



**ALRB Cite:** PPF Local 488 v. Fish Int'l Canada  
[1985] Alta. L.R.B. 85-073

---

**UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION 488, Applicant and VIKON TECHNICAL SERVICES, LTD., CALGARY, ALBERTA, Respondent and WARCON CONSTRUCTION LIMITED, CALGARY, ALBERTA, Respondent and FISH INTERNATIONAL LTD., CALGARY, ALBERTA, Respondent and FISH INTERNATIONAL CANADA LIMITED, CALGARY, ALBERTA, Respondent and ATTORNEY GENERAL OF ALBERTA, EDMONTON, ALBERTA, Respondent and DOME PETROLEUM LIMITED, CALGARY, ALBERTA, Respondent. Board Files: L.R. 174-F-11, 174-V-6, 174-W-19. December 20, 1985.**

*A. Sims, Chairman, A. MacDonald and W. Flookes, Members*

For the Applicant: J.R. Scott (Counsel), Leanne Chahley (Co-Counsel), B. Shaughnessy (Business Agent)

For the Respondents: D.R. Laird (Counsel)

For Vikon Tech. Serv.: P. Ponting (Counsel)

For Attorney General: Dave Kinlock (Counsel), Mr. Bell (Rep. Apprenticeship Branch)

For Dome Petroleum: Doug Gander (Counsel)

### **INTERIM DECISION OF THE BOARD**

**Andrew C.L. Sims:** This interim decision covers some preliminary points raised in a series of applications that have been pending before the Board for a long time. The applications consist of a s.133 application to declare certain companies to be related employers, along with an application for certification in relation to one of those companies and a series of unfair labour practice complaints by certain former employees of the company.

Counsel for the Applicant has asked throughout that the Board deal with s.133 first, and deal with the remaining certification application and unfair labour practice complaints only once the s.133 is disposed of. Hitherto the Board has acquiesced, although in hindsight this may not have been wise. Ever since the s.133 application was first filed the Employer's counsel has objected to it on the basis that there are

insufficient particular: of the allegations being made to show that we have a bona fide application before us.

The matters to be decided by us now are:

1. Do we have sufficient particulars of a s.133 application to justify proceeding, or should we dismiss the application for want of those particulars?
2. Should we issue a notice to produce documents to an officer of Dome Petroleum Limited to require them to produce certain contractual documents alleged to be relevant to the s.133 application?
3. Do we have authority under s.13 of the Act to issue a notice to attend to the Executive Director of Apprenticeship and Trade Certification, an employee of the Crown, to give evidence in relation to the certification application?

### **The Need for Particulars**

Before turning to the particulars given in this case it is useful to make some general observations on the need for particulars in applications before this Board. When a party commences an application or complaint before us they must give particulars of what they are applying for, or why they are complaining. What this means is that in their initial correspondence they should set out in plain English a set of allegations of fact which, if accepted as true, would establish that the section of the Act in question may apply, or have been violated. They are not required to prove their allegations in the initial application, they must just make them. It is not enough to recite the section in question and then say some other person has violated it. The Board, when reading a complaint, should get a clear understanding of when, how, and by whom, the Act was violated. When receiving an application the Board should get a clear understanding of how the facts alleged justify the use of the section of the Act referred to, and justify the granting of the order or remedy sought.

This requirement for particulars is not a request for a “legalistic” approach. A layman, reading a complaint or application should be able to get a clear understanding of what the matter is about and why the Board is being asked to use its powers. Most sections in the Labour Relations Act are not complex. The particulars should make it clear why the facts referred to make the section or sections of the Act applicable. This is not an onerous task. Applications that lack these basic particulars will not be accepted initially, and will not be processed further.

We insist on particulars in order to ensure fairness to all parties. We have broad powers given to us by the Legislature. The exercise of these powers may cause major inconvenience to the party complained against. Answers must be given, officer's investigations cooperated with, records that would otherwise be

confidential disclosed, hearings attended, and lawyers sometimes retained. We will only enter into or continue this process where there is an allegation that, if true, would lead us to believe that the legislation might apply or have been violated. If an applicant cannot even allege facts that would, if proven, result in a Board order or remedy, then there is no justification for the process being started.

