REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2017-00827

BETWEEN

RBC FINANCIAL (CARIBBEAN) LIMITED *Claimant*

AND

THE REGISTRATION, RECOGNITION AND CERTIFICATION BOARD *Respondent*

THE BANKING, INSURANCE AND GENERAL WORKERS' UNION *Interested Party*

Before The Honourable Madam Justice Margaret Y. Mohammed

Dated the 14th December, 2017

APPEARANCES

Mr. Martin Daly SC, Mr. Christopher Sieuchand instructed by Messrs MG Daly and Partners Attorneys at law for the Claimant.
Mr. Douglas Mendes SC, Ms. Tinuke Gibbons Glenn instucted by Ms. Svetlana Dass Attorneys at law for the Respondent.
Mr. Michael Quamina, Mr. Anthony Bullock instructed by Ms. Gitangali Gopeesingh Attorneys at law for the Interested Party.

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JUDGMENT

The Claimant's case

1. The Claimant is a company involved primarily in the business of banking in Trinidad and Tobago. The Respondent ("the RRCB") is a statutory body established by section 21 of the Industrial Relations Act[1] ("the IR Act") and one of its responsibilities is the determination of all applications, petitions and matters concerning certification of recognition made by trade unions. The Interested Party is a trade union ("the Union").

2. The Claimant is aggrieved with the process applied by the RRCB in arriving at its decision to issue a Certificate of Recognition dated the 16th January, 2017 ("the Certificate of Recognition") to the Union as the Recognized Majority Union of the Claimant. The facts which appear in the affidavit of the Claimant's Industrial Relations Manager, Ms Susheila Maharaj ("the Maharaj affidavit") filed in the instant matter are not in dispute but to fully appreciate how the parties have arrived at this juncture it is necessary that I set out in detail the background.

3. On or about 16th February 2011, the Union by Application No. 3 of 2011 ("the Certification Application"), applied to the RRCB for recognition as the Recognized Majority Union for persons employed with RBC Royal Bank (Trinidad and Tobago) Limited. Thereafter, the Claimant was invited to and participated in the registration, recognition and certification process ("the Certification Application Process") in the capacity of representative for not only its interests, but those of six other companies falling within the RBC Group of Companies, namely RBC Royal Bank (Trinidad and Tobago) Limited, RBC Trust (Trinidad and Tobago) Limited, RBC Investment Management (Caribbean) Limited, RBC Merchant Bank (Caribbean) Limited, RBC Insurance Services (Caribbean) Limited and West Indies Stockbrokers Limited (collectively "the RBC Group of Companies").

[1] Chapter 88:01 of the Revised Laws of the Republic of Trinidad and Tobago

4. The Claimant argued that the Union's constitution was not in compliance with Section 34 of the IR Act. Section 34 allows the RRCB to certify a trade union as the recognised majority union if it is satisfied that the trade union had more than 50% of the workers in the appropriate bargaining unit and the workers are members in good standing. The Claimant raised concerns with the RRCB that the Union did not adhere to the mandatory statutory requirements of section 34 of the IR Act in its making of the Certification Application. The Claimant maintained this objection throughout the Certification Application Process and petitioned the RRCB on the 17th August 2012[2] ("the Petition") wherein it indicated that the information it had to support its concerns that the Union did not comply with section 34 (3) of the IR Act was that nine workers had informed the Claimant that they had:

> "1. Withdrawn their membership from the union prior to the relevant date, and /or
> 2. Paid an entrance fee of TT $23.00 or TT $30.00 of TT $50.00 but had never paid dues, and in particular, had never paid dues over the period December 2010 to February 2011, and /or
> 3. Had paid dues in 2009 or early 2010 but not since then, and/or
> 4. Had not received receipts from the union."

5. In February 2013, the RRCB informed the Claimant in writing that it had adopted a two-stage process in treating with the Certification Application namely: (a) it would first move to determine the appropriate bargaining unit and (b) thereafter treat with the Claimant's concerns when examining the Union's and the Claimant's records in considering whether the workers in the bargaining unit were members of the Union in good standing.

6. On or about 7th March 2013, the Claimant informed the RRCB that, in the interests of fairness and natural justice, the Claimant ought to be: (1) given an opportunity to be heard on the Certification Application and (2) permitted access to certain items forming part of the Union's records relating to whether workers in the bargaining unit were members of the Union in good standing.

[2] Exhibit "SM 10" to the Maharaj affidavit

7. Despite having the aforesaid reservations, the Claimant participated in the process of determining the appropriate bargaining unit and by letter dated the 8th June 2015, the RRCB determined the appropriate bargaining unit to be *"The monthly rated employees of RBC Group of Companies whose positions fall within levels 10 to 12 but excluding"* certain positions which were outlined in the said letter.

8. Shortly thereafter on the 15th June 2015, the RRCB indicated to the Claimant that it would appropriately address the Claimant's concerns about the bona fides of the Union's membership during the examination of the Union's and the Claimant's records and it directed the Claimant to rule 17 of the RRCB Rules with respect to the Claimant's request for access to certain items of the Union's records. The RRCB also provided the Claimant with two Practice Notes namely Practice Note 1 of 1975 ("the 1975 Practice Note") and Practice Note 2 of 2008 ("the 2008 Practice Note") which, according to the RRCB, identified the factors to be taken into account when deciding the issue of whether workers in the bargaining unit were members of the Union in good standing.

9. After receiving the aforesaid communication, on the 18th June 2015, the Claimant wrote to the RRCB seeking a decision on its earlier requests to be heard on the Certification Application and for access to certain items in the Union's records. The RRCB responded on the 26th June 2015 where it indicated to the Claimant that:

    a. It would examine all of the relevant records of both the Union and the Claimant in determining questions as to membership in good standing of the Union;

    b. If there were discrepancies, the RRCB would ask the parties for explanations, including submissions if it deemed same necessary;

    c. It would be during that process that the Claimant's concerns about access to certain records of the Union would be addressed;

d. The RRCB's power to disclose documents was discretionary and it will make a decision on disclosure of the Union's records only if it considered it necessary to do so;

e. The decision of the Court of Appeal in Civ. App. 35 of 1995 **Aviation, Communication and Allied Workers' Union v. Registration Recognition and Certification Board** ("the Appeal Case") would be instructive to the Claimant; and

f. The Claimant was required to make relevant documents and/or records available to the RRCB's Examiners by the 13th July, 2015.

10. The Claimant responded to the RRCB immediately on the 13th July 2015 where it indicated that:

a. Natural justice and/or fairness required that the documents which the Claimant had requested be disclosed to it;

b. The RRCB's citation of the Appeal Case appeared to be premature and supported its view that a decision of the RRCB could be subject to judicial review if it acted outside its duties and functions and/or exceeded its jurisdiction or acts contrary to natural justice;

c. The RRCB must act within its jurisdiction and not permit the Certification Application to be granted unless it is satisfied that the requirements of section 34 of the IR Act were met;

d. The duty placed on the RRCB by section 34 was an inquisitorial duty; and

e. The RRCB must give the Claimant an opportunity to see the requested records and question the authenticity of the Union's records at a hearing before the RRCB.

11. The RRCB responded on the 15th July 2015 where it indicated that it would address the Claimant's aforesaid concerns during the process of verification of the Union's membership and it also stated that the principle of *"audi alteram partem"* would be adhered to. Thereafter, the Claimant and the RRCB exchanged further correspondence on the 24th July 2015 and the 29th July 2015 with respect to the issues raised by the Claimant.

12. Approximately one year after, on the 6th June 2016, the RRCB informed the Claimant that it was ready to permit it the opportunity to present its case with respect to the Union's compliance with section 34 of the IR Act. The RRCB scheduled a date for a meeting to be held with a Committee of the RRCB comprising its Chairman and two of its members ("the Committee") to allow the Claimant to present its case and informed the Claimant that the Union would be given a copy of the Claimant's allegation and it invited the Claimant to attend the proposed meeting. At the meeting on the 21st June 2016, the Claimant repeated its position with respect to the need for a hearing and its request for access to certain records. On the 27th June 2016 the Committee indicated that it was re-scheduling the proposed meeting due to the unavailability of one of its Committee members and it also advised the Claimant to submit the names of its witnesses by the 5th July 2016.

13. On the 4th July 2016 the Claimant wrote to the RRCB and raised its failure to indicate (1) whether it would hold a hearing and (2) whether it would grant the Claimant's request for access to certain records of the Union. The Claimant also noted that: (1) in the absence of the RRCB's response to these matters, the requirement to have all witnesses attend on the 13th July 2016 was premature and (2) the Claimant did not consider a meeting with the Committee to satisfy the requirements of a hearing regarding the issue of compliance with section 34 of the IR Act.

14. The RRCB responded on the 7th July 2016 and called upon the Claimant to present its case at the hearing scheduled for the 13th July 2016 and it sought confirmation of the names of the nine workers involved.

15. On the 12th July 2016, the Claimant informed the RRCB that its Counsel would make submissions at the meeting scheduled for the 13th July 2016 and that the requested information with respect to the nine workers was contained in the Petition.

16. On the following day, the Committee held a meeting where the Union and the Claimant were present. The Committee informed the Claimant and the Union that it had been appointed pursuant to section 29 of the IR Act and, after hearing submissions from the parties the Committee gave directions for a hearing pursuant to rule 15(1) of the RRCB Rules. The Committee also provided the Claimant with copies of the application forms for four of the workers identified by the Claimant in the Petition namely Sonia Young, Laura Seecharan, Reah Planchard and Allison Connell-Rodriguez. The Claimant and the Union filed their respective evidence and arguments, on the 27th July 2016.

17. The Hearing took place on the 24th and 26th August 2016. The Committee did not determine the Claimant's request for documents, prior to the taking of evidence, on the ground that it wanted to be satisfied that enough doubt had been cast to allow it to exercise its discretion to make further disclosure of the Union's records to the Claimant in accordance with rule 17 of the RRCB Rules.

18. The Committee summoned the workers ("the Subject Workers") to whom the Claimant referred to as having doubtful Union status along with a former Union Officer and an official related to the Claimant. Some of the workers did not attend the hearing. Of the subject employees who testified, the Committee indicated to the Claimant and the Union that some of them were not submitted by the Union in support of the Certification Application.

19. Throughout the Hearing, the Claimant maintained that it was handicapped and/or prejudiced in its ability to examine the witnesses and/or to conduct its case without having had sight of the documents in respect of which it sought disclosure. During the course of the Hearing, the Committee disclosed to the Claimant: (1) copies of the Application Forms completed by some of the Subject Workers in joining the Union and (2) specific

correspondence referred to by the Union and the RRCB's Examiner, Mr Martin in the course of his giving evidence. The Claimant's full request for access was not met in that it was not provided with the receipts issued by the Union to the Subject Workers in respect of entrance fees and contributions, the entries in the Union's books in relation thereto or records of deposits or other dispositions of the monies received by the Union from those workers.

20. After the Hearing the Claimant and the Union filed their respective closing submissions and on or about the 19th January 2017, the RRCB informed the Claimant that at its meeting No. 1 of 2017 held on the 16th January 2017, it unanimously accepted the Committee's Report ("the Committee's Report") that concluded the Union was not in violation of section 34 of the IR Act. That said letter enclosed a copy of the Certificate of Recognition issued to the Union as the Recognized Majority Union of "RBC Financial (Caribbean) Limited".

21. The Committee's Report disclosed that the Committee: (1) denied the Claimant's request for certain specified records of the Union and (2) found that the records submitted by the Union in support of the Certification Application met the requirements of section 34 of the IR Act and (3) disallowed the Claimant's prayer to have the Certification Application dismissed.

22. Based on the aforesaid facts the Claimant's complaints were:

    a. the RRCB denied the Claimant a fair opportunity to be heard in breach of the rules of natural justice and unreasonably exercised its discretion in refusing to grant access to the Claimant of the specific items in the Union's records which they had requested;

    b. the RRCB, through the Committee, further denied the Claimant of a fair and reasonable opportunity to be heard in breach of natural justice by wrongfully reversing the burden of proof in the Certification Application;

c. the RRCB erred in law when it misdirected itself in law in applying the mandatory statutory provisions of section 34 of the IR Act and in particular, in finding that the Union's accounting practices were sound and the workers forming the subject of the Certification Application were members of the Union in good standing;

d. the RRCB erred in law in treating itself *as "immune from being put right by any Court"* such that it could apply section 34 (b) of the IR Act in any way it thinks fit, whether correctly or incorrectly, in relation to statutory functions and responsibilities;

e. the RRCB misdirected itself in law and to the extent that it adopted the Committee's Report and issued the Certificate of Recognition without the cross-referencing phase of the count of the workers having been concluded, the RRCB acted ultra vires its statutory powers;

f. the decision of the RRCB to certify the Union as the Recognized Majority Union of the Claimant was plainly and wholly unreasonable and/or irrational.

23. Based on the aforesaid complaints the Claimant seeks the following orders:

a. A declaration pursuant to rule 56.14(3) of the Civil Proceedings Rules 1998 ("the CPR") and section 8(1)(b) of the Judicial Review Act[3] ("the JR Act") that the Union, in the making of the Certification Application, failed to comply with the requirements of section 34 of the IR Act;

b. An order of certiorari pursuant to rule 56.14(3) of the CPR and section 8(1)(a) of the JR Act quashing the Committee's Report dated the 4th January 2017;

c. An order of certiorari pursuant to rule 56.14(3) of the CPR and section 8(1)(a) of the JR Act quashing the Certificate of Recognition dated the 16th January 2017;

[3] Chapter 7:08

d. An order of mandamus pursuant to rule 56.14(3) of the CPR and section 8(1)(a) of the JR Act compelling the RRCB to dismiss the Certification Application;

e. Costs; and/or

f. Such further and/or other relief as this Honourable Court considers just and appropriate in the circumstances of the Application for Judicial Review.

