File: 125-18-78

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

STAFF OF THE NON-PUBLIC FUNDS

Applicant

and

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 864

Respondent

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

RE: Request for review under section 27 of the Public Service Staff Relations Act

Before: Yvon Tarte, Chairperson

For the Applicant: Richard Fader, Articling Student

For the Respondent United Food and Commercial Workers Union: Ronald A. Pink, Counsel

For the Respondent Public Service Alliance of Canada: Alain Piché

Heard at Fredericton, New Brunswick,
June 23 and 24, 1998

By letter dated 3 October 1997 the Staff of the Non-Public Funds (SNPF) requested, inter alia, the merger of two bargaining units at Canadian Forces Base (CFB) Gagetown.

The applicant's request in this regard reads as follows:

> *The Staff of the Non-Public Funds requests, in accordance with section 27 of the Act, under the new provisions of section 33, the merging of the following bargaining units:*
>
> > *CFB Gagetown - (1) Administrative Support Category certified on 26 November 1984 and represented by the Public Service Alliance of Canada, Board file 145-18-231B; (2) Operational Category certified on 17 June 1981 and represented by United Food and Commercial Workers Union, Local 864, Board file 146-18-190.*
>
> *The reasons for this submission are:*
>
> > *A single classification plan which is based on the compensable factors of Skill, Effort, Responsibility and Working Conditions, as specified in the Canadian Human Rights Act, is now in effect in various locations and will be implemented soon at Gagetown. This new classification plan will apply to all employees in the bargaining units.*
> >
> > - *According to section 33(2) of the Act, the Board has to establish a bargaining unit that is coextensive with the employer's classification plan unless any such unit would not permit the satisfactory representation of employees.*
> >
> > - *Past practice at various Bases confirms that: "the capacity of the bargaining agent to conduct a viable and meaningful labour relationship with the employer in relation to the employees in the bargaining units would not be deterred" (PSSRB Board file 142-18-316).*
> >
> > - *As per Valcartier Board file no. 142-18-314, all employees from the Operational and Administrative Support Category were lumped together for the vote.*
> >
> > - *Non-Public Funds (NPF) employees at CFB Gagetown have substantial community of interest and concerns.*
> >
> > - *Consolidating the bargaining units would allow the Employer to apply the new job evaluation plan to all*

> *employees and therefore comply with the Canadian Human Rights Act. At present, pay practices are different between the two bargaining units. Part 1 Chap. H-6 Art. 11 (equal wages) states that "It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value...."*
>
> *In our view, the new job evaluation plan measures the relative worth of all NPF jobs in the bargaining units at Gagetown.*

- *The recent decisions of the Board recognize that very large bargaining units comprising a broad range of group categories were in fact appropriate to ensure proper representation of employee's interests ref: (Board files: 142-26-297 to 301; 142-29-312 and 313).*

The Evidence

For the applicant

Gérard Étienne is the SNPF's Compensation and Benefits Manager. He has worked previously with the City of Ottawa for a period of approximately 10 years as a senior classification officer.

In 1987, the respondent Public Service Alliance of Canada (PSAC) filed a pay equity complaint against the SNPF at the Canadian Human Rights Commission. The matter was only resolved by consent order in 1996. Pursuant to this order, the PSAC agreed to work with the applicant to develop a gender neutral classification plan which would be implemented at all the establishments where the applicant operates.

Exhibit E-1 is the SNPF's classification plan (the plan). The plan groups the applicant's employees into three categories as follows:

> ***CATEGORY I:*** *Incumbents of these positions are engaged in the preparation, manipulating, transmitting, systematizing and maintenance of hard-copy and electronic records, reports and communications, and/or in the performance of a trade/craft or of semi-skilled or unskilled work in the operation of machines, equipment and vehicles, and in the*

> *provision of personal, domestic and other services, and/or the application of basic knowledge, principles and skills.*
>
> ***CATEGORY II**: Incumbents of these positions engage in the planning, execution, conduct and control of programs; and/or engage in the inspection, operation and maintenance of equipment, systems and processes; and/or engage in the application of a comprehensive body of knowledge.*
>
> ***CATEGORY III**: Included are executive positions under the direct control of the Managing Director of CFCF or in the case of CANEX employees, the chairman of the CANEX Board of Directors.*

The plan has already been implemented for category-II employees at 9 establishments across the country. The applicant believes the implementation of the plan is required to meet the requirements of the equal-pay provisions of the *Canadian Human Rights Act*.

With multiple bargaining units at any given establishment, such as CFB Gagetown, there is the possibility that employees with the same classification under the new plan would be receiving different salaries. The implementation of the plan requires joint union-management evaluation committee, and that would be very difficult to do with two or more bargaining agents.

The applicant has not tried working with both respondents at CFB Gagetown because of the difficult relationship that has existed in the past between the two bargaining agents. Mr. Étienne believes that, even if the evaluation portion of the exercise could be performed with 2 separate bargaining agents, it would be practically impossible for them to bargain collectively the same pay and benefit structure. The applicant presumes that setting uniform pay and benefit structures with two bargaining agents would fail.

Brenda Dagenais is the applicant's Labour Relations Manager. This witness expressed the view that there are very few differences between the categories of employees represented by the bargaining agents or between their bargaining interests.

The witness believes that the application of the standard test to assess community of interest (see *United Steelworkers of America v. Usarco Ltd.*, [1967] O.L.R.B. rep. 526) can only lead to the conclusion that a single bargaining unit is

appropriate. Category-II employees at CFB Gagetown have a community of interest and a single management authority. In addition, they operate under identical economic factors with similar sources of work.

Mrs. Dagenais stated that moving to single bargaining units at five other establishments had not created a problem. Furthermore, she feels that the classification plan (Exhibit E-1) cannot be implemented realistically with the two bargaining units at CFB Gagetown, given the relationship between the bargaining agents and the nature of collective bargaining. In her mind there is no likelihood that two bargaining agents would agree on a pay package or coinciding termination dates for their collective agreements.

In cross-examination, the witness acknowledged she had never worked with the PSAC or the United Food and Commercial Workers Union, Local 564 (UFCW) or, for that matter, ever visited CFB Gagetown before the hearing. She also indicated that she had never bargained with separate bargaining agents at the same table or tried to get the PSAC and the UFCW to negotiate together.

Ms. Dagenais agreed that trends are often set in collective bargaining by the first group to bargain. She also agreed that the present administration group at CFB Gagetown is office-based and normally has minimal contacts with the military or with the operations group, which is service oriented and usually not office-based.

For the respondents

Francine Baily is a shop steward for the UFCW. She has held several jobs at CFB Gagetown in the food services sector. Her work requires that she have regular contact with military customers who frequent the canteen, bar or shop at the base. On the other hand she has limited interaction with any of the administrative support employees who are represented by the PSAC.

Ann Griffiths is also a shop steward with UFCW. She works as an inventory clerk at the Canex warehouse. Her position requires constant physical exertion. Her contacts with the PSAC bargaining unit members are limited. Ms. Griffiths has no social interaction with the PSAC members.

Madeline Underhill is an accounts payable clerk and a member of the PSAC. Her work is performed in an office during daytime hours. She has no contacts, formal or otherwise, with members of the UFCW. Mrs. Underhill expressed the concern that her PSAC unit, which is smaller than the UFCW unit, would likely be forgotten following a consolidation. This witness stated that PSAC and UFCW members have different bargaining interests ranging from pay rates to hours of work.

Terry Murphy is a Regional Vice-President for PSAC/SNPF employees. He has been involved with the employer and the UFCW to try and resolve the pay equity problem at the SNPF. Mr. Murphy believes that the collective bargaining problems raised by the employer could be resolved through cooperation between the two bargaining agents.

Michael Tynes is a negotiator and grievance and adjudication officer with the PSAC. Previously he acted as regional representative for the PSAC for over 13 years. Mr. Tynes has compared the UFCW and PSAC collective agreements (Exhibits U-1 and P-1). His analysis has revealed that the major differences between the two agreements are in the areas of rates of pay and hours of works. Most benefits are identical or similar. Mr. Tynes also mentioned the general principle that collective bargaining patterns are set by the first bargaining unit to sign. Although there has been no need in the past for the PSAC to cooperate with the UFCW, the witness believes that the respondents could easily work together to resolve any problems that might arise because of pay equity. Mr. Tynes indicated that the PSAC could provide satisfactory representation to a merged bargaining unit at CFB Gagetown and has done so at other establishments.

Arguments

The parties presented written arguments which are reproduced textually in full.

For the applicant

> *The following is in response to the Board's request that closing statements be presented in writing.*
>
> *This application for consolidation is made pursuant to s. 27 and 33 of the Public Service Staff Relations Act (hereinafter the PSSRA). It is requested that a bargaining unit encompassing all employees of the employer at CFB*

Gagetown be created by the consolidation of the following bargaining units:

> ***CFB Gagetown*** *– (1) Administrative Support Category certified on 26 November 1984 and represented by the Public Service Alliance of Canada, (Board file 145-18-231B); (2) Operational Category certified on 17 June 1981 and represented by United Food and Commercial Workers Union, Local 864, (Board file 146-18-190).*[1]

1. <u>PURPOSE</u>

It is not in dispute, and it was not disputed at the hearing, that the driving force behind this application is the employer's obligation to comply with the provisions of the Canadian Human Rights Act, R.S.C. 1985, c. H-6, as amended, (hereinafter the CHRA) to ensure that gender-based discriminatory pay practices do not exist within the Gagetown work establishment. The testimony of Gérard Étienne established that this can only be achieved by the implementation of a single classification plan applicable to all employees of the relevant bargaining units, and that the implementation of this plan requires the creation of bargaining units coextensive with the classification plan (exhibit E-1).

Although the driving force behind this application is compliance with the CHRA, the employer's classification plan is no less a classification plan than those of other federal Public Service employers and is a classification plan as envisaged by the PSSRA. As can been seen at tab 3 of the plan, and as established in the testimony of Brenda Dagenais and Gérard Étienne, employees are grouped according to their duties and responsibilities.

As noted in my opening statement, a subsidiary goal of this application is to achieve the administrative efficiency that results from a simplified and de-layered organisational structure. This has long been recognised as a legitimate goal. In Heating, Power and Stationary Plant Operation Case No. 2 (1970) P.S.S.R.B. Reports K 607 (Board file nos. 146-2-138, 140-142) at page 7, the Board noted:

> *There are undoubtedly practical limits to any employer's capacity to carry on negotiations and to administer*

[1] *It is important to note that the Board certified these two units at a time when it was prohibited by subsection 33(3) of the PSSRA from including, in the same bargaining unit, employees from different "occupational categories". Both subsection 33(3) and the definition of "occupational category" were removed from the PSSRA by the Public Sector Reform Act, 1992, S.C., c.54.*

> *agreements with bargaining agents representing employees in a multiplicity of bargaining units.*

This subsidiary purpose is consistent with the initial position taken by the Public Service Alliance of Canada (hereinafter P.S.A.C.). In an October 28, 1997, letter to the Board, Alain Piché wrote:

> *It is recognized that there has been a reduction of the workforce at many NPF locations resulting in smaller bargaining units. It is also recognized that it makes for more effective collective bargaining to have as many workers as possible represented in the same bargaining unit with the same employer. For these reasons, the Alliance does not, in principle, oppose the application of the employer to consolidate the Administrative Support and the Operational bargaining units… (emphasis added).*

2. BACKGROUND

The background facts were presented in the testimony of Gérard Étienne. On 12 February 1987, the Public Service Alliance of Canada (PSAC) filed a complaint with the Canadian Human Rights Commission on behalf of the predominantly female Administrative Support Category employees of the Director General Personnel Services (DGPS) bargaining unit. PSAC alleged that the pay plan for employees in that bargaining unit discriminated on the ground of sex. Specifically, DGPS was alleged to have been paying its Administrative Support Category employees less than employees in the Operational and Technical Categories for work of equal value in contravention of s. 11 of the CHRA. In addition, it was alleged that the job evaluation plan in existence at the time of the complaint similarly discriminated on the ground of sex in contravention of s. 7 and 10 of the CHRA.