The other aspect of fairness, and the other major reason for requiring particulars, is that the parties on the other side of an application or complaint are entitled to know, in general terms, what is alleged against them. This is so they can reply to the complaint or application clearly, and so that they can prepare their defence or reply knowing what it is they have to defend or reply to. We are going to expect the same degree of precision in replies as we are in complaints. Again, we expect the parties concerned to set out their defences or replies in English rather than that obnoxious form of legalism known as “boilerplate”; designed to raise every defence known to mankind and yet telling the Board and the applicant or complainant absolutely nothing about the real issues in dispute.

We require particulars, in part, to speed up the processing of cases before the Board. This object would be frustrated if the requirement for particulars was seen as an invitation to launch preliminary objections about the adequacy of each application. The initial assessment of the adequacy of any given application will more frequently be a matter of administrative review by Board staff than of adversarial jousting by the parties. Where a party legitimately requires more particulars from the other side in order to prepare their case, and this cannot be accomplished by informal discussion either directly or with the help of a Board officer, then the Board will hear that question and make a ruling. However, where there is only a dispute about whether the Act does or does not apply, as a matter of laws to the matters alleged, then the Board will customarily not hold a preliminary hearing, and will hear the argument in the ordinary way at the formal hearing.

So far the Board has not adopted strict rules of procedure nor has it generally required the use of forms. Instead it has preferred the flexibility allowed by accepting applications through ordinary correspondence. We hope to continue this practice because it best suits the needs of those who appear before us, consisting as they do of lawyers and non-lawyers; experienced union and employer representatives; and ordinary employees with little or no experience before the Board. Wherever we think it helpful we have issued Informational Bulletins to assist the parties in setting out those things the Board requires in dealing with specific sections of the Act. These, combined with the availability of Board staff for informational purposes, make our requirements readily available to any person in doubt as to how to properly bring an application or complaint before us, or to reply to one brought against them.

There is a further reason for requiring particulars to be clearly given by both applicants and respondents. The inevitable result if they are not given is an adjournment. If one party is taken by surprise by the other's raising a matter not alleged previously, and not reasonably to be expected as part of the case, this will almost invariably lead to a request for an adjournment.

This is frustrating, expensive and unnecessary for all parties and for the Board.

Our requirements are not that different from those of other Boards. Sack and Mitchell, in their text *Ontario Labour Relations Board Practice*, set out the Ontario Board's practice at p.39.

“1.4540 Adequacy of particulars. In determining whether particulars are adequate, the Board does not hold the parties to the strict standard laid down by the courts in the drafting of pleadings, but looks at the language of the particulars to see whether they contain in substance the material facts which constitute the essential ingredients of the alleged acts. Thus, the Board considers such matters as: (1) whether the allegations substantially identify and describe the offences alleged and indicate the acts or omissions and the time, place and names of the persons involved; (2) the knowledge or availability of knowledge possessed by the parties of the circumstances and details of the alleged violations; (3) whether the language of the allegations and the absence of certain particulars are likely to mislead, confuse or cause real prejudice to the opposite party in the preparation of its defence; (4) whether additional particulars sought or demanded are merely descriptive of the evidence by which they are to be proved rather than of the acts or omissions and the time, place and names of the persons involved; (5) the nature and circumstances of the violations alleged; (6) whether particulars demanded are likely to be required by the party demanding them for the bona fide purpose of preparing his defence or solely as a technical matter for the purpose of harassing and embarrassing the applicant and creating delay in the disposition of the application.”

We believe this quotation aptly describes the situation before our Board in most respects.

Similarly, arbitrators have arrived at much the same position, at least in respect to the giving of particulars to allow a full and fair defence. See, for example, the comments of Chairman Lucas in *Re International Brotherhood of Electrical Workers Local 424 and Devonian Electrical Services Ltd.* (1971) 23 L.A.C. 358 at 362.

### **The Adequacy of Particulars in this Case**

There has been an ongoing dispute about the adequacy of particulars in this case. The matter came to a head at an earlier hearing when the Board issued the written decision of October 26, 1984 holding that the Applicant had not given sufficient particulars. The ruling was clear and direct. At page 14 the Board said:

“Mr. Laird has taken the position that the Board should not involve themselves in an investigation where the application itself is vague and lacks particulars. He also submits that his clients have no ability to answer the allegations without particulars as to the claims made by the Applicant. We agree. The Board will not proceed with any further

investigation into this matter unless and until the Applicant clarifies what it is they are alleging with respect to Fish International Ltd. and Fish International Canada Ltd. as well as providing full particulars regarding their claims. The Board is prepared to issue a declaration when, in our opinion, the conditions in Section 133 have been met but it is incumbent upon the Applicant to convince the Board the conditions have been met. The onus is on the Applicant and no action by the Board is required nor will it be taken until at least full particulars have been provided.”

