

BRITISH COLUMBIA LABOUR RELATIONS BOARD

CERTAIN EMPLOYEES OF WHITE SPOT LIMITED

("Certain Employees")

-and-

WHITE SPOT LIMITED

(the "Employer")

-and-

NATIONAL AUTOMOBILE, AEROSPACE,
TRANSPORTATION AND GENERAL WORKERS UNION
OF CANADA (CAW-CANADA), LOCAL 3000

(the "Union")

-and-

THE BRITISH COLUMBIA FEDERATION OF LABOUR,
BUSINESS COUNCIL OF BRITISH COLUMBIA,
COALITION OF B.C. BUSINESSES, HOSPITAL EMPLOYEES' UNION,
HOSPITAL EMPLOYERS' ASSOCIATION OF B.C.,
AND PACIFIC OPERA VICTORIA

(respectively, the "Federation", the "Business Council", the "Coalition",
"HEU", "HEABC", and "POV"; collectively, the "Intervenors")

PANEL: Frances R. Watters, Associate Chair (Adjudication)
Lisa Hansen, Registrar and Vice-Chair
John B. Hall, Vice-Chair
Tony Hickling, Vice-Chair
Laura Parkinson, Vice-Chair
Keith Bennett, Member
Garry Worth, Member

COUNSEL: Adam Albright, for Certain Employees
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CASE NOS.: 41404 & 41405

DATE OF HEARING: May 10, 2000

DATE OF DECISION: January 23, 2001

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 Certain Employees and the Employer apply under Section 141 of the *Labour Relations Code* (the "Code") for leave and reconsideration of BCLRB No. B440/99 (the "Original Decision"). The Original Panel dismissed Certain Employees' application for partial cancellation of the Union's certification with the Employer. Certain Employees represent a number of employees at the Employer's Georgia Street, Vancouver location ("Store #135") and had applied for a "partial decertification" of that location only.

2 On receiving the Section 141 applications from Certain Employees and the Employer, the Board observed that its policy concerning the availability of partial decertification was at issue and would likely be of interest to the labour relations community at large. Accordingly, the Board invited submissions from the organizations which have traditionally intervened to represent the larger labour relations community: namely, the Business Council, the Coalition, the Federation and the Confederation of Canadian Unions (the latter did not participate). In addition, the Board received and

granted applications for intervenor status from HEU, HEABC, and POV. After a full exchange of written submissions, a one-day hearing was scheduled at which all parties made oral submissions.

3 The submissions focused on the central issue of the currency and validity of the Board's present policy concerning the availability of partial decertification, generally known as the "*Westar* policy".

II. BACKGROUND

4 The background to Certain Employees' application is set out in the Original Decision and will not be repeated in detail.

5 The Employer had 51 White Spot restaurant locations in British Columbia in 1999, 16 of which were corporately owned and operated (the remaining 35 were franchise locations). Of the 16 corporate stores, 10 were certified to the Union and the remaining six were non-union. Although all the unionized employees belonged to one bargaining unit, the Union was certified to represent those employees on a location-by-location basis. That is to say, when the Union could demonstrate majority support in the usual way among employees at a given location, it would apply under Section 142 to vary its certification by adding that location. Store #135 was added to the Union's certification in 1996, and the employees there became members of the bargaining unit. In 1999, Certain Employees at Store #135 applied to have the Union's certification cancelled for that location, either by decertification under Section 33 or, alternatively, by a variance to the certification under Section 142 of the Code.

6 In seeking partial cancellation or "partial decertification" of the Union's certification, Certain Employees made a number of arguments to the Original Panel concerning the Board's policy on such applications as set out in *Westar Timber Ltd.*, BCLRB No. B47/87, (1987), 14 CLRBR (NS) 360 (affirmed on reconsideration, IRC No. C102/87) ("*Westar*"). Certain Employees also made an argument based on the freedom of association guarantee in Section 2(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canadian Act 1982 (U.K.), 1982, c. 11 (the "*Charter*"). The Employer supported Certain Employees' application under Section 142 for a variance of the certification to allow the employees at Store #135 to decertify that location only. The Union opposed Certain Employees' application, arguing the requirements for partial decertification set out in *Westar* had not been met, and it was not appropriate to review the *Westar* policy as advocated by both Certain Employees and the Employer. The Union also opposed the Certain Employees' *Charter* argument.

III. THE ORIGINAL DECISION

7 The Original Panel dismissed the application for decertification brought under Section 33 on the basis set out in *Baptist Housing Society of B.C.*, BCLRB No. B442/98 (application for reconsideration dismissed, BCLRB No. B176/99) ("*Baptist Housing*"). In

that decision, the Board held that Section 33 applicants must demonstrate the requisite level of support for their application (not less than 45%) from the bargaining unit membership as a whole. The Original Panel noted that ". . .Certain Employees do not purport to have the requisite threshold support for their application across the bargaining unit as a whole" (para. 63).

8 With respect to the alternative application for a variance of the certification under Section 142, the Original Panel considered the policy set out in *Westar* and clarified in *White Spot Limited*, IRC No. C148/89 (Reconsideration of IRC No. C70/89), (1989), 2 CLRBR (2d) 227. In considering the *Westar* policy, the Original Panel noted:

There are three categories of argument before us. First, the application should be allowed under the policy set out in *Westar*. Second, the *Westar* policy does not apply. Third, the *Westar* policy should be revisited and revised so as to allow the application.

We find our responsibility is to apply the existing policy as set out in *Westar*. As noted in *BCAA*, it is not appropriate for an original panel of the Board to revisit fundamental policy decisions that have been rendered by past reconsideration or specifically constituted "superpanels", except where there may be persuasive reasons for doing so. The *Westar* decision was rendered by one such panel. It may be appropriate in some cases such as, for example, where the statute upon which the policy was based has been substantially changed. Whether the *Westar* policy requires revision is a matter of debate that may properly occur at a reconsideration level. That is not to say, however, that a specific set of facts may fit within the existing policy determination and lead to the conclusion that the requested variance be granted, or may justify an exception to that policy. Accordingly, we intend to address the first two of the three categories of argument set out above. (paras. 70-71)

9 The Original Panel then applied the *Westar* test, which it described as requiring the applicants to show that circumstances have changed since the original certification, or their inclusion in the bargaining unit, such that it is no longer appropriate for them to be included in the unit. It found that Certain Employees had not met the "changed circumstances" aspect of this test:

In this case, we have heard no evidence from Certain Employees regarding any changed circumstances. Rather the applicants depend entirely on employee wishes as evidenced by the signed decertification forms filed in support of the application. Although the policy enunciated in *Westar* and clarified in *White Spot Limited, supra*, establishes that the changes do not need to be demonstrated to a particularly high standard, no further attempt has been made to meet the test.

Notwithstanding the lack of evidence, Certain Employees did not attempt to meet their evidentiary onus by producing any other types of evidence. They do not point to any agreed fact which might suggest alienation. No documents or public statements indicating any form of changed circumstances were presented at the hearing. Nor did Certain Employees elicit from Kellahan in cross-examination any events or circumstances of changed circumstances affecting the bargaining relationship as a whole or Store #135 in particular. There is quite simply no basis upon which we might infer that changed circumstances have been established. (paras. 78-80)

10 The Original Panel also found the Certain Employees had not established that it was no longer appropriate to include them in the existing bargaining unit. While the remaining bargaining unit would continue to be appropriate with or without Store #135, the Original Panel found that Store #135 would not be an appropriate stand-alone bargaining unit in the event that a subsequent decertification bid failed. In order to find that the variance of the certification sought by Certain Employees would result in an appropriate bargaining structure, the Board would have to assume that the decertification bid would be successful, and "[t]hat assumption cannot be made" (para. 84).

11 The Original Panel rejected an argument from Certain Employees that the *Westar* policy did not apply to multi-location certifications (paras. 88-91). It also rejected an argument that there ought to be symmetry between the certification and decertification processes, such that a group of employees varied into a larger unit should be able to choose on its own to decertify from that unit (paras. 97-98). Finally, it rejected the *Charter* argument (paras. 99-104). The Original Panel summed up its decision as follows:

The tests to be applied in adjudicating this application are those set out in *Westar* as clarified by the reconsideration panel of *White Spot Limited*, IRC No. C70/89, (1989), 2 CLRBR (2d) 208. Certain Employees ". . . must show that circumstances have changed since the original certification or their inclusion in the bargaining unit is such that it is no longer appropriate for them to be included in that unit". In this instance, Certain Employees have not made out their case on either point. They have chosen to rely only on the wishes expressed through signed decertification forms. These wishes have been given weight, but alone are not determinative. As a consequence, and for all of the reasons set out above, we dismiss the application. (para. 105)

IV. LEAVE TO APPLY FOR RECONSIDERATION

12 One function of the reconsideration power in Section 141 is to allow for periodic review of Board policies. Such review "ensures that the Board's policies remain current and, to the extent possible, represent a balanced response to often conflicting views of

the labour relations community": *British Columbia Automobile Association*, BCLRB No. B282/99, at para. 22 (upheld on reconsideration, BCLRB No. B515/99) ("*BCAA*"). In *BCAA*, the original panel had invited submissions on the *Westar* policy from intervenors, but found in the end that it was not necessary to review the policy on the particular factual circumstances before it. In finding that the original panel had properly exercised its discretion not to review the *Westar* policy, the reconsideration panel noted that the *Westar* policy issue was squarely before the Board in the present case:

. . . While not a consideration in our decision in this case, the timing of the emergence of the *Westar* issue in *White Spot* may allow the Board and the community (including these parties) a contemporary opportunity to address the *Westar* policy issue. (BCLRB No. B515/99, para. 37)

13 While the parties in *BCAA* did not choose to apply for intervenor status in the present application, others did. This indicates the interest of the larger labour relations community in having an opportunity to address the *Westar* policy. We find that the Certain Employees' and Employer's Section 141 applications squarely raise the issue and that here, unlike the situation in *BCAA*, there are no facts which render it unnecessary or inappropriate to take the opportunity to review the Board's policy in this area. Accordingly, leave is granted.

