ONTARIO LABOUR RELATIONS BOARD

0239-13-R Jonathan Flor, Applicant v. Sheet Metal Workers' & Roofers' Local 30, Responding Party v. **2068553 Ontario Inc. c.o.b. as Ronco Roofing & Sheet Metal,** Intervenor.

BEFORE: Jesse M. Nyman, Vice-Chair.

DECISION OF THE BOARD: September 30, 2013

1. Board File 0239-13-R is an application pursuant to section 63 and/or section 132 of the *Labour Relations Act, 1995*, S. O. 1995, c.1, as amended, (the "Act") filed by the applicant, Mr. Flor, for a declaration that the responding party, Sheet Metal Workers' & Roofers' Local 30 ("Local 30") no longer represents the employees in a bargaining unit of the intervenor, 2068553 Ontario Inc. c.o.b. as Ronco Roofing & Sheet Metal ("Ronco") for which Local 30 is the bargaining agent.

2. By letter dated September 5, 2013, Local 30 requested the Board order Mr. Flor to provide certain particulars and produce certain documents. By decision dated September 6, 2013 the Board granted some of Local 30's requests and denied others. In particular, at paragraphs 3, 6, 7 and 8 of that decision the Board held as follows:

> 3. By letter dated September 5, 2013 Local 30 has requested the Board order Mr. Flor to provide the following particulars and documents:
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> 1) the name and contact information for the Labour Watch representative who allegedly assisted Mr. Flor;
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> 2) any and all documentation Mr. Flor printed from the Labour Watch website and/or was provided by Labour Watch or its representative to assist in filing this termination application;
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> 3) the heading on the list of employees who supported the filing of the termination application filed with the Board with the termination application, with all the employee names and signatures blacked out or otherwise concealed for confidentiality purposes;
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> 4) any agreement, promise, correspondence, letters or other document related in any way to an alleged agreement between Mr. Flor and Ronco that he would forego payment of wages, the reasons for such an agreement, the terms of that agreement, the dates on which the wages should have been paid but were not, and the dates on which he received the overdue wages if any; and

> 5) the applicant's paystubs from Ronco in the period from January 1, 2013 through May 1, 2013.
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> 6. It is not at all clear why the document covered by request number three is arguably relevant to the issue before the Board. Accordingly the Board declines to issue any production order with respect to this request.
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> 7. With respect to the documents covered by requests four and five, at paragraph 34 of the Board's May 30, 2013 decision the Board held as follows:
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> > 34. While the applicant in its reply submissions of May 22, 2013, requested further particulars surrounding the circumstances of the lump sum payment to the applicant, as well as production of the applicant's banking records for the months of March and April 2013, the Board declines to do so. At no time, has the applicant trade union made any allegations that Ronco and/or Cordeiro provided financial support to the applicant in the filing of his termination application. As stated in the Board's decision in this matter, dated April 24, 2013 at paragraph 24, "the Board will rarely make an order for further particulars. It is up to the party pleading its case to set out sufficient detail or suffer the consequences". Even though the Board is not prepared to make an order directing the employer to provide the particulars and production requested by the union, it notes that the employer, in correspondence dated May 29, 2013, has voluntarily provided much of what was asked for by the responding party.
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> 8. Nothing has changed in this regard. At no time has there been any allegation of Ronco providing financial support to Mr. Flor. Given this, it does not appear that the documents covered by requests four and five are arguably relevant to any issue. Rather, it appears Local 30 would like the documents to ascertain if there is any allegation it could make in this regard. This is a classic fishing expedition and therefore the Board declines to order production of these documents: see for example *General Commercial Construction Management Inc.*, 2000 CanLII 7687 and *Westfair Foods Ltd.*, 2005 CanLII 31920.

3. By letter dated September 13, 2013 Local 30 requested reconsideration of paragraphs 3, 6, 7 and 8 of the Board's September 6, 2013 decision. Specifically, Local 30 requests the Board reconsider its decision to the extent that it denied Local 30's production request.

4. Local 30 submits the Board ought to exercise its discretion to reconsider the decision because it asserts it was denied the opportunity to make submissions setting out the basis on which the documents it sought to be produced were arguably relevant. Local 30 asserts that it never understood there was issue as to the arguable relevance of these documents when it made its production request.

5. Local 30 submits that the documents covered by the production request are arguably relevant to the issues in dispute. With respect to the documents concerning the lump sum payment (paragraphs 3(4) and (5) of the Board's September 6, 2013 decision, hereinafter the "Lump Sum documents") Local 30 agrees that it has never asserted or pleaded that Ronco paid Mr. Flor to file this termination application. Local 30 argues however that the Lump Sum documents are arguably relevant to other issues. First, Local 30 asserts that the Board determined at the first day of hearing that the payment of the lump sum was relevant to the issue of why Mr. Flor turned his mind to the filing of the termination application but acknowledged that the Vice-Chair warned the parties that the extent of the evidence on this issue would be determined as the case proceeded. Local 30 asserts that the Board has thus determined the lump sum payment is arguably relevant separately from the fact that it cannot be relied upon to argue that Ronco paid Mr. Flor to bring this application. Local 30 asserts it can therefore inquire about the nature and terms of the agreement between Mr. Flor and Ronco and is entitled to review the Lump Sum documents to make its argument that entering into the agreement to pay the Lump Sum with Ronco was part of the initiation of the application.

6. The applicant also asserts that the Lump Sum documents are arguably relevant to issues of witness credibility because Local 30 is entitled to test the explanation offered by Ronco for the payment.

7. With respect to the heading of the petition, Local 30 asserts that it is relevant to whether Mr. Flor contacted Labour Watch for assistance. Local 30 asserts the Board already determined other Labour Watch materials are relevant to the issues in dispute and submits that therefore the heading of the petition that was filed is relevant.

8. Ronco submits the Board ought not to reconsider its decision and that even if the Board does reconsider its decision the requested documents ought not to be ordered to be produced. Ronco submits the production request is untimely and ought to have been made during the pleadings stage as directed by the Board in a decision dated April 24, 2013 in these proceedings. Ronco maintains that the relevance of the Lump Sum documents has already been determined by the Board in its May 30, 2013 decision. Ronco argues that Local 30's submissions as to why the Lump Sum documents are arguably relevant reinforces the fact that they are requested not to prove anything, but to try to ascertain if there is any allegation to make. Ronco submits the request is therefore a fishing expedition. Ronco also argues that credibility and reliability are not at issue as neither Mr. Flor nor Ronco's principal has given any evidence at this time. Ronco relies on these same arguments as the basis for objecting to the production of the heading of the petition.

9. Mr. Flor objects to the request for reconsideration on the basis that the union is fishing to find a problem.

10. By letter dated September 25, 2013, Local 30 advised the Board and Ronco that it intends to call Mr. Flor and a person whom Local 30 believes performs Ronco's bookkeeping.

11. In reply, Local 30 asserted that it had established a basis for the Board reconsidering the September 6, 2013 decision, reiterating its position that it had been denied an opportunity to make submissions as to the arguable relevance of the requested documentation. Local 30 argued that its request was not untimely and asserted that it is often the case that in the course of testimony documents are referred to that are requested to be produced by a witness. It argued that this request was no different. Local 30 maintained its position that it has already been determined that the Lump Sum payment may be arguably relevant and therefore it is entitled to all of the documentation.

DECISION

12. Even assuming that the Board would exercise its discretion to reconsider the production request, the Board would not reach a different result in this case from the one it reached in its September 6, 2013 decision.