Earlier in that decision the Board set out in detail the original application and its inadequacies. There is no need to repeat that material here. Perhaps ill advisedly, since that time the Board has made a number of efforts to perfect this application and get the matter on for a hearing on the merits. What follows is a summary of these matters since the October, 1984 decision.

On November 8, 1984 the Applicant sent the Board a letter purportedly giving the particulars requested. It reads in part:

- “1. Insofar as the Union is able to ascertain Fish International Canada Limited or Fish International Limited have been caught within the terms of Registration Order 1-72 granted by your Board in 1972. Certainly Fish International Canada Limited and/or Fish International Limited have been included in Schedule A or Schedule B to the Collective Agreement since at least 1972. In this regard we do draw to your attention the fact that the two names appear interchangeable, and to the knowledge of the Union they have been treated as the same in each particular instance. In 1977, Fish International Canada Limited was shown in the terms of the Collective Agreement and, in fact, made remittances to the Union in that same year.
2. The nature of the collective bargaining relationship between either Fish International Limited or Fish International Canada Limited with Local 488 is obviously covered within the terms of the Collective Agreement entered into previously the M.C.A. and now by C.L.R.A. as affecting those employers in the trade jurisdiction.
3. The nature of the breach alleged as against the employer or employers as the case may be is that in their actions they have attempted to avoid their obligations under the terms of the Labour Relations Act. It is quite definitely recognized that if there is any alleged breaches of collective agreement that the Union must be brought on before an arbitrator the same to be determined by that individual or that Board as the case may be.

It is, however, the Board's responsibility to determine if there has been an action contrary to Section 133 of the Labour Relations Act whereby an employer or employers bound by the terms of a collective agreement have attempted to avoid their obligations under the terms of the Labour Relations Act by, in fact, carrying on their trade and calling via non-union corporate structures such as Warcon or Vikon.

We trust that these are the particulars which you required although I must confess that from the decision of the Board it is very unclear as to whether the Board is seeking particulars as opposed to allegations. I do believe there are definite distinctions and certainly this union has supplied all of the information requested by Mr. Laird, that being the allegations regarding the collective bargaining relationship. Your Board of course will recall that we do not have to in an application prove our case we must merely make the application with its allegations and thereafter the Board during its investigation will seek out certain facts to support or destroy those allegations as the case may be.”

On November 21, 1984 counsel for Fish International Canada Limited replied to this letter raising a series of objections to this letter's lack of further particulars. Counsel for the Respondent set out in detail where he felt the deficiencies lay, and as a result of this letter and the Board's decision, it cannot be said that the Applicant was unaware of either what the Board ordered, or what Counsel for the Employer sought.

On November 19, 1984 notwithstanding the Board's decision, an officer's report was sent out detailing certain aspects of the corporate control of the various corporate entities. It read, in part:

“With a lack of information supplied by the parties, the opinion of the officer based on the information presented in this report, is that:

- Fish International Ltd. does not exist.
- Fish International Canada Ltd. does not have common control or direction over Vikon or Warcon.
- Vikon Technical Services Ltd. does not have common control or direction over Fish International Canada Ltd. or Warcon.
- Warcon Construction Ltd. does not have common control or direction over Fish International Canada Ltd. or Vikon.

The officer cannot form an opinion concerning the Section 8 application due to the lack of information supplied.

It is recommended that these matters proceed to a Board Hearing to deal with Mr. Laird's and Mr. Scott's concerns outlined in their letters dated November 12, 1984 as well as objections to this report filed before the date of the hearing."

The Board then attempted to set the matter down for hearing on January 17, 1985. Counsel for the Applicant advised on November 29, 1984, that "I am already committed to attendance proceedings in another matter on the 17th and 18th days of January, 1985 and will be unavailable for hearings on those dates". It should be noted as well that at about this same time the Applicant Union was attempting to get a related matter before an arbitrator. Counsel for the Employer advised on December 4, 1985, that it would no longer consent to further adjournments of the Board matters.