The CHRA states that it is a prohibited discriminatory practice for an employer to pay a different wage for work performed by one class of persons as compared to another class when the work is of equal value or worth. In essence, an employer has to establish a compensation practice that is based primarily on the relative value of the work performed irrespective of the gender of employees. No employer is permitted to establish or maintain a difference between the wages paid to male and female employees employed by that employer, who are performing work of equal worth.

A Canadian Human Rights Commission investigator examined the complaint. The Commission, using the

investigator's findings and conclusions, found that systemic discrimination existed.

On January 18, 1993, DGPS made a proposal for resolution of that portion of the complaint made under s. 11 of the CHRA. The new classification plan was endorsed by the Canadian Human Rights Commission and explained to PSAC. The parties agreed by consent order issued by the Canadian Human Rights Tribunal to adopt the employer's proposal.

Four years later, in a letter dated February 28, 1997, the employer requested consolidation of the Operational Category bargaining unit and the Administrative Support Category bargaining unit. The bargaining agent for both units was the Public Service Alliance of Canada. In a decision dated June 30, 1997, the Board consolidated both bargaining units (Board file no. 125-18-72). In its decision, the Board noted that s. 33(3) and the definition of "occupational category" of the PSSRA which prevented the crossing of occupational categories in bargaining units, no longer applied (repealed effective June 1, 1993: Public Service Reform Act). Thus, a bargaining unit comprising all the employees of both former occupational categories was found to be appropriate for collective bargaining.

Virtually exact decisions of the Board also dated June 30, 1997 between the same parties were issued regarding Bases Bagotville (Board file no. 125-18-71); Goose Bay (Board file no. 125-18-73); Petawawa (Board file no. 125-18-74); and Valcartier (Board file no. 128-18-75). Thus, at all these Bases, the Operational and Administrative Supports categories are presently consolidated into all-encompassing bargaining units by virtue of determinations of the Board under s. 33 of the PSSRA (the jurisprudence referred to is attached hereto).

For the past two years, the employer has conducted a detailed analysis of its compensation practices in light of s. 11 of the CHRA. Gender predominance for jobs were established along with pay lines. In many establishments there are often two and sometimes three different pay structures and pay practices. There is a close parallel between the situation that existed at DGPS and the situation in existence at other establishments of the Employer.

It is important to note that, in cross-examination, P.S.A.C. negotiator Mike Tynes testified that the sole bargaining agent at these other establishments, covering the Operational and Administrative Support categories, has been and is currently providing satisfactory representation to both groups of employees.

3. CLASSIFICATION PLAN

The classification plan the employer will implement, should the Board agree to consolidate the bargaining units suggested, is the classification plan already implemented at Bases Bagotville, DGPS Ottawa, Montreal/St-Jean, Valcartier, and at non-unionized Bases Greenwood, Edmonton and Cold Lake. It is also soon to be implemented at CFB Petawawa.

The Equal Wages Guidelines made pursuant to the CHRA require employers to apply classification plans to their whole operation or establishment. As required by the Canadian Human Rights Act, pay equity must be achieved not within each bargaining unit but within the entire establishment, notwithstanding any collective agreement applicable to any employees of the establishment.

Gérard Étienne testified that the Gagetown base is an "establishment" for the purposes of the CHRA. He also pointed out the difference between the jurisprudence under the CHRA and the Ontario human rights legislation, regarding the definition of "establishment". This difference shows how the CHRA has addressed the issue of multiple bargaining units within the same work establishment. While the Ontario legislation allows for differences between bargaining units, the CHRA applies to all employees of the same class at the same establishment. Therefore, contrary to the assertion of Mr. Pink, the CHRA has been developed with the present factual scenario in mind. Jurisprudence pursuant to the CHRA states that the creation of separate bargaining units, at the same establishment with respect to the same class of employees (i.e., support category), will not frustrate the application of section 11 of the Act.

Brenda Dagenais testified that the Gagetown base is an "establishment" for the purposes of the PSSRA. This is consistent with the position of this Board in the Retail Clerks Union and the Staff of the Non-Public Funds, CFB Cornwallis (1980) Board File No. 146-18-176.

The employer is facing a situation where the same job class is divided into two bargaining units. Each unit now has its own pay structure and its own hierarchy of jobs.

The classification plan implemented at the Bases indicated above, and soon to be implemented elsewhere, consists of three new categories. The number of levels within each category varies from Base to Base. Category III is the executive category (members of this category are not found on all Bases). Category II is the managerial category. Category I is the category in which the employees of the

present Operational and Administrative Support categories are found.

The implementation of the classification system followed an analysis of responses to a questionnaire. The questionnaire helped determine relative worth of positions by assessing them against the factors skill, responsibilities, effort and working conditions. Benchmark positions were arrived at using a point rating system in accordance with ranking of the four factors skill, responsibilities, effort and working conditions.

4. APPLICATION OF S. 33 PSSRA

Two profound changes have been brought about by the Public Sector Reform Act (on June 1, 1993).

Firstly, the prohibition of including employees of a given occupational category in a bargaining unit of employees of a distinct occupational category has been removed. In fact, the formal concept of an occupational category has disappeared. As such, there can no longer be a presumption of a predisposition that there exists, amongst employees of a former occupational category, community of interest distinct from that of employees of another former occupational category.

Secondly, the Board must establish bargaining units in keeping with the employer's classification plan. The Board is no longer mandated to "take into account … the duties and classification of the employees in the proposed bargaining unit in relation to any plan of classification as it may apply to the employees in the proposed bargaining unit" as was the case under the former provisions of s. 33. The Board is no longer invited to assess in detail the duties of employees. Only in a case where unsatisfactory representation of employees would result, and for that reason only, can the Board choose not to follow the classification plan.

In the employer's estimation, the effect of these amendments is not only to limit the Board's discretion in determining appropriate bargaining units, but to place upon the bargaining agents in this application, the onus of establishing that the employer's classification plan "would not permit satisfactory representation of the employees to be included in it and, for that reason, would not constitute a unit appropriate for collective bargaining".

Clearly the respondents have failed to meet the onus upon them. They called no evidence with regard to the appropriateness of the proposed unit. In fact, in cross

examination, P.S.A.C. negotiator Mike Tynes confidently testified that P.S.A.C. could effectively represent the interests of all employees, should the present application be successful.

5. BOARD JURISPRUDENCE

The Board has had a consistent approach to the configuration of bargaining units subsequent to initial certification. The following oft-cited passage from the Heating, Power and Stationary Plant Operation Case No. 2 (1970) P.S.S.R. Reports K 607 (Board file nos. 146-2-138, 140-142), although particularly relevant to fragmentation applications, expresses the Board's general approach at pp. 609-610:

> *Whether we approach the problem that is posed by s. 32(1) of what is the relevant group as one of what policy should be applied to a proposal to split off a segment from an established bargaining unit, or as one of what policy should be applied in the determination of an appropriate bargaining unit where no unit has previously been established, appears to us to be of little moment. One of the major concerns of the Board in carrying out its responsibilities under the Public Service Staff Relations Act to determine the appropriateness of bargaining units under s. 32 is the proper functioning of the bargaining system in the Public Service. The sheer size of the Service, the dispersal of employees throughout the country and at various points in the world, the complexity of the employment relationship and the multiplicity of classifications into which the employees are divided makes undue fragmentation impractical and probably unworkable. It should be borne in mind that, in some respects, the employer in the Public Service is unlike other employers. There are probably some employers that may be under an obligation to bargain for employees in a greater number of bargaining units than the number that has already been established in the Public Service of Canada. Nevertheless, lack of uniformity in conditions of employment among various sections of the Public Service is more difficult to justify than it is in the private sector. It is our considered opinion that the inclination of the Board should be towards service-wide units. That is not to say that there are no circumstances in which a service-wide occupational group should not be split into two or more segments. However, there is a heavy burden resting on an applicant that seeks severance. That onus is not met by showing merely that the unit proposed is just as appropriate as a service-wide unit. Nor is it met by showing merely that the employees in the proposed unit desire to be represented by another employee*

> *organization; a bargaining unit ought not to be deemed appropriate solely because it is co-extensive with an employee organization's success in recruiting membership among a group of employees.*

The Board did detract from its general reticence in establishing less than service-wide units in some cases. Notably, in Retail Clerks Union and the Staff of the Non-Public Funds, CFB Cornwallis (1980) Board File No. 146-18-176, the present Employer objected to bargaining units confined to single Base locations. However, the Board did accede to the bargaining agent's request for establishing a bargaining unit confined to a single Base.

The Board adopted the private sector approach of a single location unit because of the nature of the employer's operations. Most interesting for the purposes of the present application, is that the Board expanded the bargaining unit proposed by the applicant to include all employees of the Operational Category, not just to the CANEX employees who were the only subjects of the bargaining agent's application.

The Board could not go beyond including employees of the Operational Category because of the impediment at s. 33 of the PSSRA, as it stood at the time. As noted above, no such impediment exists today.

Consequently, site-specific or single-Base bargaining units are the norm for the present Employer, notwithstanding the Board's consistent tendency of favouring service-wide bargaining units. That being said, there is no reason to favour fragmentation of the work force in more than one bargaining unit at a given site or Base. In other words, the Board's approach of favouring large all-inclusive bargaining units still finds application to individual Bases.

In recent years the Board has been called upon to configure bargaining units of employees that left the central administration of the Public Service over to new separate employers.

In P.S.A.C. et al. and National Energy Board (Board file nos. 142-26-297 to 301) (the N.E.B. case), a decision of November 8, 1993, the Board rejected the employer's request that one all-inclusive bargaining unit be created. The Board applied the criteria in the cases United Steelworkers of America v. Usarco Ltd. [1967] O.L.R.B. Rep. 526 and Canadian Museum of Civilization et al., April 30, 1992, C.L.R.B., file no. 590-7, in determining that, given the quite dissimilar situation of professional employees vis-à-vis non-professional employees, a single bargaining unit was not appropriate. There is no

analogy between the situation of professional and non-professional employees of the N.E.B. on the one hand and employees of the Operational and Administrative Support categories of Gagetown on the other hand. The N.E.B. case is thus quite distinguishable.

The Board was again asked to configure the bargaining structure of a new separate employer in Council of Graphic Arts Unions et al. and Canada Communication Group (Board file nos. 142-28-302 to 310, 161-28-702, and 705) a decision dated March 29, 1994. Again the Board rejected the employer's request to create one all-inclusive bargaining unit. The employer had put forward, in keeping with the CHRA a single classification plan taking into consideration skill, effort, responsibility and working conditions of the positions. The Board found that at no time did the employer consider its classification plan with labour relations in mind. The employer did not group the employees according to duties and responsibilities of positions. The Board concluded that the employer's classification plan was not a classification plan for the purposes of the PSSRA. It also found that even if the classification plan were one envisaged by the PSSRA, a single bargaining unit would not be appropriate. The terms and conditions of employment and work environment of the administrative, clerical, sales and technical employees (white collar) on the one hand were different from those of the printing production and related operations personnel (blue collar) on the other. The Board concluded that there was little community of interest between the white collar and blue collar groups and created two bargaining units along these lines. Again, the Board used the factors contained in the Usarco, supra, and Canadian Museum of Civilization, supra, decisions in its analysis.

