PRINCE EDWARD ISLAND
LABOUR RELATIONS BOARD

File No.

Decision No.

09-004

IN THE MATTER OF AN APPLICATION FOR CERTIFICATION

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4932

APPLICANT

AND:

CITY OF SUMMERSIDE POLLUTION CONTROL PLANT

RESPONDENT

DECISION

Background

The Applicant, Canadian Union of Public Employees, Local 4932, filed an Application for Certification on the 25th day of February, 2009 pursuant to the *Labour Act*, R.S.P.E.I. 1988, Cap. L-1, and the *Labour Act Regulations* as amended, requesting that the Prince Edward Island Labour Relations Board ("the Board") certify the Applicant as bargaining agent of the employees in the unit being set forth as appropriate for collective bargaining purposes. That unit is described in paragraph 9 of Form 1 of the Application as:

> *All Employees employed at the Water Pollution Control Centre for the City of Summerside, Prince Edward Island, save and except those excluded by the Labour Act.*

The Respondent employer, City of Summerside, filed a Reply to the Application for Certification on the 26th day of March, 2009. The Respondent requested that a hearing be held to "determine the issue of the composition of the bargaining unit" and whether an existing unit, CUPE Local 804, is the appropriate unit for the employees affected by the application.

The hearing of this matter originally proceeded on the 19th day of January, 2010, when, at the outset of the Hearing, counsel for the Applicant raised an objection with respect to the Chair of the Board panel being in a conflict of interest. In response to the objection, the Chair ruled that no decision would be issued on the Union objection on that date and that the parties would make written submissions concerning the objection. The Hearing was adjourned pending receipt and review of written submissions from the parties and a determination by the Board concerning the

alleged conflict and apprehension of bias. Ultimately, the Chair withdrew without rendering a decision on the issue and a new panel was constituted. The Hearing proceeded with the new panel on the 10th day of November, 2010.

Although not raised by either of the parties at the Hearing, the Board confirms that CUPE Local 804 had been certified as bargaining agent for a unit of employees of the City of Summerside which includes the employees which are the subject of the present application. Local 804 was certified by virtue of Certification Order 2-60, an Order of the Prince Edward Island Labour Relations Board dated November 17, 1960, which was subsequently amended on June 11, 1961 and again on June 11, 1986. The fact that Local 804 is presently certified as the bargaining agent of the Pollution Control Plant employees was not made clear by either of the parties in their written submissions or at the Hearing of this matter, although it is clear that the Pollution Control Plant Employees were excluded from the current collective agreement (reference Article 3.01 of the Collective Agreement between City of Summerside and Local Union 804).

Statutes Considered

1. *Labour Act*, R.S.P.E.I. 1988, Cap. L-1
2. *Labour Act Regulations*

Texts Considered

1. *Canadian Labour Law*, 2nd Edition, George W. Adams, 10.1340
2. *Ontario Labour Relations Board Law and Practice*, Sack Mitchell Price, 3rd Edition

Evidence

The Application was accompanied by the membership evidence and the requisite schedules and exhibits. Each of the parties filed with the Board decisions from other Labour Relations Boards in Canada. The Applicants presented Bill McKinnon, CUPE National Representative in Prince Edward Island, to present oral evidence at the Hearing. The Respondent presented Terry Murphy, CAO of the City of Summerside and Greg Gaudet, Director of Municipal Services with the City of Summerside.

Preliminary Matters

At the hearing, counsel for both parties agreed that the technical and statutory requirements had been met with respect to the Application for Certification and that the Application as submitted to the Labour Relations Board was in the proper form.

Issue

The issue before the Board in this matter is whether the employees of the City of Summerside Pollution Control Plant comprise an appropriate unit for collective bargaining.

Decision

The Board has carefully considered all of the evidence presented and the submissions advanced by the parties regarding this Application for Certification being identified as Board File Number 09-004.

The Board has reviewed the Application for Certification and the supporting evidence filed therewith and the evidence given in support of the Reply, all oral evidence presented by the parties at the Hearing, and all submissions in light of and pursuant to sections 12 and 13 of the *Labour Act* and section 3 of the *Regulations of the Act*. The Act reads:

