

14-003
14-006
14-008

2015 CanLII 14368 (PE LRB)

**IN THE MATTER OF AN APPLICATION FOR REVOCATION OF
CERTIFICATION ORDER, NO. 01-11 (14-003)**

BETWEEN:

**GARRY ROSS AND CINDY KING, EMPLOYEES OF
SELKIRK ENTERPRISES dba DR. JOHN M. GILLIS
MEMORIAL LODGE**

APPLICANT

AND:

PEI UNION OF PUBLIC SECTOR EMPLOYEES

RESPONDENT

- AND -

**IN THE MATTER OF AN UNFAIR LABOUR PRACTICE
COMPLAINT (14-006)**

BETWEEN:

PEI UNION OF PUBLIC SECTOR EMPLOYEES

APPLICANT

AND:

**GARRY ROSS AND CINDY KING, EMPLOYEES OF
SELKIRK ENTERPRISES dba DR. JOHN M. GILLIS
MEMORIAL LODGE**

RESPONDENT

- AND -

**IN THE MATTER OF AN UNFAIR LABOUR PRACTICE
COMPLAINT (14-008)**

BETWEEN:

PEI UNION OF PUBLIC SECTOR EMPLOYEES

APPLICANT

AND:

**SELKIRK ENTERPRISES dba DR. JOHN M. GILLIS
MEMORIAL LODGE**

RESPONDENT

Paul Trainor

**Representative for the
Applicants, Ross and King**

Gordon Forsythe

**Counsel for the Union of
Public Sector Employees**

DECISION

Background

1. Dr. John M. Gillis Memorial Lodge (hereinafter the “Lodge”) is a nursing care facility located in Eldon, Prince Edward Island. The Lodge is operated by Selkirk Enterprises Ltd., (hereinafter the “Employer”) whose controlling shareholder is Douglas MacKenzie (hereinafter “MacKenzie”). MacKenzie is also the owner/operator of the facility.

2. The employees at the Lodge became represented by the PEI Union of Public Sector Employees (hereinafter the “Union”) on April 4, 2011, after a vote was held pursuant to the *Labour Act*, R.S.P.E.I. 1988, Cap. L-1. (hereinafter the “Act”). The vote results were exceptionally close with the outcome being that the Union was successful by one vote. A collective agreement was negotiated and became effective March 13, 2012. A copy of the Collective Agreement was filed as Exhibit R-1. Since that time, the labour situation at the Lodge has often been fraught with tension and difficulty. Some employees have expressed their displeasure with the Union. Some employees are vocally supportive of the Union. Several allegations of unfair labour practices have been filed with the Labour Relations Board (hereinafter the “Board”). The Union has filed a number of grievances alleging improper conduct by the Employer. It is clear that both the pro-union and the anti-union groups are passionate about their perspectives.

3. While there are presently several matters filed with the Board, the Board heard the following three inter-related matters concurrently by agreement of all parties and pursuant to the provisions of Section 21 of the *Labour Act Regulations* (hereinafter the “Regulations”).

4. The first matter is identified as Board File #14-003 and consists of an Application made by Cindy King (hereinafter “King”) and Garry Ross (hereinafter “Ross) (together referred to as the “Applicants”) pursuant to Section 20 of the *Act* to Revoke the Certification Order Serial No. 01-11, certifying the Union as the Bargaining Agent. The second matter is identified as Board File #14-006 and consists of an unfair labour practice complaint filed by the Union against Ross and King. The third matter is identified as Board File #14-008 and consists of an unfair labour practice complaint filed by the Union against the Employer.

5. With respect to the Application for Revocation of Certification Order, Serial No. 01-11, Ross and King are both employees at the Lodge and were members of the bargaining unit. They have undertaken the process of applying to revoke the certification order appointing the Union as the bargaining agent for the unit of employees described. The Application for Revocation of Certification Order in Form 7 was dated February 18, 2014 and filed with the Labour Relations Board on February 18, 2014. Paragraph 4 of Form 7 states:

Does the respondent union represent a majority of the employees in the unit for which it was certified: No longer - see petition signed by majority of staff. State particulars: Exhibit "A". We wish to apply for termination of bargaining rights held by the PEI Public Sector Employees."

Attached to the Form 7 was a petition consisting of three pages titled "Petition for Decertification". A copy of the Collective Agreement was also filed with the Application.

6. A copy of the Application was sent to the Employer who advised the Board by letter received at the Board office on February 28, 2014 that the notice had been posted, as was required, in conspicuous places at the worksite. The Employer also filed an employee list with the Board on March 4, 2014.

7. A copy of the Application was also sent to the Union. The Union requested, and the Board granted, an extension to the terminal date. The Union's reply was subsequently filed on March 24, 2014.

8. The Union's reply consists of the Form 10, along with a Statutory Declaration filed in support of the Form 10, sworn by Kevin Gotell, the Secretary Treasurer of the Union. The reply contains several allegations of improper conduct by Ross and King as well as by the Employer. The Statutory Declaration also contains allegations that the employee list provided by the employer contained a number of errors and furthermore, that a number of employees on the list should not be entitled to vote due to the nature of their close personal relationships with MacKenzie.

9. The Board received a response to the Union's reply on April 4, 2014 filed by Ross and King, denying any improper conduct, stating that the signatures were obtained in compliance with the *Act*.

10. The second matter consists of the unfair labour practice complaints made by the Union against Ross and King. These complaints were filed separately but comprise one Board file, being File #14-006. The Unfair Labour Practice Complaint made by the Union against Garry Ross was filed on March 18, 2014, pursuant to the Form 11, which was signed by Deborah Boyver, and supported by an Affidavit of Wendy McKeeman. The Unfair Labour Practice Complaint made by the Union against Cindy King was filed on March 24, 2014, pursuant to Form 11, which was signed by Deborah Boyver, and supported by an Affidavit of Wendy McKeeman. The reply of Garry Ross to the Unfair Labour Practice Complaint was filed with the Board on April 4, 2014 as was the reply of Cindy King. The Union filed a Response to the Reply with the Board on May 1, 2014.

11. The third matter which forms part of this proceeding is the unfair labour practice complaint filed by the Union in which it names Douglas MacKenzie, Owner/operator of Dr. John M. Gillis Memorial Lodge as the Respondent. This complaint was filed on March 24, 2014, in Form 11, signed by Deborah Boyver, and supported by an Affidavit of Rebecca Murdock as well as an Affidavit of Wendy McKeeman. The Employer's reply to the Unfair Labour Practice Complaint was filed with the Board on April 17, 2014. The Union subsequently filed a Response to the Employer's Reply, which was dated May 1, 2014.

12. Counsel for the Union wrote to the Board on April 30, 2014, to clarify that the Unfair Labour Practice Complaint filed against Douglas MacKenzie was not against Mr. MacKenzie in his personal capacity but as representative of the Employer. The Board acknowledged that any reference to Mr. MacKenzie in the documents filed was to be interpreted to mean in his capacity as a representative of the Employer. The Union also requested that the Affidavits of Wendy McKeeman and Rebecca Murdock were also to be considered as part of the file record regarding the application to revoke the Certification (Board File #14-003), and the Board agreed.

13. The Employer has taken no position on the merits of the application to revoke the certification of the Union, and denies the allegations contained in the Unfair Labour Practice Complaint filed against the Employer.

14. The Board, pursuant to its powers in sections 13, 14 and 20 of the *Act*, as well as section 20 of the *Regulations* ordered that a vote be taken, which was conducted on August 6, 2014. At the same time as the vote was ordered, the parties were given notice that the hearing would commence on September 8, 2014 for the purposes of hearing the three matters. The vote has not been counted and the unopened ballot boxes continue to be held by the Board in a secure facility.

15. The hearing was held on September 8th, 9th and 10th, October 14th and 15th, and December 8th, 2014. A total of fifteen witnesses gave testimony regarding the matters before the Board. In reaching this decision, the Board has carefully considered all evidence before it, including all pleadings, all oral evidence and all documentary evidence tendered at the hearing.