The RRCB's response

24. The RRCB's response was contained in the affidavits filed in the instant matters by its Chairman Mr. Augustus Ramrekersingh ("the Chairman's affidavit"), its Secretary Mr. Brendon Taitt ("the Taitt affidavit") and Mr. Emerson Martin ("the Martin affidavit"), Examiner II at the RRCB. With respect to the Claimant's allegation that the RRCB breached the rules of natural justice by failing to grant the Claimant access to certain items in the Union's records, the RRCB's position was that it had a discretion under section 17 of the IR Act to grant the Claimant limited disclosure of the documents it requested. The RRCB was of the view that there were issues of confidentiality and the Committee provided the Claimant with the application forms of four of the workers which the Claimant had identified in its request for documentation. The reasons the Committee did not disclose the forms for other workers to the Claimant was because the other workers were not members of the Union and that the four workers had written statements in the form of withdrawal letters from the Union.

25. The RRCB admitted that it received a letter dated the 30th June 2011 from the Claimant expressing its concerns about the Union's adherence to section 34 of the IR Act in respect of the Certification Application and that the Claimant raised this concern many times during the process with the 21st June 2016 being the last.

26. There was no specific evidence from the affidavits filed on behalf of the RRCB where it responded to the Claimant's assertion that it denied the Claimant a fair hearing by wrongfully reversing the burden of proof in the Certification Application.

27. In response to the Claimant's allegation that it misdirected itself in law in its application of section 34 of the IR Act in finding that the Union's accounting practice were sound and that the workers forming the subject of the Certification Application were members of the Union in good standing, the RRCB stated that its decision to certify the Union as the Recognized Majority Union of the Claimant was based on its application of section 34 to the evidence which was presented to it. The Committee complied with section 34 (3) of the IR Act since it applied a two stage process in the Certification Process. At the first stage the Committee determined the appropriate bargaining unit which it communicated to the parties by letters dated 15th June 2013.

28. After receiving the Certification Application it appointed a Committee pursuant to section 29 of the IR Act, to hear the parties respective cases in relation to the Claimant's complaint: (i) that the Union had not complied with Section 34 of the IR Act in seeking to establish that it had more than 50% of the appropriate bargaining as its members in good standing; and (ii) that the RRCB had failed to provide the Claimant with specific documents. The Committee met with the representatives of the Claimant and the Union and had Hearings. It was established during the course of the Hearings that:

    i. The Union had employed a practice used by unions in their organizing drive (with which the RRCB was quite familiar) of employing a Collector to approach workers to submit application forms for membership along with an entrance fee and three months dues;

    ii. No individual receipts were issued to the workers;

    iii. When the Collector was satisfied that she had obtained applications from more than 50% of the members of the proposed bargaining unit, she submitted to the Union the application forms, a list of the workers who had submitted applications

for membership with the amount each had paid next to his or her name and the total of the entrance fee and the three months contributions which had been collected from the workers;

iv. The Union issued a receipt dated the 24th November 2010 in the name of the Collector for the total sum received;

v. The Union then admitted the workers on the list to membership which occurred on the 25th November 2010;

vi. The Union then made the Certification Application on the 16th February 2011.

29. At the second stage, the Committee determined that the Union, on the relevant date 16th February 2011, had more than 50% of the workers comprised in the appropriate bargaining unit as members in good standing. In making its determination at the second stage the Committee accepted that the Union had followed sound accounting procedures and practices and that the 1045 members of the bargaining unit which it accepted to be members of the Union were members in good standing. The Committee also took into account its previous practice of looking at the date the workers were admitted into the membership of the Union then determining whether the workers had paid the entrance fee and sums by way of contributions for a period of eight weeks prior to the application date. The Committee noted the fact that the sums may have been collected from the workers before the Collector turned those sums over to the Union was not relevant but rather the date the worker was admitted into membership and whether as such member, he/she had paid the requisite sums for the requisite period was relevant.

30. The RRCB did not respond specifically to the Claimant's allegation that it erred in law in treating itself *as "immune from being put right by any Court"* such that it could apply section 34 (b) of the IR Act in any way it thinks fit, whether correctly or incorrectly, in relation to statutory functions and responsibilities. However paragraph 96 of the Committee's Report addressed this matter which I will deal with in greater detail later.

31. The RRCB's response to the Claimant's allegation that it misdirected itself in law by adopting the Committee's Report and issued the Certificate of Recognition without the cross referencing phase of the count of workers having been concluded was that the Committee submitted the Committee's Report to the RRCB on the 4th January 2017. The cross-referencing exercise was done by the Examiners who were given the responsibility of determining the issue of majority membership in good standing. Subsequently the Examiner's final report was submitted to the RRCB at its meeting on the 16th January 2017. At the said meeting the RRCB accepted the Examiner's opinion that the Union had followed sound accounting procedures and practices and that the 1045 members of the bargaining unit which he accepted to be members of the Union in good standing.

The Union's response

32. The Union's response to the Claimant's allegations were contained in the affidavit of its President Mr. Vincent Cabrera ("the Cabrera affidavit"). The Cabrera affidavit primarily addressed the Claimant's allegations with respect to the disclosure of documents and the Union's accounting practice in the context of the practice it adopted for the recruitment of members before making a certification application.

33. The Union's response to the Claimant's request for disclosure of certain documents which it had in its possession concerning the nine Subject Workers was that the Union did not submit six of those names as members in the Certification Application to the RRCB. Therefore these workers were of no consequence. The other persons submitted resignation letters to the Union, each dated after the relevant date of the 16th February 2011. Therefore when the Union submitted the Certification Application those persons were members of the Union.

34. The Union's position was that it provided the RRCB with the documents requested for its examination. The Cabrera affidavit stated that in the Certification Application Process it is has always been the practice that parties generally ought not to show the records that the other party has submitted as they are considered to be confidential in nature. Further the

Union stated that the Committee's Report disclosed that the Committee: (1) denied the Claimant's request for certain specified records of the Union and (2) found that the records submitted by the Union in support of the Certification Application met the requirements of section 34 of the IR Act and (3) disallowed the Claimant's prayer to have the Certification Application dismissed.

35. The Union's response to the Claimant's allegation that its accounting practices were not sound and the workers forming the subject of the Certification Application were not members of the Union in good standing was to describe the method and practice it used to recruit members. It stated that the method used by the Union to recruit was not unusual and it has always been adopted by the Union in an exercise, which involved a recruitment or mobilization drive as big as the one which was undertaken with the Claimant's employees since there were over 1000 workers involved.

36. The Union described the recruitment process for workers utilized by the Union as follows. The applicant/ worker would pay $23.00 to the Organizer. The said payment constituted an entrance fee of $5.00 and $6.00 per month for a three month period. The Organizer would recruit members and collect money and the application forms, then provide them to the Union's office along with a list of the applicants when satisfied that a sufficient number of persons had applied for membership for the purpose of recognition, that is, more than 50% of the proposed bargaining unit. After the Organizer would provide the Union with a collector's sheet ("the Collector's Sheet") showing the names of the workers. The Union would then issue a receipt to the Organizer for the total amount of money that was collected and paid to the Union. Individual receipts were not issued by the Organizer. The list of applicants then had to be approved by the Union's executive, in accordance with Rule 10 (g) of the Union's constitution. The money received would then be deposited in the bank and a deposit slip evidencing this deposit is retained. The Union denied that its Constitution was not in compliance with Section 34 of the IR Act.

Issues

37. It was common ground that the issues to be determined in these proceedings are as follows:

(i) Is the Court is barred from judicially reviewing the decisions and/or actions of the RRCB which form the subject of these proceedings?

(ii) Did the RRCB err in law and/or misdirected itself in law in holding and/or treating itself as and/or acting on the basis that it was *"immune from being put right by any Court"* such that it could apply the IR Act in any way it thinks fit, in relation to statutory functions and responsibilities?;

(iii) Did the RRCB err in law and/or misdirected itself in law in failing to apply the mandatory statutory provisions of section 34 of the IR Act and, in particular in finding, without reference to the mandatory statutory criteria, that (1) the Union's accounting practices were sound and (2) the workers forming the subject of the Certification Application were members of the Union in good standing and, in so erring and/or misdirecting itself in law, the RRCB exceeded its statutorily defined jurisdiction and/or acted ultra vires its statutory powers.

(iv) Was the decision of the RRCB to certify the Union as the Recognized Majority Union of the Claimant plainly and/or wholly unreasonable and/or irrational?

(v) Did the RRCB deny the Claimant a fair hearing and/or a reasonable opportunity to be heard in breach of the rules of natural justice and/or acted unfairly and/or unreasonably exercised its discretion in refusing to grant access to the Claimant of certain items in the Union's records which the Claimant had requested and/or wrongfully reversing the burden of proof in the Certification Application?

Issue (i)

Is the Court barred from judicially reviewing the decisions and/or actions of the RRCB which form the subject of these proceedings?

38. The Claimant, the RRCB and the Union agreed that the RRCB is precluded from relying on section 23 (6) and (7) of the IR Act as ousting the Court's jurisdiction to review its decision in this case. However, the Union added a caveat since its position was that the Court did not have the jurisdiction to review the RRCB's decision on the basis that it was plainly and wholly unreasonable.

39. It is common ground that judicial review is the means by which judicial control of administrative action is exercised[4] and that section 5 of the JR Act provides for applications for judicial review of a decision of an inferior Court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law to be made to the High Court in accordance with the JR Act and the Rules of Court. Section 23 sub-sections 6 and 7 of the IR Act, precludes the Court from reviewing the decisions of the RRCB. It provides as follows:

> "(6) No decision, order, direction, declaration, ruling or other determination of the Board shall be challenged, appealed against, reviewed, quashed or called in question in any Court on any account whatever; and no order shall be made or process entered or proceeding taken by or in any Court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto or otherwise to question, review, prohibit, restrain or otherwise interfere with the Board or any proceedings before it.
>
> (7) Subject to this Act, and in particular to section 31, the Board shall be the sole authority competent to expound upon any matter touching the interpretation and application of this Act relating to functions and responsibilities with which the Board is charged by the Act or any other written law; and accordingly, no cause, application, action, suit or other

[4] Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 per Lord Diplock at para. 408E.

proceeding shall lie in any Court of law concerning any matter touching the interpretation or application of this Act."

40. Section 32(4) of the IR Act also provides:

"Subject to this Act, all determinations of applications for certification of recognition under this Part as well as determinations as to the appropriateness of a bargaining unit under section 33 and as to variations thereof under section 39 shall be final for all purposes."

41. All the parties referred to the Court of Appeal decision of Ibrahim JA **Aviation, Communication and Allied Workers' Union v. The Registration, Recognition and Certification Board**[5] where sections 23(6) and 23(7) of the IR Act were interpreted as:

"The language used in sec 23(6) of the Act is clear. It is drafted in the widest possible terms. It prohibits the order of certiorari on any account whatsoever and states that no proceedings shall be taken in any court to question, review, prohibit, restrain or otherwise interfere with the Board or any proceedings before it. Certiorari is therefore, ousted.

Sec 23(7) excludes any court from expounding on any matter touching the interpretation and application of the Act relating to the Board's functions and responsibilities and prohibits any legal proceedings concerning any matter touching the interpretation and application of the Act. It makes the Board the sole authority competent to deal with such matters. Once therefore, it is a matter that falls within the functions and responsibilities of the Board then the Board can interpret and apply the Act in any way it thinks fit in relation to those functions and responsibilities. It may do so correctly or incorrectly and, if incorrectly, it is immune from being put right by any court. If, however, the error made does affect jurisdiction of the Board then it may be put right, as for example, if it seeks to deal with a matter outside of its functions and responsibilities (**South East Asia Fire Bricks Sdn BHD v. Non Metallic Mineral Products Manufacturing Employees**

[5] supra

Union and others [1980] 2 All ER 689). Also, if it violates the rules of natural justice as for example if it makes orders against a party without hearing that party or if one of its members has a real interest in the matter before it."

42. The learned Justice of Appeal further stated in his judgment:

> "…It is unclear precisely what the judge meant by saying that 'the Board is a creature of statute and should it exercise its functions granted therein in a manner other than as laid down therein it is my view that the Court can question the decision made in this purported exercise of its powers.' If what the learned judge said is to be taken to mean that this Court can interpret the provisions of the Act and determined whether the Board has exercised its functions in accordance with these provisions as interpreted by this Court, then I do not agree with this finding. It is not for this Court to say what its view is with respect to the manner in which the Board should exercise its functions. It is for the Board to interpret the provisions of the Act and to apply its interpretation to its functions and responsibilities. If however, it is to be construed to mean that this Court can interpret the provisions of the Act to determine whether the Board has acted outside its jurisdiction or contrary to the rules of natural justice then I agree with that view."[6] (Emphasis added).

43. All the parties also noted that in **Desalination Company of Trinidad and Tobago v Registration, Recognition and Certification Board**[7] Gobin J declared that section 23(6) and (7) to be in breach of the separation of powers doctrine, null and void and of no effect and that the decision is currently on appeal, but in the meantime the ruling meant that the RRCB is precluded from relying on section 23(6) and (7) as ousting the Court's jurisdiction to review its decision in this case.

[6] Supra, paragraph 25
[7] CV 2013-00039

44. Therefore where the RRCB acts outside of its jurisdiction or contrary to the rules of natural justice, those actions and decisions will be judicially reviewable. In the instant case the complaints by the Claimant against the RRCB are errors of jurisdiction and failures to adhere to the principles of natural justice. In my opinion if in failing to adhere to the principles of natural justice the RRCB's decision was plainly and wholly unreasonable and/or irrational then its decision is also reviewable.

Issue (ii)

Did the RRCB err in law and/or misdirected itself in law in holding and/or treating itself as and/or acting on the basis that it was *"immune from being put right by any Court"* such that it could apply the IR Act in any way it thinks fit, whether correctly or incorrectly, in relation to statutory functions and responsibilities?

45. Counsel for the Claimant stated that the Claimant was not alleging bias by the RRCB since it was entitled to assume that the RRCB acted with bona fides during the Certification Application Process. However, the Claimant submitted that the RRCB indicated a pre-disposition to granting the Certification Application thereby treating it unfairly when it referred to the Court of Appeal decision in **Aviation Communication and Allied Workers Union**[8] in its letter dated the 26th June, 2015. The Claimant's position was that the inference to be drawn was that the RRCB intended to rely on the ouster clauses in section 23 of the IR Act in response to the Claimant's requests for access to the Union's records. The Claimant also submitted that it did not waive its right to nor did it delay in its challenge of the RRCB's pre-disposition since in its correspondence preceding the trial it had protested and reserved its position with respect to the RRCB's failure to adequately address its request for the disclosure of certain documents by the Union.

