5295
IN THE MATTER OF
the *Labour Relations Act*
and an application for certification
pursuant to 36 of the *Act* affecting

Construction General Labourers Rock and Tunnel Workers, Local 1208 **Applicant**

- and -

W.R.H. Construction Inc., carrying on business under the name and style of Hydro-Guard Roofing Systems (Hydro-Guard) **Respondent**

AND

5299, 5300 & 5345
IN THE MATTER OF the
***Labour Relations Act* and**
applications for unfair labour
practice complaint pursuant to
section 122 of the *Act* affecting

Construction General Labourers Rock and Tunnel Workers, Local 1208 **Applicant**

- and -

W.R.H. Construction Inc., carrying on business under the name and style of Hydro-Guard Roofing Systems (Hydro-Guard) **Respondent**

AND

5316
IN THE MATTER OF the *Labour Relations Act* and application for unfair labour practice complaint pursuant to section 122 of the *Act* affecting

W.R.H. Construction Inc., carrying on business under the name and style of Hydro-Guard Roofing Systems (Hydro-Guard) Applicant

- and -

Construction General Labourers Rock and Tunnel Workers, Local 1208 Respondent

Before: **Ms. Sheilagh M. Murphy** **Chairperson**
Mr. William Parsons
Mr. Denis A. Galway **Board Members**

Appearances:

For Construction General Labourers Rock and Tunnel Workers, Local 1208: Mr. Dana Lenehan, Q.C. and Mr. Ken Jerrett

For W.R.H. Construction: Mr. Gregory Anthony

REASONS FOR DECISION

Introduction

1. Rarely at a Labor Relations Board hearing is there a *Perry Mason* moment where a witness confesses to a lie on the witness stand. This was one of those hearings. Trying to get a direct answer from some employees as to what actually happened during the membership drive and pre-certification vote goings-on in this matter was like trying to squeeze Jello: the truth, until that moment, kept slipping through our fingers.

2. Construction General Labourers Rock and Tunnel Workers, Local 1208 ("Labourers 1208" or "the Union") organized a membership drive for employees of Hydroguard Roofing Systems, a Division of W.R.H. Construction Inc. ("Hydroguard" or "the Employer") in the summer of 2010. The Union then filed an application for certification of a bargaining unit with the Labour Relations Board. The Employer opposed the certification application, argued that the

bargaining unit applied for was inappropriate for not including individuals the company asserted were working foremen, and the Employer argued, among other things, that the Union had failed to include in the list of employees qualified to participate in the certification vote a group of six employees (the "Placentia six") that the Employer alleged were working on the day the application for certification had been filed with the Board.

3. The Employer alleged that the Union committed unfair labour practices in that the Union, it alleged, attempted to coerce or intimidate or entice employees into signing union membership cards. Mid-way through the hearing, the Employer brought an amended complaint and argued that the union obfuscated or intentionally misled the employees as to the meaning of signing a union membership card.

4. The Union alleged that the Employer committed unfair labour practices in that the Employer, it alleged, circulated a newsletter to the employees that contained material considered to be intimidating, and that the method of delivery of the newsletter was done in manner that was intimidating.

5. Later, during the hearing, the Union also alleged that the Employer committed an unfair labour practice by deliberately attempting to mislead the Board as to which employees were working on the date the certification application was filed, thereby attempting participate in or interfere with the selection or formation of a trade union, and committing an unfair labour practice pursuant to Section 23. (1)(a) of the *Labour Relations Act*. The Project Manager admitted under oath at the hearing that that was exactly what the Employer had done.

6. In order to ensure it had all pertinent information before it, the Board decided to hear all applications, i.e. the certification application and the related unfair labour practice complaints, during one hearing. The evidence of each witness with respect to each separate file was considered to be evidence of that witness in each other file. All witnesses were ordered excluded from the hearing room and were asked to not discuss their testimony with other witnesses until the hearing ended.

7. Following a lengthy hearing where a number of witnesses appeared, namely employees Michael Hawco, Gary Boone, Jason Purcell, Ronald Whitty, Trevor Penney, Anthony Wheeler, Daniel Sutherland, Freeman Rideout, Albert Boone, Bruce Peckford, and Hector Hann, and Union Organizers Hugh Peddle, Morgan Hinchey, and Lee Crossan, the Board issued the following the order. What follows are the Board's reasons for that order.

5295/5299/5300/5316/5345
IN THE MATTER OF

Labour Relations Act

- and -

Construction General Labourers, Rock and Tunnel Workers, Local 1208 **Applicant**

- and -

W.R.H. Construction Inc., carrying on business under the name and style of Hydro-Guard Roofing Systems **Respondent**

WHEREAS an application for certification as bargaining agent for a unit of employees of W.R.H. Construction Inc., carrying on business under the name and style of Hydro-Guard Roofing Systems has been received from the Construction General Labourers, Rock and Tunnel Workers, Local 1208 ("Union") by the Labour Relations Board pursuant to the *Labour Relations Act* (Board File # 5295);

AND WHEREAS the Board has received four (4) unfair labour practice complaints/files 5299, 5300, 5316 and 5345;

AND WHEREAS the Board pursuant to Section 47 of the *Act*, conducted a representation vote;

AND WHEREAS the Board, following investigation, follow-up investigation and consideration of the application, the representations of the interested parties, and the evidence adduced at a hearing of all matters has determined that:

1. with respect to Board File # 5295, the appropriate bargaining unit is to be all labourers and working foremen working for the Employer in the Province of Newfoundland and Labrador;
2. with respect to Board File # 5295, Mr. Ron Whitty and Mr. John Poole and Mr. Brian Tulk are included in the appropriate bargaining unit;
3. with respect to Board Files # 5295 & 5300, the parties have consented at the hearing to the exclusion of the ballots cast by Mr. Bruce Peckford, Mr. Dan Sutherland, Mr. Albert Boone, Mr. Freeman Rideout, Mr. Gary Sutherland, and Mr. Alfred Brenton because they were not working on the date of the application;
4. with respect to Board File # 5299, the Board finds that the method of delivery of the Employer's newsletter constitutes an unfair

labour practice and therefore allows that complaint against the Employer. The ballots cast at the certification vote at the Labour Relations Board on June 17, 2010, therefore cannot be relied upon;

5. the Union has the support of the majority of the members of the bargaining unit as evidenced by the executed union membership cards;

6. with respect to Board File# 5300, the Board finds that the Employer committed an unfair labour practice in that it committed a fraud upon the Board for the purposes of manipulating the representation vote. The Board therefore finds that the Employer has committed an unfair labour practice;

7. with respect to Board File # 5316, the Board finds that there was no coercion or intimidation on the part of the Union in its organizing drive. The employees were not mislead or unduly influenced by the Union with respect to the signing of the union membership cards; therefore, the cards can relied upon as evidence of support of the Union. The Employer's unfair labour practice complaint in this respect is denied; and

8. with respect to Board File # 5345, the Board finds that there was insufficient evidence to support that complaint and therefore denies the Union's request.

NOW THEREFORE it is hereby ordered by the Labour Relations Board that:

1. Construction General Labourers, Rock and Tunnel Workers, Local 1208 be and it is hereby certified to be the bargaining agent for a unit of employees of

2. W.R.H. Construction Inc., carrying on business under the name and style of Hydro-Guard Roofing Systems comprising all labourers and working foremen working for the Employer in the Province of Newfoundland and Labrador;

3. the ballots cast in connection with the vote be destroyed.

THE official seal of the Board was hereunto affixed and attested to by the Chief Executive Officer of the Board at the City of St. John's in the Province of Newfoundland and Labrador this 8th day of July 2011

Signed
Chief Executive Officer (A)

Issues Addressed at the Hearing

Issue 1

Matter 5295: With respect to the application for certification itself:

A. Is the bargaining unit applied for appropriate for collective bargaining?
B. If so, which employees ought to be included in or excluded from the bargaining unit?

Issue 2

Did the Employer, in the circulation of a newsletter to the employees during the membership drive/in the days leading up to the certification vote, commit an unfair labour practice? Can the vote be relied upon to show the employees' true wishes with respect to union representation in the workplace?

Issue 3

Matters 5299 and 5316: Did the Union threaten, coerce, or intimidate the employees or use incentives or make promises during the organizing drive, thereby committing and unfair labour practice? Can the membership cards be relied on to show the employees' support for the union?

Issue 4

Matter 5300: Should the Board exercise its discretion to disregard the membership vote and rely upon the cards presented to the Board in support of the application for certification? Can those membership cards be relied upon to represent the employee's true wishes with respect to union representation in the workplace?

Issue 5:

Matter 5345: Did the Employer, though its legal counsel, commit an unfair labour practice by asking allegedly inappropriate questions of the witnesses Mr. Penney and Mr. Wheeler prior to their giving evidence at the hearing?

Background facts

8. Though not exhaustive, the following is a brief chronology of what transpired from the date the application for certification was filed with the Labour Relations Board until the hearing. A more detailed analysis of the facts takes place within the analysis of each issue that follows.

9. The Applicant, W.R.H. Construction, carried on business as "Hydroguard". It is a roofing company owned and operated by Ms. Cecile Stares. There is one project manager, namely Mr. Hector Hann. There are two or three crews of workers generally working with Hydroguard. One is led by Mr. Poole, one by Mr. Tulk, and the third is led by Mr. Peckford. Mr. Peckford's crew generally operates out of Bishop's Falls, but at all times material to this matter they were due to start a project at the Placentia Hospital. Mr. Peckford's crew has been referred to as the 'Placentia six' throughout this decision. The only remaining employee who is not a foreman or a member of a roofing crew is Mr. Whitty. He is referred to as the delivery driver and drain installer for the Employer. A fuller description of his duties is in the analysis below.

