

BRITISH COLUMBIA LABOUR RELATIONS BOARD

VERTEX CONSTRUCTION SERVICES

(the "Employer" or "Vertex")

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL NO. 115

(the "IUOE")

-and-

CHRISTIAN LABOUR ASSOCIATION OF CANADA,
LOCAL NO. 68
(CONSTRUCTION AND ALLIED WORKERS' UNION)

("CLAC")

-and-

BRITISH COLUMBIA AND YUKON TERRITORY BUILDING
AND CONSTRUCTION TRADES COUNCIL

(the "Building Trades Council")

-and-

BRITISH COLUMBIA PROVINCIAL COUNCIL OF CARPENTERS

(the "Carpenters")

-and-

INDEPENDENT CONTRACTORS AND BUSINESSES ASSOCIATION

("ICBA")

-and-

GENERAL WORKERS UNION OF CANADA, LOCAL 1

(the "GWU")

PANEL: Frances R. Watters, Associate Chair (Adjudication)
Lisa Hansen, Registrar & Vice-Chair
Irene Holden, Associate Chair (Mediation)

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CASE NO.: 39053

DATE OF HEARING: April 21, 1999

DATE OF DECISION: March 15, 2000

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The IUOE applies under Section 141 of the *Labour Relations Code* (the "Code") for leave and reconsideration of BCLRB No. B528/98 (the "original decision"). In that decision, the original panel considered two applications for certification, the first filed on August 28, 1998 by the IUOE for its traditional craft unit, and the second filed on September 3, 1998 by CLAC for "all employees except office and supervisory staff". At issue was which application should be considered or processed first. The original panel determined that CLAC's application should be processed first given the Board's preference for all-employee bargaining units and concerns about ensuring the larger group's access to collective bargaining.

2 The Building Trades Council, as the body representing craft unions in the construction industry, was granted intervenor status in the proceeding: BCLRB No. B528/98. Intervenor status was also granted to the GWU and ICBA: BCLRB No. B114/99. After the applications in question were filed, the Carpenters filed an application for certification for its traditional craft unit with the Employer and were therefore granted interested party status: BCLRB No. B528/98.

3 We find the Board has the jurisdiction to consider two applications where they are filed contemporaneously (i.e., within ten days of each other). In most cases, the Board will prefer an application for an all-employee unit to an application for a smaller unit. However, in this case, we find the original panel erred in preferring the larger unit, because in so doing it failed to consider the specific nature of the construction industry in which the two models of representation, the craft unit and the all-employee unit, are both appropriate. Our reasons follow.

II. GROUNDS FOR RECONSIDERATION

4 The IUOE's grounds for reconsideration are:

1. the original panel disregarded the Board's policy and jurisprudence in dealing with multiple applications for certification and, in so doing, exceeded its jurisdiction under the Code;
2. the original panel disregarded the Board's policy and jurisprudence in the construction industry where the presumption favouring all-employee over craft units does not apply;
3. the original panel declined to process an application for an appropriate unit in favour of what it determined was a more or most appropriate unit. This

result is contrary to Board policy and jurisprudence and is in excess of the Board's jurisdiction under the Code; and

4. the original panel gave as its rationale for the result that CLAC's application would ensure access to collective bargaining for more employees. The original panel misapplied the principle of access to collective bargaining and fundamentally misconstrued the principles of appropriateness.

III. BACKGROUND

5 The Employer is a contractor in the construction industry, engaged in construction work in British Columbia and Alberta.

6 On August 28, 1998, the IUOE filed an application for certification under Section 21 of the Code for its traditional craft unit, composed of approximately twenty employees. On the date it filed its application, the IUOE had sufficient support for an automatic certification, pursuant to Section 23 of the Code.

7 Six days later, on September 3, 1998, CLAC filed an application for certification under Section 18 of the Code for a bargaining unit described as "all employees except office and supervisory staff", composed of approximately 160 employees. It too had sufficient support in the proposed unit for an automatic certification, although it did not have majority support of the employees in the proposed IUOE unit.

IV. ORIGINAL DECISION

8 The original decision addressed, for the first time, the issue of what the Board should do when faced with competing applications for certification in the construction industry, filed within ten days of each other, where one is for a craft bargaining unit and the other is for a larger, all-employee unit.