> *12. (1) A trade union claiming that a majority of employees of an employer in a unit that is appropriate for collective bargaining wish that the trade union be certified as bargaining agent on their behalf may, subject to the rules of the board and in accordance with this section, apply to the board to be certified as bargaining agent of the employees in the unit.*
>
> *(2) Where no trade union is certified as bargaining agent for any of the employees in the unit and the employees are not bound by a collective agreement, the application, subject to subsection (7), may be made at any time.*
>
> *(3) Where a trade union is certified as bargaining agent for any of the employees in the unit, but no collective agreement binding on such employees has been entered into, the application may be made at any time after ten months from the date of certification, but not before, without the consent of the board.*
>
> *(4) Where a collective agreement binding on any of the employees in the unit is in force and the agreement is for a term of not more than two years, the application may be made only after the commencement of the last two months of the term of the agreement.*
>
> *(5) Where a collective agreement is in force and the agreement is for a term of more than two years, the application may be made only after the commencement of the twenty-third month of the term and before the commencement of the twenty-fifth month of the term and during the two-month period immediately preceding the end of each year of the term that the agreement continues to operate thereafter or after the commencement of the last two months of the term, as the case may be.*
>
> *(6) Where a collective agreement referred to in subsections (4) or (5) provides that it will continue to operate for a further term or successive terms if neither party gives to the other notice of termination or of its desire to bargain with a view to the renewal of the agreement or to the making of a new agreement, the*

application may be made during the further term or successive terms only during the last two months of each year of such further term or successive terms, or after the commencement of the last two months of such term or successive terms that it so continues to operate, as the case may be.

(7) Where a collective agreement binding on any of the employees in the unit has expired and notice has been given pursuant to section 23, but a new collective agreement has not been entered into, no application for certification as bargaining agent of any of the employees in the bargaining unit defined in the collective agreement, whether the bargaining agent named in such collective agreement is or is not certified, shall be made until ten months after the expiration of the said agreement, except with the consent of the board.

(8) Notwithstanding subsection (7), no such application shall be made without the consent of the board during a lawful strike or lockout. R.S.P.E.I. 1974, Cap. L-1, s.11.

13. (1) Where a trade union makes application for certification under this Part, the board shall determine whether the unit in respect of which the application is made is appropriate for collective bargaining.

(2) The board may, before certification, either to make the unit appropriate for collective bargaining or for other good reason, include additional employees in or exclude employees from the unit.

(3) For the purposes of subsections (1) and (2) and for the purpose of determining whether a majority of the employees in the unit wish the applicant trade union to be certified as bargaining agent of such employees, the board shall

> *(a) make, or cause to be made, such examination of records or other inquiries and hold such hearings as it considers necessary;*
>
> *(b) take such other steps as it considers appropriate to determine the wishes of the employees in the unit as to the selection of a bargaining agent to act on their behalf including, whenever the board considers it necessary, the taking of a representation vote of such employees.*

(4) Where the board has taken a representation vote under this Act and a majority of eligible employees in the unit appropriate for collective bargaining vote in favour of the applicant union, the board may determine that a majority of the employees in the unit wish the applicant union to be certified as bargaining agent of such employees.

(5) If the board is satisfied that a majority of the employees in a unit appropriate for collective bargaining wish the applicant trade union to be certified as bargaining agent of such employees, the board shall certify the trade union as the bargaining agent of the employees in that unit.

(6) In determining what number of employees constitute a majority of the employees of a unit pursuant to subsection (5), the board may consider any increase in the number of employees in

the bargaining unit after the application was made, and the board may consider any anticipated increase in the number of employees in the bargaining unit.

(7) If the board is not satisfied that the applicant trade union is entitled to be certified under this section, it shall dismiss the application and may designate the length of time that must elapse before the same applicant may make a new application.

(8) In determining the number of eligible employees for the purpose of subsection (4), employees who do not cast their ballots shall not be counted as eligible employees. R.S.P.E.I. 1974, Cap. L-1, s.12; 1988, c.36, s.1.

The regulations at section 3 state:

3. (1) An application by a trade union for certification as bargaining agent pursuant to the Act shall be made in Form 1.

(2) Subject to subsection (2.1), concurrently with the filing of an application for certification, the applicant trade union shall file with the Board the material upon which it relies to establish its right to certification and such material shall include

(a) a list of persons in the proposed bargaining unit who wish that the applicant trade union be certified as bargaining agent on their behalf;

(b) evidence that the persons in the list referred to in clause (a) wish that the applicant trade union be certified as bargaining agent on their behalf;

(c) a copy of its constitution, rules and bylaws, or other instruments or documents containing a full and complete statement of its objects and purposes;

(d) a list of its officers.

(2.1) The Board may waive compliance by an applicant trade union with clause (2)(c) where the applicant trade union, by statutory declaration, declares that current copies of the union constitution or other documents required by clause (2)(c) have been filed with the Board.

(3) The material filed by an applicant trade union pursuant to

(a) clauses (2)(a) and (b), shall be for the information of the Board only and shall not be available to or open for inspection by any other party to the proceedings;

(b) clause (2)(c), or material on file with the Board pursuant to subsection (2.1), shall be available to and open for inspection by any other party to the proceedings; or

(c) clause (2)(d), shall be available to and open for inspection by any other party to the proceedings only with the approval of the Board.

