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Citation: 2003 PSSRB 79



Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

BETWEEN

NATIONAL ENERGY BOARD

Employer - Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA AND  
PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Bargaining Agents - Respondents



RE: Application pursuant to section 27 of  
the Public Service Staff Relations Act

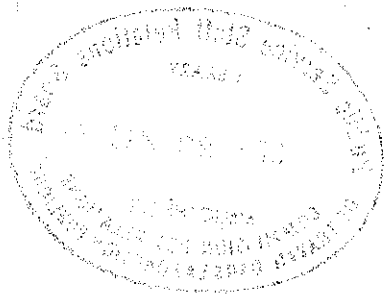
*Before:* Yvon Tarte, Chairperson

*For the Applicant:* Stephen Bird, counsel

*For the Respondent Public  
Service Alliance of Canada:* Alain Piché

*For the Respondent Professional  
Institute of the Public Service of Canada:* James Bart

Heard at Calgary, Alberta,  
January 21, 22, 23, 24, 2003, and April 8, 9, 2003.



## DECISION

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### The Application

[1] On May 15, 2002, the National Energy Board (NEB) made an application pursuant to section 27 of the *Public Service Staff Relations Act* (PSSRA) for the reconsideration of existing bargaining unit certifications.

[2] The NEB proposed in its application that the Public Service Staff Relations Board (PSSRB or Board) determine that a single bargaining unit be created in order to facilitate sound and efficient labour relations, permit satisfactory representation of the employees and be coextensive with its existing classification plan.

[3] The bargaining agents representing the two NEB bargaining units, the Public Service Alliance of Canada (PSAC) and the Professional Institute of the Public Service of Canada (PIPSC or Institute), both opposed the application, stating that there was no compelling reason or evidence to justify the alteration of an existing bargaining unit structure which has worked well since it was instituted by the PSSRB in 1993 (see Board files 142-26-297 to 301).

[4] Numerous witnesses were heard and extensive documentation was filed during the hearings held in Calgary, Alberta, in January and April 2003. Given the nature of the proceedings, the time period over which hearings were held and the volume of material tendered, the parties were advised that written submissions would be required.

### The evidence

#### For the Applicant NEB

[5] Valerie Katarey is the Business Leader, Corporate Services, for the NEB. Her curriculum vitae may be found at Tab 1 of Exhibit E-2. Ms. Katarey described in detail her work at the NEB, as well as the agency's mandate and responsibilities. She identified several documents such as the Annual Report, Reports on Plans and Priorities and the Departmental Performance Reports.

[6] The NEB has approximately 290 employees, all of whom work in the same building in Calgary, Alberta.

[7] Over the last five years, the NEB has gone from regulating industry in a very specific way to a process of goal-oriented regulation in which the industry must develop the detailed plans that it intends to follow to achieve the goals set by the NEB.

[8] Since 1996, the NEB has restructured itself to become less hierarchical. Under the new structure, employees work in teams which often include members from both bargaining units.

[9] Before the NEB became a separate employer in 1993, its employees were spread over 26 occupational groups represented by five different bargaining agents. In May 1993, the NEB developed its own classification plan, which came into effect in December of that year. The NEB's classification system (Exhibit 2, Tab 8) was fully implemented in 1996. The classification system is based on the four neutral factors recognized by the *Canadian Human Rights Act* (CHRA).

[10] Exhibit E-2, Tab 9, contains a chart which lists employees of the NEB in order of levels from NEB 1 to NEB 16, as well as their old Treasury Board classifications. NEB levels 7, 8 and 9 have the most significant levels of bargaining unit cross-over.

[11] In recent years, NEB human resources officers no longer have knowledge of the old Treasury Board classification system on which the certificates issued by the PSSRB in 1995 are based. The differences between the old Treasury Board classification system and the new NEB system have created problems with respect to the allocation of newly created positions into the existing bargaining unit structure. This problem is exemplified by two Gas Plant Specialist positions which are the subject of a bargaining unit determination application before the PSSRB.

[12] The NEB has recently established a competency framework for most of its positions (Exhibit E-3). This new framework, which is 90% completed, does not respect bargaining unit lines. Different positions in different bargaining units may have the same competency requirements. The new framework permits the NEB to fashion training and development along job family lines.

[13] The existence of bargaining unit certificates at the NEB means that different pay lines exist for positions classified at the same level. Attempts to harmonize these differences at the bargaining table have not been successful. Currently, both bargaining units have chosen binding arbitration as their method of dispute resolution.

[14] Although the witness finds the bargaining unit structure cumbersome, it has not impeded the NEB in meeting its statutory goals and objective. The inclusion of PEs in the bargaining unit in 1993 is no longer a problem since all employees working in human resources have since been excluded from collective bargaining.

[15] Prior to this application, the NEB considered maintaining the *status quo*, clarifying the existing bargaining unit certificates and asking for a single bargaining unit. Continuing problems in allocating new positions to the existing bargaining units as well as the need to streamline operations has convinced the NEB to move for a single bargaining unit.

[16] Amy Campbell, whose curriculum vitae is found at Tab 1 of Exhibit E-6, is a labour relations consultant. She was retained by the NEB in December 2001 to review and make recommendations on the bargaining unit configuration. She had done similar work for other agencies.

[17] In order to understand the NEB better and prepare for her work, Ms. Campbell reviewed many documents, including the classification plan and present and past collective agreements. She also looked at relevant jurisprudence, particularly in the area of community of interests.

[18] With respect to this latter point, she focused on terms and conditions of employment, skills, source of work and functional coherence and interdependence.

[19] Her initial reaction looking at the NEB, which is a small organization staffed by highly skilled and knowledgeable employees, was that a single bargaining unit might be appropriate. At a high level, the organization structure is based on multi-disciplinary teams with no obvious division along bargaining unit lines.

