ONTARIO LABOUR RELATIONS BOARD

0930-10-R; 0938-10-U United Brotherhood of Carpenters and Joiners of America, Local l946, Applicant v. **VanderWal Homes & Commercial Group**, Responding Party.

BEFORE: Caroline Rowan, Vice-Chair.

APPEARANCES: Jesse M. Nyman and Chris Zimmer appeared on behalf of the applicant; Deborah Hudson and Jim VanderWal appeared on behalf of the responding party.

DECISION OF THE BOARD: November 24, 2011

1. The style of cause is hereby amended to reflect the correct name of the responding party: "VanderWal Homes & Commercial Group".

2. Board File No. 0930-10-R is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") by the applicant, United Brotherhood of Carpenters and Joiners of America, Local 1946 ("the Union") on June 9, 2010 in respect of a bargaining unit of employees of the responding party, VanderWal Homes & Commercial Group ("VanderWal" or "the Company"). There are a number of outstanding issues remaining in this application, including the status of some fifteen individuals, a dispute concerning the appropriate bargaining unit description as well as the responding party's contention that the application should be dismissed for employer support.

3. Board File No. 0938-10-U is a related application filed under section 96 of the Act, in which the Union alleges that the Company violated sections 5, 70, 72, 76 and 87(1) of the Act and seeks by way of remedy, among other things, remedial certification without a representation vote pursuant to section 11 of the Act. More specifically, the Union contends that VanderWal violated the Act by terminating persons who spoke with, or joined, the Union on June 2nd, 2010. According to the Union, VanderWal did so in order to intimidate and coerce them into seeking to abandon their rights under the Act and to prevent them from supporting an application for certification.

4. The parties requested that the Board first address the Union's unfair labour practice complaint and its claim for relief under section 11 of the Act, as well as the Company's related contention that the certification application should be dismissed for employer support having regard to section 15 of the Act. The parties further agreed that, in the event that the Company was found to have violated the Act as alleged by the Union, any additional remedy for such violations would be raised with the Board thereafter.

5. The Board heard from a total of seven witnesses. The following four individuals testified on behalf of the Company: Jim VanderWal and his wife, Mary VanderWal, Alex McGillivrey, a sales and marketing coordinator who works in the Company's office and who is also Jim and Mary VanderWal's son-in-law, and Pat McEachreon Senior ("Pat Senior"), a truck driver for the Company who works from time to time in its shop. The following three individuals

testified on behalf of the Union: Jason Carver, one of the employees alleged to have been terminated contrary to the Act, Christopher Zimmer and Pat Martin, who are both representatives of the Union.

6. In arriving at my findings of fact in this case, I have considered all the evidence and have taken into account such factors as the demeanour of the witnesses, the clarity of their evidence, the witnesses' apparent ability to recall events and to resist the tug of self-interest in their responses to the questions, and what seems most reasonable and probable in all of the circumstances having regard to the evidence as a whole.

Factual Background

7. VanderWal is in the business of fabricating, supplying, assembling and installing cold-formed steel framing systems. Its offices are located in Petrolia, Ontario, where it also has a manufacturing shop. The Company is jointly owned by Jim and Mary VanderWal.

8. The events in issue in this proceeding occurred at the beginning of June 2010. At that time, Paul Prelaz, Jim and Mary VanderWal's former son-in-law, was working as the Company's site supervisor at its project located at the St. Gabriel's Health Centre in Chelmsford, Ontario (the "Chelmsford site"). The Company's work at that site involved supplying and installing a steel framing system for a building and included constructing a roof on the ground and then lifting and installing it in sections.

9. Members of Paul Prelaz's crew included his brother, Dan Prelaz, who would take over as supervisor if Paul Prelaz was not there, as well as Mike Larson, Jason Carver, Luke Scott, Ken Caza, Jordan VanderWal, Jason Jensma, Glen Durance, Jeff Kerrigan, Lucas Vondette, Andrew Isaac, Tyson Isaac, Brent Snetselarr-Ewen ("Mr. Ewen") and Chris Boothe.

10. By the Spring of 2010, Paul Prelaz's relationship with Jim VanderWal's daughter had deteriorated to the point where they were no longer living together. According to the evidence, this led to problems between Paul Prelaz and the Company such that Paul Prelaz as well as his brother Dan Prelaz and Chris Boothe resigned their employment with VanderWal on or about May 17th, 2010.

11. After a lengthy discussion with Jim VanderWal that same day, the three of them reconsidered their decision and agreed to go back to the Chelmsford site so that Paul Prelaz could receive his bonus for completing the project on time. Paul Prelaz did not, however, return to the Chelmsford site until May 31, 2010, mere days before the alleged unlawful terminations of members of his crew on June 2, 2010. By that time, Chris Boothe was no longer part of the crew, since he had again quit his employment with VanderWal for his own personal reasons a few days earlier.

June 1, 2010

12. There is no real dispute in the evidence regarding what transpired on June 1, 2010, the day prior to the alleged terminations. On that date, members of Paul Prelaz's crew were attempting to lift sections of the roof under his direction. Paul Prelaz called Jim VanderWal at the Company's office in Petrolia to report that they were having difficulty lifting a section of the roof because it was heavier than was indicated on the drawings. Paul Prelaz called Jim VanderWal several times that morning to discuss the discrepancy between the weight of the roof registered on the crane and the weight indicated on the drawings.

13. Jim VanderWal had the office check the numbers on several occasions but could not get a different number from that indicated on the drawings and could not determine why the roof was overweight.

14. According to Mr. Carver's evidence, the crew worked from approximately 7 a.m. until approximately 6 or 7 p.m. on June 1st, 2010. On that date, Mr. Carver and other members of Paul Prelaz's crew were attempting to fly a section of the roof with the crane when they encountered difficulties lifting the second section of the roof because of its weight. They consequently stopped the lift and moved to the third section of the roof which they were able to complete that day.

15. At the end of the workday, the crew went back to the hotel and had dinner together. Although Paul Prelaz was not with them over dinner, Mr. Carver ended up speaking to him later that night at around 9 p.m., at which time Paul Prelaz informed him that he "had decided to pull his expertise off the job". Paul Prelaz also said that there was some discrepancy as far as not being able to get some direction from the office about how to proceed with the lift on the section that was miscalculated. Mr. Carver testified that he understood what Paul Prelaz was telling him to mean that Paul Prelaz was "cancelling his relationship" with the Company and that Mr. Carver was going to have to contact the office himself about being without a supervisor or equipment.

16. After speaking to Paul Prelaz that night, Mr. Carver got the rest of the crew members together after 9 p.m. that evening and tried to come up with a group decision about how they should carry forward in the circumstances. Mr. Carver testified that they decided at that time that Mr. Carver would contact the office to discuss the situation with Mr. VanderWal in the morning.

June 2, 2010

17. There were a number of inconsistencies in the evidence concerning what occurred on June 2, 2010, including the precise sequence and timing of events. With the exception of Mr. Zimmer, who took notes of events as they unfolded, none of the other witnesses who testified about what occurred that day purported to recall with precise accuracy the timing of events. Mr. Carver, in fact, acknowledged that his account of the timing of the events was in all cases simply an approximation. The same appears to be true of the Company's witnesses, who could not similarly be expected to recall at the time they testified the precise time various events happened that day. As explained below, the discrepancies in the witnesses' respective accounts about the timing of events appear to be a function of their fading of memory and not the result of any deliberate attempt to mislead the Board.

18. According to Mr. Carver, the crew all gathered in the parking lot of the hotel in the morning on June 2, 2010. Mr. Carver spoke to Jim VanderWal on the phone that morning when Paul Prelaz, who was on his cellphone with Jim VanderWal, passed the phone to Mr. Carver. Mr. Carver testified as to his belief that that call took place at 8 a.m. However, since Jim VanderWal was using Mr. McGillivrey's cellphone when he spoke to Mr. Carver that morning, the precise time of that call was established, through Mr. McGillivrey's cellphone records, to have been at 8:50 a.m.

19. Mr. McGillivrey had been trying to reach Paul Prelaz's cellphone using his own cellphone that morning, because Paul Prelaz was not answering calls from the office telephone. Mr. McGillivrey was able to reach Paul Prelaz on his third attempt at 8:50 a.m., and then passed his cellphone to Jim VanderWal, who then ended up speaking to Mr. Carver.

20. According to Mr. Carver, during that call he explained to Jim VanderWal that he was the spokesman for the crew and that they felt they needed to come home as there was no direction or equipment on the site. Mr. Carver testified that Jim VanderWal was a bit upset and initially asked him to stay on site to perform other jobs. However, after Mr. Carver referred to safety concerns and the lack of supervision and equipment on site and also indicated that the crew would like to get paid whether or not they were working, Jim VanderWal agreed that they should come home. According to Mr. Carver, Mr. VanderWal at that point said "well if you guys can't go on site then you might as well come home".