(4) A person shall be deemed by the Board to agree to the applicant trade union being certified as bargaining agent on the person's behalf if at the date of application

(a) the person was a member in good standing of the applicant trade union, and, had paid at least two dollars as union dues within three months preceding the date on which the application was filed; or

(b) the person has signed a document stating that the person wishes the applicant trade union to be certified as bargaining agent on the person's behalf and has within three months preceding the date on which the application was filed paid at least two dollars as union dues or fees. (EC521/71; 651/07)

The issue to be decided by the Board is not whether the Applicant meets the requirements and criteria to comprise a unit of employees for collective bargaining purposes. Rather, the issue that the Board must decide is whether the available evidence demonstrates that the employees of the City of Summerside Pollution Control Plant comprise an appropriate unit for collective bargaining. Indeed, the Respondent has admitted that the technical and statutory requirements for the Applicant's Application for Certification have been met. Notwithstanding the Application's compliance with the necessary provisions, and the admission of the Respondent, the Board maintains the authority to make a determination as to whether the unit in respect of which the Application is made is appropriate for collective bargaining (*Labour Act*, s. 13(1), supra).

The Application for Certification was brought by CUPE Local 4932 claiming bargaining rights on behalf of the five (5) employees employed at the "Water Pollution Control Centre" for the City of Summerside (a sixth employee being ineligible due to his position of management at the Pollution Control Plant). In its Reply to the Application for Certification, the Respondent City of Summerside has suggested that CUPE Local 804 is the appropriate bargaining unit for these five employees, as CUPE Local 804 is the certified bargaining unit for, *inter alia*, the City of Summerside Water and Sewer Utility employees.

The employees of the City of Summerside Pollution Control Plant are specifically excluded from Local 804 by virtue of section 3.01 of the Collective Agreement between the City of Summerside and CUPE Local 804:

3.01 ***Bargaining Unit***

The Employer recognizes the Canadian Union of Public Employees and its Local 804 as the sole and exclusive Collective Bargaining Agent for all of its employees, save and except those employees excluded by virtue of section 7(2) of the Prince Edward Island Labour Act, Fire Caretakers, employees of the Electric section of the Municipal Services Department, employees of the Police Department, ***employees working at the Pollution Control Plant,*** *Clerical Employees who are*

represented by IBEW Local 1432 ***and SCN Internet Installers who are represented by IBEW Local 1432.*** (Exhibit A-1) (emphasis in original)

Bill McKinnon testified in his capacity as CUPE National Representative for Prince Edward Island that CUPE Local 804 was the municipal works local and comprised as many as thirty-five (35) members engaged in municipal works for the City of Summerside, including Water and Sewer employees; those employees within the division of Parks and Recreation; and various labourer positions, both seasonal and otherwise. Mr. McKinnon testified that the reference to the employees working at the Pollution Control Plant in section 3.01 of the Collective Bargaining Agreement is shown in bold print in Exhibit A-1 because it is a new amendment appearing in the Collective Agreement dated April 1, 2006. The Board therefore concludes that the bold print appearing in this Exhibit, which confirms the exclusion of Pollution Control Plant employees, does not connote emphasis but only references a new amendment as of the 1st day of April, 2006.

Mr. McKinnon advised that Local 804 is a standalone unit, with no sub-units or fragmentations. It was Mr. McKinnon's opinion that City of Summerside Water and Sewer employees who were included in Local 804 did not wish to work in the Pollution Control Plant; however, it was further Mr. MacKinnon's opinion that very little negotiation surrounded the recognition provisions of the current Local 804 Collective Agreement and the option of Pollution Control Plant employees unionizing at that time.

Counsel for the Applicant presented evidence through Mr. McKinnon which the Board marked Exhibit A-2 and Exhibit A-3, being Applications for Amendment of Certification Orders dated the 15th day of June, 1984 and the 18th day of June, 1984, respectively. With these documents, the Applicant drew the Board's attention to the City of Charlottetown where a smaller Local unit was deemed appropriate comprising only Water and Sewer employees. Mr. McKinnon testified that the five Summerside Pollution Control Plant employees watched with admiration the support that CUPE provided to the members of the small bargaining unit during a period of intense labour negotiations which included a strike by union members in or about October 2008. Comparisons were made with respect to the size of that smaller unit with the size of potential Local 4932 and with respect to similarities in job descriptions for the employees of the two units. Mr. McKinnon noted that a "without prejudice" offer had been made to the Respondent City to voluntarily recognize the Pollution Control Plant employees as members of a sub-local of Local 804, which offer was refused. Mr. McKinnon noted for the Board that sub-locals would do all of their own negotiations and have their own autonomous rights.

