

IN THE MATTER OF a complaints being
filed pursuant to section 14 of the
Human Rights Act, 2010 SNL 2010, c. H-13.1

File No: 115755

Don Pardy v HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR A
REPRESENTED BY THE MINISTER OF INNOVATION, TRADE AND RURAL
DEVELOPMENT

File No: 115785

Eldon Fudge v HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR A
REPRESENTED BY THE MINISTER OF INNOVATION, TRADE AND RURAL
DEVELOPMENT

File No: 115786

Gary Peddle v HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR A
REPRESENTED BY THE MINISTER OF INNOVATION, TRADE AND RURAL
DEVELOPMENT

File No: 115790

Dennis Power v HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR A
REPRESENTED BY THE MINISTER OF INNOVATION, TRADE AND RURAL
DEVELOPMENT

File No: 115798

Richard Lane v HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR A
REPRESENTED BY THE MINISTER OF INNOVATION, TRADE AND RURAL
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File No: 115797

Boyd Hiscock v HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR A
REPRESENTED BY THE MINISTER OF INNOVATION, TRADE AND RURAL
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File No: 115800

Robert Rowe v HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR A
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File No: 115801

Dennis Hiscock v HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR A
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Albert Hopfel v HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR A REPRESENTED BY THE MINISTER OF INNOVATION, TRADE AND RURAL DEVELOPMENT

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File No: 126686
Gilbey Langdon v HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR A
REPRESENTED BY THE MINISTER OF INNOVATION, TRADE AND RURAL
DEVELOPMENT

On behalf of the Commission: Ms. Donna Strong

Counsel for Complainants: None

Counsel for Respondent: Mr. Peter Ralph

Adjudicator: Ms. Keri-Lynn Power

Hearings: November 7, 8 and 9, 2016, June 29, and 30, 2017 and June 13, 2018 along with multiple written submissions

Decision: December 18, 2019

INTRODUCTION

1. The 35 Complainants involved in these human rights complaints were all employees of AbitibiBowater at the time of the mill closure in Grand Falls- Windsor, Newfoundland and Labrador on March 28, 2009 and were all members of the Communications, Energy and Paperworkers Union (CEP herein) of either CEP Local 59N, 60N, 63, 88 or 161.
2. At the time of the mill closure on March 28, 2009, thirty- four (34) of these thirty- five (35) Complainants were off work and in receipt of either Long Term Disability insurance benefits (hereinafter LTD) or Worker's Compensation benefits (hereinafter WCB); thirty (30) of the 35 Complainants were in receipt of LTD as of March 28, 2009; and four (4) of the 35 Complainants were in receipt of WCB as of March 28, 2009. One (1) of the Complainants, Donald Parly, was not in receipt of either LTD or WCB as of March 28, 2009.
3. The Respondent, is a government department formally titled as Her Majesty the Queen in Right of Newfoundland and Labrador represented by the Minister of Innovation, Trade and Rural Development (hereinafter called HMQ) who implemented a program when the mill closed to pay money to displaced workers that was equivalent to severance owed by AbitibiBowater however the Complainants herein were denied the same from HMQ.
4. The claims made here are pursuant to section 14(1) of the *Human Rights Act*, 2010, SNL 2010, c. H-13.1 (hereinafter called the Act) which is titled "Discrimination in Employment" and states,

"14. (1) An employer, or a person acting on behalf of an employer, shall not refuse to employ or to continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment on the basis of a prohibited ground of discrimination, or because of the conviction for an offence that is unrelated to the employment of the person."

EVIDENCE

5. At the Hearings the Parties entered into evidence the following:
 - An Agreed Statement of Facts;

- Consent # 1 Investigation Report of Don Pardy's Complaint completed by Ms. Anissa Goodyear of the Commission, undated;
- Consent # 2 Reply of HMQ to the Investigation Report, dated January 14, 2014;
- Consent # 3 Book of Attachments from Ms. Goodyear on behalf of the Commission to accompany her Report, dated July 2014;
- Consent #4 Documents of Her Majesty , undated;
- Consent # 5 Settlement Agreement between the Employer and CEP Locals relating to grievances and decision of Quebec Superior Court endorsing a Company Creditor Arrangements Act plan; and
- Various exhibits put in through Mr. Donald Pardy during his testimony.

6. The Board also heard viva voce evidence from the following:

- Mr. Donald Pardy, one of the Complainants herein;
- Mr. Gary Healey, National Representative for the CEP Union;
- Mr. William Browne, Human Resources Manger AbitibiBowater Grand Falls- Windsor Mill; and
- Mr. Larry Weatherbie, Director of Industry Adjustments with the Department of Innovation, Business and Rural Development (formerly Innovation, Trade and Rural Development).

ISSUES

7. The Parties agreed to bifurcate the hearings in these matters and address liability only with the agreement that in the event liability was found to exist then the matter would continue to ascertain damages.

8. The issues herein were as follows:

- | | |
|-----------|---|
| Issue #1 | Was HMQ a person acting on behalf of the Employer, AbitibiBowater pursuant to section 14(1) of the Act? |
| Issue # 2 | Were the Complainants disabled pursuant to section 9 of the Act? |
| Issue# 3 | Were the Complainants discriminated against by HMQ when refused the money sought? and |
| Issue #4 | If so, was disability a factor in this discrimination? |

9. In relation to Issue #2, initially the Parties indicated that they had agreed that 34 of the 35 Complainants were disabled pursuant to the Act, and thereafter agreed that all 35 Complainants were disabled therefore this issue has been resolved.

