1970 S. C. Nos. 15304 and 15305

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

On Motions for certiorari and mandamus of the INTERNATIONAL UNION, UNITED AUTOMOTIVE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (U. A. W.) and BENOIT BEAUDRY re Order No. 1536 and Order No. 1537 of the LABOUR RELATIONS BOARD (NOVA SCOTIA)

HEARD at Halifax, Nova Scotia, before the Honourable Chief Justice McKinnon, the Honourable Mr. Justice Coffin and the Honourable Mr. Justice Cooper of the Appeal Division, June 26, 1970

OPINION September 24, 1970

COUNSEL

G. R. Matheson, Q.C.	Applicant
D. M. Nunn, Esq.	Respondent

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McKINNON, C.J.N.S.:

Notices of motion given herein involve two applications:

(1) An application for an order for a writ of certiorari to remove into the Supreme Court and to quash a certain order made by the Labour Relations Board (Nova Scotia) on or about April 23, 1970, bearing Labour Relations Board No. 1536, whereby the Board granted an application made to the Board on or about February 3, 1970, on behalf of International Brotherhood of Electrical Workers, Local 1818, and members thereof, for certification of the said International Brotherhood of Electrical Workers as bargaining agent, pursuant to the Trade Union Act, for certain employees of Rhand Electronics, Limited, at Glace Bay, Nova Scotia.

(2) An application for an order for a writ of mandamus commanding the Board and members thereof to exercise the jurisdiction conferred upon them by the Trade Union Act in respect of an application made to the said Board on or about March 4, 1970, on behalf of the

International Union, United Automotive, Aerospace and Agricultural Implement Workers of America (U.A.W.) Local 1467, as the bargaining agent pursuant to the Trade Union Act of a bargaining unit consisting of certain employees of Rhand Electronics, Limited, of Glace Bay, Nova Scotia, and commanding the said Board and members thereof "forthwith to hear and determine the said application according to law".

The orders of the Board in question are as follows:

"EXHIBIT 'H'

[crest] L.R.B. No. 1536

LABOUR RELATIONS BOARD

NOVA SCOTIA

IN THE MATTER of the Trade Union Act of Nova Scotia, and

IN THE MATTER of International Brotherhood of Electrical Workers,
Local Union 1818,
Dalhousie Street,
New Glasgow, Nova Scotia Applicant

- and -

Rhand Electronics Limited,
120 Reserve Street,
Glace Bay, Nova Scotia Respondent

- and -

International Union, UAW, Local 1467,
4001 Metropolitan Blvd. East,
Room 100,
Montreal 456, Quebec Intervener

APPLICATION having been made to the Labour Relations Board (Nova Scotia) on February 4, 1970, for certification of the Applicant as the Bargaining Agent pursuant to the Trade Union Act;

AND the Application not having been contested by the Respondent;

AND the Application having been opposed by the Intervener;

AND the Board having considered the Application and the documents filed by the Applicant, Respondent and Intervener, and the representations made and evidence presented on behalf of the parties at a Hearing held on March 10, 1970;

AND the Board having satisfied itself that a majority of the employees of the Respondent in the Bargaining Unit are members in good standing of the Applicant in accordance with Regulation 3A (1) Governing Procedure of the Board;

AND that the Unit requested is an appropriate one for Collective Bargaining purposes;

THEREFORE, the Labour Relations Board (Nova Scotia) does hereby certify International Brotherhood of Electrical Workers, Local Union 1818, New Glasgow, Nova Scotia as the Bargaining Agent for a Bargaining Unit consisting of all employees of the Respondent, but excluding Foremen and those equivalent to the rank of Foreman and above, Office Employees and those excluded by Clauses (i) and (ii) of Paragraph (j) of Section 1 of the Trade Union Act.

MADE BY THE LABOUR RELATIONS BOARD (NOVA SCOTIA) AT HALIFAX, THIS TWENTY-SECOND DAY OF APRIL, 1970, AND SIGNED ON ITS BEHALF BY THE CHIEF EXECUTIVE OFFICER.

'C. A. Crowell'
C. A. CROWELL
CHIEF EXECUTIVE OFFICER.