V. ISSUES

14 The Labour Relations Board has a broad plenary power to vary its orders, including certifications. The present case involves the exercise of that power in applications for partial decertification. In particular, it involves a challenge to the *Westar* policy. The central issue before this panel is whether to continue or revise the *Westar* policy. Arguments for and against revising the policy fall into two broad categories: labour relations policy and the *Charter*.

15 The labour relations policy arguments focus on the right of employees under the Code to choose whether to be represented by a trade union. Also argued is the need for a fair, balanced and "symmetrical" labour relations policy with respect to the addition and removal of groups of employees to and from a bargaining unit. Conversely, labour relations policy arguments in support of the *Westar* policy focus on the need for unions to be able to represent bargaining units effectively and democratically. Those supporting the *Westar* policy also rely on the need to promote industrial stability and collective bargaining, in accordance with the Section 2 purposes of the Code.

16 With respect to the *Charter*, those challenging the existing policy raise the Section 2(d) guarantee of freedom of association. In particular, they argue Section 2(d) includes a guarantee of freedom from forced association, and they say the existing policy and the Original Decision infringe such freedom, and are not saved by Section 1 of the *Charter*. Those defending the existing policy acknowledge the *Charter* applies to Board policy but disagree on all other points. They say the *Charter* does not include a

freedom from association; the *Westar* policy does not infringe such an alleged freedom; and, in any case, the policy would be saved under a Section 1 analysis.

17 Three other matters are raised as alleged errors in the Original Decision: first, the Original Panel's refusal to consider argument about the correctness of an established Board policy; second, the Original Panel's reference to employee choice as a "whim"; and third, the Original Panel's "two-step" approach to determining applications for partial decertification.

18 Certain matters are not in issue. No issue has been taken with the Original Panel's decision to dismiss Certain Employees' application for decertification under Section 33. Nor has issue been taken with the Original Panel's findings of fact.

VI. POSITIONS OF THE PARTIES

19 The arguments of the Employer, the Business Council, the Coalition, HEABC and POV (the "employer-side parties") and Certain Employees were largely consistent with each other. The same can be said of the arguments of the Union, the Federation and HEU (the "union-side parties"). Although the arguments of the parties are summarized below rather than set out in detail, we have considered all of the arguments in our deliberations.

1. Position of Certain Employees and the Employer-Side Parties

20 These parties argue that the *Westar* policy has never been fair or sensible, and is even less so now in light of the Board's seminal decision in *Island Medical Laboratories*, BCLRB No. B308/93 (Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), (1993), 19 CLRBR (2d) 161 ("*IML*"). The Board's "building block" approach to certification under *IML* has resulted in larger bargaining units with disparate groups (e.g., office and production employees) being lumped into the same unit where, in the past, the Board might have allowed or created separate units. Therefore, it is even more important now that the Board have a policy which makes available the option of partial decertification to a group which no longer wishes to be represented.

21 The current policy is not symmetrical because the employees of Store #135 did not have to "justify" their choice to the Board to join the bargaining unit, but must do so in order to leave (because of the requirement to show a "change of circumstances"). The *Westar* policy treats the certification as an "entrenched property right" and places the institutional interests of a union ahead of the right of employees to choose whether or not they wish to belong to the union. A fair policy would be for the Board to apply the same test to applications to vary a group of employees out of the bargaining unit as it applies to applications to vary a group of employees into the unit. That is to say, on applications for partial decertification the wishes of the group of employees in question should be determinative, subject only to the requirement that the remaining bargaining unit be appropriate for collective bargaining.

22 The *Westar* decision was based on a faulty analysis of prior Board authorities. It improperly applied the principle of "respect for the existing bargaining unit", drawn from partial raid and consolidation cases, to the situation of partial decertification. It further erred when it referred to earlier Board decisions stating that the wishes of employees do not prevail. Those decisions stand for the proposition that employee wishes do not prevail where granting those wishes would result in an inappropriate bargaining unit. The cases do not support the proposition that employee wishes should not prevail where the result would still be an appropriate bargaining unit. The effect of these errors has been virtually to preclude applications for partial decertification from succeeding.

23 With respect to broader policy concerns about industrial instability and relative balance of bargaining power, it cannot be assumed that a bargaining unit which contains a dissident and disaffected group will necessarily be more "stable" than an appropriate unit minus the group. The *Westar* rationale for not making partial decertification readily obtainable (i.e., because that would make it difficult for unions to make necessary "tough choices" among competing interests in the bargaining unit) is not a consideration which should override the wishes of employees with respect to union representation. The relative loss of bargaining power to the union *vis-a-vis* the employer as a result of a partial decertification is not a relevant consideration in deciding whether to grant such applications.

24 Sections 2(1)(a) and 4 of the Code support the proposition that the freedom of employees to choose whether to belong to a union is a fundamental principle of the Code. In the present case, where the Union was permitted to "build up" the bargaining unit on a location-by-location basis, the employees at each location who chose as a group to join the bargaining unit should equally be free to decide as a group to leave. In other words, there should be a parallel ability to "build down" the unit on a location-by-location basis, as long as the resulting unit remains appropriate for bargaining. Otherwise, it is not practically possible for employees in a multi-location bargaining unit to exercise their fundamental right to choose whether or not to belong to a union.

25 The application of the *Westar* policy in this case has the effect of infringing the employees' freedom of association under Section 2(d) of the *Charter*, by compelling them to remain as members of a trade union. The infringement of this *Charter* freedom cannot be justified under Section 1 of the *Charter* because it would be easy to structure a policy which does not impair the employees' Section 2(d) freedoms in the way the *Westar* policy does. The approach taken in the Original Decision under the *Westar* policy does not represent a minimal impairment of the *Charter* freedom.

2. Position of the Union-Side Parties

26 As the union-side parties characterize it, the issue is whether employee wishes alone should prevail in partial decertification applications (where the remaining unit would be appropriate for collective bargaining if the application were granted). This test was specifically rejected in *Westar*. The employer-side parties wish to return to pre-*Westar* policy. However, the pre-*Westar* policy insufficiently respected the integrity of

the bargaining unit. The *Westar* policy is a delicate balance of competing interests. This policy was sound in 1987 and remains so today.

27 The "changed circumstances" requirement is an attempt to balance the competing interests of the employees who wish to leave the bargaining unit with those of the union and the remaining employees, who may be negatively affected by the decision of some employees to leave the bargaining unit. Taking the present case as an example, why should the wishes of the employees of Store #135 be considered, but not the wishes of the rest of the employees? It would be unfair to consider only the wishes and the interests of employees at Store #135 and ignore the effect of the application on the rest of the bargaining unit.

28 A bargaining unit is a single entity and not a collection of subsets of employees. Store #135 is not a discrete unit; rather, it became merged into the bargaining unit as a whole when it joined in 1996. Benefits of joining the larger bargaining unit included transfer and seniority rights. For that reason, there is no requirement for symmetry between varying in and varying out of the bargaining unit. Nor are the statutory provisions for certification and decertification perfectly symmetrical.

29 The Original Decision was correctly decided under the *Westar* policy. The Certain Employees made no attempt to fulfill the requirement for "changed circumstances" and therefore their application was doomed to failure. The Original Panel was entitled to rely on prior Board authority to the effect that original panels should be guided by existing Board policies and need not undertake a review of that policy simply because one party or the other wishes to make argument concerning the validity of the policy. There is no reviewable error contained in the Original Decision, and it should therefore be upheld.

30 *IML* is congruent with the *Westar* policy in its preference for larger bargaining units over a proliferation or fragmentation of bargaining units, and in its position that the wishes of employees are "not determinative of the extent of the bargaining unit" (*IML*, at p. 184). There are many justifications for the *Westar* policy which are as relevant today as in 1987. The policy prefers large bargaining units and that, in turn, promotes industrial stability. It gives weight to employee wishes, but balances those wishes against the interests of the other members of the bargaining unit. Allowing the wishes of a discrete group in the bargaining unit to exclude themselves from the unit will undermine the effectiveness of unions. It will also circumvent the "majoritarian principle" by which decisions concerning union representation are based on the wishes of the majority in the bargaining unit.

31 With respect to the *Charter*, Section 2(d) does not protect a freedom *from* association. Even if it did protect such a freedom, it does not confer a freedom to vary an existing bargaining unit. Even if it did protect the rights asserted by Certain Employees, the Original Decision does not violate those rights; and even if the Original Decision violated Certain Employees' *Charter* rights, such a violation is justified under Section 1 of the *Charter*. Further, since *Charter* rights are individual rights, how can Certain Employees assert a collective right not to associate? Why would this collective

right not infringe on the individual rights of employees within Store #135 who wish to continue their association with the Union? The only proper constitutional question would be whether an individual employee has the right not to be included within a bargaining unit, which is not the question raised by Certain Employees or by the facts of this case.