BACKGROUND

10. The Complainants did not retain their own Legal Counsel and depended on the Commission to present their case. Since the complaints have been made, the matter between Mr. Pardy and HMQ (File No. 115755) has been resolved and this claim no longer requires adjudicating, in relation to the outstanding claims some background factual information should help.
11. A mill has operated in Grand Falls since 1909, however, on December 4th, 2008, AbitibiBowater announced that the mill was permanently closing on March 28th, 2009 with paper-making operations ending as of February 12, 2009. On December 16th, 2008 HMQ announced that it would introduce legislation which would repatriate timber rights, rights to land, and water use rights held by AbitibiBowater. This bill, the AbitibiBowater-Consolidated Rights and Assets Act, SNL 2008, c A-1.0, enabled HMQ to expropriate AbitibiBowater property related to the mill.
12. AbitibiBowater filed for creditor protection and was granted a stay of creditor proceedings under the Companies Creditor Arrangements Act (CCAA) on April 17, 2009 (subsequently extended to May 26, 2009). All obligations of AbitibiBowater to pay severance and other employment related payments were stayed by this filing. Some former employees of AbitibiBowater made a claim for the unpaid severance in these proceeding as unsecured creditors. Some employees, including some of the Complainants in this matter, received benefits from AbitibiBowater as a result of these claims. The Unions negotiated settlements with AbitibiBowater on behalf of 21 Complainants for severance through the CCCA process.
13. On May 19, 2009, HMQ issued a Press Release announcing the provision of financial payments for former workers displaced by the closure of the AbitibiBowater mill including severance payments. The then Premier Williams stated:

“Many of these individuals have given a lifetime of service to AbitibiBowater and deserve to be treated with dignity and respect in the face of this closure. Unfortunately, that has not been the case to date by the company. Working in the best interests of the province, in December of last year our government repatriated certain assets related to this mill as a result of the company having broken their contract to operate in this province. It is now only appropriate and fair that the workers are not left behind and disadvantaged by AbitibiBowater's decision to close this operation.

Given the unique circumstances of government having expropriated related assets, it is now proper and right that workers receive benefits from this repatriation particularly in light of the company's inaction... So, beginning today, we will enter into discussions with union representatives to facilitate the allocation of severances and other financial allowances to the former mill workers and we will determine an appropriate and fair severance for loggers and silviculturists”.

14. The Backgrounder to this Press Release further stated:

“The Government of Newfoundland and Labrador's commitment to enable the CEP and IBEW to provide earned severance and other allowances to those impacted by AbitibiBowater's creditor protection builds-upon other investments and other action directed at revitalizing the central Region.”

15. By a further Press Release dated July 22, 2009, HMQ announced the agreement to make payments of severance to displaced workers. The then Premier Danny Williams stated in part :

“As a government, we made a commitment on day one to ensure that the workers and communities of the Central Region are protected to the greatest extent possible. This formal agreement lays the foundation to ensure the impacted individuals receive well earned financial benefits and reduces the

impact of the AbitibiBowater's actions and its failure to provide benefits to workers.

AbitibiBowater's filing for creditor protection absolved it from paying severance or making payments under its Work Force Reduction and Supplementary Retirement Allowance programs until financial arrangements are made and agreed upon by the courts. The drawn-out nature of this process precipitated the Government of Newfoundland and Labrador to intervene and provide entitled severance and various payments ..."

16. In the same Press Release, Dave Coles, President, CEP Canada was quoted:

"These workers were abandoned by the company that closed its mill and refused to pay required severance, along with being abandoned by the federal Government. Our members recognize that the government of Newfoundland and Labrador did not abandon them and had come to their aid when they need it the most."

17. An agreement was entered into on July 8th, 2009, called the Framework Agreement wherein HMQ committed to paying equivalent to severance and other payments to employees of AbitibiBowater with an assignment of debt or a release depending in the Party. The other signatories to the Framework Agreement included CEP Locals 59N, 60N, 63, 88, 161; the International Brotherhood of Electrical Workers (hereinafter IBEW) Local 512; and Grand Falls Equity Inc. (hereafter referred to as " Grand Falls Equity ").

18. Based on the preamble in the Framework Agreement, Grand Falls Equity was established because

"Government has required as part of this program that there be a single entity ultimately responsible for the organization of the program of payments and for filing as a creditor in AbitibiBowater's Companies Creditors Arrangement Act (CCAA) proceedings or Bankruptcy and Insolvency Act (BIA) proceedings."

Grand Falls Equity was a company created and incorporated to carry out the tasks assigned to it pursuant to the Framework Agreement.

19. The Framework Agreement included sections:

- That prescribed which former employees would be entitled to some type of payment pursuant to the Framework Agreement;
- That stated the 5 conditions under which an individual would receive payment of equivalent to severance, but it was in exchange for the assignment of severance;
- Addressed how four of the applicable Collective agreements between AbitibiBowater and the respective Unions contained provisions regarding severance and in those it required the IBEW and CEP to execute and deliver to Grand Falls Equity an "assignment of each severance assignment agreement". Grand Falls Equity would then pay severance to Union members on behalf of the Unions;
- Addressing where one Collective agreement did not entitle its members to severance (the loggers) but under the Framework Agreement the CEP loggers were entitled to equivalent to severance as long as they provided a release; and provided evidence of their employment with AbitibiBowater;
- To provide Grand Falls Equity with "Operational Funds" and "Assignment Funds", Operational Funds were used to fund the administrative and operational activities in the Framework Agreement and Assignment Funds were provided to Grand Falls Equity to fund payments to individuals in exchange for the assignment of debt from AbitibiBowater;
- Requiring Grand Falls Equity to file as an unsecured creditor in the AbitibiBowater CCAA proceeding claims equal to the value of all obligations of AbitibiBowater for funds owed to former employees that have been assigned by former employees to Grand Falls Equity as per the Framework Agreement and money recovered through the CCAA process by Grand Falls Equity would be given to HMQ; and
- Requiring Grand Falls Equity to retain an accounting firm to assist CEP Locals and the IBEW in administering the Framework Agreement, the accounting firm was required to provide an array of services including: 1) provide facilities for individuals to sign agreements; 2) calculate amounts payable; 3) provide payments; 4) obtain assignments; and 5) report to Grand Falls Equity and

HMQ.