On November 29, 1984, Counsel for the Union wrote a letter to the Board which said in part:

"We are in the process of and have been in the process of obtaining those particulars previously suggested and we will attempt to have them to you prior to December 7, 1984. However, in view of the fact that you will probably set the matter for January 17, 1985, (contrary to what I believe has been a previous decision of your Board) we will certainly have them prior to that time."

On January 10, 1985, a conference call was held to adjourn the January 17 hearing to February 27 and 28, due to delays in the court application by the Applicant in relation to the arbitration matter. Apparently there was an understanding at that time that particulars on all applications would be supplied by January 29, 1985; and in a letter of January 17 Counsel for the Union confirmed this by saying:

"Contents of your officer's report and the correspondence of Messrs. Ponting and Laird have been brought to the attention of our client for their comment. Upon receipt of any particulars provided we shall provide those to your Board and to the parties."

The February 27 and 28 dates were adjourned at the Applicant's request (but with apparent consent) because the court application on the arbitration matter was still pending. The matter was not rescheduled. What followed was a series of requests, by Counsel for the Applicant, to issue notices to attend (including the ones in dispute here), and discussions about the propriety of so doing given the alleged continuing lack of particulars.

On August 9, 1985, Vice-Chairman Sims wrote to the Applicant in the following terms:

“I have reviewed the substantial correspondence on each of the three Board files. You have sought both a more extensive Board investigation and the exercise of the Board's powers under s.13, and I will address those specific issues below; however, behind both the employers objections and what you perceive as the Board's reluctance to proceed is a more central question and that is whether you have, on behalf of your client, provided sufficient particulars to comply with the Board's decision of October 26, 1984. The direction of Vice-Chairman Canning in this decision is extremely clear. In particular he said at page 14

[The letter then recites the passage quoted above and continues:]

It is true that, notwithstanding this directive, certain steps have been allowed. An officer's report, albeit brief, was compiled, and certain informal steps were taken by the Chairman and officers of the Board to meet your often voiced concerns over the Dome contract and the Manpower Development Act qualification of certain employees. Despite these efforts at accommodation the basic directive in the Canning award still stands.

I have reviewed all three files in detail, including your letter of November 8, 1984 and can find nothing provided by you or your client that would constitute particulars of a s.133 application as commonly understood by practitioners before this Board. ...lest there be any misunderstanding the Board's requirements in this type of application are as follows:

The applicant in its letter must set out allegations of fact, which, if proved, may result in a declaration being granted. The applicant is not obliged to prove its case in the letter of application, but it must set out sufficient particulars to indicate that there is a bona fide basis for an application being made, and to put the respondent on notice of the matters in issue. Such particulars should include:

1. The name, address, telephone number and contact person of the applicant trade union.
2. The names, and where possible the address, etc. of all the corporations, partnerships or persons involved in the application.
3. Particulars of the relationship that is alleged, to exist between the trade union and one or more of the corporations, partnerships or persons involved in the application including details of any bargaining relationships through certification or of any collective agreements.

4. Particulars of the activities, business undertakings or other activities being carried out, and the involvement of each of the corporations, partnerships or persons in those activities etc. These particulars should as far as possible identify the specific projects engaged in and the period of time when such activities etc. were carried out. This may include particulars of equipment use and ownership, payroll arrangements, direction of employees, job locations, etc.
5. Particulars of the facts that support the allegation of common control or direction, including where appropriate corporate records from public registries.
6. Any special reason why it is important for labour relations purposes and the administration of the Act that a declaration should be granted.
7. Any other particulars which are relevant to and support the application and which should, in fairness, be disclosed to a respondent in advance of any hearing which may be held.

In order to ensure that this matter progresses from here in an orderly fashion the Board directs that the following procedure be followed.

In the event no particulars, or insufficient particulars, are received by Friday, August 23, 1985, the Board will dismiss the application pursuant to s.133 and the related s.8 application and will schedule the certification application and unfair labour practices for hearing forthwith.

In the event the applicants provide proper particulars, the Board will assess whether any further officer's report is warranted, and will set a hearing date forthwith to hear and decide the following matters:

- (a) Any preliminary objections from any party
- (b) Any application pursuant to s.13
- (c) The hearing date for all outstanding applications.

Notice of this hearing will be given to all effected parties including Dome Petroleum and the Executive Director of Apprentices Certification insofar as they are affected by the notices to attend.”