46. The complaint by the Claimant surrounds a letter dated the 26th June 2015[9] written by the RRCB to the Claimant where it outlined its reasons for making the decision to only permit limited disclosure of the documents requested. In the letter the RRCB referred to sections

[8] Supra
[9] Exhibit "SM 19" to the Maharaj affidavit

33 and 34 of the IR Act and the two stage process which the RRCB adopts in dealing with Certification Applications. The material part of the said letter which the Claimant complains of stated:

> "In connection with Rule 17 of the Registration, Recognition and Certification Board Rules Chapter 88:01, the Board's power is discretionary and it will make a decision on disclosure of the trade union's records only if it considers it to be necessary in the circumstances.
>
> You may find CVA 35 of 1995, dated October 13, 1998 between Aviation Communication and Allied Workers Union and Registration Recognition and Certification Board instructive."

47. The Claimant responded to the aforesaid paragraph of the RRCB's letter by letter dated 13th July 2015[10] in which the Claimant expressed surprise that the RRCB had raised the reviewability of a decision that it was yet to make. The Claimant also stated its understanding of the effect of the **Aviation Communication and Allied Workers Union** case which was that the said decision and other decisions where the RRCB was a party, expressly supported the position that a decision of the RRCB is subject to judicial review if it acts outside its duties and functions and/or exceeds its jurisdiction or acts contrary to natural justice.

48. At paragraph 96 of the Committee's Report it stated the following:

> "It is the Board that must decide whether the collection sheet, the list of members and the single "mass" receipt are in accordance with Section 34 of the Act. It is the Board's interpretation of the Act that matters. We repeat what the Appeal Court said in **Cv A 35 of 1995** that "in a matter which falls within the functions and responsibilities of the Board" the "Board can interrupt and apply the Act in any way it thinks fit in relations to those functions and responsibilities. It may do so correctly or incorrectly. It is immune from being put right from being by any court." The

[10] Exhibit "SM 20" to the Maharaj affidavit

Board has long accepted the Unions' practice of submitting a collection list, a membership list and a single receipt."

49. The RRCB argued against the Claimant's position on two bases. It submitted that by the Claimant's inactivity after its letter of the 13th July 2015 it is deemed to have waived any right to challenge the RRCB's decision on this basis. It also argued that the RRCB's reference to the **Aviation Communication and Allied Workers Union** case falls woefully short of the evidence needed to establish a case of pre-disposition.

50. The Union adopted a similar argument to the RRCB in opposition to the Claimant's position. It submitted that the Claimant's interpretation of the RRCB's position outlined in the 25th June 2015 letter are outlandish and insupportable. Further, even if it was arguable that the reference by the RRCB to the **Aviation Communication and Allied Workers Union** case indicated a pre-disposition to rule against the Claimant and therefore some sort of apparent bias on the part of the RRCB, its reference to the said decision occurred in 2015. The Claimant made no complaint to the RRCB that it was biased or predisposed to rule against it prior to the delivery of the RRCB's decision on the Certification Application.

51. There are three reasons I do not agree with the Claimant's submissions. Firstly, the RRCB did not expressly state in its letter dated the 25th June 2015 that its decision on the issue of disclosure could not be reviewed. The letter addressed two matters. The procedure the RRCB intended to follow in dealing with the Certification Application and the powers of the RRCB under section 17 to order disclosure. The **Aviation Communication and Allied Workers Union** case did not deal with disclosure. The case made it clear that notwithstanding the ouster clauses, it was possible to review a decision of the RRCB, where it acted outside its jurisdiction and in breach of natural justice principles. In my opinion to accept the Claimant's interpretation is to speculate that the RRCB was stating that its decision was not reviewable.

52. Secondly, the Claimant did not express to the RRCB in its July 2015 letter that it viewed the RRCB's reference to the **Aviation Communications and Allied Workers Union** case

that it was biased against the Claimant. In **Amjad v Steadman-Byrne**[11] the English Court of Appeal stated the following position at paragraph 17 on waiver in the context of a claim for bias:

> "We would, however, stress that the time to draw the attention of a tribunal to a clear manifestation of bias on its part is ordinarily when it occurs. There is no reason why a judge to whom it is courteously pointed out that he or she may have overstepped the mark should not accept that it may be so and stand down. Equally, however, it is only in a clear case that an advocate can responsibly take this course and a judge accede to it, both because such applications have been known to be made opportunistically and because of the expense that a recusal will inevitably throw upon one or both parties, neither of whom will ordinarily be to blame for what has happened. The law of waiver is not simple, but appellate and reviewing courts tend not to look favourably on complaints of vitiating bias made only after the complainant has taken his chance on the outcome and found it unwelcome."

53. The Claimant has submitted that there were 33 occasion between the 13th July 2016 and the 25th August 2016 where it claimed it was treated unfairly but on none of those occasions did the Claimant see it fit to complain to the RRCB that it saw the RRCB's actions as predisposed to rule against it prior to the delivery of the RRCB's decision on the Certification Application. Therefore I agree with the RRCB and Union's submission that the Claimant has waived its right to challenge the RRCB's decision on this basis.

54. Thirdly, the RRCB's reference does not satisfy the test that it was predisposed against the Claimant. In **Locabail Ltd v Bayfield Properties Ltd**[12], Lord Bingham said at paragraph 25 that a real danger of bias may arise:

> "... if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any

[11] [2007] EWCA Civ 625
[12] [2000] QB 451

question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind..."

55. In my opinion the views expressed by the RRCB were not extreme and unbalanced to cast doubt on its ability to determine the Certification Application without an objective judicial mind. In any event, even if I accept the Claimant's interpretation of the said letter, the RRCB's actions subsequent to the letter showed that it kept an open mind and not a predisposed position by disclosing some information to the Claimant and held hearings in which evidence was led, and witnesses were cross-examined.

56. For the aforesaid reasons I am not of the opinion that the RRCB misdirected itself in law by its reference that it was *"immune from being put right by the Court"* in paragraph 96 of the Committee's Report in relation to its statutory functions and responsibilities.

Issue (iii)

Did the RRCB err and/or misdirect itself in law in failing to apply the mandatory statutory provisions of section 34 of the IR Act and in particular in finding without reference to the mandatory statutory criteria, that (1) the Union's accounting practices were sound and (2) the workers forming the subject of the Certification Application were members of the Union in good standing and, in so erring and/or misdirecting itself in law, the RRCB exceeded its statutorily defined jurisdiction and/or acted ultra vires its statutory powers?

57. All the parties agreed that this was the main issue in the instant matter. In paragraphs 8-13 of the Chairman's affidavit the RRCB set out the matters which it considered in arriving its decision to issue the Certification of Recognition to the Union as:

"8. During the course of the hearing, it had been established that:

i) BIGWU had employed the organising practice used by unions in their organising drive (with which the Board was quite familiar) of

employing collectors to approach workers to submit application forms for membership along with an entrance fee and three months dues;

ii) No individual receipts were issued to the workers;

iii) When the collector was satisfied that she had obtained applications from more than 50% of the members of the proposed bargaining unit, she submitted to BIGWU the applications forms, a list of the workers who had submitted applications for membership with the amount each had paid next to his or he name and the total of the entrance fee and the three months contribution which had been collected from the workers;

iv) BIGWU issued a receipt dated 24th November 2010 in the name of the collector for the total sum received;

v) BIGWU then admitted the workers on the list to membership. This occurred on 25th November 2010;

vi) BIGWU then made its application for certification on 16th February 2011.

9. It was also clear from the evidence that the monies were received from the workers at varying points in time before they were actually handed over to the BIGWU. The evidence received from individual workers was that they had paid their monies to the collector in 2009 and early 2010.

10. The Committee had heard evidence from Mr. Martin that in determining the question whether the persons who BIGWU had claimed to be its members had paid a reasonable sum by way of entrance fee and has actually paid reasonable sums by way of contributions for a continuous period of eight weeks immediately before the application for certification was made, he had regard to the date on which the workers had been admitted to membership, which was 25th November 2010, and then sought to determine whether they had each paid the entrance fee and the requisite sums for a period of eight continuous weeks before the application date. This methodology was in accordance with how the Board has in practice applied section 34 of the Act.

11. The examiner had also given evidence that he had received a report from an auditor attesting to the fact that the union had employed proper accounting practices.

12. Having considered the evidence and read the copious submissions lodged by the parties, the Committee's submitted its report to the Board on 4th January, 2017. A true copy of the Committee's report is exhibited to the Maharaj affidavit as "SM36". Subsequently, the Examiner's final report was presented to the Board's secretary and was included in the Board papers for consideration by the Board at its meeting on 16th January, 2017. A true copy of the Examiner's report is hereto annexed and marked **"AR1"**. The Committee's report and the Examiner's report were considered and accepted by the Board at its meeting on 16th January 2017.

13. At that meeting the Board considered, among other things, whether it accepted the Examiner's opinion that the Union had followed sound accounting procedure and practices and that the 1045 members of the bargaining unit which he accepted to be members of the union were members in good standing. In accepting the examiner's report, the Board took account of the matters referred to in paragraphs 8-11 hereof. In particular, the Board took account of its previous practice of looking to the date the employees were admitted into the membership of the Union and then determining whether the employees had paid the entrance fee and sums by way of contributions for a period of eight weeks prior to the application date. The fact that the sums may have been collected from the employees before the collector turned those sums over to the union, did not matter. What is of importance is the date the worker was admitted into membership and whether as such member he or she had paid the requisite sums for the requisite period."

58. The Claimant's position was that the RRCB erred in law in three material aspects. Its first argument was that the RRCB exceeded its jurisdiction since it failed to apply the mandatory statutory provisions of section 34 of the IR Act and the two Practice Notes issued by the

RRCB by finding that the Union's accounting practices were sound and the workers in the bargaining unit were members in good standing.

59. The Claimant's second argument was that the RRCB illegally supplanted or altered section 34 of the IR Act by applying its custom and practice of accepting the Collector's Sheet and a global receipt as evidence of membership of the workers in the bargaining unit with the Union in good standing.

60. The third argument was that the RRCB erroneously issued the Certificate of Recognition naming the Claimant as the employer of the workers in the bargaining unit which was at variance with the terms of the bargaining unit.

61. The RRCB disagreed with the Claimant's assertions. Its position was that the RRCB applied a purposive interpretation to section 34 of the IR Act in finding that the Union's accounting practices were sound and that the workers in the bargaining unit were members in good standing. It was argued that section 34 of the IR Act did not impose a particular time frame on a trade union to process an application for membership.

62. The Union's position was that section 34 of the IR Act does not require the RRCB to assess the date when the workers applied to become members of a union. It only requires that the workers be members in good standing at the time the Certification Application was made. The relevant date was the date of the Certification Application which was the 16th February 2011. It was also submitted on behalf of the Union that the workers were not issued with individual receipts since this was not a requirement under its constitution and section 34 of the IR Act. Therefore the RRCB was entitled to consider that a single receipt was acceptable evidence that payment had been made.

63. In order to ascertain whether the RRCB acted ultra vires its statutory powers there are three questions which the court must address namely: (a) what are the requirements of section 34 of the IR Act for Certification; (b) can the requirements of section 34 of the IR Act be supplanted by custom and practice; and (c) whether, from the evidence, the method used by the Union to recruit workers met the requirements of section 34 of the IR Act.

Requirements for Certification

64. Section 34 of the IR Act sets out the requirements for certification. It states:

> "34. (1) Subject to this Act, the Board shall certify as the recognised majority union that trade union which it is satisfied has, on the relevant date, more than fifty per cent of the workers comprised in the appropriate bargaining unit as members in good standing.
>
> (2) Where it appears to the Board that more than one union has as members in good standing more than fifty per cent of the workers comprised in an appropriate bargaining unit it shall certify as the recognised majority union that union which has the greatest support of the workers determined by preferential ballot, being in any event more than fifty per cent of those workers.
>
> (3) All questions as to membership in good standing shall be determined by the Board, but a worker shall not be held to be a member in good standing, unless the Board is satisfied that—
>
> *(a)* the union of which it is alleged the worker is a member in good standing has followed sound accounting procedures and practices;
>
> *(b)* the particular worker has—
>
> (i) become a member of the union after having paid a reasonable sum by way of entrance fee and has actually paid reasonable sums by way of contributions for a continuous period of eight weeks immediately before the application was made or deemed to have been made; or

(ii) actually paid reasonable sums by way of contributions for a continuous period of not less than two years immediately before the application was made or deemed to have been made;

(c) no part of the funds of the union of which it is alleged the worker is a member in good standing has been applied directly or indirectly in the payment of the entrance fee or contributions referred to in paragraph *(b)*; and

(d) the worker should be considered a member in good standing having regard to good industrial relations practice."

65. Based on section 34 of the IR Act, the RRCB can certify a trade union as the recognised majority union if it is satisfied that:

i) The trade union, on the relevant date, had more than 50% of the workers comprised in the appropriate bargaining unit as members in good standing;

ii) With respect to any issue of the workers being members in good standing,

a) that the trade union followed sound accounting procedures and practices, and

b) that the particular worker became a member after having paid a reasonable sum by way of entrance fee and had actually paid reasonable sums by way of contributions for a continuous period of eight weeks immediately before the application was made or deemed to have been made.

iii) That the funds of the trade union had not been applied directly or indirectly in the payment of the entrance fee or contributions; and

iv) That having regard to good industrial relations practice the worker should be considered a member in good standing.

66. The first issue which the RRCB had to resolve with respect to the Certification Application was whether the Union had more than 50% of the bargaining unit as members. The RRCB concluded that the Union had 52%.

67. The next question was whether on the evidence those workers were members in good standing and whether the Union followed sound accounting practices and procedures.