20. On March 31, 2010 HMQ and Grand Falls Equity entered into an Amending Agreement to amend portions of the Framework Agreement. Of Practical note is the following:

“2.4 Article 3.4 should be deleted and replaced with the following:

3.4 In addition to section 3.1, payment in exchange for the assignment of severance shall be made under this agreement to any individual who:

3.4.1. was an employee of AbitibiBowater Grand Falls-Windsor mill in operation on 4 December 2008;

3.4.2. would have been entitled to severance under section 3.1.2, or pursuant to Government's program for payment of severance to CEP Loggers under Section 6 below, but for the fact that the individual was on 14 December 2009:

(a) receiving long term disability benefits;

(b) receiving short term disability benefits; or

(c) receiving WHSCC benefits; and

3.4.3. can demonstrate to the satisfaction of government, which may include the requirement for a functional assessment, that the individual is fit to return to work on or before 28 March 2011, or for those employees receiving short term disability benefits if their coverage expires before 28 March 2011.”

Issue #1 Was HMQ a person acting on behalf of the Employer, AbitibiBowater pursuant to section 14(1) of the Act?

21. Both Parties agreed that HMQ was not the Employer herein, so the argument was whether HMQ was acting on behalf of the Employer, AbitibiBowater. I agree that HMQ was not the Employer herein and the issue is whether HMQ was **“a person acting on behalf of AbitibiBowater”**.

Summary of the Commission's Position

22. The Commission submitted that HMQ was “acting on behalf of” the Employer, AbitibiBowater. They claimed HMQ indicated and intended to pay earned severance to the workers, paying amounts AbitibiBowater was legally obligated to pay its employees under the severance obligation of the various collective agreements.

23. They also argued that the validity of the claims including the entitlement to severance and the amounts payable for severance were at the discretion of AbitibiBowater and HMQ followed the decision of AbitibiBowater on this, that AbitibiBowater acknowledged and understood that HMQ was paying out the severance they owed its former employees under the collective agreements, and therefore HMQ was acting for or instead of AbitibiBowater when it entered into arrangements to pay severance as per various collective agreements negotiated between the various Local Unions and AbitibiBowater.

Summary of HMQ's Position

24. HMQ submitted that this was done to help the people and communities adversely affected by the Mill closure. They argued that that Province and the Unions associated with the Grand Falls Mill created a Framework Agreement and an Amending Agreement as a mechanism for providing equivalent to severance for former employees associated with the Mill and the agreements incorporated the relevant clauses of the respective collective agreements regarding severance.

25. In return, a person receiving severance from Grand Falls Equity through funds provided by HMQ was required to assign the debt owed by AbitibiBowater for severance to Grand Falls Equity; and Grand Falls Equity was required to file claims against AbitibiBowater in the CCAA proceedings to recover this debt and repay HMQ. Later in the matter, HMQ instructed Grand Falls Equity not to file claims because of the impact that the claims could have on other litigation involving the Province and AbitibiBowater.

26. They also submitted that HMQ, the Unions and Grand Falls Equity relied upon information from AbitibiBowater to determine entitlement and quantum but AbitibiBowater did not have the authority to determine who received severance or how much.

27. They submitted that there was a distinction between those actively working when the Mill closed and those in receipt of LTD and WCB, because those in receipt of the latter would continue to receive the same after the Mill closure which is why they denied such claims unless said person

were fit to work within two years of the Mill Closure (which coincided with the recall rights as per the collective agreements.) They also submitted that those on LTD and WCB were claims not being acknowledged as entitled by AbitibiBowater which for HMQ created a problem in terms of said debt being assigned, and it being recovered if it was not acknowledged.

Decision

28. I have considered all the evidence , submissions and jurisprudence herein and find that the Complainants claims shall fail for reasons as outlined below.

A Person On behalf of

29. The guiding legislation is section 14(1),

“14. (1) An employer, or **a person acting on behalf of an employer**, shall not refuse to employ or to continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment on the basis of a prohibited ground of discrimination, or because of the conviction for an offence that is unrelated to the employment of the person.”

30. The Parties both agreed that HMQ was not the Employer herein and I agree with the same. AbitibiBowater was the Employer. Neither Party herein made any submissions as to whether or not HMQ was **a person** under this section of the legislation and both focussed on whether HMQ was acting on behalf of an Employer but were not able to provide any cases wherein HMQ was found to be acting on behalf of an Employer. My analysis herein starts with whether or not HMQ is a person pursuant to the Act and I find that it is not the case.

31. I do find that the Act can apply to HMQ and that HMQ can and has been found as an Employer however I believe the Act deliberately excludes HMQ as a person . The Act defines person under section 2(n) as follows:

“In this Act (n) "person", in addition to its meaning in the *Interpretation Act*, includes an employment agency, a trade union and an employers' organization”

32. HMQ is not an employment agency, a trade union nor an employer's organization therefore it shall only be a person if it is included in the definition pursuant to the aforementioned *Interpretation Act*. Under the *Interpretation Act*, RSNL1990 CHAPTER I-19, section 27(1)(t) states, "In an Act or regulation, the expression "person" includes a corporation and the heirs, executors, administrators or other legal representatives of a person."
33. I find that HMQ is not a corporation, nor is it an heir, executor, administrator or legal representative of a person. In light of the above I find HMQ is not a person and was not intended to be a person in relation to the Act and for this reason could not have been **a person acting on behalf of an Employer** and the claims should fail.
34. However, because the evidence and submissions were focused on HMQ acting "on behalf of", it is only fair I also address that claim. Therefore, even if HMQ was found to be a person under the Act (which I find it is not) I also find that HMQ was not **acting on behalf of** an Employer.