VII. ANALYSIS AND DECISION

A. The Westar Policy: Historical Overview

1. The Westar Decision

32 *Westar* was rendered in 1987 by a reconsideration panel consisting of the then Chair and two Vice-chairs of the Board. They heard intervenor submissions on the policy issue from a cross-section of the labour relations community. *Westar* has been recognized by subsequent panels as a "policy decision"; that is, a decision setting down a policy to be followed by subsequent panels on a given labour relations issue. Generally, such policy decisions are adhered to unless overturned by judicial review, by legislative change, or by a subsequent policy decision of the Board.

33 The impetus for the *Westar* decision was a desire to create a consistent policy with respect to applications for partial decertification. The reconsideration panel stated:

To date, panels of the Board have adopted various reasons for granting such applications. Some panels have emphasized the factor of whether the remaining bargaining unit, after the applicant employees have been excluded, would constitute an appropriate unit. Others have indicated that if a group of employees have previously been varied into the unit pursuant to a s. 36 [now s. 142] application, they should be allowed to vary out at some subsequent time. Panels have also noted that granting such applications will not offend the Board's general policy against the fragmentation of bargaining units, because the exclusion of the applicant employees does not result in the creation of a second bargaining unit.

* * *

Having reviewed the Board's earlier decisions, we are satisfied that there is a need for the Board to set out in a clear and consistent fashion the principles and policies the Board will apply in applications to exclude a group of employees from an existing bargaining unit. (pp. 370-1)

34 At issue in *Westar* was whether the Board had jurisdiction to entertain an application for partial decertification, as opposed to an application for decertification of the entire bargaining unit. The Code expressly provided for cancellation of a union's certification as a whole under then Section 52 (now Section 33). However, there was (and is) no express provision allowing cancellation of part of a union's certification.

Nonetheless, the *Westar* panel found it had the jurisdiction to give effect to such applications under then Section 36 (now Section 142).

35 The *Westar* panel noted that in applications for partial decertification, it was "being asked to alter the scope of an existing unit which the Board has previously found to be appropriate for collective bargaining" (p. 371). Accordingly, the panel concluded that the applicant must demonstrate "changed circumstances", such that the existing bargaining unit is no longer appropriate:

As is the case with other similar applications under s. 36 of the Code, we are satisfied that the Board should follow a policy of respect for established bargaining structures in cases of applications by groups of employees seeking to be excluded from existing bargaining units. Accordingly, to succeed in such applications, *the applicant employees must show that circumstances have changed since the original certification or their inclusion in the bargaining unit such that it is no longer appropriate for them to be included in that unit.* (p. 373, emphasis added)

36 The *Westar* panel emphasized that the wishes of the applicant employees "albeit a factor, is not the determinative factor" (p. 373). It accepted the argument that to allow partial decertifications on the basis of employee wishes "alone" (i.e., in addition to the fundamental requirement that the variance result in a unit appropriate for collective bargaining) would hamper the ability of unions to make "difficult decisions" when the interests of various groups of employees within the bargaining unit conflict:

. . . If a group of employees, which is dissatisfied with the union's decision on a particular issue which they view as favouring another group in the unit, can simply turn around and apply to the Board to be excluded from the unit, the union's willingness and ability to make these tough decisions will be severely compromised. In our view, it would not be consistent with the purposes and objects set out in s. 27(1) of the Code to adopt an approach to applications of this kind which would give rise to such a result. (p. 375)

37 The *Westar* panel further stated that, in determining prior applications of this kind, the Board had relied "heavily, if not exclusively, on the wishes of the applicant group of employees". It stated that this had likely occurred because the applications were treated as "tantamount to decertification applications, instead of what they in fact are, namely, applications to vary the scope of an existing bargaining unit pursuant to s. 36 of the *Labour Code*" (p. 375). The panel concluded that this reliance on employee wishes "is not consistent with the Board's long-standing approach to the determination of an appropriate bargaining unit" (*ibid.*).

38 In summing up its new policy on applications for partial decertification, the *Westar* panel hinted at the kind of circumstances which might meet the test:

In summary, an application which seeks to exclude a group of employees from a bargaining unit will have to show that it is no

longer appropriate for them to be included in that unit. For example, experience may demonstrate that the employees' interests cannot be adequately represented as part of the existing unit. Other conditions, such as geographic location or the structure of bargaining units in the particular industry, may have changed giving rise to different conclusions with respect to the factors of administrative efficiency and convenience in bargaining and the community of interest amongst the employees in respect of their inclusion in the bargaining unit. (p. 375)

39 The *Westar* decision was affirmed on further reconsideration by a panel of the Industrial Relations Council (as the Labour Relations Board was re-named), after the enactment of the *Industrial Relations Act* in 1987: see IRC No. C102/87.

2. Partial Decertification Decisions After *Westar*

40 After the *Westar* decision was released, partial decertification applications were decided in light of the new policy. In *Vancouver Fancy Meats*, BCLRB No. 135/87, the original panel was not prepared to apply the new policy "retroactively" to a partial decertification application filed prior to the release of the *Westar* decision. However, this decision was overturned on reconsideration: *Vancouver Fancy Meats*, IRC No. C85/89, (1989) 2 CLRBR (2d) 234. The reconsideration panel applied the new policy and overturned the original panel's decision to allow the partial decertification because the requirement for "changed circumstances" had not been met:

To summarize, we have not been persuaded by the arguments for changed circumstances presented by the Certain Employees and by the Employer. We find that those arguments are essentially capable of being distilled into one, or at the most, two main arguments, namely, that it was not appropriate to include these office workers in the bargaining unit in the first place and basically, for that reason, their wish to be excluded must be given a good deal of weight. We find that both of those arguments must be rejected. They do not constitute a change of circumstances since these Certain Employees were varied into the bargaining unit such that it can be said that the bargaining unit with these employees in it is no longer appropriate for collective bargaining. Accordingly, this application is dismissed. (pp. 251-2)

41 The reconsideration decision in *Vancouver Fancy Meats* records that the union argued the *Westar* policy "make(s) getting out of the bargaining unit difficult" (p. 245). By contrast, the employer argued that the onus on employees seeking to be excluded from a bargaining unit to show changed circumstances should vary. The employer submitted that, on the facts, the onus on the applicants was "very light". This argument was soundly rejected by the reconsideration panel:

In fact, the onus of proof on applicants seeking to vary a bargaining unit by excluding themselves from it, is very high. This is the result and consequence of *Westar* and, in essence, the very thing

complained about by those who dislike or disagree with that decision. (p. 251)

42 Two other post-*Westar* decisions of particular relevance to the present case are *White Spot Limited (Ernie's Fine Foods Unit No. 558)*, IRC No. C133/87, and *White Spot Limited (Ernie's Fine Foods Unit No. 528)*, IRC No. C148/87. In each of these decisions, employees at one restaurant in the White Spot chain applied for partial decertification of that location only. As in the present case, the locations had been added to the bargaining unit by way of a variance. Again, as in the present case, it was argued that it should be possible for the employees simply to vote themselves out of the bargaining unit, where they had previously voted themselves in. This argument was rejected in both decisions (the panels coincidentally consisted of the same vice-chair of the Council).

43 In IRC No. C148/87, the panel stated:

The Employer's argument boils down to an assertion to the effect that *Westar, supra*, is wrongly decided or, at least, is distinguished from the fact pattern in the instant case. The Council has already spoken on that issue. *The wishes of employees in circumstances such as those obtaining in this case are not determinative of the question of whether or not the request to vary the bargaining unit should succeed. The applicants must show that their inclusion in the bargaining unit renders that unit inappropriate for collective bargaining. That is a very heavy requirement.* It will not be met by assertions of the Certain Employees that they are unhappy with a change in the affiliation of the bargaining agent; nor will it be satisfied by the somewhat self-contradictory submission of the Employer that "the employees at this West Vancouver unit have *nothing in common* with the employees at other location, *except that the same collective agreement applies*" (emphasis added). That claim (which was advanced in the earlier *White Spot, supra* case) was made for the purpose of distinguishing the bargaining structure which exists in bargaining units consisting of many geographical locations (accreted into the amalgam of the bargaining unit) from that of a single location unit (as in *Westar*) failed to convince the Council in *White Spot* that the *Westar* decision should not apply to bargaining units consisting of multiple geographical locations for reasons reproduced above. I will not depart from that reasoning in this case and find that *Westar* applies. (p. 9, emphasis added)

44 The same issue next arose in *White Spot Limited*, IRC No. C148/89, (1989) 2 CLRBR (2d) 227 (reconsideration of IRC No. C70/89) ("*White Spot 1989*"). Unlike the two decisions just discussed, the Council found that the applicants had demonstrated "changed circumstances" sufficient to meet the *Westar* test, and granted the partial decertification application.

