Application No. 91-020

# 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 Consent

**BETWEEN:**

**ULTRAMAR CANADA INC.**

APPLICANT

**AND:**

**UNITED FOOD AND COMMERCIAL WORKERS' INTERNATIONAL UNION**

INTERESTED PARTY

*******

**COUNSEL FOR THE APPLICANT:** **KAREN A. CAMPBELL**

**COUNSEL FOR THE INTERESTED PARTY:** **EUGENE P. ROSSITER, Q.C.**

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**BACKGROUND OF APPLICATION:**

1. The Applicant, Ultramar Canada Inc., (hereinafter referred to as "Ultramar") forwarded an Application for Consent to the Labour Relations Board (hereinafter referred to as the "Board") on October 7, 1991 by facsimile, with the original being received by the Board on October 9, 1991.

2. Ultramar requested the Boards' consent pursuant to Section 16 of the Labour Act, R.S.P.E.I. 1988 Cap. L-6 (hereinafter referred to as the Labour Act) " to change the shift scheduling at

its Georgetown liquid asphalt storage and distribution plant as a result of the intended elimination of two positions. The down-sizing of the employee compliment and resulting change to the hours of work of the remaining employees are as a result of technological equipment additions to the plant which permit unmanned operation of the plant for up to eight hours at a time, pursuant to the Power Engineers Act and Regulations".

3. At the time the Application for Consent was filed, the Interested Party (hereinafter referred to as "UFCW") had filed an Application for Certification with the Board on August 21, 1991 on behalf of the employees of Ultramar, and that Certification Application had not been disposed of by the Board.

4. The Certification Application was heard and disposed of on October 21, 1991, with the ultimate result being that UFCW was certified as the exclusive bargaining agent to represent the employees of Ultramar.

5. The Consent Application came on for hearing on February 12, 1992 and was continued on February 19, 1992 and March 3, 1992. The Board took the matter under advisement.

**LEGISLATION:**

6. The legislation pertinent to the Application for Consent that is currently before the Board is contained in Section 16 of the Labour Act which states as follows:

> 16. "Where an application is made under this Part for the certification of a trade union as bargaining agent of employees in a unit, the employer shall not, without the consent of the board, increase or decrease rates of pay or wages or alter any other term or condition of employment of any employees in the unit until the board has given its decision on the application and, where the board certifies a trade union as bargaining agent, until section 22 has been complied with."

7. As Section 16 of the **Labour Act** refers to Section 22 of the **Labour Act**, the latter section is reproduced hereafter:

> 22. "Where notice to commence collective bargaining has been given under Section 21
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> (a) the bargaining agent and the employer, or an employer's organization representing the employer shall, without delay, but in any case within twenty days after the notice was given or such further time as the parties may agree, meet and commence or cause authorized representatives on their behalf to meet and commence to bargain collectively and shall make every reasonable effort to conclude a collective agreement; and
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> (b) the employer shall not, without the consent of the bargaining agent of the employees affected, increase or decrease rates of wages or alter any other term or condition of employment of any employees in the unit for which the bargaining agent is certified until
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> (i) a collective agreement has been concluded, or
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> (ii) 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
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> (A) a conciliation officer 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
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> (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.

**FACTS:**

8. The reason for the changes to the Ultramar plant located at Georgetown, Prince Edward Island is concisely stated in Section 3(i) of its Application for Consent, which is reproduced earlier in Paragraph 2 hereof.

9. Ultramar operates its Georgetown plant on a seasonal basis, generally between approximately late April to late November in each year. There are only five (5) employees working at the

plant excluding management. UFCW is the certified bargaining agent for all of those employees except for one, being an individual by the name of Terry Martell. Terry Martell holds the position of Chief Engineer and he was excluded from the bargaining unit by consent of Ultramar and UFCW.

10. Essentially, Ultramar wished to implement technological changes to its Georgetown plant which would allow it to eliminate two (2) positions. The Board was advised that it was determined that an alarm system could be put in place to allow the plant's boiler equipment to operate unmanned for a period of up to eight (8) hours daily.