Statutes Considered

- (a) *Labour Act*, R.S.P.E.I. 1988, Cap. L-1
- (b) *Labour Act Regulations*
- (c) *Interpretation Act*, R.S.P.E.I. 1988, Cap. I-8

Texts Considered

- (a) *Canadian Labour Law*, 2nd Edition, George W. Adams
- (b) *Ontario Labour Relations Board Law and Practice*, Sack Mitchell Price, 3rd Edition

Cases Considered

- (a) *United Brotherhood of Carpenters and Joiners of America Local 1338 v. MacLean Construction Limited Employees*, [1984] P.E.I. J. 34.
- (b) *Pombinho v. Local 444 C.A.W.* [1990] O.L.R.B. Rep. April 457.
- (c) *Thompson Interior Savings Credit Union* B.C.L.R.B. No. B336/2003.
- (d) *Fallico v. I.L.G.W.* [1982] O.L.R.B. Rep. 1942.
- (e) *Chapman v. I.A.M. & A.W. Beothuck Lodge 1763*, 77 CLRBR (2d) 92.
- (f) *Harvie and UFCW Local 864 and Shannex Incorporated* 2012 NSLB 139.
- (g) *Gallagher Bros Contractors Ltd.* [2004] B.C.L. R. B.D. No. 61.
- (h) *Re Flemming* [2005] S.L.R.B.D. No. 30.
- (i) *Grant & Melo and International Union of Painters and Allied Trades District 46 Local 1891 and Manel Contracting Ltd.* 2012 CanLII13739 (ON LRB).
- (j) *ES and Assiniboine Regional Health Authority and Manitoba Nurses Union* 2007 CanLII 81864 (MLB).
- (k) *Certain Employees of RJ HealthLink Lt. and RJ Healthlink Ltd. and UFCW Local 1518* 2011 CanLII 47715 (BCLRB).
- (l) *Excell Agent Services Canada Co.* BCLRB No. B172/2003.
- (m) *Corps Commissionaires and Public Service Alliance of Canada* 2002 PEISCTD 61
- (n) *The International Union of Operating Engineering Local 942 and the Prince Edward Island Department of Health* 2006 PEILRB 06-035.
- (o) *Beaudoin v. National Automobile, Aerospace and Agricultural Implement Union Workers of Canada (CAW - Canada)* 1996 CanLII 11150 (ON LRB).
- (p) *Carpenters Union (United Brotherhood of Carpenters and Joiners of America) v. Everstrong Construction Ltd.* 2010 CanLII 26770 (ON LRB).
- (q) *Cole v. Horn*, PEI LRB 95-062.
- (r) *Simon Fraser University v. Teaching Support Staff Union* 2013 CanLII 2946 (BC LRB).
- (s) *H-Line Enterprises v. International Brotherhood of Electrical Workers, Local 1432* 2014 CanLII 36807 (PEI LRB).

Preliminary Matters

16. The matters that are before the Board have been challenging to all parties involved. As the Lodge is located in a small rural community, many community members are aware of the labour issues at the Lodge, in varying degrees of detail or speculation.

17. A total of thirty-eight (38) letters were sent to the attention of the Board, all written from employees or members of the community. These letters were unsolicited by the Board, and the parties were advised of the letters at the commencement of the hearing.

18. The Board heard argument on whether the letters should form part of the record. Ross/King had no objection to their inclusion. The Union was opposed to the inclusion, and the Employer had no difficulty with the letters being included provided names and identifying information of the employees was redacted.

19. After hearing argument on the issue, the Board found that the letters would form part of the record and copies were provided to all parties, with names and personal identifying information redacted from any employee letters. Any relevance of the content of the letters to the merits of the matters before the Board is a question of weight, bearing in mind that the letters were not sworn testimony.

20. The Union raised several preliminary arguments on the Application for Revocation of Certification Order, Serial No 01-11, to de-certify the union summarized as follows:

- (i) the petition itself is deficient as it does not state the name of the employer;
- (ii) there is an error on the face of Form 7, in paragraph 4 where the answer is that the Union does represent the majority;
- (iii) the language on the petition is not descriptive, not clear enough - doesn't state "I hereby resign/wish to resign";
- (iv) the documentation is insufficient - the Board does not have a proper and valid application before it;
- (v) the Union sought an unredacted copy of the petition, disclosing names and witnesses of signatures on the petition;
- (vi) challenging the place and timing of the petition being circulated, and subsequently signed.

In the result, the Union sought to have the Application preliminarily dismissed.

21. In response, the Applicant argued that the petition was sufficiently clear, and all employees knew that the purpose of the petition was to choose whether to be represented by the Union or not, and that the petition was completed in compliance with the provisions of the *Act*.

22. The Employer did not consent to the preliminary matters raised by the Union, arguing that the matter should be heard, and that the failure to hear the matter on its merits would result in the issues being unresolved and the tensions and difficulties at the work place continuing to escalate. Employee relations would not benefit from the Board dismissing the matters on overly technical arguments.

23. After hearing submissions of all parties on the preliminary matters raised by the Union, the Board found as follows, in summary. With respect to issue (ii), the Board held that the question of whether or not there was a majority would be part of the substance of the hearing and would be decided in due course based on the evidence. With respect to issue (iii), regarding the paragraph 4 of Form 7, the Board is of the view that this is an unduly technical reading of the section. There is a reference to the rest of the petition - not just a simple "No". Also, the Board refers to Section 9 of the *Interpretation Act* R.S.P.E.I. 1988, Cap. I-8, which allows that every enactment should be given fair and large liberal interpretation as best ensures the attainment of its objects. With respect to issue (iv), the Board held that the form was sufficiently clear, containing specific language which stated: "We understand...". The employees would be aware of the meaning of this language. With regard to the issue (v), releasing the names on the petition, the Board held that the public policy and legislative provisions of the *Act* permits the Board to protect the names of those who might sign the petition to decertify the Union.

24. With respect to the first issue raised, that the employees had no way to know which employer the petition referred to, as well as the last issue raised, the place and timing of the petition being signed, the Board ruled that evidence on the merits would answer these concerns. In conclusion, the Board held that the hearing would proceed on the merits of the matters before it.

25. The Union then raised the matter of the composition of the employee list, and specifically argued that there are thirteen names on the list of employees who should be ineligible to sign the petition given their close personal relationship with MacKenzie. The list being referred to was the list of employees filed by the Employer on March 4, 2014, which contains sixty-five names.

26. The Union argued that the following thirteen individuals should not be entitled to vote as they are each in a conflict of interest or were not employed at the time of the petition: Cathy Jamieson, Garry Ross, Cara Jamieson, Gincy Chako, Nita Sebastian, Omair Imitaz, Marlene Cassidy, Darlene Martin, Taylor Martin, Cindy King, Laura Mooney, Darrell Nicholson and Paula MacKenzie.

27. The Board heard the evidence of Christine Murphy, the Union's first witness. Ms. Murphy testified that she is a licensed practical nurse presently seconded from her position at Hillsborough Hospital to the executive of the Union. She is presently a member of the Board of Directors of the Union. Previously Ms. Murphy was employed at the Lodge and knows many of the present staff.

28. Ms. Murphy testified that her duties for the Union included providing information to the staff at the Lodge who might have questions about the Union and its representation. In response to the petition to revoke the certification, she planned and held meetings for the membership in the spring of 2014, as well as spending several days in a parked car on the shoulder of the road opposite the entrance to the Lodge in the summer of 2014. She indicated that on one of those days she was approached by Omair Imitaz. She stated that he had suggested to her that he didn't want to support the petition to decertify, but he had no other job possibilities because he was limited by the immigration rules so he felt he had to. On cross examination, Ms. Murphy admitted she had been unaware that Mr. Imitaz had previously worked at another place of employment.

29. The Union called Rebecca Murdoch who testified that she had worked at the Lodge for thirteen years, but had been terminated in July 2014. She testified that her termination has been grieved by the Union. She provided testimony regarding the relationship of the thirteen individuals with MacKenzie. In summary, she testified that, in her opinion, seven of the thirteen had a close connection with MacKenzie that should prohibit each of them from having their names considered on the petition, specifically, that Marlene Cassidy, Nita Sebastian and Gincy Chako were tenants of MacKenzie, and as such were relying on him to provide them with a place to live. She also testified that she believed Ross and MacKenzie to be friends and felt Ross benefitted from this relationship by having a place to live at the Lodge. Cathy Jamieson and Kara Jamieson were also closely connected to MacKenzie through personal relationships, and Omair Imitaz was limited in his work opportunities because of immigration rules, and was therefore too reliant on MacKenzie to exercise his free will.

30. On cross examination, Rebecca Murdock testified that she wasn't sure if Omair Imitiz felt pressure to vote, and she really didn't know how he voted. She also testified with respect to the living arrangements of Marlene Cassidy that she didn't know what rent Marlene Cassidy paid. She stated "I don't know for sure, but I think she pays rent." With respect to Nita Sebastian's living arrangements, she stated "I have no idea if she pays rent or not. I believe she might." With respect to Gincy Chako, Ms. Murdock testified that she believed Gincy "... pays rent, but not sure on details, perhaps \$600.00 a month." She testified that Ross might pay \$750.00 per month. When asked by counsel for the Employer if she thought these amounts would be representative of fair market value, she indicated she thought the rents might be high for the Eldon area.

31. The applicant chose not to call any witnesses.

32. The Employer called Jennifer Penny as a witness. Ms. Penny testified that she is employed at the Lodge as the Director of Nursing. She testified as to the status of three employees namely, Darlene Martin, Cindy King (the Applicant), and Taylor Martin, and confirmed that each was on sick leave.

33. With respect to Laura Mooney, Darrell Nicholson, and Paula MacKenzie, it was agreed by the parties during the course of argument that these three would be excluded, as they had ceased working prior to the date of the petition. It was also agreed that Darlene Martin, Cindy King and Taylor Martin were to be included as these three individuals were on sick leave authorized by the employer and supported by proper paperwork. The parties also agreed that Cathy Jamieson would be excluded from the employee list.

34. Accordingly, the Board was left with six names to consider. After consideration of the evidence before the Board, the Board held that with respect to Gincy Chako, Nita Sebastian, Omair Imitiz, Garry Ross, and Marlene Cassidy, there was insufficient evidence to find that a conflict of interest was present to such a degree as to outweigh those individuals' right to sign the petition or to vote if they chose to do so. During the hearing the Board reserved on the decision with respect to Cara Jamieson, who is the daughter of Cathy Jamieson. For reasons outlined below, it is unnecessary to make a ruling on this issue.