45 In the *White Spot 1989* original decision (IRC No. C70/89, (1989), 2 CLRBR (2d) 208), the panel followed the *Westar* policy, but emphasized the different implications which arose from a multi-location certification as opposed to a single-site location as in *Westar*. First, the original panel found that geographic separation of work locations may have implications for community of interest among employees, and therefore appropriateness of the bargaining unit:

With respect to Vice-Chairman Arseneau's statement in [*White Spot*] IRC No. C148/87, that geographical separation is not significant whenever employees are bound by the same collective agreement, it is important to note that his conclusion was reached absent any *viva voce* evidence to the contrary. I agree that employees who perform the same work and who are covered by a single collective agreement are presumed to have a community of interest. The Council operates on these types of assumptions in granting virtually all certifications. However, as *Westar, supra*, notes, ". . . experience may demonstrate that the employees' interests cannot be adequately represented as part of the existing unit" [at p.375]. This Panel must decide what impact, if any, geographical separation *has had* on the initial assumption that the bargaining unit was appropriate. (p. 220; emphasis in original)

46 Next, the original panel noted that the picketing provisions had changed, such that it was no longer possible for an employee in a multi-location bargaining unit to picket other locations in the event of a labour dispute. Therefore, the Board's preference for "large industrial units" was not absolute, and need not preclude the decertification of a single location. Finally, the panel concluded that the *Westar* principle of respect for the existing bargaining unit was not intended to create a "slavish reliance" upon the original appropriateness decision, and that certification description should not become "a property right, immune from changes in the industrial relations landscape" (p. 222).

47 The original panel in *White Spot 1989* then noted a number of changes that had occurred since the consolidation of all unionized White Spot locations into a single bargaining unit in 1973. These included the changes to the picketing provisions which affected multi-location bargaining units; changes to the proportion of locations covered by the collective agreement (from all to some); and, to a lesser degree, changes to the identity of the bargaining agent (a merger of the original union, FASWOC, with another union, CAIMAW). Having found some changed circumstances, the panel proceeded to consider whether they affected the appropriateness of the existing bargaining unit. It summarized its conclusions as follows:

In summary, a number of significant changes have occurred since the consolidation of all White Spot locations was granted. Most significant are the change in the legislation and the number of restaurants not covered by the existing certification. The weight to be given to certain factors, industrial stability, administrative efficiency and convenience, and the structure of bargaining have all shifted since the initial consolidation in 1973. In particular,

industrial instability is no longer the critical factor. The assumptions made in concluding a community of interest exists between each unit have been eroded by the experience of the employees at Broadway and Larch. *In weighing the various factors in isolation and in combination, I find the disenfranchisement of the Certain Employees the most compelling factor. This application would not succeed had the restaurant not been geographically separated. Nor would it succeed if there had been a functional integration among employees either operationally or through provisions of the collective agreement (i.e., inter-unit job posting or bumping rights). Nor would this application succeed if all restaurants had remained certified.* However, absent the industrial stability concerns that existed prior to the 1984 amendments to the *Labour Code*, given the fact that there is an existing large non-union component within White Spot and given that Certain Employees have demonstrated that their dissatisfaction has continued since May 1987, I find Certain Employees have demonstrated that it is no longer appropriate to include them in the bargaining unit. (pp. 225-6, emphasis added)

48 On reconsideration, the union argued that the original decision in *White Spot 1989* represented a "retreat to the pre-*Westar* policy of resolving such disputes solely in accord with employee wishes" (p. 230). However, after clarifying the *Westar* policy, the reconsideration panel concluded that the original decision was in keeping with the policy. In particular, the reconsideration panel found that the original panel did not err because it did not base its decision on employee wishes alone, but rather on a number of factors. The reconsideration panel further stated:

It may be difficult for applicant employees to demonstrate that they should no longer be included in an existing bargaining unit. However, the onus of proof on the applicants is not "unusually high" as stated in *Vancouver Fancy Meats, supra* [see *infra*, at p. 251] but rather is the same onus as must be met in any other proceeding before the Council. (p. 232)

49 The reconsideration panel in *White Spot 1989* concluded:

To conclude, *Westar, supra*, remains the cornerstone of the Council's policy governing "partial decertification". But that decision was never intended to prohibit the exclusion of a group of employees from a bargaining unit where changed circumstances justify such a measure. The issue for determination in each case is not whether the entire bargaining unit continues to be appropriate for collective bargaining, but whether changed circumstances justify an exclusion. (p. 233-4)

50 It would appear there was no Board decision concerning an application for partial decertification by a group of employees after *White Spot 1989* until the 1998 decision in *Baptist Housing, supra*. In that case, the issue of partial decertification arose in the health sector, which has a unique, statutorily mandated multi-employer bargaining unit

structure. The original panel found that a "rote application" of the *Westar* policy to units under the *Health Sector Labour Relations Regulation* (BC Reg. 329/95) "would make it virtually impossible for employees in these multi-employer, province-wide units to ever opt out from collective bargaining" (para. 59). As a result, the original panel concluded the *Westar* policy should not be applied in the health sector:

We agree with HEABC that the Board must still consider the *IML* appropriateness factors and determine whether any of them alone or in combination outweigh employee wishes. In considering applications for partial decertification under Section 142 of the Code, the Board will, as it does in certification, consider whether the group applying exhibits a sufficient distinctiveness -- a distinct community of interest -- based on the *IML* factors. *The Board will not permit rump groups that for example, cut across classification lines or that are functionally integrated with others in the same large consolidated bargaining unit, whether with others at other locations of the employer or with other employers, to depart. Dover, p. 123.* An employer cannot be left with employees both in and out of the unit performing the same job. In *Dover*, the group rejecting collective bargaining was cohesive and could have constituted an appropriate unit in and of itself: p. 123. Here, too, the group that would otherwise have been appropriate but for the Regulation and the statutorily mandated consolidation, ought to have its rights similarly recognized.

* * *

The approach used by the Board in some cases prior to *Westar* was not unlike that we have outlined above. That earlier approach turned essentially on two features: first, that a group of employees were seeking to decertify and, second, that the diminished bargaining unit would remain appropriate for collective bargaining. Assuming that the *IML* factors support a defensible line drawn around the group proposing to depart, any question of the appropriateness of the remaining bargaining unit is largely resolved by the *Act* which deems it to be so. *As long as the bargaining unit remaining is appropriate, and the group leaving is not inappropriate as outlined above, and that the group's departure does not undermine viable collective bargaining for the remaining bargaining unit, then there is no reason to ignore the group's wishes given the absence of an express requirement in the law to do so.* Finally, it must be remembered that, but for the multi-employer bargaining unit structure imposed by statute, this would have been a routine decertification application that would have raised nary an eyebrow. (paras. 74 & 76, emphasis added)

51 The reconsideration panel in *Baptist Housing* upheld the original decision, but stated:

The reasoning of the original panel, that the circumstances of the Certain Employees in the context of the legislated bargaining unit configuration in the health care sector justifies an exception to the *Westar* policy, is upheld. In so finding we need not adopt the broader commentary by the original panel concerning *Westar*. Accordingly, we find that the original decision does not represent a new policy decision inconsistent with *Westar*. (para. 12)

52 The validity of the *Westar* policy was raised again in *BCAA, supra*. The original panel did not review the policy, because it was not prepared to grant a partial decertification application during a legal strike by the union:

We have determined it is not necessary in this application to re-visit the Board's current policy regarding partial decertification found in the *Westar* decision. Regardless of what policy does or should apply, we would not exercise our discretion under Section 142 of the Code and allow partial decertification given the present circumstances of the Union's strike against the Employer. We sympathize with the obvious convictions of the Certain Employees, and recognize they will be disappointed with our decision. But as we have endeavoured to explain, their wishes cannot be placed ahead of other conflicting considerations. (para. 38)

53 On reconsideration, the original panel's decision not to revisit the *Westar* policy was upheld as a proper exercise of discretion. The next occasion on which the Board considered an application for partial decertification was the Original Decision.

B. Alleged Errors in Applying *Westar* by the Original Panel

54 Before dealing with the central issue of the *Westar* policy, we will address three alleged errors by the Original Panel in applying the *Westar* policy:

1. Refusal to consider argument on the validity of the *Westar* policy (paras. 70-71 of the Original Decision);
2. Referring to employee choice to join or leave the bargaining unit as a "whim" (para. 96 of the Original Decision); and
3. The "two-step" approach to determining whether the applicants had met the test for partial decertification (paras. 81-85 of the Original Decision).

1. Refusal to Consider Argument re *Westar* Policy

55 One of the arguments made before the Original Panel by Certain Employees and the Employer was that the *Westar* policy should be revisited and revised. The Panel set out its reasons for not considering that line of argument in the Original Decision. In essence, it followed the Board's general approach that an original panel will not review

the policy decisions of reconsideration panels of the Board "except where there may be persuasive reasons for doing so" (para. 71). An example of where an original panel would not follow a prior policy decision was "where the statute upon which the policy was based has been substantially changed" (para. 71). The Original Panel found that the *Westar* reconsideration decision was clearly a policy decision of the Board, and that there were no persuasive reasons for not following it.

56 We do not find any error in the Original Panel's reasoning on this point. The *Westar* decision was unquestionably a policy decision by a reconsideration panel of the Board. A number of years have elapsed since it was published. During that period, the Board has amended and updated other policies in light of legislative and other changes. But no legislative change has occurred which specifically called the *Westar* policy into question. It was a matter for the Original Panel to decide whether it would follow the *Westar* policy, or whether it considered that persuasive reasons existed for considering a departure from it.