21. Jim VanderWal disagreed with Mr. Carver's version of their conversation. In particular, Jim VanderWal disputed that there was any discussion about the crew being paid or not being paid. According to Jim VanderWal's version, Mr. Carver had indicated that he was speaking for all of the staff and that they had all quit because of safety concerns and were on their way home. Jim VanderWal then responded by telling Mr. Carver that there were other things to do at the site and that he would be there later that day. Jim VanderWal understood that the employees were already well on their way home at that stage and that they were not returning to the site even though Jim VanderWal was planning to head up there later that day. Jim VanderWal nonetheless did not suggest in his evidence that he had insisted that the crew return to the site to await his arrival.

22. There is, in any event, no dispute that, after this telephone conversation, Mr. Carver and the rest of the crew, including Paul Prelaz, drove home. Mr. Carver drove back in his own vehicle with some of the other members of the crew, including Mr. Durance, and Paul Prelaz drove back in his truck. The rest of the crew members drove back in the Company van.

23. At the first rest stop on their ride home, the crew discussed, and decided, to file a claim with the Employment Standards Branch of the Ministry of Labour for unpaid overtime hours. They also discussed getting in contact with a trade union to protect themselves in light of the situation. According to Mr. Carver, he asked Paul Prelaz if he knew anyone they could contact and Paul Prelaz indicated that he did. Paul Prelaz then phoned the Union hall at around 10 or 11 a.m. that day looking for Kevin Hoy, one of the Union's representatives. Christopher Zimmer, who has known Paul Prelaz since high school, called him back. Paul Prelaz told him that he had an agreement with his boss that was not working out and that there were other guys who were "in the same boat". They arranged to meet at the Flying J truck stop, which they did later that day at around 5 p.m.

24. During the course of that same workday, Jim VanderWal, who was at the Petrolia office, tried to deal with getting the Company's project at the Chelmsford site back on track despite the apparent sudden resignation of Paul and Dan Prelaz and the decision of the rest of the crew to leave the site and head home.

25. Jim VanderWal testified that he first learned about this turn of events from Devin Arbuckle of Tribury Construction, the general contractor at the site, before he had spoken to Mr. Carver on the phone that morning. Jim VanderWal also testified that he immediately tried to contact Paul Prelaz by phone, but without success.

26. The Union suggested that Jim VanderWal's evidence about the sequence of these phone calls was not credible given that Jim VanderWal testified that Devin Arbuckle phoned him at approximately 9 or 9:15 a.m. on June 2, 2010 to advise that none of VanderWal's crew were on site that day. The Union also suggested that Mr. McGillivrey's contrary evidence that

Mr. Arbuckle, in fact, called the office shortly after Mr. McGillivrey arrived at work at around 8 a.m. that day should not be believed either.

27. Little ultimately turns on whether Jim VanderWal first learned about the departure of the crew from Mr. Arbuckle or from Mr. Carver given that there is no dispute that Jim VanderWal did not learn about any union activity until much later that day. In any event, it seems most likely that Mr. McGillivrey's recollection that Mr. Arbuckle called earlier that morning is more accurate than Mr. VanderWal's recollection that Mr. Arbuckle called around 9 or 9:15 a.m. In this regard, I note that while Jim VanderWal could be expected to have a distinct recollection about being surprised to learn that the crew was not on site when Mr. Arbuckle called him, it is not surprising that his recollection of the precise timing of that call was inaccurate many months later when he testified. In addition, the fact that that telephone call from Mr. Arbuckle occurred earlier than Jim VanderWal believed explains why Mr. McGillivrey was attempting to contact Paul Prelaz using his cellphone commencing at 8:30 a.m. According to Mr. McGillivrey's cellphone records, he attempted to reach Paul Prelaz first at 8:30 a.m., again at 8:46 a.m., and was finally successful on his third attempt at 8:50 a.m.

28. In all the circumstances, I accept as credible Jim VanderWal's evidence that he had no idea Paul Prelaz's crew was not on site that day until Mr. Arbuckle called him that morning. Up to that point, he knew only that there had been a problem with the lift of a section of the roof the day before.

29. Bill Burn from AllCanada Crane also contacted Jim VanderWal later that morning to indicate that he had a crane on site and did not know where VanderWal's crew was or what he should do.

30. Later that same morning, at 10:02 a.m., Mr. Arbuckle followed up with an e-mail to Jim VanderWal expressing his concern about the progress of the work at the site. The content of that e-mail reads as follows:

> Your inability to fulfill your contractual obligations has now put this project in a very precarious situation. We are behind schedule now, with your inability to show proof of material and installation methods and the implication and time this has caused. We have major concerns from yesterday's performance with your roof weight calculations and the damage this has caused to the trusses, not to mention the safety factor. Your men are not on site due to this fact, and there is still a substantial amount of outstanding work.
>
> My conversations with you has not proven to be of any urgent matter to you. Delay of project will be discussed and recorded.
>
> I highly recommend that you be on site tomorrow morning to discuss this matter and inform us on how you will complete your contract without further costs implications.

31. Shortly after receiving that e-mail, Jim VanderWal sent an e-mail to Paul Prelaz at 10:09 a.m., in which he states:

> When is my truck going to be back?
> I need it to go back up and continue the remainder of the job.
> Who ever wants to work should let me know.

> Tony crew (sic) will also be there tomorrow.
> I will be up late today and we are fling (sic) the roof tomorrow afternoon or Friday morning.

Jim VanderWal indicated that, at the time he sent this e-mail, he was planning to head up to the Chelmsford site later that day and that he knew the crew was heading back to Petrolia. He also acknowledged that he may have taken whoever wanted to work back, but that he could not supervise a crew that size with just himself and Mr. Peters available to do the supervision.

32. Jim VanderWal testified that, as soon as he realized the crew had vacated the site, he phoned Tony Boudreau, a contractor with whom he had worked in the past, to make arrangements to have Mr. Boudreau complete phase 2 of the work at the Chelmsford site, which involved the other half of the building. Mary VanderWal then followed up with an e-mail providing the drawings at 11:47 a.m. An e-mail exchange between Jim VanderWal and Mr. Boudreau then occurred at or around 12:40 p.m. on June 2, 2010 regarding the contract arrangements, such as the price to be paid by VanderWal for different portions of the work.

33. According to Jim VanderWal's evidence, everything was "etched in stone" for Mr. Boudreau and his crew to do the work at the Chelmsford site and that, up to that point, he had heard nothing about union activity. All he knew was that the crew had vacated the site and were heading home. Jim VanderWal acknowledged that, at that point in time, he was willing to take some of the crew members back to the site. Jim VanderWal's e-mail to Mr. Boudreau at 12:40 p.m. also refers to Jim VanderWal's plan to complete the remainder of the project himself with his remaining crew.

34. Jim VanderWal explained his reasons for hiring Mr. Boudreau to perform the second phase of the project were that he knew he needed another option to complete the work at the Chelmsford site because of what had happened on May 17th when Paul and Dan Prelaz and Chris Boothe resigned. He explained that Paul and Dan Prelaz as well as Chris Boothe, who, as noted, had quit for personal reasons days before the events in issue, were the only possible supervisors available to supervise the crew. Jim VanderWal therefore recognized that he had a crew at the Chelmsford site but no one to run it.

35. Although Jim VanderWal had planned to go up to the Chelmsford site later that evening with some of his shop employees, he cancelled that plan after he received a Ministry of Labour report that same day. In that report, the inspector ordered, among other things, that the hoisting operation for the roof segments not proceed until the load estimate and pick up point design was completed by a professional engineer and a copy provided to the inspector. That investigation had apparently occurred as a result of a call to the Ministry of Labour from staff to report that the roof was overweight. In order to comply with the order, Jim VanderWal cancelled his original plan to head up to the Chelmsford site that night and decided to remain at the office instead so that he could make arrangements to comply with the direction to obtain the necessary engineering report.

36. According to Pat Senior's evidence, he was going to go up to the Chelmsford site that night with Jim VanderWal until he was advised at around 5 or 5:15 p.m. of the change of plan just as he was finishing loading the tools into the truck to bring up with them.

Meeting with the Union's Representative at 5 p.m. on June 2, 2010

37. At approximately this same time, Mr. Zimmer met with Paul Prelaz and with members of his crew, who had returned from Sudbury, at the Flying J rest stop in London, Ontario. Mr. Carver spoke on behalf of the crew at the meeting and explained their safety concerns to Mr. Zimmer. Mr. Zimmer then asked them if they would like to join the Union and, if so, they could sign cards and be represented. Ten of the crew members signed cards at that time. Mr. Zimmer then advised them to let him know if they were going back to work the following Monday. According to Mr. Zimmer's evidence, the crew talked about going back up to the job site so that they could bring the certification application and no one said anything to him about having quit their employment with VanderWal.