In PSAC et al. and National Capital Commission (Board file nos. 142-29-312, 313) (the N.C.C. case), a decision of August 24, 1994, the Board acceded to the employer's request to establish one all-inclusive bargaining unit. The unit brought together over one thousand employees who, under the old classification system, belonged to the following disparate groups:

> *Library Science (LS), Administrative Services (AS), Information Services (IS), Programme Administration (PM), Drafting and Illustration (DD), Engineering and Scientific Support (EG), General Technical (GT), Photography (PY), Social Science Support (SI), Data Processing-Production (DA-PRO), Clerical and Regulatory (CR), Office Equipment (OE), Secretarial, Stenographic and Typing (ST-SCY), General Labour and Trades (GLT), General Services (GS), Purchasing and Supply (PG), Financial Administration (FI),*

> *Architecture and Town Planning (AR), Law (LA), Engineering (EN), Biological Sciences (BI), Library Science (LS), Economics, Sociology and Statistics (ES), Computer Systems Administration (CS), Historical Research (HR).*

The Board noted that the Usarco factors must be applied in light of current collective bargaining conditions. The following passage beginning at page 28 of the decision, although lengthy, is reproduced to demonstrate that the Board recognizes that a more modern approach to bargaining unit configuration has evolved. The emphasis added is that of the undersigned.

> *A similar approach has been taken by the Canada Labour Relations Board in Canada Post Corporation (1988), 73 di 66 (C.L.R.B.), wherein it was stated as follows at page 91:*
>
> *In the instant case, we are cognizant of the fact that it is not our obligation to establish the most appropriate bargaining units. The statute talks only of appropriate bargaining units. Nonetheless it was our intention at the commencement of these proceedings, and it has remained our intention throughout, to establish bargaining units that most closely meet the needs of the employees and the employer today and in the future. The direction the Board has taken in the instant case has been to try to establish bargaining units that allow the employer to conduct its operations in as reasonable and logical a manner as possible while, at the same time, protecting the rights of employees as provided under the Canada Labour Code. We have, on the other hand, taken extreme care to ensure that the issue that we focussed on is not what is best for the bargaining agents as they (while not diminishing the importance of their role) only represent the outward manifestation of the needs and desires of their members.*
>
> *What we established as our principal objective is to ensure that the configuration of bargaining units that we determine allows and provides for employees the greatest benefit while employed with the Corporation, to alleviate to the extent possible their considerable fears with regard to job security, and to permit the greatest amount of flexibility to employees in furthering their careers within the organization without being artificially restricted. This panel adheres to the philosophy that favours the formation of large bargaining units and looks with disfavour on the notion of the artificial fragmentation of bargaining units. Maintenance of that philosophy was an additional objective.*

.....

In United Steelworkers of America v. Usarco Limited v. Group of Employees [1967] OLRB Rep. Sept. 526, the Ontario Labour Relations Board set out the following criteria to assess community of interest: (1) Community of interest: (a) nature of work performed; (b) conditions of employment; (c) skills of employees; (d) administration; (e) geographic circumstances; (f) functional coherence and interdependence;

Although these criteria remain valid today and are still applied by the Ontario Labour Relations Board, it is fair to say that they must be and are being interpreted in light of the current collective bargaining conditions.

Collective bargaining has evolved considerably in all parts of Canada since 1967. It is not uncommon to find bargaining units which group together employees with very divergent educational backgrounds, technical skills and career objectives. As it was noted in The Hospital for Sick Children, [1985] O.L.R.B. Rep. Feb. 266, current realities may dictate groupings of employees "with quite diverse skills, education, training, positions and career aspirations":

14. It will be seen that the statutory language has remained basically unchanged for more than four decades, and in the early years it provided the basis for making broad distinctions for bargaining unit purposes between such groups as: "white collar" office and technical employees, and "blue collar" production employees; skilled tradesmen (electricians, plumbers, sheet metal workers, etc.), and unskilled or semi-skilled workers; part-time employees and full-time employees; employees working for an employer in one plant or municipality and employees in another plant or municipality; and so on. However, these fairly simply(sic), and then unexceptional distinctions do not apply so easily today. Collective bargaining has extended beyond its traditional "blue collar" industrial base, into the public sector and to increasingly sophisticated and diverse job hierarchies. Real life collective bargaining experience has outstripped some of the conventional wisdom and has shown that the collective bargaining system can exhibit quite a variety of structures, which, at one time, parties might have considered unconventional or inappropriate. Ontario Hydro, for example, has a province-wide bargaining unit, encompassing a broad range of employee classifications, and thousands of employees, ranging from unskilled workers to highly trained technicians. A typical municipal

"inside workers" (white collar) bargaining unit may include occupations ranging from filing clerks, to computer programmers, economists and planners with a considerable amount of post-secondary or even graduate training [see the Board's decision in The Regional Municipality of Durham, Board File 1818-84-R, decision released November 20, 1984)]. The Ontario Civil Service bargaining unit contains thousands of employees ranging from clerks and typists to sophisticated scientific and technical personnel - and, incidentally, the staff of a number of provincial psychiatric hospitals (see: Owen Sound General Hospital and Marine Hospital, [1978] OLRB Rep. May 445, where the Board noted that in the government sector nurses, paramedicals, service employees, and clericals are all in the same unit, even though under the Labour Relations Act, they have typically been segregated into separate units). While at one time common opinion and industrial relations practice might have supported fairly rigid (almost "class") divisions between employee groups, modern collective bargaining seems to be able to thrive quite well in many contexts without such rigid distinctions. It is no longer as easy as it once was to say that it is "inappropriate" to group together for collective bargaining purposes, employees with quite diverse skills, education, training, position in the job hierarchy or probable aspirations.

In Motor Coach Industries Limited [1992] OLRB Rep. June 744, that Board stated the following in relation to a long-standing policy of separating office and clerical workers on the one hand, and plant employees on the other:

13. The policy in question is one which had fully matured more than forty-five years ago. In the state of the reported jurisprudence, we can only speculate on the facts and circumstances which might then have led the Board to articulate a "policy" that office workers would be excluded from a plant unit "except in the most exceptional circumstances". On the face of it, the basis of these pronouncements was its assessment of community of interest. We have no difficulty imagining that circumstances in which plant and office employees shared an adequate community of interest were "exceptional" in the workplaces being organized in the 1940's. It would have made sense for the Board to make it very clear that arguments for inclusion of office workers in the units sought by trade unions were unlikely to succeed, if that was its experience. We do not think that the Board's statements about the conditions of the 40's and 50's can be taken as an undertaking that the Board would continue

> *to apply an "exceptional circumstances" test into the 90's despite changes in the nature of the workplaces being organized.*
>
> *14. The nature and kinds of employment and the ways in which jobs are created, staffed and valued have all changed considerably in the last forty-five years. The fact that one person's work area is described an (sic) an "office" and another's is not does not always carry with it the same implications as it did forty-five years ago. We imagine that a workplace like this one, where the same pay scheme applies equally to office and "plant" employees and where office employees can apply for and are transferred to "plant" jobs and vice versa, would have been "most exceptional" in the 40's and 50's. We are not confident that that is so today.*

It is noteworthy that in the N.C.C. case the employer's classification plan used the four factors of skill, effort, responsibility and working conditions to measure relative worth of jobs. The Board did not find it necessary to address the claim that the employer's classification plan was not in accordance with the PSSRA. It held that even without addressing that issue, it was satisfied that a single bargaining unit was appropriate.

The decision is also noteworthy in that it supports the present Employer's contention that the onus is on the bargaining agents to demonstrate that the classification plan is not appropriate. At p. 31 the Board states (emphasis is that of the undersigned):

> *The employer adduced considerable evidence to show how the goals, mandates and work methods of the N.C.C. have changed over the years. While all of this may be beyond dispute, it relates more to what is convenient to the employer and less to what is an appropriate bargaining unit for the purposes of collective bargaining.*
>
> *On the other hand, the witnesses who testified on behalf of PIPSC failed to convince this Board that their interests could be protected only if they belonged to a separate and distinct bargaining unit comprised of professional employees.*

In conclusion, the employer's submission is that the Board's role in determining bargaining units pursuant to s. 33 no longer calls for analysis of duties of employees in a proposed classification plan. Nonetheless, if the Board is inclined to assess the plan of classification in a manner similar to its practice before the recent amendments to the PSSRA, the

testimony of Brenda Dagenais and Gérard Étienne established that classic labour relations considerations have been utilized in the crafting of the classification plan. The classification plan proposed by the employer regroups employees with quite similar functions. There is no cogent reason that in this day and age the employees concerned could not be properly represented in a single-Base bargaining unit. It matters not that the employer is motivated mainly by concerns stemming from the CHRA in making these applications.

6. CLOSING ARGUMENTS

(a) Classification plan:

As noted above, it is the position of the employer that in light of the National Capital Commission case the Board should not ask whether the plan is a "real plan" as it did in the Canadian Communications case. However, if the Board does choose to ask this question, the evidence shows that this is a real plan, as envisioned by the PSSRA. Brenda Dagenais and Gérard Étienne testified that employees are grouped according to their duties and responsibilities. They are grouped into three separate categories (exhibit E-1). It is important to note that the respondents did not object to, or lead evidence to challenge, the legitimacy of the classification plan.

(b) Threshold:

It is the position of the employer that there is no "threshold" for this application.

In arguing that there should be a high threshold for an application to consolidate, the respondents rely exclusively on the jurisprudence under the Canadian Labour Code. However, there is nothing in the PSSRA to suggest that there is a higher threshold on a section 27 application than with a section 28 application. In essence both sections are timing provisions. They answer the question "when" can the application be brought. Section 27 provides that this may be done at any time. The question "how" the matter is to be brought, is addressed by subsection 33(3).

Subsection 33(3) reflects Parliament's intention to create a more modern approach to collective bargaining. This intent should not be frustrated by transplanting the jurisprudence of a different legislative scheme, one which does not have a provision similar to subsection 33(3). Parliament modernised the approach to collective bargaining in 1993. Where it chose not to create a separate threshold for this type of application the Board should not read one in based on the jurisprudence

of a different legislative scheme. It should not create an artificial threshold, and in effect dillute the employer of its duties and responsibilities under section 7 of the PSSRA.

Should the Board find that a higher threshold exists, the employer has established, through the testimony of Brenda Dagenais and Gérard Étienne, that this threshold has been met.

Given that:

(a) Gagetown is an "establishment" for the purposes of the CHRA,

(b) the Operational and Administrative Support workers are the same class of employees, and

(c) the wide definition of "wages" in section 11 of the CHRA,[2]

there is no other way for the employer to meet its <u>current</u> obligations under the CHRA than to consolidate these two units.

In addition, Brenda Dagenais highlighted the long-standing acrimonious relationship between the two bargaining agents. She specifically pointed out that in December of 1996, or early 1997, PSAC was invited to sit down and work out benchmark positions. However, when PSAC found out that UFCW would be at the table, they refused to attend. Both Mr. Étienne and Ms. Dagenais testified as to the strained relationship between these two unions.

However, even if there was a healthy relationship between these two bargaining agents, Gérard Étienne pointed out the practical impossibility of "creating the exact same pay structure with two sets of negotiators and maintaining the exact same pay structure throughout time." What is required

[2] *11 (7) For the purposes of this section, "wages" means any form of remuneration payable for work performed by an individual and includes*

(a) salaries, commissions, vacation pay, dismissal wages and bonuses;

(b) reasonable value for board, rent, housing and lodging;

(c) payments in kind;

(d) employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans; and

(e) any other advantage received directly or indirectly from the individual's employer.

is one bargaining unit and one bargaining agent for this class of employees.

(c) Respondents' positions:

The respondents' bore the burden of proving that the proposed application would not "permit satisfactory representation of the employees to be included in [the new bargaining unit] and, for that reason, would not constitute a unit apropriate for collective bargaining." However, neither respondent called any evidence in this regard. As a result, this application should be granted.

If however, the Board chooses to apply the pre-1993 test for determining the appropriateness of the bargaining unit, the evidence shows that the proposed unit is appropriate. The respondents' own witness, Mike Tynes, testified that PSAC could properly and effectively represent all the employees in the new unit, should this application be successful.

