



**GOVERNMENT OF PRINCE EDWARD ISLAND  
LABOUR RELATIONS BOARD**

M. Lynn Murray, B.B.A., LL.B.  
Chairman

Roy J. Doucette  
Chief Executive Officer

DEPARTMENT OF LABOUR  
P.O. BOX 2000  
CHARLOTTETOWN  
PRINCE EDWARD ISLAND  
C1A 7N8

RE: APPLICATION FOR CERTIFICATION : TIMELINESS

BETWEEN: PRINCE EDWARD ISLAND FOODWORKERS' UNION APPLICANT

AND: CAVENDISH FARMS, a division of Irving Pulp & Paper Ltd. RESPONDENT

AND: UNITED FOOD AND COMMERCIAL WORKERS' UNION LOCAL 1252 (IN TRUSTEESHIP) INTERVENOR

AND: UNITED FOOD AND COMMERCIAL WORKERS' INTERNATIONAL UNION INTERVENOR

DECISION

COUNSEL FOR THE APPLICANT: PAUL J. D. MULLIN, Q.C.

COUNSEL FOR THE INTERVENORS: EUGENE P. ROSSITER

COUNSEL FOR THE RESPONDENT: UNREPRESENTED AND NOT PRESENT

BACKGROUND OF CURRENT APPLICATION NO. 89-015

1. Board Application No. 89-015 is an Application for Certification, filed April 17, 1989, by the Prince Edward Island Foodworkers' Union (hereinafter referred to as the "Foodworkers' Union"). The Foodworkers' Union seeks to be bargaining agent of a unit of employees of Cavendish Farms. Several documents accompanied the application, including a list of officers of the Foodworkers' Union, a list of the employees of the Respondent who wished the Foodworkers' Union to represent them, the constitution and bylaws of the Foodworkers' Union, a letter addressed to the National Automobile, Aerospace and Agricultural Implement Workers' Union of Canada dated March 20, 1989, membership

evidence and receipts regarding the payment of fees, and minutes of the founding meeting of the Foodworkers' Union.

2. The Chief Executive Officer of the Labour Relations Board, by virtue of Section 4(1) of the Regulations made pursuant to the Labour Act, R.S.P.E.I. 1974, Cap. L-1, is required to set a terminal date. On April 20, 1989, he scheduled May 5, 1989, as the terminal date.

3. The Respondent, Cavendish Farms, filed a Reply to the Application for Certification on April 27, 1989, which indicated in part:

- (a) that 536 employees were appropriate for collective bargaining as of April 17, 1989, the date the application was filed with the Board;
- (b) that UFCW, Local 1252, was a trade union known to the Respondent to be claiming to be the bargaining agent of the employees in question; and
- (c) that the Collective Agreement signed October 3, 1984, and effective as of that date, contained Article 19.03, a provision relating to its termination or renewal.

4. The application of the Foodworkers' Union included a request that the Board order a pre-hearing representation vote. While the Board did meet on April 27, 1989 to deal with this issue, after reviewing the documentation in the file the Board declined to make such an Order until it had determined the following, namely:

- (a) that the Application is not in contravention of a previous Board Order issued March 1, 1989 in Board Application No. 87-010/88-018; and
- (b) that the Application was filed during a period permitted by Section 11 of the Labour Act.

5. Notices of intervention by the United Food and Commercial Workers' Union, Local 1252 (In Trusteeship) and the United Food and Commercial Workers' International Union (hereinafter referred to collectively as "UFCW") were filed with the Board on May 2, 1989. In the notices of intervention, which for the most part are identical, several grounds are relied on. The points relevant to the Board's consideration at this point in time are outlined below:

- (a) that the Application is made during a closed period as provided in the Labour Act [Ground No. 10 of Schedule "B" of the Interventions]; and
- (b) that the Application is in contravention and violation of an Order of the Prince Edward Island Labour Relations Board of March 1, 1989, which provided that the certified bargaining agent would have six months of uninterrupted time, within which to carry out its certified bargaining agent obligations [Ground No. 11 of Schedule "B" of the Interventions].

6. The Board held a hearing to deal with these issues. The Board then requested the parties to appear before it and make further representations on these issues, which they did, and hearings concluded on September 7, 1989. On the basis of its consideration of items (a) and (b) of paragraph 5, the Board has decided to dismiss the application, for the reasons set out below.

