

File No. App # 99-015

Decision No.

**IN THE MATTER OF AN APPLICATION UNDER SECTION 4(1) OF THE ACT
(APPLICATION FOR RECONSIDERATION)**

BETWEEN:

TOWN OF KENSINGTON

APPLICANT

AND:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1174

RESPONDENT

COUNCIL FOR THE APPLICANT

Mr. Paul J.D. Mullin, QC

**LEGAL AND LEGISLATIVE
REPRESENTATIVES FOR THE RESPONDENT**

**Susan D. Coen and
James Stanley**

DECISION

Background

An Application for Certification was brought by the Canadian Union of Public Employees, Local 1174 on the 9th day of December 1996. The Board issued Certification Order No. 02-97 on the 5th day of February 1997. The Town of Kensington filed an Application for Amendment of Certification Order No. 02-97 on the 4th day of June 1997 to have the Town maintenance man removed from the Bargaining Unit. Also filed on the 4th day of June 1997 was an Application to Amend Certification Order No. 02-97 by having the Town Administrator removed from the Bargaining Unit. In January of 1998, the parties had agreed that the maintenance position be included in the Bargaining Unit and the Town Administrator position be removed from the Bargaining Unit and that the CUPE, Local 1174 would withdraw its outstanding Unfair Labour Practice complaint.

On the 9th day of November 1998, an Unfair Labour Practice complaint was filed by the CUPE, Local 1174 against the Town of Kensington. This complaint was the subject of a hearing conducted on the 19th and 20th days of January 1999 in Charlottetown and, in a decision of this Board, dated the 10th day of March 1999, the Board held that the Respondent employer, the Town of Kensington, was not in contravention of provisions of the *Act*, and the remedy sought by the Applicant Union Local 1174 was not granted.

On the 8th day of September 1999, the Town of Kensington filed with the Board an Application for Reconsideration of the Certification Order No. 02-97 made and issued on the 5th day of February 1997. The remedy sought by the Applicant employer, the Town of Kensington, was a further hearing before this Board so the parties could address the issue of the appropriateness of the Bargaining Unit.

The hearing of this Application for Reconsideration was conducted on the 15th day of February, 2000, in Charlottetown, Prince Edward Island.

Cases Considered

1. ***Trigen Canada Inc and Trigen PEI v. The International Brotherhood of Electrical Workers, Local 1432*** (unreported, 21 April 1999, Prince Edward Island Labour Relations Board);
2. ***Insurance Corporation of British Columbia and Canadian Union of Public Employees, Local 1695 and Office and Technical Employees' Union, Local 378 and British Columbia Government Employees' Union and Miscellaneous Workers', Wholesale and Retail Delivery Drivers' and Helpers' Union, Teamsters Local 351***, [1974] 1C.L.R.B.R.403 (BCLRB., P.C. Weiler, Chair);
3. ***Northwest Company Inc (Re)***, [1999](Nfld. L.R.B. D. No. 5, LRB File No. 712:2714 February 22, 1999, M. Cooper Vice-Chair);
4. ***RE Horton CBI, LTD. and United Steel Workers, Local 8473*** (1982), 4 L.A.C.(3d) 97, (Ontario, B.L. Adele, A. Sharp, I.H. McGowan);
5. ***Greyhound Lines of Canada Ltd.*** (1990), 91 CLLC 16, 003, CLRB, December No. 829, (Serge Brault, Vice-Chair, Calvin B. Davis and Michael Eayrs);
6. ***International Brotherhood of Electrical Workers, Local Union 254, Applicant and Corporation of the City of Calgary, Respondent and Canadian Union of Public Employees, Local 38, Intervenor***, [1989] Alta. L.R.B.R. 429, (A. Sims, Chair, L. Flannery and W. Flookes, Alberta Labour Relations Board);
7. ***Canadian Union of Public Employees (CUPE) v. Dalhousie (Town) (N.B.C.A.)***, [1990] N.B.J. No. 105, Action No. 198/89/CA, New Brunswick Court of Appeal (Hoyt, Rice and Ryan JJ.A.)
8. ***Sackville (Town) (Re)***, [1998] N.B.L.E.B.D. No. 38, New Brunswick Labour and Employment Board (E. McGinley, Q.C., Chair);

9. *Westar Timber Ltd and International Woodworkers of America, Local No. 1-405 and Certain Employees of Westar Timber Ltd and BC Federal of labour and Confederation of Canadian Unions, BC Council and Teamsters, Joint Council No. 36 and Business Council of British Columbia*, (1987), 14 C.L.R.B.R.(NS) 360, (Labour Relations Board of British Columbia, John Kinzie, Chair, Wayne Moore and Richard Longpre, Vice-Chairs)

Statutes Considered

Labour Act, R.S.P.E.I. 1988, Cap. L-1, Sections 4(1), 13(2), 35, and 41;
Labour Act Regulations, R.S.P.E.I. 1988, Cap. L-1, Section 18;
Trade Union Act, R.S.N.S. 1989, Chapter 475, Subsections 25(14), 26(1) and (2);
Ontario Labour Relations Act, R.S.O. 1995, C.1, Schedule A, Section 14; and
Alberta Labour Relations Code, R.S.A. 1988, c.L-1.2, as amended.

