weighed the evidence, this Board concludes that the circulation of a document to employees that specifically provides direct reference to a petition, otherwise known as a Statement of Desire, is a violation of section 3(5) of the Act, in that it amounts to undue influence.

18. Furthermore, the Board was persuaded by the fact that Mr. Biggar circulated the petition during working hours on the work floor and it was there that he obtained the first three signatures on the petition.

19. Finally, the Board heard evidence of a disturbing nature from John Leeman who testified that on one day, the date of which he could not remember, when he attended work on the night shift as a cleaner he was approached by Mr. Biggar and asked to enter the Warehouse Manager's office at which time the Statement of Desire was presented to

him in the presence of the manager. This evidence was introduced despite the objections of counsel for the respondent and the petitioner, however, having considered the evidence of Mr. Biggar as compared to Mr. Leeman the Board accepts the evidence of Mr. Biggar as further collaborated by the Warehouse Manager himself, Roland Thibeau, who testified that at no time was he present in his office in the presence of Mr. Biggar and Mr. Leeman and in fact Mr. Thibeau was unaware of the fact that a petition was being circulated. When the Board weighs the evidence of Mr. Biggar and Mr. Thibeau against the evidence of Mr. Leeman it is prepared to accept the former version of the facts. However, it was conceded by all parties that Mr. Biggar did in fact request Mr. Leeman to enter the warehouse manager's office at which time the petition was presented to Mr. Leeman. This Board concludes that there was no reason for Mr. Biggar to be present in or be allowed to be present in the manager's office unless he had been provided permission to do so. The clear perception associated with Mr. Biggar's presentation of the petition to Mr. Leeman whilst in the manager's office would be that the petition was indeed supported by management. Therefore, this Board concludes that the Statement of Desire was not perceived as being voluntary and free from management influence or interference.

20. The Board was further referred to the case of *Grandview Civil Contractors Ltd., (IR-082-99)* in the submission by counsel for the Respondent and the petitioner who suggested that this case was supportive of the position that there was no management interference or influence in the origination, circulation and execution of the Statement of Desire in this case. The Board does not necessarily, with respect, accept entirely the

rationale of Vice-Chair Kuttner in the case of *Grandview Civil Contractors Ltd. (supra)*. In the case before the Board in this instance, the facts are significantly distinct. The fact that Mr. Biggar approached Mr. Leeman in the warehouse manager's office presents a situation significantly different than the fact situation found in *Grandview Civil Contractors Ltd.*

21. For reasons that will be noted later in this decision, the Board does not accept the submission made by the Applicant that Mr. Biggar was a management employee.

22. In conclusion, this Board finds that the Statement of Desire, or Petition, circulated by Mr. Biggar was not free from management involvement or interference and this Board orders that the Applicant be certified as the bargaining agent for the bargaining unit described.

Issue #2 **Are those employees employed as Quality Assurance officers members of management and by application of the *Industrial Relations Act* excluded from the bargaining unit?**

23. The next issue of some significance is whether or not three employees that hold the position of Quality Assurance officer were employed in a managerial capacity. Initially, the Applicant claimed that six employees should not be included in the Bargaining Unit, but the only evidence adduced was with respect to the Quality Assurance officers. The evidence in this regard included a memo to all staff dated

October 2, 1998, signed by Mr. Biggar and Mr. Irvine, a Safety Committee Representative. in which the concluding paragraph states:

> "Failing to follow these lockout procedures will lead to immediate dismissal as they are for your own safety."

In addition, evidence was led that the role of the QA officer was such that they could provide orders to employees. This submission was premised upon the evidence that in a mandatory employee meeting, Mr. Pothier, the President of the Company, made a statement to the effect that if Quality Assurance officers tell an employee to do something, their comments should be taken as an instruction from management. However, there was no evidence of any authority that would allow these employees to discipline, discharge, hire or fire, indeed the only concrete evidence was that they had no such power and were in reality an integral part of the production line.