[20] Nearly all of the work at the NEB is specialized, involving research and analysis. The work is conducted mostly in an office environment, on regular schedules, using standard office tools such as computers. All employees work in the same building in Calgary.

[21] The NEB job descriptions and organization charts reveal a high degree of functional interdependence, common skill sets and similar work with little distinction along bargaining unit lines.

[22] Ms. Campbell feels that the NEB classification system and the job descriptions might make it difficult in certain cases to allocate jobs to one or the other of the bargaining units.

[23] The witness looked at several positions in different branches and found that many of the positions in the two bargaining units did similar work while participating on the same teams.

[24] Her review of the collective agreements has led her to conclude that the work contracts are not materially different, the differences usually reflecting quantum and not substance. From a community of interests standpoint, the two most recent collective agreements in most cases provide the same or similar benefits. Although there are differences, particularly in the area of Workforce Adjustment Policy, those differences are not material.

[25] The grievance history of the members of both bargaining units does not suggest distinct communities of interest.

[26] Given the results of her research and analysis, Ms. Campbell came to the conclusion that the only logical solution was a single bargaining unit, which is what she recommended to her client, the NEB.

[27] Mr. Bart conceded in his cross-examination of Ms. Campbell that she had made a "compelling case for a single bargaining unit" if they were "starting from scratch".

[28] Although the revision of existing bargaining unit certificates is not impossible, it would be quite a challenge and would likely continue to ignore shared communities of interests.

[29] Mr. Byron Goodall, whose curriculum vitae is found at Exhibit E-8, is the Business Leader, Information Management, at the NEB. He discussed in detail the work of his section, whose teams provide services, advice and support to other units. The work of the NEB in all sectors is conducted by highly integrated, interdependent teams.

[30] Mr. Goodall pointed out that Ms. Greentree, who testified for the PSAC in the 1993 application (Exhibit E-2, Tab 11), now belongs to the PIPSC bargaining unit.

[31] The employees in his sector all work in the same building, under normal conditions (except for Mr. Kane, who works in the print shop). They work normal hours with occasional overtime and very little fieldwork.

[32] John McCarthy, whose curriculum vitae is found at Exhibit E-10, Tab 1, is the Business Leader of Operations at the NEB.

[33] Mr. McCarthy provided an extensive view of the functions of the employees in his section. He identified several instances where the employees in his group belonging to both bargaining units worked together on the same teams. His employees also interact extensively with other teams in the other business lines. Again, these other teams cut across both bargaining unit lines. All processes at the NEB are highly integrated.

[34] Team members who are Inspection Officers belong to both bargaining units. In order to work on safety matters, regardless of the bargaining unit to which an employee belongs, that person must understand and be able to apply the same industry and regulatory standards.

[35] All the employees in Mr. McCarthy's sector work in Calgary at the NEB headquarters. Their hours of work, the fieldwork they do and their training opportunities are identical, regardless of the large unit to which they belong. The 1999 strike had no significant effect of the work of his teams, but it did affect morale.

[36] Terrance Rochefort, whose curriculum vitae is found at Exhibit E-11, is the Business Leader for the Commodities sector. His employees work in teams that include members of both bargaining units. These teams also work with teams in other sectors as part of the NEB's integrated business delivery system. The members of his teams work in an office environment during regular hours with occasional opportunities for overtime.

[37] Mr. Rochefort believes that the existence of two bargaining units has in fact impeded the NEB's ability to reach its objectives.

[38] Brenda Kenny, whose curriculum vitae may be found at Exhibit E-12, is the Business Leader for the Applications group at the NEB. As with the other business lines, her employees work as teams involving members of both bargaining units. These teams work closely with the teams from the other sectors.

[39] The work of the NEB is much more integrated than it was six years ago.

[40] Prior to the reorganization in 1996, the work at the NEB was very knowledge-based. Teams or units were built on specific expertise and functions were segregated. Since 1996, the NEB has achieved maximum integration. Employees, regardless of bargaining unit membership and expertise, work together. Now, learning is important for all employees and for both bargaining units to integrate roles and functions better. There is now a holistic approach to team work.

[41] Employees in Ms. Kenny's area normally work standard hours in an office environment. They may be involved in some fieldwork, most often with Inspection Officers.

#### For the PSAC

[42] Guy Hamel, whose curriculum vitae is found at Exhibit A-3, is a Regulatory Officer for the NEB, where he has worked for twenty-nine years in various positions. He is the President of the PSAC local.

[43] The NEB has always used a project working groups system. Since 1996, the groups have become multi-disciplinary.

[44] Most members of the PSAC bargaining unit perform administrative support work, whereas the members of the PIPSC bargaining unit are professionals. The NEB favours the professionals and this is very frustrating for the administrative support group. The employer also deals with the two bargaining units differently at the bargaining table.

[45] Members of the PSAC bargaining unit have different interests from those of the PIPSC bargaining unit. They are more interested in job security at the NEB than the professionals, who can easily find employment elsewhere.

[46] Although Mr. Hamel's supervisors would like to see him take on more project management responsibilities (Exhibit E-13), he doesn't believe the opportunities really exist for him.

[47] If there was only one bargaining unit at the NEB, the PIPSC majority would overwhelm the PSAC membership. Mr. Hamel is concerned that some PSAC issues would not be properly addressed in a single bargaining unit although he has no



evidence that either the PSAC or the PIPSC would be unable to represent the interests of a minority group. Mr. Hamel was not aware of a bargaining agent's statutory responsibility to represent its membership fairly.

[48] Ann Shalla, whose curriculum vitae is found at Exhibit A-9, is a Technical Specialist who has worked for the NEB since 1980. She is currently the Vice-President of the PSAC local and has held other union positions in the past.