9 The IUOE argued before the original panel that its application should be preferred over that of CLAC's because: (1) the two applications are not competing because they are for different bargaining units (that is, the IUOE's application is for its traditional craft unit which has, in the construction industry, a special status under Section 21(2) of the Code and confirmed in Part 4.1 of the Code); and (2) IUOE's application was filed first in time. The result would be that the craft unit would be certified, requiring CLAC to sign up not only 45% of the employees in the all-employee unit it seeks to represent, but also a majority of the employees in the IUOE's craft unit: Section 21(2); see also *Cicuto and Sons Contractors Ltd. et al*, IRC No. C271/88 (Reconsideration of BCLRB No. 52/87), (1989), 1 CLRBR (2d) 63 ("*Cicuto*"). In addition, as a result of the interaction between Sections 18(2) and 21(2) of the Code, the CLAC application is untimely as a raid application cannot be made for at least six months after the IUOE certification.

10 The original panel noted the need for balance between two important principles: the special or protected status accorded to craft units in the construction industry under Section 21(2), and the goal of ensuring access for employees to collective bargaining within the Board's overall framework of a strong preference for all-employee bargaining units as articulated in *Island Medical Laboratories Ltd.*, BCLRB No. B308/93 (Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), (1993), 19 CLRBR (2d) 161 ("*IML*").

11 If accepted, the IUOE's position would mean that the right of the larger group to representation would be rejected in favour of the right of the smaller group to be represented by the union of its choice. In the circumstances, the original panel determined that the ten day rule set out in *Dayross Developments Ltd.*, IRC No. C93/88 (Reconsideration of IRC No. C78/88), 18 CLRBR (NS) 267 ("*Dayross*") applied. The ten day rule provides that where two applications for certification are filed for substantially the same bargaining unit, both will be considered if filed within ten days of each other. A vote is held to determine which union the employees prefer, given the equivocal nature of the membership evidence. The application filed first in time does not have priority. According to the original panel:

While the 10 day rule has been applied in cases involving which of two unions will represent the employees, there is no compelling policy reason that the rule would not also be applied where as in this case, a key concern involving access is raised. In the circumstances of this case the 10 day rule ensures an appropriate balance between access considerations, the need for certainty and the ability of the IUOE to represent its traditional craft unit. It is therefore applicable and the application by the IUOE has no *prima facie* right to be preferred simply because it was filed first in time. (para. 22)

12 The original panel concluded:

While recognizing the historical and important role played by craft unions in the construction industry, there is no basis, as a matter of law or policy, to prefer the application of the IUOE in this case, and the application by CLAC will be processed first. (para. 26)

V. POSITIONS OF THE PARTIES

(a) The IUOE

13 The IUOE, supported by the Building Trades Council and the Carpenters, makes four arguments. First, the IUOE says that the original decision is contrary to the clear policies of the Board, and exceeds the Board's statutory jurisdiction. It says that the language of Section 23(1) is mandatory. The Board "must" certify a trade union where "on the date it receives an application for certification", it is satisfied that the union has the requisite membership support and that "the unit is appropriate for collective

bargaining". The IUOE argues that the language of Section 23 is a provision which establishes and limits the jurisdiction of the Board and the Board is required to be correct in applying its provisions.

14 The IUOE submits that the Board can only depart from the mandatory wording of Section 23 and consider a second application for certification where the second application calls into question the membership evidence. In such cases, the Board has the discretion, under Section 24(1) of the Code, to order a representation vote to determine the true wishes of the employees on which trade union should represent them.

15 Accordingly, the Board has the discretion to consider two applications filed contemporaneously (which the Board has defined as within ten days) when both applications are for substantially the same bargaining unit. It does so by holding a representation vote to ascertain the true wishes of the employees, given the ambiguity created by the second application: *Dayross, supra*; *Glennbrook Contracting Ltd.*, BCLRB No. B201/93 (Leave for Reconsideration of BCLRB No. B244/93). The Board has no jurisdiction to consider a second application, where that second application is for a substantially different bargaining unit: *Richmond Cabs Ltd. et al*, BCLRB No. B264/95; *Portofino Management Inc.*, BCLRB No. B198/96. Absent the authority to order a representation vote, the Board is statutorily required under Section 23(1) to process the application filed first in time.