BACKGROUND OF BOARD APPLICATION NOS. 87-010/88-018

7. In order to explain the Board's reasons, a brief review of the factual background of Board Application Nos. 87-010/88-018 which led up to the Board decision of March 1, 1989 referred to above is provided.

8. Previous decisions of this Board rendered January 31, 1989 and March 1, 1989 indicate that in 1987, in the Atlantic region, and specifically in Nova Scotia, Newfoundland and Prince Edward Island, a massive union struggle began between the Fisherman, Food and Allied Workers' Union (FFAW) and the National Automobile, Aerospace and Agricultural Implement Workers' Union, often referred to as CAW-Canada, on the one hand and UFCW on the other hand. The officers of UFCW resigned in mass and changed their allegiance to FFAW or CAW-Canada. CAW-Canada or its affiliate, FFAW, then sought to represent all the employees in all the units previously represented by UFCW.

9. On Prince Edward Island, there were eight units represented by UFCW, with Cavendish Farms being the largest unit in question. CAW-Canada made application to be certified as bargaining agent for the employees at various units in this

Province, of which Cavendish Farms was one. UFCW opposed the applications and filed unfair labour practice complaints against CAW-Canada and several of the employers.

10. Numerous decisions were rendered by the Board, the last of which were rendered on March 1, 1989. On that date, the Board found both Cavendish Farms and CAW-Canada guilty of unfair labour practices, in that Cavendish Farms had failed to bargain and CAW-Canada had used intimidation and/or coercion on the employees at the Cavendish Farms plant.

11. After determining that there had been an unfair labour practice committed by CAW-Canada, the Board then had to impose an appropriate remedy, keeping in mind that one of the main purposes of the Board is to promote orderly and harmonious labour relations in this Province. The labour climate at Cavendish Farms was unhealthy to say the very least. The Board found as a fact that tensions were running high, the bargaining rights of UFCW had been interfered with to such an extent that it was effectively precluded from exercising any of the normal duties that a certified bargaining agent would perform, and that the acts of violence occurring at the plant were of such a nature so as to warrant a finding of intimidation and coercion.

12. In the context of the foregoing, on March 1, 1989, the Labour Relations Board gave a decision in United Food and Commercial Workers' Union, Local 1252 (In Trusteeship) and National Automobile, Aerospace and Agricultural Workers' Union of Canada (CAW-Canada) [Board Application No. 87-010/88-018]. One paragraph of the decision and the relevant paragraph for the purposes of this case stated as follows:

27. In addition, while an extraordinary remedy, in order that the labour climate at Cavendish Farms stabilize, the Board directs and so orders that UFCW have an uninterrupted period of time in which to utilize the certification rights it has previously acquired in regard to the employees at Cavendish Farms. That period of time will be six months from the date of this Order. The Board feels that this period of time is necessary and imperative in the circumstances. The employer, the employees and the union representing the employees need stability and the Board feels this period of time should accomplish that stability.

WAS THERE A BREACH OF THE BOARD ORDER OF MARCH 1, 1989?

13. The plain terms of the March 1, 1989 Order mean that UFCW is to have an uninterrupted six months in which to utilize its certified bargaining rights. An application for certification presented within weeks of commencement of that period is entirely inconsistent with UFCW having an uninterrupted period of six months in which to use its certification rights. In order to utilize its rights as bargaining agent - the right to negotiate a new collective agreement, the right to deal with grievances, and the various other rights that a union has as certified bargaining agent - at the very least UFCW required the ability to carry on without another attempted organization of its members, for that would detract from the efforts that could be put into collective bargaining and would be almost guaranteed to prevent UFCW from exercising its rights as certified bargaining agent as effectively as it otherwise could. The Board's March 1, 1989 Order is expressed in broad terms and the Board finds that the application that is the subject of this case is entirely inconsistent with the Order.

14. At the hearing of this issue, it is significant that the Foodworkers' Union did not question that its application, if brought by CAW-Canada, would be in violation of the Order. The position of the Foodworkers' Union was that the Foodworkers' Union was not a party to the proceedings in which the Order was issued and that therefore, not being bound by the Order, it was free to violate it; that is not exactly how the position was expressed but that is what it amounted to.

15. The Board is aware that the Legislature has bestowed upon it the power to administer and to adjudicate, not the power to legislate.