10. The applicant filed the application for certification on Friday June 11, 2010. The Employer drafted and sent a newsletter to the employees via hand delivery on Monday June 14, 2010. Mr. Poole and Mr. Whitty delivered the newsletters to individuals on Mr. Poole's crew who lived in Portugal Cove and on Bell Island. Mr. Hann and Mr. Tulk delivered newsletters letters to employees on Mr. Tulk's crew. Mr. Tulk contacted the members of his crew and asked them to meet him at the Carbonear Hospital, a project they had been working on, where he then delivered the letters to them. He and Mr. Hann delivered the letters there.

11. With respect to the Bell Island employees, Whitty and Poole drove to Bell Island in Mr. Whitty's truck. Once on the island, they asked for directions as to how to get to Michael Hawco's house. Mr. Hawco met them at a local store and went with them throughout Bell Island in order to deliver letters to each employee's home, or, in some cases, to find where the employees were working on that date, track them down there, and hand deliver the letter to them at another person's premises. Whitty and Poole made some comments to some of the employees when they delivered the newsletter, which are further discussed below.

12. On the date the application was filed and before the letter was drafted, Mr. Hann concocted a scheme whereby the Employer would lie to the Labour Relations Board about which employees were working on the date the application was filed in an effort to defeat the certification vote. Cecile Stares, owner of the company, agreed to the scheme. Mr. Peckford, the working foreman, also agreed to the scheme and purported to have the consent of the entire Placentia six to do so. On the date the application was filed, no one was working in Placentia and the Placentia six crew was not working that day.

13. The Employer filed its reply with the Board, citing that the Placentia six were working on the date of the application and that the application should fail. Cecile Stares swore an affidavit to that effect in support of the reply to the application, knowing it to be false.

14. Once the plan to intentionally mislead the Board in order to defeat the application was in place, the Employer then drafted the letter to the employees and arranged for it to be hand-delivered to each employee in the company.

15. In the meantime, prior to filing the application for certification, the Union had been conducting an organizing drive and had been approaching numerous employees, often more than once, with one or more union officials present, in order to solicit support for the union. The Employer alleges that the union went too far in its quest for support and that it crossed the line by either enticing members to join in an improper way by offering a waiver of union dues, or by intimidating employees when union officials visited them. This is discussed more fully below. There was also an allegation the Union misled the employees as to the meaning of the membership cards and that the cards could not be relied on.

Issue 1: With respect to the certification application (5295): what is the appropriate bargaining unit and which employees should be included in it?

16. The bargaining unit is described as a unit of employees of W.R.H. Construction Inc. carrying on business as Hydro-Guard Roofing Systems comprising all labourers and working foremen working for the Employer in the province of Newfoundland and Labrador.

17. At issue was whether Ron Whitty, John Poole and Brian Tulk were to be included in the bargaining unit in addition to the other labourers. The Employer argued that they ought to properly be included. The Union argued that they were management and should not be. Although Poole, Tulk and Whitty were paid based on a 40-hour work-week and the other employees in the bargaining unit were paid based on hours worked, the Board found that they were working foremen and ought to be included in the bargaining unit.

18. Mr. Hawco explained the general methodology of work undertaken by the roofing crew on which he worked. There are three types of workers on the roof at any given time: the general labourers, the labourers who were able to use a torch to apply roofing material, and the plumber. Generally, everyone, including the foreman, participates in the tear off of the old roof. The old roof is torn off, put in a wheel barrel and dumped. Then the Labourers get gyproc, vapour barrier, insulation, soffit board, and rolls of roofing material ready for and bring the materials to the people who would be installing it. As the torchers (labourers who used torches to applying roofing material) were installing the material, the general labourers would then clean up behind them. Sometimes, the labourers would assist in laying gyproc and add plates and screws. In his words, "when we get a big roof laid out no one stands around doing nothing." The evidence of all witnesses was consistent with Mr. Hawco's on this point, with the clarification that Mr. Whitty does not take part in the roofing activities except installing the roof drains.

19. Mr. Hawco explained that Mr. Whitty is the Plumber and driver on the job sites. Mr. Purcell also confirmed this. His duties include attaching roof drains, picking up material and dropping it off and generally running errands for the company.

20. Mr. Whitty confirmed that he has worked with W.R.H Construction for the past 18 years. For the last 12 years he has worked as a truck driver and drain installer. Prior to that, he was a self-described working foreman and prior to that, a roofer. In 1999 he had two motor vehicle accidents. Injuries from those accidents have prevented him from doing the heavy work required in roofing. His Employer accommodated his injuries. His duties and responsibilities include picking up and preparing to deliver materials to the site, attending the site and going back for more materials, going to the warehouse to pick up and bring materials to them in

his truck. His pickup truck has no markings on it identifying it as W.R.H Construction. It has a back rack on it for tying on the propane. The truck that he drives is his own personal vehicle and he gets paid by the company for each kilometer he drives.

21. Mr. Whitty's other duties include picking up the mail once per day for the company office and delivering mail to the post office. He claims that he spends very little time working on site and generally will have conversations with people on site. He spends all day in the summer delivering materials to the various job sites. He only goes to the office to write down where he has been all day. He has no authority to hire or fire personnel. However, other employees testified that Mr. Whitty, who is also a plumber, is the only individual with Hydro-Guard who installs drain pipes on roofs. According to the evidence given by Mr. Purcell, Mr. Whitty has labourers working with him when installs the roof drains on each roof drains. Mr. Hawco confirmed that Whitty's duties include attaching roof drains and that he works with the labourers when doing do.

22. Although Mr. Whitty's duties and responsibilities are no longer identical to other labourers or working foremen on the jobsite, he is not management. He has no ability to hire or fire or otherwise reprimand workers and therefore has no control over their financial well-being. He does not direct others in how or where to work or otherwise provide any management function. He did not purport to exercise any management function or to be employed in a confidential capacity in matters relating to labour relations. As well, Mr. Whitty spends very little time in the office so he cannot be said to be office staff.

23. Section 5.(1) of the *Labour Relations Act* states:

> 5. (1) An employee has the right to be a member of a trade union and to participate in its activities.

24. Mr. Whitty does not exercise any management function and is not employed in a confidential capacity in matters relating to labour relations. It would be improper to invent a second bargaining unit for Mr. Whitty, as a bargaining unit of one employee would not be appropriate for collective bargaining in this circumstance. Therefore, in order to protect Mr. Whitty's right to be a member of a trade union, his position has been included by the Board in this bargaining unit.

25. As to Mr. Tulk and Mr. Poole's positions, in addition to Mr. Hawco's evidence about Mr. Tulk and Mr. Poole's duties, both Mr. Tulk and Mr. Poole testified. Both acknowledged that they are paid a regular pay based on a 40-hour work week. Both drive a truck provided by the company for driving the employees to and from work and to and from job sites. Mr. Trevor Penney testified that each of Tulk and Poole was a foreman, but that Hector Hann was the project manager. Evidence from all witnesses who were asked was consistent: Cecile Stares, the

owner, and Hector Hann, the project manager, were the only two people who had the authority to hire or fire workers. Hector Hann was the project manager on all projects. Mr. Hann would go to sites, check on the progress of jobs, determine if more materials were needed, and would hire and fire individuals. Mr. Hann also testified that he would estimate and bid on jobs for the company, manage projects, and hire and fire personnel where necessary. All parties agreed that Mr. Hann was in the HydroGuard management team.

26. In terms of Mr. Tulk and Mr. Poole's responsibilities and duties, Mr. Tony Wheeler also testified that "everyone from labourers to supervisors" worked on the roof, meaning that Mr. Tulk and Mr. Poole worked up on the roof with the workers. We also have the evidence of Lee Crossan, who testified on behalf of the Union. The Union wished to exclude Tulk and Poole from the bargaining unit. However, Crossan's evidence about meeting with Mr. Poole on at least one occasion was that Poole had just arrived home from work and was dirty from working on the roof all day.

27. In determining whether Mr. Tulk or Mr. Poole are members of the bargaining unit as working foremen, the Board applied the following text from *Hibernia Management and Development Company Ltd. and FFAW* **(2001), 68 C.L.R.B.R. (2d) 161 at pages 180 to 181 as follows:**

> There are several decisions of this Board that have addressed the issue of management exclusions. Management functions are determined in part by examining an individual's duties and responsibilities to determine whether he or she exercises effective control and authority over the employees supervised or whether he or she makes decisions or effective recommendations in areas that materially affect the economic lives of those employees. (See *Re Newfoundland (Treasury Board)* **[1992] Nfld. L.R.B.D. No. 25**, Re *Newfoundland Hospital and Nursing Home Association* **[1992] Nfld. L.R.B.D. No. 18**). The Board will also consider such factors as independence of decision making in significant policy areas, management authority, and significant association with the management team. The Board will consider the organizational structure of the Employer and the proposed numbers of management and bargaining unit employees. The Board will also consider the extent to which the person does "hands on" work that would be considered bargaining unit work. With respect to the decisions or effective recommendations in areas that materially affect the economic lives of employees, the Board will consider the following areas of responsibility: (1) hiring, including participation in a selection committee and the extent of input into the decisions; (2) discipline and discharge, including the role played with respect to various levels of disciplinary action, including oral warning or counseling, written warning, suspension or discharge; (3) evaluation of performance, including an examination of the consequences of the

> evaluation on salary increases, promotion, training opportunities and other advancement opportunities; (4) leave requests, including the ability to authorize absence from work for sick leave, bereavement or family responsibility; (5) promotion or transfer, including any involvement in a committee that recommends a decision, (6) overtime authorization, including the authority to direct an employee to work outside the regular hours of work, (7) directing the employees in the manner of performance of their duties, and (8) assignment of job duties.

