



File No.

Decision No.
99-005

**IN THE MATTER OF AN APPLICATION UNDER SECTION 4 OF THE ACT
(APPLICATION FOR RECONSIDERATION)**

BETWEEN:

**TRIGEN ENERGY CANADA INC
AND TRIGEN PEI**

APPLICANT

AND:

**THE INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL 1432**

RESPONDENT

**Legal and Legislative Representative for Applicant:
Counsel for Respondent:**

**John K. Mitchell
Gordon MacKay**

DECISION

BACKGROUND

On 12 February 1999 the applicants Trigen Energy Canada Inc and Trigen PEI filed with the Board an application requesting the Board to reconsider the decision of this Board issued on the 11th day of January 1999 and to issue an order denying the International Brotherhood of Electrical Workers, Local 1432 successor rights pursuant to section 39 or, alternatively, issue a new order that such successor rights have been extinguished.

On 14 April 1999 the respondent Union local, IBEW, Local 1432, filed a reply to the reconsideration application and a counter-application. In their reply, the IBEW, Local 1432 requested that the Employer's application for reconsideration be dismissed. By way of counter-application the Union requested that the Board clarify the original order issued on 11 January 1999 to grant the original relief requested by the respondent.

The matter was set down for hearing on the 21st day of April 1999.

STATUTES CITED

Labour Act R.S.P.E.I. 1988 Cap. L-1 section 4

Labour Act Regulations R.S.P.E.I. 1988 Cap. L-1 section 18

AUTHORITIES

Brantford General Hospital, [1994] ORLR Rep. August 1103; Caressant Care Nursing Home of Canada Limited, [1984] ORLB Rep. August 1060; Associated Clinical Laboratories, [1996] Alta. L.R.B.R. 70.; Re Telegram Publishing Co and Zwelling, (1972), 1 LAC (2d) 1.; Allied Pacific Processors Ltd, [1997] BCLR Bd. No. 388; and Williams and MacKie v. UFAW, Local 1518 (unreported, August 17, 1994. British Columbia arbitration).

ARGUMENT

PRELIMINARY MATTERS

At the outset of the hearing, the Board requested that Counsel for the Applicants, Trigen Canada Inc and Trigen PEI, clarify whether he would be proceeding with an application under Section 39 of the *Act* or if he wished the Board simply to note in its decision that the right to make an application under section 39(2) of the *Act* was being reserved by the Applicant. Counsel for the Applicants indicated he only wished to reserve the right to make application under Section 39(2).

Counsel for the Applicants and Respondent stated there were no preliminary matters they wished to raise.

The Board raised the preliminary matter of the “threshold test” by which applications for reconsideration would be reviewed. The Board noted that section 4(1) of the *Act* empowers the Board to reconsider its decisions and Section 18 of the *Regulations* sets out a three (3) part threshold test which reads:

Where it appears that the Board has made a decision in ignorance of some material fact, or by reason of some technical irregularity, or if there is good reason for the Board doing so, the Board may entertain an application to reconsider a decision or order made by it under the Act.

The Board asked Counsel for both parties to make submission with respect to the matter of whether the threshold test has been met by the Applicant in this instance.

Mr. Mitchell reviewed the chronology of the proceedings to date and summarized the arguments he advanced at the previous hearing. He indicated that the Applicant had filed both this application and an Application for Judicial review. He offered to proceed to take the Board through all of the evidence on the issues raised in the initial hearing. Prior to proceeding to

Judicial Review, he felt he owed a duty to come back to this Board when there had been a mistake made. He stated that there would be no further evidence to be given and submitted the Board failed to make any reference to any of the evidence in its decision. He concluded his submission by pointing out it lies within this Board's discretion to determine if the "test" has been met.

Mr. MacKay, Counsel for the Respondent, submitted that the Board's decision of 11 January 1999 did not state there was no evidence but that there was not sufficient evidence. He stated that the applicant had not brought forward any evidence on this application of any technical irregularities and, therefore, neither of the first two steps of the test have been met. He also submitted that the application for reconsideration did not satisfy the third step of the threshold test as it did not raise a good reason to reconsider. It was argued the threshold test had not been met by the Applicants so as to invoke section 4(1).

The Board then adjourned to consider the written submissions and oral presentations made by Counsel.


DECISION

Having carefully considered all of the material and submissions placed before it in regards to this Application for Reconsideration, the Board has concluded that none of the components of the threshold test has not been met. There is no evidence of the Board decision being reached in ignorance of some material fact. There does not appear to have been any technical irregularity. There has been no good reason placed before it whereby the Board could embark on a reconsideration of its decision.

The Board has, in its ruling of 11 January 1999, very specifically stated the limit of its considered issues and that it was not prepared to rule on the three arguments based on the available evidence. The Board is of the opinion and rules that, given its position on the threshold test issue, there is no requirement and probably no jurisdiction, for the Board to go on to deal with the collateral issues as referred to in the Applicants' written submission. Accordingly, the Board denies the Application for Reconsideration.

The Applicant has reserved its right to apply under Section 39(2) of the *Act* and this Board fully recognizes that fact. The Board will consider an application pursuant to section 39(2) of the legislation as the Board has, at the hearing of this matter, as previously indicated to the Applicants in this matter.

This Decision was made on the 21st day of April 1999 and issued under the hand of the Chief Executive Officer on 23 June 1999.



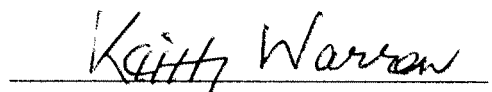
Robert MacArthur

Chair



Ted Crockett

Member



Keith Warren

Member