Counsel for the Union then replied with a letter setting out certain facts and particulars, which are discussed below. Counsel for the Employer again maintained that the particulars were insufficient and the Board as a result set the matter down for hearing on November 7, to deal with preliminary matters, and November 27 and 28 to deal with the merits of the applications.

At the hearing, Counsel for the Union took the position that by setting the matter down for argument the Board had already implicitly ruled that sufficient particulars had been given. The Board had not, it merely gave the parties an opportunity to be heard on the issue.

We must decide now whether we have sufficient particulars within the parameters set out above. The Canning Board has already ruled on the sufficiency of particulars as at October, 1984. We are not inclined to reconsider that decision both because it accords with this panel's thinking, and because it was not challenged at the time.

The question is whether the Applicant has, since that time, provided sufficient extra particulars to justify proceeding. Some information was finally elicited at the hearing, however, we have approached the question on the basis of the materials filed prior to the hearing. To do otherwise would be to go back on the specific direction contained in the Board's letter of August 9, 1985, which would be unfair in light of the frequent opportunities given to the Applicant both in the Canning decision and thereafter.

The items appropriate as particulars of an application of this nature are set out in the Board's letter of August 9 quoted above. They are virtually identical to those set out in the Board's Informational Bulletin No. 19. Items 1 and 2 have been met.

Item 3 requests “Particulars of the relationship that is alleged to exist between the trade union and one or more of the corporations, partnerships or persons involved in the application including details of any bargaining relationships through certification or of any collective agreements” The Applicant alleges that Fish International Canada Ltd. and Fish International Ltd. are one and the same entity. This we understand. In addition, it alleges, in its letter of August 28, 1985:

“3. Collective Agreement between Local Union 488 and following by virtue of Registration Certificate 1-72 as amended.

DATE	COMPANY	WHERE COMPANY NOTED IN COLLECTIVE AGREEMENT
1975-1977	Fish International Canada Ltd.	Appendix B
1977-1978	Fish International Canada Ltd.	Appendix B
1978-1980	Fish International Canada Ltd.	Appendix B
1980-1982	Fish International Ltd.	Appendix A

1982-1984      Fish International Ltd.      Appendix A.”

Later in the letter under item 6 it is alleged that a letter from the C.L.R.a. to the union enclosed a list of employers “who to their knowledge were contained within registration certificate 1-72”.

We know that certificate 1-72 is a Registration Certificate held by Construction Labour Relations - an Alberta Association Mechanical (Edmonton) Trade Division. We extrapolate from the Applicant's information that they are alleging that Fish is bound by that registration certificate. They gave evidence to support the inference. However, they never say how Fish is alleged to be bound by this registration. It can only arise in one of the three ways set out in s.54(1) of the Act. The employer must be certified or have agreed to be bound through voluntary recognition, or must have agreed to comply with any of the terms of a registration agreement under s. 54(1)(b). The Board decision of October 1984 at p.11 raised this question directly saying:

“no where in the application did Mr. Scott indicate by what means Fish International Ltd. is bound to the agreement. It is by certification or voluntary recognition and if by voluntary recognition, what form is the recognition?”

This question was posed again by Counsel for the employer as late as October 25, 1985. No reply has ever been given. Nothing could be simpler than to allege that “Fish International Canada Ltd. was certified on such a date” or that “Fish International Canada Ltd. entered into an agreement with the union to recognize it voluntary (giving an approximate date)” or some other such allegation. Despite repeated suggestions no such allegation has been made. The result is that the Board and the respondent are still, after 18 months, in the dark about how Fish is alleged to be caught by Registration. If there are no bargaining rights between the Union and Fish (whatever its correct name) there is no purpose to be served by declaring them to be a common employer with either Warcon or Vikon, at least on the basis of the allegations presently before us.

Item 4 is similarly deficient. It requires “particulars of the activities, business undertaking or other activities being carried out and the involvement of each of the corporations, partnerships or persons in those activities”. In its reply of August 28, 1985 the Applicant states:

“4. West Pembina Construction Project

Particulars insofar as they are available to the Union on this matter are itemized on our correspondence of previous date. As noted, to the Union there is no knowledge regarding equipment:, payroll, direction of employees of job locations other than as previously mentioned. It should be noted that there is a matter of some obvious interest to the writer and to the Board and that is the quickness in which the novation agreement

was entered into on the 3rd day of May, A.D. 1984, some 10 days after the application was brought to the attention of the affected parties.”