16 Given this analysis, the IUOE says the original panel had no jurisdiction to consider the second application in this case because it was for a substantially different unit. Instead, the original panel improperly and without jurisdiction reformulated the ten day rule. Instead of using the ten day rule to resolve ambiguity in membership evidence, it recast it as a policy conferring jurisdiction on the Board to choose one certification application over another when they are filed within ten days of each other (para. 22). The IUOE says the Board is without jurisdiction to simply choose to process a subsequent application where there is not an issue of membership evidence. Any concerns the original panel had with the IUOE's membership evidence could have been resolved by ordering a representative vote of the craft unit alone under Section 24. The original panel therefore erred in disregarding the mandatory language of Section 23(1).

17 Second, the IUOE argues that the original panel erred in finding the Board has a strong policy preference, or a preference of any kind, for an all-employee unit over a craft unit in the construction industry. It says one of the exceptions to the *IML* approach of a clear preference for large units is the craft unit in the construction industry: *Canadian Kenworth*, [1979] 2 Can LRBR 64 at p. 66; *IML, supra*, at p. 177, 182; *Dayross, supra*, at p. 5; *Cicuto, supra*, at p. 80.

18 Further, the IUOE says the recent amendments to the Code provide a statutory scheme which specifically addresses labour relations in the construction industry (i.e., Part 4.1 of the Code) and support a legislative intent that craft units are at least as appropriate in the construction industry (if not more so) as wall-to-wall units: *Looking To The Future: Taking Construction Labour Relations Into The 21st Century*, Report to the

Minister of Labour (February 25, 1998)(Stephen Kelleher, Q.C. and Stan Lanyon, Q.C.) (the "Kelleher/Lanyon Report") at p. 19. The IUOE offers a number of reasons why craft units are preferable, including superior skills and training: see Section 55.11(b) of the Code.

19 Third, the IUOE argues that the original panel erred in favouring what it determined to be the *most* appropriate unit over *an* appropriate unit, when the Board has clearly stated that a bargaining unit must be "an appropriate" unit, not the "most appropriate" unit. In doing so, the original panel disregarded the Board's jurisprudence and exceeded its jurisdiction under the Code: *Canadian Kenworth, supra*, at p. 183; *B.C. Coal Ltd.*, [1982] 3 Can LRBR 177; *IML, supra*, at p. 179. The IUOE says that since *Cicuto* the Board's policy has been to be neutral with respect to choosing between craft and wall-to-wall units. Furthermore, the Board is without jurisdiction to require a most appropriate unit even if it prefers wall-to-wall units. Craft units are appropriate: *Cicuto*. Once a union satisfies the appropriateness criteria, the Board "must" certify the union subject only to ordering a representative vote to determine employee wishes: Sections 23 and 24.

20 Fourth, the IUOE says the original panel erred in favouring an all-employee application on the basis that the larger unit would ensure access to collective bargaining. The IUOE says "access to collective bargaining", as that term is used in *IML*, refers to the organizing of employees, not the number of employees in the bargaining unit. The IUOE says smaller units promote access to bargaining; larger units promote labour relations stability. In finding that larger units mean greater access, the original panel erred by conflating the two competing principles.

21 The IUOE also says the original decision will result in the elimination of craft organizing in the construction industry, which is not consistent within the scheme of the Code: Section 21 and Part 4.1. The IUOE says that the original decision gives an employer ten days to interfere with the process to find an alternative to a craft or building trades union because employers would rather be certified with wall-to-wall unions: see, for example, *Vertex Construction Services Ltd. et al* unreported, ALRB, No. GE-02876, CR-02331, March 16, 1999; *Harbour Electric Ltd.*, BCLRB No. B96/99.

22 Finally, the IUOE says the options proposed by the original panel of, for example, organizing through a poly-party application, are not feasible. Those applications are not craft applications, and organizing on a poly-party basis is more difficult.

23 In reply to the Respondents' arguments, the IUOE says that the result in *Teleflex (Canada) Limited*, BCLRB No. B69/97, does not apply in the construction industry because of the legislative protection given craft units by Section 21 of the Code. By law, a second application for a larger unit cannot simply subsume the prior application for a craft unit: *Cicuto, supra*.