57 This is not to say that original panels must apply Board policy in rote fashion. In any case where an argument is made that Board policy should not be followed, a panel is independently able to decide whether to consider the argument. For the sake of consistency and expediency, however, original panels generally follow and apply existing Board policy, unless there are persuasive reasons for not doing so. As stated in *British Columbia Automobile Association*, BCLRB No. B94/99:

The immediate question is whether we should adopt an interpretation of Section 68 which is at odds with previous panels. We do not believe that would be appropriate. The doctrine of *stare decisis* does not apply to administrative tribunals. Nonetheless, the Board has recognized that uniform and consistent decision-making is a valued objective under its statutory mandate. The labour relations community is entitled to organize its affairs based on past decisions, particularly where those decisions have been rendered on reconsideration: see *JJM Construction Ltd.*, BCLRB No. B16/96, at paras. 139 and 141; and *Weyerhaeuser Canada Ltd.*, BCLRB No. B296/96, at para. 120. An original panel should have a persuasive reason for adopting a different interpretation of the statute. (para. 42)

58 We believe this approach accords with the purposes of the Code and, particularly, the purpose in Section 2(1)(d) of promoting conditions "favourable to the orderly, constructive and expeditious settlement of disputes between employers and trade unions". If original panels follow policies found in prior reconsideration decisions, then unions, employers and employees can be relatively certain how the Board will adjudicate particular disputes. This predictability of outcome in turn allows parties to order their relationships and, more importantly, settle their disputes in a constructive and expeditious fashion.

2. Referring to Employee Choice as "Whim"

59 Certain Employees and others object to the phrase "at a whim" in the following paragraph of the Original Decision:

More importantly, Certain Employees' assertion they may leave the bargaining unit and then later change their minds and rejoin demonstrates a fundamental weakness of their argument. If groups of employees may, *at a whim*, come and go from a certification, it would introduce a serious element of industrial instability into the scheme of the Code and may cause the Board to use future discretion when considering the wishes of these employees. It would also breed unfairness. Both the union and the employer would feel the destabilizing affect [sic] that a series of expansions and contractions of the bargaining unit would have on labour relations. A union would be hard pressed to make the sometimes necessary and difficult trade-offs in collective bargaining for fear of disintegration, piece by piece, of its bargaining unit. Groups of less committed employees may seek to reap benefits won by employees within the bargaining unit upon whose strength those gains were made, without participating in the bargaining unit's activities or "paying their dues". A trade union may feel obligated to cater to the wishes of the newly varied in employees at the expense of the overall membership and to the detriment of the collective bargaining process. Newly joined employees could seriously undermine collective bargaining by demanding the Union get for them what they want, or they will decertify. (para. 96, emphasis added)

60 In our view, when the paragraph is read as a whole, nothing turns on the impugned phrase. There is no question that the Original Panel did not place paramount importance on the concept of "employee choice", as the Certain Employees advocated. However, the use of the phrase "at a whim" does not, when read in context, indicate that the Original Panel dismissed employee choice as nothing more than a "whim". Another turn of phrase, more in keeping with the meaning of the paragraph as a whole, might have been "at will". Either way, the point of the paragraph remains the same. The Original Panel was expressing its concerns over what it perceived would be the consequences if groups of employees were able to remove themselves from the bargaining unit and then later rejoin, as suggested by the Certain Employees.

61 The issue of the proper emphasis to be placed on the factor of "employee choice" in the context of a partial decertification application is one which arises in the context of a review of the *Westar* policy as a whole. It is clear that the *Westar* policy does not place paramount importance on this factor. As the Original Panel chose not to undertake a review of the *Westar* policy but simply to apply it, we do not find that the above-quoted paragraph reveals a reviewable error in the application of that policy.

3. The "Two-Step" Approach to the Test

62 The Original Panel expressed uncertainty over whether there was a "one-step" or a "two-step" approach to determining whether to allow a partial decertification application. In other words, it was uncertain whether the group of employees seeking to be varied out of the bargaining unit had to be assessed as a stand-alone unit in the event the decertification bid failed:

If the Board were to consider only the continued appropriateness of the consolidated unit absent the group of employees seeking decertification, it would be required to assume that the decertification bid would be successful. That assumption cannot be made. In the event that the decertification bid failed, Store #135 would not be an appropriate stand-alone certified bargaining unit. (para. 84)

63 However, the Original Panel then went on in the next paragraph to consider the result "[i]f there is only one step to be considered in deciding if the variance should be granted ..." (*ibid*). Its conclusion was the same in either case.

64 In our view, nothing turns on the Original Panel's "one-step" versus "two-step" analysis. In each case, the Panel's conclusion was the same: it was not appropriate to grant the application for partial decertification because Certain Employees had not met the *Westar* requirement to show a change of circumstances, such that the existing bargaining unit was no longer appropriate. Accordingly, while we do not agree with the Panel's two-step analysis, we do not find it amounts to a reviewable error.

C. Validity of the *Westar* Policy

65 Having decided that the original panel made no reviewable error in applying the *Westar* policy to the facts, we must consider the validity of the policy itself. We begin by noting there are certain aspects of the policy that are not challenged and do not require revision.

66 First, no party challenges the finding in *Westar* that the Board has jurisdiction to grant partial decertification applications under what is now Section 142 of the Code. That finding was based on an analysis of the Board's "plenary independent power" as interpreted by the Supreme Court of Canada in *Oliver Co-operative Growers Exchange*, (1962), 35 DLR (2d) 694, and subsequent court decisions referred to in *Westar* (at pp. 368-370). While the Federation took the position that Section 142 should not be used to "finesse" the requirements for decertification in Section 33, it did not expressly challenge this aspect of the *Westar* decision and supported the Union's position that the *Westar* policy should be continued without revision. In our view, this position necessarily implies an acceptance of the finding in *Westar* that the Board has jurisdiction to consider applications for partial decertification under Section 142.

67 Second, there is no challenge to the requirement enunciated in *Westar* that, in order to succeed on an application for partial decertification, the applicants must

establish that the unit remaining would be appropriate for collective bargaining. Indeed, Certain Employees and the others who criticize the *Westar* policy specifically endorse this as a legitimate threshold requirement for applications for partial decertification. Their criticism of the *Westar* policy focuses on the finding that employee wishes, while a factor, is not the sole factor to be considered beyond this threshold requirement. In their view, employee wishes should be the determinative factor where the unit remaining would be appropriate for collective bargaining. They object strenuously to the additional *Westar* requirement for applicants to show that "circumstances have changed since the original certification or their inclusion in the bargaining unit such that it is no longer appropriate for them to be included in that unit".

68 Certain Employees and the employer-side parties contend the analytical foundation in the *Westar* decision justifying the changed circumstances requirement is fundamentally flawed. They submit it is asymmetrical and unfair to subject applications to remove a group of employees to this additional requirement, when no equivalent requirement applies if a group of employees is added to the bargaining unit. They argue the two types of applications are parallel, and the test should therefore be the same: does the addition or removal of this group of employees to or from the unit result in an appropriate bargaining unit? They also argue that the changed circumstances requirement has effectively precluded applications to remove a group of employees (i.e., applications for partial decertification) from succeeding.

69 In response, the union-side parties submit that Certain Employers and others want to return the Board's policy to its pre-*Westar* position. Before *Westar*, such applications were decided primarily on the basis of "employee wishes" (i.e., the wishes of the employees seeking to leave the unit). They submit there were important policy reasons enunciated in *Westar* for not allowing employee wishes to be the sole deciding factor (where the unit remaining would be appropriate). They contend the *Westar* decision was correct in holding that employee wishes is a factor, but not the determining factor. They note this principle has been upheld in subsequent decisions, including the *White Spot 1989* reconsideration decision. They submit further that to make the wishes of the majority of the group of employees for which application has been made the sole deciding factor would be unfair to the employees in the remaining bargaining unit and would increase the potential for instability in the collective bargaining relationship.

70 In our view, both sides make legitimate points regarding the validity of the *Westar* policy. On the one hand, the changed circumstances requirement can be criticized both for its analytical underpinnings and its practical effect on applications for partial decertification. On the other hand, we are not persuaded that the Board should only consider the wishes of the group of employees seeking to leave the bargaining unit (or, more accurately, the wishes of the majority of the employees in that portion of the bargaining unit for which application has been made) when deciding applications for partial decertification. It follows that we do not completely accept the arguments of either side, for reasons set out below.

D. The Changed Circumstances Requirement

71 Certain Employees and others have criticized the reasoning in *Westar* which led to this requirement. However, the *Westar* decision was long ago subject to reconsideration, and was upheld (IRC No. C102/87). Therefore, it is not necessary to engage in a critique of the reasoning in *Westar*. For our purposes, it is sufficient to consider whether, as a matter of current labour relations policy, the changed circumstances requirement should be continued or revised. Policy changes are "a necessary reality in the field of labour relations" to "ensure that our labour laws are always responsive to the current economic and social climate in which the parties before the Board are operating": *B.C. Rail Ltd.*, BCLRB No. B109/96 (reconsideration of BCLRB No. B427/95), at para. 55. A change in policy does not necessarily imply that the previous policy was wrong or inappropriate for its time.

72 We find that, while some important aspects of the *Westar* policy continue to be as valid and appropriate today as they were in 1987, experience has demonstrated that the changed circumstances requirement is no longer appropriate and is in need of revision. Earlier, we noted a passage in the *Westar* decision where the panel hinted at the kinds of circumstances where partial decertification might be appropriate (p. 375). These circumstances included: where experience demonstrated that the employees' interests could not adequately be represented as part of the existing bargaining unit; or where other conditions such as geographic location or the structure of bargaining units in a particular industry may have changed. In our view, these comments indicate that the panel did not intend or anticipate that its new changed circumstances requirement would make partial decertification unobtainable in all but the most exceptional circumstances.