[49] She appeared before the Board in 1993 on behalf of the PSAC during the original restructuring application. Ms. Shalla still holds most of the views she expressed then. She believes that the memberships of both unions have different interests and that the professionals "have the ear of management".

[50] The establishment of a competency framework at the NEB has had no impact on her position. Unless she goes back to school, she has little chance for advancement.

[51] Being represented by the PSAC ensures that her interests are properly represented. She was not certain that either bargaining agent could properly represent the mixed interests of a single bargaining unit, although the PSAC would likely do a better job.

[52] Ms. Shalla has acted in positions that belong to the PIPSC bargaining unit.

[53] George Kealy, who is now retired and whose curriculum vitae may be found at Exhibit A-10, worked for the NEB from 33 years before retiring in 2001. He holds a university degree. From 1991 to 2001, he was a Technical Inspector at the NEB. Throughout his career, he was a member of the PSAC. Since retirement, he has kept in touch with former colleagues and has done representation work on a couple of grievances.

[54] From 1993 until his retirement, he was President of the PSAC local. Mr. Kealey expressed a "strong sense" that PIPSC interests would differ from those of the PSAC. A single bargaining unit would allow the professionals to "hold sway".

[55] The 1996 reorganization leading to integrated team work was "almost revolutionary". Contrary to what existed in 1993, the NEB went from a silo organization based on disciplines to a team structure where persons from all disciplines and both bargaining units get together to work on projects.

[56] Since professionals aspire to management responsibilities and have a different work ethic from non-professionals, it is doubtful that, in a single bargaining unit, they would fight as well for minorities as the PSAC.

[57] Brent Storey has held several positions at the NEB since 1983. He works as an Investigator, Inspection Officer and Health and Safety Officer.

[58] He sees little difference in teamwork concepts since 1993. Although he is not a member of the union executive, Mr. Storey has been involved in a few rounds of collective bargaining. He believes that the interests of the PIPSC and PSAC bargaining units are different. Whereas the PSAC is more activist and inclined to fight for issues, the PIPSC appears money-hungry and willing to sell benefits for money.

[59] As did George Kealy, Mr. Storey trained and mentored young engineers also. In his work, he must know and apply engineering standards.

[60] Although he has never been in a combined professional, non-professional bargaining unit, he believes neither the PSAC nor the PIPSC could represent the unit adequately.

[61] Dave Jackson, whose curriculum vitae is found at Exhibit A-12, is a Regional Representative for the PSAC. He works out of Calgary.

[62] Although the PSAC members at the NEB have chosen binding arbitration for their next round of bargaining, they were empowered by their last strike action in 1999. PSAC members are given every possible opportunity to input the collective bargaining process.

[63] The witness disagrees with Amy Campbell that the differences between the PSAC and PIPSC collective agreements are not significant. According to Mr. Jackson, any difference in benefit is material and therefore significant. Any harmonization of the two collective agreements will inevitably lead to a reduction of benefits for the PSAC membership.

#### Rebuttal Evidence of the NEB

[64] With the consent of the parties, Mr. Bird indicated that the implementation of the new audit function referred to in the documentation for the Gas Plant Specialist positions will be delayed beyond April 2003.

Arguments

[65] The parties exchanged written arguments. What follows are summaries of those arguments.

For the NEBPART I: A. Legal principles Regarding Requests to Reconsider Bargaining Unit Structure

[66] On the basis of existing jurisprudence the following principles can be said to govern a bargaining unit review application:

1. *There must be sound labour relations reasons for the reconsideration; mere ease of administration is insufficient;*
2. *There has been a recognition that jobs, industries and organizations change and as a result, collective bargaining relationships may need to be changed as a result of such evolution;*
3. *Access to unionization favours smaller bargaining units. After this is sufficiently accomplished, there is less reason to deviate from the Board's general presumption in favour of large, all encompassing bargaining units;*
4. *An Applicant need not demonstrate that the present structure is unworkable. It need only demonstrate that it is not conducive (sic) to sound labour relations; and,*
5. *A review application will be granted when it is demonstrated that the existing bargaining unit configuration no longer meets the labour relations needs of employees and the employer.*

[67] The NEB believes there are four grounds which justify the granting of their application.

[68] First, the existing bargaining unit description is unsound since it is based on Treasury Board designations which no longer exist under the NEB's classification plan. In so doing, the certificates issued by the Board in 1993, contained critical deficiencies which, among other things, create overlap between the bargaining units.

[69] Second, the Board's decision in 1993 to create professional and non-professional bargaining units was unsound from a labour relations perspective. In crafting the two units, the Board gave no consideration to its impact on labour

relations, the potential "whip-sawing" of bargaining demands, the existing similarities in terms and conditions of employment or the added costs and inefficiencies due to multiple rounds of collective bargaining. The Board's decision was based on assumptions that never existed or have changed and no longer exist at the NEB.

[70] Third, fundamental changes have occurred at the NEB since the 1993 decision. A new organization structure was introduced in 1996, moving the NEB from a hierarchical organization to one that is focused on business lines. This has resulted in a much greater emphasis on multi-disciplinary and cross-functional teams of employees drawn from both bargaining units. In evidence on behalf of the PSAC, Mr. Kealy described these changes as revolutionary.

[71] The NEB has introduced a job competency framework which demonstrates that a large number of employees share similar skill, knowledge and competency requirements.

[72] Furthermore, health and safety officers, responsible for the application and enforcement of Canada Labour Code standards in the oil and gas sector, are drawn from both existing bargaining units.