Furthermore, the testimony of Brenda Dagenais established the appropriateness of the proposed unit based on the traditional Usarco factors. She testified that both groups share a community of interest. The work they perform is "identical" in that they play a support role for the military personnel at the base. The conditions of their employment are "identical" in that they are separate from the community and they exclusively serve military personnel. They have similar levels of skills and training. Their administration is "identical". They share the same geographic circumstances. There is also a functional coherence and interdependence between the groups in that one cannot operate without the other. Both groups share the same centralization of authority. Both groups share the same economic factors, i.e., their success or failure is inter-related. Finally, Ms. Dagenais testified that both groups share the same source of work, i.e., from the military forces on the base.

7. ORDER REQUESTED

The employer objects to the respondents' proposal that this application be set aside so that the parties can attempt to "work this out". Such a proposal ignores two facts: (a) the acrimonious relationship which, despite their efforts to re-characterise it at the hearing, exists between the unions, and (b) that given the employer's current requirements under the CHRA, there is no other way for it to live up to the CHRA than to consolidate the two units and implement the Classification Plan. Even if the relationship between the two bargaining agents was better, the evidence shows that there

is no way for the employer to meet its current obligations under the CHRA other than to consolidate these two units.

The two bargaining agents are posturing a healthy relationship because they want to preserve the status quo. However, the status quo prevents the employer from exercising its authority under sections 7 and 33 of the PSSRA and managing its affairs in a way which is consistent with the CHRA.

The employer requests the consolidation of the bargaining units described at the outset of this document.

The employer takes no position regarding the conduct of a representation vote at CFB Gagetown.

For the respondent UFCW

...

Issue - Should the Public Service Staff Relations Board exercise its discretion and combine the two bargaining units of the United Food & Commercial Workers, Local 864 and the Public Service Alliance of Canada (the "PSAC") into a single unit pursuant to Section 27(1) of the Public Service Staff Relations Act?

To begin, it is necessary to recognize that neither the UFCW, nor the PSAC are desirous of this proposed merger. This unilateral application made by the Employer is done for the singular purpose of attempting to comply with the provisions of their supposed obligations under the Canadian Human Rights Act.

Facts

There are two distinct sets of facts which may be applicable to this case. The first set of facts concerns the lack of action by the Employer in attempting to achieve cooperation between the bargaining units. The second set of facts concerns the actual work relationship between the bargaining units. I will review each set of facts separately.

Employer Presumptions

The Employer, through the evidence of its witnesses, presumes that the two unions are unwilling and unable to cooperate with respect to the supposed issue which concerns the Employer.

Essentially, the Employer's problem is simple. It says "We believe we are bound by the pay equity provisions of the Canadian Human Rights Act and we are concerned that there may be an application made against us and we want to act in a pre-emptive way and comply with the Canadian Human Rights Act, and in particular, the pay equity provisions". In order to do this, the Employer needs to have a single classification system within the Base establishment and it needs to have, it says, agreed upon rates of pay between the bargaining units for work of equal value, depending on the level in the evaluation in which that work finds itself.

The Employer:

1. Has not received any written opinion or direction from the Canadian Human Rights Commission with respect to its obligation in this respect.

2. Has not provided, nor sought, any clarification from the Canadian Human Rights Commission with respect to the issues where there are two bargaining units within the establishment with different bargaining agendas.

3. Has not found any precedent for a situation under the Canadian Human Rights Act where there are two bargaining units within the same establishment operating under different collective agreements.

4. Has met with the Unions and has begun a process of job evaluation which is essential to the establishment of a uniform classification system.

5. Has not sought the agreement of the Unions attempting to achieve a workable solution to the perceived dilemma of the Employer.

6. Has not called the parties together to discuss the matter to any extent.

7. Has presumed that past difficulties which extend over a 15 year history, approximately, will continue in light of this new problem.

The Employer has presumed that the Unions are unwilling to meet, discuss and attempt to resolve the dilemma which they collectively face.

The evidence before the Board is that the Unions have met with the Employer, have adopted joint statements with respect to job evaluation and classification and are willing to meet to attempt to resolve the matter internally. Options such

as joint bargaining, observers on other's bargaining teams, agreeing to go with the lead bargaining agent are all possible solutions which may be available to the Employer. Simply put, no one has talked about these matters because no one has seen fit to put this problem in perspective.

Legal Issues Arising

It is the position of the UFCW that as a result of the foregoing evidence, this Board ought not to exercise its discretion under the provisions of Section 27. The Union's submission is that the Applicant is seeking an extraordinary remedy from the Board. The obvious effect of any order under Section 27 would be the elimination of bargaining rights of employees within a known structure and the forcing of a bargaining agent on an unwilling party. As well, a bargaining agent who has invested significantly over time and who has a long bargaining history and relationship within the bargaining unit would be deprived of its representational rights.

This is an extraordinary remedy. One which, we submit, ought not to be exercised without substantial justification and one which cannot or would not be issued unless there are overwhelming labour relations issues which warrant the change.

But for the Human Rights issue, it is the submission of the UFCW that this application would never be made.

The effect of this application is to decertify one of the bargaining agents. A decertification application requires significant input from employees who are expressing dissatisfaction with their representational rights. The employees are very happy with the status quo.

There have been no jurisdiction disputes between the parties and there has been no inter-union dispute in any other fashion.

It is only because of the perceived human rights issue that the Employer makes this application.

Administrative convenience for the Employer is no ground, in and of itself, to seek this review. Historical bargaining relationships will have significant weight with respect to any decision that is made ultimately in this case and unless it can be shown that there have been significant ongoing problems, the Employer has a very heavy onus.

It is the submission of the Union that it is the human rights issue which drives this application. The human rights issue

may or may not be a problem. It may not be a legal problem because there has been no legal analysis done, to our knowledge, with respect to the issue of two bargaining units within an establishment. There is no evidence of any legal opinion given. There has been no evidence of any review by the parties as to their obligations with respect to the foregoing and whether or not they agree with the position adopted by the Employer. Finally, there is no evidence that the Canadian Human Rights Act has any application with respect to this issue when there are two bargaining units in an establishment. These are all matters which ought to be reviewed and discussed by the parties, perhaps even discussed with the cooperation of the Canadian Human Rights Commission and seek their opinion and expertise in this matter.

However, presuming that there is a problem and notwithstanding the two bargaining units, it is a matter which must be overcome and there must be one pay classification within the establishment and there must be one pay plan within the establishment which may occur under two collective agreements, it is then necessary to have the cooperation of the bargaining units.

The Unions, through their submissions and their evidence, are stating categorically that they are prepared to meet with the Employer to resolve the matter.

In order for the Board to exercise its discretion under Section 27 of the Public Service Staff Relations Act, it is imperative the Board be satisfied that there is a fundamental problem which warrants the Board's attention. As a matter of principle, the Board should be satisfied that the problem which is being experienced in not able to be resolved between the parties themselves. The Board must be satisfied that all internal remedies available to the parties through their own mechanisms have been utilized and have been found wanting. The Board ought to be the place of last resort. The concept of asking the Board to exercise its discretion in an extraordinary manner such as modification of bargaining units, and disenfranchising certain employees of their bargaining agent is so extraordinary that it is only to be done in the most exceptional circumstances. It is not an application that ought to be considered "on a whim".

It is the submission of the Union that the Applicant must come to the Board after having exhausted all opportunities to resolve the matter. The Board should only consider exercising its discretion when it is satisfied that there is nothing that the parties can do between themselves and only the Board can resolve the problem for them.

You will recall that the UFCW made an application for non-suit, but on instructions from the Board, the matter was put off until final argument. In essence, the position of the Union is that in order for the Board to enter upon the inquiry and consider exercising its discretion, it must be satisfied that the Board is the place of last resort. In a mature, labour relations setting, such as the one in this case, it is incumbent upon the parties to attempt to resolve this fundamental issue themselves. Where the Board is satisfied that there is opportunity yet available for the parties to meet their mutual objectives without the necessary intervention of the Board, the Board should direct a dismissal of the application because of the failure of the parties to resolve the matter internally.

The obligation upon the Applicant is to show that the application warrants the consideration of the Board's discretion. It is the submission of the UFCW that in this case, the Applicant has failed in this fundamental obligation.

The two-step process which the UFCW analyses under Section 27, would be seen as follows:

1. The Board should first answer the question "Should the Board consider entering upon the inquiry"?

2. If the Board decides that it is worthwhile to enter into that inquiry, should the Board exercise its discretion and merge the units?

The UFCW states, with respect, that the answer to the first question is a resounding no. The Employer has not met its most major obligation of showing that there is an industrial relations reason why the Board should move off the first question and onto the second question. The Union states that the Employer has failed to show that there is a fundamental labour relations problem that cannot be resolved mutually. The Union believes that it is incumbent upon the Employer to satisfy you that they have exhausted all the means available to them and that they must have the Board resolve the problem.

The evidence paints a resoundingly different picture. You have unions who are willing to work together, have begun to work together with the Employer on this issue, but everything seems to have stopped, including bargaining, pending the results of this hearing. The Board ought to advise the Employer that their application is dismissed without prejudice to making a further application pending a significant attempt to resolve the issues between the parties and a failure in that attempt, which failure necessarily prejudices the Employer

and which would then require the Board to enter upon the second question.

Therefore, it is respectfully submitted that this application should be dismissed for the failure of the Employer to persuade the Board that there is a problem which cannot be resolved between the parties and which requires the Board to exercise its extraordinary powers pursuant to Section 27.

Facts on the Merits

As a result of the evidence with respect to the merits of the case, it is submitted that there is a deafening silence on the evidence from the Employer on the reasons why the Board should exercise its discretion pursuant to Section 27.

Let us look at what the Employer's evidence is in this respect. The Employer says that it has reviewed files and talked to certain persons who are off the Base, but there has been no firsthand testimony in the Employer's case from any firsthand knowledge of problems involving the bargaining units.

The witnesses for the Employer have not interviewed any employees, have not inspected the premises, have not reviewed with managers at CFB Gagetown the work performed by employees, the overlap, the similarities and the like. They have not done this, in the submission of the Union, simply because they have no reason to do so. Their application is based upon the Canadian Human Rights Act. There is no other reason to merge the units.

The evidence from the Unions is significantly different from that of the Employer. The only firsthand knowledge of the jobs came from the employees themselves and they testified as to the simple different variety of the jobs and the nature of the work that is performed. Simply put, the UFCW bargaining unit is the service oriented bargaining unit. It deals with the customers on a day by day basis and the PSAC bargaining unit is the office or administration bargaining unit and they have no dealing on a day by day basis with the customers. The physical work is performed by the UFCW. The clerical work is performed by the PSAC.

Historically, the division between office and operations has been a perfectly legitimate mechanism to divide the bargaining units. The UFCW recognizes that in modern labour relations jurisprudence, a "wall to wall" bargaining unit may be the more preferable bargaining unit. However, the experience is that there is a clear demarcation between the UFCW and the PSAC bargaining units. The Employer was

unable to provide a single example of where there is an ongoing problem which warrants this Board's intervention. The bargaining units see no problem. If the bargaining agents have no problem, why should the Employer have a problem with respect to the bargaining units. The Unions are of the view that the Employer does not have any foundation for a Section 27 review, except for its human rights issue. There is no substantial evidence with respect to administrative convenience other than a mere statement by various witnesses.

The Role of Section 33 in a Section 27 Application

The UFCW submits that the test under Section 33 does not arise in the initial consideration of a Section 27 application.

If the Board should decide to enter upon the inquiry under Section 27, its first stop should not be at Section 33. The Board must restrict itself to Section 27 for much of its deliberation.