The Law

35. In the Supreme Court of Canada case of **Canadian National Railway Co. v. Canada** (Canadian Human Rights Commission), 1987 CanLii 109 (SCC), [1987] 1 S.C.R. 1114, at p. 1134, Dickson C.J., acknowledging the unique purpose of human rights legislation, held that,
- "the words of the Act must be given their plain meaning, but [that] it is equally important that the rights enunciated be given their full recognition and effect" and held that remedial statutes like the Act are to be given "such fair, large and liberal interpretation as will best ensure that their objects are attained".
36. Human Rights requires a remedial perspective and the Parties agreed that the Board must adopt a fairly large and liberal interpretation to ensure the objective and intent of the legislation is met. However, in doing so there is still a balance as the Supreme Court said in that the plain meaning still has to apply .
37. Our own Court of Appeal in **Newfoundland (Human Rights Commission) v Newfoundland (Health)** (1998) CanLii 18107 NLCA, at p 4 said that,

“A true purposive approach looks at the working of the statute itself, with a view to discerning and advancing the legislature’s intents. Our task is to breath life, and generously so, into the particular statutory provisions that are before us.”

38. The overall intent of the legislation is to ensure Human Rights are protected, not violated and if they are then there is a remedy available and recourse but it does not mean so liberal that anything will be captured, the liberal and broad interpretation is not infinite, there sill has to be the plain meaning and factual analysis. This means there has to be careful scrutiny of the particular facts and they must be assessed against the legislation, the wording of the same, the law on it, and the intent.

39. The section in particular that is the foundation for these claims is section 14 which is specifically entitled “Discrimination in Employment”. People depend on employment income to survive; the employer is the superior and the employee is then therefore by nature of the same vulnerable and that is why it is vitally important to have protection under Human Rights Legislation relating to discrimination in employment. The issue here is whether in offering to pay an amount equivalent to owed severance HMQ was acting on behalf of the Employer, AbitibiBowater.

40. In AA v UATSE Local 411, 20165 CanLii 65836 (ON LRB) at page 6 it stated,

“to act on behalf if an employer: ...means to take action at the request of, or at the insistence of, or pursuant to an undertaking or agreement with, or with the approval or authority of, an employer.”

41. Black’s Law Dictionary defines “on behalf of “ as

“In the name of, on the part of, as the agent or representative of, on account of, instead of (official agency).”

42. The Oxford English Dictionary defines “on behalf of “ as

“on the part of, in the name of, as the agent or representative of, on account of, or instead of”

43. Both Parties agreed that the definitions were accurate but disagreed to the outcome when applied to the facts.

44. In **R v Ontario Secondary School Teachers Federation** 2012 CanLii 80015 (ON LRB) paras 67-68 they quoted **Canadian Red Cross Society**, [1994] OLRB Rep. Jan. 34 at paras 30-32 where it said that,

“Because the issue of whether a person is "acting on behalf" of another is essentially factual, we think it would be a mistake to overanalyze it or set up some more elaborate test, as some of the parties urged. The plain meaning of the phrase suggests that to come within its ambit, at least part of the reasons for a party's activities must be to provide some benefit to another or at the behest of another....”

45. In that case, the Board refused to find that other service providers who provided services to home care facilities to replace the services of another struck service provider (the “Red Cross”) were acting on behalf of the Red Cross . It also found that the mere fact that one party may also benefit from the action of the other (in the sense that the Red Cross benefits that its otherwise struck services still being provided to its customers) is in and of itself not enough to make one acting on behalf of the other.

46. Submissions have been made that the word employer was broader and more inclusive under Human Rights legislation than other contexts and therefore “on behalf of the employer” must also be interpreted sufficiently broad to ensure that the legislative mandate of the protection of vulnerable individuals against discrimination is achieved. In cases where an entity was found to be an employer, even though at first glance one would not think so, it was still grounded on factual circumstances that had indicia of employer/ employee relationships. Even if looking at the situation herein broadly, the facts do not support the assertion that HMQ was acting on behalf of AbitibiBowater. I will give reasons and examples of the same based on the evidence tendered.

Viva Voce Evidence

Testimony of Donald Pardy

47. The Board heard from Mr. Donald Pardy, one of the Complainants herein. His evidence was not really helpful in ascertaining that HMQ was acting on behalf of the employer because his knowledge and recollection was limited to his own circumstance, other than he applied, attended some sessions, was told he would not qualify and received a lay off letter.

Testimony of Gary Healey

48. Mr. Gary Healey, National Representative for the CEP Union and intimately involved in the matter did provide evidence that satisfied the Board in determining the question at hand. He testified that at the time the relationship with HMQ and AbitibiBowater was divided, and there was zero cooperation, which makes sense considering AbitibiBowater were shutting down a Mill, and the Province had expropriated some of their assets and there were acrimonious matters ongoing.

49. He also stated from the Union perspective it was a surprise HMQ was going to step in and explained the devastating impact the closure of mill had to not only its employees but spin offs and the region.

50. His understanding of the plan was that the Union would be given autonomy over \$40,000, 000.000 dollars of Government money to find a way to distribute cash to those entitled to severance . He testified that he felt this was a big burden on him and his Union so then he went to Grant Thornton and engaged them to assist and then he retained Sheila Greene for legal advice on behalf of the Union. This was done at his instigation and before there was any sort of agreement in place, only the commitment from Government to give an amount and seek some sort of repayment. He said that he saw the Union role as the Guardian Sheppard of the \$40 million.

51. He also explained that what unfolded thereafter was organic, an evolution which resulted in a Framework Agreement. He testified that Ms. Greene did that at request of the Union as protection for Union. They were uncertain about decorum and methodology to disburse the funds, and because of the amount of money, Grand Falls Equity was the vehicle they chose. He

said that the Framework Agreement was decided by lawyers for the Province and the Union and they adopted terms from the collective agreements to the extent possible.