The Applicant did not call any witnesses other than Mr. McKinnon including, it is noted by the Board, none of the five Pollution Control Plant employees seeking to certify Local 4932 or any employees of Local 804.

The Respondent City of Summerside first called Terry Murphy, CAO with the City of Summerside to present evidence. Mr. Murphy has been involved in the collective bargaining process for all unions within the City of Summerside up until 2009 and has been the lead negotiator with Local 804. Mr. Murphy confirmed the evidence of Mr. McKinnon that Local 804 members did not wish to be working in the Pollution Control Plant. However, it was confirmed that at the time of negotiating the April 1, 2006 Collective Agreement, the Pollution Control Plant operated as a primary treatment facility and consisted of two employees. In 2008, the current pollution control treatment plant came online, being a tertiary plant and employing the five employees in the proposed unit for which Local 4932 seeks certification.

Mr. Murphy commented on certain logistical and practical difficulties presented by having both unionized and non-unionized City employees involved in the waste water and pollution control aspects of municipal operations. Mr. Murphy commented that issues pertained to the use of municipal equipment which could be used by unionized employees but not by those in the Pollution Control Plant and the resulting duplication of equipment in some instances. Mr. Murphy further commented with respect to the occasional confusion surrounding permitted job duties. Exhibit R-1, being the Respondent's Book of Material Documents, contains various grievance forms and dispositions concerning non-union member activity with respect to equipment and operations at the Pollution Control Plant. Mr. Murphy confirmed, from his perspective, that the City of Summerside already had to negotiate collective agreements with approximately eighty unionized employees under five Locals and an additional sixth Local would add to the difficulty in the ultimate collective agreement process. In Mr. Murphy's opinion, the members of the Applicant Local 4932 would have the right to strike and possess similar rights as would unionized members of other City Locals. Mr. Murphy concluded his evidence by stipulating his preference to negotiate one larger Collective Agreement instead of two separate agreements and that including the group of five Pollution Control Plant employees into Local 804 would eliminate cross-over issues and result in certain efficiencies for the Respondent City.

Greg Gaudet, Director of Municipal Services, was the second and final witness called by the Respondent City. Mr. Gaudet presented a general overview of the structure of the Municipal Services department of the City of Summerside. Summerside's Municipal Services are diverse, including the electric utility, sewer utility, water utility, public works department and an IT component.

Mr. Gaudet confirmed that four classifications of employees comprised the Water and Sewage division within Local 804:

1. Waste water collection;
2. Waste water treatment;
3. Water distribution; and
4. Water treatment.

A minimum certification level 2 is required for all classifications except waste water treatment, and members exist within Local 804 that have their level two certification except for waste water treatment. Mr. Gaudet confirmed that Local 804 employees work with the water utility; the collection and delivery of sewage that feeds into the Pollution Control Plant; and public works. Several classifications comprise Local 804, including labourers, seasonal employees, operators and semi-skilled labourers. The City tries to make employees as versatile as possible to enable cross-over between positions and the City pays for employees to obtain certifications as required and as possible.

Much of Mr. Gaudet's evidence addressed the series of lift stations involved in the City of Summerside sewage collection system, a schematic of which appears at tab 8 of the Respondent's Book of Material Documents (Exhibit R-1). Although the schematic shows a total of twelve (12) lift stations, number 12 has recently been decommissioned. Lift stations 1, 2 and 3 are monitored and maintained by the group of five Pollution Control Plant employees; lift stations 4 through 11 are monitored and maintained by Local 804 employees. The requirements for the various lift stations are the same. In the event of trouble, alarms will dial the Local 804 employee on call for lift stations 4 through 11; alarms will dial the Pollution Control Plant employee on call for lift stations 1, 2 and 3.

Although Pollution Control Plant employees are primarily involved in maintaining the lagoon in the north end of the City, Local 804 employees do participate in the lagoon's general maintenance, and both groups are involved in water sample collection for testing; chlorine and chemical handling; the use of equipment, including tractors and loaders; snow clearing; after-hours pager deployment for trouble calls; lift station monitoring and maintenance; and general familiarity with pumps, valves, piping and reading of instrumentation.

It was Mr. Gaudet's position, as it was Mr. Murphy's opinion, that several benefits would accrue to the City should the group of five Pollution Control Plant employees join Local 804 versus forming their own bargaining unit. According to Mr. Gaudet, these benefits included the sharing of resources and equipment and the ability to use Pollution Control Plant equipment, for example, for other municipal purposes. Other benefits include a greater ability to share human resources for vacation and sick leave; a more efficient use of stand-by pay; the ability to cross-train employees and utilize employees in cross-over positions; less administration for the City in dealing with one Collective Agreement as opposed to a Collective Agreement for Local 804 and proposed Local 4932; less administration generally; and the ability to draw from a greater pool of employees for promotion or transfer. Tab 7 of the Respondent's book of material documents (Exhibit R-1) shows several improvements to the benefits which would be obtained by the group of five (5) Pollution Control Plant employees for joining Local 804, under the current Collective Agreement, including stand-by pay improvements and improvements concerning overtime, annual leave and service pay.