38. According to the uncontradicted evidence of both Mr. Carver and Mr. Zimmer, Paul Prelaz was present at the meeting but had no involvement in the discussion about joining the Union. This meeting was the only occasion at which the Union obtained signed membership cards on behalf of employees of VanderWal. As such, all of the cards filed with the Union's certification application were signed at that meeting.

After the Meeting with the Union's Representative on June 2, 2010

39. Jim VanderWal testified that he first learned about the crew's meeting with the Union at around 6 p.m. that night from Pat Senior, who had, in turn, heard about it at around 5:30 p.m. when his son, Pat McEachreon Junior ("Pat Junior") called his father at work after speaking to Paul Prelaz. Jim VanderWal referred in evidence to his understanding that Paul Prelaz had convinced the guys to join the Union because he was going to "get even" with VanderWal because of the issues between himself and Jim VanderWal's daughter. Jim VanderWal also noted that he "was not impressed" when he learned about the fact that the crew had met with the Union, but nonetheless felt it was more of a "non-issue" because the guys had left the site. In this regard, he explained that he knew from an earlier certification application that had been filed in respect of his employees in 2001 or 2002 that the employees had to be working on site for an application for certification to proceed.

40. According to Jim VanderWal, approximately seven members of the crew returned to the shop in Petrolia at around 7 p.m. that night. His recollection is that Mr. Carver and Mr. Durance were there and that they were the spokespeople for the rest of the crew members who showed up and that they explained at that time that the crew had left the site because of safety issues relating to the weight of the roof. According to Jim VanderWal's evidence, they did not discuss going back to work at that time, other than to discuss that they would have to regroup and see what was required. He explained that he did not confirm with them at that time that they were not going to go back to work at the site, regardless of whether they wanted to or not, because there were seven of them and he was by himself. Jim VanderWal however acknowledged that, when members of the crew arrived at the shop and explained why they had left the site, "they were basically going to go back up to work". As such, according to Jim VanderWal's evidence, members of the crew expressed their willingness to return to the site when they arrived at the shop that night, but he made no commitment one way or the other as to whether he would return them to the site.

41. After everyone had left the shop, Jim VanderWal went into the truck and discovered that there were quite a few tools missing, including all the fall arrest systems, the safety harness, the lasers, etc. He estimated the cost of the missing tools at just under $19,000. He explained that he did not pursue the matter with the police given his belief that Paul Prelaz, who is the father

of three of his grandchildren, was responsible for taking the majority of the missing tools. Jim VanderWal testified that the discovery that the tools were missing frustrated him more than anything else in that the crew had not only vacated the site but had also made it virtually impossible to continue working. According to Jim VanderWal, this was the biggest reason his crew did not return to the site until June 7th. After he discovered that the tools were missing, he wanted to confront the crew members about it and decided that he was going to confirm that none of them were coming back to work regardless because of the missing tools.

42. Mr. Carver disputed Jim VanderWal's version of the events that evening.

43. According to Mr. Carver, neither he, nor Mr. Durance, went to the shop at all that day. Mr. Carver instead maintained that he had spoken to Jim VanderWal only by telephone that night, since he had gone home after the meeting with Mr. Zimmer without stopping at the Company's shop. According to Mr. Carver's evidence, Jim VanderWal called him at his home at around 6 or 7 p.m. on June 2nd, at which time Mr. Carver expressed his concerns about some safety issues and Mr. VanderWal agreed that they would be taken care of. Mr. VanderWal then indicated that, in light of the fact that the equipment was no longer on site, he would need a couple of days before resuming work. During this telephone conversation, Mr. Carver expressed to Mr. VanderWal that at no time did he want to terminate his position with VanderWal, and that that was also the feeling of the others who were working up at the Chelmsford site, other than Paul Prelaz. According to Mr. Carver, they then agreed over the phone that Mr. Carver would return to work at the Chelmsford site the following Monday and that Mr. Carver would contact the other employees. Thereafter, Mr. Carver telephoned Mr. Zimmer to advise that they would be heading back to the site the following Monday.

44. Mr. Zimmer confirmed in his evidence that he had received a voicemail message at around 8:20 p.m. that night from Mr. Carver indicating that "it was pretty much a go" for Monday.

45. Having regard to all of the evidence, it seems most likely that Jim VanderWal is mistaken about the fact that Mr. Carver was among those who returned to the Petrolia shop that night and therefore that his conversation with Mr. Carver at around 6 or 7 p.m. on June 2nd was in person at the Petrolia office, rather than over the phone. In this regard, I note that Mr. Carver's contention that he spoke to Jim VanderWal over the phone that night when he was at home is consistent with what Mr. Carver indicated in his written statement made at Mr. Zimmer's request the following day when the events were fresh in his mind. While it was suggested that their conversation must have occurred at the Petrolia office because Jim VanderWal would not otherwise have known that Mr. Carver had travelled back by car with Mr. Durance, it is certainly possible that that fact was communicated to Jim VanderWal by someone such as one of the crew members.

46. In any event, regardless of whether their conversation was at the office or over the telephone, I accept that, during their first conversation that night, Mr. VanderWal, at a minimum, gave Mr. Carver the impression that the crew would be going back up to the site the following week. In this regard, I note that it seems unlikely that Mr. Carver would have left a message for Mr. Zimmer that night about his belief that they would be back at work at the site the following Monday if Mr. VanderWal had not at least given him that impression.

47. There is no dispute that Mr. Carver and Jim VanderWal spoke again by telephone later that night at or around 9 p.m. Mr. Carver testified that, during that call, Mr. VanderWal indicated that he had heard that they had gotten in contact with the Union and then said that

"because [he] had talked to the Union, as of this morning all of you guys quit your job". After his phone call with Mr. VanderWal, Mr. Carver contacted Mr. Zimmer again at around 9:30 p.m. to inform him that the arrangements to go back up to Chelmsford site had been changed and that they were not going back to work. Mr. Carver arranged to meet with Mr. Zimmer and the other employees at Mr. Carver's residence on Thursday, June 3rd.

48. Jim VanderWal acknowledged that he had ended up calling every one of the crew members he could get hold of later that night. According to his version of those calls, he explained to them not only that he considered that they had quit their job, but that the other issue was that the tools were missing. When asked what reason he had given them, he noted that the biggest issue was that they had left the site without notifying the office or himself. The second issue was that there were a substantial number of tools missing from the truck.

49. There is no dispute that Jim VanderWal had heard about the crew's meeting with the Union by the time he made those calls and that he raised the issue of the Union during those calls. While Jim VanderWal did not purport to recall precisely what he had said, he acknowledged in evidence that he had "gone fishing" during his telephone conversations with members of the crew to find out if they had, in fact, met in London to sign up with the Union. He also acknowledged that, during those calls, he probably did say something to the effect that because the crew had left the site and signed with the Union, they no longer had a job.

50. When it was put to him in cross-examination that the fact that the crew had spoken to the Union and had signed cards impacted his decision not to bring them back to work, Jim VanderWal acknowledged that that fact may have impacted "who" he brought back to work. He also added that, in the end, the crew members he did end up bringing back up to the Chelmsford site were the ones who contacted him later that week and asked to be returned to the job site.

June 3 and 4, 2010

51. Mr. Carver contacted Jim VanderWal the next day, on June 3, 2010, to ask about his record of employment and also to advise him that the crew members had talked to Employment Standards and that they were pursuing payment of overtime hours.

52. Shortly before 10 a.m. on Thursday June 3rd, Mr. Zimmer got a call from Mr. Kerrigan asking that his membership card be ripped up. Mr. Kerrigan explained that he had been fired and that everyone who signed a card had been fired. Mr. Zimmer responded by asking him to wait and think about it and that they would see what they could do. Mr. Zimmer then started calling the other parties involved, such as Paul Prelaz and Mr. Larson.

53. Mr. Zimmer spoke to Mr. Carver at approximately 10:30 a.m. and learned that members of the crew would be meeting at Mr. Carver's house at 1 p.m. that day. Mr. Zimmer then left messages for Mr. Jensma, Mr. Scott and Mr. Ewen. Mr. Zimmer spoke to Mr. Caza, who told him that Jim VanderWal wanted him to come back to work but that, before he would be able to come back, he had to sign a letter saying that he was not interested in joining a union. Mr. Zimmer then spoke to Mr. Carver again that morning, at which time Mr. Carver told him that Jim VanderWal had got wind of the crew talking to the Union and that because they left the job, they had automatically quit. Mr. Zimmer understood from Mr. Carver that Jim VanderWal was taking the position that they had quit.