Issues :

- (a) Should the application to revoke the Certification Order #01-011, dated April 4, 2011 be granted?
- (b) Should there be a finding of an unfair labour practice against Garry Ross and/or Cindy King?
- (c) Should there be a finding of an unfair labour practice against Selkirk Enterprises dba as Dr. John M. Gillis Memorial Lodge?

Decision

35. With regard to the first issue, the Board must determine whether the requirements for revocation of a certification order as prescribed by the *Act* have been satisfied.

36. The relevant provisions of the legislation are as follows:

20. (1) An employer or a trade union named in a certification order or any employee in a unit for which a trade union has been certified as bargaining agent by such certification order may apply to the board for the revocation of such certification on the ground that a majority of the employees in such unit no longer wish the trade union to act as bargaining agent on their behalf.

(2) If the board is satisfied that the majority of the employees in such unit no longer wish the trade union to act as bargaining agent on their behalf, the board shall revoke the certification of the trade union.

37. The Application for Revocation of Certification Order was filed on February 18, 2014 by King and Ross. It is clear that Ross and King are both employees of the Lodge in a unit for which a trade union has been certified. The Application they filed indicated that they had a majority of employees of the unit who no longer wished to be represented by the Union. On a cursory review of the filed materials, one could conclude that this test has been met. The Applicants filed a petition that contained, by the Applicants' admission in affidavits filed with the Board, a total of forty-one names. The list of employees provided by the Employer indicated a total of sixty-five employees. On a simple analysis, there is a clear majority. However, the Union raised several objections to the make up of the list as well as the manner in which the petition was circulated.

38. As noted above, one of the preliminary matters raised was the list of employees and specifically which employees should be on the list for determination of the majority. After the ruling by the Board on the preliminary matter of the list of the employees, the total number of employees in the unit as of the date of the petition is sixty. Assuming that the number of names remaining on the petition is valid, a majority of employees have signed the petition.

39. The second part of the legislative test requires that the Board must be satisfied that the majority of employees no longer wish the trade union to act as the bargaining agent. It is in this test that the Applicants face the biggest hurdle. The Union argues that this test is not met because the actions of Ross and King have unfairly influenced the employees.

40. The Applicants were assisted in their representation by Paul Trainor. Ross testified that he located Mr. Trainor through an internet search, which led to the Labour Watch website and Mr. Trainor's specific contact information. Both Ross and King testified that Mr. Trainor was very helpful to them in getting the materials and advising of the process required to undertake the petition to revoke the certification. What was lacking in their understanding of the process, however, was a clear expression to the Applicants of how important it was not to indulge in any behaviour that might later call into question either the employees' true wishes, or the possibility that the Employer was supporting, either implicitly or explicitly, the application for de-certification.

41. Specifically, the main allegations raised by the Union, in summary form and in no particular order are as follows:

- Ross and/or King were intimidating employees;
- Ross and/or King were coercing employees;
- Ross and/or King were deceiving employees;
- Ross and King approached employees during work hours and in the workplace;
- employees believed Garry Ross was working on behalf of the employer;
- Ross and King asked employees to "just sign" and the document would be explained later;
- Ross and King suggested to employees that employee benefits, in particular vacation pay, would improve without the Union representation;
- Ross and/or King met with employees in a secretive fashion and in particular, in a closet at the workplace.

42. After being given the opportunity to present oral evidence, Mr. Trainor indicated that he would not

be calling witnesses and would rely on the materials filed with the Board. As a result, counsel for the Union, commenced with the calling of King to cross examine her on the Affidavit she had filed in response to the Unfair Labour Practice Complaints. Under cross examination, King testified that she has been employed at the Lodge for about six years and works in the kitchen as a cook. She has been on sick leave since early 2014. She and Ross had initiated the petition to de-certify the Union because, generally, they felt there were problems with the Union and a majority of staff no longer wanted that Union to represent them. King also testified that she and Ross had met with Mr. Trainor who had given them assistance in the de-certification process. They obtained a form and proceeded to talk to several staff members and obtained a number of signatures.

43. Counsel for the Union questioned the witness extensively on the manner in which the signatures were obtained. The witness admitted that she and Ross had circulated a petition at the workplace. She also testified that she had discussions with employees and had expressed the sentiment that vacation pay would be better without the Union. She testified that it was possible she advised some employees during her circulation of the petition that “a majority of the staff had already signed up”. King also testified that she had made the comment to at least one employee “just sign it and I will explain it later”, during the process of obtaining signatures.

44. King was questioned whether she had signed the employees Jessica Lea, Jessica Byrne, Brooke Hancock, Joanne Sudsbury and Jennifer Morrison. She was shown Exhibit R-7, which consists of letters from each of the five employees dated March 2014. Each letter states:

I have signed a form which is being used in an effort to get rid of the Union of Public Sector Employees in my workplace (Gillis Lodge). I was not fully informed of what my signature was supporting and I do not want to be considered supportive of de-certification of this Bargaining Unit. I want to remain a member of the Union.

45. King was asked if she met with any employees, specifically, Brooke Hancock, in a closet at the workplace to discuss the petition. She was presented with the Affidavit of Wendy McKeeman, and referred to paragraph 11 which states:

11. Cindy King was also intimidating to some employees when approaching them about the Application by trying to meet with them furtively or secretly in the workplace by requesting they go into a small closet with her to discuss the issue. This is intimidating due to the confined space of the closet and the fact that she appeared to be hiding from other employees.

46. King denied the allegation, and testified that she discussed the petition with Brooke Hancock, when Brooke came into the kitchen at the Lodge, and then they both went in to the bathroom where Brooke signed the petition. She also testified that she did meet with Maude Morrison, a fellow employee, in a linen closet at the Lodge, but this was to discuss a personal matter. She also testified that to her knowledge Ms. Morrison wasn't a Union member.

47. King also testified that after this petition had been circulated, she and Ross were told by Mr. Trainor that he had discovered it was improper to circulate the petition during work hours and at the place of employment. King indicated that she and Ross then proceeded with a second petition, and that second petition is the one filed with the application to decertify now before the Board. She testified that in obtaining the signatures on the second petition, she and Ross spoke to employees at locations other than the Lodge and obtained the signatures on the petition one to three weeks after the signatures were obtained on the first petition.

48. There was also extensive questioning of King regarding her knowledge of the financial situation of the Lodge. Counsel for the Union alleged that MacKenzie had made it known through direct statement or by rumor that the Lodge was suffering financially because of the presence of the Union. King denied having ever been told by MacKenzie, but did state that she had her own concerns about the financial welfare of the Lodge and that she had discussed this with fellow employees.

49. Counsel for the Union also cross examined Ross on the affidavit he had filed in response to the unfair labour practice complaints. Ross testified that he has known MacKenzie for over thirty years, and that he had begun working at the Lodge as a Resident Care Worker in 1989, and has continued to work at the Lodge since then.

50. Ross was questioned extensively regarding his relationship with MacKenzie, specifically, if Ross and MacKenzie were friends, and if MacKenzie lets Ross live at the Lodge rent free. Ross testified that MacKenzie has been a very good employer to Ross over the years. He testified that a number of years ago, Ross was in serious difficulty

finding himself with nowhere to live, and he approached MacKenzie to ask if he might live at the Lodge rent free in exchange for providing services such as general maintenance, snow removal, lawn care, and security. MacKenzie agreed and Ross testified that this arrangement is still in place. Ross was also asked if his meals were provided to him at the lodge. He testified that all employees were given meals while they

were working. He did not get free meals when he was not working. Rebecca Murdock also testified that employees had free meals while they were working. On cross examination, she said that she didn't know if Ross had meals at the Lodge when he wasn't working.

51. Counsel for the Union cross examined Ross at length regarding the manner in which he obtained the form to de-certify and commenced the process of getting the petition signed. Ross testified that he had looked on the internet and had stumbled across the website for Labour Watch which had taken him to Mr. Trainor. Mr. Trainor had provided Ross with information about de-certification, and Ross testified that he and King then had the discussions with other employees. Both Ross and King denied ever having any discussions with MacKenzie about the Union or financial strain that the Lodge might be experiencing due to the labour unrest. They both testified that Mr. Trainor was acting as their representative for no remuneration.

52. Throughout the cross-examination of both King and Ross it was apparent that these two employees were unhappy with the Union's representation of the workers. Ross felt that the Lodge was suffering and he worried about the residents, as well as felt a strong loyalty to MacKenzie. King believed that the Union had not improved the benefits at the Lodge and felt that the result was worse. She testified that she was taking home less pay after the Union became the bargaining agent.

53. The Union called Jessica Byrne who testified that she has been employed as a Resident Care Worker at the Lodge since 2010. She had been approached by King and asked if she would sign the petition. She stated that she was aware at the time what she was signing and that it would mean the Union would no longer represent the employees. She recalled the phrase "75% of the employees had already signed" being made by King during their discussion, and she didn't want to be "the only one" not signing the petition. She testified that a couple of days after she had signed the petition, she felt that she had made a mistake. She then spoke with another employee, Jessica Lea, and then to the shop steward, Wendy McKeeman. Ms. McKeeman arranged for her to meet with the Union's in-house counsel, Hans Connor. She presented an unsigned affidavit (Exhibit R-6) that she stated had been prepared by Mr. Connor following his meeting with her. She agreed with the contents of the Affidavit, except that she never felt threatened by King.