Mr. Gaudet further admitted under cross-examination that although the unionized and non-unionized employees perform a lot of similar tasks in the span of a week, some differences do exist in their job descriptions. Mr. Gaudet further admitted that having the same certifications did not mean that the employees completed identical work. Mr. Gaudet further commented that the five Pollution Control Plant employees are limited to the Plant, lagoon and lift stations and do not participate in work in other areas of the City. The Board further notes Mr. Gaudet's admission under cross-examination that he did not verify the summary of Certification Levels appearing at Tab 7 of Exhibit R-1 against the source of the information; however, he does believe the information to be correct as summarized at Tab 7 of Exhibit R-1.

The Board has further reviewed in some detail the current collective agreement between the City of Summerside and Local 804 employees, effective the 1st day of April, 2006 to the 31st day of March, 2011. The Board has further reviewed the excerpts provided by the parties from *Canadian Labour Law*, 2nd Edition, and the excerpts from *Ontario Labour Relations Board Law and Practice*, 3rd Edition, as submitted by the Applicant. Finally, the Board has reviewed the Labour Relations Board Decisions from other Canadian jurisdictions as submitted by counsel for both parties.

In closing submissions, counsel for the Applicant asked the Board to consider article 3.01, being the recognition clause, in the current Collective Agreement between the Respondent City and Local 804 employees. Specifically, counsel for the Applicant suggested that the exclusion of Pollution Control Plant employees from the Local 804 bargaining unit is proof of the intent and desire of the parties to have the group of five Pollution Control Plant employees excluded from Local 804. According to the Applicant, the Board should therefore give considerable weight to this alleged intent of both parties. The Applicant provided decisions from the Saskatchewan Labour Relations Board (*International Association of Bridge, Structural Ornamental Iron Workers, Local 771*, 1992, SLRBD No. 33) and the Alberta Labour Relations Board (*Grand Prairie (City) (re)*, 2005, ALRBD No. 17) and drew the Board's attention to section 35 of the PEI *Labour* Act in support of its position that the "wishes of the parties" must be considered.

Upon consideration of the Applicant's argument, the Board is of the view that very little weight, if any, should be placed on the recognition provision appearing at article 3.01 of the current Collective Agreement. At the time of the implementation of the Agreement, the Pollution Control Plant operated in a very different fashion than it does at present, having then been a primary as opposed to tertiary plant, and then comprising two employees in contrast to the current group of five employees in Local 4932. Paragraph 3.01 represents a snapshot in time with respect to the structure of the Pollution Control Plant and reflects the landscape of the day with respect to the two employees at the time the Collective Agreement was reached. The current factual circumstances distinguish the Pollution Control Plant and its workers in their present form and composition from the plant and its workers at the time of the 2006 Collective Agreement. This Board cannot be satisfied that the wishes of the parties are presently reflected in

the current Collective Agreement. The circumstances before the Board are therefore distinguishable from the factual circumstances addressed by other labour boards in the case references provided by the Applicant.

Ultimately, this Board is not bound by the recognition clause or any alleged agreement that the parties may have reached, and has the inherent authority to determine an appropriate bargaining unit based on the evidence of the present day. As stated in *Bell Canada* [1982] 1 Can LRBR 274: "[t]o underline the Board's approach the parties are reminded in each case that, regardless of any agreement they may reach, the Board has sole authority to determine the appropriateness of a bargaining unit. . . . " Further, *Grand Prairie(City) (Re)* asserts that the bargaining history of the parties may be relevant, but it is not controlling, and an agreement between the parties may be overridden by a Board when the proposed bargaining unit is inappropriate. The Board further notes that the original Local 804 Certification Order (2-60) included water and sewer employees.