EXHIBIT 'I'

[crest] L.R.B. No. 1537

LABOUR RELATIONS BOARD

NOVA SCOTIA

IN THE MATTER of the Trade Union Act of Nova Scotia, and

IN THE MATTER of United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1467, 4001 Metropolitan Blvd. East, Room 100, Montreal 456, Quebec — Applicant

- and -

Rhand Electronics Limited, 120 Reserve Street, Glace Bay, Nova Scotia — Respondent

- and -

International Brotherhood of Electrical Workers,
Local Union 1818,
Dalhousie Street,
New Glasgow, Nova Scotia Intervener

APPLICATION having been made to the Labour Relations Board (Nova Scotia) on March 6, 1970, for Certification of the Applicant as the Bargaining Agent pursuant to the Trade Union Act;

AND the Application having been contested by the Respondent;

AND the Application having been opposed by the Intervener;

AND the Board having considered the Application and representations made by Solicitors on behalf of the parties on April 14, 1970;

AND the Board having determined that the Intervener, the International Brotherhood of Electrical Workers, Local Union 1818, Dalhousie Street, New Glasgow, Nova Scotia be certified as Bargaining Agent for a unit of employees of the Respondent;

THEREFORE, the Labour Relations Board (Nova Scotia) does hereby dismiss the Application for Certification.

MADE BY THE LABOUR RELATIONS BOARD (NOVA SCOTIA) AT HALIFAX, THIS TWENTY-SECOND DAY OF APRIL, 1970, AND SIGNED ON ITS BEHALF BY THE CHIEF EXECUTIVE OFFICER.

"C. A. Crowell"
C. A. CROWELL
CHIEF EXECUTIVE OFFICER."

The facts involved herein are as follows.

On February 3, 1970, International Brotherhood of Electrical Workers, Local 1818, hereinafter referred to as "I.B.E.W.", made application to the Labour Relations Board, Nova Scotia, for certification as bargaining agent for certain employees of Rhand Electronics Limited, referred to as the "Company".

On February 19, 1970, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, referred to as "U.A.W.", gave the Board a notice of intervention on behalf of Local 1467.

On March 4, 1970, the U.A.W. applied to the Board for certification as bargaining agent for certain employees of the Company. The description of the unit in this application was the same as the bargaining unit in the I.B.E.W. application.

On April 3, 1970, the Company gave notice to the Board that it wished to contest the U.A.W. application.

On March 18, 1970, the I.B.E.W. gave notice to the Board that it desired to oppose the U.A.W. application.

On March 10, 1970, the I.B.E.W. application was considered at a hearing of the Board, referred to as the "first hearing". At this hearing the Chairman of the Board announced that the proposed bargaining unit, in respect of which the I.B.E.W. application was made, was appropriate for collective bargaining and that a majority of employees in the unit were members in good standing of the said I.B.E.W. The Board then declared that the cutoff date for determination of the membership in the Union in accordance with the regulations was the day on which the application was filed; that it would not admit evidence that the membership had been reduced or increased after that date, but evidence would be admitted to show that in the interval between filing of the application and the hearing employees in the bargaining unit had a change of mind, and a serious doubt existed that they still wished to be represented by the applicant Union.

At the first meeting referred to, the Board heard evidence from Mrs. Ernestine Penny that she no longer wished to be represented in collective bargaining by the applicant I.B.E.W., but decided to be represented by the U.A.W. The Board refused to hear the evidence of Mrs. Eunice MacKinnon, who was not a member of the applicant Union on the date of application and not, I understand

from the evidence, an employee of the Company on that date. She was, however, an employee and member of the bargaining unit on the date of the hearing. The reason given by the Board was that she would be unable to testify as to a change of mind.

At the hearing the Board also heard evidence from Benoit Beaudry, Montreal, Quebec, the organizer for the U.A.W., that the employees of the Company wished to be represented in collective bargaining by Local 1467, U.A.W., and not by I.B.E.W. At the conclusion of the hearing, the Board did not announce any decision with respect to the I.B.E.W. application.

On April 14, 1970, the Board held the "second hearing", pursuant to a notice of hearing, convened for the purpose of considering the U.A.W. application for certification. At the commencement of the hearing, the Board announced that the proposed bargaining unit, in respect of which the application was made, was appropriate for collective bargaining "and also there would appear to be a majority".

At this hearing, the Company contended that the application of I.B.E.W. for certification should be decided by the Board before it considered the U.A.W. application. The Company did not further actively participate in the hearing. Following the Company statement, the Board heard counsel for the applicant U.A.W. and the intervener I.B.E.W. on how the Board should discharge its responsibility of determining the wishes of the employees in the proposed bargaining unit with respect to the selection of a bargaining agent to act on their behalf. The Board, without calling on the parties to adduce evidence, retired to consider the representations so made. On resuming the hearing, the Chairman announced that the Board

had decided to reconfirm its decision, previously made, to certify the I.B.E.W. as bargaining agent for the bargaining unit of the respondent Company.