54. Later that day, at around 1 p.m., Mr. Zimmer attended the meeting at Mr. Carver's house with most of the workers from the Chelmsford site. There is no dispute that Jim and Mary

VanderWal drove past Mr. Carver's house several times while this meeting was taking place. Mr. Zimmer asked the crew members in attendance to make a written statement in their own words regarding the events that week. He obtained written statements from Mr. Durance, Mr. Caza, Mr. Jensma, Mr. Carver, Jason VanderWal, Mr. Scott, Mr. Larson and Mr. Kerrigan at that time, which statements were entered into evidence. In assessing the evidence in this case, I accept the Company's contention that those statements should not be relied upon for the truth of their content, particularly in the absence of any explanation regarding why those individuals, other than Mr. Carver, were unable to testify.

55. That same day, Mr. Kerrigan, to whom Jim VanderWal had spoken the night before to advise that his services were no longer required, came into Jim VanderWal's office and told him he was pressured into signing a card but that he really wanted to continue working for the Company. According to Jim VanderWal's uncontradicted evidence, Mr. Kerrigan offered to sign a paper saying he did not want the Union. Mr. Caza and Mr. Ewen and Mr. Vondette also contacted Jim VanderWal that week and explained to him that they had no choice but to return home because the Company truck was leaving the site and they had no transportation. Jim VanderWal told both Mr. Caza and Mr. Ewen that, before they could come back to work at the Chelmsford site, they had to sign letters to the same effect as Mr. Kerrigan's**,** which they both did and provided to Jim VanderWal that week. Mr. Kerrigan's letter states as follows:

> "My name is Jeffrey Kerrigan [.] I did not sign a Union Card [.] I was intimidated into signing the card [.] I don't even like the idea of the Union. So I don't want to (sic) Union."

56. Mr. Caza's statement has his name at the top and states:

> "I have spoken to Jim and would like to work for him [.] I have no interest in joining a union."

57. The content of Mr. Ewen's letter dated June 3, 2010 similarly states:

> "This letter was requested by you Mr. Jim VanderWal, to state that I Brent Snetselaar-Ewen DID NOT SIGN any Union card on Wednesday June 02, 2010 at the Flying J in London, Ontario. And that I Brent Snetselaar-Ewen have NO intention to sign any type of Union cards or sign up for any Union type person to visit myself or anyone while I am in the employment of VanderWal Homes & Commercial Group".

58. Jim VanderWal acknowledged in evidence that these letters were a condition of returning to work.

59. On June 4, 2010, Mr. Zimmer received a telephone call from Mr. Ewen indicating that he had changed his mind and that it was too soon for him to join the Union.

60. Sometime on either June 3 or 4, 2010, Jim VanderWal hired back the following four crew members to complete phase 1 of the work at the Chelmsford site: Mr. Ewen, Mr. Kerrigan, Mr. Caza, and Mr. Vondette.

<u>The following week – June 7, 8 and 9, 2010</u>

61. Commencing the week of June 7th, Mr. Ewen, Mr. Kerrigan, Mr. Caza, and Mr. Vondette worked at the Chelmsford site together with a number of shop employees (Dave

McKay, Kevin Cox, Marcy Jacques and Pat Senior) under the supervision of Jim VanderWal and Henry Peters. Tony Boudreau's crew also showed up on June 7th. According to Mr. VanderWal, he had enough work to keep nine people busy for a two week period from June 7 to 15th, 2010.

62. All of the crew members were aware of the interaction between the Union and Paul Prelaz's crew and that Jim VanderWal was not happy about it. During the week of June 7th, 2010, they worked on shortening up or lowering four of the walls, installing some non-structural panels and some bracing work as well as removing some fasteners. On June 9, 2010, the date of the certification application, Jim VanderWal's crew completed some polyurethane insulated panels on some exterior walls, did some bracing, and also checked the roof that was still on the ground to confirm that everything was complete.

63. On June 7, 2010, Mr. Caza responded to a text message from Mr. Zimmer's by texting back that they were within an hour away (presumably from the site) and that Ken (Caza), Lucas (Vondette) and Jeffrey Kerrigan were all riding up together. Although Mr. Zimmer sent Mr. Caza several more text messages shortly thereafter, Mr. Caza did not respond to them.

64. Mr. Zimmer headed up to Sudbury on June 8, 2010 at around 5 p.m. and picked up Pat Martin, a representative of the Union, at the Sudbury union hall before heading over to the Chelmsford site where he saw ten guys working putting up the insulated panels.

65. Mr. Zimmer went back to the job site the next morning on June 9, 2010 and took a number of pictures of the site and of the work being performed. He was there for a total of between 15 and 20 minutes that day, during which time he observed VanderWal's crew doing work of the carpentry trade, such as bracing walls and generally preparing to install wall panels.

66. Mr. Zimmer indicated that he approached one of the workers and asked him if he was interested in the Union. That individual however simply walked away. He then approached another worker, who was screwing the sections of the wall panels together in preparation for a lift. When Mr. Zimmer asked him if he considered working in the Union, the worker did not answer. This second worker (who would not give Mr. Zimmer his name) then agreed with Mr. Zimmer's suggestion that it was because he was not allowed or will get fired and noted that that is what happened to the last guy. Mr. Zimmer testified that he then left in order to avoid any more "firings" and proceeded to make arrangements to file the present certification application. Mr. Zimmer acknowledged that it was possible that the people he encountered on the job site may not have been VanderWal workers, such as men from Mr. Boudreau's crew.

67. Mr. Martin was present when Mr. Zimmer approached these two individuals. According to Mr. Martin, they both replied "yes" when Mr. Zimmer asked them if they were employees of VanderWal. Mr. Martin also corroborated Mr. Zimmer's version of his interaction with them and noted that the two workers in question were working on heavy gauge steel stud walls.

68. Pat Senior testified about having been approached by a union representative sometime in the week of June 7, 2010 when he was running the forklift. According to his evidence, when the union representative introduced himself, Pat Senior directed him to speak to Jim VanderWal as a joke.

69. On the evening of June 9th, Mr. Zimmer got a call from Mr. Caza, who told him that he was in the bathroom with the shower and the radio on so that no one would find out he was

giving the Union information. Mr. Caza indicated that there were nine guys working up at the site for VanderWal.

70. According to Mr. VanderWal's evidence, on June 9, 2010, the following nine employees of VanderWal were working at the Chelmsford site: Mr. Caza, Mr. Kerrigan, Mr. Ewen, Mr. Vondette, Pat Senior, Dave McKay, Henry Peters, Kevin Cox and Martha Jakes.

Decision

71. The first issue to be determined in this case is whether the evidence before the Board discloses that VanderWal violated sections 5, 70, 72, 76 and 87(1) of the Act by refusing to re-employ members of Paul Prelaz's crew after June 2nd because they spoke with or joined the Union as alleged.

72. The relevant provisions of the Act read as follows:

> **Membership in trade union**
> **5.** Every person is free to join a trade union of the person's own choice and to participate in its lawful activities.
>
> …
>
> **Employers, etc., not to interfere with unions**
> **70.** No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.
>
> ...
>
> **Employers not to interfere with employees' rights**
> **72.** No employer, employers' organization or person acting on behalf of an employer or an employers' organization,
>
> ...
>
> (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.
>
> ...
>
> **Intimidation and coercion**
> **76.** No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or

of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

…

Protection of witnesses rights

87. (1) No employer, employers' organization or person acting on behalf of an employer or employers' organization shall,

(a) refuse to employ or continue to employ a person;

(b) threaten dismissal or otherwise threaten a person;

(c) discriminate against a person in regard to employment or a term or condition of employment; or

(d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that the person may testify in a proceeding under this Act or because the person has made or is about to make a disclosure that may be required in a proceeding under this Act or because the person has made an application or filed a complaint under this Act or has participated in or is about to participate in a proceeding under this Act.

…

...

Burden of Proof

96. (5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person's employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

73. The Union's allegation that VanderWal refused employment to, or discharged, persons who spoke with or joined the Union engages the reverse onus provision in subsection 96(5) of the Act. The burden of proof is therefore on the Company to demonstrate that it did not act in violation of the Act when it failed, or refused, to return all of the members of Paul Prelaz's crew to the Chelmsford site after June 2, 2010.

74. While the Company argued that I should draw an adverse inference from the Union's failure to call Paul or Dan Prelaz or any other members of the crew beside Mr. Carver to testify that members of the crew quit their employment with VanderWal on June 2nd, 2010, I cannot accept that contention. In this regard, I note that the onus is not on the Union to prove that members of the crew did not quit their employment. Rather, it is the Company that has to establish that no part of its reasons for failing to return all members of Paul Prelaz's crew at the Chelmsford site after June 2, 2010 was because of their union activities. As such, the question of whether they did or did not quit that day is relevant only to the Company's defence to the effect that the reason they were not returned to the Chelmsford site the following week was because Jim VanderWal considered them to have abandoned their employment on June 2nd, 2010. In the

circumstances, the failure of any of the members of Paul Prelaz's crew to testify simply means that the Board must assess whether the Company has discharged its evidentiary burden having regard to the evidence of those who did testify.