Texts Considered

Adams, *Canadian Labour Law (2d. ed.)*, pages 5 - 11.

Evidence

Submitted with the application was the Statutory Declaration of Gerald A. McCarville dated the 8th day of September 1999. Exhibit "A", attached to that Statutory Declaration, was the letter of the Honourable Wes MacAler, Minister of Community Services and Attorney General to His Worship Mayor Gerald McCarville dated the 22nd day of June, 1999. The letter of Paul J.D. Mullin, Q.C., dated the 8th day of July 1999, to the Honourable Wes MacAler, Minister of Community Services and Attorney General was submitted as Exhibit "B" to the Statutory Declaration referred to above.

Submitted with the Reply of the Respondent were, an excerpt from *Canadian Labour Law*, 2nd Edition, by George W. Adams, Q.C., two letters from Mr. Doucette, Chief Executive Officer of the Prince Edward Island Labour Relations Board dated February 11, 1997 and June 10, 1977 respectively, to Mr. Bob Crockett, Business Representative of the Canadian Union of Public Employees, Local 1174, with an attached copy of the Certification Order No. 02-97, and correspondence with respect to amendment of Certification Order No. 02-97. Also submitted was the original Application for Certification and supporting documentation filed with the Board on the 23rd day of December 1996.

Issue

The sole issue to be decided by this Board is whether it is appropriate for the Board to exercise its discretionary power under the provisions of Subsection 4 of the *Labour Act* to reconsider its issuance of the Certification Order No. 02-97 and grant a hearing so that the parties can then address the issue of the appropriateness of the Bargaining Unit.

Argument

In summary, the Applicant quite correctly addressed the threshold test for Applications for Reconsideration as set out in this Board's decision in *Trigen Energy v. International Brotherhood of Electrical Workers, Local 1432*. The three-part threshold test that must be met

by an Applicant to have the Board exercise its discretionary power is either to establish that the Board acted in ignorance of some material fact, or erred by reason of some technical irregularity, or thirdly, establish that there is good reason for the Board doing so. The Board has verbally expressed and here reiterates its appreciation for the excellent submissions of both Counsel on behalf of their respective parties in developing their arguments in respect to this Application. Each party allowed their opponent to fully explore events leading up to this Application and develop their arguments, in light of the various resolutions for the previous proceedings between the parties. Of necessity, the parties, of course, addressed the end result of any eventual hearing if the Application for Reconsideration was granted.

The Applicant, for the most part, conceded that the first two branches of the threshold test were essentially not in issue. Counsel for the Applicant centered his argument largely on the third leg of the test which requires that there be established a very good reason for the Board to reopen an examination of the issues and grant the Application for Reconsideration. Counsel for the Applicant also cited legislative provisions in other jurisdictions and case law in various jurisdictions which have addressed the essential issues in this matter.

There was particular emphasis placed on the evidence of Mayor Gerald McCarville where, in paragraphs 5, 6 and 7 of his Statutory Declaration, he states:

5. *That the parties hereto have not been able to conclude a first collective agreement;*

6. *That the Minister advised the parties by letter dated June 22, 1999, received by the Town of Kensington on July 2, 1999, that he was proceeding with the appointment of a board of arbitration pursuant to section 41(6) of the Act which letter is attached hereto as Exhibit "A" to this Statutory Declaration;*

7. *That the Minister's decision brought to light an issue not earlier recognized by the parties, or earlier addressed before the Labour Relations Board, as to the appropriateness of the police constable being part of the same bargaining unit as the other non-essential employees which issue is more particularly described in the letter of the Applicant's solicitor dated July 8, 1999 and hereto attached as Exhibit "B" to this Statutory Declaration;*

The Respondent took the position that there was no error on the Board's part and there was no material fact of which the Board was ignorant in reaching its decision, nor was there any technical irregularity. The Respondent cited a number of examples within this jurisdiction where mixed bargaining units (essential and non-essential employees as members of the same bargaining unit) currently exist. The Respondent took particular issue with the allegation of the Applicant's solicitor that the mixed units that exist within this Province only exist by agreement between the parties. The Respondent's counsel discounted the examples from other jurisdictions and urged the Board to consider P.E.I. legislation as relevant and submitted that the submissions of the Applicant had not met the requirements of the legislation in this jurisdiction. The Respondent argued that it must be presumed the Board had put its mind to the issue which the applicant now seeks to have addressed. The Respondent argued the Unit has not changed, the law in Prince Edward Island has not changed, and the laws in other jurisdictions have not changed. The Respondent argued that the decision in the *Sackville* case did not stand for the proposition that essential and non-essential employees cannot be placed at the same bargaining unit.