24 The IUOE also says that there is nothing prohibiting CLAC from applying to represent the remaining employees. Members of the building trades unions regularly

work alongside employees in the "open shop sector" of the construction industry without incident.

(b) The Carpenters

25 The Carpenters say first that the jurisprudence accepts and is neutral toward both craft units and all-employee units as appropriate in construction: *R.M. Hardy & Associates*, BCLRB No. 41/77, [1977] 2 Can LRBR 357; *Cicuto, supra*, at p. 68. Although craft units do have special recognition in the Code (see Section 21(2)), neither one is to be preferred, or needs to be given preference. The Carpenters say the original decision upsets that balance in favour of all-employee units. The original panel did so by "cross polarizing" concepts used in *IML*, and applying them improperly to craft organizing in construction: *IML, supra* at p. 182.

26 Second, the Carpenters say the ten day rule allows the Board to assess employee support where competing applications are received for substantially the same bargaining unit. There is no need to apply the ten day rule in the context of this case because the units applied for are not substantially the same.

27 The Carpenters also submit that the ten day rule has no relevance to a determination of appropriateness. If the unit is appropriate, the first application should be granted. There is therefore no need to measure employee support through the holding of a runoff vote. If a subsequent application calls into question that membership evidence, then a representative vote can be held with respect to the craft application.

28 In response to the original panel's suggestion that the crafts apply as a poly-party, the Carpenters submit that where craft unions apply as a poly-party they apply under Section 18 and are no longer a craft certification. This comment gives no weight to a union's ability to apply as a craft unit.

29 Finally, the Carpenters submit there is no legislative mandate to take away the choice of a craft unit from employees because of the "practical effect" of granting the craft certification. The legislative mandate cannot be gained from the ten day rule.

(c) The Building Trades Council

30 The Building Trades Council says the Board has no jurisdiction to decide which application should be processed; that is, to choose between applications. Instead, the Building Trades Council says the Board is obliged to process an application where it otherwise meets the requirements of Section 23(1). The Building Trades Council says that since 1974, Section 23 has mandated that the issue of appropriateness must be determined as of the "date" the application is received. The wording of Section 23 is mandatory; that is, if on the day the application is filed, the applicant has the requisite support and the unit is appropriate, the Board must then grant the application: *Retail Clerks' International Union* (1971), 22 DLR (3d) 480 (SCC). In this case, both applications should have been processed. Because the IUOE's application met the requirements of the Code and was received first in time, it should therefore have been

processed first. The second application, if amended to cover the balance of the employees, may still be appropriate and it should have been processed as such.

31 The Building Trades Council says the ten day rule is no longer valid given that the Code no longer requires a vote. At best, there is a "one day rule"; that is, the Board's jurisdiction to consider competing applications for substantially the same unit is limited to applications received on the same date. If the ten day rule does apply, it is limited to the ordering of a vote on applications which apply for substantially the same unit; it cannot be used to jettison one of the two applications.

32 The Building Trades Council says that the Board must be neutral in its approach to these applications. The only way to be neutral, given that both the units are appropriate, is to process the first received.

33 Alternatively, the Building Trades Council says the original panel's decision not to process IUOE's application first is inconsistent with the expressed or implied principles of the Code. The Building Trades Council says that there is no preference for an all-employee unit in the construction industry. The comments in *Cicuto* suggesting a preference for larger units are in the context of supporting the concept of wall-to-wall units, not to suggest that they are preferable to craft units.

34 The Building Trades Council submits that certification of craft units is required under Section 23(1) where the application is for a standard unit and the union has the requisite support. That outcome could only be avoided by finding that the craft unit was not appropriate in light of the subsequent CLAC application; such a finding would be inconsistent with *Cicuto* and the Board's jurisprudence since it would indicate that the Board's preference for all-employee units makes an "exception" for craft units in construction: *IML, supra*, at p. 177. If found to be correct, the original decision is saying that craft units are not appropriate.

35 Finally, the Building Trades Council says that adopting the original panel's approach will have serious policy ramifications for craft units. "On call" or "dial a" unions will be able to shield employers from craft certifications.

36 On the issue of employee access to bargaining, the Building Trades Council says CLAC is at liberty to represent the balance of the bargaining unit, either through a certification application or a voluntary recognition.