11. During questioning of one of the witnesses for Ultramar, it became apparent to the Board that one of the positions being eliminated concerned that of an emulsion technician. The Board, understandably, was somewhat surprised that it would have heard almost all evidence being submitted before it would be fully cognizant of the plans Ultramar was actually intending to implement at its Georgetown plant. While there was a reference in the Application for Consent to three (3) power engineers remaining (including the Chief Engineer), the Board had no way of deciphering from the Application filed by Ultramar that the positions proposed to be eliminated were that of a power engineer and an emulsion technician, the latter having no relationship to the installation of the alarm system.

12. Ultramars' District Manager for Atlantic Canada, Louis Guevremont, testified and indicated that he had hired Jeff Gallant to be Terminal Manager of the Georgetown Plant in June of 1991. With the exception of Mr. Gallant, the Board was advised that all employees of the Georgetown plant were classified as temporary employees, meaning "those who are not permanent employees". The difference appeared to surround the benefit package paid to the employees in the different categories. While Mr. Guevremont indicated that there was no such term as a "seasonal employee",

those words are found in a document containing Minutes of a meeting of employees at the plant in question (Exhibit R-1). The Board was advised that Exhibit R-1 "fairly reflects" what transpired at the meeting on that date and in fact notes that there is a section contained in that document which deals with " Benefit Program - RE: Seasonal Employees", under which appears the comment " **As seasonal employees, you are on automatic recall each season**".

13. Jeffrey Gallant had been hired as Terminal Manager of the Georgetown plant in June of 1991, and subsequently became District Manager for Prince Edward Island on October 1, 1991. In June of 1991, Mr. Gallant had immediately been advised by the senior management of Ultramar to manage costs as the company had lost millions of dollars the previous year.

14. Mr. Gallant was advised by the Chief Engineer, shortly before July 5, 1991, that the alarm system referred to earlier could be put into operation; however, Mr. Martell was never advised by Mr. Gallant prior to the Certification Order being issued, that two positions would be eliminated at the plant. The purpose of Terry Martell in drawing the provision contained in the **Power Engineers Act**, R.S.P.E.I. 1988, Cap. P-15 and the **Regulations** made pursuant thereto, which permitted this unmanned operation, to the attention of Mr. Gallant will never be known as Terry Martell did not testify.

15. However, having said the foregoing, Mr. Gallant saw a potential for cost savings if Ultramar implemented the mechanical changes in the form of an alarm system. Mr. Gallant proceeded to investigate the system but made no mention of it to the employees at a meeting he held on July 10, 1991 (Exhibit R-2), or the subsequent meeting with employees on July 31, 1991 (Exhibit R-1). The investigation made by Mr. Gallant, occurred both prior to and subsequent to July 31, 1991. He obtained quotes regarding the cost of the system [Exhibits A-6 (July 22/91); Exhibit A-8 (September 3, 1991)], and satisfied himself that the company could maintain

production and service their customers. He advised Mr. Guevremont of the results and a decision was made by Ultramar to install the system in approximately mid September, 1991. The installation was completed around the end of September, 1991 and was approved by the Boiler Inspector on October 2, 1991 (Exhibit A-9).

16. Both Mr. Guevremont and Mr. Gallant advised the Board that the Application for Certification did not precipitate the changes that Ultramar was now requesting as the wheels had been put in motion prior to the Certification Application being filed. However, Mr. Guevremont did concede that the elimination of two (2) positions at the Georgetown plant was a substantial change in the plant and it was "not a change in the usual course of business" at Georgetown (which was a profitable operation). However, it was not an unusual change for the company given the turn of events involving the major financial loss experienced by the company.

17. Mr. Steven Martell (brother of Terry Martell) testified on behalf of UFCW. He has been employed on a seasonal basis at the Georgetown plant since May of 1982, and presented himself to the Board as a most forthright and credible witness. He described in some detail the duties that were performed by the employees at the plant on a daily basis and had indicated that the power engineers of which he was one, had wanted the alarm system in place so that they would be able to maintain the lines outside the plant and still be able to determine whether or not the boiler was functioning properly.