28. When determining whether a bargaining unit is appropriate, the Board often refers to the following guidelines discussed in its decision in *S.E.A. Contracting* [1998] L.R.B.D. No. 11, as follows:

> G.W. Adam's text, *Canadian Labour Law*, outlines guidelines which are often applied by Boards when assessing the appropriateness of a bargaining unit. Assessing the community of interest of a group of employees can include considerations of:
>
> > -Similarity in the scale and manner of determining earnings; in employment benefits, hours of work and other terms and conditions of employment; in the kind of work performed; and in the qualifications, skills and training of employees;
> >
> > -The frequency of contact or inter-change among employees and the geographic proximity of workplaces;
> >
> > -Continuity or integration of production processes;
> >
> > -Common supervision and determination of labour relations policy;
> >
> > -Relationship to the administrative organization of the Employer;
> >
> > -History of collective bargaining;
> >
> > -Desires of affected parties and employees; and
> >
> > -Extent of union organization.
>
> The weight given to these factors may vary from case to case depending on the circumstances. The objective of the exercise as stated by Adams at page 7-4 of his text is: "*To maximize an employee's freedom, to join a trade union of his choice while at the same time promoting harmonious labour relations through effective and efficient collective bargaining procedures.*

29. In discussing whether working foreman, such as Mr. Tulk and Mr. Poole should be considered management as a result of having a company vehicle, being paid regularly hourly wages and providing some direction to the employees, the Board relies on its previous analysis and its decision in *Re: Allied Constructors*

Inc. [2007] N.L.L.R.B.D. No. 3, 134 C.L.R.B.R. (2d) 220 [2007] L.R.B.D. No. 3 where it stated:

> 94. …indeed, the constant income paid to Mr. Bishop seems to suggest that he is on a salary. On the other hand, despite this documentation, it is clear that both Mr. Bishop and Mr. Driscoll consider that he is paid on a [sic] hourly rate. Whether or not Mr. Bishop is on salary is not determinative of whether he should be included in the proposed bargaining unit. The reality is that about 80% of his time is spent working side-by-side with those performing carpentry work: this is the most persuasive factor which allowed the Board to find that Charlie Bishop has a community of interest with the members of the proposed bargaining unit. To elaborate, the nature and extent of Mr. Bishop's hands-on work overrides any concerns raised by his access to a company vehicle, charge card, cell phone and manner of payment. For clarity, the weight given to the nature and extent of Mr. Bishop's hands-on work, coupled with the fact that he does not perform management functions, leads the Board to the conclusion that he must be included in the unit.

30. Like the individuals in *Allied Constructors*, Mr. Poole and Mr. Tulk keep track of the employees' hours on time sheets, receive regular weekly pay based on 40 hours / week regardless of weather, and they drive company vehicles and carry company cell phones. They have the ability to determine how many workers are brought to a given site, but they do not hire or fire. They spend the overwhelming majority of their time working on a roof side by side with the other roofers and labourers. The nature and extent of their hands-on work overrides any concerns raised by their access to a company vehicle, cell phone and manner of payment particularly in light of the fact that they do not perform management functions. They ought to be included in the bargaining unit.

31. As to whether the six Placentia employees ought to be included in the bargaining unit, the Board relies on its decision in *Re Farrell's Excavating* [2008] L.R.B.D. No. 27 citing *Skyway Steel* wherein the Board held, "First, the date of the application determines voter eligibility such that if an employee is working on the date of the application, then the employee is eligible to vote." This practice is common to all jurisdictions throughout Canada on the basis of the impermanent, transitional and fluid employment relationships that occur in the construction industry. Both the Union and the Employer ultimately agreed in this case that those six individuals were not working on the date of the application and should not therefore have their vote counted.

32. The composition of the bargaining unit, then, includes the 19 employees as agreed to by the parties, plus the working foremen (Mr. Poole and Mr. Tulk) and Mr. Whitty. The parties agreed that Cecile Stares, President, and Hector Hann, Project Manager, were not to be included in the bargaining unit, nor was Gary Maclean, who was not working for the company at the time the application was filed. This

brings the total number of employees in the work, undertaking and business of the company as 22 on the date the application for certification as filed. There were 14 of those 22 who were members in good standing of the applicant union. At 63.6%, this constitutes a majority.

Issue 2: Did the Employer, in the circulation of a newsletter to the employees during the days before the certification vote, commit an unfair labour practice? Can the certification vote be relied on?

33. The Union made two allegations of unfair labour practices with respect to the newsletter. One was that the Employer committed an unfair labour practice in the method of delivery of the newsletter, namely that individuals who were seen by the employees as being in a position of power hand-delivered the newsletter to their homes and, in some cases, made negative comments with respect to the union organizing drive that interfered with the employees' selection of a trade union. The other was that by directing the employees to the website www.labourwatch.com, it argued that the Employer was sending the employees to an employer-centric and allegedly anti-union website and it therefore interfered with or attempted to interfere with the employees' selection, formation or administration of a trade union in contravention of the *Labour Relations Act* which states:

Unfair labour practices

23. (1) An employer or employers' organization, and a person acting on behalf of an employer or employers' organization, shall not

(a) participate in or interfere with the selection, formation or administration of a trade union; or

(b) contribute financial or other support to a trade union.

(2) An employer shall not be held to contravene subsection (1) by reason only that the employer

(a) in respect of a trade union or a council of trade unions that is the bargaining agent for a unit comprising or including employees of the employer,

(i) permits an employee or representative of that bargaining agent to confer with him or her during working hours or to attend to the business of the bargaining agent during working hours, without deduction of time so occupied, in the calculation of the time worked for the employer and without deduction of wages in respect of the time so occupied,

> (ii) provides free transportation to representatives of the bargaining agent for purposes of collective bargaining, the administration of a collective agreement and related matters, or
>
> (iii) permits the bargaining agent to use his or her premises for the purposes of the bargaining agent; or
>
> (b) contributes financial support to a pension, health or other welfare trust fund, the sole purpose of which is to provide pension, health or other welfare rights or benefits to employees.

34. This Board has previously found in *Breakwater Fisheries* [1998] Nfld. L.R.B.D. No. 6 & 7 that there may have been intimidation or coercion as a result of actions of other employees within the meaning of Section 47(8) of the *Act*, even though the actions were not committed on behalf of the Employer. In the within case the evidence is clear that Mr. Poole, the working foreman, delivered letters with Mr. Whitty to the members of Mr. Poole's crew at the behest of the Employer. While not management, the employees were aware that Poole was their foreman. Further, that Poole and Whitty drove to Bell Island and did not just deliver the envelope to each employee's home, but ensured the employee was home in order to deliver it, and then, in some cases when they were not home, they kept driving to different locations on Bell Island until they found the specific employee and delivered the letter. Then, both employees, namely Mr. Whitty and Mr. Poole, admittedly made comments to some of those employees while delivering the letters to them. Those comments that Mr. Whitty admits he "may have" made were to the effect that if the Union were certified, the Employer would shut the business down and they would be out of work, or that they might otherwise lose their rides to work, coffee breaks and Christmas bonuses if they supported the Union.

35. The Board has analyzed the permissible scope of Employer communication to employees in the context of a newsletter from the Employer in *Griffiths Guitars International* (re), wherein the Board cites *Re Eastern Health Care Services* [1995] Nfld. L.R.B.D. No. 12.

> The Board considered the *American Airlines Inc.* case and the *Adams* text and stated the following, commencing at paragraph 25:
>
> > Similar language [to Section 23(1) of the *Act*] was considered by the Canada Labour Relations Board in *American Airlines Inc. and BRAC* [1981] 3 Can LRBR 90. The Board stated at page 104 as follows:
> >
> > > We cannot stress enough the unique relationship that exists between an employer and his employees and the privileged position that puts the employer in to influence those employees. From this unique relationship, the employee perceives the awesome power of the employer to fire him/her at any time. ...

> Any statement, action, comportment that indicates to employees the employer's desire not to have them join a union, further impresses on them that their action clearly goes against his wish, he who is ultimately responsible for their job security.

The Board also refers to George W. Adams, *Canadian Labour Law*, 2nd edition, paragraph 10.780 as follows:

> An analysis of the cases tends to reveal that a more strict standard of communication is applied to employers during an organizing campaign than where a collective bargaining relationship is in place. Speech, where no trade union is in place, requires a more delicate appreciation of employee sensitivity.

36. It is not just the content of the letter or communication itself that must be taken into consideration in this case. It is the totality of the evidence as to the circumstances surrounding its delivery. The Board cannot simply ignore the fact that the Project Manager Hector Hann, with the knowledge and consent of the Employer Cecile Stares and the consent of the employees Bruce Peckford and the 6 Placentia employees, concocted a scheme to intentionally mislead the Labour Relations Board and its officer as to who was working on the date the application was filed. Then, within days, that same management team drafted or had drafted a letter to the employees about the application for certification and then had that letter delivered to each employee via personal delivery by either their foreman (as was the case of the Bell Island employees) or by the Project Manager Hector Hann himself (as was the case of the Carbonear Employees). The Employer sent the correspondence via personal delivery to every employee's home on Bell Island. Mr. Hann arranged, in the case of Mr. Tulk's crew, for each employee to drive to the Carbonear General Hospital and wait in the parking lot for him to deliver the letter to them.