13. At paragraphs 33 and 34 of the Board's May 30, 2013 decision the Board held as follows:

> 33. The Board, however, will allow the allegations that Cordeiro provided Flor with information and assistance in order to complete a termination application as this is a possible inference that could be drawn from the particulars advanced by the responding party concerning how the applicant was able to properly identify the bargaining unit in his termination application without the assistance of the employer, given that unique bargaining unit description was only set out in Minutes of Settlement to which the applicant was not a party. Further, it is a possible inference that could be drawn if Flor and Tiago were paid for 12 hours work, on April 16, 2013, which the union in its reply submissions submits is demonstrated by the timesheets and pay stubs pertaining to that day. As such, the allegation that Cordeiro instructed Flor and Tiago to attend at the union's offices on April 16, 2013 will also be allowed to be pursued as it is a possible inference that could be drawn if these individuals with the knowledge of the employer, did receive paid time off from work to attend the union's offices to apply for membership. It is also a possible inference that could be drawn given the applicant, in his submissions of May 16, 2013, failed to provide any explanation as to how or why he or any other employee of the employer turned their minds to the need to terminate the union's bargaining rights when they did, especially in circumstances where the Confederation Freezers jobsite, was specifically excluded from the application of the union's Provincial Collective Agreement. The particular issues outlined above in this paragraph, however, are the only issues that will proceed to hearing.
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> 34. While the applicant in its reply submissions of May 22, 2013, requested further particulars surrounding the circumstances of the lump sum payment to the applicant, as well as production of the applicant's banking records for the months of March and April 2013, the Board declines to do so. At no time, has the applicant trade union made any allegations that Ronco and/or Cordeiro provided financial support to the applicant in the filing of his termination application. As stated in the Board's decision in this matter, dated

> April 24, 2013 at paragraph 24, "the Board will rarely make an order for further particulars. It is up to the party pleading its case to set out sufficient detail or suffer the consequences". Even though the Board is not prepared to make an order directing the employer to provide the particulars and production requested by the union, it notes that the employer, in correspondence dated May 29, 2013, has voluntarily provided much of what was asked for by the responding party.
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> [emphasis in original]

14. On the first day of hearing Local 30, in its opening statement, made reference to the Lump Sum payment and asserted that Mr. Flor was a vulnerable employee whose employer was withholding one month's pay and whose financial issues were resolved shortly after the instant termination application was filed. It asserted that the withholding of pay was relevant to why Mr. Flor turned his mind to terminating Local 30's bargaining rights. In response, Ronco objected to the Union even raising the Lump Sum payment and asserted the Board had foreclosed the issue entirely in its May 30, 2013 decision. Ronco argued Local 30 could not even ask questions that touched on the Lump Sum payment. In reply, Local 30 agreed that it was precluded from seeking the banking records or particulars concerning the payment but Local 30 believed the fact that Mr. Flor had to wait to be paid was connected to how Mr. Flor came to know about the union. Local 30 argued that while it was not permitted to obtain the records, the May 30, 2013 decision had not precluded it from asking questions around the payment.

15. Following the parties' opening statements, the Board ruled orally that there is a clear issue in this case as to why Mr. Flor turned his mind to terminating the union and that the timing of the payment could be arguably relevant to that issue. The Board therefore ruled that it would not preclude Local 30 from asking questions about the payment before those questions were asked but that any determinations about the propriety of such questions or evidence would be determined as the case proceeded.

16. In this respect Local 30 is simply incorrect when it submits the Board determined that it is free to ask any and all questions about the payment. In particular, the questions Local 30 proposes in its submissions that it will ask about the payments such as "what was the nature of the agreement reached and what were its terms" are questions that are about the payment itself and why it was made as opposed to how the fact of the payment affected or was related to Mr. Flor's decision to file the instant termination application. Such questions are geared towards ascertaining whether there is a *quid pro quo* for the payment, an issue which Local 30 acknowledges is foreclosed from pursuing.

17. In this respect, there is no issue for Local 30 to pursue about why the payment was made. The Board has already determined there is no issue to be pursued or argument to be made that Mr. Flor was paid to bring this application. There are therefore few, if any, questions that can be asked about the terms of the payment that are relevant to the substantive issue before the Board. If Local 30 wants to explore how the fact that Mr. Flor had agreed to the deferral of wages raised the issue of Local 30's bargaining

rights or impacted his decision to bring this application, it will likely be allowed some latitude to do so given that the reason why Mr. Flor turned his mind to bringing this application is a substantive issue before the Board. As the Board ruled orally at the last day of hearing, determinations about the propriety of such questions will be determined in the context of a specific question and as the case proceeds. However, what is not in issue, and what has not been in issue since the May 30, 2013 decision of the Board, is why and on what terms Ronco made the payment it did.

18. Moreover, it is not appropriate to order the documents to be produced for purposes of credibility and reliability. As there is no issue in dispute about the reason for the payment, facts concerning that issue are collateral facts. In Sopinka, Lederman, Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at 16.166 to 16.167 the authors describe the collateral fact rule and the limitations on impeaching the credibility of a witness through issues not in dispute as follows:

> **C. The Collateral Fact Rule**
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> **§16.166** There is a general rule that answers given by a witness to questions put to him or her on cross-examination concerning collateral facts are treated as final, and cannot be contradicted by extrinsic evidence. Without such a rule, there is the danger that litigation will otherwise be prolonged and become sidetracked and involved in numerous subsidiary issues. The rule does permit the use of extrinsic evidence to contradict a witness who has made a statement in cross-examination which is relevant to the substantive issue. However, with respect to questions which are directed solely to impeaching a witness' credibility, the answers must, save for certain common law and statutory exceptions, be accepted as final.[337] McIntyre J., in *Krause v. The Queen,*[338] described collateral matters as being "not determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved for the determination of the case".[339] Difficulties have arisen, however, because of uncertainty as to whether a question merely goes to a collateral issue or whether it goes to a substantive one. Pollock C.B. attempted to articulate the distinction in A.G. v. Hitchcock, [340] as follows:
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> > the test, whether the matter is collateral or not, is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence — if it have such a connection with the issue, that you would be allowed to give it in evidence — then it is a matter on which you may contradict him.
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> **§16.167** The collateral fact rule applies to parties as well as to ordinary witnesses [341] Certain exceptions to the rule have developed. The generally recognized categories are both common law and statutory. They are:
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> > (1) to prove a charge of bias or partiality in favour of the opposite party;
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> > (2) to prove that the witness has previously been convicted of a criminal offence;

> (3) where the proper foundation has been laid, a previous inconsistent statement may be proved to contradict a witness;
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> (4) medical evidence to prove that, by reason of a physical or mental condition, the witness is incapable of telling or unlikely to tell the truth; and
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> (5) independent evidence to prove that an adverse witness has a general reputation for untruthfulness and that the witness testifying to such reputation would not believe the impugned witness under oath.

None of the above exceptions to the collateral fact rule apply in this circumstance. Thus, given that there is no substantive issue before the Board with respect to why the Lump Sum payment was made (or therefore its terms), even if Local 30 is permitted to ask questions about the nature of the arrangement that lead to the Lump Sum payment, Local 30 will be stuck with the answers it gets.

19. The corollary to all of this is that Local 30 has not convinced the Board that the Lump Sum documents are arguably relevant to an issue that is in dispute in this file. Accordingly, the Board declines to order Mr. Flor to produce the Lump Sum documents.

