

BRITISH COLUMBIA LABOUR RELATIONS BOARD

LEDCOR INDUSTRIES LTD.

("Ledcor")

-and-

BRITISH COLUMBIA AND YUKON TERRITORY BUILDING
AND CONSTRUCTION TRADES COUNCIL LOCAL UNION
#16

("Local 16")

-and-

CHRISTIAN LABOUR ASSOCIATION OF CANADA, LOCAL
NO. 68 (CONSTRUCTION AND ALLIED WORKERS'
UNION)

(the "CLAC")

PANEL:	John B. Hall, Associate Chair (Adjudication)
COUNSEL:	Peter Gall, for Ledcor David Blair, for Local 16 Alan Favell, for the CLAC
CASE NOS.:	29145, 29147 and 29200
DATE OF HEARING:	May 30, 1996
DATE OF DECISION:	July 9, 1996

DECISION OF THE BOARD

I. BACKGROUND

1 This decision concerns the disposition of various matters involving the parties
which are outstanding before the Board. Those matters (as well as other related
events) arose in the following chronological order:

2 1. On January 26, 1996 the Board received an application for certification under
Section 19 of the *Labour Relations Code* from the British Columbia and Yukon Territory
Building and Construction Trades Council, Local Union No. 16. The application sought
to represent a unit of employees of Ledcor Industries Ltd. and constituted a "raid" on a
unit already certified to the Christian Labour Association of Canada, Local No. 68. The
unit was described as "all construction employees of Ledcor". The only worksite
address listed in the application was "Line Creek Colliery, near Sparwood". The Board
began to process the certification application (Case No. 29147) in accordance with its
usual procedures.

3 2. Local 16 subsequently confirmed that it wished to amend the bargaining unit
description to read: "all employees in British Columbia engaged in all construction work
other than roadbuilding and pipeline work except non-working supervisory personnel,
office and sales staff and those excluded by the *Labour Relations Code*, employed by
Ledcor Industries Limited."

4 3. Also on January 26, 1996 Local 16 filed an unfair labour practice complaint
against Ledcor under several sections of the Code (Case No. 29145). The essence of
the complaint was that effective December 15, 1995 (the beginning of the open period
for raids under the CLAC collective agreement), Ledcor had transferred all of its
employees at the Line Creek Colliery worksite to a payroll company known as Mountain
Millwright Service Ltd. ("Mountain Millwright"). Except for this change, the employees
initially experienced no alteration in the terms and conditions of their employment with
Ledcor. Then, on January 23, 1996 (i.e., shortly before the certification application), all
but three of the employees were laid off.

 Later in these proceedings, Local 16 submitted a Record of Employment form
prepared by Ledcor and dated December 14, 1995. Local 16 said the form had been
prepared for an employee working at the Line Creek Colliery site, and the reason for
issuance was code "A" or shortage of work. Local 16 alleged this was a false statement
as most of the crew had continued to work without interruption on Mountain Millwright's
payroll.

5 4. By letter dated January 31, 1996 counsel for Ledcor wrote to the Board
responding to the unfair labour practice complaint:

We write to advise that the individuals who were laid off last week at Ledcor's Line Creek project and who are the subject of the Union's complaint have all been recalled to work. Also, all of these individuals will be compensated for any lost wages.

Further, Ledcor accepts that for the purposes of the raid application, the nine employees of Mountain Millwright who were working on Ledcor's Line Creek project last week prior to their lay off are to be treated as employees of Ledcor.

All of this is done without any admission of wrongdoing.

- 6 5. The Industrial Relations Officer's report prepared in respect of Local 16's certification application was received by the Board on February 1, 1996. The report concluded in part:

...Payroll evidence clearly supported evidence of 'construction' employees working at multiple work locations throughout the province. Based on these facts, there is a significant shortfall to a majority of employees required in order for the application to proceed. For this reason, the IRO has not set a tentative vote date.