73 After *Westar*, however, the tendency has been to interpret the changed circumstances requirement as presenting a virtually insurmountable barrier to partial decertification. In the reconsideration decision in *Vancouver Fancy Meats, supra*, the argument that the changed circumstances requirement was a variable standard was rejected. Instead, the panel stated that the onus on applicants seeking partial decertification in light of the *Westar* decision was "very high". While this remark was specifically repudiated by the reconsideration panel in *White Spot 1989*, it nonetheless appears to represent the prevailing interpretation of the policy. In the passage from the second of the two *Ernie's Fine Foods* decisions cited earlier, for example, the panel stated that the requirement for applicants to show that their inclusion in the bargaining unit renders the unit inappropriate for collective bargaining was "a very heavy requirement" (IRC No. C148/87, at p. 9).

74 In virtually all cases, applicants for partial decertification have been unsuccessful because they were found not to have met the changed circumstances requirement. See, for example, the decisions in *Pro-Active Resource Management Corp.*, BCLRB No. 116/87; *Certain Employees of White Spot Limited (Ernie's Fine Foods Unit No. 558)*, *supra*; *Certain Employees of White Spot Limited (Ernie's Fine Foods Unit No. 528)*, *supra*; *Borden Company Limited*, IRC No. C137/87 (upheld on reconsideration IRC No. C187/88); *Vancouver Fancy Meats*, IRC No. C186/88, *supra*; the Original

Decision; and *Pacific Opera Victoria Association*, BCLRB No. B149/2000 (currently under reconsideration).

75 Even in *White Spot 1989*, the finding that the changed circumstances requirement had been met was based on a highly unusual combination of factors, the most "compelling" of which was said to be "the disenfranchisement of the Certain Employees" (p. 226). In the passage from the decision cited earlier, the original panel stated that the application would not have succeeded had the restaurant not been geographically separated, or had there been functional integration among employees, or if all restaurants had remained certified. Only in the exceptional circumstances presented in that case did an application for partial decertification succeed after *Westar*.

76 Quite apart from the question of the particular factual circumstances in which the changed circumstances requirement has been considered and applied, it becomes clearer why the test is all but impossible to meet when it is considered on a purely analytical level. The test has been interpreted as meaning applicants must establish that, due to a change of circumstances, a unit previously found appropriate for collective bargaining is no longer appropriate unless the applicant group is removed. Given the Board's relatively elastic notion of appropriateness, which has always preferred larger and more inclusive bargaining units, it is very difficult to demonstrate that a larger, more inclusive bargaining unit is not appropriate for bargaining while a smaller, less inclusive unit is. Coupled with the admonition in *Westar* to have "respect" for the existing bargaining unit in considering such applications, it is perhaps not surprising that the likelihood of meeting the changed circumstances requirement has turned out to be virtually nil.

77 The practical effect of the changed circumstances requirement, in all but precluding partial decertification, has become even less appropriate from a labour relations policy perspective since the Board's 1993 decision in *IML*. This is not because of any conceptual inconsistencies between *IML* and *Westar*; rather because the practical effect of *IML* has been that the Board has tended to enlarge existing bargaining units via the "building block" approach rather than certifying a second or additional unit. The application of *IML* principles has encouraged the creation of larger units containing employees who may be geographically separated with little functional integration: see, for example, *Starbucks Corporation*, BCLRB No. B231/97; *West Coast Waste Systems Inc.*, BCLRB No. B396/97; and *Southland Canada, Inc.*, BCLRB No. B484/98.

78 In our view, given that the Board is now more likely than ever to create large, diverse bargaining units which may present a daunting, if not impossible, challenge to decertify as a whole, it is important to have a policy which permits partial decertification in appropriate circumstances. It is even less appropriate now to have a policy which treats the certification description as a "property right, immune to changes in the industrial relations landscape", in the words of the *White Spot 1989* original panel. Experience has shown that the changed circumstances test has had something close to this effect. In our view, it was clearly not intended to do so.

79 The Union and the Federation argue that the test was intended to focus attention on the effect of the application on the remaining employees and on the collective bargaining relationship. While we agree that this may well have been the intention, we find that in practice it has not had this effect. The decisions generally have not focused on these factors, but rather on the question of whether the applicants have presented evidence of a "change of circumstances" which renders their inclusion in the bargaining unit no longer appropriate. Satisfying this test has turned out to be an impossible task in all but one exceptional situation (*White Spot 1989*).

80 Accordingly, the time has come to replace the changed circumstances requirement for partial decertification applications with a new policy or analytical approach, intended to focus attention on the relevant factors to be considered in assessing such applications. In changing the Board's policy on partial decertification, we anticipate the effect will be to make partial decertification more available than it has been in the years since the *Westar* decision. However, our intention is not to swing the pendulum from one extreme to the other. We do not intend to change the policy from one which effectively precludes partial decertification to one which makes it readily available "on demand". For reasons described below, partial decertification will remain a limited rather than a routine solution to problems in the bargaining unit. Other less drastic and more creative solutions to deal with bargaining unit discord may be appropriate. However, where other solutions are not satisfactory, and where a consideration of the relevant factors leads to the conclusion that they do not bar the application from proceeding, the door should be open to the possibility of partial decertification.

81 Before describing what are the relevant factors or considerations in deciding applications for partial decertification, we will address the argument of Certain Employees and the employer-side parties that the only factor should be "employee wishes" (assuming the unit remaining is appropriate for bargaining).

E. Why not just "employee wishes"?

82 Certain Employees, with the endorsement of the employer-side parties, suggest that an appropriate policy on partial decertification to replace the *Westar* policy would be: subject to the remaining bargaining unit being appropriate, the wishes of the group seeking partial decertification should prevail. While this proposed test has the virtue of being clear and concise, and provides a reasonable starting point for the development of an appropriate policy, we find that it is not in itself an appropriate test or policy.

83 In our view, partial decertification should not become a routine solution to difficulties and dissension within a bargaining unit. We accept the point made by the union-side parties that the potential threat of partial decertification has an intrinsically destabilizing effect on bargaining unit cohesiveness, and therefore on a union's ability to bargain collectively on behalf of that unit with the employer. The more remote the possibility of partial decertification, the less destabilizing the effect. A union that does not have to concern itself seriously about losing part of the bargaining unit is less likely to flinch from making the difficult choices among conflicting employee interests often

required in collective bargaining. Conversely, the more readily available the option of partial decertification becomes, the greater the destabilizing effect on both the bargaining unit's relationship with the union and the balance of power between the union and the employer.

84 This is not to say unions and employers should be able to ignore the concerns of a minority of employees within the bargaining unit. Nor is it to say a group within the bargaining unit which comprises less than a majority of the employees has no right to press its demands upon the union (and by extension the employer). Unions are not accountable only to the majority in the bargaining unit; they must endeavour to represent the interests of all employees. However, when the wishes or interests of a minority collide with that of the majority of employees in the unit, it would rarely be fair or democratic that the minority should prevail over the majority simply because they are able to threaten to leave the bargaining unit. While the threat of partial decertification would not invariably have this result, the risk increases as partial decertification becomes more readily available.

85 Balanced against this concern for the destabilizing effect of partial decertification on the bargaining unit and the collective bargaining relationship is the point emphasized by Certain Employees and the employer-side parties: employee choice to be represented by a union. Leaving aside for the moment the question of any *Charter* issues which may arise, it is a fundamental principle of the Code that employees are free to choose whether they wish to be represented by a trade union. That choice, however, is not unfettered. As explained in the seminal Board decision *Insurance Corporation of British Columbia*, BCLRB No. 63/74, [1974] 1 Can LRBR 403 ("*ICBC*"), at pages 405-7, employees have a right under the Code to decide by majority decision whether they wish union representation in an appropriate bargaining unit. But they do not by their wishes define the scope of the bargaining unit, nor who should be included or excluded, because those matters are exclusively for the Board to decide under its statutory mandate to determine bargaining unit appropriateness (currently Section 22 of the Code).

86 Thus, an appropriate bargaining unit will almost inevitably include within it a minority of employees who did not wish union representation. Moreover, on applications for certification, the Board does not require that the union demonstrate support among each constituent component of a proposed bargaining unit, where the proposed unit as a whole is found to be appropriate: see *WMI Waste Management of Canada Inc.*, BCLRB No. B53/93, which followed *Sung Food Enterprises Limited*, BCLRB No. 126/84 (Reconsideration of BCLRB No. 387/83). The Board cited the approach taken in these cases with approval in *Overwaitea Food Group*, BCLRB No. B477/98 (upheld on reconsideration, BCLRB No. B36/99). Similarly, on decertification, it is the wishes of the majority of the bargaining unit *as a whole* (and not the majority within a constituent component) which determine whether the Board will cancel the certification of the union under Section 33 of the Code: *Baptist Housing, supra*.

87 The effect of these Board decisions is to confirm the principle that employee free choice with respect to union representation is determined on the basis of the wishes of

the majority of the bargaining unit as a whole, and that ordinarily no effect is given to the wishes of a minority or sub-group within that unit. An exception to this principle is partial decertification. Where a partial decertification application is allowed to proceed, the Board gives effect to the wishes of a minority of the employees in the bargaining unit with respect to union representation. The wishes of the minority are only allowed to prevail with respect to that group of employees (and not the unit as a whole), and only where allowing the wishes of that minority to prevail does not directly affect the choice of the remaining employees to have union representation (in other words, the unit remaining must continue to be appropriate). Nonetheless, in our view, it is obvious from this analysis why partial decertification must be a limited, and not routine, response to disagreement within the bargaining unit over the issue of union representation. Partial decertification is an exception to the Board's usual majoritarian ("majority rules") approach to determining the issue of union representation.