Section 33 is inapplicable in this case because it applies to the termination of new bargaining units, not the amalgamation of old bargaining units and it is fundamental to understand that Section 33 states "... shall determine the relevant group of employees that constitutes a unit appropriate for collective bargaining".

It has long been understood that for the determination of appropriate bargaining units it is not always necessary to find "the" appropriate bargaining unit.

The bargaining units which are in place at the moment were appropriate at the time they were certified and may well today, on an application for certification, be an appropriate bargaining unit. The fact that there may be better defined bargaining units is not a relevant question. The only question is whether or not the bargaining unit proposed is "a" unit appropriate for collective bargaining.

Therefore, it is submitted that Section 33 bears no relevance to a determination under Section 27. It is the view of the UFCW that the only issue relevant before this Board is whether or not it should exercise its discretion under Section 27, presuming it refuses to dismiss the application as earlier proposed.

In the UFCW's view, there is no valid precedent under the Public Service Staff Relations Act dealing with a merger of two unions into a single bargaining unit.

The UFCW submits that the best precedent in cases of this sort comes from the Canada Labour Relations Board. The Union relies upon the case of Atomic Energy of Canada Ltd. v. IAM et al., (1995) 99 di 37 (CLRB Dec. No. 1135). At pp. 39-40 in that case, the Canada Board analyzed the legal rationale on how these cases ought to be decided. In that case, there was an attempt to merge six bargaining units into one unit and the Board set out, in its decision, how a case of this sort ought to be reviewed.

As the Public Service Staff Relations Board is aware, there is a long history of dealing with cases of this sort. Reference is made to the mergers at Canada Post, the CBC, Marine Atlantic and CN, among others.

Weatherill, writing for the Board, at p. 39 said:

> *The Board has recognized that jobs, industries and organizations change and that, in some circumstances at least, collective bargaining relationships need to be changed as a result of such evolution.*

The history in Canada Post was infamous. The longstanding disputes between the CUPW and the Letter Carriers' Union and the virtual industrial warfare between the two bargaining agents was legendary. Such is not the case in the instant case.

The Board said at p. 40:

> *This Board, like other labour relations boards, has consistently required that* ***some substantial justification for a change in existing bargaining unit structures be established, where change in those structures is sought****. The Labour Relations Board of British Columbia stated this rather forcefully in* ***MacMillan Bloedel Limited (Alberni Pulp and Paper Division)*** *(1984), 8 CLRBR (NS) 42 as follows in the headnote of the decision:*
>
> > *"The Board enunciated the legal framework which it accepted as applying to applications for consolidation under the Labour Code. First the Board will not lightly interfere with established bargaining structures, particularly in cases where to do so would result in the loss of bargaining rights for one of the trade unions involved. Rather, consolidation of existing bargaining rights is an extraordinary measure which the Board will resort to only in situations*

> *where there is a serious labour relations problem for which consolidation is the result most able to further the principles and policies of the Code. Second, the Board will not consider consolidation applications in the same way in which it considers fresh applications for certification. Third, the kind of jeopardy which an employer or other applicant relies on in support of such an application must be of a profoundly serious nature. Where real and demonstrable adverse labour relations consequences are evident, the Board will also be required to consider the possibility that such consequences will recur in the future. Mere administrative inconvenience and inefficiency, of itself, normally will not suffice. The Board must be satisfied that effective industrial relations have been virtually frustrated by the impugned bargaining structure. The Board has in the past and will continue to exercise its discretion on consolidation application in such a way as to confine its intervention in longstanding historical bargaining relationships to situations where* ***extraordinary*** *relief is required."*
>
> *While the foregoing may be thought to be somewhat too strictly put, there is no doubt that there is an onus on the applicant in an application such as this to establish good grounds for the Board's interference with established bargaining structures, and the applicant in the present case accepted that onus. (emphasis added)*

The Board rejected the application in this case on the following rationale, when it stated at p. 41:

> *Indeed, the evidence established that that structure works well, and although the existence of certain distinctions between classifications of employees based on craft lines and reflected in bargaining unit membership may have inhibited the employer in its willingness to make certain work assignments, the evidence is that the employer has never sought in any significant way to go forward with such assignments, nor sought, at least not in any persistent way, the co-operation of the trade unions involved (with whom a good relationship exists, and who have displayed a considerable degree of co-operation in collective bargaining) in order to achieve the flexibility in assignment which it might quite reasonably require.*

> *The employer's case, to put the matter bluntly, has not been made out on the evidence before us. Certainly, the employer's organization has changed over the years, and there has been a significant downsizing, particularly at the supervisory level. The employer has taken a non-confrontational stance with respect to many matters which it regarded as problems. Partly on this account perhaps, and no doubt for many other reasons to the credit of all parties, the working relationship has improved in recent years. The number of grievances filed has decreased; the rate of absenteeism has decreased, productivity has increased. While the company might find it somewhat more convenient to deal with one bargaining agent rather than four in the administration of collective agreements, that consideration does not outweigh, in the circumstances of this particular case, the value of maintaining the traditions of employee representation by the bargaining agents in question here. This is not to say that the institutional interests of the trade unions carry great weight in cases such as this; the Board is, properly, much more concerned with the interests of employees as such, and in the instant case there has not been, as there was in some of the major restructuring cases which have been referred to, any expression of employee dissatisfaction with the present structure, nor has the employer established that employee interests would be better served, to any significant degree, by a changed structure.*
>
> *For all of the foregoing reasons, the application is dismissed.*

This very same analysis can be made to this case. There has been some modification of the employer's operation. There has been some downsizing, some changing of full-time to part-time jobs, but overall, the relationship between the Unions has improved over the years and the Employer has not sought in collective bargaining any modification of the existing structure. The administrative convenience does not outweigh the bargaining history. There is no evidence before this Board of any employee dissatisfaction. In fact, the evidence was to the contrary.

Based upon the jurisprudence in Atomic Energy, supra, this case has not been made out.

In the B.C. Labour Relations Board case of MacMillan Bloedel Limited (Alberni Pulp and Paper Division) and CPU, Local 592 et al., the Board dealt with an application to consolidate into

two bargaining units the work which had previously been performed by four bargaining units. The Board said at p. 57:

> *As its starting point in considering the merits of that application, the panel made it clear that the Board will not engage in the wholesale review of previous unit determinations. It noted that while the Board generally prefers large integrated bargaining units, a long history of collective bargaining in a particular form creates its own community of interest which should not lightly be disturbed (at p. 547):*
>
> > *This case presents an extremely delicate labour relations problem. As our starting point, we wish to make it very clear that this Board will not engage in the wholesale review of previous unit determinations. The reasons underlying that principle lie in this Board's previously enunciated policy concerning appropriate bargaining units.*
> >
> > *This Board's preference for large integrated units, as expressed in the Insurance Corporation of British Columbia, [1974] 1 Can LRBRR 403, is well known. However, that decision went on to outline certain exceptions to that preference. One of these exceptions is based upon the Board's assessment of the community of interest between various working groups. Should there be factors of such significant effect that they destroy the community of interest between groups of employees then we have indicated our willingness to accommodate these interests through the formation of units which contradict our expressed preference for large integrated units.*
> >
> > *While there are many factors which may move the Board to deviate from its general policy, the most predictable point of departure comes when the Board's investigations reveal a bargaining history which, in and of itself, is sufficient to create a community of interest. As the Chairman commented in the Cariboo Memorial Hospital case, [1974] 1 Can LRBR 418:*
> >
> > > *"In defining and redefining appropriate bargaining units that kind of history is all important. It indicates the existence of*

> *workable relationships amongst the employer and both unions and tends to produce an even stronger community of interest among the group of employees than was present on the original certification."*
>
> *Thus, as was stated in B.C. Equipment Company Limited, and J.S. Galbraith and Sons Limited, Decision no. 156/74, where the evidence discloses "historically healthy labour relationships, it does not follow that a consolidation of bargaining units, however desirable, would necessarily improve matters".*

In our view, it is important to bear in mind that the basis upon which the panel in B.C. Ice approached the question of consolidation of bargaining units was one of respect for established bargaining relationships. The reasons for this are clear. No bargaining unit determination, however sound the labour relations policy underlying that determination may be, can guarantee healthy and acceptably stable labour relations. The quality of any collective bargaining relationship depends, in large measure, on the parties involved in that relationship and the economic and social climate within which those parties interact. The Board cannot simply presume that its intervention in an existing bargaining relationship and its reorganization of the structure upon which that relationship is based will have a positive effect. This is particularly so where the parties have been able to accommodate themselves reasonably well to the existing bargaining structure. Furthermore, as the panel in B.C. Ice noted, a particular bargaining history can create its own community of interest, and where this is so, it is all too likely that to force all the parties involved to adapt themselves to a new bargaining structure may create tensions and conflicts which outweigh whatever mischief the Board was attempting to correct.

The Board said at p. 59:

> *Thus, B.C. Ice established two basic preconditions to an application for consolidation.* ***First****, one or more of the units must no longer be appropriate for collective bargaining.* ***Second****, there must be some real jeopardy which exists as a result of the current bargaining structure.*

The Board made its analysis at pp. 65-65 where it said:

> *At this point, we will enunciate the legal framework which we accept as applying to applications for consolidation under s. 36 of the Labour Code. At the outset, we must say that we accept the* ***fundamental distinction between initial bargaining unit determinations and applications under s. 36 involving reconsideration of longstanding bargaining units****, on the basis of the extensive jurisprudence.*
>
> *In our view, from that extensive jurisprudence, including the cases outlined above, a number of principles emerge.* ***First****, it is clear that the Board will not lightly interfere with established bargaining structure, particularly in cases where to do so would result in the loss of bargaining rights for one of the trade unions involved. Rather, consolidation of existing bargaining units is an extraordinary measure which the Board will resort to only in situations where there is a serious labour relations problem for which consolidation is the result most able to further the principles and policies of the Labour Code.*
>
> ***Second****, the Board will not consider s. 36 consolidation applications in the same way in which it considers fresh applications for certification, where it is writing on a "clean slate" insofar as a bargaining unit configuration is concerned. It is the Panel's view that while the principles enunciated in cases such as ICBC, are helpful to the Board in applications such as the one presently before us, it is not necessarily appropriate to apply those principles in a wholesale manner. Where the Board is fashioning relief (and in our view, that is precisely what the board is doing when it grants orders such as the one the Employer presently seeks), it must take account of all the factors which influence the industrial relations climate under consideration. The Panel might well conclude that, for historical and practical reasons, a large, all employee unit would not be an appropriate response.*
>
> ***Third****, the kind of jeopardy which an Employer or other applicant relies on in support of such an application must be of a real and profoundly serious nature. A consolidation application based on mere speculation about the industrial relations consequences of fragmented bargaining will not succeed. Where, however, real and demonstrable adverse labour relations consequences are evident, the*

> *Board will also be required to consider the possibility that such consequences will recur in the future. Mere administrative inconvenience and inefficiency, of itself, normally will not suffice. The fact that an Employer would rather bargain with only one trade union, and only have to administer one collective agreement, cannot serve to extinguish the community of interest which may well have developed by reason of the historical collective bargaining structure. The Board must be satisfied that effective industrial relations have been virtually frustrated by the impugned bargaining structure.*
>
> *In the Panel's view, one of the keys to the Board's approach to s. 36 consolidation applications is the discretionary nature of the Board's reconsideration power. Section 36 provides, in part "The board may ... reconsider a decision or order made by it ... and may vary or cancel the decision or order ...."*
>
> ***The Board has in the past, and will continue to exercise that discretion in such a way as to confine its intervention in a longstanding historical bargaining relationship to situations where extraordinary relief is required.*** *The Board must, in the exercise of its discretion, take care to place appropriate limits upon its role in ongoing collective bargaining relationships. (emphasis added)*

The analysis in the MacMillan Bloedel case is identical to the analysis which the UFCW is submitting to this Board. We believe that there is no foundation for the application on the merits. We submit that the Board has not heard any evidence which would warrant interference with the historical bargaining relationship which exists. The Board must recognize this as being an extraordinary remedy, one in which it ought to be cautious in exercising its discretion.