52. His testimony was clear that in order to be entitled under this fund it was paramount you were **severed, laid off and eligible for severance** and that from the Union point of view people who were on LTD would not be laid off until they reported back to work, were therefore not severed and not eligible for severance at that time. He said this was consistent with his understanding of the collective agreements in place and how they had been applied and a number of restructurings over the decades that resulted in layoffs and the Union always maintained that people on LTD or Short Term Disability were not laid off. He gave an example wherein one member, George McDonald was on Short Term Disability and got a general layoff notice from AbitibiBowater during the Mill Closure, it was grieved on the grounds that those on disability could not be laid off under the collective agreement and the Arbitrator agreed.
53. He also stated that the Grant Thornton offices were acting on behalf of Grand Falls Equity, that AbitibiBowater were not involved in the negotiation of the Framework Agreement, AbitibiBowater had no exposure to the process of screening applications and determining if someone is eligible. He said that the Union had its own records, but they were incomplete, so they asked AbitibiBowater to provide their employment records.
54. He also testified that the Union never considered Government the employer, never made any grievances against the Government based on violations of the collective agreement, never had any sense that the Government was acting on behalf of AbitibiBowater. He said that the Company never denied them severance, the Company was in CCCA proceedings and therefore payment of severance was stayed by the process.
55. He testified that this was a Government program and the Government had the right to administer it any way they saw fit and part of the template was to avoid a disaster in the economy.

Testimony of William Browne

56. The Board also heard from Mr. William Browne, Human Resources Manager AbitibiBowater Grand Falls- Windsor Mill which assisted in this matter also. He testified that relations between the senior executives of AbitibiBowater and the Williams Government, the Cabinet and Williams himself was very strained during that period which support the assertion that HMQ was not acting on behalf of AbitibiBowater.
57. He said that the Local Management at AbitibiBowater provided information to HMQ on who was entitled or what was due but there was no lobbying or request from AbitibiBowater about this. This came from HMQ; the Union was working closely with HMQ and they had Grand Falls Equity as a vehicle to do this.
58. He said that AbitibiBowater were involved because Head office earlier had looked at the severance file which he had prepared previously (before CCCA proceedings) and they had signed off on the amount that would have been paid if not for CCCA proceedings so HMQ contacted them and needed names, birth dates, social insurance numbers, wage information, hire dates etc.. It makes sense to the Board that HMQ would want what the employer had signed off on as owing because HMQ were having these debts assigned to Grand Falls Equity, who then were to seek to recover and repay HMQ so it was a sense of security in that it would be difficult for the employer to deny these debts as legitimate and owing if they had previously signed off on them.
59. His position was you were on LTD until 65 unless cleared for work before that, at which point you were entitled to the 2 year recall limitation and severance. He testified that while on LTD the employment relationship was not severed, the ability to return to a job was secured because as long as they were on LTD there was an employment relationship in existence, their status was as a disabled employee, they were disabled employees of the company, they retained that status at a continuing cost to the company, the relationship was not terminated, they could even grieve under the collective agreement, even though the mill was closed and their job position had been eliminated. He testified that his office did up amounts of severance for people on LTD in case they were able to return to work during the 2 year recall, and that whilst people were on Workers

Compensation Benefits, or LTD their severance still accrued and his office considered that in their calculations.

60. He testified that he dealt mainly with Mr. Weatherbie who was he saw as the main spokesperson for overseeing the program HMQ was setting up.

Testimony of Larry Weatherbie

61. The Board also heard from Mr. Larry Weatherbie, Director of Industry Adjustments with the Department of Innovation, Business and Rural Development (formerly Innovation, Trade and Rural Development). Mr. Weatherbie provided some valuable background information about how this program came about, why HMQ offered to pay the money and that context shows not only that HMQ were not acting on behalf of AbitibiBowater but more importantly HMQ was doing what governments do, assist their people when in need, provide services, programs, funding and assistance.

62. He testified that Industry Adjustments Program of which he was Director at the time of the Mill closure came about to respond to fish plant closures, there was a team from various departments, and they went to communities and offered services and programs and it now relates to any significant industry closure. They were part of the Stephenville mill closure and Grand Falls also. Their role was economic diversification, to help local businesses, for people negatively impacted provide financial assistance for them, they often worked with the Federal Government and ACOA.

63. He said in this case, HMQ decided to provide the compensation in exchange for the assignment of the debt of severance, but excluded other items owed by AbitibiBowater to employees such as vacation time, unpaid leave, paid leave. HMQ estimated \$38,000,000.00 and relied on the collective agreements they received from the Department of Labour to come up with those numbers.

64. He testified that AbitibiBowater were not involved in negotiations that led to the signing of the Framework Agreement and that HMQ entered into a loan with Grand Falls Equity as a vehicle and there was assignment of debt for those who could provide eligibility of severance, they would

assign the debt to Grand Falls Equity and Grand Falls Equity would go to court and seek compensation from AbitibiBowater under CCAA and pay that money back to HMQ.

65. People affected could go to then CCAA process themselves or come under their program and if you said you were owed and if the amount was validated and authentic you would get it through the HMQ program with an assignment of that debt. He testified that Grand Falls Equity had a loan with HMQ and therefore were taking instructions from HMQ on the seeking to recover under the CCAA process but HMQ because of the North American Free Trade Agreement challenge, abandoned recovery and recovery was not pursued.