88 The Board has struggled in the past, and likely will continue to struggle, with the question of when partial decertification should be permitted. As indicated above, the Board must strike a balance between collective bargaining and industrial stability considerations and "employee wishes". In our view, neither of these values can prevail absolutely over the other. The *Westar* decision attempted to balance these two values by stating that employee wishes, while a factor to be considered in applications for partial decertification, would not be determinative. We agree with this statement of principle. However, as already discussed, we find that the *Westar* test does not strike a balance in practice. Partial decertification has been virtually eliminated under *Westar*, so that the value of employee wishes as against collective bargaining stability receives little if any weight.

89 The Board's policy and practice on partial decertification needs to be altered to give increased recognition to the factor of employee wishes. However, this factor should not be over-emphasized, and must be weighed against other relevant considerations. In particular, we do not accept the argument that the effect of granting a partial decertification application on the remaining employees in the bargaining unit and on the collective bargaining relationship as a whole are not valid concerns. In our view, Section 2 of the Code requires the Board to take such matters into consideration.

90 Under Section 2(2) of the Code, the Board must exercise the powers and perform the duties conferred or imposed upon it under the Code having regard to the purposes set out in subsection (1). These purposes include, broadly speaking, encouraging and promoting conditions conducive to industrial stability and collective bargaining and dispute resolution between unions and employers. A policy which ignores the impact of a partial decertification on the remaining employees in the bargaining unit and the collective bargaining relationship as a whole would not accord with these purposes. For example, collective bargaining and dispute resolution between the union and the employer may be seriously hindered where the union is subject to the threat of partial decertification from a group of dissident or disaffected employees. As noted by the Original Panel, a union in this situation may be unable to make the difficult choices between competing interests of employees within the

bargaining unit needed to resolve grievances and collective bargaining disputes with the Employer.

91 We accept the argument put forward by Certain Employees that the effect of granting an application for partial decertification is not necessarily negative for the remaining employees or the union. It may actually be beneficial to the collective bargaining relationship as a whole, in that a group which has been a "thorn in the side" of the unit may be removed. However, in our view, this argument merely supports the view that it is appropriate to consider the effect of granting the application on employees in the remaining bargaining unit and the collective bargaining relationship as a whole.

92 Perhaps the strongest reason put forward in favour of this "single-factor" approach is the argument that it is the test which the Board applies to applications to expand the bargaining unit by adding a group of employees. On applications under Section 142 to vary a group of employees into an existing bargaining unit, the Board must be satisfied that the resulting unit is appropriate for collective bargaining, and that a majority *among the group to be added* supports the application: *Olivetti Canada Ltd.*, BCLRB No. 113/74, [1975] 1 CLRBR 60. No inquiry is made into the impact on, or the wishes of, the employees in the pre-existing bargaining unit, nor the impact on the collective bargaining relationship as a whole. Why would the same test not apply to applications under Section 142 to applications to diminish the bargaining unit by removing a group of employees? Certain Employees and the employer-parties parties argue that logic, neutrality, symmetry and fairness all demand that the same test apply.

93 The *Olivetti* principle, whereby the Board canvasses only the wishes of the group of employees to be added rather than the bargaining unit as a whole on "variance in" applications, derives from a concern that unions not use their existing constituency to "sweep in" unrepresented employees: see *Olivetti, supra*, and *SGS Supervision Services Inc.*, BCLRB No. B13/93, (Reconsideration of IRC No. C95/92, upheld on judicial review in [1994] BCJ No. 3061 (SC)).

94 The Canada Industrial Relations Board has expressed partial disagreement with the strict *Olivetti* approach, arguing that it is contrary to the general principle that matters of representation are decided by a majority of the bargaining unit: see *Teleglobe Canada*, 32 di 270, [1979] 3 Can LRBR 86. Other jurisdictions take an approach which gives at least nominal recognition to the majoritarian principle as well as the *Olivetti* principle. This is discussed by Professor D. C. McPhillips in "The Appropriate Bargaining Unit: The Need for Policy Consistency by Canadian Labour Boards" Vol. 43 No. 1 *Relations Industrielles* 63 at p. 68 (a paper cited by Certain Employees in their submissions to this Panel). Professor McPhillips notes that the Alberta and Saskatchewan Boards have adopted a so-called "double test" whereby the applicant must be able to demonstrate majority support in both the group of employees to be added and the new, enlarged unit. However, he points out that the second test is "easily satisfied" because the Board presumes majority support in the original unit absent evidence to the contrary. Thus, these jurisdictions "have in effect adopted the same approach" as this Board.

95 While this Board has not expressly stated the presumption that majority support exists in the original unit absent evidence to the contrary, it would be reasonable to suggest that this presumption does indeed underlie the *Olivetti* principle. The Board does not canvas the wishes of the employees in the original bargaining unit (although they are given notice of the application) because it is presumed that a majority of them are in favour of the union's application to expand the unit. Professor McPhillips refers to this as a "dangerous assumption" because the original unit might in fact prefer no unit at all to a merged one. If such circumstances were to arise, then presumably evidence could be called to rebut the Board's presumption. For our purposes, it is sufficient to conclude that, while the Board does not expressly canvass the wishes of the employees in the original unit, this fact does not imply that it is indifferent to the wishes and interests of the majority. Rather, the Board presumes that the wishes and interests of these employees are reflected in the application made by the union which represents them.

96 As noted in the Original Decision, increasing the size of the bargaining unit is generally to the advantage of the members of the unit, leading as it usually does to both increased bargaining power and increased opportunity for advancement or placement. Conversely, reducing the size of the bargaining unit is generally to the disadvantage of the members of the unit, leading as it usually does to both decreased bargaining power and decreased opportunity for advancement or placement. Therefore, no presumption can be made that employees in the remaining bargaining unit would support an application for partial decertification.

97 In the absence of such a presumption, the Board would effectively be ignoring the wishes of the majority of the employees in the bargaining unit if it were to decide an application for partial decertification on the basis only of the wishes of those employees directly at issue (i.e., in the present case, the employees at Store #135). Although it might appear that the Board ignores the wishes of the majority of the employees in the bargaining unit on variances-in, this is not in fact the case. The wishes of the majority are presumed to coincide with the union's application to expand the bargaining unit (absent evidence to the contrary). For the reasons outlined above, no such presumption can be made with respect to an application to diminish the bargaining unit, and therefore the Board must inquire into the impact of the application on those employees. To do so is not unfair, unbalanced or illogical. It merely reflects the inherently different implications that these two kinds of applications (to expand or reduce the size of the bargaining unit) have for the remaining employees in the bargaining unit.

F. The Threshold Requirement

98 Before turning to a consideration of the other relevant factors which should be considered besides employee wishes, we will elaborate briefly upon the "threshold requirement" that the unit remaining be appropriate for bargaining. No party before us expressed disagreement with the threshold requirement. The Board will not use its discretionary power to vary a certification under Section 142 unless the result is a unit

appropriate for bargaining. This is true whether the application is to expand the unit by varying it to add a group of employees (a "variance in"), or to reduce the unit by varying to remove a group of employees (a partial decertification).

99 In most cases, the requirement that the group remaining be appropriate will necessarily imply that the group seeking to leave will also meet the Board's definition of appropriateness. That is to say, if it is possible to draw a rational and defensible line around the group remaining, it will almost always be possible to draw a rational and defensible line around the employees in that portion of the bargaining unit for which application has been made. Nevertheless, there are two reasons for requiring that both groups (those remaining and those leaving) meet this requirement.

100 First, the employees applying for partial decertification are attempting to impose their wish with respect to union representation on other employees in the bargaining unit, even though they are a minority within the unit as a whole. Assuming their application has the requisite 45% support among the employees in the portion of the unit applied for, and meets the other requirements set out in this decision, the Board would hold a representation vote for the employees within the portion of the unit. The outcome of the vote (the wishes of the majority within the portion) would be binding on all employees in the portion, including any in the minority within that group who wish to continue union representation.

101 Second, the Board's appropriateness criteria are well established in the jurisprudence, especially the *IML* decision. There are four criteria for determining whether a group of employees have a sufficient community of interest such that a rational and defensible line can be drawn around them. Applying these criteria provides a clear and consistent method for distinguishing those groups of employees which are entitled to apply for partial decertification from those which are not.

102 We agree with the original panel in *Baptist Housing* that, in considering applications for partial decertification under Section 142, "the Board will, as it does in certification, consider whether the group applying exhibits a sufficient distinctiveness -- a distinct community of interest -- based on the *IML* factors" (para. 74). We further agree that various forms of "rump groups" will not be permitted to apply for partial decertification, for the reasons given by that panel.

103 We further note that the original panel in *Baptist Housing* described the test for partial decertification in the health sector as involving a weighing of various factors against "employee wishes". We do not adopt the formulation of the *Baptist Housing* test (which applies in the health sector only) for general use, preferring to formulate a separate test for partial decertification outside the health sector. Nonetheless, we note that, despite differences in emphasis and specifics, there is considerable similarity between the test enunciated in this decision and the *Baptist Housing* test. Both tests require that, in addition to the group remaining being appropriate, the group leaving must meet a similar requirement, and both tests involve a weighing of other considerations against employee wishes.