54. The Union also called Jessica Lea who testified that she has worked at the lodge since May 2011 as a licensed practical nurse. She stated that she had signed the petition after being approached by King. She also recalled the phrase "75 % of the employees" being used to describe how many people were supporting the petition. She further testified that after signing the petition, she had a change of heart. She approached Wendy McKeeman

who also helped her get in touch with Mr. Connor, who prepared the Affidavit which was presented to the Board during the hearing (Exhibit R-5). Ms. Lea also testified that no one in management ever influenced her about the Union.

55. The other employees who signed the letters presented in Exhibit R-7 did not testify before the Board. The Board does make note of the contents of the letter which states, in part "...I was not fully informed of what my signature was supporting...". This statement does not appear to be accurate at least insofar as Jessica Byrne and Jessica Lea, as both of these employees acknowledged during their testimony that they each knew what the petition was for, but they each had a change of heart a couple of days after signing it.

56. The Board also heard testimony that there was a great deal of rumor and speculation about the financial situation at the Lodge, with the strong message being that the Union was causing the Lodge financial hardship. Several of the Union witnesses spoke to this, as well as King who testified she had concerns about the financial welfare of the Lodge. Many of the letters which were received by the Board also address this suggestion that the Lodge was in serious financial trouble. In a small community, and a small place of employment, it is not difficult to believe that many employees would have talked amongst themselves and/or with members of the community.

57. Jim Kinnee, a resident of Eldon, Prince Edward Island, testified on behalf of the Employer, and stated that it was certainly well known in the community that the Lodge was having labour issues. He is a member of the Belfast Community Development Corporation, and during a regular council meeting the issue of the labour unrest at the Lodge was raised. He testified that the Lodge's financial stability is a concern to the community as it is an important business in the area and provides a number of jobs. Darlene Compton, the office manager at the Lodge is also a member of the Belfast Community Development Corporation. Mr. Kinnee testified that Ms. Compton spoke at a meeting of the Belfast Community Development Corporation about the labour matters at the Lodge and answered questions about the costs the Lodge was incurring because of the labour problems. Mr. Kinnee also testified that he wrote a letter to the Board after the meeting, to express his concerns about the situation.

58. It is against this backdrop that the Board must decide whether the employees' wishes are accurately represented by their signatures on the petition or if the methods used by the Applicants in obtaining the signatures on the petition might have tainted the process such that the true wishes of the employees are not clear. It is important at this juncture to state that the Board does not find any evidence to suggest that the Applicants were acting in bad faith. To the contrary, the Applicants had undertaken the task of petitioning to decertify the Union because they sincerely believed that the Union was no longer wanted by the majority of the employees. The Union argues that the petition can not be relied upon as a true expression of the employees' wishes because of the behaviors of Ross and King.

59. This Board is guided by the comments made in the case of *United Brotherhood of Carpenters and Joiners of America local 1338 v. MacLean Construction Limited Employees*, [1984] P.E.I. J. 34, which was a review of a Board decision in the matter of an application for de-certification. The Supreme Court made the following comments, at paragraph 28:

The decision of the board indicates that it was aware of the obligation placed upon it when considering an application for decertification. It rightfully found that it must determine whether the employees no longer wish to have the union act as their bargaining agent. In determining that question the board said it had to determine "whether or not the position of the employees was arrived at in a free and voluntary manner, or whether it is the result of actions of the employer, either direct or indirect, which would be of such an extent that it would be difficult, if not impossible, for them to arrive at their position in a free and voluntary manner."

29. There can be no question that the board realized that it had to determine whether or not the decision of the employees was freely given by looking for facts that might prove the employer's influence.

60. And, at paragraph 32:

The board correctly set forth the standard by which it was to determine the employer influence when it stated:

"Having regard to the sensitive nature of the employer-employee relationship, the board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management

*has been actively involved in its organization, preparation or circulation, the Board will dismiss the statement. [emphasis start] **The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it.** [emphasis added].*

61. The case of *Pombinho v. Local 444 C.A.W.* [1990] OLRB Rep. April 457 was an application to decertify a union and the Board found evidence that the employees had a belief that fishing quotas would be increased if the union was gone. At paragraph 7 of the decision, the Board reviewed the principles that have been established in interpreting the legislation governing applications to de-certify, which require a determination of the voluntariness of the employees' wishes, and stated:

"If employees are motivated to sign a petition by such concerns or by an expectation that they will be financially rewarded by their employer for doing so, the petition will not be "voluntary" within the meaning of section 57(3)."

62. And at paragraph 8 of the decision:

...it is clear that what motivated them to sign it (the petition) was the belief that if they "got rid of the union", the Company would increase the fishing quotas available to them and thereby substantially increase their potential earnings.

63. The Board ultimately found, at page 11:

*It is unnecessary for purposes of this decision to determine whether or not Mr. Peralta actually made any such statement to Mr. Francesco. It is also unnecessary to determine whether or not Mr. Francesco told the applicant that Mr. Peralta had done so. **What is significant for purposes of this decision is the fact that the applicant believed that to be Mr. Peralta's expressed intention, and used it in attempting to persuade crew members to sign against the union.** (Emphasis added)*

64. In the case of *Thompson Interior Savings Credit Union* BCLRB No. B336/2003, the Board summarizes the concern this way:

it is not necessarily direct evidence of the impact of improper conduct on employee minds: but rather evidence of circumstances from which I can reasonably draw an inference that the true wishes of the employees are unlikely to be disclosed in a decertification vote.

65. In the decision of *Chapman v. I.A.M. & A.W. Beothuck Lodge 1763*, 77 CLRBR (2d) 92, the Board stated, at paragraph 50:

Moreover, the British Columbia jurisprudence makes clear that the proper test in the circumstances is an objective one.

“The test is an objective one, not subjective. It is sufficient that the conduct could have that effect on a reasonable person.”

66. Mr. Trainor argued, on behalf of the Applicants, that the only petition that mattered to the proceedings before the Board was the second petition, the petition filed on February 18, 2014. He argued that all the names on that petition were obtained in a “clear and concise manner in full compliance with the requirements of the Labour Board.” In essence, the Applicants take the position that any questionable conduct by the Applicants in obtaining the names was only with respect to the first petition, and had nothing whatsoever to do with the second petition.

67. The Board finds this argument difficult to accept. The evidence before the Board is that the second petition was completed within a short time period after the first petition, perhaps within one to three weeks. The Board finds on the evidence before it, that at least during the time of soliciting support on the first petition, King made comments intended to suggest that most employees had already signed the petition, resulting in the scenario where other employees would be cautious about not wanting to be “the only one” not supporting the petition.

68. Further, the actions of King and Ross, specifically the signing of employees during work hours and at the place of employment on the first petition, as well as King’s testimony that she advised at least some of the employees she spoke to that vacation pay benefits would be better without the Union, do amount to actions that could, on an objective review, support a finding that those signatures obtained on the petition might not have been entirely free of influence.

69. As set out in the *MacLean* decision, the Board must determine if the wishes of the employees were free and voluntary and whether, having regard to the totality of evidence, there was enough uncertainty, influence, rumor and innuendo that the true wishes of the employees can not be ascertained. It is clear that the test to be applied is an objective test. It is not necessary to find that employees were actually swayed by comments or actions of Ross and King, only that the actions occurred and the comments made. The case law is clear that the mere fact that the first approach made to many employees by either Ross or King occurred at the workplace could lead a reasonable employee to

conclude that the Employer supported the petition. For example, see the decision of *Fallico v. I.L.G.W.* [1982] OLRB Rep. 1942, where the Board stated, at paragraph 8:

Where the petition activity in fact takes place during work hours, the Board has noted that mere indulgence on the part of management may be sufficient to destroy the petition as a reliable expression of the employees' own wishes. This is because, once again, employee perception is the key, and a "hands-off" approach by management in circumstances where that would be unusual can convey to employees, deliberately or otherwise, that management is somehow connected to the petition.

70. Further, in a small place of employment, where it is clear that the labour unrest was pervasive, the Board finds it unlikely that a one to three week window was enough time to give employees a fresh unbiased look at the efforts of the Applicants to decertify. Given all of the above, the Board is not satisfied that a majority of employees no longer wish the trade Union to act as bargaining agent. The Board therefore denies the Application for Revocation of Certification Order of the trade union as the bargaining agent. As a consequence, the ballots cast in the August 6, 2014 vote need not be counted.

Unfair Labour Practice Complaint against Ross and King

71. The second matter that was before the Board is the union complaint made against Cindy King and Garry Ross of an unfair labour practice. Section 10 (2) of the *Act*, supra, states as follows:

10(2) No employee, trade union or person acting on behalf of a trade union shall

(e) use coercion or intimidation of any kind with a view to encouraging or discouraging membership in or activity in or for a trade union or labour organization. R.S.P.E.I. 1974, Cap. L-1, s.9; 1990, c.27, s.1; 1994, c.32, s.18.