On the basis of the foregoing jurisprudence, it is submitted that there is no ample justification for an order pursuant to Section 27.

The supposed application of the "Usarco" test is inappropriate in the Union's view in cases of this sort. We are not dealing here with original certifications. We are dealing here with wholesale modification of historical bargaining structures. This Employer must be cautioned about coming to the Board, seeking applications which destroy historical bargaining relationships unless there are fundamental concerns expressed or unless there is agreement by the bargaining agents.

As a result therefore, the Union submits that the Board ought to dismiss the application as being without merit.

Vote

In the event the Board should not dismiss the application and the Board decides to merge the units, the UFCW's position is that there should be no vote on the basis of the jurisprudence previously expressed in its letters to the Board dated December 12, 1997 and January 30, 1998.

For the respondent PSAC

Argument: Section 27 Review Application NPF Gagetown

The position of the Alliance is that the Board should dismiss the application and should not order the consolidation of the Administrative Support and Operational bargaining units of the employees of NPF at CFB Gagetown as requested under Section 27(1) of the Act.

Evidence:

1. *The Board heard evidence at the hearing which established that the Administrative Support bargaining unit represented by the Public Service Alliance of Canada has established a stable collective bargaining relationship with the employer. Madeline Underhill, Administrative Support worker and President of PSAC Local 380, CFB Gagetown indicated she had participated in several rounds of collective bargaining and that the members of the unit had benefited significantly in negotiating benefits which met their needs. She cited the negotiation of family related leave and the continuation of severance benefits for workers converted to part time from full-time status as particularly significant.*

2. *Ms. Underhill also testified to the community of interest shared by Administrative Support workers. She indicated that their work takes place in an office environment; it requires training in computer skills, accounting, bookkeeping and financial programs. She stated their work was to support other services. She also indicated that they dealt most regularly with the other administrative staff in their office and that they communicated regularly with other public side administrative staff with whom they shared office facilities.*

3. *The hours of the Administrative Support employees are shorter than the Operational staff. The Admin. Support*

work a 37.5 hour week rather than a 40 hour week. The evidence of Ms. Underhill was that she and her co-workers did not work shift work or evenings as distinct from the Operational group employees who the Board heard, were required to work shifts and provide services in the evening.

4. *Ms. Underhill testified that the majority of the Admin. Support workers were long service employees with 15, 14, 12 and 10 years of service respectively and many of the group were presently or had been full-time workers until the employer started converting full-time positions to part-time a few years ago.*

5. *The Board was presented the collective agreements of both bargaining units and the significant discrepancy in pay rates between the units was identified by Ms. Underhill. Admin Support workers are substantially better paid than the Operational group.*

6. *The Board also heard that the Admin. Support unit feared being combined with the Operational group because it would be outnumbered and would not have the same ability to put forward issues specific to the working conditions and priorities of the Admin. Support workers. While there is no animosity between the two groups, Ms. Underhill also indicates there was little regular contact and that the present structure of representation met the needs of the Admin. Support group most effectively.*

7. *A petition signed by 12 of the 13 members of the Admin. Support unit was submitted and identified by Ms. Underhill. The petition asks the Board to maintain the status of the Administrative Support group as a separate bargaining unit.*

8. *Ann Griffith testified that she was an employee in the Operational group and worked in the Canex combination store. Ms. Griffith does work which she described as physical, requiring the manipulation of boxes, lifting, carrying and pushing, opening containers, stocking the shelves and pricing and occasionally unloading trucks. She indicated to the Board that this comprised 65 to 75% of her job. She testified she did not have a telephone in her immediate work area. She described the major "paperwork" to do with the store as being performed by clerks Debbie Casey and Linda Ward who worked in the office and were members of the Admin. Support group represented by PSAC. Ms. Griffith indicated that the*

connection with the PSAC group was primarily "small talk" and informal.

9. *Terry Murphy, National Vice-President, NPF, Union of National Defence Employees indicated that his experience as a NPF member representative has involved him in a number of meetings with UFCW representatives. Mr. Murphy indicated that the unions are increasingly called upon to work together on issues. He cited the example of the Employment Equity Program Committee on which he sat with UFCW representatives in 1997 and which resulted in a joint statement of principle on employment equity signed by both unions. He also cited the example of a training session on employment equity presented at the PSAC Headquarters in February 1998 and attended by UFCW, PSAC and UNDE representatives. Mr. Murphy indicated that the unions were working together and could see no problem in cooperating to ensure the interests of both PSAC and UFCW members at CFB Gagetown were effectively represented as separate bargaining units.*

10. *Mike Tynes, PSAC Staff Negotiator, Atlantic Region, testified that he was the negotiator of the NPF Gagetown Administrative Support unit's collective agreement. He identified the collective agreement and the clauses which had been negotiated into the agreement at the request of the Admin. support members. Mr. Tynes also identified some of the significant differences between the UFCW and PSAC agreements, including the substantial difference in wage rates between the Admin. Support and Operational and described how the PSAC deals with and ensures the effective representation of the different communities of interest between the administrative and operational groups in locations such as CFB Goose Bay where the bargaining units have been consolidated. Mr. Tynes explained that in this situation Admin. and Operational issues are dealt with by having different representatives at the bargaining table. Mr. Tynes indicated that the Admin. Support group at CFB Gagetown had a stable and long-standing bargaining relationship with the employer, which by all measures has served the members of the bargaining unit well and resulted in good collective agreements.*

11. *Mr. Tynes also testified that he had not been consulted or involved in any discussion with the employer and the UFCW regarding the implementation of the job evaluation plan which was being proposed by the employer. He stated, on the basis of his extensive experience with bargaining both in the public service and*

in other sectors in the Atlantic, that it was entirely feasible that PSAC and UFCW could arrive at some understanding with regard to negotiations if a joint job evaluation plan was put in place and this plan led to a single classification system for the category of employees that included both Admin. and Operational workers. Mr. Tynes also stated that negotiations with NPF had traditionally been done on the basis of pattern agreements following the establishment of a settlement for one location and the application of the pattern to other locations. He offered that he did not see much problem in dealing with the situation where one bargaining unit would set a pattern for the other unit with respect to wage increases.

12. *The employer's case was entered by Mr. Gérard Étienne, Compensation and Benefits Manager for NPF. Mr. Étienne described the process for developing and implementing the job evaluation plan at other NPF sites. He testified that plan development had gone forward with input from the union and that implementation had taken place at a number of NPF sites both union and non-union. Mr. Étienne indicated that the plan had not taken note of differences between the bargaining groups, because, "For us, we see no division". His evidence indicated that the employer did not see any labour relations distinctions between the Administrative and Operational groups for purposes of the job evaluation plan, although he recognized that one group did clerical work and the other he described as doing a number of jobs involving manual labour. His evidence was these distinctions were not considered relevant in the development of the plan.*

13. *Mr. Étienne was clear that NPF had no choice but to proceed with a universal job evaluation plan in order to meet the requirements of the Canadian Human Rights Act. In fact, he said NPF was compelled to do so. He also confirmed that the employer had not considered going ahead with development and implementation of such a plan at CFB Gagetown because the employees were represented by two unions. He acknowledged that the plan development would require a joint committee including the employer and the union and that if two unions were present in the workplace both would have to be represented on the committee. In Mr. Étienne's view this kind of cooperation between the unions was not feasible on the basis of past experience. He stated no decision had been taken to try to implement the job evaluation plan at CFB Gagetown. Mr. Étienne also indicated in response to a question that he had no*

knowledge of other situations such as the National Energy Board where employees were represented by two unions and one single classification plan was implemented to respond to the needs of the Canadian Human Rights Act. In fact it was indicated little research or consideration of any option but consolidating the two bargaining units and, therefore, eliminating one union were considered.

14. *Ms. Brenda Dagenais, Labour Relations Manager for NPF testified that to her knowledge the distinction between administrative and the operational work at CFB Gagetown was becoming blurred and for all intents the interests of the employees were identical. She also testified to the fact that the unions could not work together. In further questioning Ms. Dagenais allowed that she had been employed by NPF since February 1998. She also indicated that her knowledge of the situation at CFB Gagetown was acquired by a few telephone conversations with the Human Resource Manager at CFB Gagetown. She gave evidence that she had not visited the worksite nor spoken directly to the employees at CFB Gagetown. She had made no attempt to raise the issue of implementation of a job evaluation plan for CFB Gagetown employees at any Labour Management meetings. She indicated she had once raised it in a telephone conversation with Bev Tiskin of UFCW, but had never raised it with any representative of PSAC.*

15. *Ms Dagenais did not cite any concrete examples of jurisdictional problems that existed between the bargaining units or the unions at CFB Gagetown. While she stated that her experience was that the unions could not work together she provided no examples of any disputes between the unions regarding the work done by bargaining unit members.*

Argument:

1. *The Board has been asked by the employer to intervene in a stable bargaining relationship and impose a change where none is necessary. The employees of NPF at CFB Gagetown have chosen their bargaining agents, as is their right under the Act. After having made this choice, they have negotiated successive collective agreements and addressed the issues which were their priorities. The Board heard from Madeline Underhill that the Administrative Support group is satisfied by what it has achieved in collective bargaining and stands to lose the ability to protect its contract and benefits if the Board allowed the consolidation of the unit. The Board heard*

testimony from Francine Bailey and Anne Griffith, members of the Operational bargaining unit indicating that their union representation was effective in meeting their needs as Operational workers. On the basis of the evidence, the bargaining unit structure for NPF employees at CFB Gagetown meets the needs of these employees with regard to collective bargaining. There was no evidence of dispute between the bargaining units that would support the extraordinary action of consolidation of the units.

We submit that this Board can be guided by the decision of the Canada Labour Relations Board in Atomic Energy of Canada Ltd, (1995) 99di37. In this decision the Board considered a request for consolidation of six existing bargaining units into one. The application was dismissed with the finding that the employer had not made the case for disturbing an existing bargaining unit structure and had not attempted to involve the unions in cooperating to address certain problems the employer perceived to exist. The Board found that although consolidation may be more convenient for the employer it was not a sufficient consideration to justify intervening in the established collective bargaining structure.

This Board, like other labour relations boards, has consistently required that some substantial justification for a change in existing bargaining unit structures be established, where change in those structures is sought. The Labour Relations Board of British Columbia stated this rather forcefully in MacMillan Bloedel Limited (Alberni Pulp and Paper Division) (1984), 8 CLRBR (NS) 42, as follows in the endnote of the decision:

> *"The Board enunciated the legal framework which it accepted as applying to applications for consolidation under the Labour Code. First, the Board will not lightly interfere with established bargaining structures, particularly in cases where to do so would result in the loss of bargaining rights for one of the trade unions involved. Rather, consolidations of existing bargaining rights is an extraordinary measure which the Board will resort to only in situations where there is a serious labour relations problem for which consolidation is the result most able to further the principles and policies of the Code. Second, the Board will not consider consolidation applications in the same way in which it considers fresh applications for*

> *certification. Third, the kind of jeopardy which an employer or other applicant relies on in support of such an application must be of a profoundly serious nature. Where real and demonstrable adverse labour relations consequences are evident, the Board will also be required to consider the possibility that such consequences will recur in the future. Mere administrative inconvenience and inefficiency, of itself, normally will not suffice. The Board must be satisfied that effective industrial relations have been virtually frustrated by the impugned bargaining structure. The Board has in the past and will continue to exercise its discretion on consolidation applications in such a way as to confine its intervention in longstanding historical bargaining relationships to situations were extraordinary relief is required."*
>
> *(pages 44-45)*

While the foregoing may be thought to be somewhat too strictly put, there is no doubt that there is an onus on the applicant in the application such as this to establish good grounds for the Board's interference with established bargaining structures, and the applicant in the present case accepted the onus. It may well be that if this were an original application for certification, the Board would determine that a single "industrial" bargaining unit of the sort suggested by the employer was appropriate, although it might also be that the firefighters, who also carry out significant security duties, should in any case be included in a distinct bargaining unit.