Supported by decisions from other Canadian jurisdictions, including the Ontario Labour Relations Board (*Active Mold Plastic Products Ltd.*, 1994, OLRB Rep. June 617; *General Signal Limited,* 1993, OLRB Rep. November 1141; and *Burns International Security Services Limited,* 1994, OLRB Rep. April 347) the Applicant raised the often discussed issue of "the" appropriate bargaining unit versus "an" appropriate bargaining unit. The Board has considered all of the case references submitted by the Applicant, with particular attention to the following passages from *Active Mold Plastic Products Ltd.*, commencing at paragraph 27 of that decision:

> *The Board succinctly restated its approach to bargaining unit determination in the following passage at paragraph 23:*
>
> > *... We are troubled by the fact that a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive and time-consuming process for deciding a relatively simple question: does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer. (as quoted from "Hospital for Sick Children [1985] OLRB Rep. Feb. 266*
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> *Should the unit requested by the applicant satisfy this standard, the unit will be granted by the Board. It is unnecessary to consider, in those circumstances, any alternative bargaining unit configuration, as the Board's function is to determine only whether the unit requested by the applicant is "an" appropriate unit. Comparative assessments of possible bargaining unit descriptions are unnecessary.*
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> . . .
>
> *Most recently, in Burns International Security Services Limited . . . the Board addressed the utility of the concept of "community of*

> *interest". In this decision, it was noted that the term "community of interest" does not usually provide the Board with much assistance in determining whether an applied for bargaining unit is appropriate. It was observed in this decision that the focus before the Board in bargaining unit determination cases should be upon "concrete problems rather than the sometimes nebulous concept of 'community of interest'". (Active Mold, paragraph 29)*
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> . . .
>
> *As noted by the Board in Burns International Security Services Limited, all employees share a "community of interest" that can be identified in any particular workplace. It is not necessary nor is it desirable for the Board to assess the relative strengths of the varied "communities of interest" in the workplace, just as it is unnecessary for the Board to consider alternative bargaining unit descriptions in the absence of serious labour relations problems. At the end of the day, the Board's focus should be upon the concrete, demonstrable problems which will result from the applicant's proposed bargaining unit should it be granted by the Board. In the absence of such concrete, demonstrable problems, the applicant's proposed bargaining unit will be acceptable to the Board. (Active Mold, paragraph 30)*

In its deliberations on the appropriateness of the proposed bargaining unit, this Board gave due consideration to the following passage from *Burns International Security Services Limited*:

> *These goals must be harmonized within a framework that now recognizes (as early Board "policies" might not) that there is no single unique and indisputably "appropriate" unit. There are degrees of appropriateness; or to put the matter another way, sensible, alternative ways in which one can define the bargaining unit without triggering (as the board in Hospital for Sick Children put it) "serious labour relations problems". A trade union need not seek to represent the MOST comprehensive or MOST APPROPRIATE bargaining unit; and as the applicant or moving party, the union has a degree of flexibility in deciding what unit to organize. As long as the unit it seeks does not generate serious labour relations difficulties for the employer, it will be granted the unit that it applies for. The focus is on concrete problems rather than the sometimes nebulous concept of "community of interest".* (paragraph 29) (emphasis in original)

This Board has also considered the meaning of "appropriate bargaining unit" as addressed by *Ontario Labour Relations Board Law and Practice*, 3rd Edition, which suggests at paragraph 3.223 that "the essence of appropriateness in the context of labour relations is that the unit of employees is able to carry on a viable and meaningful collective bargaining relationship with the employer".

The above passages are particularly compelling with respect to the matter to be determined by the Board at present, being the determination of an appropriate bargaining unit for the five Pollution Control Plant employees. Counsel for the Applicant has further asked the

Board to consider the Charlottetown situation as discussed by Mr. McKinnon, and that history may be a useful tool to assist the Board in its determination.

However, history alone can not be determinative of what shall comprise an appropriate bargaining unit at present. The Board must consider all relevant factors, including community of interest; the effects of fragmentation on both the employer and the employees; the rationalization of the workplace; and common sense considerations. Although the above passages from other Board decisions are compelling, this Board is not bound by them, and they cannot be read in a vacuum. For example, paragraph 3.223 of *Ontario Labour Relation Board Law and Practice* continues as follows:

> *Although section 9(1) uses the words "the unit", the Board has recognized that there may be more than one unit which is appropriate, and if there is, the Board has a wide discretion in selecting which unit it will certify as "the unit of employees that is appropriate for collective bargaining".*

Although certainly not bound by Ontario Labour Relations Board decisions, this Board does contain the same discretion in determining an appropriate bargaining unit and can consider the analysis and factors relied upon in other jurisdictions.

The Board further references paragraph 28 of *Burns International Security Services Limited*:

> *Both in Hospital for Sick Children and in later cases, the Board has explored the tension between bargaining structures that facilitate organizing (one of the goals of the Statute) and bargaining structures that are likely to be more stable and effective in the long-run (another goal of the Act). The former objective points to smaller employee groupings which are more readily organized. The latter goal points to broader-based bargaining units that have the organizational mass and bargaining power to survive over time and in changing market conditions.*

Paragraph 13 of *General Signal Limited* (1993, OLRB Rep. November 1141) further addresses the move towards more broadly-based bargaining units:

> *. . . [T]he Board has expressed a decided preference for broader-based bargaining structures that minimize the fragmentation entailed by a multiplicity of bargaining units, and absent such concerns as the difficulty of organization, it is clear that when the applicant's proposed bargaining unit is, in the Board's view, likely to engender such difficulties, the proposed unit will not be accepted. . . . In our view, these amendments point in the direction of more inclusive, broadly-based bargaining units that, at the same time, do not adversely affect employees' right to organization and participation in collective bargaining.*

It is clear that in Ontario at least the trend is towards larger bargaining units when possible and when employees' rights are not adversely impacted.