Following the filing of the Complaint on March 18, 2014 on Ross and March 24, 2014 on King, and pursuant to Section 11 of the *Act*, the Chief Executive Officer inquired into the Complaint and endeavoured to affect a settlement. The Chief Executive Officer filed his report to the Board advising that he was unable to affect a settlement of the matter complained of. The matter was then set down before the Board to conduct a Hearing.

72. The allegations contained in the complaint are that "*Ross did violate section 10(2)(e) of the Labour Act as follows: by coercion and intimidation discouraging membership in the union*". Paragraph 4 of the Complaint states as follows:

In the course of recruiting support for any application for revocation of certification, the respondent intimidated a number of employees and used coercion to discourage union membership. The coercion was in the form of deception and via the respondent's status in the workplace as a friend of the owner.

73. In support of the complaint, an affidavit of Wendy McKeeman was filed. She alleges that Ross has a close relationship with MacKenzie and because of this, many employees would feel pressure to sign the petition to decertify just because it was Ross who was asking. Ross is accused of coercing employees by using this relationship to garner support for the decertification application.

74. Under cross examination Ross was questioned carefully regarding his relationship with MacKenzie. Counsel for the Union asked Ross whether he had any discussions with MacKenzie concerning the Union. Ross denied having had any discussions. Much was made of the arrival of Ross and MacKenzie at a ratification meeting that had been organized by the Union in February 2012. Rebecca Murdock and Wendy McKeeman both testified that MacKenzie and Ross had arrived together. However, Ross denied that. He testified that it was coincidental that he and MacKenzie had entered the meeting room at the same time. He had traveled to the meeting on his own.

75. There was strong suggestion put to Ross that he was keeping MacKenzie apprised of the decertification progress, and in particular reporting to MacKenzie on various matters that were occurring. Ross denied this, and stated that he did not have any discussions with MacKenzie regarding the Union. He stated repeatedly that it was his belief that the Union was not helping the employees at the Lodge and this unrest was causing disruption to the residents. He stated that his primary concern was always for the well being of the residents. He further testified that he was not against unions and the role they can play within a workplace, but felt the Union had done nothing to improve the work conditions at the Lodge, and as a result should no longer represent the employees.

76. Ross was also questioned about approaching one of the employees, Kelly Vos, during a midnight shift. It was suggested to Ross that he snuck up behind Ms. Vos as she was working when he approached from the back stairs which lead to his apartment. Ross confirmed that he did approach Ms. Vos and that this was during an evening shift. He denies having snuck up on her. He did testify that he asked Ms. Vos to sign the petition and that he had explained to her what the petition was for. He stated that he asked her the following evening if she was prepared to sign and she advised she was not.

77. Ross was cross examined about his freedom within the lodge and the perception that he was given special favour because of his relationship with MacKenzie. He denied receiving any special treatment. When asked if he received free meals, he testified that all employees were given meals during their shifts. He made his own meals in his

apartment when he was not working. He also stated that he would not agree that other employees would perceive him to have a close personal relationship with MacKenzie.

78. Wendy McKeeman was asked about her perception of Ross's relationship with MacKenzie. She stated "I'd say they are close. Garry lives at the Lodge in an apartment downstairs." When asked if Ross had the run of the Lodge, her reply was "He has meals there when he is working." During cross examination, Ms. McKeeman testified that she has worked at the Lodge for fourteen years. She stated that she knows of only one time when Ross and MacKenzie were together, and she has no first hand knowledge that they regularly meet. She also acknowledged it was common for employees to drop in to the Lodge when they were not working and that when they were not on a shift, they were able to go freely about the Lodge.

79. Brenda MacPherson testified on behalf of the Union. She advised that she works as a cleaner at the Lodge and has been employed there for fifteen years. During direct examination by Union counsel she testified that she knew Ross and she believed him to be anti-union. She believed he had meetings with MacKenzie. She provided no testimony that any such meetings had occurred. She was asked if Ross enjoyed special status at the Lodge. Her reply was "He lives there". When asked again if he enjoys special status, her reply was "probably not."

80. Rebecca Murdock was asked during her testimony how she would describe Ross's relationship with MacKenzie. She stated that Ross respects MacKenzie, that MacKenzie had helped Ross out and that she felt they were "very friendly".

81. Jennifer Penny was also questioned about the relationship Ross had with MacKenzie. She stated that her office is in close proximity to MacKenzie's office. She stated that in her opinion Ross did not frequent MacKenzie's office any more so than any other employee. She commented that many employees stop in to MacKenzie's office to "say hello".

82. The allegation in the Unfair Labour Practice complaint against King is that "*the Respondent did violate section 10(2)(e) of the Act as follows: by coercion discouraging membership in the union.*" Paragraph 4 of the Form states:

In the course of recruiting support for an application for revocation of certification, the respondent used coercion to discourage membership. The coercion was in the form of deception, promising different employees benefits if de-certification was to occur.

83.As noted above, King testified that she had advised some of the employees she spoke to that she believed their employee benefits would be improved without the Union. She also testified that she did, on at least one occasion, tell an employee to “just sign the form and I will explain it later”. The Board also heard testimony from two employees who stated they had been told by King that at least 75 % of the employees had already signed the petition.

84.The text of *Canadian Labour Law*, (Adams, 2ed.) defines the concept of an unfair labour practice this way, at page 10-1:

Freedom of association, the right to organize and the principle of free collective bargaining are concepts fundamental to the system of industrial relations established by statute in each of the Canadian jurisdictions. Within the legislated framework, legal restraints operate to control certain employer and union behaviour. Conduct which interferes with the rights of employees to join the trade union of their choice, to be represented by that union in the process of collective bargaining or in some other way violates protections provided by the various labour relations statutes constitutes an unfair labour practice and is prohibited.

...all provide certain basic protections for employees, employers, and trade unions.

85.The governing legislation in this province is clear that the use of coercion or intimidation of any kind is considered an unfair labour practice. The question then becomes what constitutes coercion or intimidation. The Oxford Dictionary defines coercion as follows:

Coercion is the practice of persuading someone to do something by using force or threats.

86.The word “intimidation” is defined by the Oxford Dictionary in this way: “*Frighten or overawe, especially in order to make them do what one wants.* Websters’ Dictionary defines intimidation as “*compelling or deterring someone by or as if by threats.*”

87.The issue has been raised previously before this Board in *Cole v. Horn*, PEI LRB 95-062, where the Board had to consider whether the actions of an employee in her attempts to decertify the union amounted to an unfair labour practice against another employee. After reviewing the evidence before it, the Board stated as follows:

The law is quite clear on this subject and is stated on page 192 of Ontario Labour Relations Board Law and Practice by Sack and Mitchell, published by Butterworth 1985 that in determining the effect of a threat on membership evidence the Board must consider the nature of the threat and whether it is made and taken seriously, whether it could reasonably be carried out, and the role and authority of the person responsible. The test of intimidation utilized

but the Board is an objective one. It must look at the conduct of the Respondent and would it deter a reasonable employee of ordinary conviction. The Board distinguished between intimidation and peer pressure, which is inherent in trade union organizing and which is not relevant to the reliability of membership evidence.

The Board found evidence that the employee did not feel coerced or intimidated. In the case of *Excell Agency Services Canada Co. and International Union of Operating Engineers, Local 882 and Certain Employees* 2003 CanLII 62576 (BC LRB) the Board, in determining whether an unfair labour practice had been committed pursuant to legislation similarly worded to Section 10(2)(e) of the *Act*, made the following statement at paragraph 69 of the decision:

Intimidation and coercion as those terms are used in Section 9 have been defined as the use of force, threats, fear or compulsion for the purpose of controlling or influencing conduct. A threat, whether implied or actual, is a prerequisite for conduct to be characterized as coercion or intimidation. There has to be some sort of unfairly forceful pressure or threat of adverse consequences. The context of the statements, the relative power of the parties, and the ability to take action that would adversely affect the employees if they do not act in the desired manner are relevant factors to consider when deciding whether a threat has been communicated. The Board is more likely to find coercion and intimidation where the party exerting the pressure has the capacity to take action that would directly affect the employees concerned: British Columbia Housing Management Commission, BCLRB No. B3/93.

70 The Board uses an objective test assessing the conduct against a standard of a reasonable employee. Characterizing statements as misrepresentation does not automatically make them coercion or intimidation. The focus instead is on the objective effect of a statement: North Shore Association for the Mentally Handicapped, BCLRB No. B474/99, para. 29.

88. In a more recent decision in *Simon Fraser University v. Teaching Support Staff Union* 2013 CanLII 2946 (BC LRB), the B.C. Labour Relations Board again considered the relevant legislation which is similar to Section 10(2)(e) of the *Act* and stated at paragraph 37:

The Union alleges that the Employer breached Sections 6(3)(d), 9 and 68(3) of the Code by intimidating and coercing employees when it made these inquiries. The Board's determination of whether action amounts to intimidation and coercion is done on an objective basis. The question is whether a reasonable employee would have felt unfairly forceful pressure or thought if they did not act in the manner expected by the Employer there would be adverse consequences.