18. Steve Martell also indicated that the Minutes of the meetings of the employees (Exhibits R-1 and R-2) accurately reflected what transpired at those meetings and that there had never been any suggestion that two (2) positions would be eliminated. He advised the Board that the employees were concerned about the change in management, and they wanted some reassurance about their jobs. The employees were advised by Mr. Guevremont on July 31, 1991 that they were "temporary employees" who were

"subject to recall every season". In fact, at that meeting on July 31, 1991, the employees were also advised that Ultramar had recently entered into a five year contract with the Government of this Province, that the Georgetown operation was profitable and that their work was appreciated.

19. Much time was spent at the hearing concerning whether or not the product being produced at the Georgetown plant is meeting the requirements of any contracts Ultramar might have entered into, and in addition, there was some emphasis placed on the value of the operation in question. Undoubtedly, Ultramar has made a large capital expenditure in this plant, and the functioning of the boiler system is crucial to its operation in that the product has to be controlled at an extremely high temperature. However, in terms of whether or not Ultramar is honouring its contractual obligations, this is irrelevant to the Boards' determination of whether or not consent is required for Ultramar to implement the requested changes, and if so required, will that consent be granted.

20. In terms of the evidence that was heard by the Board regarding whether or not the power engineers at the Georgetown plant are performing tasks which they are not permitted to perform, the Board does not find it necessary to comment on this aspect of the case in order to arrive at a determination of the issue before it.

**LAW AND DECISION:**

21. As noted previously, in this Province, while an Application for Certification is pending or prior to the first Collective Agreement being entered into, an employer cannot change terms or conditions of employment without the consent of the Board. This is often referred to as the statutory freeze period that is contained in Section 16 of the Labour Act.

22. The Application for consent was made during a period when the Application for Certification was pending, and thus, was clearly within the statutory freeze period. The Board was advised that UFCW had served Notice to Bargain on Ultramar on January 14, 1992 (Exhibit A-1), and at the date the Board was hearing this matter, the parties were in negotiations. In fact, there was a draft of a Collective Agreement on the table for discussion (Exhibit A-12). In light of these facts, the statutory freeze period was in effect at the date of the Board hearings.

23. Ultramar's position was that it did not believe it needed the Consent of the Board as the changes to be implemented would be considered to be "business as usual".

24. However, in the alternative, if the Board should determine that consent was required, Ultramar was requesting that consent. Essentially, Ultramar was seeking to protect itself from an Unfair Labour Practice Complaint being filed by UFCW, and the Board believes it acted properly in making the Application for Consent. **See: Canada Labour Relations Board Policies and Procedures by Foisy and Lavery and Martineau (Butterworths, Toronto).**

25. Having earlier determined that the parties are within the statutory freeze period, the first issue to be answered is whether or not consent is required during the statutory freeze period, or whether, as Ultramar has alleged, the proposed changes constitute "business as usual".

26. In determining whether or not the changes proposed by Ultramar constitute "Business as usual" or "business as before", (used interchangeably in this decision) there is no statement which more succinctly states the meaning of the phrase than that stated by the Ontario Labour Relations Board in the case of **Spar Professional and Allied Technical Employees Association v. Spar Aerospace Products Limited, [1978] OLRB Rep. Sept. 859 (OLRB),** where it is stated at page 868:

> "23. The `business as before' approach does not mean that an employer cannot continue to manage

> its operation. **What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before.** Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit."**(Emphasis Added)**

27. The above noted statement clearly indicates that the legislative intent is for existing patterns of the employment relationship to be maintained during the statutory freeze period. It is the "totality of the employment relationship" that the statutory freeze seeks to protect. **See: Spar Professional and Allied Technical Employees Association v. Spar Aerospace Products Limited; bid.**

28. On the facts presented to the Board, can it be said that this proposed decision by Ultramar falls into the term "business as before". Ultramar took the position that its decision to terminate two positions was not taken lightly indicating that it was not a normal one in the context of its Georgetown operation. In the same breath, Ultramar alleged that the decision to eliminate two employees was "business as usual" in the context of its goal to eliminate costs.