In the instant case, the Board, having heard all of the applicant's evidence, does not consider that the circumstances are such as to call upon the Board to interfere with the established bargaining unit structure. Indeed, the evidence established that the structure works well, and although the existence of certain distinctions between classifications of employees based on craft lines and reflected in bargaining unit membership may have inhibited the employer in its willingness to make certain work assignments, the evidence is that the employer has never sought in any significant way to go forward with such assignment, nor sought, at least not in any persistent way, the cooperation of the trade unions involved (with whom a good relationship exists, and

who have displayed a considerable degree of cooperation in collective bargaining) in order to achieve the flexibility in assignment which it might quite reasonably require.

In the present case the Board is faced with a situation that is similar, in that the employees have indicated their satisfaction with the structure of representation. The Board is not required to make the determination it would be required to make if it was considering a new application for certification. This application is pursuant to Section 27(1) of the PSSRA, which allows the Board to consider all relevant factors, including the established pattern of representation and the history of bargaining. Unlike a new application for certification the Board has the benefit in the present case of knowing that its past decision has produced satisfactory representation for employees at CFB Gagetown. There is no compelling requirement that the Board alter the orders that it has made in certifying the Admin. Support and Operational units for bargaining.

2. *The employer has not only failed to make the case that the implementation of a job evaluation plan requires the consolidation of the bargaining units at CFB Gagetown, it has also confirmed through its evidence that NPF has given no consideration to moving forward with the plan because it* ***presumes*** *the unions are not prepared to cooperate on the plan implementation. The employer admits that its application is driven by the need to respect the requirements of the CHRA and submits that it can only do so if one group of employees is deprived of the right to be represented by the union which they have chosen. Mr. Étienne indicated that no attempt had been made to establish how the application of the universal job evaluation plan could be applied to a situation where there are two unions representing employees and the Board was told that nothing had been done at CFB Gagetown to commence the work and invite the bargaining agents to participate in the process. This begs the question of how the employer can know that something will not succeed without having attempted in any serious way to make it succeed? This is again a real consideration for the CLRB in its consideration of Atomic Energy of Canada Ltd., supra, p.41, where the Board cites the failure of the company to attempt to resolve differences with the unions in place.*

3. *The employer has argued before the Board that its hands are tied by the requirements of the CHRA. It was suggested by Mr. Étienne that a complaint could be filed*

at any time with the Canadian Human Rights Commission if NPF did not move ahead with its plan. It was not explained to the Board why the two unions involved in representing a group of employees could not both be involved in the implementation of such a plan. Clearly, the employer has given little thought to this option, as it assumes that the Board will accede to consolidate the units. This decision would be more convenient for the employer, but the evidence before the Board is that it would not provide for satisfactory representation given the established pattern of bargaining history at CFB Gagetown, the different interests and workplace duties of each group and the fact that to combine the groups would likely lead to a situation where the interests of the small group would be swallowed up by the far larger Operational Group which is represented by another union.

4. *This Board has in the past considered the situation where an employer has proposed to implement a universal classification plan and where two bargaining units were found to be appropriate for collective bargaining. This was in the context of new applications for certification for employees of the National Energy Board (Board file: 142-26-297 to 301). Without, at this point, addressing the issue of whether the NPF job evaluation plan is in effect a classification plan for purposes of the Act, it was found in National Energy Board that two units were appropriate for bargaining given the requirement under Section 33(2) that such a unit provide for satisfactory representation:*

> *While the Board is required to have regard to the classification plan of the employer in determining the appropriateness of a bargaining unit is not required to establish a bargaining unit on the basis of that plan where it is satisfied that a bargaining unit based on the plan would not permit the satisfactory representation of the employees to be included in it. Moreover, while the wishes of the employer and the employees are a factor the Board may take into account, they are not a deciding factor in determining the appropriateness of a bargaining unit. The functions of the employer and the classification system established by the employer are also factors for considerations but again they are not necessarily determinative. Indeed, there may be many factors that the Board will consider, but ultimately it is the responsibility of the Board to determine an appropriate unit for the purposes of collective bargaining. In doing so, the Board must consider the viability of the unit*

and the degree of community of interest of the employees concerned. In this regard the Canada Labour Relations Board in Canada Post Corporation and Various Unions (19 CLRBR (NS) 129) had the following to say at p. 153:

> *"In matters of determining appropriate bargaining units, it is trite law that a labour relations board is vested with the ultimate discretion in determining what constitutes an appropriate bargaining unit as that issue is not a question of law but rather a factual determination that is dependent on the circumstances of each case."*

In the present case it has been demonstrated that the circumstances of CFB Gagetown do not support a finding that the units should be consolidated. The Board came to a similar conclusion in considering the new application for certification at the Canada Communications Group (Board File: 142-28-302-310, 161-28-702-705).

In conclusion, while the Board is required to have regard to the classification of the employer in determining the appropriateness of the bargaining unit, it is not required to establish a bargaining unit on the basis of that plan where it is satisfied that a bargaining unit based on that plan would not permit the satisfactory representation of the employees to be included in it. In the case of these applications for certification, the Board has considered the viability of the unit, the history of certifications and negotiations and the degree of community of interest of the employees concerned and it concludes that the evidence establishes a clear lack of community of interest between the white collar and the blue collar units. Even though labour relations boards and in particular this Board wish to avoid the proliferation of bargaining units, the Board is satisfied that a single bargaining unit is not appropriate in this particular case. The Board finds that there are two appropriate bargaining units.

5. *The employer's submission that bargaining consolidation is essential to moving ahead with the implementation of pay equity is seriously compromised by the fact that the employer has withdrawn its application to have bargaining units consolidated at CFSU Ottawa, (Board file: 125-18-80). At CFSU Ottawa employees are represented by three different unions. It is difficult to*

> *understand how the employer can argue that consolidation is essential to meet the requirements of the CHRA at CFB Gagetown and at CFB Trenton, but has withdrawn the application for CFSU Ottawa which was filed at the same time as the other two requests and subsequently withdrawn on January 20, 1998.*
>
> *For all of the above reasons the Alliance respectfully submits that the employer's application pursuant to Section 27(1) of the Act should be dismissed.*

Representation Vote:

In the alternative, if the Board judges it appropriate to proceed with consolidation of the two bargaining units at CFB Gagetown NPF, we submit that a representation vote should be ordered to ensure that all members of the newly created bargaining unit have a say in their choice of union.

The Board has, in the past, considered it appropriate to order such a vote when it is clear that members would not have had notice of an application that affected their bargaining rights. In CFB Cornwallis (Board File: 146-18-176), the Board ordered a vote because employees included in a bargaining unit had not received notice of the application for certification.

> *Before dealing with the number of employees in the bargaining unit for purposes of the count and the evidence of membership filed by the Applicant, we would point out that the unit the Board has found to be appropriate for collective bargaining is larger than that applied for by the Applicant. This means that employees are included in the unit who did not have notice of the application. In these circumstances, even assuming that the Applicant had sufficient evidence of membership as to normally entitle it to outright certification, the Board would direct the taking of a representation vote so as to allow all members of the unit to express their wishes as to the entitlement of the Applicant to represent them.*

In the present case it is our understanding that no posting of the application took place as it is not a new application for certification but a review application pursuant to Section 27(1). The Alliance submits that the decision to consolidate will create a new bargaining unit and the members of this unit should have the right to express their wishes and chose the bargaining agent they feel will best represent their interests.

Replies

The parties have also presented the following written replies.

For the applicant

> *The following is in reply to the written submissions of the respondents and in response to the Board's request that reply be made in writing.*
>
> *The position of the employer has been presented in opening statements, during testimony and in closing statements. I do not plan to reiterate the primary points of law or arguments already addressed. However, before dealing with the two main points which arise out of the respondents' closing statements, I wish to note the following. Due to their almost exclusive reliance on Canada Labour Code decisions and their failure to address the post-1993 Public Service Staff Relations Act legislative scheme,[3] the respondents have failed to present an argument on the only real issue in this case.*
>
> *The respondents have not argued that the proposed unit would fail to "permit satisfactory representation of the employees to be included in it and, for that reason, would not constitute a unit appropriate for collective bargaining." Given the evidence of the employer, the fact that the same type of unit is successfully in operation at other bases across the country, and the testimony of PSAC negotiator Mike Tynes, it is clear that the proposed bargaining unit would in fact properly and more than adequately represent the interests of all the employees.*
>
> *There are two new issues which flow from the respondents' closing statements.[4] First, the argument that the Canadian*

[3] The fact that the employer has not been able to point to a previous decision merging two bargaining units for the purpose of complying with pay equity legislation is as a result of two facts: (a) other related mergers were done with the consent of the bargaining agents, and (b) pay equity legislation is of new origin and there is no previously decided case on this issue. The arbitral and legal jurisprudence cited by the bargaining agents is of no use in determining the issue at hand as none has given any consideration whatsoever to the mandatory duties and obligations imposed on an employer by virtue of the CHRA, or any similar legislation. It is important to note that the testimony of Gérard Étienne was unchallenged with respect to the importance and the extent of the legal obligations placed upon the employer by virtue of pay equity legislation. The respondents have not taken issue with the employer's legal duty as they have no basis upon which to do so.

[4] There is an additional point of clarification that the employer wishes to address. Mr. Piché, in his written submissions, suggested that the employer's position has been "seriously compromised" by the alleged withdrawal of its application to consolidate the bargaining units at CFSU Ottawa. As pointed out to Mr. Piché during the hearing, all applications for the consolidation of bargaining units for the purposes of implementing pay equity remain pending before the Public Service Staff Relations Board, and have not at any time been withdrawn by the Employer.

Human Rights Act is not related to labour relations and therefore is not relevant to the present application. Second, the attempt to trivialize the actual requirements of the CHRA in order to raise the possibility of joint negotiations as a solution.

1. The Canadian Human Rights Act

The respondents are incorrect in concluding that the requirements of the CHRA are not sufficient justification in and of themselves for the present application.[5] Specifically the UFCW argues that there must be a "fundamental labour relations problem" to bring this type of application and that the requirements of the CHRA do not qualify as such. However, this application is based on the employer's right and responsibility under section 7 of the PSSRA:

> *7. Nothing in this Act shall be construed to affect the right or authority of the employer to determine the organization of the Public Service and to assign duties to and classify positions therein.*

The fact that the employer is exercising its rights and responsibilities to ensure that the organization of the Public Service accords with its obligations under pay equity legislation does not make it any less of a "labour relations" issue, the two are intricately interwoven.

It must not be forgotten that the CHRA is fundamental law of general application. Although it is not constitutional in nature, the courts have made it clear that it will override any inconsistent legislation unless Parliament has clearly stated otherwise.[6] As such, the employer's duties under the CHRA are paramount.

*As noted by Gérard Étienne, the employer is faced with a **current** obligation to comply with the CHRA. The employer has the right and the responsibility to organize this work establishment so as to comply with this requirement. To suggest that the employer should be stripped of its role under section 7 or insulated from the requirements of the CHRA,*

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[5] *However, as previously noted, the employer has a subsidiary purpose in bringing this application, that being administrative efficiency.*

[6] *Winnipeg School Division No. 1 v. Craton, [1985] 2 S.C.R. 150, at 156; Ontario Human Rights Commission v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, at 547; Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84, at 89-90; Insurance Corp. of B.C. v. Heerspink, [1982] 2 S.C.R. 145, at 157-158; Canada (Attorney General) v. Druken, [1989] 2 F.C. 24, at 31 (C.A.). It should also be noted that the CHRA is legislation declaring public policy and cannot be avoided by private contract: Winnipeg School Division No. 1 v. Craton, [1985] 2 S.C.R. 150, at 154.*

because this application does not fall within the respondents' self-crafted "fundamental labour relations" test, is patently unreasonable.