[73] Fourth, the 1993 decision is contrary to law. The existing bargaining unit configuration is not coextensive with the employer's classification plan, as is required by section 33 of the PSSRA, nor does it respect the pay equity requirements of the *Canadian Human Rights Act* (CHRA). The NEB has been unable to achieve a single pay line through collective bargaining with two bargaining units. At present, it is only the lack of female dominance in any bargaining unit that has insulated the NEB from being in violation of its obligations under the CHRA. Finally, human resource employees, which had been unrepresented prior to 1993, were included in the "all other" bargaining unit even though no such request had been made by any of the parties to the original application.

#### *PART II: Determining the Bargaining Unit Configuration for the NEB*

[74] The NEB requires a bargaining unit structure that recognizes its organizational structure, the diversity of its role, functions and mandate enabling it to meet its human resources goals while ensuring that the representational concerns of its employees are satisfactorily addressed. The Board should, in its decision in this

matter, determine the most appropriate bargaining structure for the NEB and its employees.

[75] The Board has, since 1993, found that employees with very diverse work responsibilities have a sufficient community of interest to constitute a single bargaining unit for the purposes of collective bargaining. In addition to community of interest considerations, the bargaining unit structure chosen must foster sound collective bargaining ability.

[76] Because of the size of the NEB, any bargaining unit should have sufficient numbers to be in a position to bargain effectively. The evidence shows that there are no material differences in the PIPSC and PSAC collective agreements from a labour relations perspective.

[77] In order to maintain and promote sound and efficient labour relations, the Board should strive to achieve a balance in the concerns of both the NEB and its employees. From the NEB perspective, there is a need for administrative efficiency, facilitation of common terms and conditions of employment and the promotion of career advancement and mobility.

[78] The evidence adduced by the PSAC has failed to challenge the demonstrated communities of interest or to disclose any reason why satisfactory representation could not be achieved in a single bargaining unit coextensive with the NEB's plan of certification. At best, the evidence of the PSAC was impressionistic. The NEB employee survey results (Exhibit A-6) show that the views expressed by the PSAC's witnesses (who were all union officials or bargaining team members) are not shared by the majority of employees.

*PART III: Describing a Bargaining Unit Structure which Maintains its Integrity*

[79] Canadian labour boards have traditionally favoured large and comprehensive bargaining units. The goal of the NEB in pursuing this application is to achieve the administrative efficiency that results from a simplified and de-layered organizational structure.

[80] The Canada Industrial Relations Board stated the following in *Canadian Pacific*, [1976] 1 C.L.R.B.R. 361 (CLRB):

*Generally speaking, the ideal bargaining unit is the one constituted of all the employees of a given employer who are entitled to collective bargaining rights. It is ideal because it does ensure two of the basic objectives mentioned above: least descriptive for the employer, most conducive (sic) to cohesive and swift attainment of a collective agreement and most capable of protecting all the employees of a given employer who are entitled to collective bargaining.*

[81] The proposal of the bargaining agents to continue separate units for professional and non-professional employees is inappropriate. Unless there is a clear demarcation in the community of interest between professionals and non-professionals, all employees should be included in the same unit. Given the pervasive "team work" approach at the NEB, there is no longer any reason for the segregation of employees along existing lines.

#### *Part IV: Conclusions*

[82] For all the preceding reasons, the NEB proposes that the Board determine that a single bargaining unit comprised of employees represented under the existing bargaining certificates should be established. Such a unit would be coextensive with the NEB's plan of classification, would facilitate sound and efficient labour relations, would address present and future pay equity concerns, would correct the human resource officer situation and would permit satisfactory representation of all employees affected.

[83] The NEB proposes a single bargaining unit described as follows:

*All employees of the National Energy Board, save and except Executives, employees involved in the planning, execution, control of, or the provision of strategic advice on human resources or organizational services, and such other persons employed in a managerial or confidential capacity.*

[84] In support of its application the NEB referred to the following authorities:

1. *Communications Security Establishment, Department of National Defence, [2001] C.P.S.S.R.B. No. 9; online: QL.*
2. *Canada (Canadian Forces, Staff of the Non-Public Funds), [1998] CPSSRB No. 99; online: QL.*
3. *Atomic Energy of Canada Limited, (1995), 99 di 37 (C.L.R.B.); online: QL.*

4. *Purolator Courier Ltd.* (1993), 19 C.L.R.B.R. (2d) 84 (C.L.R.B.).
5. *Radio Acadie Ltée.* (1994), 94 di 128 (C.L.R.B.); online: QL.
6. *National Energy Board*, [1993] C.P.S.S.R.B. No. 183; online: QL.
7. *National Energy Board of Canada, Public Service Alliance of Canada* [unreported], December 29, 1993 (PSSRB).
8. *National Capital Commission*, [1994] C.P.S.S.R.B. No. 112; online: QL.
9. *Canada Communication Group*, [1994] C.P.S.S.R.B. No. 46; online: QL.
10. *Canada Post Corporation* [1988] 19 CLRBR (NS) 129 (CLRB).
11. *Parks Canada*, [2000] C.P.S.S.R.B. No. 72; online: QL.
12. *Usarco*, (1967) O.L.R.B. Rep. 526 (O.L.R.B.).
13. *Sick Children's Hospital* (1985), O.L.R.B. Rep. February 266 (O.L.R.B.).
14. *Mississauga Hydro-Electric Commission*, [1993] O.L.R.B. Rep. June 523; online: QL.
15. *Canadian Museum of Civilization* [1992] 87 di 185 (C.L.R.B.); online: QL.
16. *Canadian Pacific*, [1976] 1 C.L.R.B.R. 361 (CLRB); online QL.
17. *Niagara Regional Health Unit* [1975] O.L.R.B. Rep. April 376.
18. *Jewish Vocational Services*, [1977] O.L.R.B. Rep. 754.
19. *Bell Canada* (1976), 19 di 117 (C.L.R.B.).
20. *Canadian General Electric Co.*, [1979] O.L.R.B. Rep. 169.