The grounds argued in support of the applications herein are as follows:

(1) The Board erred in that it did not take appropriate steps to determine the wishes of the employees in the proposed bargaining unit.

(2) The Board erred in that it refused to hear the evidence of Mrs. Eunice MacKinnon, a member of the bargaining unit at the date of the hearing.

(3) The Board erred in holding that it was bound by its own practice to determine the wishes of the employees in the unit as of the date of application.

(4) If the Board was correct in finding that it must consider the bargaining unit as of the date of the application then the result is that it certified a bargaining agent for a bargaining unit consisting of only one employee.

(5) There was a denial of natural justice in refusing to consider the wishes of the employees in the bargaining unit and in refusing to hear Mrs. MacKinnon.

(6) The Board acted without jurisdiction because it was improperly constituted in that A. Russell Harrington, a member of the Board, who was not present at the First Hearing sat on the Board at the Second Hearing and for the same reason the Board acted contrary to the rules of natural justice.

(7) The Board acted without jurisdiction and was improperly constituted at the time it decided to grant an order for certification to the I.B.E.W. in that the Board was convened at that time for the express purpose of holding a hearing on the U.A.W. application and not for the purpose of considering or reconsidering the I.B.E.W. application.

(8) The Board acted contrary to section 7 (2) of the Trade Union Act in refusing to hear the U.A.W. application on the ground that the Board was precluded from doing so because it had a prior application for certification before it. Section 7 (2) expressly provides that where no collective agreement is in force and no bargaining agent has been certified for the bargaining unit, the application may be made at any time.

As the first five grounds given in support of the applications herein appear to be interrelated, I propose to consider them together.

In The Queen v. Labour Relations Board (Nova Scotia), (1961), 29 D.L.R. (2d) 449, at p. 453, MacDonald, J., succinctly outlined the function of the Board in relation to certification, as follows:

> "The primary function of the Board relates to the certification of unions as bargaining agents for defined groups or units of employees determined by it to be appropriate for collective bargaining. It is important to note that the Board does not initiate the process leading to certification but that it acts upon an application made to it. Thus the process leading to the grant of certification is initiated by an application by a trade union under s. 7 (or where the certification is sought of a craft-group, under s. 8), and in the form and manner prescribed by the Regulations of the Board. When such an application is received it is the duty of the Board under s. 9 (1) and s. 8 to determine whether the proposed 'unit' is one 'appropriate for collective bargaining' as those terms are defined in s. 2 (2) of the Act; provided there is the necessary 'community of interest' among the employees of the proposed unit (s. 9 (5)). Before making such a determination 'the Board may . . . include additional employees in, or exclude employees from, the unit' (s. 9 (1)); but must be satisfied by vote or examination of records or such enquiries (or hearing) as it deems necessary (s. 9 (2), (4)) of the wishes of the employees in the

unit (s. 9 (1)). It is also provided that questions as to the appropriateness of the unit (and other questions involved in the application such as whether the majority of the employees in the unit are members in good standing of a trade union, etc.) shall be decided by the Board finally, subject to its own reconsideration of its decisions thereon."

In considering the argument of the applicant, attention should be given to the following provisions of the Act: s. 7 (1) concerning the application for certification; s. 9 (1), setting forth the duty of the Board with regard to the application; s. 9 (2), which provides that pursuant to a determination by the Board that a unit of employees is appropriate for collective bargaining:

"(a) if the Board is satisfied that the majority of the employees in the unit are members in good standing of the trade union; or

(b) if a vote of the employees in the unit has been taken under the direction of the Board and the Board is satisfied that not less than sixty per cent of such employees have voted and that a majority of such sixty per cent have selected the trade union to be bargaining agent on their behalf;

the Board may certify the trade union as the bargaining agent of the employees in the unit."