89. There is evidence before the Board that both Ross and King did engage in the following conduct: having employees sign the petition at the work place, suggesting that they just “sign it and it would be explained later”, advising that at least 75% of the employees had already signed the petition, and promising better benefits without the Union. There is also evidence before the Board by Jessica Byrne and by Jessica Lea that neither of them felt threatened, coerced or intimidated by Ross or King. Each stated that she had simply had a change of heart after signing the petition. While the conduct noted was certainly of a sufficient degree to challenge the true intention of employees in the signing of the petition to revoke the certificate, the question is whether any of those specific actions, individually or collectively, were of such a degree as to constitute coercion or intimidation. The Board can find no evidence of a threats made by either Ross or King. Further, in assessing the conduct of Ross and King, and applying the test objectively, the Board is of the view that a reasonable employee would not mistake comments such as “just sign it and I will explain it later”, or “75% have already signed up” or “vacation pay will be better” to be threats. There was no evidence before the Board that either Ross or King had made a threat of any adverse consequences if the employee did not sign the petition. Further, the Union argued that Ross held a position of influence in the Lodge because of his seniority and friendship with MacKenzie. However, the Board does not find sufficient evidence before us to make such a finding. The evidence before the Board is not overwhelming in this regard, and in fact, Union witnesses testified that he did not enjoy any special relationship with MacKenzie. Accordingly, the Board finds there is insufficient evidence to make a finding of an unfair labour practice contrary to section 10(2)(e) of the *Act* against Ross, as well as insufficient evidence to make a finding of an unfair labour practice contrary to section 10(2)(e) of the *Act* against King.

Unfair Labour Practice Complaint against Selkirk Enterprises dba as Dr. John M. Gillis Memorial Lodge

90. With respect to the third matter before the Board, the allegations of unfair labour practice against the Employer, the Union alleges that the Employer violated Section 10(1) (a), (b), and (c) of the *Act*, and stated in paragraph 4 of the Complaint as follows:

The employer hired a labour relations expert who presented information to employees intended to coerce them in exercising union rights; 2. The employer tried to influence employees in their selection of a union; 3. The employer sought to change a condition of employment of certain employees, asking them to move from permanent to casual status.

Following the filing of the union Complaint on March 24, 2014, and pursuant to Section 11 of the *Act*, the Chief Executive Officer inquired into the Complaint and endeavoured to affect a settlement. The Chief Executive Officer filed his report to the Board advising that he was unable to affect a settlement of the matter complained of. The matter was then set down before the Board to conduct a Hearing.

91. Affidavits of Rebecca Murdoch and Wendy McKeeman were filed in support of the Unfair Labour practice complaint. Paragraph 10 of the Affidavit of Rebecca Murdoch states:

10. Subsequent to this, Douglas MacKenzie called a staff meeting for March 12, 2014 and I attended. At this meeting, Douglas MacKenzie briefly alluded to conflict in the workplace arising from the Application of Cindy King and Gary Ross and that he had posted a notice as directed by the Labour Relations Board. He then directed remarks to "employees that are in the Union" and outlined a comparison of vacation pay packages between the provisions currently in the Collective Agreement and some other "policy" if there was no union. He indicated that the vacation pay would be better without the Collective Agreement but his explanation did not make sense. However, given that he is aware of some employees seeking to de-certify the workplace, I believe that he was attempting to interfere with employees' selection of having a union and with the Union's representation of our bargaining unit.

92. The affidavit of Wendy McKeeman filed in support of the Unfair Labour Practice complaint contains the following:

6. It came to my attention that a staff meeting was being called for January 25, 2014 for unionized workers at the Lodge for a presentation from a purported expert on Labour Relations from Newfoundland named Robert Canoe.[Giannou] The meeting was optional but I decided to attend because I thought it was strange that someone from Newfoundland with no first hand knowledge would be brought in to provide education on our collective agreement. I also heard that he was a friend of the Lodge's office manager, Darlene Compton.

7. At the meeting of January 25, 2014, Robert Canoe [Giannou] provided no information or education about the Collective Agreement. Instead, he reviewed a number of aspects of our employee pay stubs and provided a lot of commentary about how costly employee benefits such as sick days and vacation days were to the Employer, Douglas MacKenzie. I believe the employer called this meeting and hired Robert Canoe [Giannou] to deliver a message that would interfere with the employees accessing benefits such as sick days and to interfere with any future bargaining for improved benefits.

8. *I have direct knowledge of at least two employees to whom Douglas MacKenzie made the suggestion to change their employment status from permanent to casual and I believe he did this due to their membership in the union.*

93. The reply filed by the Employer/MacKenzie to the unfair labour practice complaint states, in part, as follows:

3. *The Respondent is a director and shareholder of the corporation. (Selkirk Enterprises Ltd.).*

6. *The Respondent denies that hiring a labour consultant would be a violation of the Labour Act.*

7. *At a staff meeting held on or about December 11, 2013, there was discussion about the Collective Agreement and about staff knowledge of its terms and conditions. Wendy McKeeman, shop steward, suggested that it was not only the Applicant Union's Responsibility to inform staff about the terms and conditions of the agreement but rather it was a mutual responsibility involving the employer. It was determined that the employer had some obligation to educate its staff on the agreement, The Respondent states that the corporate employer has previously offered to host seminars conducted by the Applicant Union.*

8. *Flowing from this meeting a third party was retained by the corporate employer for the purposes of providing a seminar on the Collective Agreement. The Respondent states that this was done in conjunction with the Applicant Union's request for the employer to participate in educating staff on the Collective Agreement.*

9. *The Respondent denies that the employer coerced or intended to coerce employees by the retention of a labour consultant. It is noted that the Applicant's evidence indicates that attendance at the meeting with the labour consultant was optional. The Respondent states that attendance at the meeting was low, approximately three to five unionized staff numbers.*

10. *The Respondent states that the labour consultant also presented a seminar to non-unionized employees as well.*

14. *The Respondent states that neither he nor the corporate employer has offered incentives to any person or employee in connection to Mr. Gary Ross's and Ms. Cindy King's application for decertification.*

15. *The Respondent states that at a staff meeting, as a representative of management and not in his personal capacity, he presented an outline of benefits for non-unionized staff. This benefit package has been in place for approximately 25 years. This was done as the corporate employer had been informed that unionized staff were spreading misinformation about these benefits to the non-unionized staff. The corporate employer did speak to a non-unionized employee and the employee did indicate there was some confusion about these benefits. The corporate employer merely provided clarification to a segment of employees. There has been no increase or change in these benefits to non-unionized staff-the discussion at the meeting was merely for clarification as*

there was some confusion as to the scope of the benefits and their implementation. This is no way connected to any Labour Relations Board applications. The Respondent states that the corporate employer was and is continuing to manage its affairs in the normal course.

94. The relevant provision of the *Act* states:

10. (1) No employer, employers' organization or an agent or any other person acting on behalf of an employer or employers' organization shall

(a) interfere with, restrain or coerce an employee in the exercise of any right conferred by this Act;

(b) participate or interfere with the formation, selection or administration of a trade union or other labour organization or the representation of employees by a trade union or other labour organization; or contribute financial or other support to such trade union or labour organization;

(c) suspend, transfer, refuse to transfer, lay-off, discharge, or change the status of an employee or alter any term or condition of employment, or use coercion, intimidation, threats or undue influence, or otherwise discriminate against any employee in regard to employment or any term or condition of employment, because the employee is a member or officer of a trade union or has applied for membership in a trade union;

95. With respect to the first allegation of unfair labour practice by the Employer, namely that it did hire a labour relations expert who was intended to coerce employees about their choice of union, Wendy McKeeman testified that she had commented to MacKenzie at a labour management meeting in January 2014 that it was the employer's responsibility to bring someone in to help explain the collective agreement. The evidence before the Board is that the Employer did arrange for an employee meeting with a labour consultant named Robert Giannou, who was someone known to the office manager, Darlene Compton. Mr. Giannou did host a meeting for employees, at which time he discussed the terms of the collective agreement. The Board heard evidence from Wendy McKeeman as well as Rebecca Murdock that this meeting was not mandatory, and very few employees attended. Ms. McKeeman testified that she attended the meeting, and "*quickly learned that the meeting was about how unions cause hardship for employers*". She stated that Mr. Giannou said negative things that had nothing to do with explaining the collective agreement, and she felt the message was a "*pity party for the employer*". Under cross examination, Ms. McKeeman was asked if Mr. Giannou spoke about Union members' rights under the collective agreement. Her reply was that it was possible that

Mr. Giannou did explain the terms of the collective agreement, stating *“I’m not saying it didn’t happen, just saying I don’t recall”*.

96. Jennifer Penny testified on behalf of the Employer, and stated that she has worked at the Lodge for over seventeen years, and has been the Director of Nursing for the past six years. She was present at the meeting with Mr. Giannou. She stated that there were only twelve to fifteen people there. She recalled Wendy McKeeman and Marlaine Gillis were at the meeting. She testified that the meeting was very informal, and that Mr. Giannou went through each topic in the collective agreement and spoke to what each topic was about. She advised there was an opportunity to ask questions, but not many were asked. She stated that Wendy McKeeman asked the most questions. She also testified that it was not a mandatory meeting.

97. With respect to the second allegation, the Union argued that the Employer did not want the Union and engaged in several actions that support this allegation. One of the allegations is that the Employer failed to uphold a provision of the Collective Agreement. The allegation was that the Employer did not pay out vacation pay as was required pursuant to the terms of the Collective Agreement. The Board heard testimony from Marlaine Gillis, a resident care worker at the Lodge for fifteen years, who testified that prior to the Collective Agreement coming into effect, it had been the practice of the Employer to pay out vacation pay by December 17th, and employees came to consider this as a Christmas bonus, relying on it for the Christmas season.