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For the PSAC*Part I: Legal Principles Relating to an Application for Reconsideration by the National Energy Board.*

[85] The respondent PSAC is opposed to the application of the NEB. Very little has changed significantly since the Board heard detailed submissions during the certification hearings in 1993. Neither the mandate, the operations nor the size of the NEB has changed significantly since then.

[86] There is no evidence before the Board in these proceedings that would show that the two bargaining agents do not continue to enjoy the support of the members they represent.

*A: Legal Principles Regarding Reconsideration of Board Decisions*

[87] In Board file 125-2-41, the Board provided a clear statement of the standard to be applied in making a section 27 review:

*In Board's view, section 25 [now section 27] was not designed to enable an unsuccessful party to reargue the merits of its case. The purpose of section 25 was rather to enable the Board to reconsider a decision either in the light of changed circumstances or so as to permit a party to present new evidence or arguments that could not reasonably have been presented at the original hearing or where some other compelling reasons for review exists. It would be not only inconsistent with the need for some finality to proceedings, but also unfair and burdensome to a successful party to allow the unsuccessful one to try to shore up or reformulate arguments that had already been considered and disposed of.*

[88] In cases dealing with bargaining unit reconfiguration, the applicant bears a very heavy onus. The employer's interpretation of that onus in this case is modestly stated as requiring only the establishing of a sound labour relations basis to justify a change in the existing bargaining unit structure. The employer is setting the measure for itself and the bar is conveniently low. It is clear that the jurisprudence speaks to a much higher standard. The employer must demonstrate present and serious labour relations harm. It is not sufficient to suggest that a new structure would be more effective for the employer or even that it might be more efficient.



[89] The Board's decision in 1993 has resulted in a decade of labour stability. It follows that compelling reasons are required to justify the extraordinary intervention requested by the NEB. The PSAC submits that:

*(a) The Applicant must identify ongoing and serious problems which result from changed circumstances that demonstrate that the bargaining unit structure is not viable and that compel the intervention of the Board;*

*(b) The Applicant must demonstrate to the satisfaction of the Board that employee interests would be served by the change sought by the applicant;*

*(c) A review application is not a fresh certification application and shall not be assessed on the same terms;*

*(d) Each application must be considered on the basis of its own facts and with the objective of furthering stable collective bargaining relationships;*

*(e) Applications for review of bargaining units should not be a means for one party to seek strategic advantage in the bargaining process or to further bargaining objectives;*

*(f) The parties to a proceeding have the right to some finality in a determination of the Board with regard to certification and labour relations. The review process should not allow a reconsideration of a decision unless the party can demonstrate new facts that could not reasonably have been presented at the original hearing.*

[90] The PSAC believes that the NEB has not met these tests.

[91] The employer has stated in its agreement that the 1993 decision of the Board was contrary to law. In making that statement, the NEB ignores the record and attempts to substitute its view to the findings of the Federal Court which upheld that decision.

#### *B and C: "Unsound" Bargaining Unit Description*

[92] The Board's decision in 1993 was to certify a professional bargaining unit and a non-professional bargaining unit. The measured logic of this decision was based on the evidence presented, the culture of the workplace, the past history of collective bargaining and the perceptions of certain non-professional employees that their

interests in bargaining were separate and distinct from the interests of the professional employees.

[93] The NEB takes great exception to the fact that the certificates crafted by the Board in 1993 referred to the Treasury Board occupational standards. This was appropriate and effective. It cannot be ignored that the employees of the NEB had come from the core federal public service and that the NEB as a separate employer continues to operate within the family of federal public service agencies.

#### *D. Identifying Fundamental Changes*

[94] The employer has identified three changes since 1993, which it classifies as fundamental. They are a) the new organization structure implemented in 1996-97; b) the introduction of a job competency framework; and, c) the assumption of responsibilities under Part II of the *Canada Labour Code*. It is the submission of the PSAC that the evidence before the Board on all three counts does not constitute proof demonstrating labour relations harm.

[95] The NEB's application in this case was filed five years after the 1996 reorganization. It is difficult to understand how the consequences of changes made in 1996 only became an issue for the NEB and the primary justification for this application five years later.

[96] The evidence shows that employees worked as teams or project working groups prior to 1996 and continued to do so afterwards. There is no evidence that this pattern changed greatly with the reorganization of 1996.

[97] The job competency framework is nothing but a management tool which has no real effect on workplace duties for purposes of labour relations.

[98] It is clear from the evidence that the addition of new duties under the *Canada Labour Code* has not changed the fundamental dynamic of labour relations at the NEB.

#### *E. The Board 1993 Decision is not Contrary to Law*

[99] While the applicant may continue to believe this, the facts are that a panel of three judges of the Federal Court of Appeal found otherwise. The applicant's argument is based on the false premise that the Board is bound by the Act to treat the

present application as if it were a new certification process, thereby triggering the requirements of section 33 of the PSSRA.

[100] There are two bargaining agents in the workplace. It goes without saying that it would be more convenient and perhaps more efficient from a human resource management perspective to eliminate one union. The fact remains, however, that the Board is not required to assess the present application as if it were a new application for certification.

[101] The CHRA problems identified by the employer are hypothetical. There is no jurisprudence that would suggest active compliance with the CHRA requires a single bargaining unit. There is no evidence to indicate anything but a limited gap in base salary between professionals and non-professionals, and there is certainly no evidence that indicates a *prima facie* case of unequal pay for work of equal value even though the PSAC unit is in fact female dominated.

[102] The inclusion of the human resource group of employees (PE) in the bargaining unit in 1993 was neither unlawful nor unusual. In any event, all human resource officers have since been excluded from the bargaining unit.