Section 9 (4) and section 55 (7) empowering the Board to hold hearings and receive evidence; section 55 (8), which gives the Board power to determine its own procedure, "but shall in every case give an opportunity to all interested parties to present evidence and make representation"; section 58, omitting irrelevant parts, as follows:

"58 (1) If in any proceeding before the Board a question arises under this Act as to whether

(h) a person is a member in good standing of a trade union;

the Board shall decide the question and the decision or order

of the Board shall be final and conclusive and not open to question, or review, but the Board may, if it considers it advisible so to do, reconsider any decision or order made by it under this Act, and may vary or revoke any decision or order made by it under this Act."

regulation 3A (1):

"3A (1) A member in good standing of a trade union shall be deemed by the Board to be a person who, in the opinion of the Board, has at the date of application for certification:-

(a) Signed an application for membership in that trade union; and

(b) On his own behalf, paid at least $2.00 as union dues for or within the period commencing on the first day of the third month preceding the calendar month in which the application is made and ending upon the date of application; or

(c) Where he has joined the union within the period mentioned in sub-paragraph (b), has on his own behalf paid at least $2.00 as union dues."

and regulation 4 (3):

"4 (3) Within seven (7) days of the receipt of the Notice of Filing, the employer shall file with the Board a certified list of his employees as of the date on which the application was filed, excluding foremen, those equivalent to foreman and above that rank. He shall list the employees in the alphabetical order of their surnames showing the occupational classification of each employee and the number of hours each employee normally works during a week. The employer shall verify the list of his employees by statutory declaration."

As pointed out by MacDonald, J., in The Queen v. Labour Relations Board (Nova Scotia), supra, whether the application for certification is (1) a trade union, (2) whether it includes in its membership in good standing employees in the group for which it seeks certification, and (3) whether such member-employees constitute the requisite majority — are all questions which the Board must determine in respect of every application, by way of prelude to the determination of the appropriateness

of the group as a unit for collective bargaining (s. 7(1), s. 9 and s. 58(1). Moreoever, they are questions which are not collateral or prerequisite to jurisdiction but constitute integral parts of the exercise of jurisdiction and are not open to judicial review.

Labour Relations Board and Attorney-General for British Columbia et al. v. Traders' Service Ltd., (1959), 15 D.L.R. (2d) 305, at 320, 321, [1959] S.C.R. 672, per Judson, J.:

> "My opinion is that no question of jurisdiction arose for the Court's consideration in this case. What the Board did was to make a finding of fact and, indeed, one that was very simple and obviously correct, that these six employees were employed by the respondent. By s. 65 [our present s. 58] of the Act the Board is required to determine whether a person is an employer or employee and this decision is to be final and conclusive. . . . What is there 'collateral' or outside the main issue in the determination here that a particular person is an employee of a particular employer? . . . That is the very subject-matter of the adjudication. . . . It was for the Board and the Board alone to make the finding on the one issue and this finding is not open to review by the Court."

Hughes, J., in Banks et al. v. Canada Labour Relations Board et al., (1959), 19 D.L.R. (2d) 764, at 768, referring to the powers of the Board under s. 9 (4) [also our present s. 9 (4) and s. 54 (7)]:

> "It is not for me, however, to consider whether the findings of the Board in this matter were justified by the evidence given at the hearing and indeed if no evidence had been given at the hearing and the Board relied on what I have called extracurial inquiries, I would still have no jurisdiction to consider the merits of the applications before it."

and at pages 769, 770:

> "Rule 15 [our present regulation 3A (1)] provides that for the purpose of this section a member of a trade union in good standing shall be deemed by the Board to be a person who, in the opinion of the Board, is at the date of the application for certification, a member of the union and has, on his own behalf paid at least one month's union dues subject to certain limitations as to time set forth in the Rule.

Then it is said that the transcript discloses that the Brotherhood could only establish a membership of less than half of the members of the proposed bargaining unit. No doubt if the Board had been satisfied of the majority position of the Brotherhood in the proposed bargaining unit, it would never have ordered a representation vote but the size and membership of the proposed unit also fell to be determined at the Board's hearing of the application and, in my view, the determination of these matters is for the Board alone." [emphasis added]

In Parkhill Bedding & Furniture Ltd. v. International Molders & Foundry Workers Union of North America, Local 174 and Manitoba Labour Board, (1961), 26 D.L.R. (2d) 589, at 593, per Freedman, J.A., referring to sections 59 (1) (c) and 18 (1) (c) of the Manitoba Labour Relations Act:

"Was this latter question, in the circumstances of this case, one that could properly be classified as preliminary or collateral, in the sense in which those terms are used in certiorari matters? Or was it part of the main issue which the Board had to decide? If it was the latter, then clearly the Board had exclusive jurisdiction to deal with it, and its decision would not be subject to review."