98. Wendy McKeeman also testified that employees were upset when vacation pay wasn’t paid out in mid December. Under cross examination, she did testify that the vacation pay was paid out with the last pay of the 2013 year. She also agreed that this was not a violation of the terms of the Collective Agreement, that vacation pay was paid out as required, just later than it had been in the past. When questioned on cross examination, she acknowledged that she was not aware that a number of employees had asked to receive their vacation pay early, and that the Employer had paid it out to those who had requested. Brenda MacPherson was also questioned about the payment of vacation pay. She also testified that some employees were upset that vacation pay was paid out later than it had been in the past. On cross examination, she testified that she was aware that an employee could request to have vacation pay paid out earlier. She also acknowledged that she had not been aware that a number of employees had requested and had received their vacation pay in November and early December of 2013.

99. Wendy McKeeman testified that it was her feeling that MacKenzie really didn’t want a union at the workplace and she felt he didn’t uphold the terms of the Collective Agreement. When asked why she had this opinion, she stated *“different things that were said”*, but could not provide specific examples. On cross examination, she

testified that she had never heard MacKenzie state that he did not want a union. She also agreed that the Employer does follow most of the terms of the Collective Agreement. She acknowledged that there is a grievance procedure in the Collective Agreement, and that there have been several grievances filed. She also acknowledged that the Employer does respect the process and any outcome determined from a grievance. She also acknowledged that the Employer follows the provisions regarding sick leave in the Collective Agreement.

100. The Union also alleged that the presence of MacKenzie at the ratification meeting held in February 2012 was suggestive of the Employer's disrespect for the Union as well as MacKenzie's friendship with Ross. Andrew Jack was called on behalf of the Union and testified about his involvement with the Lodge. He testified that he is a Labour Relations Officer employed by the Union and in that capacity was tasked with negotiating the Collective Agreement. He testified that at the ratification meeting, there were between twenty and thirty people present. He stated that he recalled seeing MacKenzie and Ross enter the meeting room together. He stated that it appeared the two had attended the meeting together, and that he was surprised to see a management representative of the Employer at the meeting as in his view this was not appropriate. He testified that he and another Union representative spoke to MacKenzie and asked him to leave. He stated that Ross voiced his objection to MacKenzie being asked to leave. Mr. Jack stated "I figured that whatever we said about the Collective Agreement would get back to the Employer."

101. On cross examination, Andrew Jack confirmed that when MacKenzie was asked to leave, he did and that in doing so, MacKenzie was polite and respectful. He agreed that MacKenzie had not been rude or intimidating to him in any way. He further agreed that he could not say for certain that Ross and MacKenzie had arrived in the same car, but only that they had entered the meeting room at the same time. Both Wendy McKeeman and Rebecca Murdock also testified that MacKenzie was asked to leave as it was explained to him that it was improper for him to be present, and once asked to leave, MacKenzie did so. Ross stayed at the meeting for part of it, and then left on his own. Brenda MacPherson was also asked about the ratification meeting. She recalled that Ross and MacKenzie were there. She stated she didn't know if they came to the meeting together. She testified that they left the meeting separately.

102. The Union also presented evidence about a meeting that was to occur between the Union representatives and management. Troy Warren testified for the Union. He stated that he has been employed by the Union as a labour relations officer for the past five years. He recalled attending a meeting at the Lodge that had been set up between Union members and management in early February 2014, and that the meeting had been

called at the request of the Union. He testified that the purpose of the meeting was to address a number of concerns regarding the treatment of Union members by management. He indicated that the Union had been made aware that Ross was circulating a petition, and the Union felt this was poisoning the workplace and the Union was concerned that employees who were trying to defend themselves against Ross's behaviour were being disciplined by management. It was agreed that a further meeting would be scheduled to discuss the concerns with the employees affected. The difficulty was that in the attempt to hold the meeting it had to be rescheduled on at least two occasions, once because of weather and once because no one from the Union was available to attend.

103. Brenda MacPherson testified that the Employer had rescheduled the meeting to April 3, 2014, as the Employer was anxious to have the matters discussed. Ms. MacPherson also testified that she refused to attend the meeting without a Union representative being present. She advised that she, Marlaine Gillis and Rebecca Murdock were disciplined for their failure to attend the meeting. This was also presented by the Union as suggestive of the Employer's anti-union attitude. The discipline was subsequently grieved by all three employees, and a copy of the grievance was filed as Exhibit R-11. However, a determination of the issues raised and the outcome of the grievance itself is not before this Board.

104. The Union also presented a copy of the minutes that were taken at the March 12, 2014 staff meeting which is referenced in the Affidavit of Rebecca Murdock. This was marked Exhibit R-13. The comments made under the section titled "Union" were reviewed. That section states, in part:

Douglas commented that we are under an application to decertify with the union at the moment. The decision should be your [sic] and Douglas and the Union should not be involved.

105. Counsel for the Union suggested that these minutes were a statement that MacKenzie was involved in the application to decertify. Rebecca Murdock testified that she was at the meeting. Her opinion was that MacKenzie had commented that the Union should not be involved in whether or not the employees remained unionized, that it was between the employees and the Employer. On cross examination, Ms. Murdock agreed that the minutes were not typed verbatim, and that someone had taken notes which were typed up some time after the meeting. She also agreed that it was possible that the minutes were not accurate. Her response was "*they are kind of, but not exact*".

106. During her testimony, Jennifer Penny was asked about the reference in the

minutes of the meeting. She stated that she was at the meeting on March 12, 2014. She advised that Cathy, a staff person, takes notes at the meeting and the notes are typed up a couple of days later. She also testified that she recalled MacKenzie saying that the Union decertification issue was up to the staff, that neither the Union nor the Lodge should be involved. She testified that the notes were to be read as meaning that Douglas stated he was not to be involved. Upon review of the minutes, the Board is of the view that the minutes are clearly not typed verbatim. They could be interpreted either way, but the verbal testimony of Jennifer Penny was not contradicted, and Rebecca Murdock's testimony was more vague on this point.

107. There was also evidence presented to the Board that there have been several grievances filed which allege that the Employer has violated provisions of the Collective Agreement. As noted earlier, the substance of any grievances along with any consequent decisions are not for the Board to decide at this hearing. The Board finds that the mere existence of a grievance is not sufficient to make a finding of unfair labour practice by the Employer.

108. The third allegation contained in the unfair labour practice complaint stated that the Employer had attempted to change conditions of work for two employees. The Board heard evidence from Rebecca Murdock that after the certification of the Union, the Employer changed the shift schedules, so that everyone had to take a "line" (shift) that included a night shift. The allegation made against the Employer is that MacKenzie approached two employees, Betty Boudreault and Florence MacDonald to suggest they change their status from permanent to casual.

109. The Board heard testimony from witnesses who spoke to the allegations regarding the actions of MacKenzie. Rebecca Murdoch testified that she challenged MacKenzie at the staff meeting in March 2014 where she questioned MacKenzie about his attempt to change the work terms of Betty Boudreault and Florence MacDonald. Ms. Murdoch testified that she felt this was a change in work terms and amounted to an unfair labour practice. Specifically, the affidavit she swore in support of the Unfair Labour Practice Complaint states, at paragraph 11:

Additionally, at the staff meeting on March 12, 2014, Douglas MacKenzie referred to allegations that he had suggested to certain staff members that they should move from permanent positions to casual work at the Lodge. He denied these allegations and I challenged him verbally on that issue at the meeting. A number of employees have been asked to move from permanent positions to casual work ostensibly in order to avoid working night shifts. This would amount to a drastic change in a condition of employment for these employees.

12. I have direct knowledge of at least two employees to whom Douglas MacKenzie made the suggestion to change their employment status from permanent to casual and I believe he did this due to their membership in the Union.

110. Rebecca Murdock, in her oral testimony, stated that she was in fact only aware of the two employees, Betty Boudreault and Florence MacDonald, having been approached by MacKenzie.

111. Betty Boudreault was called by the Union and testified that she has been employed at the Lodge as a Resident Care Worker for seventeen years. She testified that MacKenzie had asked she and Florence MacDonald to meet with him in February 2014. She testified that MacKenzie explained that he wanted to give Florence and Betty the choice to take a casual position which would allow them to avoid a night shift. She testified that he had advised them that if they wanted to do this, they could reapply for a permanent position on the next vacancy. During cross examination, she testified that during the meeting MacKenzie was not disrespectful or angry or upset with either of them. She also testified that she didn't mind doing a night shift, she continues to be a permanent employee and continues to work her regular rotation which includes a night shift.

112. Jennifer Penny was also asked about the shift changes. She stated that after the Lodge went through an expansion four years ago, there was consideration given to how to change schedules to ensure that better quality of care was available around the clock, and not a situation where just junior employees were on night shifts. She indicated that the discussion about changing shift schedules had been ongoing for some time before the Collective Agreement was implemented. She commented that it was pure coincidence that the timing of the shift schedules was at the time of the Collective Agreement coming into effect.