68. Before the Hearing the Claimant enquired of the RRCB what factors it would take into account in determining whether the Union had satisfied section 34 of the IR Act[13]. The RRCB referred the Claimant to section 34 of the IR Act and to the two Practice Notes".

69. The 1975 Practice Note concerns the issue of time in the consideration of the section 34 of the IR Act and the 2008 Practice Note sets out the documents which the Union must provide to the RRCB in order to satisfy the requirements of section 34 of the IR Act.

70. According to requirements 3, 4 and 5 of the 2008 Practice Note, the Union is required to supply the RRCB with the following information:

(a) (Requirement 2) Acceptable evidence to show that the worker has been admitted into membership of the Union in accordance with the Constitution and/or Rules of the Union;

(b) (Requirement 3(i)) Entries on a Union's Collection Sheet which must include the actual dates moneys were received by the Collector showing the periods and dates covered by the individual payments;

(c) (Requirement (3)(ii)) a Collection Sheet signed and dated by the Collector with the entries made out by the Collector or other persons who collected moneys from the workers;

(d) (Requirement (3)(iii)) Cash Book/Day Book;

[13] Exhibit "SM 13" to the Maharaj Affidavit

(e) (Requirement 4) Receipts or Receipt Books showing that moneys collected by the Collector (or other person who collected same) were received in the Union's office and the actual date of such receipt; and

(f) (Requirement 6) A certified list separate from the Collection Sheet set out in alphabetical order of the Union's members who are in the determined Bargaining Unit.

71. The Claimant has argued that section 34 of the IR Act placed an inquisitorial duty on the RRCB in its determination of the Certification of Application. It also argued that section 34 of the IR Act and the two Practice Notes, are mandatory requirements and they are not mere technicalities which would otherwise attract the operation of rule 18 of the RRCB rules[14] and that the Union did not satisfy all of the requirements of section 34 of the IR Act and the two Practice Notes.

72. While it was not in dispute that the requirements of section 34 of the IR Act are mandatory the Union did not agree with the Claimant's submissions that the two Practice Notes were also mandatory.

73. Were the requirements in the two Practice Notes mandatory when the RRCB was considering the Certification Application? In my opinion, the two Practice Notes provide guidance to the parties on the kind of evidence which the RRCB would accept where section 34 of the IR Act is in issue but they do not provide an exhaustive and conclusive statement of the kind of evidence that the RRCB would consider since they were not part of the legislative formula and therefore they are not mandatory.

74. However in the RRCB's dealing with the Certification Application it appeared to me that the RRCB treated the requirements contained in the two Practice Notes as mandatory since it expressly indicated to the Claimant by letter dated the 15th June 2015[15] that in determining the Certification Application it was going to consider the provisions under section 34 of

[14] Paragraph 64 of the Claimant's submissions.
[15] Exhibit "SM 16" to the Maharaj affidavit

the IR Act and the requirements in the two Practice Notes. If there was any doubt on the expressed approach the RRCB was taking, its own Examiner, Mr. Martin, admitted that in discharging his duty to ensure that the Union satisfied the requirements of section 34 of the IR Act, he was guided by the various Practice Notes issued by the RRCB, in particular the 2008 Practice Note.

75. I now turn to the interpretation of section 34 of the IR Act. The Claimant, the RRCB and the Union disagreed on the interpretation of section 34(3)(b) (i).

76. The Claimant submitted that based on the natural and ordinary meaning of the words in section 34 (3) (b) (i) the RRCB had to be satisfied that each worker in the bargaining unit which the Union claimed to be its member:

i) has become a member of the union;
ii) after having paid a reasonable sum by way of entrance fee; and
iii) has actually paid reasonable sums by way of contributions for a continuous period of eight weeks *immediately* before the application for recognition was made or deemed to have been made.

77. Counsel for the Claimant did not dispute that the recruitment of workers may have taken an extended period of time. Counsel argued that all the Union was required to do was to implement an organization tactic or system which complied with the statutory provision. However, instead in the instant case the Union engaged in the systematic practice of delaying the process of membership until close to the time of the Certification Application in order to circumvent the statutory provisions in section 34 of the IR Act.

78. Counsel for the RRCB submitted that the Court should apply a purposive interpretation to section 34 of the IR Act. It was submitted on behalf of the RRCB that the Claimant's real complaint in this case concerned the methodology employed by the Union in processing the applications for membership for the workers, and in particular, in delaying consideration of the applications for membership until such time as the Union was confident that it had crossed the 50% membership mark. Counsel argued that the process

used by the Union was the universally accepted practice in industrial relations since in large entities it usually takes a long time for a trade union to obtain the requisite amount of workers for the proposed bargaining unit. In this regard, Counsel for the RRCB submitted that there was nothing in section 34 of the IR Act which placed any obligation on trade unions to process applications for membership in accordance with any particular timeframe and to deny a worker membership in good standing because of a delay in the processing of his or her application for membership would involve reading into the IR Act a requirement which was not there.

79. The Union advocated an approach which was similar to that suggested by the RRCB in interpreting section 34 of the IR Act. It argued that no dues were due to the Union until the workers had become members and that neither section 34 of the IR Act nor the Union's constitution required the issuing of individual receipts.

80. It was not in dispute that: all of the workers with which the RRCB was concerned was admitted into membership on 25th November 2010 since that was the date on which the Executive Committee of the Union met, considered and approved their applications; the Certification Application was made on 16th February 2011; and that under twelve weeks had elapsed between the date the workers were admitted into membership on 25th November 2010 and the date the Certification Application was made.

81. To support its position, the Claimant referred the Court to the Canadian case of **Les Salaries de New Carlisle Local 610 v Radio CHNC Limitee, New Carlisle[16].** In that case a trade union filed an application for certification pursuant to section 124 of the Canada Labour Code. The information received from the union was incomplete, particularly with respect to the payment of initiation fees. The evidence was that all of the workers concerned had paid the five dollar fee to the trade union before the commencement of the six-month period immediately preceding the date for filing the application for certification. The Board

[16] 12 CLRBR (NC) 112

was concerned with section 27(2) of the Canada Labour Code Regulations which provides that:

> "27(2) On any application for certification made after June 1, 1979, the Board may accept as evidence of membership in a trade union evidence that a person …
> (b) has paid to the trade union a sum of at least five dollars for or within the six-month period immediately preceding the date of the filing of the application for certification by the trade union." (Emphasis added)

82. There were two issues in that case namely what were the requirements for the validity of union membership and whether initiation fees ought to be paid "within" or "for" the six months preceding an application for certification.

83. On the second issue, the Board held that membership fees were to have been paid "within" the six-month period preceding the application pursuant to Regulation 27(2) and that non-compliance with section 27(2) of the regulations was fatal to an application. The Board discussed the meaning of "for" the six-month period and found that it was not applicable in the circumstances. The Board dismissed the application for certification because the trade union failed to prove that the membership fees had been paid "within" the required time limits. The Board had found that the fees were collected outside the six–month period. The union applied for judicial review, however the application was dismissed.

84. The Board explained its reasons as follows:

> "This is a contravention of section 27(2) of the Regulations. This provision is designed to ensure that the time between the signing of a card, the payment of fees, and the filing of the application is kept to a minimum. In short, the point at which the initiation fees are paid constitutes, as it were, the beginning of the period during which the union can seek certification while complying with the requirements of the Regulations respecting payment of dues. This substantive defect alone – and this may not have been the only error in the case – is fatal and warrant the dismissal of this application.

Moreover, the amount collected by the applicant union could not have been deemed to have been paid "for" the six-month period in question and therefore to have met the requirements of section 29(2) of the Regulations. In this regard, the Board wishes to dissociate itself from a literal reading of this provision, which would deprive it of any significant meaning. Some might be tempted to argue that five dollars, regardless of when it is paid, could always, without further formality, be deemed to have been deducted "for" the six-month period immediately preceding the filing of an application! For example, a union might have deducted five dollars in 1978 and not have filed its application until 1985 and then simply argue that it collected this five dollars "for … the … period."

This section of the Regulations will not support this interpretation.

Payment of an initiation fee of five dollars is a heavy enough outlay that, when taken together with the signing of a membership card, it leaves no doubt in the Board's mind that the employee wishes to join a union. Anyone who has ever dealt with union organization knows that workers are not interested, any more than are their employers, in throwing away their five dollars and that no one will pay five dollars without first asking himself why. The answer is then clear to him: he is paying five dollars to join a union, and soon. Clearly, the time factor is a consideration. The organizing union seeks members, and one of the major arguments used on the employees is that certification is imminent. To allow the union to avoid, for all practical purposes, taking any action would be adverse to the objects of this legislation.

The Regulations have allowed unions longer than six months after collecting the dues to seek certification, but at a price, namely more extensive organization work, is required. In that case, the union must collect an initiation fee of more than five dollars which would be deemed to have been collected for a subsequent period to be defined.

Thus, a union that seeks to organize very large units sometimes requires more than six months. We recognize this fact, but once again, it will have

to persuade its prospective members of this need and ask them to pay dues that will last "for" more than six months. This is what is meant in section 27(2)(b) by a contribution of five dollars "for" …the … period." Indeed, this language applies to the few unions whose constitution and by-laws provide expressly for initiation fees of more than five dollars. In such a case, the fees paid are expressly spread over a period of time that is divided into six-month segments of five or more dollars each. For example, fees of twelve dollars would be deemed to be payment in advance of two successive contributions of six dollars each, valid for two successive periods of six months each, commencing at the time payment is made. Thus, a sum of at least five dollars is in fact paid "for" a six-month period identified in advance. In short, the levying of the amount is provided for in the constitution and by-laws and is not left to the discretion of the applicant. If it were, it would deprive the requirement in section 27(2)(b) of the Regulations of its meaning. In such a case, the sum of five dollars can never "cover" more than six months or be valid for a period which is not clearly defined at the time of payment.

For the sake of avoiding any ambiguity, the Board wishes to point out that nowhere did the applicant allege that it collected dues "for" the six-month period, nor does anything in the evidence presented in support of its application permit the Board to ascertain that this was the case. In the final analysis, the Board concludes that the applicant union did not meet the requirements of section 27(2) of the Regulations."[17]

85. I agree with Counsel for the RRCB that the **Les Salaries de New Carlisle Local 610 v Radio CHNC Limite** case is distinguishable from the instant case for three reasons. Firstly, it is based on a different set of provisions from section 34(3) (b) (i) of the IR Act. Secondly, in that case the Board was engaged in determining whether it was satisfied that, as of the date of the filing of the application, or of such other date as the Board considers appropriate, a majority of the employees in the unit wished to have the trade union represent them as

[17] Supra, at pages 13-14

their bargaining agent. In that case the Board must be satisfied that there is proof of membership that a sum of at least five dollars has been paid to the union "for or within the six-month period immediately preceding the date of the filing of the application for certification by the trade union." Thirdly, under the Canadian Act the payment of the sum of five dollars can be made at any time within the six month period. There is no requirement of continuous monthly payments during the period.

86. Notwithstanding the aforesaid differences, in my opinion the **Les Salaries de New Carlisle Local 610 v Radio CHNC Limite** case is instructive on the approach the Court took in interpreting legislation involving the certification process. It was clear that in the **Les Salaries** case the Court adopted an interpretation to meet the objective of the legislation.

87. What was the objective of section 34 of the IR Act and in particular section 34 (3)(b)(i)? In my opinion the objective of section can be ascertained from the natural and ordinary meaning of the words.

88. Under section 34 (3) (b) (i) of the IR Act the onus is on the Union to demonstrate to the RRCB that the worker paid both the entrance fee and the contributions for a continuous period of eight weeks immediately before the Certification Application was made or deemed to be made. The RRCB can only consider the issue of a worker being in good standing after the application for certification is made and will therefore be looking backwards in time to determine whether the sufficient number of continuous contributions were actually paid. Therefore, the payment of contributions is to take place after the date on which the Union determines that the worker has become a member of the Union. Thus, time begins to run for the payment of contributions only when the worker becomes a member.

89. Section 34 (3) (b) (i) contemplates that three steps must be done consecutively in order for the RRCB to be satisfied that the worker is a member in good standing in the Union. The worker must (a) pay the entrance fee; (b) become a member of the Union and (c) pay the contributions for a continuous period of eight weeks immediately before the Certification Application was made or deemed to be made. The section does not set a time frame within

which all three steps are to be done so all can be done on the same day. However the last step must be done within a particular time frame namely eight weeks immediately before the application for recognition. In my opinion the reason the legislature included the words *"immediately before the application for recognition"* in section 34(3)(b)(i) was to ensure that the trade union collected the contribution at a point in time when the certification application is imminent. The intention of the framers of this section was to give workers, who applied to be members of a trade union for a proposed bargaining unit, a degree of protection by ensuring that a trade union diligently pursues the task of securing the requisite numbers of workers for the proposed bargaining unit.

90. I am not of the opinion that section 34(3) (b) (i) permits a trade union to collect the eight week contribution at any time long before the worker became a member and ascribe it to the continuous eight week period to meet the requirements of section 34(3)(b) (i). If this was the intention of the framers of this provision then it would have stated that the trade union could have collected the said contribution at any time before making a certification application.

91. While I appreciate that the trade unions may have adopted the aforesaid practice as outlined by Counsel for the RRCB, such a practice is not consistent with the object of section 34(3)(b) (i). In my opinion the purposive interpretation advocated by the RRCB, while attractive, is dangerous since it permits a trade union to apply an interpretation to circumvent the provision of section 34 of the IR Act. It would permit a trade union to delay in getting on with its purpose of gathering the requisite number of workers for the proposed bargaining unit. It also gives the trade union a free hand to treat with workers contributions as it saw fit since a purposive interpretation would allow a trade union to collect a worker's contributions years in advance of any certification application, and act with no haste in gathering the requisite numbers before the certification application was made.

92. In my opinion, where the number of workers which the Union required to form the bargaining is large as in the instant case, the onus is on the Union to implement a system which would meet the requirements of section 34 of the IR Act.