20. Local 30 has also requested that Mr. Flor or the Board produce the heading of the petition that was signed in support of this termination application. Local 30 is incorrect when it argues that the Board has already determined other Labour Watch materials are relevant or that the other parties have not objected to it being produced. In the September 6, 2013 decision the Board held that the materials Mr. Flor downloaded from Labour Watch may be relevant and provided Mr. Flor with an opportunity to object to their production. Mr. Flor chose not to object and provided a website address where the forms could be located. He did however take the position that Local 30 is looking for a problem or essentially engaging in a fishing expedition. Ronco objected to the petition's production on the same grounds as it objected to production of the Lump Sum documents.

21. While Local 30 has pleaded that Ronco assisted and initiated this application by providing Mr. Flor with a copy of the Minutes of Settlement entered into by Ronco and Local 30, Local 30 has never pleaded or otherwise alleged that Mr. Flor did not also contact Labour Watch. There is therefore no issue to pursue or allegation to be proven by producing the heading of the petition. Rather Local 30 is simply seeking a copy of the petition to determine if in fact there is an allegation to be made about it. This is a fishing expedition. Moreover, as with the Lump Sum documents, the sufficiency of the petition is not a substantive issue before the Board and thus attempts by Local 30 to contradict Mr. Flor's answers to where he obtained the petition form through other evidence are barred by the collateral fact rule.

22. For the foregoing reasons the Board declines to order Mr. Flor to produce the documents covered by paragraph 3(3), (4) and (5) of the Board's September 6, 2013

decision. In light of this determination there is no need for the Board to consider whether it would exercise its discretion to reconsider the September 6, 2013 decision because even if it did, the result would be the same.

"Jesse M. Nyman"
for the Board

ONTARIO LABOUR RELATIONS BOARD

0239-13-R Jonathan Flor, Applicant v. Sheet Metal Workers' & Roofers' Local 30, Responding Party v. **2068553 Ontario Inc. c.o.b. as Ronco Roofing & Sheet Metal,** Intervenor.

BEFORE: Jesse M. Nyman, Vice-Chair.

DECISION OF THE BOARD: September 6, 2013

1. Board File 0239-13-R is an application pursuant section 63 and/or section 132 of the *Labour Relations Act, 1995*, S. O. 1995, c.1, as amended, (the "Act") for a declaration that the responding party, Sheet Metal Workers' & Roofers' Local 30 ("Local 30") no longer represents the employees in a bargaining unit of the intervenor, 2068553 Ontario Inc. c.o.b. as Ronco Roofing & Sheet Metal ("Ronco") for which Local 30 is the bargaining agent.

2. By decision dated May 30, 2013 the Board dismissed all of the outstanding issues in this proceeding except for Local 30's allegation that the application was initiated by Ronco and ought to be dismissed pursuant to section 63(16). A first day of hearing was held on June 20, 2013. The matter is scheduled to continue on October 7 and 9, 2013.

3. By letter dated September 5, 2013 Local 30 has requested the Board order Mr. Flor to provide the following particulars and documents:

> 1) the name and contact information for the Labour Watch representative who allegedly assisted Mr. Flor;
>
> 2) any and all documentation Mr. Flor printed from the Labour Watch website and/or was provided by Labour Watch or its representative to assist in filing this termination application;
>
> 3) the heading on the list of employees who supported the filing of the termination application filed with the Board with the termination application, with all the employee names and signatures blacked out or otherwise concealed for confidentiality purposes;
>
> 4) any agreement, promise, correspondence, letters or other document related in any way to an alleged agreement between Mr. Flor and Ronco that he would forego payment of wages, the reasons for such an agreement, the terms of

> that agreement, the dates on which the wages should have been paid but were not, and the dates on which he received the overdue wages if any; and,
>
> 5) the applicant's paystubs from Ronco in the period from January 1, 2013 through May 1, 2013.

4. Local 30's letter advises the Board that Local 30 has written to Mr. Flor on two occasions seeking these particulars and documents but has received no response. Despite Local 30's letter indicating copies of this correspondence to Mr. Flor were enclosed with its letter to the Board, it appears they inadvertently were not.

5. It is well-established that the test for the pre-hearing production of documents is that the documents sought must appear to meet the standard of arguable relevance: see *Mollenhauer Limited*, [1987] OLRB Rep. Sept. 1156; *Dinnerex Incorporated*, [1985] OLRB Rep. March 398; *Shaw-Almex Industries Limited*, [1984] OLRB Rep. April 659. It appears to the Board that the particulars covered by request number one and the documents covered by request number two may be arguably relevant to the issue currently before the Board. If he does not object to so doing, Mr. Flor is directed to provide these particulars and documentation to Local 30 on or before September 17, 2013. If Mr. Flor objects to providing these particulars and/or producing these documents, he must file submissions in support of that objection with the Board by September 17, 2013. Should any such submissions be received, Ronco and Local 30 shall file any submissions they wish to make with respect to Local 30's production request and Mr. Flor's objection on or before September 23, 2013. In the event of an objection, Mr. Flor ought to be prepared to provide the particulars and/or produce the documents immediately if directed to do so by the Board.

6. It is not at all clear why the document covered by request number three is arguably relevant to the issue before the Board. Accordingly the Board declines to issue any production order with respect to this request.

7. With respect to the documents covered by requests four and five, at paragraph 34 of the Board's May 30, 2013 decision the Board held as follows:

> 34. While the applicant in its reply submissions of May 22, 2013, requested further particulars surrounding the circumstances of the lump sum payment to the applicant, as well as production of the applicant's banking records for the months of March and April 2013, the Board declines to do so. At no time, has the applicant trade union made any allegations that Ronco and/or Cordeiro provided financial support to the applicant in the filing of his termination application. As stated in the Board's decision in this matter, dated April 24, 2013 at paragraph 24, "the Board will rarely make an order for further particulars. It is up to the party pleading its case to set out sufficient detail or suffer the consequences". Even though the Board is not prepared to make an order directing the employer to provide the particulars and production requested by the union, it notes that the

> employer, in correspondence dated May 29, 2013, has voluntarily provided much of what was asked for by the responding party.

8. Nothing has changed in this regard. At no time has there been any allegation of Ronco providing financial support to Mr. Flor. Given this, it does not appear that the documents covered by requests four and five are arguably relevant to any issue. Rather, it appears Local 30 would like the documents to ascertain if there is any allegation it could make in this regard. This is a classic fishing expedition and therefore the Board declines to order production of these documents: see for example *General Commercial Construction Management Inc*., 2000 CanLII 7687 and *Westfair Foods Ltd*., 2005 CanLII 31920.

36. I am seized of this proceeding.

"Jesse M. Nyman"
for the Board

ONTARIO LABOUR RELATIONS BOARD

0239-13-R Jonathan Flor, Applicant v. Sheet Metal Workers' International Association, Local 30, Responding Party v. **2068553 Ontario Inc. c.o.b. as Ronco Roofing & Sheet Metal,** Intervenor.

BEFORE: Jesse M. Nyman, Vice-Chair.

APPEARANCES: Jonathan Flor appearing for himself; Elizabeth Mitchell, Stoney Baker and Lea West appearing for Sheet Metal Workers' & Roofers' Local 30; Adrian Jakibchuk, Patrick Ganley, Carolyn Savoury and Armenio Cordeiro appearing for 2068553 Ontario Inc. c.o.b. as Ronco Roofing & Sheet Metal.