*Part II: Determining the Bargaining Unit Configuration for the NEB*

[103] The PSAC rejects the employer's submission that jurisprudence dealing with initial certification is applicable in this case.

[104] The NEB is still an organization dominated by a professional staff that does not have the same concerns in bargaining and labour relations as the administrative support and technical staff.

[105] It is clear from the evidence that both unions take a very different approach to collective bargaining on the basis of the direction they receive from their members. The PSAC prioritizes overtime, salary protection and job security language as issues that provide more security to members. The evolution of this dynamic through the bargaining process since 1993 has demonstrated the distinct community of interest of the bargaining unit.

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*Part III: Describing a Bargaining Unit which Maintains its Integrity*

[106] The weight of evidence is that the NEB has never accepted the establishment of the two bargaining unit structure and wants what it has always felt would be more administratively convenient - a single bargaining unit.

[107] There has been little or no attempt to investigate, discuss and resolve the problems posed by the current certificates, if indeed such problems exist.

*Summary and Conclusion*

[108] The PSAC submits that the evidence tendered in this application does not support an intervention by the Board to alter the existing bargaining unit structure. The parties have a right to some finality in such matters and on this basis, the Board should dismiss the NEB's application.

[109] The Board must assess what changes have occurred since 1993 and determine whether such changes have resulted in serious and profound labour relations problems. If this is not the finding of this Board, then it should not intervene in the current, stable bargaining unit structure on the assumption that a new bargaining unit structure may possibly be more appropriate.

[110] The Board could dismiss the NEB's application and yet remain seized for a specified period of time to allow the parties to resolve issues surrounding the allocation of positions to the appropriate bargaining units.

For the PIPSC

*The Threshold Issue*

[111] An application for review under section 27 of the PSSRA must be distinguished from an initial application for certification pursuant to section 28 and from an application under section 48.1 dealing with successorship.

[112] In the present review application of an order made pursuant to section 33 of the Act, the Board must first determine whether the existing structure continues to be appropriate for collective bargaining purposes. If that question is decided in the affirmative, then the application must fail even if another bargaining unit structure might possibly be viewed as more appropriate.

[113] Even if the weight of evidence would otherwise support a declaration of a single bargaining unit in respect of an initial application for certification, such evidence may not be sufficient, in terms of either weight or relevance, to lead to a similar determination in response to an application to alter an existing structure.

#### *Guiding Principles*

[114] The Board should be guided in determining this application on the principles stated by the Canada Industrial Relations Board in *Rogers Cablesystems Ltd.* [2000] CIRB No. 51, at pages 6 to 8:

...

*24. In deciding whether to consolidate bargaining units, the Board is guided by the effectiveness of the current bargaining structure and by the best way to balance the divergent interests of viable bargaining units in order to ensure effective bargaining and harmonious labour relations. The applicant has the onus of presenting evidence as to why the existing unit structure is no longer appropriate and a valid labour relations purpose for reviewing the existing bargaining unit. ...*

...

*29. ... None of these issues can be characterized as the critical or recurring labour relations problems referred to by the Board in *Atomic Energy of Canada Limited* (1995), 99 di 37 (CLRB no. 1135).*

...

*31. Under the new provisions of section 18.1, it is not sufficient to show that the remedy requested is more appropriate than what currently exists; there must be compelling reasons why the bargaining structure is no longer appropriate and warrants interference. ...*

[115] The NEB has seriously understated the onus which it bears in this case. Other cases provide guidance as to what might constitute "compelling reasons" for change:

- i. Where an existing structure has been overtaken by changes in business conditions and the marketplace and, thus, unduly hinders the ability of the Employer to conduct its business;*

- ii. *Where the jurisdictional boundaries arising out of an existing structure hamper the flexibility to assign work and have it performed in the most efficient manner;*
- iii. *Where a merger of the functions carried out by employees in more than one bargaining unit has taken (or will take) place;*
- iv. *Where a multiplicity of bargaining units with similar communities of interest unduly impede the collective bargaining process;*
- v. *Where a bargaining unit would not be viable (i.e., too small to have any real influence in collective bargaining or labour relations).*

[116] The evidence adduced by the NEB discloses no such problems. In fact, the evidence is indicative of a bargaining unit structure that is working well. The documents tendered by the NEB show that the collective bargaining process has functioned as intended. Each of the bargaining agents has participated in four rounds of bargaining and is engaged in a fifth. In only one of the four rounds has the PIPSC found it necessary to resort to arbitration. The PSAC has reached settlement in three rounds, one of which followed a strike, and has resorted to binding arbitration once (Exhibit E-2, Tab 24). This record is not indicative of a dysfunctional collective bargaining system.

[117] There is no evidence that the existing structure a) has interfered with the NEB's ability to conduct its business either before or after the 1996 reorganization; b) has impeded the introduction of fundamental changes; c) has created jurisdictional problems which hamper the employer's flexibility to assign work in the most efficient manner; or, d) hampers employee mobility.

#### *Organizational and other Changes*

[118] Counsel for the NEB has argued that three changes implemented following certification represent an evolution that would justify the reconfiguration of bargaining units. They are the 1996 reorganization, the introduction of a job competency framework and the assumption of responsibilities under the *Canada Labour Code*.

[119] Given that the current bargaining unit structure has in no way impeded the implementation of these changes, the Board must consider whether these changes

have altered the nature of the employment relationship so profoundly that the current configuration is no longer appropriate for collective bargaining.

[120] Although the team structure has been more formalized and has been used in more instances since 1993, the essential methodology under which work is getting done appears not to have changed in any fundamental way. The 1996 reorganization may be more properly described as one of those incremental steps that all public or private business entities take, from time to time, to facilitate the conduct of their business.