Custom and practice

93. At paragraphs 93 to 96 of the Committee's Report it stated that:

> "93. Jackson-Smith not only explained how the union mobilises for the purpose of recognition but also explained the role of the collector/organizer. Mr Martin also stated that the Board has traditionally accepted the collection list as evidence of payment. The date on the receipt is also accepted as the day on which the Union received payment. Nowhere in the Act or in the rules is it stated specifically and unequivocally that individual receipts have to be issued to applicants for membership.
>
> 94. The Union does not officially receive the monies until the Collector/Organiser submits it and receives a single receipt for the total amount. In this regard, the Employer contended that "the union has engaged in a systematic practice of delaying the process of membership until close to its time of application in order to circumvent the mandatory requirements of section 34 of the Act." (Paragraph 23 of the Employer's Evidence and Arguments).
>
> 95. The Employer's insistence that individual receipts must be issued to each of the applicant members and dated on the exact day on which payment was made demonstrates unfamiliarity on the Employer's part with the mobilization process which the union utilizes rather than a deliberate attempt to be obstructive as the union claims.
>
> 96. It is the Board that must decide whether the collection sheet, the list of members and the single "mass" receipt are in accordance with Section 34 of the Act….The Board has long accepted the Union's practice of submitting a collection list, a membership list and a single receipt." (Emphasis added).

94. These sentiments were echoed at paragraphs 10 and 13 of the Chairman's affidavit as:

> "10. The Committee had heard evidence from Mr. Martin that in determining the question whether the persons who BIGWU had claimed to be its members had paid a reasonable sum by way of entrance fee and has actually paid reasonable sums by way of contributions for a continuous period of eight weeks immediately before the applicant for certification was made, he had regard to the date on which the workers had been admitted to membership, which was 25th November 2010, and then sought to determine whether they had each paid the entrance fee and the requisite sums for a period of eight continuous weeks before the application date. This methodology was in accordance with how the Board has in practice applied section 34 of the Act….
>
> 13. At that meeting the Board considered, among other things, whether it accepted the Examiner's opinion that the Union had followed sound accounting procedure and practices and that the 1045 members of the bargaining unit which he accepted to be members of the union were members in good standing. In accepting the examiner's report, the Board took account of the matters referred to in paragraphs 8-11 hereof. In particular, the Board took account of its previous practice of looking to the date the employees were admitted into the membership of the Union and then determining whether the employees had paid the entrance fee and sums by way of contributions for a period of eight weeks prior to the application date. The fact that the sums may have been collected from the employees before the collector turned those sums over to the union, did not matter. What is of importance is the date the worker was admitted into membership and whether as such member he or she had paid the requisite sums for the requisite period." (Emphasis added)

95. Mr Martin also expressed similar sentiments at paragraphs 20 and 21 of the Martin affidavit where he stated that:

> "20. I understood that the sums received by the collector from the 1045 workers, of which BIGWU acknowledged receipt on 24th November 2010, had been paid by the workers to the collector prior to 24th November 2010. I gleaned this from the

evidence led at the hearing before a Committee of the Board held in August 2016. To the extent that the collectors sheet recorded that those sums were received by the collector on 24th November 2010, I accept that that is not correct. However, in accordance with BIGWU's records they only became members on 25th November 2010 and BIGWU only accepted receipt of those sums on 24th November 2010. Therefore, in assessing whether they had become members of BIGWU after having paid a reasonable sum by way of entrance fee and had actually paid reasonable sums by way of contributions for a continuous period of eight weeks immediately before the application was made, I had regard only to the period after they had become members, I did this in accordance with the long standing practice of the Board.

21. Particularly in relation to large employers, the practice followed by trade unions seeking recognition has been to employ collectors to organise the workers in the proposed bargaining unit and to receive application forms and the appropriate entrance fee and contributions from them. However, the collector would not submit the application forms and the monies collected to the union until satisfied that the number of applicants exceeded 50% of the workers in the intended bargaining unit. When it was thought that that number was crossed, the collector would then pay the total sum collected to the union which would then issued a receipt for the total sum to the collector and the applicants would be admitted into membership. This practice has developed because of the extended periods of time it could take to achieve majority support." (Emphasis added)

96. There is no provision in section 34 of the IR Act and in the two Practice Notes for the acceptance of a global receipt. Therefore such a custom and practice cannot override the legal requirements. Further, the RRCB did not inform the Claimant prior to the Hearing that its acceptance of a global receipt was a settled custom and practice. It had informed the Claimant that the only matters that it would consider in determining the Certification Application was the conditions in section 34 of the IR Act and the requirements in the two Practice Notes. Indeed the evidence was that the first time the Claimant became aware of this settled custom and practice was during the Hearing. In my opinion the RRCB's

acceptance that the "global receipt" was evidence of the date upon which the workers joined the Union as part of the RRCB's custom and practice was outside the statutory provision in section 34 of the IR Act.

Collection method used by the Union

97. The Claimant contended that the RRCB could not have been satisfied based on the evidence presented to make a finding that the workers in the bargaining unit had satisfied the conditions in section 34 of the IR Act.

98. The RRCB in applying section 34(3) (b) (i) of the IR Act was mandated to be satisfied that the Union provided evidence to demonstrate that the workers on its list paid the entrance fee, were members of the Union and had actually paid contributions for a continuous eight week period immediately before the Certification Application. In my opinion it failed to do so for the following reasons.

99. Firstly, the RRCB accepted that the Collector's Sheet satisfied requirement 3 (i) of the 2008 Practice Note when the totality of the evidence demonstrated otherwise. Under requirement 3(i) of the 2008 Practice Note, the Union is required to provide to the RRCB *"entries on a Union Collection Sheet which must include the actual dates moneys were received by the Collector showing the periods and dates covered by the individual payments"*.

100. At paragraph 11 of the Martin affidavit he stated the documents he collected and considered from the Union relevant to the Certification Application. He stated that he was presented with documents which included the application forms for membership in the Union from 1175 persons. He noted that many, but not all the applications were dated. The forms indicated that a payment of $23.00 was enclosed. They all contained a section at the bottom in which the President and General Secretary of the Union appeared which indicated to him that the applications for membership was approved on the 25th November 2010. He was also presented with an extract of the Minutes of the meeting of the Central Executive Committee of the Union held on the 25th November 2010 which indicated that the applications for membership of the 1175 persons were accepted.

101. Mr Martin also stated that he received: the Collector's Sheet which contained the 1175 names; a receipt dated the 24th November 2010 made out in the name of Marlene Sanatan, the Collector for the sum of $27,025.00 for the entrance fee of $5 and 3months dues of $18 for 1175 persons.; the cash book in which the receipt of the sum of $27,025.00 was recorded; a deposit slip bearing a Republic Bank stamp dated 24th November 2010 for the sum of $27,025.00; an audit certificate from E. Augustus Alexander & Co certifying that the accompanying financial statements of the Union were audited as at the 31st December 2010 in conformity with generally accepted accounting principles and in accordance with the Trade Union Act and a list of the 1175 names in alphabetical order certified by the Union.

102. At paragraphs 19-21 in the Martin affidavit he explained how he arrived at his conclusion that the Collector's Sheet satisfied the requirements in 3(i) of the 2008 Practice Note:

> "19. On the question whether these 1045 employees had become members of BIGWU after having paid a reasonable sum by way of entrance fee and had actually paid reasonable sums by way of contributions for a continuous period of eight weeks immediately before the application was made, I noted that each of these 1045 persons had submitted application forms, that the signatures on the application forms matched the signatures given to us by the Claimant and that their names appeared on the collector's list as having paid a sum of $23, which was made up of $5 as an entrance fee and $18 as three months dues. I noted that the union had issued a receipt on 24th November 2010 to the collector for the total sum of $27.025.00 which amounted to the sum of $23 for each of the 1175 persons on the collector's list. I noted that the sum of $27,025.00 was entered in the union's cash book accounts and that that sum had been deposited to the union's bank account. I noted as well that each of the 1045 persons had become members of BIGWU on 25th November 2010.
>
> The sum which BIGWU had accepted from them on 24th November 2010 consisted of an entrance fee plus contributions for a continuous period of more than eight

weeks before the application for recognition was made on 16th February 2011. I considered these sums to be reasonable.

20. I understood that the sums received by the collector from the 1045 workers, of which BIGWU acknowledged receipt on 24th November 2010, had been paid by the workers to the collector prior to 24th November 2010. I gleaned this from the evidence led at the hearing before a Committee of the Board held in August 2016. To the extent that the collectors sheet recorded that those sums were received by the collector on 24th November 2010, I accept that that is not correct. However, in accordance with BIGWU's records they only became members on 25th November 2010 and BIGWU only accepted receipt of those sums on 24th November 2010. Therefore, in assessing whether they had become members of BIGWU after having paid a reasonable sum by way of entrance fee and had actually paid reasonable sums by way of contributions for a continuous period of eight weeks immediately before the application was made, I had regard only to the period after they had become members, I did this in accordance with the long standing practice of the Board.

21. Particularly in relation to large employers, the practice followed by trade unions seeking recognition has been to employ collectors to organise the workers in the proposed bargaining unit and to receive application forms and the appropriate entrance fee and contributions from them. However, the collector would not submit the application forms and the monies collected to the union until satisfied that the number of applicants exceeded 50% of the workers in the intended bargaining unit. When it was thought that that number was crossed, the collector would then pay the total sum collected to the union which would then issued a receipt for the total sum to the collector and the applicants would be admitted into membership. This practice has developed because of the extended periods of time it could take to achieve majority support."

103. At the Hearing before the Committee, Mr. Martin, testified, that he obtained from the Union the documents set out in the 2008 Practice Note. Under cross examination by the Claimant's Counsel, Mr. Martin testified that with respect to requirement 2 in the 2008 Practice Note which is *"Acceptable evidence to show that the worker has been admitted into membership of the Union in accordance with the Constitution and/or Rules of the Union"*, he accepted from the Union the Collector's Sheet together with the "mass receipt" issued by the Union to the Union's Collector[18].

104. In respect of item 3(i) in the 2008 Practice Note, which states *"entries on a Union's Collection Sheet which must include the actual dates moneys were received by the Collector showing the periods and dates covered by the individual payments",* Mr Martin testified at the Hearing that he felt this to have been satisfied by the Collector's Sheet[19] .

105. The documents to which Mr. Martin referred to were not disclosed to the Claimant prior to or during the course of the Hearing which forms a separate complaint by the Claimant in the instant proceedings which I will address later.

106. At the Hearing, under cross-examination, Mr. Martin was asked how, in his view, the Collector's Sheet could satisfy the requirement of 3(i) in the 2008 Practice Note which required the entries on a Union's Collector's Sheet to include the *actual dates* moneys were received by the Collector showing the periods and dates covered by the individual payments. Requirement of 4 of the 2008 Practice Note, required receipts of receipt books showing that moneys collected by the Collector were received in the Union's office and the actual date of such receipt.

107. Mr. Martin stated that the Collector's Sheet disclosed that the monies were actually received by the Union on the 24th November 2010 from the members and that the payments covered a period of three months from that date[20]. He admitted that he accepted the data on the Union's Collector's Sheet without further enquiry, although the application forms,

[18] Page 56 of the Transcript for 26th August 2016
[19] Page 61 of the Transcript for the 26th August 2016
[20] Pages 56 and 57 of the Transcript for the 26th August 2016

which he had also considered[21] had different dates of which workers paid monies to the Collector and that there was no indication that those monies were received in the Union's offices on that date or otherwise.

108. Counsel for the Claimant asked Mr Martin what he would do if he found out that the fees, a prospective union member paid, had been received two years before the Certification Application, Mr. Martin responded that this was *"not his business"*[22] since the RRCB's examiners were only concerned about when the workers were accepted as members by the Union.

109. In paragraph 20 of the Martin's affidavit, Mr Martin has changed his position from that which he gave before the Committee to state that *"To the extent that the collector's sheet recorded that those sums were received by the collector on 24th November 2010, I accept that that is not correct.*" However Mr Martin stated that this was of little moment given that those workers were only "accepted" into membership of the Union when their applications were approved by the Union on the 25th November 2010.

110. Mr. Martin also stated at paragraphs 23 and 24 of the Martin affidavit that during his examination in the Hearing before the Committee he became aware that the Claimant had submitted to the secretary of the RRCB the names of persons, namely, Stacy-Ann Tenia-Carty, Reah Planchard, Allison Connell-Rodriguez, Laura Seecharan, Sonia Young, Lisa-Marie Samai, Marvin Dennie, Kristy Appoo, Leslie Ann Fields-Coward, Samuel Darsan and Carlene Downes, in respect of whom information was provided that they either had not paid dues at all, and/or paid it many months before 24th November 2010, and/or had not received any receipt from the union, and/or had not paid dues for the period 24th November 2010 to 15th February 2011 and/or had resigned from the Union. Mr Martin stated that this evidence was consistent with the practice whereby monies are collected from workers in the intended bargaining unit but not handed over to the Union until later when it is thought that a sufficient number of applicants exceeding 50% of the intended bargaining unit had been achieved.

[21] Page 55 of the Transcript for August 26th 2016
[22] Page 58 of the Transcript for August 26th 2016

111. Mr Martin stated that he checked the names of these workers and he noted that only six of them were among the list of persons who the Union claimed to be its members, namely Laura Seecharan, Samuel Darsan, Reah Planchard, Stacy Ann Tenia-Carty, Sonia Young and Allison Connell-Rodriguez[23]. He said that Reah Planchard was found not to be a member of the bargaining unit. The resignation letters of Laura Seecharan, Samuel Darsan and Stacy Ann Tenia-Carty were dated after the date of the Certification Application and therefore they could not have been excluded from consideration on this basis. In the case of Stacy Ann Tenia-Carty, she was not included among the 1045 members in good standing because she held the position of Security Officer which was excluded from the bargaining unit.

112. Mr. Martin admitted under examination by the Committee's member Mr. Christopher Streete that he did not believe that all of the employers signed their application forms on the date indicated on the Collector's Sheet[24].