DECISION OF THE BOARD: October 29, 2013

INTRODUCTION

1. This is an application pursuant to section 63 and/or section 132 of the *Labour Relations Act, 1995*, S. O. 1995, c.1, as amended, (the "Act") filed by the applicant, Mr. Flor, for a declaration that the responding party, Sheet Metal Workers' International Association, Local 30 ("Local 30") no longer represents the employees in a bargaining unit of the intervenor, 2068553 Ontario Inc. c.o.b. as Ronco Roofing & Sheet Metal ("Ronco") for which Local 30 is the bargaining agent.

2. The correct name of the responding party is Sheet Metal Workers' International Association, Local 30. The style of cause is hereby amended accordingly.

3. By decision dated April 24, 2013 the Board, differently constituted, determined that this application was timely and directed a representation vote. That vote was held on April 26, 2013. In accordance with the Board's April 24, 2013 decision, the ballot box was sealed. It remains sealed.

4. By decision dated May 30, 2013, the Board, differently constituted, determined that the only outstanding issue in this matter is whether the application ought to be dismissed because Ronco initiated the application within the meaning of section 63(16) of the Act. The Board also determined that Local 30 would proceed first with its evidence on this issue.

5. Hearings in this matter were held on June 20, and October 7 and 9, 2013. At the outset of the hearings, Local 30 brought a motion to vary the order of proceeding as determined by the Board in its May 30, 2013 decision and have the applicant proceed first. The Board ruled, orally, at the hearing that it would not vary the order of

proceeding. Thereafter Local 30 called its evidence. At the conclusion of Local 30's case Mr. Flor advised the Board that he had no evidence he wished to call. Thereafter Ronco brought a motion for non-suit without being put to its election. Specifically, Ronco asserted that Local 30 had not established, through its evidence, any basis on which the Board could conclude Ronco had initiated the application within the meaning of section 63(16) of the Act. Local 30 did not object to Ronco's ability to bring such a motion.

6. The Board finds that Local 30 has not, taking its evidence at its highest, established that the application was initiated by Ronco. These are the Board's reasons.

THE FACTS

7. Local 30 called three witnesses. Mr. Glenn Jewer, an organizer for Local 30, Mr. Joe Manso, Local 30's Business Manager, and Mr. Flor. I found that all three witnesses testified in a forthright and honest manner and on the basis of their best recollection of the events about which they were questioned.

8. In November, 2009 Local 30 filed an application seeking a declaration from the Board pursuant to sections 1(4) and 69 of the Act that Ronco was bound to the Sheet Metal Workers' Provincial Collective Agreement (the "Collective Agreement") as either a successor employer to one of several companies that had been run by the father of Mr. Armenio Cordeiro, Ronco's principal, and which were bound to the Sheet Metal Workers, or as a related employer with those other companies. That proceeding was eventually resolved on October 19, 2012 when Ronco and Local 30 entered into Minutes of Settlement.

9. Pursuant to the Minutes of Settlement, Ronco recognized Local 30 as the exclusive bargaining agent for the following bargaining unit:

> all employees engaged in, but not limited to, the application of roofing, damp proofing, and waterproofing material of any description whatsoever, in all sectors of the construction industry and non-construction industry work throughout the Province of Ontario .

10. The Minutes of Settlement thereby bound Ronco to the Collective Agreement but also provided that Local 30 would not enforce the Collective Agreement until July 1, 2013.

11. Mr. Flor has known Mr. Cordeiro since high school and started working for him as a labourer in 2006 after he finished high school. Mr. Flor testified that over the years he has learned the roofing trade from Mr. Cordeiro and had been working as a foreman since approximately 2011. In that capacity, Mr. Flor has generally been responsible for working in and overseeing a crew that consists of himself and two other employees, Mr. Tiago Oliveira ("Tiago") and Mr. Aldino Oliveira ("Aldino").

12. Mr. Flor testified that he was aware of Local 30's application pursuant to sections 1(4) and 69 of the Act to the extent he knew there was an ongoing proceeding and that it involved the union. Mr. Flor believed Mr. Cordeiro was stressed at the time about Local 30's application but Mr. Cordeiro did not discuss the details of the application with Mr. Flor and Mr. Flor did not ask.

13. In late October or November, 2012 Mr. Cordeiro met with Mr. Flor, Tiago and Aldino and told them that they would have to join the union because of what had happened 'in court'. The employees were told they would have to join by July 1, 2013.

14. Mr. Flor testified that he was taken aback at the news he would have to join the union. Mr. Flor testified that the employees were not given a copy of the Minutes of Settlement between Ronco and Local 30.

15. Mr. Flor decided he did not want to join the union and discussed his opinion with Aldino and Tiago. Mr. Flor testified that Aldino and Tiago came to the same conclusion. Mr. Cordeiro was not present for these conversations.

16. Mr. Flor was asked why he did not wish to be a member of the union. He answered that when he started working he was aware of the union and had chosen not to become a member. Mr. Flor's view is that he does not need a representative and the less people who have their hands in his money, the better. He was also upset that the union was being forced on him without his having any say in the matter.

17. In or about the end of January, 2013 Mr. Flor asked Mr. Cordeiro if anything had changed with respect to the union. Mr. Cordeiro told Mr. Flor that it was "a done deal" and he would have to become a member of the union by July 1, 2013. In Mr. Flor's opinion, Mr. Cordeiro was not upset or stressed about becoming bound to the union. To the contrary, Mr. Flor's view was that while Mr. Cordeiro had been stressed while Local 30's application pursuant to sections 1(4) and 69 was proceeding, he had now accepted that Ronco was a union company.

18. At that point Mr. Flor began researching what could be done to prevent having to become a member of Local 30. He testified that he began searching on Google "how to get rid of a union" and eventually came across the Labour Watch website. Mr. Flor downloaded and reviewed a package related to decertification in Ontario but concluded it was too complex for him to understand on his own. Therefore, he phoned the Labour Watch toll free help line and left a message with a person whom he believed was the secretary.

19. Mr. Flor received a phone call some time later from David Caine, a consultant with Labour Watch. Mr. Flor believed that Mr. Caine first contacted him in March, 2013. Mr. Caine explained the process of decertification to Mr. Flor and told him that if he wanted to file a decertification application, he had to do so quickly. Mr. Flor understood there was a window that would close in May and that he could not wait until July 1, 2013 to act. Mr. Flor testified that after receiving the first call from Mr. Caine, he was in contact with him by phone every few days up to the application filing date.

20. At some point in late February to mid March 2013 (Mr. Flor was unsure of exactly when) Mr. Cordeiro spoke with Mr. Flor and told him Ronco was experiencing cash flow issues and asked Mr. Flor to defer his wages for a few weeks so Ronco could pay some other bills. Mr. Flor agreed to do so. Mr. Flor testified that he was not worried about being paid as he trusted Mr. Cordeiro and believed he would eventually be paid, even if Mr. Cordeiro had to pay him out of his own pocket. He testified that he agreed to defer his wages because Mr. Cordeiro had helped Mr. Flor in the past, including providing advances. Mr. Flor also explained that he was single and still lived at home with his parents.

21. Mr. Flor was asked if he was concerned that Ronco was not doing well or whether he took Mr. Cordeiro's request to defer the payment of wages as an indication that the company would be better off if it did not pay union rates. Mr. Cordeiro said that he just believed "cash was tight" and that he never considered the impact of union rates on Ronco.