(d) CLAC

37 CLAC urges the Board to focus on the statute rather than on select Board cases. It says the Board does have jurisdiction to determine which application is for an appropriate bargaining unit and does so on the basis of which unit best reflects the purposes of the Code. Section 2(1)(a) envisions collective bargaining rights for as many employees as possible. Where a competing application better reflects the purposes of the Code it can make an otherwise appropriate bargaining unit inappropriate. For example, the Board prohibits a craft union from applying to carve out

its traditional craft unit from a wall-to-wall certification on the grounds that the unit would not be appropriate for labour relations reasons in light of the Board's preference for larger units. So too, the Board should favour an all-employee unit in this case.

38 CLAC says the policy of processing applications on a "first in time" basis is arbitrary and would amount to an improper refusal by the Board to exercise its statutory mandate. CLAC does not rely on the ten day rule, although it notes that a "first in time" application is hard on wall-to-wall applicants because CLAC's ability to organize is subject to the build-up principle. CLAC says instead the Board has the ability to consider all applications received up to the point of certification.

39 CLAC also says that certifying both applicants, one for a craft unit and the other for the balance of the employees, is not workable because the remaining employees would not constitute an appropriate bargaining unit if they were organized by an industrial union.

40 Finally, CLAC says there is no need to refer to *Cicuto, supra*, because this is not a case of a preference for wall-to-wall units versus craft units. This case is about larger versus smaller units. The way to encourage collective bargaining for the most employees is to certify the larger bargaining unit.

(e) Vertex

41 By way of introduction, Vertex makes two points. First, it says that the submissions of the IUOE on reconsideration were not before the original panel; in particular, the IUOE did not argue that the Board was without jurisdiction either to apply the ten day rule with respect to these competing certification applications or to consider the appropriateness of the respective bargaining units. Second, Vertex objects to any assertions of fact where those facts were not advanced before the original panel; in particular, Vertex objects to evidence placed before this Panel by the IUOE which supports favouring craft units over wall-to-wall units.

42 In addressing the merits of the IUOE's application, Vertex argues first that the Board not only has jurisdiction to consider competing applications received within ten days of each other, but that as a matter of law and policy it clearly should do so. Vertex points to the Board's fundamental and exclusive jurisdiction to determine the appropriateness of a bargaining unit applied for, as well as its obligation to ensure that the employees truly support the applicant union. Vertex says when the Board interprets its jurisdiction in a "functional and pragmatic" way, taking into account the wording of the Code, the purpose of the statute, the reason for the Board's existence, the area of expertise of its members and the nature of the problems before the tribunal then it does have such jurisdiction: *U.E.S. v. Bibeault*, [1988] 2 SCR 1048 at p. 1088. Whether the bargaining unit applied for is appropriate for collective bargaining is a matter squarely within the Board's jurisdiction (see Sections 18(1), 21(1), 22(1), 23(1) and 139(i)). In addition, this is uniquely a labour relations question which is particularly within the Board's expertise: *Bibeault, supra*, at p. 1097. As a result, the Board has a very broad

scope to interpret the Code, as well as to fashion policies and practices which the Board views as relevant and useful to the determination of the appropriateness issue.

43 If the IUOE was correct that the Board lacks jurisdiction to consider the applications in this case, then the Board also has no jurisdiction to consider applications for substantially the same unit. The Board considers membership evidence equivocal when it receives competing applications because it does look at the second application; something it cannot do if the IUOE is correct in its argument.

44 Where competing applications for certification are received within a very short period of time, the Board, pursuant to its fundamental jurisdiction to determine the appropriateness of bargaining units, can and should examine the two bargaining units to determine whether one is in fact more appropriate than the other, using established principles such as those set out in *IML, supra*. In this case, one bargaining unit will not only permit substantially greater access to collective bargaining but also lead to greater industrial stability. It is therefore most consistent with the purposes of the Code and the requirement to determine the appropriate bargaining unit for the Board to prefer the larger bargaining unit.