The Board asked for clarification of the reference to “correspondence of previous date”. The reply was as follows:

“Further to your correspondence of the 9th of September, 1985, and our subsequent telephone conversation, I wish to advise that the correspondence previously referred to is the initiating complaint in these proceedings, together with the subsequent correspondence from our office to your Board in response to previous requests for particulars and the decision of Mr. Canning.

In addition we wish to advise that insofar as we are aware Fish is the contracting party requesting either Vikon or Warcon, as the case may be, to provide employees' equipment and material at the West Pembina construction project. Particularly the contract between the companies or among the companies, as the case may be, will detail the requirements of each of the parties thereto. We have no knowledge of ownership of equipment nor payroll arrangements at this time other than to advise that certainly members of Local 488 purported to be under the control and direction Warcon.”

These sparse replies do little to fill in the particulars felt: by the Canning panel to lacking in October of 1984.

At the recent hearing it became apparent that the Applicant was in reality alleging the following. Dome Petroleum contracted with Fish International Canada Ltd. to build a gas plant called the West Pembina Plant. Fish International Canada Ltd., in order to avoid its contractual obligations, and to avoid the union's efforts toward certification, assigned or transferred the work in question to either Vikon Technical Services Ltd. or to Warcon Construction Ltd. or both, who then completed the project by using supervision and possibly equipment from Fish, and by hiring a non-union workforce through Warcon to do the work.

Implicitly, although regrettably not directly, the Applicant seems to be saying that Fish set up Warcon or Vikon to carry out, in a non-union environment the same industrial scale mechanical contracting work that Fish itself carried out through the Dome contract and elsewhere.

On the fifth point, relating to the issue of common control and direction the Applicant has given us a great deal of additional information. It is possible to glean from what is in essence a mass of evidence, the particulars of the allegation it is produced to support. However, what is absent is a simple, straightforward allegation as to who, or which corporate entity, is said to exercise control over or through which of the other named corporations.

Having reviewed the large body of material in this matter to date, and having heard counsels argument on the point, we believe there has been insufficient additional particulars to meet the concerns raised in the Canning decision. Not only ample, but excessive, opportunity has been given to the Applicants to remedy this deficiency, and yet until our last hearing, when certain oral information was finally given, full and sufficient particulars were not, in our view provided. To proceed now would be nothing more than a reversal of the Canning decision. This matter must be brought to a conclusion and in the absence of sufficient particulars it must be by our dismissing the s.133 application which we now do.

We note two reservations in taking this step. We are not thereby accepting all the Respondent's arguments. The particulars that would have been sufficient may well have been less than those argued for by Counsel for Fish, but even that lesser requirement was not met. Secondly, the Board continues to have the ability under s.133 to make a ruling on its own motion where appropriate circumstances exist. Nothing in this decision is meant to restrict our option to exercise that jurisdiction in this or any other case should we deem it appropriate.

#### **Notice to Attend to Dome Petroleum**

In light of our ruling on s.133 we do not need to decide the matter further, since the purpose of the notice was solely to support that application.

#### **Notices to Attend to the Crown**

The Union has asked the Board to issue a notice to attend to the Executive Director of Apprenticeship and Trade Certification (the "Director") appointed under the provisions of the Manpower Development Act, R.S.A. 1980 c. M-3 as amended. The Director, represented by Counsel for the Attorney-General, objects to this on the basis that the Labour Relations Act does not bind the Crown.

We are satisfied that the Director's evidence may be relevant to our deliberations. We have an application for certification before us for a unit of employees consisting of those working in the pipefitting trade. The Union, in essence, is saying that certain of the persons included in the officer's report as being within the unit were not performing the work of, or were not qualified to do the work of, certified tradesmen within the scope of that trade. The Director keeps a register of those who are qualified or certified in the trade, and his evidence may well, as a result, assist the applicant union in proving its case.

The Director does not appear to have, and in any event does not claim, any statutory immunity or protection from testifying under the Manpower Development Act. Similarly, this is not a case where the Crown is claiming any privilege pursuant to s.35 of the Alberta Evidence Act.