37. The evidence at the hearing was unequivocal: the company had <u>never</u> sent someone to the employees' homes to deliver anything before this. Even in cases where the Employer provided transportation to work, as in the case of the Bell Island employees, the driver picked the employees up and dropped them off at the Bell Island ferry terminal – no one had taken the ferry to the island to pick them up or drop them off and yet the foreman and company driver drove to Bell Island and did not simply deliver the letter in their mailboxes, but essentially hunted them down on Bell Island when they were at other people's homes and / or working at other jobs to ensure they were given a copy of their letter. Once delivered, the foreman, Mr. Poole, then commented to the employees that they could lose their rides to work, lose their Christmas bonuses and turkeys and even went so far as to say that the Employer would "shut her down" if they voted in favour of the Union. Likewise, Mr. Whitty testified that he made similar comments. Mr. Boone's recollection was that he remembered the discussion with Mr. Whitty and Mr. Poole in front of Mr. Purcell where Whitty and Poole had told

them if the Union were certified they would lose their bonuses and rides back and forth to work.

38. The Employer argued that these comments were the personal opinions of the foremen, who were fellow bargaining unit employees. However, all evidence put forward by the Employer in this hearing suffers from the taint of the deliberate and unapologetic lies put forward by this Employer in its vitriolic response to the Union's application for certification. Removing the taint of the fraud is not possible.

39. Even if the Project Manager Mr. Hann and the foreman Mr. Peckford had not admitted that they had lied about who was working in Placentia on the date of the application, the totality of the evidence, being the hand-delivery of the letter by the foreman to each employee's private dwelling and having taken the extra step of finding employees who were not home at the time and not working on company business and then senior employees telling the employees, while the newsletter was being delivered, that they should vote "no" at the certification vote was enough, in the Board's view, to meet the test that an employee of average intelligence would reasonably construe the Employer's views as expressed in the memorandum and by the working foremen in their delivery as, at the very least, intimidating to the extent that this vote could be influenced. [See *Re: Modern Paving Limited* 2006 LRBD no 12].

40. The Board notes that this test, as argued by the Union is an objective one. The test is not whether the employees were actually intimidated; it is whether an employee of average intelligence would reasonably construe the memorandum as intimidating. In this case, the evidence of Mr. Purcell was clear: Mr. Whitty told him that if he voted for the union there would be "no more turkeys, no more Christmas bonuses, and you can find your own ride to work." Likewise, he had a distinct recollection of Mr. Poole saying that Cecile Stares (company president) would shut the company down if they voted for a union. He was not told that the opinions expressed by Poole and Whitty were their own opinions, as Poole and Whitty stated at the hearing, or whether they were the opinions of management. Those comments were made as the newsletter was being handed out on Bell Island.

41. From the Employer's initial response to the application for certification, through to the hearing itself where members of the Placentia crew testified that they were unsure whether they worked on the date the application was filed, but presumed that they did because the times sheets said so, the Employer led the Board to believe that the Placentia 6 were working. This was their line until the moment when Mr. Albert Boone of Bishop's Falls testified that he knew for certain that the crew did not work on Friday June 11th and, contrary to the Employer's assertions to the investigating officer that the Placentia 6 employees were loading a truck for the commencement of work at the Placentia hospital on Friday June 11th, they in fact loaded the truck on Sunday morning, June 13, 2010. At that

point, it became apparent that some of the employees and the Employer / management were misleading the Board as to which employees worked on the date the application was filed.

42. Albert Boone was very specific: he was at church on Sunday morning the 13th of June and was unable to load the truck with the rest of the crew. The truck was not loaded on Friday the 11th. Following Mr. Boone's evidence, Mr. Peckford, his foreman, admitted that he knew the crew was not working on June 11th. His reason for suddenly telling the truth at the hearing was that one of the members of the Placentia's six crew had become physically ill as a result of the ongoing lie. It was not because he took an oath or solemnly affirmed to tell the truth at the hearing or for any other reason. He unapologetically told the Board, "if [the other employee] never got sick over this I would have agreed with this black and blue that I worked on Friday [the 11th]. I can agree with you now that we never worked then."

43. Mr. Hector Hann, Project Manager, then testified. With respect to the time entries for Friday June 11 (date the application was filed) and the 4 hours attributed to every worker in the Placentia jobsite namely Mr. Peckford, Mr. Sutherland, Mr. Boone, Mr. Branton, Mr. G. Sutherland and Mr. F. Rideout he confirmed that none of the men on that list did any work for Hydro-Guard on June 11 2010. He knows that they did not "and that is a fact." He knew that on the date the application was filed and the date the reply was filed and every day thereafter.

44. Mr. Hann was provided with a copy of the Board Officer's Investigative Report into this matter. Included in that report was the list of staff who were working on Friday June 11, as provided by the Employer. Peckford, Sutherland, Boone, Branton, Sullivan and Rideout were listed as having worked. Peckford agreed that the Employer provided those names to the Board and the Employer knew on the date the names were provided that they had not worked on the date of application.

45. Mr. Hann testified that it was his suggestion that the Employer should tell the Board that those 6 employees were working the day the application was filed. His rationale was that those men on that list would not get to vote at the certification because they had not been working on the date the application for certification was filed and there were men on the voter's list who were allowed to vote who were new employees and, to him, that wasn't fair. According to Mr. Hann, the system isn't fair and he still feels that way. He directed the corporate accountant to put their names on the list of employees who had worked on the date of the vote of the application and Cecile Stares knew he had done it.

46. Mr. Hann was aware on Monday June 14 that those employees did not actually work on the date of the application. It was not Mr. Peckford who put the hours in for Friday June 11 it was Mr. Hann. Mr. Hann was not contrite about this. He did it intentionally and he still does not think it was wrong.

47. Mr. Hann admitted that he discussed with Mr. Bruce Peckford, the working foreman, that Peckford and his crew had discussed the plot to mislead the Labour Relations Board and they all agreed that there was no problem with Mr. Hann advising the Board that they had worked when they had not.

48. Mr. Hann was then read sections of the company's reply in matter 5295 wherein the Union alleged that the six men from Placentia Health Care Centre had not been working on the application date and the sworn reply, as signed by Ms. Cecile Stares, of Hydroguard, where she indicated that they had been working on that date. Mr. Hann admitted that he was the one who suggested to Ms. Stares, President of the company, that the company should claim that the six Placentia workers were working on the date of the application when they in fact had not been. He confirmed that on the date Ms. Stares signed the sworn reply to the Labour Relations Board she knew that that reply was false. The Board noted that although Ms. Stares attended the entire hearing, she did not attend during Mr. Hann's testimony and she did not take the witness stand to refute Mr. Peckford's testimony.

49. Ms. Stares swore a false affidavit in response to the application in matter 5300 and Mr. Hann and Ms. Stares on behalf of W.R.H Construction (Hydro-Guard) committed a fraud upon the Board by intentionally lying to the Board about the dates on which employees worked in order to manipulate or attempt to manipulate the outcome of the certification application and vote. This was an intentional breach of Section 23. (1) (a) of the *Labor Relations Act* which states:

> 23. (1) An employer or employers' organization, and a person acting on behalf of an employer or employers' association shall not
>
> (a) participate in **or interfere with the selection, formation** or administration **of a trade union.**

50. Mr. Hann also confirmed that he lied to legal counsel for W.R.H Construction when he notified counsel as to the dates the workers prepared to go to Placentia and the date on which they demobilized the Wooddale Nursery. Mr. Hann confirmed that the information contained in the reply and in the Board file 5295 and the Investigating Officer's report of December 9 2010 at page 7 was false. He knew that the report was untrue, and Ms. Stares knew that it was untrue based on his direct discussions with her.

51. This was the background upon which the Employer then brought its unfair labour practice complaints against the Union with respect to the validity of the membership cards, threats, coercion, intimidation and inducements. This is also the factual basis upon which the Employer then drafted the newsletter to employees and circulated it to them and Mr. Hann himself personally delivered some of those letters and directed other working foremen to deliver them. This factual matrix surrounding the delivery of the newsletter and the allegations of

unfair labour practices on the part of the union and the taint of fraud that surrounded the Employer's actions throughout this matter is what made the vote unreliable in the eyes of the Board.

52. In any event, in spite of the Employer's argument that the Board should not "throw the baby out with the bathwater," the Board cannot hive off the outstanding anti-union animus expressed by the Employer in this matter and blindly debate the merits of the argument over what was said by whom when the newsletters were personally delivered. To borrow a quote used by the Union in this matter,

> No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. **Fraud unravels everything.**
>
> *Lazarus Estates Limited v Beasley* [1956] 1 Q.V.702 at page 712; per Denning, J. (emphasis added)

53. As a result of the finding of intimidation on the part of the Employer with respect to the circulation of the newsletter and its mode of delivery and the comments made by the working foremen and the Project Manager, and the juxtaposition of the delivery of the newsletters with the creation of the plan by the Project Manager with the knowledge and apparent consent of the Employer to deceive the Board with respect to the vote, the vote cannot be relied upon. Therefore, the Board ordered that all ballots be destroyed.

Issue 3: Did the Union commit an unfair labour practice during the membership drive? Can the membership cards be relied on?

