PRINCE EDWARD ISLAND
LABOUR RELATIONS BOARD

File No. 06-010

Decision No.

IN THE MATTER OF AN APPLICATION FOR RULING REGARDING THE APPLICANT'S RIGHT TO BINDING ARBITRATION

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 501, UPEI SECURITY POLICE

APPLICANT

AND:

THE UNIVERSITY OF PRINCE EDWARD ISLAND

RESPONDENT

BUSINESS REPRESENTATIVE FOR THE APPLICANT **Mr. William MacKinnon**

COUNSEL FOR THE RESPONDENT **Mr. John K. Mitchell, Q.C.**

DECISION

Background

An application was filed with this Board on February 16, 2006, pursuant to Section 4(1) of the *Labour Act*, R.S.P.E.I. 1988, Cap L-1 as amended, in which the Canadian Union Of Public Employees, Local 501, UPEI Security Police, hereinafter referred to as the "Applicant", requested a hearing and ruling regarding the Applicant's right to binding arbitration. A response from the University of Prince Edward Island, hereinafter referred to as the "Respondent" on this Application, was filed with the Board on March 7, 2006. The Respondent requested that the Board decline to hear the matter as it lacked jurisdiction to do so. In the alternative, the position taken by the Respondent

is that members of the Applicant, CUPE, Local 501, have not had a right to binding arbitration. It asserted that prior binding arbitrations have been by agreement between the parties, and that the right to strike was never taken away from members of CUPE, Local 501.

There was no Pre-hearing Conference per se, however, there was an exchange of communications between the representatives of the parties and the Board's Chief Executive Officer, Mr. Roy J. Doucette, to predict the main issues, the number of days required to conduct the hearing and to set the hearing date.

The hearing of these matters was convened and conducted on the 17th day of March, 2006. There were a number of preliminary matters which were addressed by way of oral pronouncements which will, as indicated at the hearing, be further addressed in the body of this decision. Written materials and oral submissions were very ably presented by the representatives of the respective parties.

Cases Considered

1. ***Canadian Broadcasting Corp.*** **v.** ***Canada (Labour Relations Board),*** [1995] 1 S.C.R. 157;

2. ***Carling O'Keefe Breweries of Canada Ltd. v. Newfoundland (Attorney General),*** [1993] CarswellNat 161, 113 Nfld.&P.E.I.R. 271, 353 A.P.R. 271;

3. ***MacBain v. Canadian Human Rights Commission: MacBain v. Lederman, et. al.,*** [1985] CarswellNfld 207, 16 Admin. L.R. 109, 22 D.L.R. (4th) 119, 62 N.R. 117;

4. ***Canadian Corps. of Commissionaires NP / PEI Division Inc.*** **v.** ***Prince Edward Island (Labour Relations Board),*** [2005] P.E.I.J. No. 35;

5. ***CUPE Local 501 v. University of Prince Edward Island,*** [Feb. 24, 1981] Interest Dispute Arbitration Award, Judge G. L. Fitzgerald Chair, E. Doull, and K. Ezeard members;

6. ***CUPE Local 501 v. University of Prince Edward Island,*** [Dec. 5, 1986] Interest Dispute Arbitration Award, Judge G. L. Fitzgerald Chair, W. L Carew, and T. Crockett members;

7. ***CUPE Local 501 v. Village Commissioners of Parkdale and Sherwood and the Attorney General of Prince Edward Island*** (1973), 4 Nfld.&P.E.I.R. 372;

8. ***CUPE Local 2745 v. New Brunswick (Board of Management),*** [2004] N.B.J. No 110, 2004 NBCA 24, No. 91/03/CA;

9. ***United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.,*** [1993] 2 S.C.R. 316;

10. ***United Brotherhood of Carpenters and Joiners of America, Local 579 v. Branson Construction Ltd.,*** [2002] N.B.J. No. 114, 2002 NBCA 27 No. 124/01/CA;

11. ***Nickerson v. Nickerson*** (1991), 34 R.F.L. (3rd) 34, 4 O.R. (3rd) 447;

12. ***Jost v. Manitoba Hydro,*** [1976] 2 W.W.R. 289, 65 D.L.R. (3rd) 495;

13. ***Thompson General Hospital and Retail Store Employees Union, Local 832,*** [1978] M.L.B.D. No.2;

14. ***In Re Section 4(3) of the Labour Act and the Constitution Act 1867*** (1997) CanLII 4559 (P.E.I.S.C.A.D.);

15. ***Prince Edward Island (Welfare Assistance) v. Prince Edward Island (Welfare Assistance Appeals Board),*** [2001] P.E.I.J. No. 46 (S.C.P.E.I. – Trial Division);

Statutes Considered

1. ***Labour Act,*** R.S.P.E.I. 1988, Cap. L-1, sections 3, 4, 7, 8, 9, 41(5) and 41(6);

2. ***Interpretation Act,*** R.S.P.E.I. 1988, Cap. I-8, section 9;

3. ***Police Act,*** R.S.P.E.I. 1988, Cap. P-11, sections 1, 2, 5, 6, 7, 7.1, 8 and 14.