29. It is the determination of the Board that the phrase "business as usual" or "business as before" means that the employer must continue to manage the operation for which certification is sought in the normal course. In this situation, that would mean that Ultramar would operate its Georgetown plant in the normal fashion. A Certification Order issued by this Board does not extend beyond the territorial limits of this Province, and

accordingly, the Board fails to comprehend why, on the facts of this case, it should be concerned as to how a employer operates its business outside provincial boundaries. The statutory freeze period is concerned with protecting the representation of employees, and that would necessarily mean those employees at the Georgetown plant. This is not to be taken as meaning that the Board would not concern itself with the operation of a company outside the Provincial limits if such a situation warranted it.

30. All of the employees had been advised on July 31, 1991 that they were "temporary" or "seasonal" employees subject to automatic recall each year. There was no indication to them on July 31st that there was even any contemplation of any decision to down-size the operation in terms of the employee compliment. Furthermore, Mr. Guevremont indicated it "was not a change in the usual course of business" at Georgetown and it was in fact a substantial change in that plant.

31. In this case, it is beyond the comprehension of this Board that the elimination of two out of five positions is "business as usual" or "business as before". The Board does not believe the elimination of two (2) positions here constitutes business as usual and in fact, Ultramar's District Manager admitted this. As such, the proposed changes are not changes in the normal course of business, and consent of the Board is required.

32. In order for such consent to be granted, the employer must demonstrate to the Board why the Board should depart from the usual principle of maintaining the status quo.

33. The Board fully recognizes that section 16 of the **Labour Act**, is discretionary and that any such discretion should be exercised in a judicial manner. The Board is unaware of any decision being granted in respect of this section and accordingly has attempted to develop certain guidelines. Ultramar suggested this was an appropriate circumstance for the Board to grant consent. The grounds upon which Ultramar relied for the Board to

grant consent included that the company internationally was in financial difficulty, and it should be able to manage its business in a cost effective manner.

34. The majority of the authorities submitted to the Board in relation to the Application for Consent concerned Ontario decisions determined under the Ontario legislation. It must be pointed out that the Ontario legislation is different from the legislation governing this Board.

35. In Ontario, the relevant provision does not speak of Board consent, but rather requires the trade union to consent to the employer altering wages or any term or condition of employment. In the event that the trade union does not grant consent and the employer proceeds to alter any of the terms or conditions of employment, the trade union can file a Complaint with the Ontario Labour Relations Board. In order to succeed on the Complaint, the law emanating out of Ontario appears to demonstrate that alterations put in motion prior to the onset of the freeze period will not result in the imposition of any penalties to the employer. In essence, if an employer can demonstrate that, prior to the onset of the statutory freeze period, the employee communicated to the employees the decision to make the changes in question, in all probability, a violation of the legislation will be avoided. **See: Graduate Assistants' Association v. Carleton University, [1978] OLRB Rep. Feb. 184 (Ontario Labour Relations Board).**

36. Even though the legislation in this Province differs from Ontario, the entire purpose of the statutory freeze would be of the same nature in Prince Edward Island. This purpose has been analyzed by the Ontario Labour Relations Board in the case of **Graduate Assistants' Association v. Carleton University, [1978] OLRB Rep. Feb. 184** when it was stated at page 188 thereof:

> "15. If it were open to an employer to alter conditions of employment during the freeze period by virtue of having made the decision to so prior to the freeze, notwithstanding that the employees had not been informed of the intended change until after the onset of the freeze, the desired period of stability and

> tranquility in the employment relationship following notice to bargain or an application for certification would be jeopardized. It is no less disturbing to an employee to be first informed during the freeze period of an alteration of his conditions of employment simply because the decision to make such an alteration had been made by management prior to the onset of the freeze period. To secure for the union a period of relative stability by maintaining the status quo, it is essential to eliminate unexpected changes for the employees during the freeze period