54. The Employer originally brought an unfair labour practice complaint alleging that the Union offered inducements to the employees, namely that the Union offered employees jobs at Long Harbor and other special projects in exchange for signing membership cards; that they offered a waiver of union dues for the first year of membership and that essentially the Union was going to give the employees a "free ride" in what the Employer described as a "closed shop" union at the major projects in the province. There also appeared to be an allegation that one employee was offered retroactive pension benefits from time he spent working at Avalon Roofing prior to joining Hydro-Guard. The third element of the complaint was that the union used threats or intimidation to persuade employees to join the union.

55. The Employer then brought another unfair labour practice complaint against the Union as the hearing itself progressed. That complaint was based on counsel for the Employer's discussion with employee witnesses in preparation of the hearing.

Counsel became concerned that the Union had misrepresented to the employees the purpose and effect of signing a union membership card during the organizing campaign. This misrepresentation, the Employer alleged, caused confusion on the part of some of the employees, particularly the individuals living on Bell Island, and this ultimately led to the cards themselves being unreliable and therefore unable to show the employees' true wishes with respect to union membership and certification of their workplace. The Employer alleged that the cards should be destroyed as a result.

Mr. Penney was not threatened or intimidated

56. It was alleged by the Employer that the Union attempted to threaten or intimidate employees into signing union membership cards through the organizing campaign. The allegation was that the Union brought a big man, covered in tattoos, described as a "biker guy" to individuals' houses and that this individual stepped toward one employee (namely Mr. Penney) and said "you'd better do the right thing," and that this constituted a threat. Mr. Penney testified at the hearing and said that he recalled the "biker guy" being there for one visit and that he had said words to the effect of "make sure you do the right thing" but that he was not threatened, did not see it as being made in a threatening tone, and that his comment back to the organizer was that he would do the right thing for himself – not the union or the company, but what he thought would be best for him.

57. The Board does not find that this was a threat on the part of the union official. Mr. Hanbrook, who was later identified as "the biker guy" was identified by Mr. Hinchey, who was present during the visit to Mr. Penney's house and who testified at the hearing. Mr. Hinchey admitted that Hanbrook is a tall man and that he is "big" as in fit. He recalled that Mr. Hanbrook does have tattoos on his forearms and, while he could not be sure what Mr. Hanbrook was wearing on the day they visited Mr. Penney, usually he would wear jeans and a shirt and that it was entirely possible that Mr. Hanbrook wore jeans and a short-sleeved shirt to Mr. Penney's house on the date in question. If he were wearing a short-sleeved shirt, his tattoos would have been visible. He was not riding a motorcycle. The description of him being a "biker guy" appears to have been based on Mr. Penney's description of Mr. Hanbrook's jacket as a "biker-type jacket."

58. Mr. Penney was unequivocal on cross-examination with respect to the alleged threats and/or intimidation. He said "I just didn't feel threatened. The comment "make sure you do the right thing" was something that was just part of normal conversation." He said it was Mr. Hinchey who told him to make sure he did the right thing and not the big man with tattoos. He did not feel threatened or harassed or intimidated.

Mr. Wheeler's Girlfriend – no intimidation

59. The Employer appeared to be bringing an allegation that the Union threatened Mr. Wheeler's girlfriend or otherwise made threatening or intimidating remarks to her during the organizing drive and that this constituted an unfair labour practice. Apart from Mr. Wheeler relaying information that his girlfriend had told him that an unidentified union organizer allegedly made to her one evening when he was not at home, there was no evidence brought to support that allegation. The Employer chose not to put "the girlfriend" on the witness stand. Mr. Hinchey testified that he did not say anything to Mr. Wheeler's girlfriend and wouldn't dream of intimidating anyone, much less someone's girlfriend. He was adamant that he did not know the woman and did not say anything to her other than to leave a message with her to remind Mr. Wheeler of the time and place of the certification vote. The Board cannot and will not rely on third party evidence in a he-said / she-told-someone-else-who-told-us-he-said situation. The onus of proof lies with the Employer to prove the allegation and it did not do so.

Inducements versus salesmanship

60. With respect to the issue of inducements and membership dues, the evidence from Mr. Penny was clear that it was he who brought up the issue of union dues. The first time the union organizers appeared at his home, he described it as a "sale job" by the Union to get him to join – no membership card was presented, they just told him about things like pension and health benefits. On the second visit, he claimed they brought the union membership cards. He was unclear whether the discussion about membership fees came up before or after the card was presented to him, but he recalled it was he who asked the question. Mr. Penney admitted that he was very distracted on that day – he had many things going on in his personal life and he was not paying enough attention to the union officials to be able to tell with certainty at the hearing what was said or done with respect to the cards and what was said about membership in the union, the vote or the purpose of the card. Mr. Penny also admitted that he now doesn't recall that he was asked to join a union, but it was entirely possible that he did tell the investigating officer in the months following the organizing drive that the union had asked him to join a union and that the Board Officer's notes were accurate.

61. Mr. Penny admitted that it was his belief at the time of the hearing was that he needed to sign a card in order to get a vote but that he didn't know signing the card meant he was joining the union. However, he also admitted that it was very possible he now completely misunderstood what the union was telling him about the purpose of the card, that the card was an application for membership in the union and not just a vehicle to get a vote on union certification in his workplace. His only true recollection was that all the conversations were friendly and that it was he who started the discussion about membership dues. The board found his evidence to be unhelpful.

62. Mr. Hinchey and Mr. Peddle, both union organizers who had both visited Mr. Penney, had clear recollections of their specific discussions with Mr. Penney with respect to where and when the discussion took place and what was said. In addition to this, they testified that when taking part in an organizing drive, they had a process they followed each time. Mr. Peddle recalled that Mr. Hinchey read out the membership card to the Penney brothers. Mr. Peddle remembers the conversation and remembers explaining to the Penney Brothers that if a company was not certified, if they had signed the membership cards during the drive they would still be members of the union. Mr. Peddle said Mr. Penney gave no indication that he misunderstood what was being said.

63. Mr. Hinchey recalled handing the union membership cards to each of Trevor Penney and Perry Penney. Mr. Hinchey recalled speaking directly with Trevor and that he looked over Perry's shoulder as he read the membership card to both of them. It was Trevor Penney who asked how many people had to sign the cards to unionize the company and he who asked the details of when a vote was required. This happened after Mr. Hinchey had explained the union card. Mr. Hinchey's evidence on cross examination was clear and consistent with the evidence he had given on direct with respect to the instructions and discussions he had with the employees dealing with the application for certification and the explanation of the cards.

64. Mr. Hinchey denied the suggestion by the Employer that the Union was offering individuals a "free pass" in the union in offering to waive membership fees. He clarified that in every organizing drive membership and initiation fees were waived for all employees. In any event, the issue of membership fees was not something Mr. Hinchey brought up with the employees. In each instance, he testified that he went through his routine of explaining the benefits of membership, presenting the membership card to the employee and reading it aloud to him and then asking if he had any questions. This was his usual routine in all membership drives and he followed it in this case. In Mr. Penney's case, Mr. Hinchey testified that Mr. Penney asked specifically about union membership dues after the card had been presented and read to him. Mr. Penney admitted that he had asked questions about the membership dues.

65. Mr. Hinchey admitted that part of his comments to employees was that if they chose to join the union during an organizing drive they would be automatically accepted in the union, whereas if they were to walk in off the street and seek membership they might not be able to get hired for a job due to there being a very long out of work list currently. He did, however clarify that once some of the mega-projects started to become more active, the out of work list would become shorter and the union members on the bottom of the out of work list would begin getting calls. Because the employees would have been on the union's membership list sooner as a result of the membership drive, they would be available for hire at the big projects sooner than someone who walked in off the street looking for membership. This is a subtle difference but an important one.

There was no evidence that the Union was actually a "closed shop" as alleged by the Employer. The Union was clear that the out of work list was long and someone applying for a job off the street likely would have to wait until union members already on the list had been called for work, and there was discussion at the hearing of the fact that the Union might not accept new applications off the street at some point, but there was no actual evidence of the shop being closed and only being open if employees signed a union card during an organizing drive.

66. Likewise, there was no evidence to show that Mr. Hinchey or any of the union organizers promised any employee a job if he signed a union membership card.

Inducements – Was John Poole offered a job?

67. With respect to Mr. John Poole, Mr. Crossan, a Labourers organizer brought in from Halifax Nova Scotia to organize local Newfoundland roofing companies, claims the labourers contacted Mr. Poole and went to his house on four occasions. On the first visit, June 5, 2010 he went to Mr. Poole's house alone. He knocked on the door introduced himself told Mr. Poole who he worked for and explained that he was running a campaign and asked for a minute of his time. Mr. Poole invited him into the house and they sat at the kitchen table. The first visit took approximately 30 minutes. During that visit, he explained to Mr. Poole how the union would like to successfully organize Hydro-Guard. According to Mr. Crossan, Mr. Poole talked about his father having been a member of the Rock and Tunnel Union years ago. Mr. Crossan did not understand what the Rock and Tunnel Union was. The meeting ended with a friendly handshake and Crossan asked if he could return. Poole said that he could.

68. A couple of days after the first meeting, Mr. Crossan returned to the Poole residence. At this point they had a much shorter meeting outside on the deck. Mr. Poole had obviously just come home from work his hands and clothes were dirty. He looked as if he just finished working on a roof. He was getting ready for supper. The meeting took approximately 5 minutes. Mr. Crossan's visit was to find out more about the men that Mr. Poole was working with. Mr. Poole then brought up the name of an individual working with Avalon Roofing and the fact that he is now working in Long Harbour and how they used to work together at Avalon Roofing. Mr. Poole testified that he had told Mr. Crossan about the number of years he had worked with Avalon Roofing but had not received any pension credit for it. Mr. Crossan then left and let Mr. Poole go on to his dinner.