- 7 6. Additional correspondence was received from Local 16 on February 1, 1996. Local 16 alleged it had received further information which led it to conclude that the CLAC was dominated or influenced by Ledcor. Local 16 accordingly made the following applications (Case No. 29200):

- (a) to amend the application for certification to apply first under s. 18(1) (certification of a bargaining unit for which a collective agreement is not in force and a trade union is not certified) and, in the alternative, to apply under s. 19(1) (certification of a bargaining unit for which a collective agreement is in force);
- (b) to amend the unfair labour practice complaint to add CLAC, Local 68 as a respondent and to request relief pursuant to s. 14(4)(f) certification without a vote;
- (c) to apply under s. 139(a) for a decision that the employees transferred by Ledcor to Millwright Mountain Services Ltd. are actually employees of Ledcor;
- (d) to apply under ss. 139(a) to (g) for decisions that CLAC, Local 68 is a prohibited employee association pursuant to s. 31, lacks the status of a trade union within the meaning of s. 1(1) and, as a consequence, the purported collective agreement between CLAC, Local 68 and Ledcor is void. The Union further applies under s. 142 for an order of the Board cancelling the certification of CLAC, Local 68 as the

bargaining agent for the bargaining unit of Ledcor's employees;

- (e) in the alternative, to apply under s. 33(11) for cancellation of the certification of CLAC, Local 68 as the bargaining agent for the bargaining unit of Ledcor's employees, on the ground that CLAC, Local 68 has abandoned its bargaining rights in respect of the employees in the bargaining unit.

8 7. The Board received an application on February 1, 1996 from the CLAC to be certified for employees of Mountain Millwright (Case No. 29178). The CLAC applied shortly thereafter to withdraw the application, and the withdrawal was subsequently granted by the Board.

9 8. The parties met informally at the Board. As no resolution was possible, they were directed to file written submissions on all of the outstanding issues.

10 9. A hearing was convened on February 9, 1996. After considering oral submissions in addition to the materials on file, I ordered that a vote be conducted amongst employees at the Line Creek site. The ballots cast were to be individually sealed and the entire box sealed, at least and until completion of a further investigation which was also ordered. (Other issues over the form of the ballot and the eligible voting constituency need not be recited.)

11 10. When the parties could not reach agreement over the scope of a further investigation into Local 16's certification application, additional submissions were received and an oral hearing convened on February 21, 1996. In a letter dated February 26, 1996 I determined that one or more Industrial Relations Officers would be requested to carry out an investigation which can only be described as extensive, if not unprecedented.

The central purpose of the investigation was to determine the number of employees which were properly within the bargaining unit for which Local 16 had sought certification as of January 26, 1996. In order to make this determination, the IRO was requested, among other inquiries, to determine all Ledcor construction projects ongoing as of the certification date, verify the existence of those projects through tender or other documentation, examine a series of payroll documentation (including time cards, statutory and union deduction records, cancelled cheques and so on), and personally visit construction projects and interview employees.

12 11. The final report of the Industrial Relations Officers assigned to the matter was received by the Board on March 29, 1996. The report states that the Officers reviewed original tender documents and/or contracts for projects identified by Ledcor, except for two cases where copies were examined. The following additional documentation was reviewed at Ledcor's head office:

- Original time cards that included January 26, 1996 for all construction sites

- Weekly payroll summaries for all construction sites were reviewed for the periods ending December 2/95 - Feb. 10/96
- Copies of paycheques and wage statements for all sites for pay periods ending Jan. 13, 20 and 27/96 (cheques dated Jan. 19, 26 and Feb. 2)
- Cancelled paycheques for all sites dated Jan. 19, and some for Jan. 26 - not all had been returned by the bank yet
- Invoices, cheques and receipts for Receiver General (hourly payroll) for remittance periods Jan 31. for employee deductions for CPP, UI and Income Tax
- A WCB Employer's Payroll and Contract Labour Report and a cancelled cheque indicating workers compensation benefits had been paid
- Union dues remittance for January 1996 paid to CLAC. [An IRO has done a reconciliation of dues for the month of January and confirms that the amount remitted were dues deducted for January.]
- Union benefit remittance for January 1996 paid to CLAC