Texts Considered

1. Driedger, Elmer A., ***Construction of Statutes (Second Edition),*** (Butterworths, Toronto, 1983), pp. 94-96.

Evidence

On the day of the hearing the Applicant and Respondent agreed to and the Board allowed for the introduction and entry on the record of the following exhibits by the respective parties without the need of proof through witnesses, thereby expediting the hearing process.

Applicant's Exhibits:

Exhibit A-1	Composite of Communications Involving the 1980 Round of Negotiations;
Exhibit A-2	Letter from Arthur J. Currie to Chiefs of Police, dated February 25, 1993;
Exhibit A-3	Letter from Robert Crockett to Wayne Cheverie, Minister of Justice, dated March 11, 1993;
Exhibit A-4	Letter from Wayne Cheverie, Minister of Justice, dated May 14, 1993;
Exhibit A-5	Composite of Letters 1996 Round of Bargaining; and
Exhibit A-6	University of Prince Edward Island Posting for Security Attendant and Security Officers, dated June 29, 2005.

Respondent's Exhibits:

Exhibit R-1	Ruling on the University's Objection to the Jurisdiction of the Board, signed by G.L. FitzGerald, K.W. Ezeard, and Edgar C. Doull, dated January 9, 1981; and
Exhibit R-2	Letter and Attachment from Attorney General and Premier, Joe Ghiz, to the President of the University, dated October 2, 1992.

Issues

The issues raised by this application before the Board are:

1. Whether the Board has jurisdictional authority under the provisions of the *Prince Edward Island Labour Act*, R.S.P.E.I. 1988, Cap. L-1;

2. In the event of an affirmative ruling on the first issue, have the members of CUPE Local 501 legislatively lost their right to strike, and gained a right to binding arbitration; and

3. Are there grounds for granting the relief sought by the parties.

Preliminary Matters

The Board, at the commencement of the hearing, outlined the background of the case and noted that there had been only informal pre-hearing conferences held. and cited the issues in the matter as set out above.

With respect to Preliminary Matters, it was noted and acknowledged by all parties that the Chairman in his capacity as a private solicitor had previously represented individual members of the Applicant on property matters and that this, however, in no way presented any concern for either party as to the independence of the Chairman on these current matters and the panel as constituted continued with the hearing.

The panel heard argument from Counsel for the Respondent to the effect that the Board does not have the power to entertain a simple reference for the interpretation of any question of law unless it arises in the context of an existing proceeding before the Board and an existing proceeding over which the Board has jurisdiction.

Counsel for the Respondent summarized his arguments by stating:

> *So my position is, you don't have the jurisdiction because, number one, the Province doesn't have the jurisdiction, or the constitutional authority to give you the jurisdiction; number two, it's not in the **Act**, even if the Province did have that authority; and number three, you're being asked to make a declaration of rights essentially in the air. When I say in the air, there may well be other police constables out there, I don't know, who may be affected, and they're not before you.*
>
> *So without an application, a proper application before you, you don't have the jurisdiction to proceed. And in my submission, we should shut this down now without getting into the merits.*

The Board also heard the position of the Applicant on the Respondent's Motion and rebuttal argument from Mr. Mitchell. The Board then adjourned briefly to consider the parties' respective arguments. Upon reconvening, the Board rejected the Respondent's Motion stating that on the face of it, there was a valid application before the Board, there were two parties before it who come within the purview the ***Act***, and the parties had raised or intend to raise issues that are pertinent to the legislation and that the parties right to be heard would not be denied. The Board felt that the threshold test in terms of whether it would embark upon a hearing had been met. The Board felt that it was possessed of initial jurisdiction sufficient to embark upon a hearing and the broader questions of jurisdiction raised by the Respondent would be appropriately addressed in the eventual written decision of the Board.

Decision

The Parties have expended considerable effort in proffering their respective cases in regards to this matter. Careful consideration has been afforded by the Board to the evidence presented and the submissions advanced by the respective Parties with the aid of the diligent participation of the parties and their able representatives in relation to their respective positions on these matters.