16. Whether it can make orders binding on those who are not parties to a proceeding in which an order is made by the Board is not an issue that it is necessary for the Board to determine in this case, because the Board has determined, for the reasons that follow, that its March 1, 1989 Order binds the trade union that

made the application that is the subject of this decision - the Foodworkers' Union.

17. The March 1, 1989 Order was issued against the nominal party CAW-Canada. The Board refers to CAW-Canada as a nominal party in that a trade union, in this province, is not a legal person. Section 43 of the Labour Act gives a trade union rights that are generally exercisable only by legal entities such as individuals or corporations, but it does not give a union an identity as a legal person. In some jurisdictions (for example New Brunswick) the legislation goes beyond s. 43 by stating that trade unions are at least for some purposes legal entities. In this province, it does not. In this province, "trade union" is defined in Section 7(1)(m) of the Labour Act to mean:

7(1)(m) "trade union" or "union" means any organization of employees formed for the purpose that include the regulations of relations and collective bargaining between employees and employers and includes a council of trade unions that has been vested with appropriate authority by any of its constituent unions to enable it to discharge the responsibilities of a bargaining agent;

18. A trade union therefore is an organization of employees formed for purposes which include collective bargaining.

19. In this case the applicant is an organization of employees the leaders of whom, the Board was told, are no longer affiliated with CAW-Canada. The organization calls itself the Prince Edward Island Foodworkers' Union, and they have their own constitution. The Board finds that the organization of employees who call themselves the Foodworkers' Union is not a new organization, so entirely distinct from the old one against which the Order was made that they escape its operation; instead, the employees at Cavendish Farms have simply reorganized themselves, with the result that the organization against which the March 1, 1989 Order was issued is an organization which included the organization now applying for certification.

20. The expression "organization" is a loose sort of word referring to an organized group. The identity of an organization can depend on various factors.

21. "Trade Union" is defined as an organization of employees formed for the purpose of collective bargaining. The objective of collective bargaining in general is to correct what, in some work places, could be an unfair balance of power between the employer on the one hand and the individual employees on the other. By organizing and having their organization certified, employees can achieve the ability to be represented in their relations with their employer by the organization - their union - rather than having to deal one on one with their employer. The organization requires leaders who will represent its members, and to whom much of the work of the organization is delegated; the ability of the organization to delegate much of its work to its leaders is key to the effectiveness of trade unions generally. It is for this reason that in the material that follows the Board treats continuity of leadership as the factor to which it gives the greatest weight.

22. Without purporting to use an approach that will necessarily be appropriate in all cases, the Board is of the opinion that three factors in this case indicate that the organization that now calls itself the Foodworkers' Union is the product of a reorganization, not of the formation of an entirely new distinct organization. Those factors are purpose, membership and leadership, and in view of the importance of leadership, the greatest weight is attached to that factor.

23. In connection with membership, the Board has examined the membership evidence filed by the Foodworkers' Union. The Board has also examined the membership evidence that was filed when CAW-Canada applied for certification. Before doing so, the Board indicated that it was considering that and invited the applicant and the intervenors to make representations in relation to its doing so. Having considered those representations the Board determined that it would be appropriate to examine that evidence. What that evidence discloses is that more than a majority of those whom the Foodworkers' Union claims as its

members at Cavendish Farms were also claimed as members by CAW-Canada.

24. Membership alone may not always indicate that what are said to be two different organizations are, in fact, one organization that has simply reorganized itself. Employees may lose confidence in one union and join another. There is nothing, in law, that prevents an employee from being a member of more than one union. Membership is not decisive, but it is significant, and there is certainly some degree of continuity of membership in this case. The Board is aware that in terms of membership the Foodworkers' Union, comprised of employees at Cavendish Farms, is only a fraction of the size of CAW-Canada, the national union, but in terms of membership at Cavendish Farms the Foodworkers' Union's membership is remarkably similar to those who were CAW-Canada members at Cavendish Farms when the certification application (87-005) leading to the March 1, 1989 Order was made.

25. In connection with leadership, the factor to which the Board attaches the greatest weight for the purpose of this case, the evidence before the Board supports the conclusion that the organization now calling itself the Foodworkers' Union is not a new and distinct organization and that it is simply the product of a reorganization. The evidence is that those who provide the leadership for the Foodworkers' Union are, for the most part, the same people who provided it at Cavendish Farms for the organization against which the Order was made.