Industrial Relations Officers also visited three of Ledcor's construction projects on the same date. Two sites were in the Lower Mainland and one was in the Interior of British Columbia. Twelve hourly and seven excluded employees were interviewed. Based on the foregoing, as well as additional information from the investigation, the Officers reached the following conclusions:

The BCYT [Local 16] emphasized the lack of trust that it held regarding the information Ledcor provided in the course of the initial application. Giving serious consideration to this concern, we both reviewed the material requested by the Labour Relations Board. We visited Ledcor's head office for the better part of a business day in order to view original records and documents. Copies of the records were obtained and we spent several more days scrutinizing, cross referencing and verifying the validity and consistency of the material.

We viewed contracts for all of the projects that were identified by Ledcor as well as progress claims, owner's payments and architect's certificates. We are satisfied that each of the projects listed by Ledcor were bona fide construction sites ongoing as of January 26, 1996.

All payroll information, Receiver General, WCB and Union dues remittances were confirmed for persons claimed to be employees. There was no overlap of Ledcor employees with any person provided to Ledcor by a labour broker.

All information that was obtained through site inspections is consistent with records maintained by Ledcor and inspected by us. Further, the payroll records confirm that a significant number of the employees working as of January 26, 1996 have a longstanding and in many cases continuing employment relationship with Ledcor.

We conclude that the number of employees actively employed on January 26, 1996 at the Ledcor construction sites results in the Union having substantially less than 45% membership support; the number of Ledcor construction employees was well in excess of 32 employees. Even if we eliminate persons who might be challenged when considering the following:

- removing all possible management exclusions (all working foreman [sic] (including those who were members of CLAC and paid union dues), foreman [sic], superintendent's [sic], project managers, etc.) from the unit
- removing 3 painters as there are no painters in the collective agreement
- removing 1 person who is no longer employed

the Union continues to have substantially less than 45% membership support.

13 12. The report of the Industrial Relations Officers was forwarded to the parties under cover of a Board letter dated April 2, 1996. The parties were advised that any submission which they wished to make regarding the report should be received by April 11, 1996 and any response to a submission filed by another party received by April 16, 1996. Ledcor and the CLAC filed submissions in accordance with these deadlines. Local 16 did not file any submission until after the date for final responses.

14 13. On May 7, 1996 the Board gave notice that a hearing would be convened on May 30, 1996 to hear oral submissions respecting how all outstanding matters between the parties should be addressed by the Board.

II. POSITIONS OF THE PARTIES

15 Local 16 submits that the process followed in this proceeding constituted a "new extra-statutory secrecy" which defeats its right to meet the case raised against it. Local 16 argues that it is completely unable to test the validity of the findings in the IRO report unless the Board discloses the projects at which Ledcor says it employs persons, together with the number of persons and their positions claimed to be covered by the CLAC's collective agreement. Sections 124(2), 124(3) and 146(3) of the Code are said to require, or alternatively permit, the Board to disclose information as to the numbers and locations of employees in a bargaining unit. If this disclosure is not made by the

Board, Local 16 says it is entitled to have its certification application proceed to a hearing on the merits. Alternatively, the Board should permit the withdrawal of the raid application and the continuation of the unfair labour practice complaints. Local 16 cites a number of decisions on the subject of Board investigations, but cautions that all cases before 1993 can be distinguished on the basis that they were decided prior to the enactment of Section 124(2) which now requires the disclosure of reports.

16 Ledcor submits that this case comes down to whether there should be an oral hearing. Board policy is clear: in certification applications, the Board relies on Officers' reports unless good reason is put forward to doubt their accuracy or completeness, or there is some other reason to believe that the application cannot be adjudicated on the basis of the report. No good reason has been put forward here by Local 16; it seeks the number and location of employees but the Code does not require employers to provide this type of information. Ledcor also says that these proceedings have reached the point where a withdrawal cannot be permitted. Local 16's raid application should therefore be dismissed, and the remaining unfair labour practice complaints become academic.