The Law

The relevant provisions of the ***Labour Act***, are as follow:

> ***3** (11) The board may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it may consider fit and proper, whether admissible as evidence in a court of law or not.*
>
> *(12) The board shall determine its own practice and procedure but shall give full opportunity to all interested persons to present evidence and to make representations and the board may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as are considered advisable and, without limiting the generality of the foregoing, it may prescribe what evidence shall constitute proof that an employee wishes a trade union to be certified as bargaining agent on his behalf.*

. . .

4. (1) The board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the board thereon is final and conclusive for all purposes, but nevertheless the board may at any time, if it considers it advisable to do so, reconsider any decision, interim order, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

(2) No decision, interim order, order, direction, declaration or ruling of the board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of an application for judicial review, or otherwise, to question, review, prohibit or restrain the board or any of its proceedings.

(3) The board may of its own motion state a case in writing for the opinion of the Appeal Division upon any question that, in the opinion of the board, is a question of law and the court shall hear and determine the question of law arising thereon and remit the matter to the board, with the opinion of the court thereon; no costs shall be awarded in a case stated under this section.

(4) Where any person, union or employers' organization fails to comply with a decision, order, direction, declaration or ruling of the board or any panel of the board, any person, union or employers' organization affected thereby may, after the expiration of fourteen days from the date of service of the order on the date provided for compliance by the board or panel, whichever is later, notify the board in writing of the failure to comply, and thereupon the board shall file in the office of the Registrar of the Supreme Court, a copy of the decision, order, direction, declaration or ruling and thereupon it may be enforced in the same manner, to the same extent and with the same priorities as a judgment of that court may be enforced. R.S.P.E.I. 1974, Cap. L-1, s.4; 1994, c.32, s.2.

. . .

7. (1) In this Part

. . .

(h) "employee" means a person employed to do skilled or unskilled manual, clerical or technical work, and includes police constables appointed under the Police Act R.S.P.E.I. 1988, Cap. P-11, employed by or for any city, town, community, or other person, or employed by a board, commission or agency of, or a corporation, controlled by a city, town, community or other person and also includes persons employed as security police, but does not include persons referred to in subsection (2);

. . .

***8.** For the avoidance of doubt it is declared that following are employees for the purposes of this Part:*

(a) nurses;
(b) persons employed by a hospital as defined in the Hospitals Act R.S.P.E.I. 1988, Cap. H-10;
(c) non-instructional personnel as defined in the School Act;
(d) police constables appointed under the Police Act employed by or for any city, town, community, or other person, or employed by a

board, commission or agency of, or a corporation controlled by, a city, town, community or other person, and also includes persons employed as security police. 1987, c.38, s.1; 1988, c.36, s.3; 1994, c.32, s.4.

9. *(1) Every employee has the right to be a member of a trade union and to participate in the lawful activities thereof.*

(2) No person ceases to be an employee within the meaning of this Part by reason only of his ceasing to work as the result of a lockout or lawful strike or by reason only of dismissal contrary to this Part or to a collective agreement.

(3) Where employees go on strike or are locked out in circumstances permitted by section 41, they are entitled, subject to subsection (4), upon the termination of the strike or lockout to return to and be reinstated in their employment without discrimination and subject to the terms and conditions of employment applicable on the termination of the strike or lockout.

. . .

41. *(1) No employer, employers' organization or an agent or any other person acting on behalf of an employer or an employers' organization shall call, authorize, counsel, procure, support, encourage or engage in a lockout except as permitted by this section.*

(2) No employee, trade union or person acting on behalf of a trade union shall call, authorize, counsel, procure, support, encourage or engage in a strike except as permitted by this section.

(3) Where a trade union has been certified but no collective agreement has been entered into on behalf of the employees in the unit, or where the term of a collective agreement has expired or where negotiations pursuant to a reopener clause as mentioned in subsection 36(3) have failed, whether the bargaining agent named in such collective agreement is or is not certified, the employees in the said unit may strike and the employer may lock out such employees when the bargaining agent and the employer, or representatives authorized by them on their behalf, have bargained collectively and have failed to conclude a collective agreement, and either

> *(a) a conciliation officer appointed by the Minister has been unable to bring about an agreement between the parties, and fourteen days have elapsed from the date on which the report of the conciliation officer was filed with the Minister and a conciliation board or mediator has not been appointed under section 27 or section 34; or*
>
> *(b) a conciliation board or mediator has been appointed and has been unable to bring about an agreement between the parties and seven days have elapsed from the date on which the report of the conciliation board or mediator was filed with the Minister.*

(4) No trade union or person shall declare or authorize a strike and no employee shall strike until after a vote has been taken by secret ballot of the employees in the unit affected as to whether to strike, and the majority of the employees voting has voted in favour of a strike; a strike vote shall not be taken until subsection (3) has been complied with.