26. Gordon Whitlock, one of the organizers of the Foodworkers' Union, testified that the idea to form a new union came indirectly from Hemi Mitic, Director of Organizing for CAW-Canada, when Mr. Mitic, Mr. Whitlock, James Arsenault, and others together with counsel who represented CAW-Canada at the hearings leading up to the Board decision of March 1, 1989 were discussing the repercussions of that very Board decision. Mr. Mitic gave to Mr. Whitlock the telephone number of Ray Larkin, a lawyer in Halifax, who eventually suggested the idea of a new union. Mr. Whitlock had been one of the catalysys leading the



move to CAW-Canada, and, in fact, he left his employment with Cavendish Farms for a period of time to become a full time employee of CAW-Canada.

27. On March 20, 1989, Gordon Whitlock, James Arsenault, and the other officers of the Foodworkers' Union signed a letter addressed to the National Automobile, Aerospace and Agricultural Implement Workers' Union of Canada, wherein they advise in part of the following:

We are the officers of a newly created organization called The Prince Edward Island Foodworkers' Union. This letter is to revoke our applications for membership in the CAW and to advise you that we have decided to cut all our ties with the CAW.

28. The Board has reviewed the evidence submitted on behalf of the Foodworkers' Union and UFCW. Specifically, the Board has reviewed the documentation in some detail in order to ascertain exactly what events had transpired prior to March 20, 1989, the date of the letter aforesaid. The evidence establishes that the following occurred:

- (a) Subsequent to March 1, 1989, Mr. Whitlock and Mr. Arsenault met to discuss the implications of the Board decision. They received the phone number of Ray Larkin in Halifax.
- (b) Some time prior to March 17, 1989, Mr. Whitlock spoke to Ray Larkin and eventually an agenda, a draft constitution and Bylaws of the Prince Edward Island Foodworkers' Union were prepared and presented at the founding meeting on March 17, 1989 and adopted as presented.
- (c) Mr. Larkin attended the founding meeting of The Prince Edward Island Foodworkers' Union held on Prince Edward Island on March 17, 1989.
- (d) Gordon Whitlock acted as Chairman of the founding meeting.
- (e) Mr. Larkin prepared Exhibit I-3, a bulletin from the Foodworkers' Union.
- (f) Mr. Whitlock spoke with a Summerside lawyer on or about March 19, or March 20, 1989, and he ultimately filed the Application for Certification and accompanying documents.
- (g) at least 19 cards were signed up to and including March 20, 1989;

29. Three of the four executive officers of the Foodworkers' Union were involved in the last organizational

attempt that had been made by CAW-Canada. This point is confirmed by the evidence of James Arsenault which is reproduced below in part:

Q. Okay. So you don't have any printer's bills for anything? You don't know who printed anything? I see. Okay. You would agree with me, Mr. Arsenault, that the people who were behind the Prince Edward Island Foodworkers' Union, the people who were the movers and shakers, the organizers, that sort of thing, are basically the same people that were behind the C.A.W. certification attempt on P.E.I. with the exception of the staffers of C.A.W.?

A. No, there's different ones.

Q. Okay. Let's go down. Gordon Whitlock. He was involved in the last one, was he?

A. Yes, he was.

Q. David Gallant was involved in the last one?

A. Ah, to a certain extent, yes.

Q. Brenda Rogers was?

A. No.

...

Q. Okay. Jimmy Arsenault. You're Jimmy Arsenault, are you?

A. Yes, I was involved.

Q. Frank Bell? Was he involved?

A. No.

Q. I see. Carolyn Coles? Was she involved last time?

A. Carolyn Coles?

Q. Yes.

A. Ah, yes, I'd say...

Q. Carol Paynter?

A. Carol Paynter. No, she was not involved.

Q. She testified for you. Do you recall?

A. I do believe she's a (unclear) for U.F.C.W. She was not involved in this one.

Q. Well, there was a lot of (unclear) for U.F.C.W. until recently. But she testified for C.A.W. last time. Do you recall?

A. Did she? Well, I guess she did.

Q. Do you recall that she had testified that she had obtained cards and had people sign up for C.A.W.?

A. For C.A.W.?

Q. Yes, last time.

A. Yes, I believe she testified to that.

30. So, the evidence discloses elements of continuity of membership and a very high degree of continuity of leadership. The principal leader of the Foodworkers' Union, the person providing the real leadership, is Gordon Whitlock. The principal leader of the CAW-Canada attempt at organization of the Cavendish Farms employees was Gordon Whitlock. His role in the organization is almost decisive of its continuity. Continuity of purpose is obvious; the purpose in both cases was to engage in collective bargaining, and for that purpose, to displace UFCW. The Board therefore finds that the organization now calling itself the Foodworkers' Union is the product of a reorganization and not an entirely new organization so distinct from the one against which it made the March 1, 1989 Order that it escapes its operation.