66. In terms of AbitibiBowater, he testified that it was a matter of opinion from AbitibiBowater they were seeking not direction, they had information that HMQ did not have and was needed to validate claims so HMQ went and asked their opinion. He said that to validate specifically it went through Bill Browne at AbitibiBowater, they sent information to Mr. Browne for validation, asking if information was correct and accurate but AbitibiBowater had no authority, HMQ was looking for validation of entitlement and the amount. He said they also spoke to the Union around what to do with those on disability and also looked at past practice. They felt that if one was entitled to severance then one would get it, they needed to validate claims because there was a legal agreement to assign the debt and Grand Falls Equity were given a loan and would pursue the money and if the debt was not recognised by the Company then it could not be assigned.

67. They also went to AbitibiBowater for the history around medical claims and seeking validation, the history of a person's health around fit to return to work to validate the claims. He said those on LTD when they received notices from AbitibiBowater, it did not include notice of entitlement to severance because that was not acknowledged as being owed whereas those not on LTD did receive such acknowledgment.

68. He also explained in his testimony when asked that the reason HMQ were looking at paying severance as opposed to a relief fund or lump sum was because HMQ could identify the debt for each individual, it could be assigned as a debt, and go to court to seek to recover and if there was no assignment of debt HMQ could not find a way to recover.

Framework Agreement and Amending Agreement

69. The viva voce testimony helped explain how the program came about and the process that led to there being a Framework Agreement and Amending one, which supports my finding that HMQ were not acting on behalf of the Employer however the Agreements themselves also contain clauses which support my finding.
70. The actual preamble states that HMQ and the Unions had agreed to work together in a process which would involve HMQ providing funding to pay amounts equivalent to the severance owing in exchange for the undertakings to file the workers claims for severance and make payments under the programs noted above and to pay any amounts received from or arising out of AbitibiBowater CCAA or BIA proceedings to HMQ .
71. It is of note that AbitibiBowater was not part of the Agreements or part of the process and that HMQ's role was to provide funding (as governments do) equivalent to severance owing. It had been claimed the HMQ paid the severance. I think that is incorrect. What they paid is an equivalent, which shows they were not taking responsibility for severance, nor were they relieving the Employer of this obligation, or paying on behalf of the Employer and recovering from the Employer in an agreement with AbitibiBowater. They were not taking away any rights from the Union or its members to pursue this money. If they were acting on behalf of the Employer then an agreement with the Employer and HMQ would have been more appropriate, not an agreement to use legal action against the Employer.
72. In the Agreements, HMQ required a single entity be responsible for the administering the program of payments and for filing as a creditor in AbitibiBowater's CCAA or BIA proceedings, it was to be Grand Falls Equity and 100% of the shares of Grand Falls Equity were to be held by the Law Firm in trust for the CEP and IBEW Unions. Thereafter Grand Falls Equity was incorporated, and the Directors were all officers of CEP Locals.
73. The Framework Agreement stated that HMQ, the Grand Falls Equity vehicle and the accounting firm to be hired would collaborate in making the decision on how much severance would be paid and to whom.

74. The evidence was that verification was sought from AbitibiBowater, but the Agreements also confirmed that if the Employer did not recognize entitlement, but entitlement was reasonably expected then it would qualify. This shows that AbitibiBowater were not the decisionmakers on whether a person was paid through this program.

75. It also set out criteria that a person was entitled to severance who,

- was an employee of AbitibiBowater Grand Falls-Windsor mill operation on 4 December 2008;
- was entitled to severance pursuant to a collective agreement or an individual employment contract; and
- has "had confirmation of their entitlement to and amount of severance from AbitibiBowater, or who's entitlement to severance is an obligation that has been or reasonably expected would be recognized by AbitibiBowater, and in respect of which there is no ongoing or known dispute with AbitibiBowater.

76. These clauses support the position that HMQ was giving funds but wanted the ability to recover the same, and therefore the Employer acknowledging the severance would strengthen the ability to recover.

77. In the case of workers in receipt of LTD or WCB, in addition to the above noted requirements, they also had to provide evidence that they were medically fit to return to work on or before March 28, 2011. The rationale behind that was under the collective agreements in the past if fit to return to work, the relationship was then severed, and severance becomes due but until that time whilst on LTD or WCB the relationship is not severed so severance is not due. The 2 year window was following the recall rights of 2 years as per the collective agreements and how the matter had been handled with the Stephenville Mill closure.

78. It has been submitted that following terms of the collective agreement are also proof that HMQ was acting on behalf of the Employer. I do not agree. In this case it appears that the collective agreements were followed because that is what the Employer would rely on to ascertain owed severance and HMQ needed that acknowledged by AbitibiBowater but also the Unions were the shareholders and directors of Grand Falls Equity and to contravene their own collective

agreements would create more issues under the grievance procedure.

79. Other sections in the Agreements that support my finding that HMQ was not acting on behalf of AbitibiBowater include payments were in exchange for the assignment of severance, there had to be verifiable severance entitlement and HMQ reserved the right to direct and authorize Grand Falls Equity vehicle to make payments to former employees of AbitibiBowater affected by the closure of the mill in Grand Falls-Windsor and AbitibiBowater's CCAA's Process not otherwise qualifying under this Agreement.

80. There is also a section titled Labour Relations Issues (clause 11) which stated that

- Nothing in the Agreement created an employer/employee relationship between Government and any member of the CEP Locals or IBEW;
- Nothing in the Agreement created any successor rights, or any other collective bargaining rights under statute, common law or otherwise, on part of either union or any local thereof, against Government; and
- Nothing in the Agreement imposed upon Government directly or indirectly, or in any manner whatsoever, any responsibilities, liabilities, commitments or obligations of any kind whatsoever, accrued or accruing, whether based upon statute or common law, that arise from or are in any way connected with the former employment of their members by AbitibiBowater, including, without limitation, any obligation that would otherwise accrue to AbitibiBowater under contract, common law or statute as employer.