It would seem to be clear that in considering the application for certification herein, the questions before the Board were: (a) was the applicant a trade union? (b) did the applicant include in its membership in good standing employees in the group for which it sought certification? and (c) did such member-employees constitute the requisite majority? All of these questions were not collateral matters on which the Board's jurisdiction to certify the Union depended. As stated by MacDonald, J., in The Queen v. Labour Relations Board (Nova Scotia), at page 456, they "constitute integral parts of the exercise of jurisdiction and are not open to judicial review".

Roach, J.A., speaking for the Court in Bradley et al. v. Canadian General Electric Co. Ltd., (1957), 8 D.L.R. (2d) 65, at 75, quotes

with approval the opinion of Doull, J., in Re Application of Lunenburg Sea Products; Re Zwicker, [1947] 3 D.L.R. 195, page 202, and 21 M.P.R. 305, at 321:

> "In the passages which I have quoted from Mr. Justice Doull's reasons, it seems to me that he has said plainly enough that, given the general relationship of employer-employee, the Board had final and exclusive jurisdiction to determine whether any group of persons within that relationship were or were not employees for the special purposes of the Regulations."

and at page 81:

> "Where the matter is not collateral but constitutes part or the whole of the main issue which the inferior tribunal had to decide, the Court is limited to examining the record to determine whether there was any evidence before the inferior tribunal. I hasten to add, however, that the Court can do that only in the absence of a privative clause. If there is a privative clause in the Act creating the tribunal, the Court cannot do that."

It is the contention of the applicant that the Board erred in holding that it was bound by its own regulations to determine the wishes of the employees as of the date of application.

This question was also examined by MacDonald, J., in The Queen v. Labour Relations Board (Nova Scotia). He is reported as follows at pages 456, 457.

> "The Board is authorized to determine its own procedure, and by s. 57 may make Regulations governing its procedure and 'may .... prescribe what evidence shall constitute proof that a person is a member in good standing of a trade union'; and pursuant to that latter provision it passed Regulation 3A whereby such a member was deemed to be one answering to defined descriptions 'as at the date of the application for certification'.
>
> I cannot agree that this Regulation was beyond the power of the Board to enact. In the nature of things an application for certification must be processed by the administrative officers of the Board and matters done and determined as of certain dates, e.g., the determination of the wishes of the employees may have to be taken by a vote and that requires determination of the persons entitled to vote thereat which in turn requires

scrutiny of payrolls as of a certain date, etc. All that can be expected of a Board is that it prescribe, and hold to, a known technique in arriving at the facts relative to the matters it has to determine. One of the elements in such a technique is necessarily the date as of which such facts must be found to exist or not to exist. Normally there will be little time lag between such a date and the date of the ultimate determination to certify and developments in that interim will be known to the Board's officers.

I cannot subscribe to the notion that as matter of law a Board is required to base its decisions upon the facts existent as of that day or the day before. If such were the law, it would prove a great source of delay; and in the case of a group of employees of constantly fluctuating personnel would operate frequently to debar any successful attempt by unions to secure certification at all."

MacDonald, J., in the above decision, expressed his disagreement with the decision in Re Universal Constructors & Engineers Ltd. v. Labour Relations Board of New Brunswick, (1961), 26 D.L.R. (2d) 423, where it was found that a Board before making a certification order must as a matter of law carry its scrutiny of the bargaining unit down to the time of the hearing. He did note, however, that the regulation invoked in that case was less specific than our regulation 3A, referred to above.

In Underwater Gas Developers Ltd. v. Ontario Labour Relations Board et al., (1960), 21 D.L.R. (2d) 345, at pages 352, 353, it was contended that there was no evidence before the Board that on August 6, 1959, more than 50 percent were members of the Union as set out in the certificate. According to the affidavit of the President of the applicant Company at the time of the issuing of the certificate by the Board, only 9 of the original 39 employees employed by the applicant at the time that the respondent Union's application was commenced were still employed by the applicant notwithstanding that the applicant's working force was at full strength.