22. Mr. Caine told Mr. Flor that in order to decertify, he would have to become a member of the union or at least make a "valid attempt" to become one. To this end, Mr. Flor along with Tiago and Aldino attended at Local 30's hall on April 16, 2013. Mr. Flor testified that the crew had been sent that morning to Consolidated Freezers to repair part of the roof that was leaking. He testified that it was raining that day and while he would not do new roofing work in the rain, he was expected to attend to repair work immediately.

23. He testified that on April 16, 2013 the crew met at Café Brazil at approximately 6:00 a.m., as they did each morning, and drove out to Consolidated Freezers in Brampton. The crew started working at Consolidated Freezers at approximately 7:00 a.m. At that time there was one major leak and several smaller leaks. By approximately 8:30 a.m. the crew had managed to patch up the major leak and three of the smaller leaks and decided the rest of the work could wait until the weather improved. At that point the crew changed out of their work clothes and into their street clothes and drove to the Local 30 hall, which is a little over a half hour away.

24. Mr. Flor testified the crew arrived at the Local 30 hall between approximately 9:00 a.m. and 9:15 a.m. Mr. Jewer testified the crew arrived between 10:00 and 10:30 a.m., but he was not there to greet them and in cross examination conceded that he was not entirely sure when they arrived and it was possible they arrived at the hall between 9:30 a.m. and 10:00 a.m. Mr. Manso testified the crew arrived between 10:30 a.m. and 11:00 a.m. but he did not meet with them until after Mr. Jewer was finished talking with the men. All three men agreed the crew left before lunch, likely around 11:30 a.m.

25. The evidence of Mr. Manso, Mr. Jewer and Mr. Flor was consistent as to what happened at the union hall. The men agreed that this was the first time Mr. Flor met Mr. Jewer and Mr. Manso. After the crew arrived at the Local 30 hall, Mr. Jewer was

called by reception to come meet them and he took them to a back room. There, Mr. Jewer had the men complete some paperwork, including enrolment forms, and then conducted an orientation explaining dues, benefits, pension and wages under the Collective Agreement. Mr. Flor and Tiago filled out the enrolment forms, Aldino declined to do so. After meeting with Mr. Jewer and another roofing representative, the crew met with Mr. Manso. Mr. Manso explained that while the men could fill out the enrolment forms, they would not be taken into the union that day and would not have to pay dues or initiation fees. Mr. Manso explained they would be taken into the union closer to July 1, 2013 once Local 30 received a labour requisition from Ronco. It was also explained that Ronco would not be remitting for the hours they worked prior to July 1, 2013. The meeting then finished and the crew left before lunch, sometime between 11:00 a.m. and 11:30 a.m. Mr. Jewer, Mr. Manso and Mr. Flor all agreed that Local 30 had not provided Mr. Flor with a copy of the Minutes of Settlement between Ronco and Local 30. They also agreed that the crew did not volunteer any information about their current terms and conditions of work or any desire to be non-union.

26. Mr. Flor testified that after leaving the Local 30 hall, the crew got back into the truck and Mr. Flor discovered he had missed two calls from Mr. Cordeiro. Mr. Flor phoned Mr. Cordeiro and was told that there was a major leak at Consolidated Freezers and he needed to gather the crew and head back. Mr. Flor told Mr. Cordeiro that he was still with Tiago and Aldino and that they would head back. Mr. Flor did not tell Mr. Cordeiro that he had taken the crew to the Local 30 hall.

27. Mr. Flor testified that the crew arrived at Confederation Freezers and started working at approximately 12:30 p.m. and that they continued to work for the remainder of the day, until approximately 7:30 p.m.

28. Ronco had, earlier in this proceeding, produced Mr. Flor's pay records for April 16, 2013 and all parties agreed Mr. Flor was paid for 12 hours of work on that day. Mr. Flor was asked how that was possible. Mr. Flor explained that he had worked eight hours on the roof at Confederation Freezers (an hour to an hour and one-half in the morning and six and one-half hours to seven hours in the afternoon after leaving the Local 30 hall). In addition, he explained that they billed for an hour of travel time to and from Confederation Freezers each way for each trip. On April 16, 2013 they made two trips which added up to four additional hours of travel time and a total of twelve hours of work.

29. Mr. Flor was asked why he had not provided this explanation for the 12 hours of pay in his submissions he had filed with the Board. Mr. Flor responded that he did not think he had ever been asked to explain it until he was called to testify.

30. Mr. Caine assisted Mr. Flor in navigating the Board's forms and completing the A-77 application form. Mr. Flor began filing out the A-77 form in the week leading up to the application filing date. Mr. Flor explained that when he was completing the forms Mr. Caine would be on the phone with him and they would navigate the internet

together. Mr. Flor testified that he did not print off copies of what he was looking at, but rather just kept the screens open on his computer.

31. Mr. Flor testified that he obtained the contact information for the union from Local 30's website and produced a copy of the webpage that he viewed. The copy that was produced had been printed on October 7, 2013. Mr. Flor testified that he also needed a contact name for the Local 30 and that Mr. Caine had helped him find another webpage that he had been unable to find and print for the hearing. Mr. Flor could not recall the site that had been viewed but he had put "Audie Murphy" down in his application as the Local 30 contact and included an email address for Mr. Murphy. Mr. Flor did not know who Mr. Murphy was, but believed he was a representative of Local 30.

32. Mr. Murphy was in fact the President of Local 30 from 2006 until he was defeated in an election in June 2012 and replaced by Mr. Jay Peterson. Notwithstanding this, the Local 30 website was not updated until March 13, 2013 to replace Mr. Murphy with Mr. Peterson. Mr. Flor was questioned extensively on where he obtained Mr. Murphy's name. Mr. Flor maintained that he had found it online with Mr. Caine's assistance. Specifically, he had typed something on Google and Mr. Murphy's name came up. While he could not remember precisely what had been typed or what page was viewed, he agreed that he had typed something to the effect of "Who is the president of Sheet Metal Local 30".

33. Local 30 put to Mr. Flor that Mr. Murphy's name did not come up on Google when you type in "Who is the president of Sheet Metal Local 30" or similar searches using similar words. In support of this assertion Local 30 put to Mr. Flor copies of such searches that had been performed on October 7, 2013. Mr. Flor maintained that he had obtained the contact information from the internet and pointed out that the search he did was back in March or April, 2013, not on October 7, 2013. Mr. Flor also testified that he could not recall exactly what sections of the Local 30 website he had reviewed or whether the information that appeared on those pages that was printed on October 7, 2013 was the same as the information when he had viewed the site in March or April, 2013.

34. Mr. Flor testified that when completing the application he did not know what to put in the section that requested the bargaining unit description and so he completed that portion of the application with Mr. Caine's assistance. He said that under Mr. Caine's guidance, they found a copy of the Collective Agreement online at the General Contractors Section of Toronto website and that they took the recognition clause from the Collective Agreement and "smushed it together" with something they found on CanLII. Mr. Flor produced a copy of what he had viewed on CanLII and it was a Board decision indexed as *Tariel Gambarashvili v. Sheet Metal Workers' International Association, Local Union No. 30*, 2010 CanLII 29637. Mr. Flor testified that Mr. Caine told him what to write and that they should be "OK" if they put that in the application.

35. The bargaining unit description that Mr. Flor inserted into his application reads as follows:

> "all employees engaged in, but not limited to, the application of roofing, damp proofing, and waterproofing material of any description whatsoever, in all sectors of the construction industry and non-construction industry; Including commercial, industrial and institutional work throughout the Province of Ontario" .