81. Although it is titled Labour Relation Issues, it is also clear that any claim by a member against HMQ was barred under the Agreement, showing that HMQ were not acting on behalf of any Employer because the Employer could not bar actions that would be in violation of their collective agreement nor could the Unions enter into Agreements (like they did with the Framework Agreement) that violated their own collective agreements.

82. There were also a number of forms attached that had to be executed by members, one had to apply for earned severance (it was not guaranteed) and authorize the Government of Canada or the Employer to release tax, payroll records and any other information in respect of employment

history to Grant Thornton and authorise Grant Thornton to provide payroll related records and any other information to the Government of Canada (sic) as required.

83. I believe that was an editing error in the form and should be provide information to the **Government of Newfoundland and Labrador**. The Federal Government have a program similar to what the HMQ did herein, under the Wage Earner Protection Program Act S.C. 2005, c. 47, s. 1 and the Board suspects the Federal Government forms may have been relied on for precedential value in drafting the Framework Agreement and forms.

84. The Agreements also included terms relating to Assignment of Severance, Acknowledgements that they have to verify the Amount Payable for assignment of Severance before execution of the Agreement by the assignees, that the amount identified as severance payable or calculated severance payable is the amount of severance acknowledged or would be acknowledged as payable by AbitibiBowater, but if this is less than the severance to which a party believes they are entitled they are not assigning their rights in any dispute, argument, grievance or other disagreement between themselves and AbitibiBowater about any additional severance payable.

85. The Agreements also included representations and warranties including not creating any successor right, or any other collective bargaining right under statute, common law or otherwise, on the part of the person individually, or any claim therefore, against the Government of the Province of Newfoundland and Labrador.

Press Releases, Written Letters and Memorandums

86. There was a large number of other documents tendered into evidence including Press Releases, letters and memorandums, I am not going to go through each of them individually herein, but a review of all also show support for my finding herein.

87. From the Press Releases it is clear that the severance scheme was created to assist not only the hundreds of workers associated with the Grand Falls-Windsor mill but also the entire Central region and HMQ made a commitment to enable the CEP and IBEW to provide the earned severance and other allowances impacted by AbitibiBowater creditor protection.

88. The Province created a Ministerial Task Force to respond to the Mill closure comprised of 7 ministers to provide direction and oversee along with support for diversification initiatives for the region, but also set up labour market adjustment services, career counselling, transition supports, job search skills, resume writing, skills assessment and training, funding for retraining and a focus on supporting regional properties that grow local economies.

89. The payment of severance was only a part of a larger plan, which again supports that this was HMQ governing as opposed to acting on behalf of an Employer.

90. In a letter dated December 4, 2008 from Brad Pelley, General Manager, Grand Falls Mill, AbitibiBowater, to some employees receiving long term disability at that time, entitled "*Notice of Permanent Closure - Mill & Botwood Stevedoring Operations*", he advised these employees that:

"AbitibiBowater will be permanently closing its Mill at Grand Falls Windsor on March 28, 2009 unless you are able to return to employment before March 28, 2009, your position, at the time you left for medical reasons, will be eliminated as of March 28, 2009."

91. There were submissions made that the parties were being eliminated/ terminated and severance was due. I find that all this letter does is inform the parties of the elimination of their position, not terminate or sever their relationship with the employer.

92. There was also a Notice pursuant to the *Labour Standards Act* in a letter dated February 12, 2009. The letter was signed by Bill Browne, Human Resources Manager of AbitibiBowater at the Grand Falls Mill. The letter was received by some employees receiving long term disability at the time. The notice was given in accordance with sections 52, and 55 of that Act. This letter stated in part that:

"Pursuant to the provision of Part X of the Labour Standards Act, 1977, Section 52 and 55 we hereby provide notice that the closure of the Grand Falls - Windsor mill will occur on March 28, 2009. **Our records show that that you are currently receiving Long Term Disability benefits. Should you recover sufficiently to return to work in any capacity, no work will be available from and after March**

28, 2009. Your layoff status will be effective March 28, 2009 for the purposes of the Collective agreement and you will continue to have recall rights to any position you are or become able to perform for the duration of those rights under your Collective agreement, but since this is a total shutdown, recall to employment is unlikely.

We recognize that your return to work is unknown due to medical reasons, but this notice is given to confirm that your former position and any modified duties position is among those being eliminated on March 28, 2009.”

93. The argument was made that as of March 28, 2009 the employees on LTD who received this letter were laid off. I appreciate how that interpretation may have come out of the letter but do not agree with that. You cannot just read the one sentence; it must be put into context. If you read the surrounding sentence, (which I have highlighted in bold) what it is saying is that currently you are on LTD but if you recover before March 28, 2009 no work will be available after March 28, 2009 and your layoff status will be effective as of that date as well as recall rights. Basically, telling anyone on LTD if fit to return before that, they will be laid off and have rights as per their collective agreement. The evidence of Mr. Healey and Mr. Browne also supports my conclusion for they said if someone returned to work before the Mill closure then at the time of Mill Closure that person would be deemed to have been laid off and entitled to severance.

94. In the Press Release of the Premier on May 19, 2009 it stated that the Province **would provide support to the unions enabling them to make payments** to workers for severance and allowance suspended as a result of AbitibiBowater creditor protections, with assignments and recovery to government.

95. In a Memorandum in or about August 2009 Stephanie Parsons, Senior Analyst, Tax Services of Grant Thornton LLP met with Mr. Browne to gather information regarding the workers at AbitibiBowater Grand Falls- Windsor who were receiving LTD but who had not been paid severance at that point in time. The purpose of the meeting was **“in the interest of gathering information to facilitate a decision”** on the payment of severance to these workers, this supports the other evidence that Mr. Browne was assisting to confirm/ validate but he nor

AbitibiBowater had any decision making authority of the program.