Smiley, J., who gave judgment in the Court below, said:

"The implication is that conditions at the actual time of issuing the certificate, apart from the time of the application to the Board in the first instance and the hearings or hearing thereon, is the basis for the determination of the number of Union members in the bargaining unit and, unless a certificate is issued immediately, the Board should make a further examination in this respect. Is it practical that the Board should be required to make a second examination at the actual time of making the certificate, if the certificate is not issued immediately or promptly following the first examination? If there is a second examination and a further delay for the Board to give the matter its consideration, must there be still another examination? Would there be any finality to the matter? The length of time elapsing between the first examination and the issuing of the certificate might, of course, have some bearing, but who is to say what that time should be? If it were thought desirable to require a second or further examination after a certain length of time had elapsed and if there were no other remedy provided by the Act, is that not a matter for the Legislature and not the Court? . . . . In any event, if the applicant considered it desirable that the Board should make a re-examination to determine the number of union members in the bargaining unit, it could have applied to the Board for a reconsideration of its decision in this respect under the provisions of s. 68(1) of the Labour Relations Act, ... which provides that the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling. . . . . This same section provides that the decision of the Board on any question arising in any proceeding as to whether a group of employees constitute a bargaining unit shall be final, and the Court, of course, cannot entertain anything in the nature of an appeal from such a decision of the Board. I do not think the Court on an application such as this should express an opinion as to what should be done in such a situation. It is sufficient to point out or mention what may be done."

Referring to the above decision of Smiley, J., MacDonald, J., in The Queen v. Labour Relations Board (Nova Scotia), noted [458-9]:

"The Act contemplated that even a determination made in an order of final and conclusive effect may prove to be wrong, and to require reconsideration and consequent variation or revocation under s. 58(1); and the Nova Scotia Board has provided for that in Regulation 14. Failing such resort, I do not think a Court should be astute to find reasons for upholding such a contention by an applicant for remedy by certiorari."

The applicant contended that the Board erred in that it did not take affirmative steps to determine the wishes of the employees as of the date of the hearing.

The record discloses that on the date of application by the I.B.E.W. there were two employees in the unit, both of whom were members of the applicant Union. The purpose of the first hearing, as stated by the Chairman of the Board, was to receive evidence "as to change of mind on the part of the employees in the bargaining unit as to their desire to be represented by the Union". The Board at this hearing heard the evidence of Benoit Beaudry, organizer for the intervening U.A.W., and Mrs. Penny, one of the two employees who had been a member of the applicant I.B.E.W. at the time of application. The Board ruled that the evidence of Mrs. Eunice MacKinnon, who was not a member of the unit at the time of application but was such a member at the date of hearing, was not relevant to the question of change of mind, and refused to hear her. Although it would have been preferable, in my opinion, for the Board to have allowed the evidence of Mrs. MacKinnon, as she could be described as an interested party, refusal to so hear her because her evidence was not within the scope of the Board's inquiry, does not constitute a denial of natural justice.

As indicated by the authorities cited herein, it was the duty of the Board to determine the wishes of employees. Having embarked on a hearing, and the record disclosing no refusal to hear material and relevant evidence, the Board's determination, even if incorrect in our opinion, does not constitute an error of law on the face of the record and cannot be reviewed under certiorari.

In Toronto Newspaper Guild v. Globe Printing Co., (1953), 106 C.C.C. 225, the words of Kellock, J., discloses how that case is distinguished from the application here. At page 244, he said:

> "In the case at bar it was impossible for the Board to determine whether any one of the persons alleged to be members of the appellant was in fact a member in good standing if the Board refused to enter upon the question as to whether or not, assuming membership to have originally existed, it had continued. This was the very obligation placed upon the Board by the statute. By refusing to enter upon it, the Board in fact declined jurisdiction."

In referring to the opinion of Kellock, J., above, it should be pointed out that the Court did not appear to have before it a provision similar to our regulation 3A.

Here, the Board did enter upon the question of whether membership originally existing, at the time of application, had continued, and this, according to the statement of the Chairman, was the purpose of the first hearing. Therefore, there was not, in my opinion, a "manifest defect of jurisdiction" to make the order of the Board subject to the supervising jurisdiction of the Courts exercisable by way of certiorari on this ground.

The applicant also contends that the Board was improperly constituted, and thus without jurisdiction, because a member of the Board, who was not present at the first hearing, sat on the Board at the second hearing.

According to the transcript of evidence taken by the Board at the first hearing on March 10, 1970, the name of A. Russell Harrington is listed as a member of the Board present. Other material in the record before us, however, indicates that he was not present at this hearing.

The transcript of evidence taken at the second hearing on April 14, 1970, listing the members of the Board present, includes the name of A. Russell Harrington.

A similar problem was considered by both the High Court [(1960), 21 D.L.R. (2d) 345] and the Court of Appeal in Ontario [(1960), 24 D.L.R. (2d) 673] in Underwater Gas Developers Ltd. v. Ontario Labour Relations Board et al. In that case, three members of the Board were present at the first hearing, and on the second date of hearing, two additional members were present. It was contended that by reason of the presence at the second hearing of these two additional members of the Board, the Board was illegally constituted, had lost its jurisdiction and, in effect, there was a denial of natural justice to the appellants.