The Director's positions can be stated as follows. The Board's power to issue a notice to attend arises solely from s.13 of the Labour Relations Act. The Interpretation Act provides:

“14 No enactment is binding on Her Majesty or affects Her Majesty on Her Majesty's rights or prerogatives in any manner, unless the enactment expressly states that it binds Her Majesty.”

The Director is an officer or agent of the Crown, and the relevance of his evidence (which is not disputed) lies only in his official duties as keeper of the records required by the Manpower Development Act. The only way we can compel this agent of the Crown to testify is by issuing a notice under s.13 and it is argued that since the Act does not bind the Crown, this cannot be done.

We accept that the Director is an officer of the Crown. He appears to meet the definition set out in the leading texts referred below, and certainly within H.J. Laski's off quoted definition:

“Crown in fact means government, and government means those innumerable officials who collective our taxes and grant us patents and inspect our drains. They are human beings with the money-bags of the State behind them.”

We disagree with the view that we cannot issue a notice under s.13 to a Crown officer or employee.

Firstly, the rule that legislation does not bind the Crown, as set out in Alberta in s.14 of the Interpretation Act, is far less absolute than Counsel suggests.

The *C.E.D. Western* (11 C.E.D. West. 3rd 42-64) expresses the rule that the Crown is not bound by legislation in the following way:

“59 The common law rule is expressed in a number of ways. It is said that the Crown is not “bound” is “not included”, is “exempt from the operation of the Act”, is not within the operation of the statute”, and is “not affected”. The most appropriate general expression of the common law appears to be that the Crown is not “adversely affected” by a statute that does not expressly or by necessary intendment apply to it, i.e., the Crown's existing legal position remains as if the statute had not been enacted. The word “adversely” takes into account certain subsidiary rules, e.g., that the Crown may take advantage of a statute although the statute does not otherwise affect it.”

Colin H.H. McNairn, in his text *Governmental and Intergovernmental Immunity in Australia and Canada*, devotes an entire Chapter to the issue. At page 8 he expresses the limited nature of the rule in the following way:

“Statutes, or indeed a single statute, may have differing impacts upon the Crown. But governmental immunity is only enjoyed from statutory provisions as they operate to the prejudice of the Crown. If the effect of a statute is neutral or beneficial, in terms of the position of the Crown, it will include the Crown without express reference or a necessary implication to this effect in accordance with its general tenor.”

Similar views are expressed in *Maxwell on the Interpretation of Statutes*, 12th Edition at p.161 et. seq. and Hogg, *Liability of the Crown* at p.173 et. seq. Is section 13 of the *Labour Relations Act* one that adversely affects the Crown or, operates to prejudice it in any way? In our view, it is not. The obligation, as justice requires it, to show up and give evidence before a tribunal established for valid reasons by legislation can hardly be seen as a burden; it may be a minor inconvenience but it is not something that unduly interferes with or prejudices the Crown in any way. The Crown agent called to testify comes armed with a formidable array of protections; in the *Evidence Act* and in specific legislation, to protect the Crown's interest in confidentiality in appropriate cases.

Is Section 13 something that interferes with Her Majesty's rights or prerogatives in any manner? Again, in our view, it does not. Crown agents and employees, and even Ministers of the Crown have no special general immunity for testifying. The general rule is stated in:

*Ex Parte Fernandez* 10 C.B.N.S.3: 4 L.T. 324

“Every person in the Kingdom, except the Sovereign, may be called upon and is bound to give evidence to the best of his knowledge upon any question of fact material and relevant to an issue tried in any of the Queen's Courts, unless he can show some exception in his favour.”

The same rule was reaffirmed in a case where two suffragettes issued subpoenas against Messrs. Asquith and Gladstone in a criminal proceeding. The Court said in relation to the compellability of these Ministers in *Rex v. Baines and Another* (1909) 1 K.B. 258

“It must not be supposed that the positions which the applicants hold afford them any privilege in this matter.”

This law was affirmed by the Alberta Public Service Employee Relations Board in *A.U.P.E. v. Loughheed et al* (unreported decision September 7, 1978).

As the common law afforded no prerogative right to refuse to respond to a subpoena beyond the privileges and protections now enshrined in the Evidence Act and elsewhere, it is difficult to see how an obligation to respond to a Notice to Attend under s.13 of the *Labour Relations Act* could encroach on that

common law position. Thus, in our view, the rule that a statute does not bind the Crown is of no application in this case.