69. During the third face to face meeting (Mr. Crosssan's fourth trip to Poole's home), Mr. Crossan and Josh Hanbrook attended Mr. Poole's and they met on the front step. There was no one else there. From Mr. Crossan's point of view, he was gathering more intelligence. By then, Crossan had gathered some knowledge about Avalon Roofing and the guy who use to work there who had been a member of Local 1208. He had gone back to ask members of the local union and understood from speaking with other individuals that Avalon Roofing was

unionized. The relevance of this was that Avalon Roofing was unionized but when Mr. Poole had worked there he was a casual employee and was not unionized. It appeared from the evidence at the hearing that Crossan thought he could help Poole obtain pension credit for his previous years working with Avalon Roofing but had misunderstood that at the time Poole had worked with Avalon Roofing he was a casual employee and not in the bargaining unit and was not, therefore, entitled to any pension benefits for that time.

70. Mr. Hanbrook had connections in the union hierarchy and knew more about the pension benefits and how to go about getting credit for time worked. When Hanbrook and Crossan realized that Poole hadn't been a unionized employee during his years with Avalon Roofing and he hadn't qualified for pensions, Mr. Crossan indicated that Mr. Poole would not be eligible for any pension benefits for the time he had worked previously with Avalon Roofing. Crossan was adamant he was not offering Poole anything he was not entitled to and when he became aware Poole was not entitled to it, he and Hanbrook said as much and dropped the subject.

71. Both Mr. Crossan and Mr. Poole testified that it was Mr. Poole who brought up his prior experience with Avalon Roofing and had asked about his pensionable years. Mr. Crossan was not "scheming" as had been commented by Mr. Poole; rather, he explained to Mr. Poole that if he were in the union and working in the union at Avalon Roofing then he would have been entitled to the pension benefits for the time that he had worked there. However, as soon as Mr. Poole indicated that he had been part time casual Mr. Crossan was clear that he did not qualify.

72. Also at that third meeting, Mr. Crossan explained to Mr. Poole that his former co-worker from Avalon Roofing had likely obtained a job at the Long Harbour project as a result of having been on the union's out of work list and that non-unionized employees were not allowed on that list. Crossan was adamant that he did not say anything about Mr. Poole getting a job in Long Harbour. Mr. Crossan denied having offered Mr. Poole the pension benefits or a job at Long Harbour and commented that he was not in a position to offer anyone a job. He commented that if an employee is a member of the union he is entitled to go to Long Harbour if he wants to and he can do the travel provided that the Employer is hiring from the out of work list. According to Mr. Crossan, at the end of the meeting they all shook hands and had a chuckle and he asked if he was able to come back. Mr. Poole indicated that yes it was fine.

73. According to Mr. Poole's evidence, he was trying to say that he was being offered a job at Long Harbour and he was promised that he would be credited with seven-eight years' pension benefits for the time he worked at Avalon Roofing and that he had had "enough of it." The Employer alleged that this meant Poole had had enough of the Union offering him promises in exchange for his support for the Union. Mr. Poole did not outright allege that Mr. Crossan or any union official promised him a job at the Long Harbour project or any other megaproject if he

supported the Union. He was careful about his words at the hearing with respect to that issue.

74. Mr. Crossan denied the allegation made by the Employer. There is no evidence that the Union made any promises to Mr. Poole with respect to his pension benefits or obtaining work in Long Harbor other than explaining what Mr. Poole was entitled to if he had in fact not been credited with pensionable time while he had previously been a member of the union, and explaining that if he joined the union he would be eligible to go on the union's out of work list for employment at such mega projects. This was, Crossan explained, not something Crossan brought up: it came up by way of explanation to Mr. Poole of how his former co-worker likely became employed at the project at Long Harbour.

75. The final visit to Mr. Poole's house took place with Mr. Crossan, Mr. Poole and Mr. Josh Hanbrook. This discussion took place in the driveway as Mr. Poole was outside when they arrived. It was a very brief conservation and much of it revolved around the fact that Mr. Poole had built a barn out of pallets. They briefly discussed Flynn Roofing and Northshore and the membership drives there. The conversation lasted just over 5 minutes and it ended on a good note and a handshake. Mr. Crossan referred to Mr. Poole as a gentleman.

76. In reviewing the comments of Mr. Hinchey and Mr. Crossan and Mr. Peddle to the workers, it appeared to the Board that this was a case of salesmanship during an organizing drive. The Union then referred to *United Brotherhood of Carpenters and Joiners of America Local 579 and Northland Contracting Inc.* 2005 CanLii 60143 (NL LRBD) as well as *CAW v. Johnson's Control's Limited* (1990) Carswell Ontario 1195, [1990] O.L.R.B. rep. 651, 8 CLRBR (2d) 198, 8 CLRBR (2d) 198. These cases generally deal with what is acceptable and what is not acceptable from a union during an organizing drive. In particular, the Union argued *Johnson's* wherein the Ontario Labour Relations Board discussed the concept of an inducement to join a union versus salesmanship. In particular, the Ontario Board stated:

> The tolerance by the Board for "salesmanship" is reflected as well in the "hands off" approach which the Board adopts in connection with electioneering and campaigns unless it maybe concluded that a "reasonable" voter was mislead…. The Board considers that a similar approach is appropriate in the context of "inducements" (as distinct from intimidation or coercion). The Board must proceed **on a case by case basis in the context of the specific circumstances. However, in deciding whether the impugned conduct crosses the boundary of acceptable, the Board must be cognizant of the realities of an organizational drive. A certification campaign depends for its success on the ability of union organizers to persuade employees to become members. Means of persuasion include meetings to discuss the advantages of unionization, the distribution of leaflets and personal**

> **contacts by in-plant organizers with their fellow employees. Visible demonstrations of support with the union through the wearing of pins and buttons are commonplace in campaigns and serve as a graphic indication of the level of that support amongst employees.**

77. The Employer argued that the evidence of Mr. Poole at the hearing is more credible than that of Mr. Crossan with respect to the allegations of coercion to try and get him to join the union. Mr. Poole testified that the discussion he had with Mr. Crossan was the type that one would have on an organizing drive. The Employer argues that if one considers the comparison of the evidence between Mr. Poole and Mr. Crossan it was obvious that Mr. Crossan was approaching Mr. Poole as a potential member of the bargaining unit. Mr. Crossan describer Mr. Poole as a "hard worker" and that on at least one occasion his hands and clothing were dirty and he had obviously been working hard on a roof that day. He was not describing a non-working supervisor. Although Mr. Crossan testified that he was going to Mr. Poole's solely for intelligence, based on the information given by Mr. Poole and the number of times that Mr. Crossan visited him, it was more probable and believable that he was soliciting support for the organizing drive.

78. The Employer argued that it was not credible that Mr. Crossan had attended Mr. Poole's house and was not asking him to sign a membership card. On the third visit, when Mr. Crossan brought Josh Hanbrook with him, whose Dad was "high up" in the union, and the comments that he had a "buddy at Long Harbour", Mr. Crossan, an experienced organizer crossed the line with respect to the conversation on pension credits and Long Harbour. The Employer argued that Mr. Poole's evidence, his demeanor, and his clear recollection of the events was more consistent and believable and reliable than that of Crossan. This is particularly so because it was after the visit with Hanbrook that Poole said he wanted him to leave.

79. The Employer then argued that it was the Employer's suggestion that the Union somehow deliberately pushed Mr. Poole to the point that he did not want to join the union because it was the Union's opinion that he should not be in the bargaining unit. The Employer also argued that Mr. Crossan was not to be believed because he was "smug" in his testimony. The Employer argued that Crossan was self-serving and his evidence was self-serving.

80. The Board takes notice to the fact that Mr. Josh Hanbrook was not called to testify. The Board also notes that in spite of vigorous cross-examination Mr. Crossan's testimony was unwavering. He spoke clearly directly and respectfully throughout his testimony. His evidence at the hearing was consistent on cross-examination with what it had been on direct. He was confident. The Board found him to be credible and forthright.

Two-tiered membership fee

81. The Employer also argued that because Mr. Hinchey and Mr. Peddle allegedly misrepresented the membership card and because there was a "two-tiered" membership fee in the union that it should not be certified. Mr. Peddle's evidence was that individuals who joined the union during an organizing drive would have their initiation fee waived and those people who joined the union during times when there was no membership drive (i.e. came in 'off the street') likely would not. The Employer argued that this was an inducement to individuals to use the membership drive from one employer's workplace as a vehicle for joining the union that was otherwise a closed shop or a more expensive shop in any other instance. This, the Employer argued was an unfair labour practice contrary to the *Act*.

82. The Employer argued that in allowing this inducement the Board could not be sure why the employees may have signed the cards: did executing the cards mean they wanted union representation at this workplace, or were they simply signing the cards in order to get a "free pass" into the union and then vote against unionization in the representation vote which they knew would come later?

83. The Employer argued that with respect to the two tiered initiation fee, Boards in Canada say that it is acceptable and a borderline practice and it is only acceptable if it is fully explained. In this case, the Employer argues that the Union did not sufficiently explain how the system worked, which then left the impression with the employees that they must sign during the union organizing drive or pay later if the union were certified as the bargaining agent and they hadn't signed the card.

84. The Board notes that not one employee testified that they were left with the impression that only those employees who signed membership cards during a membership drive would have their fees waived in the event the Employer became unionized as a result.