(5) Notwithstanding any other of the provisions of this Part, no member of the police force, employed in any city, town or incorporated community, nor any person being a full-time employee of any fire department, nor any person employed by a health

authority, as defined in the Health and Community Services Act R.S.P.E.I. 1988, Cap. H-1.1 nor any employee of a nursing home or community care facility nor noninstructional personnel as defined in the School Act has the right to strike, or to engage in any stoppage of work.

(6) Where any bargaining agent acting on behalf of any member of the police force employed in any city, town or incorporated community, or on behalf of any person being a full-time employee of any fire department, or on behalf of any person required for the maintenance of hospital services, or on behalf of any person being an employee of a nursing home or community care facility or on behalf of noninstructional personnel as defined in the School Act, and the employer of any such person, has complied with sections 21, 22, 23 and 24 of this Part, and where sections 25 and 26 have been invoked and complied with and where the conciliation officer has failed to bring about an agreement between the parties engaged in collective bargaining, the Minister shall appoint an arbitration board to resolve the matters upon which the parties have failed to agree and the Minister shall,

> *(a) by notice in writing forthwith require each of the parties, within seven days of the date of such notice to nominate one person to be a member of the arbitration board, and in the event of the failure of either party to make such nomination within the time specified, the Minister shall appoint a person whom he thinks fit and proper, and such person shall be deemed to be nominated by the party so in default; and*
>
> *(b) by notice in writing require the persons nominated to nominate within ten days of the date of such notice a third person who is willing and able to act to be a member and chairman of the arbitration board, and in the event of default of such nomination, the Minister shall appoint a person whom he thinks fit and proper, to be the third member and chairman of the arbitration board.*

(7) The persons nominated pursuant to subsection (6) shall be and constitute the arbitration board.

(7.1) The remuneration and expenses of persons appointed to an arbitration board under subsection (6) shall be paid

> *(a) in the case of a person appointed by or on behalf of the employer, by the employer;*
>
> *(b) in the case of a person appointed by or on behalf of the bargaining agent, by the bargaining agent; and*
>
> *(c) in the case of the chairperson, one third each by the Minister, the employer and the bargaining agent.*

(8) Sections 29 to 32 apply with the necessary changes to the arbitration board.

(9) The report of the arbitration board shall be final and binding upon the parties, and in the event that such arbitration relates to persons required for the maintenance of hospital services, the report is also binding upon the Hospital and Health Services Commission of Prince Edward Island. R.S.P.E.I. 1974, Cap. L-1, s.40; 1977,c.22,s.1; 1980,c.31,s.3; 1987,c.38,s.3; 1988,c.36,s.6; 1994,c.32,s.13; 2002,c.29,s.22.

Those sections of the ***Police Act,*** which are pertinent to this matter are as follow:

1. There shall be a force of police officers and police constables to be known as the Prince Edward Island Provincial Police. R.S.P.E.I. 1974, Cap. P-9, s.1.

2. (1) The force includes all officers, inspectors, constables, and men specially appointed for the enforcement of any statute of Prince Edward Island.

(2) All the officers, members, clerks and employees of the force are responsible to the Attorney General and shall perform such duties and exercise such powers as may be prescribed under the provisions, rules and regulations made by or under this Act. R.S.P.E.I. 1974, Cap. P-9, s.2; 1993, c.29, s.4; 1997,c.20,s.3; 2000,c.5,s.3.

. . .

5. (1) The force consists of such officers, clerks and members as may be prescribed by the regulations made by or under this Act, and every officer and member of the force has authority to act as a constable throughout Prince Edward Island.

(2) Every officer and member of the force shall be deemed to be a peace officer with power and authority to investigate breaches of provincial statutes and offences under the Criminal Code (Canada) R.S.C. 1985, Chap. C-46, and shall have the powers of peace officers and constables with regard to the arrest and detention of offenders. R.S.P.E.I. 1974, Cap. P-9, s.5.

6. The Lieutenant Governor in Council may appoint such other officers, clerks and servants of the Prince Edward Island Provincial Police as he may consider advisable. R.S.P.E.I. 1974, Cap. P-9, s.6.