17 The CLAC emphasizes that Local 16's application is a raid, as the subsequent request to amend under Section 18 has not yet been granted. The key issue is whether Local 16 has membership support and two reports have now concluded that there is substantially less than the required threshold. The Board is entitled to rely on the reports and should go no further. On the first unfair labour practice complaint, the CLAC asserts that it does not know the circumstances surrounding transfer of the employees to Mountain Millwright. However, even if this constituted an unfair labour practice, it has no bearing on the outcome of the raid application because there is no effect on the level of membership support. The CLAC argues that the raid application should be dismissed, as allowing a withdrawal would cause it real prejudice. The CLAC also refers to a February 13, 1996 submission from Local 16 wherein the appropriateness of a Section 19(2) time bar was acknowledged if Local 16's application was unsuccessful.

III. ANALYSIS

18 Broadly stated, there are three issues which arise from the parties' submissions. First, can Local 16's certification application be adjudicated on the basis of the Officers' report or should the matter proceed to a hearing on the merits? Second, if a hearing is not conducted, should Local 16 be permitted to withdraw the certification application? Lastly, depending on the outcome of the first two issues, how should the Board deal with Local 16's unfair labour practice complaints?

19 The first issue concerns the weight and reliance which can properly be placed upon the second IRO report. If necessary, I would preclude Local 16 from challenging the report by reason of its failure to file a timely submission. Where a party declines or neglects without reasonable explanation to participate in the Board's processes, it cannot expect to be heard as of right at a later date. In any event, the points raised by

Local 16 are insufficient to preclude reliance on the IRO reports in accordance with standard Board practice in certification applications.

20 It is trite to observe that the Labour Relations Board is an administrative tribunal and not a court of law. One notable feature of this status (which distinguishes the Board from the courts) is the powers contained in provisions such as Sections 123, 124, 126 and 140 of the Code — these include the jurisdiction to investigate and the Board does so regularly. Additionally, with certain limitations, the Board may adjudicate matters based on reports prepared by persons who have been appointed to carry out investigations. That is routinely the case in certification applications and has been so for many years. The only material difference is that Section 124(2) now requires the disclosure of reports to the parties, except for confidential information relating to membership in a trade union.

21 In *Western Canada Steel Limited*, BCLRB No. 3/74, [1974] 1 Can LRBR 22, then Chairman Weiler commented on the "invariable practice" of the Board to determine majority status of a trade union under what is now Section 22(2) of the Code through investigation. He gave three reasons why the Board did not then conduct oral hearings to establish the majority status of a union, and did not intend to do so in the future:

...First of all, there is the crucial need to preserve the confidential character of union membership, a policy reflected in the regulations created under the Code [see now Section 140(c) and Rule 24(4)]...

Secondly, there is the need for expeditious disposition of certification matters. The status of a bargaining agent is a fluid and changing thing and must be resolved quickly. The process cannot be allowed to become bogged down in a backlog of hearings in the more than one thousand applications which come before the Board every year. Thirdly, evidentiary hearings in the offices of the Board are not a very feasible method of determining the majority status of a union. It is much more effective to have an independent investigator of the Board canvass the hundreds of names on the company payroll or in the union records at the scene. (pp. 27-28)

Having said this, Chairman Weiler immediately recognized the natural justice requirements contained in what is now Section 126:

Accordingly, where a party believes the results of the Board's investigations are incorrect and offers specific reasons and materials why, the Board will, if necessary, reinstitute the investigation in the light of these submissions. ... (p.28)

22 Much more recently in *NRS Block Bros. Realty Ltd.*, BCLRB No. B92/96 (Leave for Reconsideration of BCLRB No. B209/95), the Board made these observations regarding investigative reports:

Under Section 124(2) of the Code, reports received by the Board are disclosed to the parties. These reports are hearsay in nature. Accordingly, the Board does not generally rely on their contents as evidence in a proceeding without disclosing them to the parties and giving the parties an opportunity to make submissions. (One obvious exception to this practice is the Board's reliance on reports concerning confidential membership records.) Aspects of a report may properly be relied upon by the Board where there is an express agreement by the parties to do so, or where certain matters are not disputed by parties in their submissions. (para. 15)