36. *Gambarashvili*, *supra*, was an application for termination of bargaining rights. The bargaining unit description in that case was described in paragraph 12 of the decision as follows:

> 12. The responding party submitted it is the bargaining agent for both Sheet Metal Workers and their Apprentices and Roofers employed in the industrial, commercial and institutional sector of the construction industry. The employer in its intervention submitted it is bound by collective agreements with the responding party and that the responding holds bargaining rights for employees in the following two units:
>
> > all certified journeymen sheet metal workers, registered apprentices, sheeters, deckers, welders, sheeter's assistants, material handlers and probationary employees in the employ of the employer for all sectors of the construction industry and non-construction industry work throughout the Province of Ontario, and
> >
> > all employees engaged in but not limited to the application of roofing, damp roofing and waterproofing material of any description whatsoever in the employ of the employer for all sectors of the construction industry and non-construction work throughout the Province of Ontario.

37. Finally, Mr. Flor believed that in preparing the application, he had reviewed article 6, Recognition of Jurisdictions, of the Collective Agreement. That article reads:

> "This Agreement covers the rate of pay, rules and working conditions of all Employees engaged in but not limited to, the application and removal of roofing, re-roofing, damproofing and waterproofing on any and all types of structure with materials of the following description when used for roofing re-roofing or in a roofing system, waterproofing or damproofing.
> …
> c) Any and all materials used for damp proofing, waterproofing and/or weatherproofing regardless of location in building system or method of application…."

38. In addition to article 6 of the Collective Agreement, article 4, Recognition by Employer, reads:

> "The employer recognizes the Union as the exclusive bargaining agent for all of their employees performing work covered by the terms and conditions of the Agreement in the commercial, industrial and institutional sectors and new high rise structures in all other sectors, except the work covered in the Collective Agreement of the Electrical Power Systems Construction Association and the Union, of the construction industry in all geographic areas in the Province of Ontario as described in Appendix "A"."

39. Mr. Flor testified that he did not know about the ICI sector or sectors of the construction industry generally and that he had relied entirely on Mr. Caine's assistance in drafting the bargaining unit description. He denied that he had been assisted by anyone else or had seen a copy of the Minutes of Settlement entered into by Ronco and Local 30.

40. Mr. Flor was questioned how he had been able to identify the effective dates of the Collective Agreement in his application, but not the date it was signed. He responded that he guessed he must not have found the paragraph that set out the date it was signed and conceded that it had been a lot of reading for him.

41. Mr. Flor testified that after visiting the Local 30 hall he called Mr. Caine and Mr. Caine told him he had made a valid attempt to join the union. Between April 16 and 19, 2013, Mr. Flor testified that he would work during the day and complete the A-77 and other forms for the decertification package at night. On April 19, 2013 the forms were sitting in his car and so after working at Confederation Freezers with Tiago and Aldino, he decided to file the application.

42. Mr. Flor testified that while some of the wording he had used in his forms and letters to the Board were not perfect, he was not a lawyer and had tried his best to fill out the forms and provide the information requested.

DECISION

43. Pursuant to subsection 63(16) of the Act the Board may dismiss an application to terminate bargaining rights where the Board is satisfied that the employer initiated the application. The parties agreed that the Board's elaboration of the term 'initiation' and description of the inquiry into an allegation under section 63(16) set out in *Bytown Electrical Services Ltd.*, [1996] OLRB Rep. Sept./Oct. 721 ("*Bytown Electrical*") was the appropriate analysis. The relevant paragraphs from *Bytown Electrical*, *supra* are as follows:

> 107. … The current provision is contained in subsection 63(16) of the Act:

> 63. (16) Despite subsections (5) and (14), the Board may dismiss the application if the Board is satisfied that the employer or a person acting on behalf of the employer initiated the application or engaged in threats, coercion or intimidation in connection with the application.

The voluntariness of the petition is no longer the crucial consideration for determining the validity of a petition. Bearing in mind that the union only weakly advanced the contention that Bytown or Mr. Boyd "engaged in threats, coercion or intimidation in connection with the application", the issue [is] to determine whether the decertification application was in fact initiated by the employer or a person acting on behalf of the employer. That is not the same determination as had to be made previously. There has been a shift of *onus*. The union must now establish that the application has been initiated by the employer, rather than the petitioners having the overall burden of proving the voluntariness of their petition. That is not the only difference. The notions of 'voluntariness' and the absence of 'employer initiation' are not necessarily coterminous or coincidental. Furthermore, the point of consideration by the Board is different as between its former determination of 'voluntariness' and its current consideration of the application of section 63(16) of the Act. The inquiry into voluntariness focused upon the circumstances of the signing of a petition, the current inquiry focuses upon the launching of the application. The focus is not restricted to the signing of the petition and includes the bringing of the application. In most cases this will be a distinction without a difference, but in some it may be significant.

108. Under subsection 63(16) of the Act, if a termination application is initiated by the employer, the Board has a discretion to dismiss it. The reason for this provision is that if a decertification application is really caused by or originated by the employer, and it is not primarily the conception of the employees who make the application, then it represents an improper interference by the employer in an area which should properly be within the exclusive terrain of the employees. Initiation involves causing, originating or facilitating, the beginning of a process or event. What meaning should the concept, 'initiation', be given in the context of section 63 of the Act? Plainly if an employer prepares a petition to terminate a union's bargaining rights, summons his/her employees and requires them to sign the petition and then requires an employee to initiate a termination application, the employer initiates the decertification application. But that is an extreme and, hopefully, rare manifestation of improper employer interference in the contemplated process of employees freely deciding of their own initiative that they no longer wish to be represented by a particular, or perhaps any, trade union. Such direct, palpable initiation will in all likelihood be an unusual occurrence. But initiation can also occur indirectly, less palpably than in the example suggested, though no less effectively. There are gradations of employer conduct in relation to a termination application, along a spectrum, part of which will be improper and part of which will be acceptable behaviour. The

> Act determines that when an employer "initiates" a termination application, the Board has a discretion to dismiss the application. There is a continuum of employer conduct, some of which will amount to 'initiation' some of which will not. How then is the distinction to be drawn?
>
> 109. We consider that the proper interpretation of the notion of "initiation" is to determine whether the employer's conduct amounted to significant or influential employer involvement giving rise to the termination application. In other words, if the application is founded in the conduct of the employer, then it can reasonably be concluded that the employer has initiated that application.

44. In addition, this case was argued on the basis of a non-suit motion. All parties agreed that the applicable standard for assessing Local 30's case is that set out in *Residential Roofing Contractors Association of Metroploitan Toronto* (unreported Board File No. 0014-95-R, April 20, 1996) which was recently cited in *Mirtren Construction Ltd.*, [2013] O.L.R.D. No. 3510 as follows:

> 15. In *Residential Roofing Contractors Association of Metropolitan Toronto* (unreported Board File No. 0014-95-R, April 20, 1996), the Board restated that the test which must be met by the moving party in a non-suit motion is as follows:
>
> > In determining a non-suit motion, the standard of proof applied in the courts is that of a *prima facie* case, and not the higher standard of the balance of probabilities. That is, the question on a non-suit motion is whether there is any evidence which, if taken at its highest, establishes or gives rise to a reasonable inference in favour of the party responding to the motion. Any doubts in that respect are to be resolved in favour of the responding party *(Hall* vs. *Pemberton,* (1974) 5 O.R. (2d) 438 (Court of Appeal)). This is consistent with what appeared to be the court's view of how administrative tribunals should handle such motions (*Ontario* vs. *Ontario Public Service Employees Union* reflex, (1990) 37 O.A.C. 218 (Divisional Court)).