96. On November 1, 2010 the Government, through the Minister of Innovation, Trade and Rural Development wrote a letter to Ralph Bowers. Mr. Bowers had submitted his application for severance. The letter stated in part:

“As part of the validation process, Government made the decision to acquire AbitibiBowater's validation on each and every severance claim request. Based on information supplied by AbitibiBowater, you have been on Long Term Disability for about 13 years due to major orthopedic issues and these benefits would have been terminated on or about September 2009 coinciding with your normal retirement date.

When we attempted to validate your claim with AbitibiBowater, they questioned the credibility of your return-to-work (RTW) note from your specialist. They cannot understand how you could have been on LTD for over 13 years with major medical issues and now have been cleared for work with little to no detailed information other than a RTW note advising you are cleared to return to work as of June 22, 2010.”

97. On November 19, 2010 the Government, through the Minister of Innovation, Trade and Rural Development wrote a letter to another former employee of AbitibiBowater, Gordon Downton. The employee had submitted a return to work note. The Minister of Innovation, Trade and Rural Development wrote seeking further medical information for this employee. The letter stated in part:

“When we attempted to validate your claim with AbitibiBowater, they questioned the credibility of your return to work (RTW) note from your family doctor. They advise you would have been under the care of a specialist during this extensive absence from work. A detailed letter from your specialist outlining why the medical and physical reasons which prevented you from working for more than B years are no longer an issue needs to be provided.

Therefore, if Government is to proceed with a severance payment, more substantive information will be necessary. Should you provide sufficient detailed information from your attending specialist and your claim can be validated by AbitibiBowater, the Provincial Government will be in a position to provide a severance payment to you.”

98. This supports my findings and HMQ’s position that they were validating the claims, they sought relevant information from AbitibiBowater but were still the decision makers and were not acting on behalf of AbitibiBowater and invited the parties (who are Claimants herein) to submit further medical information to them.

99. Based on the examples of evidence given above, and the case law and definitions referenced earlier in my decision it is my findings that HMQ was not

- taking action at the request of, or
- at the insistence of, or
- pursuant to an undertaking or agreement with, or
- with the approval or authority of, or
- in the name of, or
- on the part of, or
- as the agent or representative of, or
- on account of, or
- instead of (official agency), or
- to provide some benefit to, or
- at the behest of

AbitibiBowater and therefore the claims shall fail.

100. In rendering this decision, I also considered all the jurisprudence provided and did some of my own research. None of the parties were able to find a decision akin to the one herein. I would make some comment on why some of the decisions referenced are not applicable to this matter. Both parties recognized and agreed that most cases were in relation to Labour Relations issues and not as relevant or helpful herein as well as factual differences.

101. The Supreme Court of Canada decision of **McCormick v. Fasken Martineau DuMoulin LLP**, [2014] 2 SCA 108 and the Federal Court of Appeal decision of **Rosin v. Canada** (1990), 131 N.R. 295; 16 C.H.R.R. D/441 were both not truly relevant for they centred around the findings of “employment” which was not an issue herein.

102. In **Newfoundland (Minister of Health and Community Services) v. Tulk** 2002 CanLii 53989 (Tab B) Thompson J. affirmed a decision of the Board of Inquiry. The Board found that the Ministry was an employer “... because it directly participated in the formation and conduct of the employment relationship, it supported and funded the relationship and it could terminate that relationship” and I agree that HMQ may be an Employer in certain circumstances. However, in these claims the issue was whether HMQ was acting on behalf of an Employer, not whether HMQ was an Employer so it was not factually relevant.

103. Although not bound by a decision of this Board of Inquiry, more recently in 2017 it was presented with the “acting on behalf of” issue in **Leo Howe v Surehire**. Surehire was contracted to perform fitness testing for various companies, the Complainant applied for jobs with companies, was sent for drug, alcohol and medical testing which was conducted by Surehire. Reports from Surehire resulted in him being denied employment, he claimed discrimination by Surehire acting on behalf of the potential Employer. Testing was designed by Surehire, the Employer selected testing they wanted done, measure performance against standard test Reference was also made to **Prior v Newfoundland (Department of Health)** 1995, 25 C.H.R.R. D/268 (NL NF Inq) paragraphs 85 and 86

“The adjudicator is satisfied that the language of section 9 of the code contemplates an agency relationship wherein an employer alleged some of his powers regarding terms and conditions of employment to the agency who exercised them on his behalf...”

The Board found that Surehire was performing a service for the Employer and the claim failed. The matter was so factually different that it was of small assistance.

104. There were also submissions that Human Rights Legislation superseded both legislation and contractual language to the contrary, per **Insurance Corporation of British Columbia v.**

Heerspink, 1982 CanLII 27 (SCC), [1982] 2 SCR 145 and agreements cannot contract out of Human Rights Legislation NAPE v Newfoundland (Green Bay Health Care Centre) 1996 CanLii 190 (SCC), I agree with these legal principles however find that it not the issue herein. HMQ was not acting on behalf of the Employer based on the facts herein, therefore there is no way that the Agreements made and program offered were trying to opt out of Human Rights Legislation and the protections therein, that argument is only relevant if HMQ was found to have been a person acting on behalf of an Employer.

105. There is no need for the Board to consider Issues #3 and #4 because the claims have failed in that HMQ was not acting on behalf of an Employer. Furthermore, the Board received an application seeking to reopen evidence from HMQ relating to the collective agreements and heard argument from both parties on this, my decision was reserved on that. In light of my findings above, it is not necessary to adjudicate on that matter.

106. I would note for future reference that the Board was not provided with all Investigative Reports for the Complainants herein, and also note some documents provided on behalf of the Complainants were undated and/or unsigned. Had the liability issue claims succeeded for the Claimants then there would have been concerns for the Board in ascertaining whether the same were brought within the limitation periods.

**KERI-LYNN POWER
ADJUDICATOR
BOARD OF INQUIRY**