Per Aylesworth, J.A., at page 675:

"I do not think effect can be given to this submission. There is no evidence that the two additional members took any part either in the proceedings on the second hearing or in the deliberations of the three members of the Board present on both occasions or in the decision . . . . No objection as to the presence of the two additional members on the second occasion was made at any time before the Board by counsel for the appellants."

In the case at bar, there is no evidence that A. Russell Harrington took any part either in the proceedings on the second hearing or in the deliberations of the other members of the Board present on both occasions or in any decision of the Board. Furthermore, no objection was made by counsel for the U.A.W. to the presence of Harrington as a member of the Board at the second hearing.

A further reason for dismissing this contention is that the actual decision on the application of the I.B.E.W. for certification

was made at the close of the first hearing on March 10, 1970, when, I think it is agreed, Harrington was not present. This is indicated by a statement of the Chairman of the Board at the conclusion of the second meeting on April 14, as follows:

> "Gentlemen, at the close of the Hearing that was held in the application of the Electrical Workers for certification, the Board reached the decision and the decision was that the Electrical Union should be certified as the bargaining agent for the bargaining unit for the Respondent Company."

If the above statement is correct, and there is nothing in the record to contradict it, then we are left with the conclusion that A. Russell Harrington was not present when the decision on the application of the I.B.E.W. was reached. The contention that the Board was illegally constituted should be dismissed.

A word should be added here concerning the applicant's argument that the Chairman's statement at the conclusion of the second hearing indicated that there had then been a reconsideration of the decision to certify the I.B.E.W., and that Harrington had been present. I do not believe that a fair consideration of the Chairman's statement supports this interpretation. The Chairman said:

> "To go on with the Hearing today, . . . would really amount to a reconsideration of the decision that was made in the previous . . . application".

He then read rule 15 of the regulations, which provides that certain elements must be present before the Board could reconsider the decision or order made by it under the Act. He then said,

> "We have heard nothing in the argument today that would lead us to reconsider our decision in the previous case. Therefore, we really re-confirm the decision that we made in the previous case but had not yet been published up until today."

I think the Chairman's words should be interpreted to mean that as certain conditions precedent were not present, the Board was unable to reconsider the decision previously made and the finding arrived at after the first hearing could not be disturbed. I believe that this is all we can read into the Chairman's words, "therefore, we really reconfirm the decision".

The appellant's fourth ground presents a problem of some difficulty. It is that the Board acted without jurisdiction and was improperly constituted at the time it decided to grant an order for certification to the I.B.E.W. in that the Board was convened for the express purpose of holding a hearing on the U.A.W. application and not for the purpose of reconsideration.

The record herein includes a notice of hearing, issued by the Board on April 7, 1970, in the matter of the application for certification by U.A.W., Local 1467. Rhand Electronics Limited is named as respondent, and International Brotherhood of Electrical Workers as intervener. The notice set the time and place for the hearing of the application and stated that the purpose of the hearing was to hear oral evidence and argument of the applicant in support of the application, and for hearing oral evidence and argument of the respondent and intervener against granting the application.

At the opening of the hearing on April 14, the Chairman announced that on the basis of the application and the supporting exhibits, there appeared to be an appropriate bargaining unit requested, and also that there appeared to be a majority. The Chairman further stated:

". . . this is an unique situation . . . . The application in this particular case was made after an application for the same employees, the same unit, and the same Respondent, had been filed and there seems to be nothing in the Trade Union Act or any procedure of the Board covering a situation of that kind. However, the application in this case was made before the Hearing in the previous case. Though the Board has taken the position that the Hearing should go forward in this case; then, after having heard this case, the Board will have to make its decision - of course, and we want to hear a complete Hearing. . . ."

There is no doubt, therefore, that the Board issued a notice to all parties concerned that a hearing would be held on the application for certification by U.A.W., Local 1467, a complete hearing would be held and would go forward to a decision.

It is apparent, however, that the Board did not fulfill the announced purpose as stated in the notice for hearing, nor did it follow the procedure set forth by the Chairman of the Board.