G. Other Relevant Factors

104 We turn now to the other relevant factors which should be considered besides employee wishes (assuming a rational and defensible line can be drawn around both the unit remaining and the group leaving). In our view, two factors to be weighed in the balance against the wishes of the employees are: the impact of granting the application on (1) the employees remaining in the bargaining unit; and (2) the collective bargaining relationship as a whole. In addition to those two factors, there are a variety of other matters which may or may not require consideration, depending upon the circumstances of the case. These include: whether the application is tainted by improper interference from the employer or another entity; whether it is a disguised raid application; and whether the timing or context of the application makes it inappropriate for it to proceed. The Union will generally be in the better position to bring forward evidence on these factors. Another matter for consideration may be whether it is a practical impossibility to decertify the entire unit.

1. Impact on the Employees Remaining in Bargaining Unit

105 An application for partial decertification will almost invariably have an impact on the employees who would be left in the remaining bargaining unit. Opportunities for promotion, training, or career advancement, collective agreement seniority and other rights, and the ability to transfer to different work areas or locations, might all be affected. Depending on the circumstances, however, that impact may be great or small. The effect on the rights and interests of the remaining employees must be weighed against the wishes of the applicants for partial decertification. The effect must be real, as opposed to hypothetical. The focus of the inquiry is likely to be on the impact on collective agreement rights, but can include other interests, such as career advancement opportunities.

2. Impact on the Collective Bargaining Relationship

106 In addition to the effect on the employees in the unit remaining, the Board will consider the destabilizing impact of a successful application on the union's collective bargaining relationship with the employer. Once again, a real and not a hypothetical impact on that relationship will be required to constitute a reason for precluding the application from proceeding. It is expected that any reduction in the size of the bargaining unit will have at least some impact on the union's bargaining strength, but this is not sufficient in itself to counterbalance the weight that should be given to employee choice on the issue of representation. Evidence of the effect, if any, that the threat of partial decertification by the applicant employees has had on the collective bargaining relationship may be helpful to determining the impact of the application.

3. Other Considerations

107 In addition to these two factors which are to be weighed against the wishes of the applicant employees, there are a variety of other matters which may or may not arise in the particular factual circumstances surrounding an application for partial decertification.

Where they do arise, consideration must be given to these matters in deciding whether the application for partial decertification should be allowed to proceed to a vote.

108 One such matter is the timing or context of the application. For example, in *BCAA, supra*, an application for partial decertification was dismissed where it was made during a strike by the union (see also *Certain Employees of Adams Laboratories*, BCLRB No. B20/80, [1980] 2 Can LRBR 101). Applications made during a lockout or in the midst of collective bargaining will likely be treated in a similar fashion. There may be other circumstances where the timing or context of the application would be decisive. For example, an application for partial decertification would be precluded in most cases where the union's certification has only just been granted, or only just expanded to include the applicant employees. In such circumstances, it is appropriate to grant the union a "breathing space" to establish itself with the newly certified employees and engage in collective bargaining on their behalf: *Plateau Mills Ltd.*, BCLRB No. 87/76, [1977] 1 Can LRBR 82, at p. 88.

109 Another matter which must be considered where it arises is whether the application is tainted by improper interference by the employer or another entity. Allegations of improper interference arise from time to time in relation to applications for decertification of the entire unit under Section 33, and it is to be expected that they may arise in relation to partial decertification application under Section 142 as well. Where they do, the Board's general approach to the issue would apply equally in the context of an application for partial decertification. The Board will refuse to allow a partial decertification to proceed where it considers that, because of improper interference by any person, a vote would be unlikely to disclose the true wishes of the employees in question.

110 As well as being free from employer interference, the application must not be a disguised raid application. Partial decertification applications are not a method for eventually carving out a second bargaining unit to be represented by a different union. *IML* principles regarding second or additional bargaining units will apply. Subject to rare circumstances where the presumption against multiple bargaining units is rebutted, employees who leave a bargaining unit by way of partial decertification will not be able to seek union representation other than by way of seeking to return to the existing bargaining unit.

111 Another relevant consideration is the practical difficulty inherent in decertifying the unit as a whole. Where there is no practical possibility of decertifying the entire unit, for geographic or other reasons, the Board may be more inclined to allow partial decertification. Conversely, where the application is for decertification of a portion of a single integrated unit, and there appears to be a realistic possibility of decertifying the unit as a whole, this may be a factor which would make the Board less inclined to allow partial decertification.

112 The decision to seek partial decertification, like the decision to seek decertification of the entire unit under Section 33, has significant consequences. Apparent short-term gains or satisfaction may in some cases give way to longer-term

losses or dissatisfaction. However, we accept the point forcefully made by Certain Employees that the Board should not be "paternalistically" second-guessing the choice of a group of employees to leave the bargaining unit. Without doing so, the Board may nonetheless encourage certain employees and their unions to consider other less drastic means of dealing with tensions and difficulties within the bargaining unit. These ideas may be applicable whether or not the group of employees meets the criteria to apply for partial decertification. The employer, as a vitally interested party, would be included at an appropriate stage in any such discussions.

H. Summary of Revised Policy

113 Section 142 of the Code gives the Board the discretion to grant applications for partial decertification in appropriate circumstances. Under the former *Westar* policy, applicants were required to establish that the unit remaining would be appropriate for collective bargaining. This requirement continues under the revised policy. Applicants must also demonstrate that a rational and defensible line can be drawn around the group leaving, using the *IML* criteria. However, they are no longer required to establish "changed circumstances". Instead, the Board will consider whether the impact of allowing the application on the remaining employees and the collective bargaining relationship as a whole, or either, should outweigh the wishes of the applicant employees. Where relevant, the Board will also consider other matters such as the timing or context of the application, any allegations of improper interference, whether it is a disguised raid application, and the difficulty of decertifying the unit as a whole.

114 This revised policy gives increased recognition to employee wishes and makes partial decertification more available than it has been under the *Westar* policy. In practical terms, an application will more likely be granted where an entire group of employees at one location seeks to leave a multi-location certification. However, partial decertification will remain a limited rather than a routine solution to problems in the bargaining unit. Even in the case of multi-location certifications, functional integration or other considerations may preclude an application being granted.

115 In seeking written submissions from the parties to this proceeding, we indicated that we did not wish to receive submissions on the *Baptist Housing* decision. Therefore, we will not comment further on *Baptist Housing*, other than to note it continues to apply to the health sector.

116 Finally, in applying the new policy on partial decertification, the Board will endeavour to monitor the policy to ensure that it does not produce unintended results, and may make adjustments to the policy as appropriate.

I. Application of the New Policy to the Present Application

117 The Original Decision applied the *Westar* policy to the application for partial decertification and found that the Certain Employees had not met the "changed circumstances" requirement. Accordingly, it dismissed the application for partial

decertification. We have found the changed circumstances requirement, and therefore the *Westar* policy, is no longer appropriate for deciding applications for partial decertification. We have articulated a new test for partial decertification applications.

118 In these circumstances, we may either remit this matter to the original panel to be decided in accordance with the new policy, or set aside the Original Decision and decide the matter ourselves. In the latter case, we would decide the matter in accordance with the new policy on the basis of the facts as set out in the Original Decision. In the former case, it is no longer possible to remit this matter to *the* Original Panel which made the Original Decision, as the chair of that panel is no longer with the Board. Accordingly, if we do not decide the matter ourselves, it would have to be remitted to a new panel.

119 We find that it is appropriate to remit this matter to a new panel to be decided in accordance with the policy enunciated in this decision. In our view, this is preferable to this Panel deciding the matter, without having heard from the parties with respect to the application of the new policy to the specific factual circumstances of this case. We leave it to the new panel to decide whether, in addition to hearing submissions on the application of the new policy to the facts as found in the Original Decision, it will permit the calling of new evidence.

120 We recognize that sending this matter to a new panel will take longer than deciding it ourselves, and we acknowledge that Certain Employees, the Union and the Employer are anxious to have this matter decided. However, this application will likely be the first opportunity the Board has to apply its new policy on partial decertification. Given the importance of the issue not only to the immediate parties, but also to the labour relations community at large, in our view the need for a full and fair hearing outweighs the need for expedient decision-making in this instance.

J. The Charter Argument

121 Finally, we turn to the outstanding issue of the *Charter* argument. Certain Employees and the employer-side parties submit that, in addition to violating Code principles, the *Westar* policy and the Original Decision based on that policy are in breach of the *Charter*, specifically Section 2(d), freedom of association. We have replaced the *Westar* policy with a less restrictive policy on partial decertification applications, and effectively set aside the Original Decision by remitting the matter to a new panel to be decided in accordance with the new policy. Therefore, it is unnecessary for us to decide whether the *Westar* policy and the Original Decision were contrary to Section 2(d) of the *Charter*. In addition, it would be premature, and possibly unnecessary, for us to consider the new policy in light of the *Charter*. The parties have not had an opportunity to consider the new policy in light of the *Charter*, and to present argument in the event that a *Charter* challenge is raised. Such a challenge can be raised and considered when the Board applies the new policy.

VIII. CONCLUSION

122

For all of the above reasons, the applications of Certain Employees and the Employer for reconsideration of the Original Decision and the *Westar* policy are allowed in part. The Certain Employees' application for partial decertification is remitted to a new panel to be decided in accordance with the policy set out in this decision.

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