85. The Employer argued that it was disturbing that during the organizing drive the union was making reference to mega projects such as Hebron, Long Harbour, and Come By Chance. The Union had argued that it was salesmanship to say that they had a lot of members at Long Harbour and that it was almost a closed shop in that there was a full list of members waiting to go work. However, the Employer argued this went beyond salesmanship and it was pressure to force the employees to sign up for free membership in the union to get in on the out of work list of the union ahead of others who might be coming in off the street.

86. The Employer argued that it is not about whether or not the statements are made that crosses the line, it is whether any employee signed the membership card because they wanted to be a member of the union with their Employer versus whether they signed the union membership card so they can get into a closed shop

to get on to Long Harbour. Again, there was no evidence to show that this is was what was being discussed or being offered by the union.

87. The Employer relied on the case of *Teamsters Local Union 879 v Leon's Furniture* [1982] OLRB rep. 404 in particular at paragraph 11

> The Board has drawn the line of regulation between salesmanship and improper conduct at fundamental misrepresentation, coercion, and intimidation. Such conduct when engaged in by trade union officials will usually result in the Board's refusal to rely on any of the membership evidence submitted whereas the involvement of rank and file supports may cause the Board to reject only the membership evidence handled by such persons. The latter depends on the state of knowledge of trade union officials and their related conduct to rectify matters if they were aware of the improper conduct. The Board has not attempted to lay down standards of conduct aimed at responding to confusion and misunderstanding. Rather, it has tried to strike a balance between competing interests by censuring conduct that could deter, coerce or mislead the reasonable employee. The reduced payment before certification has been viewed by the Board as a borderline tactic which has sometimes crossed the line of acceptability.

88. The Employer argued that the Board has to be sure that the cards represent the wishes of the employees and that it cannot disregard the comments made with respect to Long Harbour and the out of work list so we cannot be sure why the employees signed the cards. However, the witness to whom the Long Harbour discussion was attributed, i.e. Mr. Poole, was clear in his evidence and the organizers were clear in theirs that it was Mr. Poole who asked Mr. Crossan about the Long Harbor Project and how his former co-worker had obtained employment there. The Union was not selling this point. Additionally, Mr. Peddle testified that it is common practice in this Province that union membership dues are waived during an organizing drive.

89. The standard to be applied is that of the reasonable person. The Employer also relied on the *Naya Inc. and Industrial Wood and Allied Workers of Canada* [1998 B.C. L.R.B.D. No. 294 at paragraph 25]

> However, persistent peer pressure and promises of what the Union may be able to achieve in collective bargaining does not amount to intimidation and coercion. It is not unusual during a union organizing drive for employees to divide into two camps with opposing views. Antagonism may develop. The Board has stated that employees may be subject to peer pressure and campaign "puffery", but it up to the employee to consider whether to sign a membership card or not.

90. The Employer noted that the *Naya* (*Supra)* case took place in a jurisdiction where there was card-based certification and that the card based certification system necessitates a high degree of integrity. However, further reading of the *Naya* decision says at paragraph 54:

> …. However, even if [an employee] had read the card closely, misrepresentation by an organizer may override the specific wording of the membership card. If an employee signs a card and it is clear that there was a condition placed on the signing of the card, the card may not reflect an intent by the individual to join the union for purposes of union membership."

91. In this case, the Employer argues that the union officials' comments made with respect to individuals possibly not being able to gain membership in the union because of the long out of work list if they walked in from off the street versus their ability to gain union membership during an organizing drive, thereby tainted the signing of the card and the card may not have reflected an intent by those individuals to join the union for the purposes of membership. Presumably, the argument is that they were joining so that they could get on the union's out of work list in Long Harbour. This was never put before the Board and the question was never put to the witnesses.

92. Based on the evidence at the hearing, the Board was unable to find that the Union either coerced or intimated employees during the union membership drive, or that it presented any inducements or misrepresentations about the purpose of the membership cards. There was no evidence that there was any condition put on the signing of the cards such that the cards did not reflect the intent by the individual to join the union for the purposes of union membership. There was one witness who alleged on direct examination that he thought he was signing the membership card in order to get a vote. However, his prior statement to the Board's investigating officer was that he understood the card's purpose was for membership in the union and on cross-examination he agreed that perhaps his understanding had changed from the time he was asked to sign the card to the time he had testified.

93. With respect to the evidence given by Mr. Penney and Wheeler, each testified specifically that while they mainly understood that the Union was trying to persuade them to vote in favor of the Union, they were not coerced intimidated and they voted their minds. The Board must take at face value those employees' testimony that they did not feel intimidated, threatened or coerced.

94. The Board refers to *Naya Inc. (*re)[1998] BCLRBD 294, which was relied upon by both the Union and the Employer in this matter. Each employee who was asked about the pressure of signing a card or voting in favour of the union was clear: they felt pressured by the union to join, but they ultimately did what they wanted to do – they were not intimidated or coerced.

95. As for the allegation of whether the Union went so far as to threaten employees, and in particular Mr. Wheeler and Mr. Penney, the Union issued subpoenas for the evidence of Mr. Penney and Mr. Wheeler. Mr. Penney's evidence at the hearing was contradictory: it contradicted itself on direct and cross examination, it contradicted the comments attributed to Mr. Penney by the Investigating Officer in his report, and it contradicted the allegations in the unfair labour practice complaint by the Employer. In particular, Mr. Penney recalled having met with two union members on two separate occasions but he did not recall any discussion with respect to the comment "vote the right way". He can't remember the conservation, doesn't think it came up, doesn't think he is sure, and denied ever having spoken to the Board's Investigating Officer about any of these matters. Later, he then said he couldn't remember if he had spoken to the Board's Investigating Officer or if he had spoken to the Employer's legal counsel. When he was asked directly how the allegation arrived in the complaint that there had been an unfair labour practice and that he has been threatened by members of the union, he stated someone else must have given the information to the Employer. He had no idea how the Employer received the information in September 2010 with respect to the complaint. This is not sufficient to show any threat to the Board. It is sufficient to cast doubt as to the reliability of his evidence overall.

Issue 4: Should the Board exercise its discretion to disregard the membership vote and rely upon the cards presented to the Board in support of the application for certification? Can those membership cards be relied upon to represent the employee's true wishes with respect to union representation in the workplace?

96. Given the overwhelming evidence of the Employer's intentional misleading of this Board, the vote could not be relied on.

97. The Board made an effort to consider the Employer's unfair labour practice complaints against the union without them being tainted by the Employer's own deliberate attempts to sabotage the certification process. The evidence of Mr. Crossan, Mr. Hinchey, and Mr. Peddle with respect to the membership drive was consistent with what they told the Labour Relations Board Officer throughout and with what each testified to the Board. It held up under cross-examination. Although one of the witnesses, namely Mr. Crossan was described by the Employer as "smug" at the hearing, his evidence was not refuted. His evidence was also supported by the evidence of the employees whose homes he visited as to what took place during the discussions, who was present, how long the discussions took place and the general content of the discussions. Mr. Crossan was a confident witness whose evidence was not shaken. The Union did not make any promises of positions or remuneration unrelated to improving working conditions with the Employer in exchange for votes for the union.

98. The Employer referred to *National Labour Relations Board Petitioner and Sheet Metal Workers' Association of Northern Ohio, Local Union 33 Intervenor v.*

Shamy Heating and Air Conditioning Inc. Respondent 2002 US app Lexis 6529; 33 fed app X. 190; 170 LRRM 2448

> The pertinent proposition of law in this case is beyond dispute. If the offers in question had occurred, the election would undoubtedly be invalid. … A Union cannot promise positions or remuneration, unrelated to improving working conditions at the Employer, in exchange for votes of the Union. This *quid pro quo* of offering narrow benefits to particular employees undermines the election process as much as handing the employee a bag of small, unmarked bills.

99. The Employer relied on the case of *Davis Distributing Limited* [1994] OLRD 3345 wherein the Ontario Board stated (at [paragraphs 6-7):

> In deciding whether improper conduct by a Union organizer casts doubt on the voluntariness of membership evidence, the Board is conscious of the heavy reliance that it places on membership evidence filed by a trade union in certification applications. In order to protect the integrity of the certification process which depends on such evidence, the Board takes care to ensure that where improper conduct is alleged, it is satisfied that it does not cast doubt on the reliability of that evidence…At the same time, the Board is also concerned that it not impose artificial standards of behavior that are contrary to normal human interaction.

Penney and Wheeler's allegation that they misunderstood or were misled as to the purpose of the union membership card.

100. During the hearing, the Employer's counsel met with witnesses in preparation for their testimony. During the questioning of the witnesses prior to their testimony, counsel became concerned that the two employees, namely Mr. Penney and Mr. Wheeler had misunderstood or been misled as to the significance of executing a membership card. The Employer amended its unfair labour practice complaint against the Union as a result.

101. There are two conflicting bodies of evidence on this point. On the one hand, the Board has evidence of Mr. Hinchey and Mr. Peddle as to what they routinely did on an organizing campaign. In addition to his usual practice, Mr. Hinchey had a direct recollection of presenting the card to each employee and reading it to him on this campaign and, in particular, he remembered his meetings with Mr. Wheeler and Mr. Penney. Written on the card is:

> [seal of Labourers' International Union of North America]
> **APPLICATION FOR MEMBERSHIP**
> Name: _____
> (Please Print)
> Tel. No. _____

> Labourers' International Union of North America
> L.I.U.N.A. LOCAL 1208
>
> I, ……..……..hereby make application to and accept membership in "L.I.U.N.A., Local 1208…..I the undersigned, authorize my employer to deduct from my pay, the amounts established by L.I.U.N.A, Local 1208...