45 Vertex says that there is nothing which mandates the ten day rule; the Board would be within its jurisdiction to choose any reasonable period of time. Consideration of competing applications allows the Board to ensure that both access to collective bargaining and industrial stability are maximized, as well as to ensure that the true wishes of the majority of employees are properly recognized. Where those applications are also competing in the "narrow" sense of applying to represent the same group of employees, the administrative remedy of a runoff vote is possible and appropriate. Vertex says the original decision is consistent with the Board's existing policy and jurisprudence: see, for example, *G.B. Mécanique Ltée*, BCLRB No. B196/94, (1994), 23 CLRBR (2d) 76.

46 Second, Vertex argues that there is no basis in either the Code or the Board's jurisprudence to prefer craft units over wall-to-wall bargaining units in the construction industry. Part 4.1 of the Code has nothing to do with the certification process, other than altering the raid periods; rather, it attempts to address problems in collective bargaining in the craft certified sector of the construction industry. Further, Section 21(2) deals only with the situation of a raid or an absorption of an existing certified craft unit into another unit, and has no application to the question of whether the craft unit should be certified in preference to a larger unit. Finally, the policy enunciated in *Cicuto, supra*, did contemplate circumstances in which a craft unit, which is an otherwise appropriate unit, could be rendered either inappropriate or less appropriate than an alternative, as in the case here.

(f) ICBA

47 ICBA argues that the Code has never mandated, either expressly or implicitly, a preference for one particular approach to representation in the construction industry; rather it has been left to be worked out within the industry. There is therefore no basis

in law or policy for preferring the craft unit where there are competing applications for certification. What the IUOE is attempting to do here is carve out a special status for craft unions in the construction industry, an approach which ICBA says is contrary to the law and policy of the Code.

48 ICBA says that if this situation occurred outside the construction industry, the Board would not grant the application that was first in time, even if a runoff vote was not required: *Teleflex, supra*. The Board would rule that in light of the competing application for a larger unit, the smaller unit is no longer an appropriate bargaining unit. The same result should apply in the construction industry. ICBA says that there is no sound legal or policy basis for creating an exception for craft unions. The Board is required to consider all of the circumstances at the time of the certification hearing, including applications received within ten days. ICBA says that there are good policy reasons for considering applications received within ten days. Certification hearings must be held within ten days. A competing application must be filed within that ten day period and prior to the hearing on the first application for the competing or second application to be taken into account.

49 ICBA says that the building trades unions are attempting to extend the legal rule enunciated in *Cicuto, supra*. In *Cicuto*, the Board held that an existing craft unit certification can only be absorbed into an all-employee unit if it is supported by a majority of employees in the craft unit. Now, the building trades unions are attempting to extend this principle beyond existing craft certifications to also include applications for certification of a craft unit that are filed shortly before an all-employee application. The result would be that the filing of a craft application for certification would preclude the Board from granting a subsequent all-employee application, unless a majority of the employees in the craft unit want to be included in the all-employee unit. An extension of the rule is not warranted, particularly in light of the comments in *Cicuto* regarding the Board's preference for large integrated bargaining units.

50 ICBA further argues that if the all-employee application is not allowed to proceed, the majority of employees who have applied for trade union representation on a wall-to-wall basis will effectively be denied access to collective bargaining. It will force the majority to bow to the wishes of the minority on the form of trade union representation, which is contrary to the fundamental tenant of the Code that the wishes of the majority govern the choice of trade union representation.

51 ICBA says that it is not an answer that the balance of the employees can apply for wall-to-wall representation. ICBA says this situation is inherently unstable. Open shops and craft units are not compatible. To say that these two traditional enemies have to co-exist with one employer makes no labour relations sense.

52 ICBA says it is incumbent upon the Board to assess which of the units applied for is most appropriate in terms of maximizing access to collective bargaining and industrial stability. The original panel was correct when it found that the appropriate unit in this case is the all-employee unit. ICBA says that the Board's standard policy that the larger

unit prevails makes sound labour relations sense. An employer should not have its workforce unnecessarily divided into different bargaining units.

53 ICBA says that two applications filed within ten days of each other impact on both membership support and the appropriateness of the bargaining unit. The Board cannot shut its eyes to the labour relations reality of a second application. That application must be considered.

54 Finally, ICBA says that IUOE's "hypothetical horrible" that the rights of trade unions will be improperly interfered with does not warrant granting an exception. The Board is able to deal with improper or illegal conduct on an individual basis under the Code.