Counsel for the Respondent dealt individually with the series of cases relied upon by the Applicant and addressed the numerous issues raised by the Applicant. One very cogent issue that was examined in that regard was whether or not there was authority to certify a single-member unit. It was argued that the practical effect, if the Applicant's application was granted, would be to establish such a unit. This was cited as a "very serious" issue. The Respondent's counsel also argued that, even if this issue of appropriateness of the bargaining unit had been raised, the result of the original application would not have differed. The Respondent questioned whether the Applicant should be allowed to raise the issue now given that there had been numerous opportunities to do so in the past. It was submitted that even if it had been raised on the day the Application for Certification was originally made, it would not have been determinative of the issue of whether or not the Certification Order should issue. He submitted that the law has not changed, that this is not a unique order, and the Board did not err in reaching its decision and that this Unit is appropriate for bargaining purposes.

In rebuttal, it was submitted that the Respondent had failed to, while addressing the first two steps of the three-part threshold test, recognize the third step. It was submitted by Counsel for the Applicant that the submission of the Respondent's counsel to the effect that this Board should leave the issue to be dealt with at arbitration, was in fact a fallacy. Mr. Mullin took the position that the Applicant should be allowed to make the argument now because, if the matter went before an Arbitration Board, they would, of course, be challenging the jurisdiction of the Arbitration Board and the matter would eventually end up back before the Labour Relations Board in any regard. It was submitted that the existence or non-existence of at least three bargaining units in this province with both essential and non-essential employee members is certainly a matter that goes to the merits of the case. The Respondent offered rebuttal to the submission of counsel for the Respondent that it must be presumed the Board addressed its mind to the issue of the appropriateness of the Unit and indicated that this was a question of fact and perhaps members' notes at the time would indicate whether or not it was.

The hearing concluded with respective counsel, at the request of the Board, addressing the possible implications of the provisions of Section 18 of the *Labour Act*.

Decision

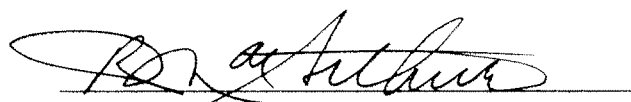
The Board has given very careful consideration to all of the evidence presented and arguments advanced in respect to this Application for Reconsideration of Certification Order No. 02-97. On the basis of the submissions of counsel, the Board holds that the provisions of Section 18 of the *Labour Act* will not come to bear on the matter before the Board in this case.

The sole matter before the Board is the critical question as to whether the threshold test, as set out in Section 4 of the *Labour Act* and Section 18 of the *Regulations*, has been met. In reviewing and considering the evidence and arguments advanced, and in view of the legislative parameters within which this issue must be decided, the Board has reached the conclusion that there are numerous legal issues that are deserving of further deliberation and ruling by this Board. From the record it is apparent these issues were not considered when the original certification order was issued. While the Board is satisfied that the submissions of the Respondent have thoroughly addressed the issues of the first two parts of the three-part threshold test, it is the very existence of the issues of evidence and/or law that have been identified that beg the question of whether or not there is good reason for the Board to reopen the case and hear further submissions from the parties on the very critical issues outlined by each of the two parties concerned.

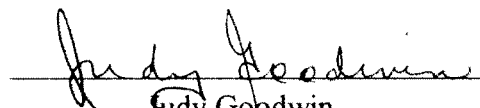
There are matters of whether or not certain pieces of evidence may or may not exist which are more than worthy of further consideration by the Board. It is also the very uniqueness of the circumstances of this case, in particular the Unit size, that is seen by this Board to potentially have very serious implications for the parties involved. It is the very particular and pressing nature of the circumstances of this case that leads the Board to conclude that there is very good reason to reconsider the original Certification Order.

The Board is loathe to exercise its discretionary power under Section 4 of the *Act* and Section 18 of the *Regulations* to reconsider decisions. It is loathe to do so out of concerns of jeopardizing and possibly supplanting the very stability in the labour relations process that is meant to be instilled by Orders of this nature. Given the very unique set of circumstances in this case, the Board feels that it is duty bound to further examine the issues and allow the parties the opportunity to fully explore the available evidence and make submissions in light of the evidence and the legislative parameters.

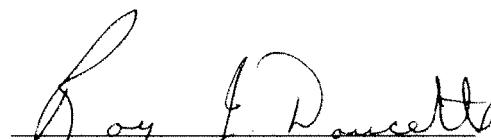
In conclusion, the Employer's application to have the matter reconsidered pursuant to Subsection 4(1) of the *Labour Act* and Section 18 of the *Regulations* is granted. The Board will convene a hearing to examine the central issue of the appropriateness of the Bargaining Unit and the issues that flow from that matter including the issues of whether essential and non-essential employees could be included in the same Bargaining Unit, and whether a Bargaining Unit of one member is conceivable under the provisions of the Prince Edward Island legislation.


Robert R. MacArthur
Chair


Gerry Doyle
Member


Judy Godwin
Member

This Decision made by the Prince Edward Island Labour Relations Board on *March 8/2000* and issued under the hand of its Chief Executive Officer.


Roy J. Doucette
Chief Executive Officer