113. Based on Mr Martin's evidence before the Committee, the Collector's Sheet did not indicate the actual dates moneys were received by the Collector from the workers and the applications forms could not have assisted him in ascertaining this information since all were not dated and there were different dates the workers paid money to the Collector to the date the Union received the money. Therefore Mr Martin's evidence fell short in satisfying that requirement 3(i) of the 2008 Practice Note of *"entries on a Union's Collector Sheet which must include the actual dates moneys were received by the Collector showing the periods and the dates covered by the individual payment"*.

114. The other evidence which was before the Committee were from the employees Sonia Young, Laura Seecharan, Allison Connell-Rodriguez, Reah Planchard, Samuel Darsan and Stacy Tenia-Carty. Their evidence was that they applied to join the Union long before the required eight weeks prior to the date of the Certification Application. During the course

[23] Paragraph 23 of the Martin Affidavit and paragraph 6 of his supplemental affidavit filed on the 30th October 2017.

[24] Page 76 of the Transcript for August 26th 2016

of the Hearing the Committee indicated that, of the nine Subject Employees, only five were members of the Union[25] however it only provided to the Claimant application forms for four employees namely: the application form dated the 4th November 2008 for Sonia Young; the application form dated the 29th February 2008 for Allison Connell-Rodriguez; application form for Laura Seecharan and the application form for Reah Planchard.

115. The Committee also had the evidence of Laura Seecharan (number 993 on the Collector's Sheet) that she applied in late 2009[26] and Reah Planchard (number 823 on the Collector's Sheet) that she applied in late 2009[27].

116. The Claimant had provided to the RRCB/Committee the questionnaires for Samuel Darsan (number 248 on the Collector's Sheet) which showed that he applied to be a member to the Union in September 2009[28] and Stacy-Ann Tenia Carty (number 1093 on the Collector's Sheet) which showed she applied in 2010[29].

117. The other material evidence which the Committee was presented with at the Hearing was that the aforesaid persons all paid an initial fee upon applying to join the Union of approximately $23.00; they did not pay Union Dues in respect of any period between December 2010 to February 2011 or at all and they never received a receipt in respect of the fees they paid to the Union[30]. All of them except for Sonia Young had resigned from the Union, (Laura Seecharan on 22nd February 2011, Allison Connell-Rodriguez on 21st

[25] Page 23 of the Transcript for July 13th 2016
[26] Page 83 of the Transcript for 24th August 2016
[27] Page 97 of the Transcript and questionnaire exhibited as " SMM 31"to the Maharaj Affidavit
[28] Exhibited " SM 31' to the Maharaj Affidavit
[29] Exhibited to the Maharaj Affidavit and marked "SM31
[30] Sonia Young- application form and page 56 of the Transcript for 24th August 2016;Laura Seecharan- application form exhibited "SM 30" to the Maharaj affidavit ; questionnaire exhibited as "SM 31"to the Maharaj affidavit and page 87 of the Transcript for August 24th 2016;Allison Connell-Rodriguez- application form exhibited as "SM 30"to the Maharaj affidavit; Reah Planchard- application form exhibited as "SM 30" to the Maharaj affidavit , questionnaire exhibited as "SM 31" to the Maharaj affidavit and page 97 of the Transcript for the 24th August 2016;Samuel Darsan- questionnaire exhibited as "SM 31" to the Maharaj Affidavit ; and Stacy Ann Tenia Carty- questionnaire exhibited as "SM 31 to the Maharaj affidavit.

February 2011, Reah Planchard on 21st February 2011, Stacy Ann Tenia- Carty on 21st February 21st 2011 and Samuel Darsan on 21st February, 2011[31]).

118. The evidence from the other Subject Employees, namely Marvin Dennie, Kristy Appoo, Leslie Ann Fields Coward and Carlene Downes[32] was that they applied between 2008 and 2009 and they resigned by 2010. Mr Dennie stated that he did not pay any union dues while, Ms Appoo, and Mrs Fields-Cowards stated they paid the sum of $23.00 at the time of applying. Ms Downes could not confirm that she paid any sum but she was certain that a cost was attached with the application form.

119. At the Hearing, the Committee also received evidence from Mr. Jackson-Smith, a former secretary of the Union. Mr Jackson-Smith's evidence was that persons wishing to join the Union pay the sum of $23.00 to a Collector/Organizer and sign an application form[33]. The $23.00 reflects a membership fee of $5.00 and 3 months' subscriptions at $6.00 per month in accordance with rule 4(d) of the Union's Constitution[34]. The Collector issues no receipts to the prospective member.[35] The date when the Collector receives the payment is not recorded and is, in the Union's view, irrelevant.[36] When the Collector forms the view that he/she has acquired applications from more than 50% of the Bargaining Unit, he/she would then bring in the application forms and fees received to the Union[37]. The Union would then issue a single receipt to the Collector in respect of all the fees received, and no receipts are issued to the individual applicants for membership.[38] The date of the receipt issued to the Collector is treated as the date of receipt, and therefore the date of effective membership specified in section 3(b) of the Union's constitution[39]. If a worker applied to join the Union, this was for collective bargaining purposes. If that worker required immediate representation before his application was approved, the worker would be required to join

[31] The respective resignation letters exhibited as "SM 31"to the Maharaj affidavit.
[32] Pages 21, 69 and 35 of the Transcript of 24th August 2016.
[33] Page 9 of the Transcript for 26th August 2016
[34] Page 9 of the Transcript for 26th August 2016
[35] Page 12 of the Transcript for 26th August 2016.
[36] Page 12 of the Transcript for 26th August 2016.
[37] Page 12 of the Transcript for 26th August 2016.
[38] Page 11 of the Transcript for 26th August 2016.
[39] Pages 12, 17 and 18 of the Transcript for 26th August 2016.

the Union separately, pay fees separately and the eight week period would immediately begin to run[40].

120. Mr Jackson-Smith disclosed during examination by the Claimant that due to the failure by the Union's representative, the Collector, to properly receipt individual applicants at the time of the collection of their fees, such applicants would not be represented by the Union while the "approval" of their application remains pending. Mr. Jackson-Smith admitted that in such circumstances the Union would compel the applicant to "re-register" for Union membership if he/ she required immediate representation and pay fees with immediate effect. This would result in the initial fee paid in support of the application, which the Union reserved to cover the eight week period immediately before the Certification Application, not covering the period in which the applicant seek representation, despite having been paid earlier in time. Mr Jackson-Smith then explained that such a person would have paid double fees for representation. He also admitted that persons who sought clarification as to the date of their membership in light of the payment of their initial fee would be bound to accept that they would only be counted as members of the Union after the "Approval" date, which said date would be uncertain.

121. In the instant matter, the Cabrera affidavit exhibited the Collector's Sheet, the mass receipt to the Collector from the Union and the deposit slip where the sums received by the Union from the workers were deposited in the bank, which it had submitted to the RRCB in support of the Certification Application.

122. According to the Collector's Sheet, the Union represented to the RRCB that at least six of the Subject Employees, being Samuel Darsan, Stacy-Ann Tenia Carty, Reah Planchard, Allison Connell-Rodriguez, Laura Seecharan and Sonia Young, were members of the Union in good standing at the time that the Union made the Certification Application. In the Collector's Sheet the name of the worker is stated, the entrance fee of $5.00 is recorded and under the heading "Monthly Dues" the sum of "$18.00 (3 mths)" is recorded and the

[40] Page 23 of the Transcript for 26th August 2016

date of "24/11/2010" is recorded under the heading date. There was no information on the Collector's Sheet of the periods and dates covered by the individual payments. There was also no indication for what three month period the monthly dues were paid for and there was no reference in the Collector's Sheet that the payments were referable to the eight week period immediate before the Certification Application was made.

123. Mr. Martin, interpreted that the $18.00 monthly fee described as having been received from the relevant worker on the 24th November 2010, as covering the three month period commencing 24th November 2010. [41] However, Mr. Martin having accepted that the monies were paid by the relevant workers prior to the 24th November 2010, the "3 mths" period referred to in the Union's Collector's Sheet could not have been a reference to the period subsequent to 24th November 2010 and the evidence of the Subject Employees provided to the Committee was that they paid those monies to join the Union, and in all cases in respect of periods long before the 24th November 2010.

124. In my opinion the totality of the evidence before the Committee was that the date on the Collector's Sheet was not the actual date the money was received from the workers by the Collector but it was the date the moneys which were collected by the Collector was received by the Union. This was admitted by Mr Martin. Further the breakdown of the entrance fees and the monthly dues in the Collector's Sheet was not consistent with the understanding of the workers. Therefore the Collector's Sheet which the Union furnished to the RRCB to support the Certification Application failed to comply with the requirement of 3(i) of the 2008 Practice Note since it did not state the periods and dates covered by the payments by individual workers.

125. The second reason I have found that the RRCB erred in law was because it found that the Union had sound accounting practice in the absence of individual receipts issued to workers. The Committee and by extension the RRCB accepted the Union's practice of

[41] Page 62 of the Transcript for 26th August 2016.

issuing a "global receipt" to satisfy the requirement of 3(i) of the 2008 Practice Note and it also accepted the resolution of the Central Executive of the Union admitting the workers into membership as evidence of membership .It was not in dispute that the Union had adopted a practice of issuing a global receipt with one date as evidence of the date the workers became members of the Union. One of the requirements of section 34 of the IR Act is the RRCB had to be satisfied of the date each worker became a member of the Union.

126. Rule 3 (b) of the Union's constitution states:

> "Application for membership shall be made on the prescribed form and an applicant shall be deemed to have become a member when the payment of the applicant's entrance fee and firstly weekly or monthly dues has been receipted." (Emphasis added)

127. This was confirmed by the evidence of Christopher Jackson-Smith that membership was from the date of receipting.

128. Paragraph 7 of the Cabrera affidavit stated:

> "7. Individual receipts were not issued by the Organizer. Further, the issuance of individual receipts is not required by the Union's rules or the Practice Notes of the Respondent. When the Organizer provided the Union with a collector's sheet showing the names of the workers the Union issued a receipt to the Organizer for the total amount of money that was collected and paid to the Union. That receipt was dated the 24th November 2010. The list of applicants then had to be approved by the Union's executive, in accordance with Rule 10(g) the Union's Constitution. This was done at a meeting of the Union's executive on the 25th November 2010. The money received by the Union is of course deposited into the bank and a deposit slip evidencing this deposit is retained.

129. In determining the issue of "good standing" under section 34 of the IR Act, there is no reference in the two Practice Notes to the date on which membership in a union is approved, but rather the date of receipting in respect of the payment of fees and dues. Further the mass

receipt is inconsistent with the provision in the Union's constitution for membership. Therefore, in the absence of the individual receipts the date the workers became members of the Union could not have been known. If the Union had followed sound accounting practices of issuing individual receipts to the workers this would not have been an issue.

130. Before I leave this issue there is one last matter which the Claimant raised in its written submissions which was not addressed by the RRCB and the Union. It was submitted on behalf of the Claimant that the RRCB erred in law by issuing the Certificate of Recognition to the Union naming the Claimant as the employer of workers in the bargaining unit since the Claimant was not the employer of the workers in the bargaining unit but that it represented the various employers in the RBC Group of Companies in the Certification Application Process.

131. Section 37 of the IR Act deals with the issuance and contents of the Certificate. It provides:

> "37. (1) The Board shall issue a certificate under its seal to the union and to the employer in every case in which it certifies a trade union as the recognized majority union.
>
> (2) A certificate under subsection (1) shall contain a statement as to the following particulars:
>
> (a) the name of the employer and of the trade union thereby certified;
>
> (b) the category or categories, if any, of the workers comprised in the bargaining unit;
>
> (c) the number of workers comprised in the bargaining unit at the relevant date;
>
> (d) such matter other than the foregoing as are prescribed.
>
> (3) The Board may issue an interim certificate under its seal to the claimant union as the employer in every case in which it certifies a trade

union as the recognized majority union in respect of an interim bargaining union."

132. The Certification Application dated the 16th February 2011 was for the Union to be the Recognized Majority Union in respect of the bargaining unit comprising all monthly paid employees of "RBTT BANK LIMITED"[42]. It was not in dispute that the workers in the bargaining unit were employed by the various companies in the RBC Group of Companies[43] and throughout the Certification Application Process, the Claimant communicated with and represented the interests of the RBC Group of Companies with the RRCB and the workers in the bargaining unit continued to be employed by their respective employers.

133. The Certification of Recognition states that the Union is the recognized majority union in respect of workers employed by the Claimant. The Certificate of Recognition identified the different entities in the RBC Group in Trinidad and Tobago as the Claimant and the same companies I have referred to in paragraph 3 of this judgment as the RBC Group of Companies. The bargaining unit is the monthly rated employees of the RBC Group of Companies whose positions fall within levels 10 and 12 but excluding certain positions identified in the Certificate of Recognition.

134. In the Reply to Application for Certification of Recognition[44] dated 23rd August 2011, the Claimant stated in response to the question "Detailed description of what the Employer considers to be the appropriate bargaining unit that should be established in Pursuance of this application"- "All monthly rated non-management employees of the RBC Trinidad and Tobago Group comprising the following companies subject to exclusion of particular positions (1) RBC royal Bank (Trinidad and Tobago) Limited (2) RBC Trust (Trinidad and Tobago) Limited; (3) RBC Investment Management (Caribbean) Ltd; (4) RBC Merchant Bank (Caribbean) Ltd; (5) RBC Insurance Services (Caribbean) Ltd and (6) RBC Financial (Caribbean) Ltd.

[42] Exhibit "SM 2" to the Maharaj affidavit
[43] Exhibit " SM 15" to the Maharaj affidavit
[44] Exhibit " SM 7" to the Maharaj affidavit

135. By letter dated the 15th August 2013, the Claimant wrote to the RRCB where it stated that the seven companies which would be affected by the proposed bargaining unit were the Claimant and RBC Royal Bank (Trinidad and Tobago) Limited, RBC Trust (Trinidad and Tobago) Limited, RBC Investment Management (Caribbean) Limited, RBC Merchant Bank (Caribbean) Limited, RBC Insurance Services (Caribbean) Limited and West Indies Stockbrokers Limited.