75. In the present case, that evidence indicates that, regardless of whether or not Jim VanderWal believed that members of Paul Prelaz's crew had quit their employment when he learned from Mr. Carver that they were heading home just before 9 a.m. on June 2nd, he was still prepared at 10 a.m. that day to return any one of them to work at the site if they were willing to go back. This fact is apparent from the e-mail that Jim VanderWal sent to Paul Prelaz at 10:09 a.m. on June 2nd, which, as noted, states, in part: "…I need to go back up and continue the remainder of the job. Who ever wants to work should let me know. Tony's crew will be there tomorrow…". As such, irrespective of what Mr. Carver communicated to Jim VanderWal earlier that morning during their telephone call at 8:50 a.m., Jim VanderWal remained prepared at 10 a.m. that day to take any crew member back to work with him at the Chelmsford site notwithstanding that he knew at that time that the crew had left the site and were heading back to Petrolia.

76. The evidence also indicates that, in addition to the work Mr. Boudreau's crew had been hired to do, there remained work to be done at the Chelmsford site and that Jim VanderWal needed his own crew to do it. According to Jim VanderWal's testimony, he contacted Mr. Boudreau about doing the second phase of the job as soon as he learned that the crew had left the site, because he no longer had any supervisors for the site and he could not supervise the balance of the project himself given his other obligations. The e-mail Jim VanderWal sent to Paul Prelaz that morning confirms that, before Jim VanderWal learned about any union activity that day, his plan was to have the second phase of the project at the Chelmsford site done by Mr. Boudreau's crew and to complete the remaining work with his own crew, including anyone from Paul Prelaz's crew who was willing to go back.

77. As such, even if I had accepted Jim VanderWal's evidence that he never indicated to any of the members of the crew, including Mr. Carver, that he would return them to the Chelmsford site, the evidence before me reveals that he had a change of heart about permitting the crew to return to the Chelmsford site between 10 a.m. that morning, when he sent Paul Prelaz the e-mail, and approximately 8 or 9 p.m. that night, when he telephoned members of the crew to communicate his position that they had abandoned their employment. The question is therefore what changed between 10 a.m. that day and 8 or 9 p.m., when Jim VanderWal called members of the crew.

78. As noted, Jim VanderWal's original plan to head back up to the Chelmsford site that same evening was delayed because of receipt later that day of the Ministry of Labour report. He did not therefore ultimately return to the site with his own crew until the following week, on Monday, June 7, 2010, when Mr. Boudreau's crew also arrived.

79. The only other significant events which occurred prior to the phone calls Jim VanderWal made to the crew members that night were that he learned both about the meeting between members of the crew and the Union's representative at 5 p.m. that day and also that a substantial number of the Company's tools had gone missing.

80. Jim VanderWal discovered that the tools were missing shortly after members of the crew returned to the shop at or around 7 p.m. on June 2nd, at which time, according to his evidence, they explained why they left the site and indicated that "they were basically going to go back up to work." In other words, according to Jim VanderWal's own evidence, the crew

members who returned to the shop that night expressed their willingness to return to work at the Chelmsford site and he did not respond "yes" or "no" at that time because there were seven of them and only one of him.

81. While I have no doubt that Jim VanderWal was furious about the costly disappearance of his tools, the evidence before me falls far short of establishing that the crew's union activities that night played no role in his decision to treat members of the crew as having abandoned their employment. In this respect, I note that, according to his own evidence, when he made those telephone calls that night, the "biggest" issue he raised was the fact that the crew had left the site and had not notified the office. However, what he described as the "biggest" issue in treating their employment with VanderWal as at an end was not something which he had earlier that day viewed as an impediment to returning them to work at the Chelmsford site.

82. In addition, while the Company attempted to suggest that it could not perform the remaining work without the tools that had gone missing, those missing tools did not prevent Jim VanderWal from returning to the Chelmsford site with a crew of workers to complete phase one of the project the following week. Pat Senior's testimony also indicates that the Company had additional tools in Petrolia to bring up to the site. In that regard, I note Pat Senior's testimony that he had just finished packing the tools in the van late in the day on June 2nd when he learned that the trip to the Chelmsford site that night had to be postponed.

83. It is further apparent from Jim VanderWal's own evidence that the crew's union activities were also on his mind when he communicated his decision to treat their employment as having been abandoned. In this regard, he acknowledged that he had gone "fishing" for information about the Union during his telephone calls to members of the crew that night. Jim VanderWal also acknowledged in evidence that the fact that members of the crew had met with the Union's representative may have influenced "who" he was prepared to bring back to the site with him and that he knew that the employees had to be working on site for an application for certification to proceed. In addition, the fact that he had those who called him later that week asking for their job back sign a statement denouncing any interest in the Union as a condition of their returning to work suggests that the crew's union activities on June 2nd did, in fact, influence "who" he was prepared to take back to the site.

84. Having regard to the evidence before me, I find that anti-union animus played a part in the Company's decision to treat members of Paul Prelaz's crew as having abandoned their employment on June 2nd with the result that not all members of the crew were permitted to return to the Chelmsford site the following week. In failing to return all of the original crew members to the site commencing on June 7th, the Company sought to interfere with their representation by the Union and to compel its employees to refrain from becoming or to continue to be a member of the Union contrary to sections 70, 72 and 76 of the Act. In the circumstances, it is unnecessary to determine whether that failure also resulted in a breach of section 87(1) of the Act, which allegation was not, in any event, pursued by the Union in final argument.

Appropriate Remedy in relation to the Certification Application

85. Having found that the responding party contravened the Act, I will next address both the Union's contention that remedial certification under section 11 of the Act is warranted in this case, and the Company's contrary submission that the certification application should instead be dismissed under section 15 of the Act because of Paul Prelaz's involvement in it.

(i) Alleged Employer Support

86. Section 15 of the Act reads as follows:

> **What unions not to be certified**
> **15.** The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the *Human Rights Code* or the *Canadian Charter of Rights and Freedoms.*

87. In determining whether the Board is precluded from certifying the Union because of the operation of section 15 of the Act, it should be noted that there is no suggestion in the present case that the Company participated in the formation or administration of the Union or that it contributed financial support to it. The issue is therefore whether the actions of Mr. Prelaz, a former site supervisor with the Company, constitutes the provision of "other support" to the Union within the meaning of section 15 of the Act.

88. When considering what constitutes "other support", the Board has applied a purposive, rather than a literal, approach. In *Superior Boiler Works & Welding Ltd.*, 2010 CanLII 68943 (ON LRB), the Board recently reviewed the history of the application of section 15 of the Act in an effort to reconcile two competing lines of authority that had developed in the Board's jurisprudence regarding whether the trade union concerned had to be aware of the support offered to it by an employer to warrant dismissal of the certification application. In reconciling these competing positions, the Board adopted a purposive approach to the interpretation of the scope of section 15, reasoning as follows:

> 54. In my view the place to start one's consideration of this question is section 2 of the Act. Section 2 states that one of the purposes of the Act is to facilitate collective bargaining between employers and trade unions that are the *freely-designated* representatives of the employees. Subject to remedial certification authorized by section 11 of the Act, in the normal course a trade union can secure a certificate from the Board only if it can establish that it is the "freely-designated" representative of the employees in the bargaining unit. It is this underlying purpose of the Act that informs the approach taken by the Board to section 15 of the Act that is reflected by *Covertite Eastern Limited*, cited above. In that decision, at paragraph 56, the Board notes that it is employer support "which is of a character or proportion such that it is reasonable to infer that employees have not exercised a free choice in the matter of the selection of a bargaining agent" that triggers the application of section 15. The Board must be satisfied that the choice made by employees is, in fact, a reflection of the free will of the employees in question, and not something else.

The Board consequently determined that section 15 was not intended to address only circumstances involving collaboration between an employer and a trade union, but rather was, more generally, intended to preclude a trade union from securing bargaining rights where it cannot reasonably be said to be the freely-designated representative of those employees due to the actions of the employer.

89. Employer actions which send a message to employees of the employer's preference for one bargaining agent or another have generally been found to constitute "other support" within the meaning of that section, since the Board cannot, in those circumstances, be satisfied

that the employees were freely choosing one bargaining agent over the other. As noted, in *Covertite Eastern Limited,* [1996] OLRB Rep. May/June 386 at para 61, when the message sent by the employer to its employees "…extended to specific support for another bargaining representative, the line set by section 15 was crossed". That was the situation before the Board in both *Superior Boiler Works & Welding Ltd.,* cited above, and *Pre-Eng Contractors Ltd.,* [2008] OLRB Rep. March/April 284 at para 25, on which the Company relied in support of its position that the present application should be dismissed for employer support.