Our second reason for rejecting the arguments of the Director is that the Crown is clearly and expressly bound by s.35 of the *Alberta Evidence Act*. That section reads as follows:

*“35(1) When a document is in the official possession, custody or power of a member of the Executive Council, or of the head of a department of the public service of Alberta, but a deputy head or other officer has the document in his personal possession and is called as a witness, the deputy head or other officer, acting by the direction and on behalf of the member of the Executive Council or head of a department is entitled to object to produce the document on the ground that it is privileged.*

*(2) The objection may be taken by that deputy head or other officer in the same manner and has the same effect as if the member of the Executive Council or head of department were personally present and made the objection.*

*(3) A subpoena shall not issue out of a court requiring.*

- (a) the attendance of an employee or,*
- (b) the production of a document of a Department in the official custody or possession of an employee; without an order of the court.*

*(4) An employee shall not disclose or be compelled to disclose information obtained by him in his official capacity if a member of the Executive Council certifies that in his opinion.*

- (a) is not in the public interest to disclose that information, or*
- (b) the information cannot be disclosed without prejudice to the interests of persons not concerned in the litigation.*

*(5) The information certified under subsection (4) is privileged.*

*(6) In this section, “employee” means a person employed in the public service of Alberta, whether his employment is permanent or temporary or on a full-time or part-time basis.”*

The words “court” and “action” are given broad definitions by s. 1 of the *Evidence Act* and clearly include this Board when conducting the inquiry we are now engaged in. The obvious implication of s. 35(3) is that a Board such as ours can issue subpoena (a term broad enough in our view to include a s.13 Notice to Attend) so long as we make an order to that effect rather than issue the subpoena administratively. If the

Crown's position were correct, all of s.35 would be redundant since Crown officers could never 'be compelled to attend a hearing in any event. Similarly many of the other statutory protections afforded Crown employees would be unnecessary, for example s.16 of the Labour Relations Act, which protects Board officials and mediators from being called to testify. The prevalence of such provisions speak strongly against the Crown's present argument.

We have not conducted an exhaustive analysis of the present day scope of the “necessary implication” rule because it is unnecessary. We believe for the reasons given we can issue the notice requested and are so ordering. However, since it was central to the argument of Counsel for the Director we will give a brief answer to the point.

We think even if the Crown is not expressly bound by s.13 it is bound by necessary implication. It is difficult to conceive of the Board being able to do its business in the labour relations area which is an area where there is considerable governmental involvement, without the power to bring Crown employees or agents before the Board as witnesses in appropriate circumstances. We are obliged to hold full and fair hearings, considering all the relevant and material evidence offered by the parties before us. How could we effectively do this if s.13 is limited in the way suggested by Counsel for the Director? In our view, the legislature, in passing this section, necessarily intended that its scope reach to Crown employees. We note that the predecessor section to s.13 in the 1973 Act gave us the same powers as a Court in a civil action, which, in our view, included the power to subpoena Crown employees. We do not believe the amendment of the Act was intended to narrow that power.

We are urged to hold, in light of the wording of s.14 of the Interpretation Act, that the “necessary implication” rule does not apply in Alberta. We are referred to the judgment of Laskin J. in *The Queen in Right of Alberta v. Canadian Transport Commission* (1977) 75 D.L.R. (3d) 257 at 268. which does appear to limit the rule. However, we have also noted a series of subsequent cases that still give the “necessary implication” rule at least a limited scope, and we are not convinced that it is as dead as is suggested. We note, for example, the comments of Reed J. in:

*Re Alberta Government Telephones and Canadian Radio-Television and Telecommunications Commission et al* (1985) 15 D.L.R. (4th) 515

In referring to a similar argument based on the comments of Justice Laskin in the P.W.A. case, Justice Reed said:

“While the facts in the two cases mentioned may not have been such as to substantiate a finding of necessary implication, I am not entirely convinced that the Supreme Court intended to rule out the necessary implication doctrine as completely as counsel for the applicant AGT contends.

I would feel more comfortable with the assertion that the Supreme Court had ruled out both branches of the necessary implication doctrine if it were clear that it had considered the second branch of this doctrine and the interaction of ss.13 and 14 with s.16 of the Interpretation Act.”

For these reasons, we believe we have the power to order that the requested notice to attend to the Director issue, and we so order.