113. In support of the unfair labour practice complaint, the Union suggested that the meeting with Betty and Florence was proof of the Employer attempting to change the terms of employment. The Board does not find the evidence supports that allegation. The evidence before the Board indicates that MacKenzie was concerned about his senior employees having to start doing night shifts again, and wanted to offer them an alternative. The evidence before the Board is that this was not a decision made unilaterally by the Employer but was an option presented to the two employees, and was not done in a tone of anger or force such that either of those employees might have felt their jobs or seniority were in jeopardy. Clearly, that was not the case as Betty Boudreault continues to work the same position with the same seniority. Florence MacDonald has since retired.

114. Furthermore, employees who are considered casual are entitled to almost all of the same benefits to which a permanent employee is under the provisions of the Collective Agreement (Article 38) and a change from permanent to casual does not result in the employee losing any seniority. The suggestion by Rebecca Murdock, set out in her affidavit in support of the unfair labour practice complaint against the Employer as well as her oral testimony, does not make sense. Even if the two employees had accepted the offer by the Employer which, the evidence shows they did not, their membership in the Union would not have been affected in any meaningful way.

115. Section 8(8) of the *Act* is also relevant to the issue before us. It states:

(8) Nothing in this Part shall be deemed to deprive an employer of his freedom
(a) to express his views on collective bargaining, or the terms and conditions of employment, so long as he does not use coercion, intimidation, threats, or undue influence.

116. In conclusion, and with regard to the first allegation of unfair labour practice complaint against the employer, the Board finds that the hiring of Robert Giannou to speak to employees about the Collective Agreement does not amount to an unfair labour practice. The evidence before the Board is that the Union shop steward (Wendy McKeeman) requested that the Employer bring in someone to address the terms of the collective agreement. It may be that the individual hired would not have been the Union's choice, but that is not sufficient to make a finding of an unfair labour practice complaint against the Employer. The Employer is entitled to continue to make business decisions in the operation of the business. Further, there is no evidence before the Board that any employee was swayed by any comments made by Mr. Giannou, the meeting was not mandatory, and few employees attended, and the terms of the Collective Agreement were discussed.

117. The second allegation of an unfair labour practice complaint is that the Employer attempted to coerce employees in their choice of a union. This is a vague allegation. The Union's position is that the totality of the behaviour of the Employer amounts to an unfair labour practice. Counsel for the Employer argued the converse. As outlined above, there are several specific instances alleged to show anti-union animus on the part of the Employer. Specifically, regarding MacKenzie's attendance at the meeting, the Board is of the view that MacKenzie may not have realized it was imprudent to be in attendance. This was the first time this Employer had undergone unionization. It is fair to assume he may not have been aware of the various expectations. The evidence is that MacKenzie left the meeting when asked to do so, and was polite and respectful to

everyone. Accordingly, this is not sufficient to make a finding of anti-union animus to a degree that the Employer is guilty of an unfair labour practice.

118. The allegation that the Employer changed the shift schedule to discourage Union involvement is not supported by the evidence before the Board. There is an alternative explanation which was uncontradicted, that the Employer had been considering changes to shift schedules prior to unionization to improve service delivery at the Lodge, and that the shift changes were required to ensure adequate service available on all shifts. Accordingly, the Board does not find this to be evidence of anti-union animus.

119. The Union also alleged that the Employer exhibited anti-union animus in its dealings with Florence MacDonald and Betty Boudreault. There is no evidence that the conversation the Employer had with these two employees was intended to discourage Union involvement or constituted any threat, intimidation, coercion or undue influence. In fact, the employees' benefits in the Union would have continued even with the change in employment status from permanent to casual.

120. In closing argument, counsel for the Union suggested that the Employer had undertaken a campaign in the community to discredit the Union by soliciting the letters that were sent to the Board. As stated earlier in this decision, the letters arrived at the Board office at various times over the course of the summer of 2014, when the labour unrest was well known in the community. There is no evidence before the Board whether the letters were solicited by any one person, other than the testimony of Jim Kinnee who testified that he wrote the letter of his own volition because he was concerned for his community. The Board has placed no weight on any of the letters in reaching its decision.

121. It might be said that the Employer was challenged by the presence of the Union at the work place and had to make changes to adapt to the presence of the Union. However, that is not sufficient to make a finding that the Employer was attempting to coerce employees in their choice of a union. It might also be said that the Union was engaging in a strong campaign once it became aware of the petition to revoke the certification to solicit support, and to perhaps challenge the Employer at every turn.

122. The Board notes of the decision in *International Union of Operating Engineers, Local 942 and the Prince Edward Island Department of Health*, 2006 PEILRB 06-035. The issue in that case was an unfair labour practice complaint filed by the Union against the Employer alleging anti-union animus by the Employer in its

dealings with the Union. While the facts were not similar, the overall finding is reflective of the Board's finding herein. The Board stated on page 7:

Although there are sufficient elements in the actions of the employer to amount to justification for the leveling of allegations of unfair labour practices against it, the Board's appreciation of the evidence offered by way of explanation of those actions, the demeanor of the witnesses on these specific matters and the overall nature of how these events have unfolded, have all led to the Board being unable to find that there truly existed an "anti-union animus" on the part of this employer.

123. With respect to the third allegation that the Employer did attempt to change the terms of employment, the Board does not find on the evidence that the Employer engaged in an unfair labour practice by asking two senior employees if they would like to consider switching from permanent to casual so that they might be able to avoid having to work night shifts.

124. As a general comment, the Board notes that it had concerns with both the affidavit evidence and oral testimony given by Rebecca Murdock and Wendy McKeeman. It was apparent to the Board that their evidence was the product of events having been perceived through a strong pro-union lens. As a result, the Board found that their testimony frequently contained biased opinion and speculation, and to that extent it was often unreliable.

Conclusion

125. For all of the above reasons, the Board finds that there is evidence that the employees' wishes could not be fairly ascertained and the application for revocation of the certification order is therefore dismissed. The Board finds that the actions of King do not support a finding of an unfair labour practice complaint. The Board finds that the actions of Ross do not support a finding of an unfair labour practice complaint. The Board finds insufficient evidence to support a finding of an unfair labour practice complaint against the Employer.

126. Union counsel requested the Board impose a time bar of twelve months on any further application for revocation of the certification of the Union as the collective bargaining agent. Section 13(7) of the *Act* states:

13(7) If the board is not satisfied that the applicant trade union is entitled to be certified under this section, it shall dismiss the application and may designate the length of time that must elapse before the same applicant may make a new application.

127. This provision is also applicable to applications to revoke certification orders. Section 20(4) of the *Act* states:

20(4) Sections 12 and 13 apply with the necessary changes to applications under this section. R.S.P.E.I. 1974, Cap. L-1, s.19.

128. The power of the Board to impose a time period in which the Applicants could not bring another application pursuant to Section 20 is discretionary. In *H-Line Enterprises v. International Brotherhood of Electrical Workers, Local 1432* 2014 CanLII 36807 (PEI LRB) the Board had occasion to consider a request for a time bar. The Board made the following comment at page 17:

As the Applicant Employer correctly acknowledged, the issuance of a time bar is an extraordinary remedy. This Board is aware of very few instances where the Board deemed fit to impose a time bar. The issues surrounding the imposition of a time bar were discussed in Public Service Alliance of Canada v. Canadian Corps of Commissionaires PEI LRB 01-012 (2002). The Board commented at page 5 of its decision as follows:

The sole decision of this Board in which the request for this remedy has, to date, been granted in an unfair labour practice complaint is the CAW Canada v. Garden Province Meats (1985) Inc., and UFCW, Local 1252, Intervener decision dated March 1, 1989. That case involved extensive proven instances of intimidation and coercion which were widespread and occurred over an extended period of time and necessitated police authority intervention. The Board in that case granted a six month time bar citing it as an extraordinary remedy.

In every case that comes before it the Board must balance interests and rights, and in most of those cases there are four sets of interests and rights to be balanced with the underlying, paramount intent of promoting harmonious labour relations within the Province. Two of those sets of interests and rights are those of organizations, being the Applicant Union and the Respondent Company/ Employer. The other two sets are individuals' interests and rights, being those of the employees that desire representation and those who do not want representation through collective bargaining. On the basis of these authorities cited and quoted above, this Board is of the opinion that it is quite trite law that the imposition of a time bar is an exercise of a discretionary power that is described and specifically regarded as an "extraordinary remedy". It is a remedy granted only in exceptional circumstances.

The Board has found evidence that some employees who signed the petition were influenced improperly by Ross and King. However, there is evidence that a number of

employees are not content with the status quo. As noted above, the Board must balance interests and rights of the Union, the Employer, the employees who desire union representation and the employees who do not. There is nothing in the matter before us to suggest that this is a situation of “exceptional circumstances” as contemplated by the Board in the *Public Service Alliance of Canada, supra*.

Accordingly, the Board denies the Union’s request for the imposition of a time bar pursuant to section 13(7) of the *Act*.

Nancy Birt, Q.C.
Chair

Judy Hughes
Member

Blair James
Member

This Decision made by the Prince Edward Island Labour Relations Board on the day of March, A.D., 2015, and issued under the hand of its Chief Executive Officer on the day of March, A.D, 2015.

Shawn M. Shea
Chief Executive Officer