90. In *Superior Boiler Works & Welding Ltd.,* cited above, the Board found it appropriate to exercise its authority under section 15 to dismiss an application brought by the Canadian National Federation of Independent Unions ("CNFIU"), in circumstances where representatives of the employer held a captive audience meeting, in which it threatened employees against joining the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 67 ("Local 67") and urged them to join instead a trade union such as CNFIU. Representatives of the employer were also found to have reiterated the employer's message that CNFIU was the preferred choice in a number of different ways throughout the CNFIU campaign. In view of its finding that the employer's actions prevented its employees from making a free choice regarding who would become their bargaining representative, the Board determined that the employer had offered "other support" to the CNFIU as defined by section 15 of the Act and CNFIU's certification application was therefore dismissed.

91. Similarly, in *Pre-Eng Contractors Ltd.,* cited above, the Board found evidence of the kind of mischief that section 15 of the Act was meant to prevent where a number of the employer's site superintendents sent a message to the employees that CLAC was to be preferred over another trade union. In the circumstances, the Board determined that it could not rely on the membership evidence submitted by CLAC as a representation of the true wishes of the employees.

92. However, as noted by the Board in *Pre-Eng Contractors Ltd.,* cited above, any set of facts must be seen in its proper context in order to determine whether they are evidence of the kind of mischief which section 15 of the Act seeks to prevent. The Board referred in that connection to the fairly uniform meaning and application given to section 15 described in *Covertite Eastern Limited,* cited above at para 56:

> 56. The Board has made clear in its jurisprudence that the purpose of section 15 is to preserve the arm's length relationship between unions and employers which is fundamental to the structure of the Act. A purposive, rather than literal, application of the section has found favour in the Board's jurisprudence, and is in our view the appropriate approach. Thus, not everything that an employer does that might be said to be supportive of an organizing campaign is sufficient to warrant the application of section 15. It is activity which is of a character or proportion such that it is reasonable to infer that employees have not exercised a free choice in the matter of the selection of a bargaining agent. See, for example, *Edwards v. Edwards,* (1952) , 52 CLLC para. 17,027 and *Ontario Hydro,* [1989] OLRB Rep. Feb. 185 and *University of Toronto,* [1988] OLRB Rep. March 325. The purposive interpretation has meant that the provision of a list of employees to a union in an organizing drive by the employer contravened section 13 [now 15] in *Tri-Can,* [1981] OLRB Rep. Oct. 1509 but not in *Continuous Mining,* [1990] OLRB Rep. April 404, because in the former the trade union applicant had been formed to thwart another union's organizing attempts,

> while the applicant in the latter had a long history of arm's length collective bargaining with the parent of the employer.

Any given action by an employer will not therefore in all cases warrant the application of the section depending on whether the context reveals the type of mischief to which section 15 of the Act is directed. The overall context must be considered in determining whether the activity is of such a character or proportion that it is reasonable to infer that employees have not freely chosen their bargaining agent.

93. The Board has consequently distinguished between support tendered by managerial employees who are acting on behalf of, or in the interests of, the employer and those acting on their own initiative against the interests of the employer and in support of the employees' interests. In *Adidas Textile (Canada) Ltd.*, [1980] OLRB Rep. May 639, the Board explained the rationale for this distinction in relation to the purpose of section 15 as follows:

> … The purpose of the section, in keeping with the scheme of the Act, is to maintain the necessary arm's length relationship between employers on the one hand, and trade unions, as representatives of employees, on the other. In applying section [15], the Board draws a distinction between support tendered by the employer, either directly or through persons holding managerial positions within his organization, and support tendered by persons who occupy management positions but act on their own initiative against the employer's interest in support of the interests of the employees. Although a question may arise in these latter circumstances as to the voluntariness of the membership evidence, the necessary arm's length relationship between employer and trade union may not be undermined in a manner which requires the automatic application of the section [15] bar. In rejecting the automatic application of the section [15] bar in these circumstances (as in the *Leamington Hospital* case, [1973] OLRB Rep. June 376) the Board stated at para. 14 of the *Children's Aid Society* case, *supra*:
>
> > …The Board recognizes that in the modern organizational setting interests of individual person deemed to be managerial are not necessarily coincidental with those of the employer. If the evidence establishes that such persons acted on behalf or in the interests of the employer then undoubtedly the section [15] bar would apply. If, however, the evidence establishes that the persons acting not on behalf of the employer but contrary to the wishes and interests of the employer (see *Air Liquide* case (1964 CLLC 16,002) then it cannot be said that the employer has participated contrary to section [15] , or section [70] for that matter. Similarly, if the evidence establishes that the disputed persons have been acting in their self-interest rather than on behalf of or in the interest of the employer, then again section [15] should not be activated.

The concern about the establishment of "sweetheart unions", which underlies the authority granted to the Board under section 15 of the Act to dismiss an application, does not arise in circumstances where a manager or foreman was clearly acting contrary to the employer's interests and would have been seen to be so motivated by any employee. As noted in *National Dry Company Ltd.*, [1980] OLRB Rep. Aug. 1217, at para 12, "[w]hen that is the case the section [15] bar to certification does not arise and there is no reason to presume, absent substantial evidence to the contrary, that the employees were subjected to undue influence in their decision to join a union."

94. In the present case, there can be little doubt that Paul Prelaz was acting on his own initiative in support of the employees' interests, rather than in VanderWal's interests, when he contacted a representative of the Union on June 2nd and arranged for members of his crew to meet with Mr. Zimmer later day. According to the evidence, Paul Prelaz contacted Mr. Zimmer only after he had abandoned work at the site and left his crew without a supervisor and therefore the ability to continue working. Paul Prelaz became involved in assisting the crew to contact a trade union only after the crew had discussed at the first rest stop on their way home that that is what they wanted to do and Mr. Carver then asked Paul Prelaz if he knew anyone they could contact. In responding to Mr. Carver's inquiry and contacting representatives of the Union with whom he was acquainted on the employees' behalf, Paul Prelaz was doing so in support of the employees' interests and against the Company's interests and, in all the circumstances, would have been seen to be so motivated.

95. The present case therefore differs from that before the Board in *Veres Wire Industry Ltd.,* [1976] OLRB Rep. July 337, in which the Board found it appropriate to dismiss the application for employer support. In that case, the Board was unable to find on the evidence that the managerial employee in question was at all material times acting in a manner known to the affected employees to be prejudicial to the employer's interests, since the only evidence before it was that the majority of the employees in the bargaining unit would perceive that individual as their boss and that that individual played a key role in the applicant's efforts to persuade those employees to sign membership cards. By contrast, the uncontradicted evidence of Mr. Carver in the present case is that Paul Prelaz's involvement in assisting the employees came only after Paul Prelaz had "cancelled his relationship" with VanderWal, had left the employees without a supervisor, and Mr. Carver asked him if he knew anyone they could contact after the employees had themselves met and decided at the first rest stop that they wanted to contact a trade union to protect themselves.

96. The situation in the present case is also distinguishable from that in *Gibson Willoughby Limited,* [1967] OLRB Rep. July 347, in which the Board dismissed the application for employer support in circumstances where one of the respondent's superintendents took an aggressively active part in the organizing campaign while still employed as a member of management. His involvement was not, like Paul Prelaz's involvement in this case, limited to responding to an employee inquiry for assistance in contacting a union representative, but rather the superintendent in that case was found to be coercive in his efforts to have employees join the trade union. His coercive activities were further found to have been invited and condoned by the union's representative in that case such that the Board was persuaded that the provisions of what is now section 15 of the Act should apply.

97. The present case is instead, in my view, similar to that in *Consumers Distributing,* [1995] OLRB Rep March 250, in which the Board declined to entertain allegations in support of a request for dismissal under section 15 of the Act after finding that the allegations failed to disclose an arguable case for dismissal. The allegations before it in that case included that the organizing of employees in the bargaining unit had taken place with the assistance and support of a current and former manager and assistant manager for the announced purposes of getting back at the employer. In declining to entertain the allegations concerning the activities of the "managerial employees", the Board noted, at para 18, that, "…it has been the law for some time now that this provision [section 15 of the Act] will not apply unless the managerial employees can be said to be acting on behalf of management or, perhaps, can reasonably have been perceived to have been doing so by employees whose support they were soliciting."

98. The circumstances before me are also, to some extent, similar to those in *Vic Murai Holdings Ltd.,* [1996] OLRB Rep. February 106, in which Ms. Hodder, an employee who had recently been promoted to the managerial position of Head Cashier was involved in the union's organizing drive relating to the employees of the store where she worked. In that case, Ms. Hodder had not only, like Paul Prelaz, attended a meeting with representatives of the trade union at which membership cards were signed, but had also contacted a number of employees who had not been present at the meeting in order to obtain more applications for membership. In finding that there had been no violation of what is now section 15 of the Act in that case, the Board noted that persons like Ms. Hodder, who hold a managerial position, and act on their own initiative against the employer's interests, do not in any way undermine the "necessary arm's length relationship" between the employer and the trade union required by the Act.