37. In **Canadian Union of Public Employees and its Local 2664 v. Le Patro d'Ottawa, [1983] OLRB Rep. Feb. 244 (Ontario Labour Relations Board),** a case where there was a complaint under the applicable Ontario legislation; in dealing with this issue and finding the employer in violation of the relevant provision, at page 245-246 of that decision it was stated:

> "5. The Board has consistently required that a firm decision to substantially change terms and conditions of employment or the privileges of employees must be communicated to the employees prior to the onset of the freeze period. (*Carleton University*, [1978] OLRB Rep. Feb. 184; *Lennox & Addington Hospital*, [1978] OLRB Rep. Sept. 843; *Ottawa General Hospital*, [1981] OLRB Rep. Oct. 1461.) The Board recognizes that for the freeze period to operate effectively it must be in relation to rights and privileges which are known to both the employer and the employees. As the Board noted in the *Carleton University* case, a decision taken before the freeze but known only to the employer could be revoked or altered during the freeze, prior to any communication to the employees, so that neither the employees nor their union, nor for that matter the Board, could effectively enforce the freeze provisions with any certainty. For that reason, in the interest of preserving stability in the employment relationship during the freeze period the Board has interpreted the freeze as applying to the rights and privileges of all parties as they were known to them at the time of the notice triggering the freeze.
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> 6. In the instant case the evidence establishes for some time in 1981 the employer was contemplating various means of upgrading its employees. To this end it established a committee which included a number of employees and it consulted separately with its principal supplier of funds, the United Way (Centraide). Its decision, however, to restructure its work force and to abolish the position of `animateurs' was not communicated to any of the employees nor to the union until some months after it had received notice of the union's application for certification. It should be stressed that this is not a situation such as

> was found in *Scarborough Centenary Hospital* [1969] OLRB Rep. Jan. 1049 and analogous cases where the Board has found that the freeze was not violated where a course of action was decided upon, communicated to the employees therefore put in motion before the period of prohibition set in.
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> ...
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> 8. The decision, however, to implement the change in the employer's organizational chart, abolishing the positions of animateurs, was not communicated to the employees prior to the onset of the freeze. That substantial change cannot be said, for the purposes of section 79 of the Act to be `business as before'.

38. Having stated the foregoing, while the Ontario legislation requires consent of a trade union, the entire scheme is designed to maintain the status quo during the freeze.

39. In this Province, not unlike the federal jurisdiction, it is the consent of the Board that is required and to depart from the status quo philosophy, the Board requires clear and convincing evidence that the charge is "necessary, justified and not in violation" of the Labour Act. **See: Union of Bank Employees, Locals 2104 and 2100, Canadian Labour Congress and Canadian IMperial Bank of Commerce, St. Catherines, [1980] 1 Can LRBR 307 (Canada Labour Relations Board).**

40. The Board is not satisifed that there was already in place a plan of action at the date of the Application for Certification. In fact, Mr. Gallant admitted the decision was made to install the alarm system in September of 1991, after the Certification Application was filed. It was readily admitted that the employees were not advised of the intended changes prior to the date the Application for Certification was filed.

41. Ultramar has not satisfied the Board with clear evidence that the requested changes are necessary and justified at the Georgetown Plant. In fact, the Board notes that the granting of the consent would alter the status quo to the detriment of UFCW.

42. The Board also notes that the statutory freeze is only in place for a certain specified period of time and sufficient evidence has not been presented that would justify a departure from the status quo principle. Accordingly, the Board does not grant consent. This is not to be taken as meaning that the Board would not grant consent in an appropriate circumstance.

This decision of the Labour Relations Board was made this 23rd day of April, A.D. 1992 and issued under the hand of its Chief Executive Officer.

ROY J. DOUCETTE
CHIEF EXECUTIVE OFFICER

**PANEL:**

M. Lynn Murray, Chair
Ray McBride, Member
Gerald Doyle, Member