The CHRA is clearly fundamental law of general application. The employer must comply with the requirements of this law in exercising its duties and responsibilities under section 7 of the PSSRA. As will be seen below, this requires the employer to consolidate these two units.

2. The Requirements of the CHRA

The proposal by the respondents to have this matter sent back to be "worked out" conceals the fact that these two bargaining agents have had a long and acrimonious relationship. The UFCW, in its closing statements, acknowledged that these difficulties have existed over a 15 year history, despite its inconsistent argument that this will not interfere with its ability to work out mirrored collective agreements.

The testimony of Brenda Dagenais and Gérard Étienne confirmed the tensions which have existed, and continue to exist, between these two unions. Historical evidence has demonstrated that there has been no rapport, and virtually no communication whatsoever, between the bargaining agents to date. Their convenient "conversion" at the time of the hearing is self-serving, without evidentiary basis or foundation, and clearly engineered to attempt to derail the employer's application. Indeed, the employer has led uncontradicted evidence that PSAC representatives adamantly refused to sit at the same table as UFCW representatives to discuss the job evaluation process, let alone to try and implement it or to finalize complex contractual issues.

The evidence is clear that the only real experience that the bargaining agents have had in working together has been as a result of recent steps taken by the employer to establish a national level committee to consult and collaborate on employment equity, as required by the appropriate legislation. The bargaining agents are in fact statutorily required to participate in that particular process by virtue of subsections 15(2) and (3) of the Employment Equity Act, S.C. 1995, c. 44, as amended, and thus virtually had no real choice other than to participate at the same meeting(s) when invited to do so by the employer.

Although the bargaining agents now proudly place considerable weight upon the fact that the National Committee agreed to the wording of a joint statement in

support of employment equity in support of their alleged ability to work together effectively, that perception is respectfully misleading. The joint statement, a draft of which was entered into evidence at the hearing, is a non-controversial and non-contentious document that includes general statements about the need for employment equity and the first steps of its implementation in the workplace, principles with which no reasonable person could disagree or have a difference of opinion. As outlined in the documents filed, the statement was basically drafted by the employer's representatives, and the final version represented a compilation of comments received from all present at the meeting.

It is respectfully submitted that the actual interaction and co-operation that may have taken place between the bargaining agents as a result of the employment equity meetings was minimal, if any. Both that particular process, and its end product, are in no way similar to the level of collaboration and co-operation that would be required to jointly negotiate critical collective agreement provisions, benefits, and pay schedules. The fact that after fifteen years of non-communication the bargaining agents recently managed to sit in the same board room with the employer to discuss employment equity should in no way lead one to the conclusion that they would be able to sit and negotiate an identical wage and benefit package and jointly implement the employer's job evaluation plan.

Evidence led in cross-examinations of Messrs. Murphy and Tynes reflects the insurmountable difficulties that would be faced in attempting to resolve these matters on a consensual basis. Although Mr. Murphy, for example, testified that "anything is possible" and that the parties may be able to agree on a method of implementing pay equity and combining their units, there was no factual basis in his evidence to suggest such was the case. Despite his admirable sentiments and intentions, he was clearly unable to provide cogent evidence of PSAC or UNDE's willingness to compromise, or even consider changing the effective dates of their current collective agreements at CFB Gagetown. UFCW led no direct evidence to support any alleged willingness to co-operate, nor any evidence of the basis upon which it would now be prepared to work jointly with PSAC.

Despite the suggestion in the UFCW's initial written submissions that the employer hasn't discussed the potential resolution of this matter with the bargaining agents at all, the employer has led evidence to the contrary. As outlined in the evidence of Mr. Étienne and Ms. Dagenais, the employer's representatives have unsuccessfully tried to resolve this issue

with both Mr. Murphy and Ms. Tyska, the responsible regional representative for UFCW. There had been no indication prior to the hearing to suggest that the employer could meet its legal obligations relating to pay equity in any matter other than to seek the merging of the bargaining units in question. On all of the evidence it is clear that any further attempts by the employer to implement its job evaluation plan at CFB Gagetown would have been futile and resulted in further frustration of its legal objectives. It is respectfully submitted that there has been no cogent factual evidence led at the hearing itself to suggest otherwise.

Despite the fact that there is no realistic prospect that these two bargaining agents will be able to work together co-operatively, the fact is that the employer cannot meet its obligations under the CHRA where there are two bargaining units with two bargaining agents, covering the same class of employees at the same work establishment. To answer the question "why," we need only to look at the very wide definition of "wages" in the CHRA, as outlined in the following excerpts:

> *11. (1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees in the same establishment who are performing work of equal value.*
>
> *(2) In assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.*
>
> *…*
>
> *(7) For the purposes of this section, "wages" means any form of remuneration payable for work performed by an individual and includes*
>
> *(a) salaries, commissions, vacation pay, dismissal wages and bonuses;*
>
> *(b) reasonable value for board, rent, housing and lodging;*
>
> *(c) payments in kind;*
>
> *(d) employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans; and*

> *(e) any other advantage received directly or indirectly from the individual's employer.*

Given this statutory wording, and the facts before us, the CHRA clearly requires the establishment of one bargaining unit. The testimony of Mr. Étienne was uncontroverted on this point. The employer should not be prevented from complying with the CHRA for what amounts to nothing more than the self-interest of the two bargaining agents.

In addition, the employer objects to any delay caused by an order to go back and "work this out". Such an order would effectively prevent the employer from exercising its rights and responsibilities under section 7 of the PSSRA in complying with the ***current*** *requirements of the CHRA. The employer's statutory obligations to implement its pay equity plan are clear and unavoidable. The current situation leaves the employer vulnerable to potential pay equity complaints, litigation, and severe fines and penalties under the appropriate legislation. On the evidence, it is respectfully submitted that an order that does anything short or either merging the bargaining units, or directing that the terms, pay schedules and benefits that are negotiated with one bargaining agent will be* ***completely*** *binding upon and applicable to members of the second bargaining unit without variation, would in effect be an order directing that the employer violate the mandatory obligations placed upon it by the CHRA.*

While the temptation may exist to direct the parties to attempt to implement the employer's pay equity plan and the issues raised in this application on a consensual basis as suggested by the bargaining agents, the employer strongly and respectfully urges the Board not to do so. Such an order, while apparently expedient, would regrettably not resolve the current differences between the parties nor the issue before the Board. It is certain that such an order would result in the parties returning before the Board at some time in the future, to once again request a determination of the substantive issue raised in the application.

The employer respectfully requests that a decision on the substantive merits of this application be made at this time, so as to enable it to fulfil its statutory obligations and ensure the timely implementation of its pay equity plan, as duly approved by the Canadian Human Rights Commission.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

For the respondent UFCW

The UFCW does not agree that Section 33 is the predominant section for consideration in this matter. There is no doubt in the original application for certification that the bargaining unit which was proposed by the Employer would indeed be a bargaining unit appropriate for collective bargaining. Indeed, it may be the appropriate unit for collective bargaining. However, it is not a question of appropriateness which concerns the Board in this application.

The Public Service Staff Relations Board necessarily has to concern itself with the significant remedy of modifying existing bargaining units. The UFCW believes that the tests which have been suggested in the Board's jurisprudence with respect to the appropriateness of bargaining units are not the criteria to be applied here. The UFCW does not take any exception to any of the cases cited, namely, PSAC and NEB and PSAC and National Capital Commission, amongst others.

The UFCW rejects the idea that there is any onus upon the Union with respect to this case. The Applicant suggests at p. 7 of its submission that there is an onus upon the Unions to dispute the appropriateness of the bargaining unit. Obviously this is a misinterpretation of the statute.

The Applicant has shown no grounds in their submissions or in their case as to why the extraordinary remedy of modification of the bargaining unit should be taken in this case. The onus in this matter is borne exclusively by the Applicant. The Applicant must convince this Board that there are ample grounds to modify the existing bargaining unit structure. The provisions of Section 27 of the PSSRA are available at any time to any applicant. However, in order for there to be any consideration of an application, the onus is still upon the Applicant to show that there is ample grounds to have this application succeed.

The UFCW retains its original position that there is a heavy onus upon the Applicant to prove that there are reasons to enter upon this question and then once entered upon, reasons for this Board to change the status quo.

The Union submits that the Employer has failed to make any efforts to achieve an internal remedy before relying upon their external remedies.

The UFCW relies upon its previous submissions.

All of which is respectfully submitted.

For the respondent PSAC

> *In his reply of July 15, 1998, Mr. Fader indicated in a "point of clarification" that I have* ***alleged*** *that the employer withdrew the application to consolidate the Admin. and Operational bargaining units at CFSU Ottawa.*
>
> *This is not an allegation but a matter of record. I attach a copy of the employer's letter to the PSSRB of January 20, 1998, indicating that the CFSU application for consolidation was withdrawn as of that date.*
>
> *The Alliance maintains its assertion that the employer's action with respect to CFSU Ottawa compromises their argument that the CHRA somehow compels the Board to consolidate Admin. Support and Operational bargaining units at CFB Gagetown and CFB Trenton.*
>
> *We submit the employer is exercising discretion to deal with CFSU Ottawa is a manner different than the other two sites and that the same discretion could be exercised at CFB Gagetown and CFB Trenton.*

Reasons for Decision

The SNPF, a separate employer listed in Part II of Schedule I of the *Public Service Staff Relations Act,* has requested that the Board review certificates issued to the Respondents for bargaining units at CFB Gagetown.

The UFCW, Local 864 was certified by the Board on 17 June 1981 as the bargaining agent for the employees of CFB Gagetown in the Operational Category. The PSAC received its certification for employees in the Administrative Support Category at the same establishment on 26 November 1984.

The employer seeks the consolidation of these two bargaining units purportedly to meet its obligations under the *Canadian Human Rights Act* "to ensure that gender-based discriminatory pay practices do not exist within the Gagetown work establishment". The SNPF argues that the consolidation of the two bargaining units has become necessary as a result of the implementation of a new gender neutral classification plan (Exhibit E-1) which it was forced to adopt by the Canadian Human Rights Commission, following the resolution of a pay equity complaint made by the Alliance in 1987. The SNPF contends that it would be difficult to negotiate pay

structures that respect the classification plan with two bargaining agents that historically have not had the best of relationships, at least at CFB Gagetown.

Both respondents oppose this review application and maintain that, given the new realities of the situation at CFB Gagetown, they could easily find bargaining solutions to allay the employer's fears and work together constructively towards the implementation of the new classification plan.

The Board has not had the opportunity to develop jurisprudence in matters such as this. Prior similar cases were either decided on consent of the parties or dealt with the issuance of new certificates, following the transfer of portions of the Public Service from Part I of Schedule I of the *Public Service Staff Relations Act* to Part II of the same Schedule.

Subsection 33 (2) of the *Act* must find strict application in cases of new certifications pursuant to section 28 only. Review applications such as this one for the consolidation of long-standing bargaining units must be approached with caution.

In such a case, strong and cogent evidence is required to justify altering an existing bargaining structure which appears to have worked well over many years. Put more succinctly, the Board believes that there is a distinction between applications for certification under section 28 of the *Act* and requests for review of long-standing bargaining structure under section 27. I am not satisfied that the applicant has presented such evidence in this case. The SNPF's application for review is in fact premature. The employer has not made the necessary *bona fide* attempts to work diligently with the respondents to resolve the difficulties which appear to lie in their path.

This application for review is therefore denied.

Yvon Tarte,
Chairperson

OTTAWA, November 4, 1998