99. In view of my finding that Paul Prelaz, who had ended his relationship with VanderWal at the relevant time, was acting on his own initiative against the employer's interests when he contacted Mr. Zimmer on the employees' behalf and would in all the circumstances be seen to be so motivated, I am not persuaded that the overall context of his actions reveals the type of mischief to which section 15 of the Act is directed.

100. The remaining issue as it relates to Paul Prelaz's involvement is the Company's alternative argument that, even if his actions are not found to constitute a breach of section 15 of the Act, his involvement ought nonetheless to be considered when assessing the membership evidence in this case. In support of its argument, the Company relies on the decision in *V.H.L. Developments (Markham Place) Inc. and V.H.L. Developments Inc.,* 2010 CanLII 13057 (ON LRB) to suggest that a representation vote should be directed given that Paul Prelaz's involvement in the collection of membership cards raises concerns about their reliability as a reflection of the true wishes of employees. In *V.H.L. Developments (Markham Place) Inc. and V.H.L. Developments Inc.,* cited above, the Board found that the support of the managerial employee did not constitute a violation of section 15 of the Act, but that some of his remarks made to employees raised sufficient concern about the employees' true wishes that the Board found it appropriate to exercise its discretion under section 128.1(13)(b) of the Act to direct the taking of a representation vote.

101. The present certification application was however filed under section 8 of the Act. Under subsection 8(2) of the Act, the Board is *required* to direct the taking of a representation vote if it determines, based on the membership evidence filed, that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appear to be members of the union at the time the application was filed. As such, in dealing with the present application, unlike that before the Board in *V.H.L. Developments (Markham Place) Inc. and V.H.L. Developments Inc.,* cited above, and subject only to the application of section 11 of the Act, the Board cannot, in any event, rely simply on the membership evidence filed to certify the trade union without first testing their wishes through a representation vote.

102. In the circumstances, having found that the participation of Paul Prelaz in the Union's organizing drive does not constitute "other support" within the meaning of section 15 of the Act, the remaining issue to be determined is whether the Union is entitled to remedial certification under section 11 of the Act as a consequence of the unfair labour practices committed by the Company.

(ii) Request for Remedial Certification

103. Section 11 of the Act reads as follows:

> **Remedy if contravention by employer, etc.**
> **11.** (1) Subsection (2) applies where an employer, an employers' organization or a person acting on behalf of an employer or an employers' organization contravenes this Act and, as a result,
>
> (a) the true wishes of the employees in the bargaining unit were not likely reflected in a representation vote; or
>
> (b) a trade union was not able to demonstrate that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appeared to be members of the union at the time the application was filed.
>
> **Same**
> (2) In the circumstances described in subsection (1), on the application of the trade union, the Board may,
>
> (a) order that a representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit;
>
> (b) order that another representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit; or
>
> (c) certify the trade union as the bargaining agent of the employees in the bargaining unit that the Board determines could be appropriate for collective bargaining if no other remedy would be sufficient to counter the effects of the contravention.
>
> **Same**
> (3) An order under subsection (2) may be made despite section 8.1 or subsection 10(2).
>
> **Considerations**
> (4) On an application made under this section, the Board may consider,
>
> (a) the results of a previous representation vote; and
>
> (b) whether the trade union appears to have membership support adequate for the purposes of collective bargaining.

104. Since no representation vote contemplated under subsection 11(1)(a) of the Act has yet taken place in this case, section 11 of the Act would only apply at this stage if the preconditions set out under subsection 11(1)(b) of the Act have been met; being, that, as a result of the Company's unfair labour practices, the Union is unable to demonstrate that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appeared to be members of the Union at the time the application was filed.

105. In support of its position that that precondition has been met, counsel for the Union referred in argument to the fact that the Union had collected membership evidence on behalf of ten of the twelve original crew members who worked at the Chelmsford site until June 2nd. As such, the Union submitted that, if the Board finds that the Company terminated these people unlawfully, the Union could clearly have established the requisite forty percent membership support and that it failed to do so only as a result of the contraventions. In this regard, the Union also pointed out that the Form A-74 filed with the certification application discloses that the Union was able to file only two membership cards on behalf of employees in the proposed bargaining unit on June 9th and that it was unable to rely on six cards it had obtained from six individuals who had been unlawfully terminated on June 2nd. The Union was also unable to rely on two additional cards signed by two members of the crew who were allowed to return to work because those two individuals had asked the Union to destroy their cards after the unlawful terminations occurred.

106. Counsel for the Union also referred, by contrast, to the evidence of Jim VanderWal to the effect that there were nine employees of VanderWal working on the date of application and that five of these individuals normally work at the Company's shop. In addition, counsel noted Jim VanderWal's acknowledgement that it was out of the ordinary for any of those shop employees to be working on site. Counsel suggested that this evidence represents further confirmation that, but for the unlawful terminations, the earlier crew would have been at work and that the unlawful terminations resulted in the Union having only two cards upon which the Union could rely out of the nine people who were at work. Counsel for the Union also made reference to Mr. Zimmer's unsuccessful attempts to obtain further membership cards in the week of June 7th in support of the Union's position that any further organizing of VanderWal's crew was impossible after the terminations given that members of the new crew knew what had happened the week before. Counsel also noted that the evidence indicates that the work done by VanderWal's crew on the date of application was bargaining unit work.

107. In response to the Union's argument, counsel for the responding party confirmed that the responding party was not taking the position in reply that the work performed by the crew on the date of application date was not carpentry work (which position the Board understands had been the basis of its earlier objection to the applicant's proposed bargaining unit of carpenters' and carpenters' apprentices). Although counsel for the responding party also did not dispute that the Union had been unable to demonstrate forty percent or more membership support, she emphasized that the burden is on the applicant to establish that such failure was *as a result of* the unfair labour practices. She referred, in this connection, to the decision in *K.D. Clair Construction Ltd., K.D. Clair Western Inc.*, [2008] OLRB Rep. January/February 60. Counsel for the responding party also relied on the decision in *L&L Painting and Decorating Ltd.*, [2007] OLRB Rep. September/October 887 for the proposition that employee terminations do not necessarily trigger the application of section 11 of the Act. She further urged the Board to consider directing a representation vote given the unique circumstances of this case involving Paul Prelaz's involvement in the original collection of the membership evidence.

108. In view of my finding that the Company contravened the Act when it failed to return all members of the original crew to the Chelmsford site in the week of June 7th, the first issue to be determined in relation to the Union's request for relief under section 11 is whether, as a result of those contraventions, the Union "was not able to demonstrate that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appeared to be members of the union at the time the application was filed" as contemplated under subsection 11(1)(b) of the Act.

109. It bears noting that the language used in subsection 11(1)(b) of the Act mirrors that used under subsection 8(2) of the Act, which latter provision requires the Board to direct the taking of a representation vote "[i]f the Board determines that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appear to be members of the union at the time the application was filed." Pursuant to subsection 8(3) of the Act, that determination "…is to be based only on the information provided in the application for certification and the accompanying information provided under subsection 7(13)." As such, pursuant to subsection 11(1)(b) of the Act, the Board may provide the trade union with the relief contemplated under section 11(2) of the Act where, *as a result of* the employer's contraventions of the Act, the trade union concerned is unable to demonstrate the appearance of membership support normally required for the Board to direct the taking of a representation vote.

110. In the present case, according to the information provided in the application for certification and the accompanying information provided under subsection 7(13), the Union filed two cards for employees in the proposed bargaining unit out of an estimated eleven employees who were at work on the date of application. The Union was consequently unable to demonstrate that 40 per cent or more of the individuals in the bargaining unit appeared to be members of the Union at the time the application was filed such that no representation vote could be directed pursuant to subsection 8(2) of the Act.

111. The evidence further establishes that, as a result of the Company's contraventions in this case, the remaining members of Paul Prelaz's crew were not at work on the date the certification application was filed and that two members of his crew who were working that day had asked the Union's representative to destroy their respective membership cards shortly after the unlawful terminations. The Union was consequently unable to rely on the additional eight membership cards it had collected and was therefore unable to demonstrate the necessary appearance of 40 per cent membership support required to obtain a representation vote under subsection 8(2) of the Act.

112. In addition, the evidence of Mr. Zimmer suggests that further organizing efforts by the Union of VanderWal's new crew were unsuccessful as a consequence of the unlawful terminations. Mr. Zimmer testified that two individuals, who identified themselves to him as VanderWal employees, refused to speak to him about joining the Union and that one of those two individuals referred in this connection to the terminations which had occurred the week before. While it was suggested that these individuals could have been members of Mr. Boudreau's crew, rather than members of VanderWal's crew, that seems unlikely given that they identified themselves as employees of VanderWal.