45. Local 30 argued that it is only in the rarest of cases that a union will be able to call direct evidence of employer involvement in an application for termination of bargaining rights. As such, it was submitted that the Board must apply its labour relations expertise and sensibilities to the circumstantial evidence that is presented.

46. Local 30 submitted that applying this standard to the facts of this case there were a number of odd, surprising and fortuitous facts and coincidences that, taken as a whole, were not believable. In other words, Local 30 submitted there was no innocent explanation in this case and the inference to be drawn therefore is that Ronco, particularly Mr. Cordeiro, was involved in initiating the application.

47. Local 30 submitted that Board must consider this case in its proper context which is that Ronco is only the latest in a long line of companies that had been bound to Local 30 and had attempted to avoid the union's bargaining rights. The history with Local 30 has gone back many years involving Mr. Cordeiro's father, who passed away in 2010. It was only after Mr. Cordeiro's father passed away that Ronco entered into Minutes of Settlement with Local 30 agreeing to be bound to the Collective Agreement. Local 30 submitted the context was with an employer that did not want to be bound to the union until it was forced to acknowledge Local 30's bargaining rights.

48. Second, Local 30 submitted the relationship between Mr. Flor and Mr. Cordeiro must be considered. They have known each other for 20 years and went to high school together. Mr. Cordeiro taught Mr. Flor the trade. Mr. Flor was so loyal to Mr. Coredeiro that he agreed to defer wages until Mr. Cordeiro could afford to pay him. Local 30 argued that the timing of the request to defer wages, in early February or March, was designed to send a clear message to Mr. Flor in the open period that the company could not afford to be unionized. Local 30 asserted that it was not a coincidence that it was at this time that Mr. Flor began researching on the internet how to decertify Local 30. Local 30 also referred to the fact that no evidence was before the Board to explain how it was that the Ronco found the money to eventually pay Mr. Flor.

49. Local 30 argued that the reasonable inference from these facts is that Mr. Cordeiro told Mr. Flor he did not want to be a unionized contractor. It argues this inference is supported by the fact that Mr. Flor knew about the earlier proceeding and that Mr. Corderio was stressed by the proceeding, that Mr. Flor and Mr. Cordeiro are friends and that it was shortly after the Minutes of Settlement were entered into that Mr. Cordeiro told the employees they were going to have to join the union.

50. Local 30 also argued that Mr. Flor had not given a plausible explanation for not wishing to join the union. It argued he was uninformed about the benefits and actual obligations of union membership at the time he filed the application for termination. It did not accept that simply not wishing to be a member of the union was a plausible explanation.

51. Local 30 also argued there was no trigger that would have prompted the application at the time it was filed. Local 30 argued it would have made sense if Mr. Flor had filed his application in October or November when he found out from Mr. Cordeiro that he had to join the union or in June, just before Local 30 would begin enforcing the Collective Agreement. Local 30 argues it must be more than mere coincidence that the application was filed during the open period. Local 30 asks the Board to draw the inference that Ronco told Mr. Flor to file the termination application during the open period.

52. Local 30 also argued that the inclusion of Audie Murphy's name as the union contact in the application demonstrates that Mr. Flor was not telling the truth. Local 30 submits that it was not possible for Mr. Flor to find Mr. Murphy's contact information on the internet when he filled out the forms as he testified. Local 30 asks the Board to draw

the conclusion that Mr. Cordeiro gave Mr. Flor the union's contact information to facilitate filing the application.

53. Local 30 also relied on the bargaining unit description in the application for certification. Local 30 submitted that it was nearly identical to the description in the Minutes of Settlement but differed from the description in the Collective Agreement and the description set out in *Gambarashvili*, *supra*. In particular Local 30 focused on the fact that the bargaining unit description in the Minutes of Settlement and the termination application referred to "damp proofing" whereas the *Gambarashvili*, *supra*, decision referred to "damp roofing". Local 30 submitted that if Mr. Flor had used the wording from *Gambarashvili*, *supra*, he would have referred to "damp roofing" not "damp proofing" as appears in the Minutes of Settlement. Local 30 also relies on Mr. Flor's reference to the ICI sector in his bargaining unit description as demonstrating that he was not working from the documents as he claimed to have been.

54. Local 30 also submitted Mr. Flor's evidence was "too perfect" in some areas, in particular with respect to the 12 hours of pay he received for April 16, 2013, the day he attended at Local 30's hall. Local 30 questioned why Mr. Flor had not provided any explanation for the 12 hours of pay prior to giving his evidence, or in his submissions to the Board in particular. Local 30 also points to what it claims is an inconsistency in Mr. Flor's pleadings and his evidence. In his pleading he asserted he had attended the Local 30 hall because he was told he had to be a member in good standing to bring the application however, after hearing Mr. Manso's evidence that the crew would not be taken into membership on April 16, 2013, Mr. Flor testified that he understood that he had to be a member in good standing or to have made a valid attempt to become one. Local 30 submitted that this was evidence of Mr. Flor changing his story to fit the necessary facts.

55. Local 30 submitted Mr. Flor's submissions show that he was not truthful with the Board. In a letter dated May 16, 2013 Mr. Flor said that the men "signed up" at the Local 30 hall, but he knew they had not been accepted as members. Local 30 acknowledged Mr. Flor is not a lawyer but submitted he was not telling the whole story. Local 30 submitted that if Mr. Flor's story is not believable, the inference to draw is he was paid to attend Local 30's hall and the employer was involved in this application.

56. Finally, Local 30 submits it is naïve to believe there were not more discussions going on between Mr. Cordeiro and Mr. Flor about the union given how long they had known and worked with each other. In sum, Local 30 submits it has called more than enough evidence to satisfy its onus.

57. I accept Local 30's proposition that findings of employer involvement will typically be based on inferences drawn by the Board on the basis of the evidence presented. Often this will mean that where the Board finds problems or gaps in the story offered by the applicant or employer, the logical inference to draw is that other, improper, actions are being hidden. In this case, however, I do not find that there are the gaps

Local 30 argues exist. Moreover, I find that there is no evidence to support many of the inferences Local 30 urges the Board to draw.

58. First, the history between Local 30 and Mr. Cordeiro's father is irrelevant to this case. The fact that Mr. Cordeiro's father, who passed away in 2010, may have sought to avoid the union with the companies he ran is of no probative value in assessing what happened in 2013 between Mr. Flor and Ronco. Nor do I accept that Ronco's defence against Local 30's application pursuant to section 1(4) and 69 is probative in this case. What is clear is at some point Mr. Cordeiro concluded being bound to Local 30 was sufficiently acceptable that he entered into the Minutes of Settlement. Moreover, the evidence before the Board was that after entering into the Minutes of Settlement, Mr. Cordeiro appeared to have accepted the fact that Ronco would be a unionized company.

59. To this end, the fact of Mr. Flor and Mr. Cordeiro's long relationship does not lead the Board to conclude that Mr. Flor and Mr. Cordeiro must have discussed this application or that Mr. Cordeiro would have expressed any desire to become non-union. The fact of the relationship between the two men is of no legal significance for the purpose of the analysis under section 63(16) of the Act other than perhaps to provide a context for other evidence: see for example *Jones*, 2013 CanLII 26903. I certainly do not find that it is enough in this case to conclude Mr. Flor is lying or that Mr. Cordeiro initiated the application. Mr. Flor's testimony, which was not shaken, was that Mr. Cordeiro did not discuss the details of Local 30's application pursuant to sections 1(4) and 69 of the Act with him. If the application was not discussed while it was ongoing, the Board sees no reason why its impact would be any more of a topic of discussion after it was settled and Mr. Cordeiro had apparently accepted that Ronco would be a unionized contractor.