102. The card is clear on its face that it is an application for membership in the union. Even if the employees could not read Mr. Hinchey said that he read the card to them and Mr. Peddle testified that he heard Hinchey reading the card.

103. On the other hand, we have the evidence of Mr. Poole and Mr. Wheeler. Mr. Poole testified at the hearing that "all union members are suck holes" and admitted that when he delivered newsletters to the Bell Island employees on behalf of the Employer he told them that if they brought in a union they would lose their Christmas bonuses, rides to work, and that the owner would "shut her down." This is the individual who alleges he was mislead as to the purpose of signing a membership card. The Board applied the evidence of Mr. Hinchey.

104. We also have evidence of Mr. Wheeler, whose evidence on the crucial issue of whether he understood what the card meant when he was presented with it changed completely. He first told the Board Officer that he understood that signing a card meant someone would become a member of the union, but at the hearing he said the Board Officer "must have made it up." Then, he testified that he understood (at the time of the hearing) that the card meant they could get a vote for certification. In order to believe Mr. Wheeler, the Board must believe that the Board Officer made up crucial information on a key point and that both Mr. Hinchey and Mr. Peddle were lying about how they presented the card to Mr. Wheeler.

105. The Board found the evidence of Mr. Hinchey and Mr. Peddle more reliable than that of Mr. Wheeler or Mr. Poole on the issue of how the cards were presented and explained to the employees during the membership drive, particularly in light of the fact that the card is plain on its face that it is an application for membership in a union. While the Employer alleged improper conduct on behalf of the Union, the Board found that the evidence did not support such allegation and that the evidence of Mr. Poole and Mr. Wheeler did not cast doubt on the reliability of the membership evidence.

106. Based on the analysis above with respect to the reliability of the membership cards and, in particular, based on the evidence of the union organizers being clear, consistent and not refuted at the hearing, versus the evidence of the employees who denied that they were misled or coerced or intimidated despite the allegation that they were, the Board did not find that the Union committed an unfair labour practice. The reliability of the cards was not in jeopardy. The Board therefore

found that, based on the preponderance of evidence, the membership cards can be relied upon and to show the true wishes of the employees.

Issue 5: Matter 5345 Legal counsel's interviews of the employees were not improper and therefore did not constitute an unfair labour practice.

107. The Board found that there was insufficient evidence presented by the Union to support the allegation that counsel for the Employer, in his interviews of the witnesses to prepare them for testimony, asked improper questions of the employees and that therefore the Employer committed an unfair labour practice.

108. In particular, the Union alleged that on March 11, 2011 the Employer's solicitor inappropriately questioned employees Trevor Penney and Tony Wheeler as to events that occurred during the union's organizing drive. The Union argued that such questioning amounted to an interference with the selection formation and administration of a trade union, contrary to section 23. (1) of the *Act*. The questions asked of the employees centered on the employees' involvement in the organizing drive and, while the witnesses had been warned by counsel that they were not to disclose whether they signed union membership cards, the Employer was questioning whether the employees were asked to sign something, and a series of other related questions. The Union objected to the line of questioning at the hearing, and stated that the questioning was not in relation to any matter before the Board. The Employer then sought to amend its complaint, as the Employer's counsel had only elicited the information from the witness shortly before he began testifying on the date of the hearing into the other unfair labour practice complaints.

109. The Union argued that the questions did not arise from a complaint before the Board, nor did they arise from a voluntary statement made by the witness at the hearing. In asking the questions, the Union argued, Hydroguard committed an unfair labour practice contrary to sections 23(1) and 25 (3) of the *Act*.

110. The second alleged instance of improper questioning was the actual questioning of the witness by legal counsel before they testified. The Union argued that given the setting and circumstances, namely that there has been a membership drive, a certification vote, and the employees knew the Union and the Employer were embroiled in a labour relations hearing, the Employer's questioning of an employee about a labour relations issue going to his employment, then the employees were being compelled by the Employer to give information with respect to their participation in or involvement in the organizing drive to the Employer's legal counsel. This, the Union, argued, was an unfair labour practice contrary to sections 23(1) and 25(3) of the *Act*.

111. Section 23 (1) and 25 (3) state:

23. (1) An employer or employers' organization, and a person acting on behalf of an employer or employers' organization, shall not

(a) participate in or interfere with the selection, formation or administration of a trade union; or

(b) contribute financial or other support to a trade union.

(2) An employer shall not be held to contravene subsection (1) by reason only that the employer

(a) in respect of a trade union or a council of trade unions that is the bargaining agent for a unit comprising or including employees of the employer,

(i) permits an employee or representative of that bargaining agent to confer with him or her during working hours or to attend to the business of the bargaining agent during working hours, without deduction of time so occupied, in the calculation of the time worked for the employer and without deduction of wages in respect of the time so occupied,

(ii) provides free transportation to representatives of the bargaining agent for purposes of collective bargaining, the administration of a collective agreement and related matters, or

(iii) permits the bargaining agent to use his or her premises for the purposes of the bargaining agent; or

(b) contributes financial support to a pension, health or other welfare trust fund, the sole purpose of which is to provide pension, health or other welfare rights or benefits to employees.

25 (3) A person, whether or not he or she is an employer, shall not seek by intimidation or coercion to compel an employee to become or refrain from becoming or stop being a member of a trade union.

112. The Employer denied that it or its solicitor committed an unfair labour practice. The Employer's counsel argued that shortly before the witness took the stand, the Employer became aware of evidence, namely statements allegedly made by the union organizers to Mr. Penney and Mr. Wheeler that called into question the integrity of the membership evidence, i.e. the cards. According to the Employer's Counsel, the witnesses Penney and Wheeler voluntarily disclosed to him that the union organizers led them to believe that the only purpose of signing the membership cards was to get a vote. These misrepresentations by Mr. Hinchey and Mr. Peddle, he alleged, violated sections 25 (3) and 28 (1) of the *Act* and that because a concern with respect to the integrity of the membership evidence was

raised, it was necessary for the Board to inquire into the matter to determine whether it could rely on the membership evidence.

113. The Employer denied asking the employees questions about their possible involvement in the organizing drive. The issue before the Board was not whether the Employer's solicitor was entitled to meet witnesses prior to the hearing. Rather, it was whether anything improper occurred during those meetings. The Employer argued that the names of individuals at that meeting were protected by solicitor-client privilege.

114. The fundamental issue became how far an Employer can go in questioning an employee about his involvement in an organizing drive. The Employer conceded that it was trite to say that the law is clear: an employee cannot be asked whether he signed a membership card. However, the Employer argued there was nothing wrong with asking about the employee's activities during a membership drive. The Union took great offence to this and argued it was akin to asking every question around the question "did you sign a card" which, when added together, could be used by the Employer to determine whether the employee signed a membership card (or supported the union) or not.

115. Mr. Wheeler advised the Labour Relations Board Officer that the Employer's counsel warned him that he was not required to disclose whether he signed a membership card or whether he supported the union or how he voted in the certification vote. Mr. Wheeler confirmed that he was asked by the Employer whether he was asked by the union to sign a membership card. The Board must be careful in relying on Mr. Wheeler's evidence, given that he alleged, when caught on cross-examination giving a contradictory story to his prior statement that the Board Officer "made up" comments he is alleged to have said about the purpose of the membership card.

116. The problem with the evidence of Mr. Wheeler and Mr. Poole is that because it was so unreliable in one regard, how can the Board believe it with respect to another? Wheeler and Poole both admitted that they had been warned by counsel at the beginning of their interviews to not divulge whether they had executed membership cards, or what way they voted or whether they supported the union. There was no evidence brought by the union to refute this and the evidence with respect to that discrete issue remained consistent throughout their testimony and it accords with what they told the Board Officer. This gave the Board some measure of comfort in determining that the Employer's counsel was not asking questions of the employees that amounted to an unfair labour practice.

117. The Board also had to consider the bigger picture of the entire hearing: Hector Hann, the project Manager, admitted that the Employer was lying to its legal counsel throughout this matter with respect to the inclusion of the 6 Placentia employees. Having heard that testimony, combining it with Mr. Pooles's obvious anti-union comments throughout the hearing, the Board cannot be sure that

anything the Employer told its counsel was true or whether the Employer, working with the working foremen, was trying to throw anything it could to get the application for certification tossed out months after the organizing drive and certification vote. Certainly, the timing of the new comments and new complaint by the Employer gave the Board pause: by the time the fresh complaint was laid, the hearing had been underway and nearly a year had passed since the organizing drive took place. It is difficult to conceive that the Employer only just suddenly became aware of a potential unfair labour practice nine months after the application for certification had been filed, the parties' positions were known, and half-way through a hearing wherein there were already several unfair labour practice complaints made by each party with respect to the application for certification.

118. Absent any evidence to the contrary, the Board considered the representations by the Employer's counsel as to what was said in the preparatory meeting, combined with the comments of Wheeler and Poole, and could not say that there was evidence of a breach of the relevant sections of the *Labour Relations Act* in this instance. The unfair labour practice complaint against the company with respect to its legal counsel's questioning of the witnesses, was therefore dismissed.

Conclusion

119. Based on the findings of fact and the analysis above, the Board made its order.

DATED at St. John's in the Province of Newfoundland and Labrador, this 27th day of August, 2012.

Sheilagh M. Murphy
Chairperson