113. The situation in the present case is therefore significantly different from that in the decisions relied upon by the Company, in which the Board was unable to find a causal connection between the employer's unlawful terminations and the trade union's failure to obtain forty percent membership support. In *L & L Painting and Decorating Ltd.*, cited above, the Board concluded that the employees concerned did not know of the unlawful termination during any relevant time and therefore that the unlawful termination would not have had a chilling affect on the union's organizing campaign. In *K.D. Clair Construction, K.D. Clair Western Inc.*, cited above, the Board was unable to find the necessary causal connection given that the union had not even attempted to obtain further membership support from the employees and the unlawful discharges had not come to the attention of any other employee in the bargaining unit prior to the filing of the application for certification. Similarly, in *Lecompte Electric Inc.*, [2008] OLRB Rep. March/April 234, the Board was unable to find the necessary nexus between the unfair labour practices committed by the employer and the union's failure to attain the forty per cent

membership threshold given the absence of meaningful evidence of organizing activity by the union after the unfair labour practices had taken place.

114. By contrast, in the present case, the Union did make further attempts to sign up members of VanderWal's new crew, who were, according to Pat Senior, for the most part aware of the previous crew's union activities the week before. The causal connection has, in any event, been established in the present case irrespective of the Union's subsequent organizing efforts, since the number of unlawful terminations in the present case prevented the Union from establishing the requisite forty percent membership support using the membership cards it had already obtained. As noted above, given Jim VanderWal's expressed willingness on the morning of June 2nd to take any of the original crew members back to work at the Chelmsford site, it seems likely that all of them would otherwise have been at work on the date of application in addition to, or instead of, VanderWal's shop employees. In all the circumstances, the Board is satisfied that the contraventions of the Act in this case resulted in the Union's inability to demonstrate that forty per cent or more of the individuals in the bargaining unit proposed in the application for certification appeared to be members of the Union at the time the application was filed such that subsection 11(1) of the Act applies.

115. In these circumstances, and given that no representation vote has yet been taken, the Board may pursuant to subsection 11(2) of the Act: (1) order that a representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit; or (2) certify the trade union as the bargaining agent of the employees in the bargaining unit that the Board determines could be appropriate for collective bargaining if no other remedy would be sufficient to counter the effects of the contravention.

116. The Board has generally found it appropriate to grant remedial certification in situations in which an employer has made threats to the continued job security of employees should the union become certified and also in situations where there has been a range of unlawful conduct that cumulatively has the effect of undermining the employees' ability to choose freely whether they want a trade union to represent them. This approach to remedial certification was adopted in *East Elgin Concrete Forming Limited*, 2007 CanLII 29221 (ON LRB), 2007 CanLII 29221 (ON L.R.B.) in the context of the current section 11 of the Act and was described in *JAK Electrical Contractors Ltd.*, cited above, as follows:

> 130. As noted by the Board in the recent decision of *Maverick Mechanical Contractors Limited*, [1996] OLRB Rep. March/April 289, at paragraph 25, the Board has, generally, granted remedial certification in two broad categories of cases. Where an employer has made threats to the continued job security of its employees, conditional upon whether the union succeeded in its attempt to become certified, the Board has historically certified that union pursuant to section 11 of the Act (or its predecessors). Alternatively, the Board has certified a union automatically where a range of unlawful employer activities, none of which taken separately would lead to remedial certification, has the cumulative effect of undermining the confidence in the rule of law which a reasonable employee is presumed to have and which gives a reasonable employee the confidence to make a free choice.
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> 131. In either of these two scenarios, it is well established that the remedy of "remedial certification" is not to be utilized by the Board in a punitive manner, but rather is a remedial option provided to the Board to ensure that an employer is not rewarded for its misconduct during a union organizing campaign. The legislature has recognized that it is inappropriate to permit

> an employer, though its own violations of the Act, to eliminate any chance that the true wishes of its employees could be reflected by way of a representation vote. Where the employer has acted in such a manner, the Act provides the Board with the power to automatically certify the union as the bargaining agent of the employees in the bargaining unit determined to be appropriate by the Board – whether the union would or would not otherwise have been successful in the absence of the unlawful conduct of the employer.

In either of these circumstances, the Board has generally found that the process of selecting a collective bargaining agent has been irreparably harmed such that remedial certification is required to ensure that the responding party is not able to benefit from its own misconduct.

117. In the present case, the evidence indicates that, shortly before the certification application was filed, Jim VanderWal not only threatened the job security of its employees, but terminated the employment of all members of the original crew when he treated them as having abandoned their employment, at least in part, because they had met with the Union. He then refused to allow most of them to return to the job site the following week and instead allowed only those who called him thereafter asking for their job back to return. He also required them to denounce any interest in the Union. As noted in *Finn Way General Contractors Inc.,* 2011 CanLII 28357 (ON LRB) at para 135, "…once the employer puts job security in issue, there is nothing the Board can do by way of remedy in the form of notices, declarations, reinstatement or other ancillary relief that will allow employees to enter a voter's booth free of the threat of job loss." In these circumstances, a representation vote would be meaningless given that those threats to their job security will follow the employees into the voting booth.

118. As such, regardless of whether the Board might in other circumstances have been inclined to direct the taking of a representation vote to test the true wishes of employees because of Paul Prelaz's involvement at the time the membership evidence was signed, the responding party's subsequent actions in unlawfully terminating the employment of the majority of its crew because of their union activity has rendered a representation vote meaningless. While the responding party urged the Board to direct the taking of a representation vote even if a contravention were established given Paul Prelaz's involvement, it did not suggest, nor can the Board imagine, what other remedy would be sufficient to counter the message sent to employees by the contraventions that support for the Union means job loss.

119. In all the circumstances of this case, the Board is satisfied that no remedy short of remedial certification, including the taking of a representation vote, is sufficient to counter the effects of the Company's contraventions of the Act. The Board therefore finds that the applicant ought to be certified pursuant to section 11 of the Act.

Disposition

120. For all these reasons, the Board declares that VanderWal breached the Act when it failed to return all members of Paul Prelaz's crew to the Chelmsford site in the week of June 7th with the result that only certain members of the original crew were at work on the June 9th, the date of the certification application. For the reasons outlined above, the responding party's contention that the certification application should be dismissed for employer support is hereby dismissed and the applicant's request for remedial certification under section 11 of the Act is granted.

121. A certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the United Brotherhood of Carpenters and Joiners of America and the Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America in respect of all carpenters and carpenters' apprentices in the employ of VanderWal Homes & Commercial Group in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

122. Further, pursuant to section 160(2) of the Act, a certificate will issue to the applicant trade union in respect of all carpenters and carpenters' apprentices in the employ of VanderWal Homes & Commercial Group in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

123. The employer is directed to post the "Notice to Employees" attached to this decision as "Appendix A" in the workplace where it will come to the attention of those employees who are affected by it and to keep that notice posted for a period of thirty (30) days.

124. Pursuant to parties' agreement, any remaining remedial issue in connection with the Union's unfair labour practice complaint is remitted back to them to resolve, failing which it can be referred to the Board for determination.

"Caroline Rowan"
for the Board

Appendix "A"
The Labour Relations Act, 1995

NOTICE TO EMPLOYEES

Posted by order of the Ontario Labour Relations Board

This notice has been posted in compliance with an Order of the Ontario Labour Relations Board issued after a hearing. The Board has determined after a hearing that VanderWal Homes & Commercial Group violated the *Labour Relations Act, 1995*. The Board concluded, as a result of these violations, that the true wishes of the employees could not be ascertained through the taking of a representation vote, and the Ontario Labour Relations Board certified the union as bargaining agent for the group of employees described as:

> all carpenters and carpenters' apprentices in the employ of VanderWal Homes & Commercial Group in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the responding party in all other sectors of the construction industry in within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman.

The Board informs the employees of the following:

All employees in Ontario have these rights which are protected by law:

> An employee has the right to join a trade union of his or her own choice and to participate in its lawful activities.
>
> An employee has the right to oppose a trade union, or subject to the union security clause in the collective agreement with his or her employer, refuse to join a trade union.
>
> An employee has the right not to be discriminated against or penalized by an employer or by a trade union because he or she is exercising rights under the *Labour Relations Act, 1995*, as amended.
>
> An employee has the right not to be penalized because he or she participated in a proceeding under the *Labour Relations Act, 1995*, as amended.
>
> It is unlawful for employees to be fired or in any way penalized for the exercise of these rights. If this happens, a complaint may be filed with the Ontario Labour Relations Board.

It is unlawful for anyone to use intimidation to compel someone else to become or refrain from becoming a member of a trade union, or to compel someone to refrain from exercising rights under the *Labour Relations Act, 1995*, as amended.

This is an official notice of the Board and must not be removed or defaced.
THIS NOTICE MUST REMAIN POSTED FOR 30 CONSECUTIVE DAYS.
Dated this 24th of November, 2011