[121] The competency framework merely formalizes certain factors that are generally taken into account in staffing and promotion exercises. Since the current structure has not impeded career progression, the competency framework is not a factor that should be given any determinative weight.

[122] The third change referred to by the NEB is also an incremental, as opposed to a fundamental, change. The NEB has merely assumed an additional responsibility related to the regulation of the federal oil and gas sector.

[123] All of these changes can be and were accommodated within the current bargaining unit structure without generating critical or recurring labour relations problems requiring a reconfiguration of the collective bargaining relationship.

#### *The 1993 Decision was Unsound*

[124] In 1993, the Board considered evidence, heard arguments and made the fundamental determination that there were two appropriate bargaining units. This determination was held to be beyond reproach by the Federal Court of Appeal. The NEB is clearly attempting to reargue its original case ten years after the matter was well and truly settled.

#### *The 1993 Decision was Contrary to Law*

[125] The NEB presents three arguments to support its attack on the legality of the 1993 decision.

[126] First, the decision did not give proper regard to section 33 of the PSSRA which requires that bargaining units be coextensive with the employer's classification plan. It

is clear that section 33 becomes operative only in an initial application for certification by an employee organization pursuant to section 28 of the Act. It is not a factor which must be considered in an application for review made pursuant to section 27.

[127] Second, the NEB does not have a pay equity problem. While there are different pay lines for certain levels of classification (NEB 6 to NEB 10), no occupational group is composed predominantly of one sex. There are, therefore, no grounds upon which a pay equity complaint can now be based. Section 11 of the CHRA does not require an employer to maintain a single pay line.

[128] The Board is not required to take into account factors that do not currently present a problem for the employer or that are within its capability to overcome within the collective bargaining relationship. Were it otherwise, the Board would be virtually incapable of determining that any structure other than a single unit was appropriate.

[129] Third, the inclusion of human resources professionals in the 1993 certificates is immaterial to the matter now before the Board. At best, the NEB's argument in this respect is "de minimis" and should be rejected.

#### *The Current Bargaining Unit Descriptions are Unsound*

[130] While the bargaining unit descriptions crafted by the Board in 1993 may contain certain deficiencies, these can easily be corrected by issuing new certificates which would more properly define the two existing bargaining units. Had the parties had the opportunity to collaborate, they might well have been able to formulate new descriptions to present to the Board in a joint application. This opportunity was pre-empted by the NEB's unseemly haste to proceed with its application for a single bargaining unit.

[131] The Institute agrees that the current bargaining unit descriptions have become problematic. However, a demonstrated deficiency in the bargaining unit descriptions, a problem that can be easily rectified, does not lead to the conclusion that the current bargaining unit structure is no longer appropriate for collective bargaining.

#### *Conclusion*

[132] The NEB has not demonstrated the existence of critical or recurring labour relations problems or established any other compelling reason to justify changing and



existing structure that has worked well for several years. No case has been made for a single bargaining unit structure. The application should therefore be dismissed.

[133] The PIPSC does, however, support an order revising the description of the professional unit to better reflect the Board's intentions as set out in the 1993 decision.

#### Reply of the NEB

##### *Threshold Issues*

[134] The PSAC and the Institute seem to be under the impression that a bargaining unit configuration must be totally unworkable before the Board will exercise its discretion to review its original certifications. This is not and has never been the test.

[135] The PSAC is asking this Board to confirm a bargaining unit description which reflects duties and classifications from 1967 (which are no longer in effect in the central administration) and relate them to employees of the NEB under a totally different classification system based not upon the appropriateness of that structure, but upon who would have represented such employees if they were still part of the Public Service.

[136] Both respondents have acknowledged that the existing certificates are imprecise and cause problems. This factor alone is sufficient to require the Board's intervention. The existing bargaining unit description is so fundamentally flawed that on this basis alone, the Board must feel compelled to revisit the certificates.

[137] Although the respondents have attempted to diminish the significance of the organizational changes at the NEB since 1995, the evidence presented, including that of Ms. Kealey, proves that there has been significant change in the organization as a whole.

##### *Employee Wishes and Historical Representation*

[138] Existing jurisprudence tells us that while the wishes of employees are not unimportant, they are not determinative of appropriate bargaining units (*Canada Post Corporation*, CLRB). In any event, the only employees who testified occupied positions in the local PSAC executive, making it difficult to ascertain the extent to which their views are personal or represent the views of their union.

[139] Both the PSAC and the PIPSC speak of a stable history of bargaining. Over the last 10 years, four rounds of collective bargaining have occurred. For approximately five of those years, the NEB was under the Public Service compensation freeze. None of the four rounds of bargaining resulted in a settlement negotiated on normal grounds.

#### *A New Certification Process*

[140] In a section 27 review, the Board has historically looked at what makes the most labour relations sense for the parties now and into the future.

#### *The NEB's Plan of Classification*

[141] It is beyond dispute that the NEB classification plan fits within the ordinary meaning of those words. The Board in 1993 made no finding that the NEB's proposed plan was not a plan of classification. Rather, it concluded that conformity with the plan as was required by section 33 of the PSSRA would result in unsatisfactory representation. The evidence before this Board does not support such a finding.

[142] In the event that the Board determines that it will review the existing structure, then section 33 is every bit as applicable as it would be in the original section 28 application.

[143] In these proceedings, the respondents have led no evidence to suggest that a bargaining unit structure coextensive with the employer's plan of classification would result in the unsatisfactory representation of employees.

#### *Canadian Human Rights Considerations*

[144] The problem at the NEB is that the Board's current certificates put employees at the same classification into different unions. It is the overlap of pay lines that causes the problem, not having more than one pay line. The countenance of the real possibility of future illegality cannot be described as furthering sound labour relations.