136. While the Certification Application was made initially in the name of RBTT BANK LIMITED, the Claimant was well aware that the Certification Application Process concerned all seven employers. I therefore see no merit with this objection by the Claimant since the Certificate of Recognition to the Union was in the name of the Claimant and it included all seven employers as the employers of the workers in the bargaining unit.

Issue (iv)

Was the decision of the RRCB to certify the Union as the Recognised Majority Union of the Claimant unreasonable and/or irrational?

137. All the parties relied on their submissions under issue number three to support their respective positions under this issue.

138. A decision is irrational if it is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it." [45] The Wednesbury principle of irrationality is but one aspect of the general principle. A claimant need not demonstrate that the decision is a bizarre one but it is sufficient that the claimant demonstrates that there has been an error of reasoning which robs the decision of logic.[46]

[45] The well known dicta of Lord Diplock in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** (1948) KB 223.
[46] Ceron Richards v The Public Service Commission & The Attorney General of Trinidad and Tobago CV2016-04291

139. **Halsbury's Laws of England, Volume 61 (201), paragraph 617** sets out the following on irrationality:

> "A decision of a tribunal or other body exercising a statutory discretion will be quashed for 'irrationality', or as is often said, for 'Wednesbury unreasonableness'. As grounds of review, bad faith and improper purpose, consideration of irrelevant considerations and disregards for relevant considerations and manifest unreasonableness run into one another. However, it is well established as a distinct ground of review that a decision which is so perverse that no reasonable body, properly directing itself as to the law to be applied, could have reached such a decision, will be quashed.
>
> Ordinarily the circumstances in which the courts will intervene to quash decisions on this ground are very limited. The courts will not quash a decision merely because they disagree with it or consider that it was founded on a grave error of judgment, or because the material upon which the decision-maker could have formed the view he did was limited.
>
> However, the standard of reasonableness varies with the subject matter of an act or decision. The court will quash an act or decision which interferes with fundamental human rights for unreasonableness if there is no substantial objective justification for the interference. By contrast, the exercise of discretionary powers involving a large element of policy will generally only be quashed on the basis of manifest unreasonableness in exceptional cases…"

140. According to **De Smith's Judicial Review**[47] although the terms irrationality and unreasonableness are often used interchangeably, irrationality is only one facet of unreasonableness. A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification.

141. In my opinion, the decision of the RRCB to certify the Union as the Recognised Majority Union of the Claimant was unreasonable and/or irrational. The weight of the evidence before it did not demonstrate that the Union had sound accounting practices. It failed to issue

[47] 7th Edition, Page 602, para 11-037

individual receipts to the applicants/workers. The Claimant's workers were called to give evidence by the Committee, as to: (1) the date upon which they paid money to register with the Union which was in fact long before the date of the issue of the "mass receipts", (2) their non-payment of dues to the Union, (3) the Union's failure to issue to those workers receipts and (4) in some cases, their withdrawal from the Union.

142. Further, the process in the determination of the Certification Application was unfair since the RRCB considered and accepted that the "global receipt" was evidence of the date upon which the workers joined the Union as part of the RRCB's custom and practice and this was outside the statutory provision in section 34 of the IR Act. The RRCB also accepted that the Collector's Sheet satisfied requirement 3 (i) of the 2008 Practice Note when the totality of the evidence demonstrated otherwise.

Issue (v)

Did the RRCB deny the Claimant of a fair hearing and/or a reasonable opportunity to be heard in breach of the rules of natural justice in refusing to grant access to it of certain items in the Union's records and/or wrongfully reversing the burden of proof in the Certification Application?

143. The Claimant argued that it was denied a fair and/or reasonable opportunity to be heard in breach of the rules of natural justice by the RRCB's failure to grant it access to the Collector's Sheet, the single mass receipt, the list of members, the bank receipt/ deposit slip or receipts to the workers. It also argued that the RRCB unreasonably exercised its discretion by refusing to grant it access to certain items in the Union's record[48]. The Claimant's position was that the RRCB could not hide behind confidentiality since it did not disclose to the Claimant its practice of accepting the Collector's Sheet, the membership list and the mass receipt as satisfying the requirements of section 34 of the IR Act.

[48] Paragraph 2(a) of the Fixed Date Claim Form.

144. The items which were requested by the Claimant by letter dated 7th March , 2013[49], were:

(i) All receipts issued by the Union in respect of entrance fees and contributions made to the Union by the nine employees named in Appendix 1 of the Petition.

(ii) All entries posted to the Union's books and records in respect of those payments referred to at (i) above; and

(iii) All records of deposits or other dispositions of the payments referred to at (i) above made by the Union to the accounts of the said persons.

145. The position advocated by Counsel for the RRCB was the RRCB's decision not to accede to the Claimant's request to provide access to the Union's records which the Examiner, Mr Martin had already examined was consistent with the principles of fairness. The basis of this position was that under the IR Act, the RRCB is charged with the responsibility of examining the records of the Claimant and the Union and the request by the Claimant was to duplicate the work already performed by the RRCB's Examiner Mr Martin. Further, there was no breach of natural justice by the RRCB in failing to disclose the information requested by the Claimant since without even having sight of the documents requested, at the Hearing, the Claimant was successful in establishing that the documents it had requested to be disclosed did not exist which was the factual basis of its case.

146. It was submitted on behalf of the Union that there was no basis on the evidence to conclude that the Claimant was treated unfairly by RRCB's failure to permit access to the requested documents and therefore there was no breach of natural justice. Further, even if the Court finds that the discretion was unreasonably exercised and there was unfairness or breach of natural justice the Claimant waived any such breach.

147. On the 13th July 2016, the Committee decided, to provide the Claimant with copies of the application forms of four of the nine employees identified by the Claimant[50]. The four

[49] Exhibit "SM 13" of the Maharaj affidavit
[50] Paragraph 41 of the Maharaj affidavit.

employees were Sonia Young, Laura Seecharan, Reah Planchard and Allison Connell-Rodriguez. According to the Committee, the forms for the other workers who were not members of the Union, and the four, in respect of whose applications it was directed be provided to the Claimant, had written statements in the form of letters of withdrawal from the Union. In the Chairman's affidavit he stated that in respect of the four workers there was no issue of confidentiality.[51] During the oral hearing the Claimant was also provided with copies of application forms by two other employees[52].

148. At paragraph 77 of the Committee's Report it stated that the denial of the request was based on the provisions of the section 17 of the IR Act and the Court of Appeal's judgment in the **Aviation Communications and Allied Workers' Union** case.

149. It was common ground that what constitutes fairness will vary depending on the situation. In **Naraynsingh v Commissioner of Police[53]**, the Judicial Committee of the Privy Council cited with approval the decision of the House of Lords in **R v. Secretary of State for the Home Department ex parte Doody[54]** on the approach to the requirements of fairness. It stated:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that:
>
> (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.
>
> (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.

[51] Paragraph 6 of the Chairman's affidavit
[52] Paragraph 47 of the Maharaj affidavit.
[53] [2004] 64 WIR 392
[54] [1994] 1 AC 531

(3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.

(4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.

(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.

(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

150. The RRCB exercised its discretion under section 17 of the IR Act not to accede to the Claimant's request. Section 17 provides that:

> **"**17**.** The records of a trade union relating to its membership and any records that may disclose whether a person is or is not a member of a trade union which are produced in a proceeding shall be for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed to any person."

151. Therefore section 17 gives the RRCB complete access to the records of a trade union relating to its membership where there is an application for certification but it places on it the responsibility of determining which if any of these records should be disclosed to another party to the proceedings in a certification application. In my opinion the section

gives the RRCB the flexibility to make this determination before or even after it has viewed the records of the trade union.

152. The Canadian authorities referred to by Counsel for the RRCB and the Union provide some insight on the reasons the legislature bestowed such powers on the RRCB during the certification process. The similar provision in the Canadian legislation is rule 35 of the Canada Industrial Relations Board Regulations, 2012, which provides:

> "35. The Board shall not disclose to anyone evidence that could reveal membership in a trade union, opposition to the certification of a trade union or the wish of any employee to be represented by or not to be represented by a trade union, unless the disclosure would be in furtherance of the objectives of the Code."

153. Rules which provide for the confidentiality of Union records in recognition applications have been given a purposive interpretation, the purpose being to protect unions and their membership from potential abuse, and they have been applied in such a manner as to require the exercise of the discretion to disclose only in circumstances where a high standard has been crossed warranting disclosure.

154. In **U.S.W.A. v. Grand & Toy Ltd**[55] the following was said on the purpose of the confidentiality of union membership records:

> "The object of certification proceedings before the Board is to ascertain the true wishes of the bargaining unit employees with respect to trade union representation. The Board's experience has been that secrecy with respect to trade union membership is essential if the true wishes of employees are in fact to be ascertained. The lack of anonymity tends to have a significant chilling effect upon both legitimate activities of trade unions and the exercise by employees of their rights under the Act, whether or not unfair labour practices are perpetrated by unscrupulous employers (and we do not suggest that this respondent is such an employer). Finally,

[55] [1986] O.L.R.B. Rep. 1223 (Ont. L.R.B.),

we must have regard to section 111(1) of the Act. The Legislature has directed that records that may disclose whether a person is/is not a member of a union or does/does not desire representation by a union shall not be disclosed except with leave of the Board. This can only mean that such records, which include the membership evidence filed in support of an application for certification, are not to be revealed except in exceptional circumstances where the Board finds that there are compelling reasons to do so."[56]

155. In **C.J.A., Local 1030 v. PGA Construction Management Ltd**[57] a decision of the Ontario Labour Relations Board, the Board had to address the issue of confidentiality of a union's records. In that case, there was an application for certification filed under the construction industry provisions of the Labour Relations Act, 1995, S.O. 1995, c.1, as amended . There was an allegation by the responding party that a membership card filed by the applicant in the name of Gaston Therrien was in fact signed by his son, Shawn Woods. The Applicant sought permission of the Board to disclose to legal counsel and to handwriting experts any membership card that may have been filed with the Board on behalf of Mr. Woods, so that the handwriting and signature on any such card can be compared with the membership card and other original signatures of Mr. Therrien supplied to the Board by the responding party. The Board in denying the request for disclosure said the following at paragraph 5 of its ruling:

> "5. Having regard to section 119(1)[58] of the Act, the Board is always hesitant to consent to the disclosure of membership evidence or records in its possession that may indicate whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union. In ***U.S.W.A. v. Grand & Toy Ltd.*, [1986] O.L.R.B. Rep. 1223 (Ont. L.R.B.)**,

[56] Paragraph 23 of the judgment.
[57] 2012 Carswell Ont 3327 (2012),
[58] "The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union."

the Board discussed the underlying rationale for the necessity of maintaining the confidentiality of membership evidence filed in certification proceedings and the standard against which a request to disclose such membership evidence should be considered. At paragraph 18 of that decision, the Board made the following observations:

> ... The legislation does entrust the Board with the discretion to disclose such records, but given the primacy of the secrecy of such evidence, that discretion must be exercised only for compelling reasons in circumstances where such disclosure would further the purposes of the Act.

I agree with that standard. Before the Board's consent will be provided, there must be a compelling reason for disclosure of any such membership record, in circumstances where such disclosure would further the purposes of the Act.

6. I am not satisfied that any such compelling reason exists in the circumstances of this proceeding. The issue before the Board is whether Mr. Therrien signed the membership card filed by the applicant in his name in support of its application for certification. The issue before the Board is *not* whether it was Mr. Woods who signed a membership card in the name of Mr. Therrien. The issue in dispute can and should be resolved by reference to the membership card filed by the applicant in the name of Mr. Therrien, the original signature documentation of Mr. Therrien secured from the records of the responding party that has now been filed with the Board, and, if necessary, the evidence of witnesses who may be called by the parties to testify.

7. In the circumstances, the Board does not consent to the request made by the applicant." (Emphasis added)

156. It is clear from the learning that due to the primacy of maintaining the confidentiality of the trade union's records, the certifying agency, in the instant case, the RRCB would only exercise its discretion to order disclosure where there are "compelling reasons"[59] and only in "exceptional circumstances".

157. In the instant case the RRCB was faced with two competing interests. The Claimant's interest was that if a certificate of recognition was issued to the Union it would curtail its common law right to directly contract and negotiate with each of its employees their respective terms and conditions of employment. The effect of this is the Claimant would be obligated to engage in the process of negotiating collective agreements for those persons employed in the relevant bargaining unit and it also exposes the employers to the risk of industrial action by its employees centrally organized by the union.

158. On the other hand the RRCB had to protect the confidentiality and secrecy by the Union in the canvassing of workers for union affiliation. In **Town & Country Ltd. v Union of Foods, Hotels & Industrial Workers & Town and Country Garment Association**[60] the Industrial Court said (at p. 12):

> "It is ... a cardinal tenet of the principles of good industrial relations, on which the Act is founded, ... that a worker should not be forced to reveal his trade union affiliation."

159. Did the RRCB act reasonably by not acceding to the Claimant's request for disclosure? In my opinion the RRCB acted unreasonably for two reasons. Firstly, there were compelling reasons for the RRCB to accede to the Claimants request. The Claimant consistently articulated to the RRCB long before the Hearing and since 30th June 2011[61] that it had concerns about the Union's compliance with section 34 of the IR Act and it provided cogent information on two occasions to consider its request.