60. With respect to the inferences Local 30 urged the Board to draw from the facts concerning the bargaining unit description in the application form, the term "damp proofing" is used repeatedly in article 6 of the collective agreement. As such it is not implausible (and in fact is likely) that Mr. Flor and Mr. Caine picked up the term, or corrected the typo from *Gambarashvili* when they described the bargaining unit in the application. Mr. Flor's response to the typo in *Gambarashvili* was that he had not noticed that *Gambarashvili* used the term "damp roofing" and he presumed he (Mr. Flor) had made a typo.

61. Moreover, the bargaining unit description in the application refers to the ICI sector not as the industrial, commercial and institutional sector (as it is known in the Act) but as the commercial, industrial and institutional sector. This is a unique way of describing the ICI sector that appears in article 4 of the Collective Agreement. To this end, I do not accept Local 30's assertion that Mr. Flor testified he did not look at article 4 with Mr. Caine when filling out the bargaining unit description. Mr. Flor testified that it was Mr. Caine who drafted the language because Mr. Flor did not know what to write. Mr. Caine was not called to testify, but it is likely the employer recognition article would have been reviewed when filling out a bargaining unit description. Moreover, the term

"commercial, industrial and institutional" does not appear in the Minutes of Settlement and Local 30 presented no evidence or plausible explanation as to where, other than the Collective Agreement, that the term could have come from. As such, I do not find that Mr. Flor's evidence is undermined or that the inference Local 30 wishes the Board to draw, namely that Mr. Flor is lying and drafted the bargaining unit description from the Minutes of Settlement, is open to being drawn.

62. The same is true with respect to Mr. Flor referring to Mr. Murphy as the union contact. The reality is no party was able to re-produce the results of an internet search Mr. Flor conducted in March or April, 2013. What is clear is that Mr. Murphy was the President of Local 30 and that, as late as March 13, 2013, he may have been listed as such on Local 30's own website. That his name may have appeared as president or a contact for Local 30 around that time on some other website or webpage does not strain credulity.

63. Moreover, Local 30 asked the Board to draw the inference that Mr. Cordeiro provided Mr. Flor with Mr. Murphy's name and contact information. There was however no evidence called by Local 30 to substantiate that Mr. Cordeiro even knew who Mr. Murphy was or ever met him. To the contrary, the evidence before the Board was that it was Mr. Manso whom Mr. Cordeiro knew and dealt with in the course of the proceeding that culminated in signed Minutes of Settlement. In other words, there is no evidence to support the inference that Mr. Cordeiro provided Mr. Flor with Mr. Murphy's name.

64. Nor do I find Mr. Flor's explanation for being paid for 12 hours of work on April 16, 2013 implausible. In fact, and to the contrary, the evidence is consistent with the objective evidence. April 16, 2013 was a rainy day. Confederation Freezers clearly has issues with its roof leaking. It is not inconsistent with these facts that the crew would have been called out to fix a new leak later in the day. Moreover, it is not unrealistic that the crew would charge for travel time to and from the job. Certainly there was no evidence called to contradict Mr. Flor's evidence.

65. Nor do I find Mr. Flor's explanation for agreeing to forego his wages or that he drew no connection between Mr. Cordeiro's request to defer wages and the union to be unbelievable. Mr. Flor lives at home with his parents. There was no evidence or suggestion that it was not financially within his means to defer receiving wages for some period of time. Moreover, he explained, and I accept, that he saw it as a fair request given that Mr. Cordeiro had advanced him money in the past when Mr. Flor needed it. As Mr. Flor explained, it was simply a case of "one hand washing the other". Finally, there is no reason why Mr. Flor would draw a connection between the request and the union. First, at the time Mr. Flor was not in receipt of union wages, so that would not be the cause of any cash shortage; and second, according to Mr. Flor, at the time he did not even know the union wage rate. Thus he would not have known if, or by how much, his wages would have increased under the Collective Agreement.

66. I also do not accept Local 30's argument that there was no trigger that would have caused Mr. Flor to file the application at the time he did. Mr. Flor's story as to when and why he filed the application was consistent and logical. After being told they had to become union, the crew discussed the issue and decided they were unhappy. Mr. Flor then asked if anything had changed and when he was told by Mr. Cordeiro that it was "a done deal", Mr. Flor began looking into his options to address the situation. There was no reason why he would not do so at that time. Once he came across the Labour Watch site and spoke to Mr. Caine, it is logical that he would have been told that the open period in the construction industry was coming to a close on May 1, 2013. This is an entirely plausible explanation and there was no evidence before the Board that would suggest otherwise.

67. While Local 30 may not believe Mr. Flor's reasons for bringing the application are valid, whether or not his reasons are rational is not relevant: see for example *McDonell-Ronald Limousine Service Ltd. (c.o.b. Airline Limosine)*, [2000] O.L.R.D. No. 3236. This said, Mr. Flor was consistent and believable through questioning as to his motives. He had a visceral reaction to be told he had to join Local 30. It may be that Local 30 thinks Mr. Flor ought to have made a more informed choice or that he made a poor decision, but the fact is that it is Mr. Flor's decision to make for whatever reasons he chooses so long as that choice is not driven by employer intimidation, coercion or initiation. Certainly his explanation was not so implausible as to cause the Board to believe that he was hiding his true motivation or assistance he received from Ronco.

68. Nor do I find the distinctions between Mr. Flor's pleadings (which are less than a page) and his testimony to be troubling or evidence that Mr. Flor is untruthful. Local 30 raised the issue of the 12 hours of pay for the first time in its reply submissions after receiving production from Ronco. While Mr. Flor could have responded to the allegation, there was no obligation to do so. It simply became an issue for the hearing.

69. Nor do I make much of the fact that Mr. Flor wrote in his May 16 submissions that the crew attended the hall because they had to be members in good standing to bring the application or that they "signed up" on that day. First, as Local 30 acknowledges, Mr. Flor is not a lawyer and his evidence was that he would discuss with Mr. Caine what to write in any letter before filing it. Second, as Mr. Flor noted, the men did in fact sign up on April 16, 2013 in that they filled out paperwork including membership applications. Finally, the distinction between having to be a member in good standing and making a valid attempt to be one is, on the facts of this case, a fine one. I do not find the fact that Mr. Flor did not explain in detail that he understood that the crew had to be members in good standing, or make a valid attempt, to be of such consequence as to undermine Mr. Flor's testimony. Mr. Flor's less than perfect understanding and explanation of the of the steps to being accepted into membership in Local 30, or being a member in good standing, does not undermine his credibility as a witness.

70. Local 30 urged the Board to draw a number of adverse inferences at this stage on the basis that Ronco did not call any witnesses. I decline to do so. For the foregoing reasons I conclude that Local 30 has not, through its evidence, established a basis on

which the Board could find this application was initiated by Ronco. Given this finding, there is no case that Ronco needs to meet and no evidence it needs to call.

71. There are no longer any outstanding issues in this application that would prevent the counting of the ballots. The Manager of Field Services is hereby directed to convene a meeting as soon as administratively possible for the purpose of counting the ballots cast at the April 26, 2013 vote.

72. I am not seized.

"Jesse M. Nyman"
for the Board