7. The Minister may authorize any person not a member of the force to exercise the powers of a provincial police constable and may place such restrictions or conditions on the appointment as he considers appropriate. 1992, c.54, s.1.

7.1 The Minister may appoint persons as auxiliary police officers who shall act and have the powers and immunities of a police officer only when accompanied by or under the supervision of a police officer or a member of the Royal Canadian Mounted Police. 1994, c.48, s.13.

8. The officers, constables, and members of the force shall have all the powers, privileges, rights and immunities conferred upon any policeman, police constable, constable or peace officer under the Criminal Code or under any statute of the province not inconsistent with the provisions in this Act. R.S.P.E.I. 1974, Cap. P-9, s.8.

. . .

14. The Lieutenant Governor in Council may make rules and regulations with respect to

(a) ranks and promotions within the Prince Edward Island Provincial Police;
(b) the duties of the force, and of officers appointed for the enforcement of provincial statutes;
(c) providing clerical and other assistance;
(d) providing accommodation and office equipment for any officer of the force;
(e) the payment or compensation of officers of the force, and clerks or officials of the force;

(f) the qualifications, training and length of appointment of persons appointed pursuant to this Act;
(g) regulating the employment of municipal police forces and persons authorized pursuant to section 7;
(h) establishing the qualifications for permanent or temporary members of police forces. R.S.P.E.I. 1974, Cap. P-9, s.14; 1994, c.48, s.13.

Findings of Fact

The facts of this case are not in dispute. Mr. MacKinnon summarized the history of this matter, subject to a couple of clarifications by Mr. Mitchell. In 1973 the Union applied for certification. When the matter came before the Board in July of 1973, the Union withdrew their application because the Board had received a legal opinion, from its then counsel, that police officers were not "employees" as contemplated in the legislation and therefore could not be "unionized". The ***Labour Act*** was then amended in 1974. The Applicant was certified in 1975 by way of a voluntary recognition agreement.

The first round of bargaining giving rise to a determination around the issue of strike versus binding arbitration was in the 1980 round of collective bargaining. The arbitration board of the day ruled that the Respondent's argument challenging the jurisdiction of the arbitration board was estopped. The arbitration board issued a ruling and there was no judicial review taken from that decision..

The next round of bargaining that occurred in which this issue arose was 1986 when binding arbitration was again employed to resolve the labour dispute. As described by the Applicant, ... *the procedure in this particular round of bargaining went without a hitch.* There was no challenge by the Respondent to the authority or jurisdiction of the process before the Arbitration Board.

In correspondence from the late Joseph A. Ghiz, former Premier and then Minister of Justice and Attorney General, dated October 2, 1992, to Dr. C.W.J. Eliot, President of U.P.E.I., it is indicated that:

Security officers at U.P.E.I. are appointed Provincial Police Constables under the Police Act, R.S.P.E.I. 1988, Cap. P-11 by the Lieutenant Governor in Council. As Provincial Police Constables, appointees have all the powers conferred on a peace officer under the Criminal Code to investigate breaches of provincial statutes and offences under the Criminal Code. However, section 7 of the Police Act empowers the Minister of Justice to place restrictions or conditions on he appointment as he considers appropriate.

The Attorney General then directed that the security personnel at U.P.E.I., were required to contact the Charlottetown City Police in regards to all matters involving criminal offences pursuant to the ***Criminal Code***. Attached to the correspondence is a chart specifying which matters will be dealt with by campus security and those which are to be dealt with by the Charlottetown City Police.

The collective bargaining process unfolded throughout a period of years without any recourse to binding arbitration being sought by the parties. In 1995, the Applicant sought binding arbitration and the Respondent raised their objection. In the process, the Minister requested that the Industrial Relations Council convene a hearing to consider this matter. This hearing was held in early 1996. The recommendation came from the Industrial Relations Council to government in the form of its December 14, 1998 meeting notes where it passed the following motion:

> *In the matter of the issue between U.P.E.I. and C.U.P.E., Local 501, it is the Council's position that because U.P.E.I. Security Police are employed as Police Constables under the Police Act, the parties must resolve their collective bargaining disputes utilizing the binding arbitration process and not strike/lockout process. Therefore, for further clarification, the Labour Act, should be amended to eliminate any ambiguities that suggest otherwise.*

Despite that recommendation, which of course has no binding or legal effect on government nor on the matters before this Board, in the interim there has been no action taken by way of any legislative amendment.

The parties next found themselves faced with the issue of whether failed collective bargaining should be referred to binding arbitration in their most recent round of collective bargaining in 2005, and hence the application currently before the Board. .