23 Thus, in the context of certification applications, it has been the Board's longstanding practice to follow an "administrative model" of adjudication which relies on information contained in reports prepared by Industrial Relations Officers. With the exception of confidential membership information, reports are now disclosed to the parties. The Board relies upon such reports to determine the level of membership support in a trade union. Additionally, reports may be relied upon where there is express agreement by the parties or where certain matters are not disputed. With respect to the latter, parties must offer "specific reasons and materials why" they believe the results of the investigation are incorrect.

24 In the present case, Local 16 has not brought forward any specifics as to why the supplemental IRO report is incorrect or inaccurate. It says in effect "we don't know", and asserts because it is not able to challenge the report the Board should conduct a hearing. With respect, Local 16 has been given ample opportunity to carry out its own inquiries and bring forward information which might cause the Board to question the two reports on file. Local 16 was also given an opportunity to provide information on a confidential basis to the Industrial Relations Officers carrying out the further investigation. There is no "new extra-statutory secrecy" which has shrouded the present process. The objections raised by Local 16 are akin to countless challenges made by employers over the years to the Board's reliance on IRO reports — challenges which have properly been rejected for the reasons articulated in *Western Canada Steel, supra*, in order to protect the certification process.

25 The second and more difficult issue is whether Local 16 should be permitted to withdraw its certification application. The Board's practice regarding withdrawal in raid situations was summarized in *Venice Bakery Ltd.*, BCLRB No. B20/96:

The decision as to whether to grant a withdrawal is discretionary and an applicant must present valid labour relations reasons for seeking a withdrawal.

The Board has repeatedly ruled that the fact that a raiding union has misjudged the level of support does not provide grounds for a withdrawal. The applicant who finds that it has simply failed to sign up enough members should not expect the Board to accept that as a valid reason to exercise its discretion in favour of granting the withdrawal: *Venice Bakery Ltd.*, IRC No. C152/89,

(Reconsideration of Decision dated February 9, 1989), p. 6. Lack of requisite membership support does not constitute a valid labour relations purpose: *Point Hope Shipyard Co. Ltd.*, Letter Decision BCLRB No. B119/94.

While a failure to sign up sufficient members is not valid reason for the Board to exercise its discretion in favour of granting a withdrawal, withdrawal may be granted where the raiding union can prove that it was unaware of other locations where employees work and the oversight was reasonable in the circumstances: *Venice Bakery, supra*, at p. 6. (paras. 19-21)

The Board must also consider prejudice to the employer and incumbent trade union: *Turner Distribution Systems Ltd.*, BCLRB No. B421/95. See also *APS Architectural Precast Structures Ltd.*, BCLRB No. B374/93.

26 None of the cases on withdrawal referred to by the parties dealt with the circumstances of a construction industry employer engaged in several geographically separate projects at the time of application. The closest reference is found in *Venice Bakery, supra*, where the panel stated "...withdrawal may be granted where the raiding union can prove that it was unaware of other locations...and the oversight was reasonable" (para. 21). The construction industry poses organizational challenges which do not arise for trade unions seeking to represent employees working permanently at a single location. This is a legitimate factor to take into account when determining whether to grant a withdrawal.

27 In this case, I am satisfied that Local 16 made legitimate efforts to locate other Ledcor worksites. From the information in its possession, it believed there was sufficient membership support based on the cards signed by employees at the Line Creek Colliery site. Local 16 provided its information regarding other worksites, together with its understanding of persons working at those locations, to the Industrial Relations Officers conducting the further investigation. The IROs determined, however, that Local 16 was mistaken as to the extent of Ledcor's operations.

28 I have little doubt that Local 16 would have been permitted to withdraw its raid application after the initial IRO report. It did not seek to do so, but instead continued to pursue its application as well as the related unfair labour practice complaints. Even now, following an extensive further investigation, Local 16 only seeks permission to withdraw as an alternative to an oral hearing on the merits. These circumstances would ordinarily result in a withdrawal request being denied. However, as already indicated, this is not an ordinary case.