No evidence was tendered by any party at the second hearing but there was extensive and lengthy argument by counsel for the U.A.W. and the I.B.E.W. Following a recess taken at the conclusion of argument, the Chairman ruled as follows:

"Gentlemen, at the close of the Hearing that was held in the application of the Electrical Workers for certification, the Board reached the decision . . . that the Electrical Union should be certified as the bargaining agent for the bargaining unit for the Respondent Company. The Board is firmly of the view that it is contrary to the policy of the Trade Union Act, regardless of how you might interpret some of the language, to permit one union to apply for certification when there is already pending before the Board an application for certification by another union."

The Chairman then cited rule 15 of the regulations, and concluded:

"We have heard nothing in the argument today that would lead us to reconsider our decision in the previous case."

The above ruling by the Board at the conclusion of the second hearing indicates that while the Board was convened for the express purpose of conducting a hearing into the U.A.W. application, it did not proceed to consider and determine the matter of that application. By its notice of hearing and opening statement, the Board led the parties to believe that full inquiry would be made into the merits of the U.A.W. application, but before any evidence could be adduced by either party, the Board concluded the hearing with the statement of the Chairman, noted above. A study of the text of that statement can only lead to the conclusion that the Board did not enter into the matter of the U.A.W. application at all.

It should be remembered that while it is undoubtedly true that the Board members, between themselves, decided to grant the I.B.E.W. application after the first hearing, such certification did not take place until the order was issued on April 27, 1970. Thus, on the date of the U.A.W. application, March 4, and the second hearing, April 14, there was no bargaining agent in existence. It follows that the U.A.W. application was properly before the Board, for section 7 (2) of the Act provides that where no collective agreement is in force and no bargaining agent has been certified under the Act, the application may be made at any time.

Section 9 (1) provides that where a Union makes application under the Act, "the Board shall [emphasis added] determine whether the unit in respect of which the application is made is appropriate for collective bargaining . . .".

It is apparent that the Board was under a statutory duty (section 9 (1)) to proceed and determine whether the U.A.W., in respect

of which application had been made, was appropriate for collective bargaining, and if it so decided and was satisfied that a majority of the employees had selected the U.A.W. to be the bargaining agent on their behalf, then the Board could certify such Union. In my opinion, the Board failed to carry out this statutory duty.

The problem arises as to whether or not a mandatory order may issue directing the Board to consider the application for certification of one Union without quashing a previous order certifying another Union.

This question was considered by Wells, J., as he then was, in Thibault et al. v. Canada Labour Relations Board et al., (1958), 12 D.L.R. (2d) 150, at 159-9:

> "It was urged on me that I could not make this mandatory order without quashing the order certifying the United Steelworkers of America which the Board made on August 19th. However, in my view this is covered by s. 10 of the statute which provides in part as follows:
>
> '10. Where a trade union is certified under this Act as the bargaining agent of the employees in a unit
>
> (a) the trade union shall immediately replace any other bargaining agent of employees in the unit and shall have exclusive authority to bargain collectively on behalf of employees in the unit and to bind them by a collective agreement until the certification of the trade union in respect of employees in the unit is revoked,
>
> (b) if another trade union had previously been certified as bargaining agent in respect of employees in the unit, the certification of the last mentioned trade union shall be deemed to be revoked in respect of such employees.'
>
> If the Board after it has carried out its statutory duties, should come to the conclusion that the application of the Mine, Mill and Smelter Workers Union should be acceded to, any order which they may then make will have the effect, it appears to me, of vacating their previous order of August 9th."

The sections of the Industrial Relations and Disputes Investigation Act quoted by Wells, J., above, are identical in wording to section 10 (a) and (b) of the Trade Union Act of Nova Scotia. I agree with the observations of Wells, J., as to the application of this section, and it follows that should the Board, in this instance, come to the conclusion that the application of the U.A.W. should be granted, any order which it may then make in pursuance thereof will have the effect of vacating the previous order of April 22, 1970, certifying the I.B.E.W., and quashing of the previous order by certiorari is not required.

I can understand the reason which may have actuated the Board in following the course it did in this instance. There was evidence before it from which it could infer that one Union had practiced "raiding" on the other, and the purpose of the Act is to maintain stability in labour relations. Nevertheless, it seems to me that there was a statutory duty on the Board which it failed to discharge.

I find that the application for a writ of certiorari should be dismissed and, that the application for a writ of mandamus should be allowed. The applicant will have costs against the respondent and intervener.

It is directed that a writ of mandamus do issue directing the Board to consider the application of the U.A.W., Local 1467, as of March 4, 1970, pursuant to the Trade Union Act of Nova Scotia.

C. J. N. S.

Halifax, Nova Scotia

September 24, 1970