In summary, over the course of some 30 plus years, there have been four instances when the Applicant has sought to move to binding arbitration. The initial event of the Applicant seeking binding arbitration was challenged by the Respondent and that challenge was overruled by the arbitrator on the basis of estoppel. The second event, in 1986, was not challenged and the parties went to binding arbitration. In 1995 when the issue arose again, the Respondent did once more raise the objection. In this instance the Industrial Relations Council opined that the proper forum, although the legislation should be amended to clarify the point, would be binding arbitration. Again in 2005, when the Applicant sought binding arbitration, the Respondent raised this same objection.

Conclusion

Whether the Board has jurisdictional authority under the provisions of the Prince Edward Island Labour Act, R.S.P.E.I. 1988, Cap. L-1;

The facts are not in dispute as to whether the U.P.E.I. Security Police are appointed and regulated under the ***Police Act***.. In the hearing before the Industrial Relations Council, both the Respondent and the Applicant conceded this point. Also, the 1992 correspondence of Minister Ghiz, as he then was, to the Respondent clearly demonstrates that Security Police are appointed as constables under the ***Police Act***, with certain restrictions imposed by the authority of the Minister of Justice and Attorney General under the ***Police Act***.

Therefore, the central issue to be determined is the interpretation of the relevant provisions of the ***Labour Act,*** in particular Sections .4, 7, 8, 9, 41(5) and (6).

The Board's general authority to make such an interpretation and to make declarations is found under section 4 of the ***Labour Act*** which states:

> *4. (1) The board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine* ***all questions of fact or law*** *that arise in any matter before it, and the action or decision of the board thereon is final and conclusive for all purposes, but nevertheless the board may at any time, if it considers it advisable to do so, reconsider any decision, interim order, order, direction,* ***declaration*** *or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling. [Emphasis added]*

In the recent Prince Edward Island Supreme Court Appeal Division decision in ***Canadian Corps. of Commissionaires NP / PEI Division Inc.*** **v.** ***Prince Edward Island (Labour Relations Board)***, [2005] P.E.I.J. No. 35, the Labour Relations Board had considered whether the Corps was an "*employer*" under the ***Labour Act***. The Appeal Division held that the Labour Relations Board's interpretation of "*employer*" in that case was a matter of mixed fact and law that fell within the specialized mandate and expertise of the Labour Relations Board and its jurisdiction under s. 4 of the ***Labour Act***. The Appeal Division also held that the Board's interpretation warranted deference on a patently unreasonable standard.

In this case, the Board is required to interpret the ***Police Act*** to the limited extent, and on what the parties are actually in agreement, in regards to the issue of whether the Security Police are constables and are regulated under the provisions of that *Act*. While administrative tribunals are entitled to deference in interpreting their own legislation, if interpreting external legislation, such as the ***Police Act*** in this case, it may be that a lessor degree of deference will be granted to the tribunal on any such interpretation on a subsequent judicial review application, however, that is a risk this panel is willing to take given the circumstances of this particular case. The Board, in light of the

Applicant asserting and the Respondent conceding that the Security Police are constables and are regulated under the provisions of that act, and that is the limit of the Board's interpretation of the ***Police Act***, it feels confident in so finding and ruling.

In ***Canadian Broadcasting Corp.*** **v.** ***Canada (Labour Relations Board),*** [1995] 1 S.C.R. 157, the Supreme Court of Canada held that:

> *As a general rule, curial deference need not be shown to an administrative tribunal in its interpretation of a general public statute other than its constituting legislation, although in cases where the external statute is linked to the tribunal's mandate and is frequently encountered by it, a measure of deference may be appropriate. This does not mean, however, that every time an administrative tribunal encounters an external statute in the course of its determination, the decision as a whole becomes open to review on a standard of correctness. The tribunal may have to be correct in an isolated interpretation of external legislation, but the standard of review of the decision as a whole, if that decision is otherwise within its jurisdiction, will be one of patent unreasonableness. The correctness of the interpretation of the external statute may affect the overall reasonableness of the decision.*

In our finding, in consideration of all of the above, the Prince Edward Island Labour Relations Board clearly has the jurisdiction and in fact the statutory mandate to interpret the provisions of the ***Labour Act*** in this case.

In our view, this matter is more strictly a case of a statutory interpretation and involves a question of law, more than a question of mixed fact and law. There is little by way of factual dispute between the parties in this case. The issue arises due to provisions of the ***Labour Act*** with some limited reference to the ***Police Act***. There is no bar to the jurisdiction of this Board as argued by the Respondent. The Board assumes jurisdiction and will proceed to rule on the other issues.