24. The Board was referred to various cases and it was submitted that a review of these cases indicates that a managerial exclusion is to be narrowly interpreted. In the case of *National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) v. Canada Packers Inc.*, [1991] N.B.I.R.D. No. 13, Vice-Chair Couturier referred to the case of *Ontario Nurses Association v. Oakwood Park Lodge*, [1982] 82 C.L.L.C. 560 where the tribunal applied the effective test as follows at page 563:

> "Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is clearly incompatible with participation in trade union activities as an ordinary member of the bargaining unit.

> A perusal of the Board's jurisprudence in the health care sector, and elsewhere, reveals the special significance accorded to the authority to make decisions which impact adversely on an employee's wages, benefits or job security. It is that kind of decision-making which the Board has always regarded as the exercise of a 'managerial function' which justifies an exclusion from collective bargaining on the 'conflict of interest' rationale set out above. Indeed, in Ontario, the Board has extended the ambit of section 1(3)(b) beyond the actual or ultimate decision-maker, to those who make what the Board has called 'effective recommendations' which materially affect the conditions of employment of those supervised.
>
> In framing the test in this way, the Board has not ignored the real distinction between a person recommending or influencing a decision, and the one ultimately making it. Supplying information or 'input' is not the same as deciding, and a person who does only the former has a much weaker claim when it is suggested that he is exercising 'managerial functions'."

25. Furthermore, Vice-Chair Morneault, in the case of *Coop régionale de la Baie Ltée*, [2002] N.B.I.R.D. No. 61, referred to the case of *Service, Office and Retail Workers Union of Canada and Canadian Imperial Bank of Commerce (1978)* 25 di 355 at page 362 where the Canada Labour Board stated as follows:

> "Since the Canada Safeway Limited decision a threefold test has evolved to determine confidentiality in matters relating to industrial relations. This threefold test is a consensus of labour boards in Canada and it and its rationale were stated in Bank of Nova Scotia, supra, as follows:
>
> > "The denial of collective bargaining rights to persons employed in a confidential capacity in matters relating to industrial relations is also based on a conflict of interests rationale. The inclusion of that person in a unit represented by

> a union might give the union access to matters the employer wishes to hold close in its dealings with the union. These include bargaining, grievance and arbitration strategy. To avoid that conflict and to assure the employer the undivided confidence of certain employees these persons are denied the right to be represented by a union even if they wish to be represented. However, this exclusion is narrowly interpreted to avoid circumstances where the employer designates a disproportionate number of persons as confidential and to ensure that the maximum number of persons enjoy the freedoms and rights conferred by Part V."
>
> "To this end this Board and other Boards have developed a threefold test for the confidential exclusion. The confidential matters must be in relation to industrial relations, not general industrial secrets such as product formulae (e.g., Calona Wines Ltd. (1974) 1 Canadian LRBR 471, headnote only (BCLRB decision 90/74)). This does not include matters the union or its members know, such as salaries, performance assessments discussed with them or which they must sign or initial (e.g.. Exhibit E-21). It does not include personal history or family information that is available from other sources or persons. The second test is that the disclosure of that information would adversely affect the employer. Finally, the person must be involved with this information as a regular part of his duties. It is not sufficient that he occasionally comes in contact with it or that through employer laxity he can gain access to it. (See Greyhound Lines of Canada Ltd. 74 CLLC 16,112 (1974) 4 DI 22, AND Hayes Trucks Ltd. (1974) 1 Canadian LRBR 284)." (p. 16,625)"

26. In summary, it is the finding of the Board that the Applicant has failed to satisfy its onus of establishing evidence to confirm that the employees engaged as Quality Assurance officers were employed in a confidential capacity in matters relating to labour relations or in a management capacity. Consequently, it is the Board's decision that they

are not excluded from the definition of employee and will be included in the bargaining unit as defined by the parties.

27. In conclusion, the Board is satisfied that the majority of employees in the unit for which bargaining rights were sought did select the applicant to be their bargaining agent. Accordingly, an Order of Certification will issue.

Issued at Fredericton, New Brunswick, this 22nd day of July 2003.

GEORGE P. L. FILLITER
CHAIRPERSON
LABOUR AND EMPLOYMENT BOARD