31. Although other factors may, in some cases, be relevant in determining the identity or continuity of a trade union, the Board would attach little weight to them in the circumstances of this particular case. Affiliation with a national or international union is, in this case, of little significance. While CAW-Canada, the national union, may flatter itself by supposing that affiliation with it was key to the identity of the organization, and while the Board is aware of the contribution that national and international unions make, an organization of employees can continue to function and retain identity without continuing affiliation with a national or international union. The nature of the affiliation of the employees of Cavendish Farms with CAW-Canada prior to the revocation by the officers of the Foodworkers' Union of their membership in CAW-Canada was never made clear because when CAW-Canada applied for certification as bargaining agent of the employees it failed, contrary to s. 3(2) of the Labour Act Regulations, to file a constitution and list of officers. Furthermore, there is no evidence that anyone other

than the officers of the Foodworkers' Union revoked their membership in CAW-Canada. As a result there is no evidence that would lead the Board to conclude that there has been any material change in affiliation that would have any significance in the determination of whether the organization calling itself the Foodworkers' Union is an entirely new and distinct organization, not just the product of a reorganization.

32. The name change is of little significance; the identity of an organization need not be affected by a change in its name. Also of little significance is the fact that the constitution under which the organization is now operating may be a different one from that under which it used to operate. A constitution is a document by which a trade union's objectives and rules are recorded; however, a new constitution does not necessarily affect the identity or continuity of an organization. As noted, the constitution of the organization against which the March 1, 1989 Order was made was not duly filed. Although changes in affiliation, name and constitution may be of more significance and perhaps even decisive in appropriate cases, the Board attaches no importance to them in this case, for the reasons given.

33. The situation is really quite simple. The Board made an order requiring an organization of employees to refrain from certain conduct. That organization has changed its membership to some extent, may have changed the way it expresses its purpose to some extent and made other constitutional changes, and may or may not have ceased its affiliation with CAW-Canada, but its membership at Cavendish Farms, its leadership and its purpose are substantially the same as they were before.

34. For the foregoing reasons, the Board has determined that when the organization of employees now calling itself the Foodworkers' Union filed its application for certification on April 17, 1989, some six weeks after the Board order of March 1, 1989, that organization violated the March 1, 1989 Order of the Board.

35. The Board is aware that its refusal to deal with the application submitted by the Foodworkers' Union because of the violation of the March 1, 1989 Order is not something that those sections of the Labour Act applicable to such applications expressly authorize. Nevertheless the Board is of the opinion that it has the power to refuse to deal with an application in such circumstances. It would be an absurdity if, having conferred the very broad powers to issue orders that the Legislature conferred on the Board by s. 10(3), the Legislature nevertheless intended that an organization could apply for certification under s. 12 when by so doing the organization acting in violation of a s.10(3) order; the Legislature cannot have intended that. Since an absurdity results unless s. 12 is interpreted as contemplating only applications not unlawfully made, the Board interprets s. 12 as not requiring it to deal with applications not lawfully made. The application in this case, being in violation of the March 1, 1989 Order, is not lawfully made and the Board is of the opinion that it is not required to deal with it and able and indeed has a duty to dismiss it.

#### TIMELINESS

36. Turning to the second issue, even if the Foodworkers' Union is not bound by the March 1, 1989 Order, it must be able to fit itself squarely within the provisions of Section 11 of the Labour Act. That section provides the periods of time in which an applicant union may file an application for certification. The provisions of Section 11 that are pertinent to this matter are as follows:

11(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.

11(7)Where a collective agreement binding on any of the employees in the unit has expired and notice has

been given pursuant to Section 22 hereof, 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.

For the reasons that follow, the Board has determined that the application was not filed during any of the periods contemplated by s. 11 and would have to be dismissed on that ground.