[59] Paragraph 23 of U.S.W.A. v. Grand & Toy Ltd.
[60] No. 74 of 1970 (Industrial Court) at page 12 of the judgment
[61] Exhibit SM 5 to the Maharaj affidavit

160. The Claimant first set out its request and the reasons for its request in its letter dated 30th June 2011 as follows:

> "The Bank is cognizant that the Board processes applications for Certificates of Recognition in two phrases, that is, it determines the appropriate bargaining unit and then determines the question of membership in good standing. However, the state of membership of the Bank's employees in the applicant union (Banking Insurance and General Workers Trade Union – BIGWU) as at the relevant date is a prerequite in any determination by the Board. The relevant date in this case in February 16, 2011.
>
> Against the background of the relevant date and in view of the information set out below, the Bank is requesting that the Board determine the fundamental and prerequisite question of the state of membership of the Bank's employees in the applicant union before proceeding further with the union's application.
>
> With regard to the state of membership of the Banks employees in the union, as you are aware, the Industrial Relations Act (IRA), Chapter 88:01, Section 34 (3), require that the Board must be satisfied that:
>
> (a) the union, of which it is alleged the worker is a member in good standing, has followed sound accounting procedure and practices;
> (b) the particular worker has:
> (i) become a member of the union having paid a reasonable sum by way of entrance fee and has actually paid reasonable sums by way of contributions for a period of eight weeks immediately before the application was made or deemed to have made.
>
> Contrary to the specific statutory requirement set out above, the Constitution of BIGWU Rule 4 (b), states that: " an applicant shall be deemed to have become a member when the payment of the applicant's entrance fee and first weekly or monthly dues has been receipted; Rule 4 (d) of the said Constitution stipulates that an entrance fee of $5.00 shall be paid upon application by each prospective member along with a monthly subscription of $6.00 where there is no certificate of recognition. This is compelling evidence that the applicant union's approach to obtaining members and its declared accounting practices are at odds with the statutory requirement referred to above.

Specifically, the union's Constitution deems an individual to become a member whenever the union unilaterally decides to issue a receipt. As a result, the union may hold payments for months or years before issuing receipts and then purport that the payments are for the period of the eight weeks immediately before the application was made. While not seeking to anticipate the response of the union, it could not legitimately be open to the union or its collector or other representative to collect the entrance fee and dues prior to the eight-week period and then seek to apply the sums to the said period by virtue of delaying the issuance, if at all, of a receipt to the purported or prospective members. We respectfully submit that any such practice would deprive the eight-week statutory time limit of meaning.

The Bank has received feedback from employees that they never pad entrance fees and monthly subscriptions and/or that they made no monthly subscriptions to the union during the eight-week period before the relevant date and/or that they never received receipts from the union and/or that they received receipts for such monies paid more than a year prior to the eight week period. This feedback reinforces the Bank's concern regarding the union's compliance with Section 34 of the Act.

The Bank unequivocally supports the principle that workers should be able to access collective bargaining if that is their wish. However, any impropriety in the organizing phrase arising from unsound accounting procedures and practices goes against the Act.

The Bank is also sensitive that it is disadvantaged since the union provides membership evidence to the Board which is not ordinarily revealed to the employer, and that the Board does not normally conduct a ballot. The Board is therefore required to hold the union to strict adherence to the statute, and to ensure rigorous application of the safeguard therein… The Bank is requesting that in the circumstances of this case, the Board does not proceed to determine the appropriate bargaining unit without first examining whether, given the provision of the union's Constitution set out above, the state of membership of the Bank's employees in the union permits it to make the application for recognition by reference to the relevant date of February 16, 2011. This is a fundamental and threshold question in the circumstances of this case."

161. In my opinion the Claimant made it clear to the RRCB that the information was requested because the Claimant was asserting that the Union had engaged in a systematic practice of

delaying the processing of membership until close to the time of the Certification Application to circumvent the requirements as set out in section 34 of the IR Act.

162. The Claimant's position remained unchanged in several letters which were exchanged between the Claimant and the RRCB from the 30th June 2011 up to and during the Hearing[62]. In all of the Claimant's letters during this period it also maintained its reservations with respect to its rights articulated in the 30th June 2011 letter.

163. Even if the Claimant's initial request was baseless, it subsequently by letter dated the 17th August 2012 provided the following information to the RRCB to support its assertion:

> "At the said meeting RBC was directed that it must submit a petition to the Board before the Board would give consideration to the conduct of a hearing into the said matter. In doing so, RBC must present information in support of its concerns.
>
> In this regard, RBC was directed that it must submit a petition to the Board before the Board would give consideration to the conduct of a hearing into the said matter. In doing so, RBC must present information in support of its concerns.
>
> In this regard, RBC advises that the nine (9) employees, whose names are attached at Appendix 1 informed the company that they had.
>
> 1. Withdrawn their membership form the union prior to the relevant date, and/or
> 2. Paid an entrance fee of TT$23.00 or TT$30.00 or TT$50.00 but had never paid dues, and in particular, had never paid dues over the period December 2010 to February 2011, and/or
> 3. Had paid dues in 2009 or early 2010 but not since then, and/or
> 4. Had not received receipt from the union.
>
> RBC respectfully submits that the Board has an Inquisitorial function to conduct a specific examination among these and other employees of the proposed bargaining unit(s) to ascertain the nature of the accounting practices used by the union in support of its certification application No. 3/2011 and fully and properly to address each of the matters set out in section 34(3) of the Act."

[62] Letters dated the 23rd August 2011, 9th March 2012, 12th July 2012 and 17th August 2012, 9th January 2013

164. The RRCB still did not make the order for disclosure as requested by the Claimant.

165. By letter dated the 7th March 2013[63], the Claimant asked to be provided with copies of all receipts issued by the Union to the nine employees it had previously identified, all entries posted in the Union's books and records in respect of those payments and all records of deposits or other dispositions of the payments by the Union to the accounts of those nine persons but it reserved its position. The Claimant renewed this request on the 18th June 2015. The RRCB still did not make the order for disclosure which it informed the Claimant by its letter dated 25th June 2015.

166. The Claimant continued to register its dissatisfaction with the RRCB with its failure to deal with its request for disclosure of the information for the nine employees in its letter dated 13th July 2015 and the 24th July 2015. By letter dated the 13th July, 2015, it was clear that the Claimant was not satisfied with the RRCB's response to its repeated request for disclosure of the documents requested since it repeated its requests and the reasons for the said request.

167. The Claimant then wrote by letter dated 24th July 2015 asking for access to the books and records examined by the RRCB as the basis for coming to its decision whether or not there has been compliance with section 34 of the IR Act. In its reply, by letter dated the 29th July 2015 the RRCB advised the Claimant that its Examiners will be examining all relevant records and if there were discrepancies the parties will be asked for explanations.

168. After the RRCB's Examiners had completed their examination of the Union's records, the Committee then scheduled hearings which it informed the Claimant in a letter dated June 2016. By this time the RRCB would have known if the information which the Claimant had requested was available from the Union but it still did not grant the Claimant's request.

169. Not being satisfied with the RRCB's response, by letter dated the 21st June 2016 the Claimant provided additional information to the RRCB from the Assistant General Secretary of the Union Mr Jackson –Smith that the Collector had retained dues collected

[63] Exhibit SM 13 to the Maharaj affidavit

from workers which were only handed over to the Union on or around the eight week period before the Application for Certification was made. The Claimant asked for an opportunity to provide evidence to the RRCB. The RRCB still did not accede to the Claimant's requests.

170. I accept that the Claimant may not have provided sufficient evidence to support its initial request from the Claimant for the access to certain records of the Union. It was reasonable in those circumstances for the RRCB not to make the disclosure order requested. However, on two occasions subsequent to the initial request the Claimant provided evidence to the RRCB to consider its request in circumstances where the Examiner had already completed the examination of the Union's records. In my opinion, there was sufficient evidence provided to the RRCB to demonstrate that there were exceptional circumstances to warrant the order for disclosure as requested and such an order would not have breached the confidentiality of the Union's records. At the end of the day, the onus was on the Union to prove that it met all the requirements for certification and not for the Claimant to disprove it.

171. Secondly, the requested information was material to the enquiry which the RRCB was required to conduct under section 34 of the IR Act. During the Certification Application Process both the RRCB and the Union had the information which was requested by the Claimant in the form of the Collector's Sheet, the single mass receipt, the list of members and the bank deposit slip. The Claimant did not have access to those documents.

172. The Chairman's affidavit makes it clear that in arriving at the decision to grant the Certification of Recognition to the Union, the Committee accepted Mr Martin's evidence, the single mass receipt, the information in the Collector's list and the membership list. Therefore the RRCB treated the information requested as material.

173. In the instant case, from the outset the RRCB was put on notice that the Claimant had certain information which, it was of the view, had a material impact on the fairness of the process. One of the reasons the RRCB gave for not acceding to the Claimant's request was that Mr Martin was examining the records of the Union. In support of this position Counsel for the RRCB submitted that there was no need for the Claimant to be given documents

since Mr Martin was already provided with the information. However, as discussed aforesaid the totality of Mr Martin's evidence before the Hearing demonstrated that he misread and or was erroneous in his interpretation of the Union's records. Further, the Collector's Sheet which was only disclosed to the Claimant in the Cabrera affidavit in the instant proceedings did not state the periods moneys were collected for from the workers and there was no reference in the Collector's Sheet that the payments were referable to the eight week period as required under section 34 of the IR Act.

174. In my opinion, the RRCB's denial of the Claimant access to the Union's records, denied the Claimant the opportunity to test the veracity of the Union's records.

175. Having found that the RRCB exercised its discretion unreasonably, I do not accept that the Claimant waived its right to raise this breach in the instant proceedings since it was clear that this was a matter the Claimant continuously raised from June 2011 until during the Hearing , altogether on at least thirty three occasions.

176. It was also submitted by the Claimant that it was treated unfairly in the Certification Application Process since the RRCB reversed the burden of proof in determining the Certification Application. In support of this position the Claimant referred to an exchange between the Committee's Chairman and Mr Martin during the Hearing. Under examination from the Committee's Chairman, Mr. Martin was asked what would happen if a hypothetical "Joe Bloke" wrote to the RRCB and said "I heard my name is on a list and that I paid money, but that is not me." Mr. Martin replied by stating, for the first time, that he would investigate this issue, but that he would ask "Joe Bloke" to substantiate his claim[64].

177. The Chairman also asked Mr Martin what if "Joe Bloke" said "I paid a sum of money on the 22nd September and another amount on 22nd October. Mr. Martin stated that he would ask "Joe Bloke" for proof and evidence since the Union had already provided evidence that the person paid the monies as alleged[65].

[64] Pages 71 to 72 of the Transcript
[65] Page 72 of the Transcript

178. While Mr. Martin when faced with contradicting evidence, reversed the burden by having the negative proved by the worker as opposed to calling upon the Union to satisfy the RRCB, in my opinion this exchange does not conclusively point to the RRCB reversing the burden of proof in determining the Certification Application. In my opinion, this was Mr Martin's opinion on how he would have conducted his investigation if faced with particular circumstances.

CONCLUSION

179. The complaints by the Claimant against the RRCB are errors of jurisdiction and failures to adhere to the principles of natural justice which are judicially reviewable. If in failing to adhere to the principles of natural justice the RRCB's decision was plainly and wholly unreasonable and /or irrational then its decision is also reviewable.

180. The RRCB did not misdirect itself in law by its reference that it was *"immune from being put right by the Court"* in paragraph 96 of the Committee's Report in relation to its statutory functions and responsibilities. It did not expressly state in its letter dated the 25th June 2015 that its decision on the issue of disclosure could not be reviewed and in any event its reference does not satisfy the test that it was predisposed against the Claimant.

181. Under section 34 of the IR Act the RRCB has an inquisitorial duty to ensure that the Union has satisfied the mandatory statutory requirements. The two Practice Notes provide guidance to the parties on the kind of evidence which the RRCB would accept where section 34 of the IR Act is in issue but they do not provide an exhaustive and conclusive statement of the kind of evidence that the RRCB would consider since they were not part of the legislative formula and therefore they are not mandatory. However in the RRCB's dealing with the Certification Application the RRCB treated the requirements contained in the two Practice Notes as mandatory.

182. The objective of section 34 of the IR Act can be ascertained from the natural and ordinary meaning of the words.

183. The Committee and by extension the RRCB erred in law its interpretation and application of section 34 of the IR Act in the Certification Application Process. The RRCB's custom and practice cannot supplant the mandatory statutory provision in section 34 of the IR Act. It is not for the RRCB to apply a meaning to suit the practice adopted by the trade unions rather it is for the trade unions to adopt a system to meet the object of section 34 of the IR Act. The totality of the evidence before the Committee was that the date on the Collector's Sheet was not the actual date the money was received from the workers by the Collector but it was the date the moneys which were collected by the Collector was received by the Union. The breakdown of the entrance fees and the monthly dues in the Collector's Sheet was not consistent with the understanding of the workers. Therefore the Collector's Sheet which the Union furnished to the RRCB to support the Certification Application failed to comply with the requirement of 3(i) of the 2008 Practice Note since it did not state the periods and dates covered by the payments by individual workers. The RRCB also erred in law was because it found that the Union had sound accounting practice in the absence of individual receipts issued to workers. For these reasons the decision of the RRCB to certify the Union as the Recognised Majority Union of the Claimant was unreasonable and/or irrational.

184. The RRCB acted unreasonably by failing to give the Claimant access to the documents it requested since there were compelling reasons to accede to the request. The information which was requested was material to the enquiry which the RRCB was required to conduct under section 34 of the IR Act. The RRCB's denial of the Claimant's access to the records used by the Union which the Committee had before it, denied the Claimant the opportunity to test the veracity of the Union's records. The Claimant did not waive its right to raise this breach in the instant proceedings since it was clear that this was a matter the Claimant continuously raised from June 2011 until during the Hearing, altogether on at least thirty-three occasions.

185. The RRCB did not err in law in issuing the Certificate of Recognition to the Union in the name of the Claimant since it included all seven employers as employers of the workers in

the bargaining unit. The RRCB did not reverse the burden of proof in determining the Certification Application.

ORDER

186. It is declared that pursuant to rule 56.14(3) of the CPR and section 8(1)(b) of the JR Act that the Union, in the making of the Certification Application, failed to comply with the requirements of section 34 of the IR Act.

187. It is ordered that pursuant to rule 56.14(3) of the CPR and section 8(1)(a) of the JR Act the Committee's Report dated the 4th January 2017 is quashed.

188. It is ordered that pursuant to rule 56.14(3) of the CPR and section 8(1)(a) of the JR Act the Certificate of Recognition dated the 16th January 2017 is quashed.

189. The RRCB is directed to dismiss the Certification Application.

190. The RRCB/Respondent to pay the Claimant's costs to be assessed by this Court in default of agreement.

191. The issue of costs with respect to the Union/Interested Party is reserved.

Margaret Y Mohammed

Judge