#### Summary

[145] All parties have recognized that the bargaining unit description contained in the 1993 decision is fundamentally flawed, and on that basis alone, the threshold test for a section 27 review has been met.

[146] In crafting new bargaining units, the Board must have regard to the NEB's plan of classification, unless a coextensive structure would result in unsatisfactory representation. There is no evidence before the Board to support such an inference; indeed, the evidence supports the exact opposite.

[147] A single bargaining unit would meet the staff relations needs of the employer and its employees, would permit satisfactory representation and would promote sound and stable labour relations.

#### Decision

[148] The NEB, a separate employer listed in Part II of Schedule I of the PSSRA, has requested that the Board review a decision it made in 1993 creating for its unionized workforce a two bargaining unit structure. The bargaining agents-respondents who hold the certificates issued in 1993, oppose this application. They have, however, recognized that the existing bargaining unit descriptions are problematic.

[149] As the Board stated in *Canadian Forces, Staff of the Non-Public Funds and United Food and Commercial Workers Union, Local 864* (Board file 125-18-78, [1998] C.P.S.S.R.B. No. 99), reviewing applications for the consolidation of long-standing bargaining units must be approached with caution.

[150] Each case, however, must be approached individually, keeping in mind that circumstances change over time. Such changes may in some cases justify a review of existing bargaining unit structures. Even in the world of labour relations, where stability is paramount, nothing is etched in stone.

[151] The test for review of bargaining unit certificates requiring evidence of real and demonstrable adverse labour relations proposed by the PSAC is too strict. The threshold for review, rather, must be significant change rendering an existing structure unsatisfactory. To hold otherwise would render impossible any change that is required as a result of evolution in any given labour relations situation.

[152] In a rapidly changing world, where technology and business practices evolve on a continuing basis, the world of labour relations cannot be allowed to stand still. It too must, when appropriate, change with the times.

[153] There has been significant change at the NEB since the Board last reviewed its bargaining unit framework. The agency modified its structure in 1996, focusing on the delivery of services along business lines. This, in turn, led to the extensive use of multi-disciplinary teams whose members come from both existing bargaining units, a practice which a PSAC witness described as revolutionary.

[154] The NEB's job competency framework is now used to evaluate all positions on the basis of set criteria. The evaluation process has shown that many employees, regardless of bargaining unit affiliation, share similar skills, qualifications and competencies.

[155] Finally, the NEB's classification plan consisting of 16 levels (NEB1 to 16) was officially approved and implemented by the Treasury Board, effective December 31, 1993 (Exhibit E-2, tab 9). Much discussion in the parties' arguments centered on whether the employer's plan of classification is relevant to these proceedings. The requirement that a bargaining unit structure be coextensive with the employer's plan of classification is contained in section 33 of the PSSRA, which refers only to applications for certification under section 28 of the Act.

[156] A review of bargaining unit certificates under section 27 therefore does not place on the Board the same statutory obligations with respect to the employer's plan of classification as do sections 28 and 33 upon initial certification. On the other hand, section 27 of the PSSRA does not specifically exclude a classification plan as being a factor which the Board may take into account in similar applications.

[157] Therefore, while there is no statutory obligation in the PSSRA to consider the employer's classification plan on a section 27 review, it makes eminent sense to do so in the context of federal public sector labour relations.

[158] Although irrelevant to these proceedings, it is interesting to note that section 70 of Bill C-25 (An Act to modernize employment and labour relations in the public service and to amend the *Financial Administration Act* and the *Canadian Centre for Management Development Act* and to make consequential amendments to other Acts), as passed by the House of Commons on June 3<sup>rd</sup>, 2003, contains a provision requiring the Board to have regard to the employer's classification system during any review of bargaining unit structures.

[159] Finally, both existing bargaining units are small. The Alliance unit contains approximately 105 members, whereas the PIPSC group numbers approximately 145 members, for a total combined unionized workforce of 250 individuals.

[160] All employees work in the same building, in a similar work environment and mostly during the same hours. The collective agreements contain some differences which are not overly significant. The grievance history of PSAC and PIPSC members shows a further commonality of interests.

[161] Over the last few years, given the enhanced team structure, several PSAC members have acted in or have been promoted to positions held by PIPSC members.

[162] Recent history has shown that the old divisions along professional and non-professional lines are not always easy to make nor are they necessarily useful. In such a small workforce operating under the conditions referred to in these reasons and given the significant changes referred to in this decision, the Board concludes that a single bargaining unit should replace the existing two bargaining unit structure.

[163] This bargaining unit will include all currently unionized employees of the NEB and be described as: "All employees of the NEB save and except those who are specifically excluded from collective bargaining by operation of law or determination of the Board."

[164] Accordingly, the Board orders that a representation vote be conducted in the manner that the Board, through its Secretary, will direct.

[165] Given the size of the existing units and the Board's firm conviction that either bargaining agent could properly represent the members of the new bargaining unit, the ballot shall include the names of both the PIPSC and the PSAC. Accordingly, voters will be asked to indicate whether they wish the PIPSC or the PSAC to represent them as their bargaining agent.

[166] In preparation for the vote, the NEB is hereby directed to provide the Board, on or before October 15, 2003, with a list of the names of all the employees in the new bargaining unit as of the date of this decision (together with an address by which each such employee may be contacted by mail, if necessary).

[167] In addition, the NEB is further directed to provide a second list of the names of all employees in the bargaining unit as of the date of this decision without the mailing addresses of the employees. This second list will be provided to the Board, the PSAC and the PIPSC on or before October 15, 2003. The bargaining agents may provide comments with respect to this list to the Board and the NEB no later than October 31, 2003. The Board will then, through its Secretary, issue the necessary directions for the taking of the vote.

**Yvon Tarte,  
Chairperson**

OTTAWA, September 17, 2003.