37. When the Respondent, Cavendish Farms, filed its Reply, it also included a copy of the Collective Bargaining Agreement between Cavendish Farms and the United Food and Commercial Workers' Union Local 1252 which contained a provision (Article 19.03) relating to its termination or renewal. On the front cover of that document are found the following words: "June 1984 - Nov. 1986". Thus, at first glance it would appear that the Collective Agreement had expired and was no longer in force. However, a review of Article 19, contained in the Collective Agreement produces a different result. It states as follows:

19.01 This agreement shall be in full force and effective as of the 1st day of June, 1984 and shall continue until the 30th day of November, 1986.

19.02 If either party wishes to terminate this agreement, they shall give the other party, not more than 90 days or less than 60 days notice in writing, prior to the date of expiration.

19.03 When notice has been served to either party by the other, negotiations shall begin no later than 21 days after the receipt of notice has been received or such longer period of time as may be agreed upon by both parties. During negotiations if an agreement is not reached by expiry date, the agreement shall continue in full force until a new agreement is signed between the parties or until the Labour Relations Act procedures required by law are completed whichever dates should occur first.

19.04 All prior agreements, both written and verbal are considered null and void effective the date of signing of this agreement.

38. The question then becomes this: What is the effect of Article 19 of the Collective Agreement and more specifically,

does it preclude the Foodworkers' Union from requesting certification on April 17, 1989 or on any date for that matter?

39. A review of the text Canadian Labour Law by Adams (Aurora, Ontario: Canada Law Books Inc., 1985) is of some benefit. At page 692 it is stated in part:

The parties to a collective agreement may wish to continue its provisions in force after the specified expiry date to avoid a legal vacuum; to guarantee to the employees the continuance of their wage rates and conditions of employment for work performed; and to allow recourse to the grievance and arbitration procedure for the interim period until the new collective agreement is finalized and takes effect. This extension is referred to as a "Bridging clause". A special type of bridging clause is the "automatic renewal" clause, wherein the parties specify that not only do the terms and conditions of employment remain intact during the negotiations beyond the agreement's specified expiry date, but that the entire agreement shall continue in effect for successive periods of one year or more. While the basic bridging clause services a useful and complementary adjunct role to the statutory freeze period in preserving a positive and suitable collective bargaining climate, the automatic renewal variant raises serious labour relations problems relating to the timeliness of strikes and lockouts, the timeliness of certification and termination applications, and the spectre of a "perpetual collective agreement". [emphasis added]

40. In accordance with the terms of the Collective Agreement and s. 11(5) of the Labour Act, the open periods would be May and June 1986, as they would be the 23rd and 24th months of the Collective Agreement, and October and November 1986, as they would be the last two months of the term of the Agreement. Thereafter, the Board must determine what the open periods are considering the wording of the Agreement and s. 11 of the Labour Act.

41. After reviewing it, the Board has concluded that Article 19 of the Collective Agreement clearly sets the term as being from June 1, 1984 to November 30, 1986. After the term ended on November 30, 1986, if negotiations have not resulted in a new agreement, the old collective agreement continues in full force until a new agreement is signed or until the parties have satisfied all procedures prescribed in the Labour Act. On April 17, 1989, the date the Application was filed, the parties had not

entered into a new agreement, nor had the parties fulfilled all the statutory provisions of the legislation, because on that date, the evidence demonstrates that the parties were in conciliation.

42. The Foodworkers' Union argued that if the Board concluded that the application was untimely, that would be taking away the employees right to change unions. Argument was further advanced by the Foodworkers' Union to the effect that parties could not by agreement preclude other parties from applying for certification or in fact remove the rights of the employees to change unions. What that argument overlooks is that it is not the parties who have done that; it was the Legislature. The legislation clearly contemplates that there may be situations where a lengthy term is negotiated, and the legislation in those circumstances has provided by virtue of s. 11 of the Labour Act that employees can exercise their right of choice during certain specified periods of time. That accomplishes a reasonable balance between the interest of employees and employers in maintaining stability and the interest of employees and competing unions in changing the bargaining agent.

43. The Collective Agreement in force between these parties was for a period in excess of two years. Therefore, s. 11(5) of the Act is the applicable section. By virtue of that provision, no union could make application to be certified as the bargaining agent for the employees of Cavendish Farms until April or May of 1986, as those would be the twenty-third and twenty-fourth months of the term of the contract. As the term was to expire on November 30, 1986, another union could make application to be certified during October and November 1986, as those were to be the last two months of the contract. After notice was given by UFCW for Cavendish Farms to commence negotiations, and negotiations were not concluded by November 30, 1986, Article 19.03 came into play. Once that provision of the contract came into play, it did not preclude any union from applying for certification, rather it limited the periods of time during which



a new union could make application. Specifically, an applicant union could make application to the Board to become the Certified bargaining agent after November 30, 1986. However, after that date, an applicant union could only make application in the eleventh and twelfth month in each year of the term thereafter that the collective agreement continued to operate, and that did not occur in this case. The Board interprets "each year of the term that the agreement continues to operate thereafter" used in s. 11(5) of the Act as referring, in the circumstances of this case, to the 12 month periods beginning on December 1, 1986, 1987 and 1988.