Have the members of CUPE Local 501 legislatively lost their right to strike, and gained a right to binding arbitration;

Turning to the main issue, a review of labour relations statutes and police services statutes reveals that the relevant legislation in other provinces is very different than in this province and of little assistance in regards to interpreting the ***Labour Act*** and ***Police Act***, of Prince Edward Island. In Ontario for instance, the labour relations statute excludes police designated under the Ontario ***Police Services Act***, without any further elaboration. The Ontario ***Police Services Act*** applies only to police designated by municipalities and to the Ontario Provincial Police. Therefore, this Board is left to interpreting the relevant provisions of the legislation based largely on general principles of statutory interpretation.

Much more enlightening is the case of ***Prince Edward Island (Welfare Assistance) v. Prince Edward Island (Welfare Assistance Appeals Board)***, [2001] P.E.I.J. No. 46 P.E.I.S.C. – Trial Division) where the Court considered an application for judicial review based on questions of excess of jurisdiction and error of law. The Court made some very key findings in relation to statutory interpretation that are particularly relevant to this case. At paragraphs 13-18, the Court stated:

> *Judicial Review often involves an exercise of statutory interpretation. In the present case, interpretation of subordinate legislation, i.e. the Regulations, is primary. The following comments taken from Sullivan, Driedger on the Construction of Statutes, 3rd ed. (1994), chapter 2 at p. 35, and chapters 7 and 11 generally, set the stage for consideration.*
>
> . . .
>
> *The legislature is presumed to know all that is necessary to produce rational and effective legislation. This presumption is far-reaching. The legislature is presumed to have a master knowledge of the law, of practical affairs, and of the nature and functioning of judicial and executive institutions.*
>
> *Effective interpretation of legislation involves consideration of the act and legislative scheme as a whole. Each provision must be read both in its immediate context and in the context of the full scheme of the legislation. Reading words in their immediate context, renders a first impression of their meaning. Such first impressions must be supplemented by consideration of the whole legislation. When analysing the scheme of legislation the court tries to discover how the provisions or parts work together to give effect to a plausible and coherent plan. It then considers how the provision to be interpreted can be understood in terms of that plan. One could not profess to understand any part of a statute before having read the whole statutory scheme.*
>
> *There are many rules of construction. Some are directly applicable here. One maxim of statutory interpretation is "implied exclusion" - "expressio unius est exclusio alterius: to express one thing is to exclude another". **This argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to it expressly**. The absence of mention of the thing becomes grounds for inferring that it was deliberately excluded. Although there is no expressed exclusion, exclusion is implied.*
>
> ***Next, where a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned.*** *This is based on the reasoning that if the legislature had intended to include all comparable items, it would have mentioned them all or described them all using general terms; it would not have mentioned some while saying nothing of the others. Finally regarding the implied exclusion rule, it is often invoked where there is an overlap among provisions, that is, where two or more provisions are applicable without conflict to the same facts. In cases of overlap, the court must decide whether one provision impliedly excludes the other.*
>
> *Second, is the presumption of coherence, or of avoiding internal conflict. It is presumed that the provisions of legislation are meant to work together, both logically and teleologically as parts of a functioning whole. The parts are presumed to fit together logically to form a rational internally consistent framework, and to work together dynamically, each contributing something toward accomplishing the intended goal. Where provisions overlap without conflict, it is presumed that each*

is meant to apply. This presumption can be rebutted by showing that in the circumstances one of the provisions constitutes an exhaustive declaration of the applicable law. If one provision is exhaustive, the other cannot apply.

Related to the last presumption is the presumption of implied exception - "generalia specialibus non derogant". ***Where two provisions are in conflict and one of them deals specifically with the matter in question while the other is of general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one.*** *The specific prevails over the general. [Emphasis added]*

In our view, and notwithstanding the learned opinion of the Industrial Relations Council as set out in its December 14, 1998 motion, it is very clear that the wording of Subsections 41(5) and 41(6) of the ***Labour Act*** is deliberately and expressly less inclusive than the definition of "*employee*" in Sections 7 and 8 of the ***Labour Act***.

Sections 7 and 8 of the ***Labour Act*** state that "*employee*" includes police that are employed by a city, town, community "...***or other person***, *or employed by a board, commission or agency of, or a corporation, controlled by a city, town, community or other person* ***and also includes persons employed as security police"*** *[Emphasis added]*.