In the present matter, no evidence has been presented that any rights or benefits of the Pollution Control Plant workers will be "adversely affected" by being included in Local 804 and being denied their own bargaining unit. Indeed, the Board must make its decision based on the evidence presented to it; however, the Board notes that none of the group of five Pollution Control Plant employees attended the Hearing to give evidence and the Board is therefore unaware of any particular advantages or disadvantages which may result for these employees, other than what was presented by the three witnesses that did appear.

In its analysis, the Board has also found helpful the materials provided by the Respondent, including the Ontario Labour Relations Board decision of *Hudson's Bay Company* (1993, OLRB Rep. October 1042) and that Board's decision of *Coca-Cola Ltd.* (1993, OLRB Rep. October 1042). The Board recognizes that *Hudson's Bay Company* is largely based on section 7 of the Ontario *Labour Relations* Act, a provision that is foreign to the Prince Edward Island legislation. However, both of these Ontario decisions, like the decisions presented by the Applicant, although certainly not binding on the Board, provide guidance as to the necessary considerations when determining an appropriate bargaining unit. Some of the considerations as suggested by these decisions include the following:

1. A trend towards more comprehensive bargaining units;
2. Minimizing fragmentation;
3. Facilitating viable and stable collective bargaining;
4. Creating administrative efficiency and convenience in bargaining;
5. Facilitating lateral mobility for the benefit of both employer and employees;
6. Achieving a common framework of employment conditions; and
7. Minimizing the risk of work stoppages.

At paragraph 23 of *Hudson's Bay Company*, the Ontario Labour Relations Board quoted from *Hospital for Sick Children*, which confirmed that

> *the structure and appropriateness of a bargaining unit cannot be determined with scientific precision. In any given situation there may not be only one uniquely appropriate bargaining unit. . . . There may be varying degrees of "appropriateness", with one or more unit descriptions being appropriate, even though some other (usually more comprehensive) bargaining unit might also be appropriate.*

Ultimately, this Board must determine a unit which would most likely facilitate viable and stable collective bargaining, reduce fragmentation, and least likely cause serious labour relations problems. The right of employees to self organization must compete with the need for viable and harmonious collective bargaining. The Board has a responsibility to create a rational and viable collective bargaining structure; it is at the present time that rationalization can occur.

With reference to *Coca-Cola Ltd.*, the Board should also consider the following in the determination of the appropriate bargaining unit:

1. Community of interest, including the nature of the work performed and conditions of employment;
2. The skills of employees;
3. Administration;
4. Geographic circumstances;
5. Functional coherence and interdependence;
6. Centralization of managerial authority;
7. The economic factor; and
8. Source of work

As further noted in *Coca-Cola Ltd.* the question of the appropriateness of a particular bargaining unit can not be determined by any precise formula. Each case turns on its own peculiar facts. However, the determination of the appropriateness of a bargaining unit is part of the Board's responsibilities.

The evidence before the Board suggests many advantages and efficiencies which may be gained by the Respondent City should the five Pollution Control Plant employees become part of the Local 804 bargaining unit, as opposed to forming their own bargaining unit. These were addressed by Mr. Murphy and in more detail by Mr. Gaudet, and include a greater sharing of resources, including human resources and equipment; a more efficient use of equipment; a lesser administrative burden; and improvements for employees with respect to advancement and work opportunities. The benefits to the Respondent City of having to negotiate one less Collective Agreement are obvious to the Board and the Board was presented with no evidence to suggest that the five Pollution Control Plant employees will be disadvantaged by being part of Local 804. The only evidence on the point came from Mr. McKinnon who testified that the five employees were impressed by the support given by CUPE to the smaller unit in Charlottetown during a time of work stoppage.

Certainly such a consideration does not support the Board's goal of determining a unit which would facilitate viable and stable collective bargaining without causing serious labour relations problems. To the contrary, the ability of the five Pollution Control Plant employees to independently engage in work stoppages has the potential to seriously disrupt municipal services. It is the opinion of the Board that the Respondent City, having to balance the competing interests of two bargaining units whose members share a very similar "community of interest", would quite likely face increased labour relations problems. Further, as previously noted, no evidence was presented by the five Pollution Control Plant employees as to disadvantages, either in the work place or otherwise, which would result by not having their own bargaining unit and by being included in Local 804. Similarly, no evidence was presented by Local 804 employees to suggest to the Board that their working conditions would be detrimentally impacted by the inclusion of Pollution Control Plant employees and responsibilities in their unit and workplace. Finally, no evidence was presented with respect to any differences in qualifications required for employees in the sewer utility, both inside and outside the plant.