29 There are two factors which militate most strongly against granting a withdrawal. These are the potential prejudice to Ledcor and the CLAC, and the argument that Local 16 acknowledged the appropriateness of a 22-month time bar if it was not successful.

30 Dealing first with the question of prejudice, this is answered in the main Ledcor's actions prior to Local 16's application. I refer specifically to the transfer of employees at

the Line Creek Colliery site to Mountain Millwright's payroll upon commencement of the raid period. It is not necessary to make any finding regarding the propriety of this action (and I expressly refrain from doing so); nonetheless, in the absence of an explanation by Ledcor, this action and the subsequent lay off of employees provided Local 16 with good cause to be acutely suspicious of anything said by Ledcor, as well as any findings based on information provided by Ledcor. At this stage, Ledcor cannot be heard to complain over any disruption caused by the investigative process put in place to address Local 16's concerns. It must likewise accept partial responsibility for any prejudice which might result from the loss of a time bar.

31 I am more sympathetic to the prejudice which might result to the CLAC. However, this does not alter the ultimate exercise of my discretion. I also note that the CLAC inadvertently added uncertainty (and by its own admission caused "confusion") by applying to represent employees of Mountain Millwright under a name which referenced a different local.

32 This leaves the argument that Local 16 should be held to the statement in its February 13 submission that if its application were unsuccessful, "...Ledcor has an adequate remedy under the Code. Section 19(2) authorizes the Board to impose a 22-month time bar on further applications for certification". I have determined that this statement must be placed in context: it was the second of two responses given by Local 16 to confidentiality arguments made by Ledcor and the CLAC over the disclosure of employee names. The fact is that the names were not divulged to Local 16, and the statement should not now be broadened to a general admission regarding the appropriateness of a time bar.

33 In summary to this point, I reject Local 16's arguments challenging the supplemental IRO report and deny its request for an oral hearing. However, the alternative request to withdraw the raid application is allowed.

34 The third issue (i.e., disposition of the remaining matters), can be more briefly answered. The question of amending Local 16's raid application to a certification application under Section 18 of the Code is clearly moot. In addition to the former having now been withdrawn, the IROs have confirmed that Local 16 cannot meet the threshold level of 45 percent membership support in the proposed bargaining unit.

35 I have further determined that Local 16's unfair labour practice complaints (including the employer domination allegation under Section 31 of the Code) should be dismissed. These complaints were directly connected to the certification application and, as such, have at least become partially academic. Withdrawal of the certification application also calls into question Local 16's standing to pursue aspects of the relief being sought. However, the dismissal should be without prejudice to Local 16's ability to re-apply based on some or all of the same facts, at which time the preliminary questions I have noted can be addressed as necessary. See *Independent Contractors and Businesses Association et al*, BCLRB No. B263/94, citing *Armscon Enterprises Ltd.*, BCLRB No. B98/94 (Reconsideration of certification granted June 2, 1993), (1994), 23 CLRBR (2d) 45. I have made no determination as to the adequacy of particulars

provided in support of the complaints, nor the request for particulars made of the CLAC (both of these points were the subject of submissions on file).

IV. CONCLUSION

36 In addressing the matters which remain outstanding between the parties, I have determined:

1. There is no valid basis on which to question the supplemental investigation by Industrial Relations Officers into Local 16's raid application, and the request for an oral hearing on the merits is denied;
2. Local 16 is permitted to withdraw its raid application and no time bar should result under Section 19(2) of the Code; and
3. All other outstanding complaints and applications before the Board are dismissed on a without prejudice basis.

37 It follows that the ballots cast in the representation vote will not be counted. In the event that any other matter has not been expressly addressed, counsel may apply in writing for clarification.

LABOUR RELATIONS BOARD

JOHN B. HALL
ASSOCIATE CHAIR (ADJUDICATION)