In reviewing the legislation and the various amendments that have been made to it, it is evident that Subsection 41(5) [previously Section 39 and then Section 40 of the ***Labour Act***] contains the same wording as the initial ***Labour Act*** which was assented to April 7th, 1971, and which contained no definition of "*employee*". The definition of "*employee*" found in Subsection 7(1)(h) of the ***Labour Act*** was added to the ***Act*** in 1974. Subsection 8(d) of the ***Labour Act*** was added in 1994 by Chapter 32, ***An Act to Amend the Labour Act***., in which the Legislature also amended several subsections of Section. 41, but there were no amendments to the wording of either Subsection 41(5) or Subsection 41(6) in relation to the exclusion for police officers.

While we have considered the argument that when the Legislature amended the ***Labour Act*** in 1974 and 1994 to include a definition of "*employee*" (which includes security personnel and police appointed under the ***Police Act***), it intended this expanded definition to apply to Subsections 41(5) and (6), it is our finding that the general principles of statutory interpretation clearly lead to the presumption that the Legislature would have had to specifically amend Subsections 41(5) and (6) if it indeed intended the broader notion of police officer to apply to that exclusion of the right to strike. It must be also noted that there is no reference in Subsections 41(5) and 41(6) of "*employee*" in relation to the police officers and therefore the amendments to the definitions of "*employee*" would not apply.

Also, the principles of statutory interpretation require that amendments generally make sense and fulfill the purposes of the legislation. All employees are entitled to the bargaining rights under the ***Labour Act***, including the right to strike, unless they are expressly excluded for reasons of the greater societal interests. We find that it would makes imminent sense that the Legislature intended the exclusions to be narrower than the definitions of "*employee*". Subsections 41(5) and 41(6) of the ***Labour Act*** expressly exclude police officers employed by a "*city, town or incorporated community*" and, it is clear that there is a societal interest in police officers being prevented from striking. We take the view that there does not appear to be any overriding societal interest in excluding security forces at U.P.E.I. from the general right to strike.

On the basis of the foregoing, we conclude that the legislation, as it currently stands, does not prohibit U.P.E.I. security police personnel from striking. The motion of the Industrial Relations Council apparently begs the question of the requirement for a legislative amendment. Were this Board to hold otherwise than it has, it would amount to we, as adjudicators, re-writing legislation which is obviously *utra vires* of our powers. The Industrial Relations Council put its opinion on the record in 1998 to the effect that a legislative amendment was necessary. The Legislature did not see fit to enact such a provision and thus, the legislation in existence must be read in according with the general rules of statutory interpretation.

Given the history of events in these matters, there being three instances over a course of thirty years and each one, for various reasons, where the Applicant sought and received a reference to an Arbitration Board where collective bargaining failed, one can certainly see why the Applicant would be prepared to assert that it is entitled to binding arbitration.

The Board must, at the same time, examine the entire set of facts, and having done so, certainly must conclude that the Respondent has been equally consistent in asserting that it has not relented in raising its objection to collective bargaining being referred to binding arbitration. In the 1980 set of circumstances the arbitrator did not hold that the Respondent's objection was invalid, but rather that it had relented in raising the objection and therefor would be estopped from raising it when it did. In 1986, the Respondent apparently did relent and did not object to going to binding arbitration to resolve that dispute. However, in 1996 and again in 2005, the Respondent again raises its objection.

In light of this, it cannot be said that the Respondent has acquiesced and allowed the Applicant to obtain the right to binding arbitration by default. Given the Board's analysis above and these observations, the Board must conclude that the members of the Applicant, CUPE Local 501, UPEI Security Police, are not possessed of the right to binding arbitration.

Whether there are grounds for granting the relief sought by the parties;

The Board has found that it has jurisdiction both in terms of receiving, hearing and ruling on the application and in terms of interpreting the provisions of the ***Labour Act*** and the ***Police Act.*** It has also found that the legislative intent must be interpreted so as to not include the Applicant or its members, UPEI Security Police members, among those police officers who have legislatively been denied of their right to strike. Further, the Board has found that the Applicant has not obtained a right to binding arbitration.

In view of these findings, the Board rules to deny the Respondent's Motion to have the Board decline jurisdiction over these matters. The Board also finds that neither are there any grounds upon which the Board could grant the relief sought by the Applicant. The Board rules that the Application is dismissed.

Robert R. MacArthur
Chair

Ted Crockett
Member

J. Brendon McGinn
Member

This Decision made by the Prince Edward Island Labour Relations Board on the 11th day of August, A.D., 2006, and issued under the hand of its Chief Executive Officer on the 11th day of August, A.D., 2006.

Roy J. Doucette