After hearing all of the evidence with respect to the job descriptions of the Pollution Control Plant employees and Local 804 employees; the practical issues faced by the Respondent

City on a day-to-day basis with respect to the current fragmented structure; and the benefits which will accrue as a result of a more comprehensive Local 804 bargaining unit, the Board is satisfied that the employees of the City of Summerside Pollution Control Plant do not comprise an appropriate unit for collective bargaining Rather, the inclusion and recognition of the Pollution Control Plant employees in Local 804 would result in numerous practical and administrative benefits and efficiencies for the Respondent City and facilitate viable and stable collective bargaining without causing labour relations problems or having a detrimental impact on the rights of Pollution Control Plant employees.

Although "community of interest" on its own is not determinative of the "appropriateness" issue, it is a consideration, along with the other factors reviewed in *Hudson's Bay Company* and *Coca Cola Ltd.*, the Board must make in its analysis. Guidance with respect to community of interest is given in *Canadian Labour Law*, Second Edition. The factors to consider include:

1. *Similarity in: the scale and manner of determining earnings, employment benefits, hours of work and other terms and conditions of employment; the kind of work performed; and the qualifications, skills and training of employees;*
2. *The frequency of contact or interchange among employees and the geographic proximity of workplaces;*
3. *Continuity or integration of production processes;*
4. *Common supervision and determination of labour relations policy;*
5. *Relationship to the administrative organization of the employer;*
6. *History of collective bargaining;*
7. *Desires of affected parties and employees; and*
8. *Extent of union organization*

(paragraph 7.60)

> *In applying these considerations, a labour board's objective is to fulfill its obligation to maximize an employee's freedom to join a trade union of his or her choice while at the same time promoting harmonious labour relations through effective and efficient collective bargaining procedures. (paragraph 7.70)*

The Board is satisfied that the appropriate "community of interest" for the Pollution Control Plant employees lies within Local 804, given the current composition of employees in Local 804; the present and available variety of job skills and working conditions; geographic proximity; and the relationship of Local 804 and proposed Local 4932 to the employer, the Respondent City. Both groups are part of the employer's "Technical Services" division of the Respondent City and both the water and sewer utilities are covered under the same Bylaw of the Respondent City. Although similarity in job description and workplace is true in a variety of aspects, it is most clearly shown by the sharing of the monitoring and maintenance of the eleven (11) lift stations servicing the Respondent City's sewer system.

The Board is satisfied that considerable workplace and administrative efficiencies can be gained by Local 804 bargaining on behalf of a unit that includes the Pollution Control Plant employees. Jurisdictional disputes will be minimized if not eliminated as revealed in the sampling of grievances filed by the Respondent. All Pollution Control Plant employees will fall within the municipal services division of the City and they will report to the Director of

Municipal Services. Local 804, which is not an excessively large bargaining unit at present, will not "swallow up" the five Pollution Control Plant employees. Ultimately, it appears clear that a more comprehensive Local 804 which includes the Pollution Control Plant employees will result in a reduction of public resources being expended in the administration and implementation of the municipal services mandate.

Local 804 is already diverse in nature, consisting of labourers, an icemaker, various operators and foreman, and technicians. Certainly the addition of the five Pollution Control Plant employees will not undermine the community of interest comprising Local 804 and in fact will only enhance the current membership which already contains those with similar skills and job descriptions.

The Board has considered the alternative proposal as brought by the Applicant to create a sub-unit under Local 804 which would solely contain the five Pollution Control Plant employees. After due consideration and discussion, the Board must deny this option as, in the opinion of the Board, such a structure would be sufficiently similar to a separate and distinct bargaining unit that the same issues of fragmentation and inefficiencies with respect to administration, human resources and usage of equipment will result.

The Board has carefully considered all of the evidence submitted by the parties and concludes that the proposed Local 4932 is not an appropriate bargaining unit for the employees at the City of Summerside Pollution Control Plant. Accordingly, the Board must deny the Application for Certification of Local 4932 filed the 25th day of February, 2009, and the Board so rules.

Matthew MacFarlane
Chair

Fraser MacDougall
Member

Blair James
Member

This Decision made by the Prince Edward Island Labour Relations Board on the 26th day of January, 2011, and issued under the hand of its Chief Executive Officer on the 26th day of January, 2011.

Shawn M. Shea
Chief Executive Officer