44. Thus, the board finds that the application in question was not filed during a period permitted by Section 11 of the Labour Act, when one considers the relevant provision of the Collective Agreement, and the application would, on this ground be dismissed, even if it was not made in violation of the March 1, 1989 Order.

#### OTHER MATTERS

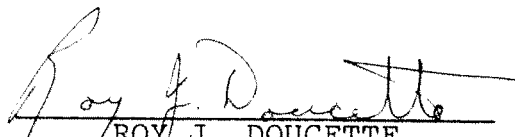
45. A final point the Board wishes to address is the issue of estoppel. It was argued by the Foodworkers' Union that the Board was estopped from stating that the application was untimely, due to the fact that this very panel of the Board had previously given its consent for CAW-Canada to file an application for certification on June 11, 1987. The Board in so doing utilized s. 11(7) of the Act to grant consent. The Board decision was made orally on October 15, 1988 in the matter of CAW-Canada, Applicant and Cavendish Farms, Respondent, and United Food and Commercial Workers' Union, Local 1252 (In Trusteeship) and United Food and Commercial Workers' International Union, Intervenors [Board Application No. 87-005]. The Board does not believe it is estopped from ruling that an application may be untimely. On reflection the Board is of the opinion in light of the provision contained in the Collective Agreement that the decision of October 15, 1988 ought not to have been made. There

is an obligation on the parties appearing before the Board to bring to the Boards' attention provisions of the legislation, applicable collective agreements or any other relevant facts which might have some bearing on the Boards' decision. In this case, Cavendish Farms brought the provision in question to the attention of the Board, and the Board's earlier error became apparent. The Board will not be held to perpetuating errors.

CONCLUSIONS

46. For the foregoing reasons, the Application is dismissed.

THIS DECISION was made by the Labour Relations Board and issued under the hand of its Chief Executive Officer this 21st day of December, 1989.

  
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ROY J. DOUCETTE  
CHIEF EXECUTIVE OFFICER

PANEL:  
M. Lynn Murray - Chairman  
Gerald Doyle - Member  
Elizabeth MacFadyen - Member

Application No 89-019



**GOVERNMENT OF PRINCE EDWARD ISLAND**  
**LABOUR RELATIONS BOARD**

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O R D E R

IN THE MATTER OF : APPLICATION FOR CERTIFICATION

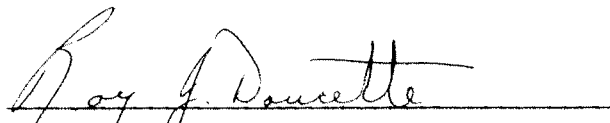
BETWEEN: CONSTRUCTION AND GENERAL LABOURERS' UNION LOCAL 1079-A      APPLICANT  
AND: MARRIOTT CORPORATION (CANADIAN DIVISION)      RESPONDENT  
AND: EMPLOYEES OF MARRIOTT CORPORATION (CANADIAN DIVISION)      INTERVENORS

WHEREAS an Application for Certification as bargaining agent of a unit of employees of Marriott Corporation (Canadian Division) has been received from the applicant by the Prince Edward Island Labour Relations Board under the Prince Edward Island Labour Act;

AND WHEREAS, following investigation and consideration of the Application and of the submissions of the parties concerned, the Board was not satisfied that a majority of the employees wished the Applicant trade union to be certified as bargaining agent on their behalf;

NOW, THEREFORE, it is hereby ordered by the Prince Edward Island Labour Relations Board that the Application for Certification received from the Applicant trade union be dismissed on the basis of the reasons aforementioned.

THIS ORDER made by the Labour Relations Board on August 28, 1989, and issued under the hand of its Chief Executive Officer.

  
Roy J. Doucette  
Chief Executive Officer

PANEL:

M. Lynn Murray, Chairman  
Judy Goodwin  
Gerald Doyle