(g) The GWU

55 The GWU says the Legislature and the Board have made it clear that there is no preference for one type of union certification over another; rather the Legislature and the Board have made it clear that there is an equal role for wall-to-wall and craft unions in the construction industry.

56 The GWU says that the debate about the advantages of craft unions versus wall-to-wall unions does not assist with the real issue before the Board; that is, what to do in the event of contemporaneous applications for certification, one filed by a craft union for a craft unit and the other filed by a union for an all-employee or wall-to-wall unit. The GWU notes that craft unions do sometimes apply for wall-to-wall units (for example, the Carpenters) and make poly-party applications.

57 The GWU argues that the ten day rule is a sensible way of dealing with contemporaneous or near contemporaneous applications and makes good labour relations sense. First, it avoids arguments about the implications of two applications that might be submitted within a few minutes of each other. Second, it addresses the issue of equivocal membership evidence created by competing applications.

58 The GWU says the Board's preference for larger bargaining units should apply equally in the construction industry as in the industrial sector; this does not create a preference for wall-to-wall unions versus craft unions, but rather a preference for larger bargaining units no matter which union may be applying. Certifying the application filed first in time means that within a few months another application for an all-employee unit would be filed with resulting disruption in the workforce. It makes more labour relations sense to process the application for the larger bargaining unit first if it includes the craft unit. The issue is not about craft units versus wall-to-wall units; rather it is about what the Board should do with two applications filed contemporaneously in time when they are for different types of units.

59 The GWU notes that the "mix and match" approach proposed by the building trades unions (i.e., that CLAC could apply for the remainder of the employees) makes no labour relations sense and leads to impractical results such as different raid periods

for the two groups of employees. The GWU says that the original panel's approach will not result in the elimination of the building trades unions. The present scenario is clearly the exception.

VI. ANALYSIS & DECISION

(a) Leave

60 As set out in BCLRB No. B31/99, the panel was satisfied that the grounds of appeal constituted a good arguable case and presented a serious question as to the correctness of the original decision: see *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), (1994), 20 CLRBR (2d) 44, 93 CLLC ¶16,043. Accordingly, leave to apply for reconsideration was granted.

(b) Merits of the Application

(i) The Board's Jurisdiction to Consider Contemporaneous Applications for Certification

61 The first issue we must address is whether the Board has the jurisdiction to consider two applications for certification filed contemporaneously, but not on the same date.

62 The original panel considered the approach used in *Dayross* (i.e., where certification applications for substantially the same unit are received within 10 days of each other, they will be treated as competing applications; both will be considered and a run-off vote will be held to determine the wishes of the employees). The panel then extended the *Dayross* approach to include certification applications for bargaining units in the same workplace, even where they are not for substantially the same unit and no run-off vote will be held.

63 The IUOE¹ argues the original panel erred by misapplying *Dayross*. It says the Board has no jurisdiction to consider a second application because the language of Section 23(1) is clear and mandatory: that is, where the Board is satisfied "on the date it receives an application for certification" that the union has the requisite membership support, and the unit is appropriate for collective bargaining, it "must" certify the union. The only exception is where a second application is received for substantially the same unit because it calls into question the membership evidence. At that point, the Board as the jurisdiction under Section 24 to order a representation vote to confirm the true wishes of the employees.

64 We accept the point made by Vertex that the arguments made by the IUOE before this Panel are more refined than those made to the original panel, possibly to the

¹ For ease of reference, we have not included the names of all the parties who make the arguments in question. Rather, we identify the argument by the party who first made it.

point of being new arguments. While the Board does not normally accept new arguments on reconsideration, we are prepared to do so in this case given the uniqueness of this case and, more importantly, the issue raised regarding the Board's jurisdiction: see *Westmin Resources Limited*, BCLRB No. B343/97 (Leave for Reconsideration of BCLRB No. B64/97).

65 The IUOE and others point to the Board's decisions in *Richmond Cabs, supra*, and *Portofino, supra*, as authority to support their argument. The Respondents rely on *G.B. Mécanique, supra*, and *Glennbrook, supra*, for the appropriateness of the ten day rule. We do not find any of these cases particularly helpful given the different circumstances (e.g., *Richmond Cabs* and *Portofino* did not involve competing applications for certification), and the lack of analysis on the issues before us. Indeed, the Board in *Richmond Cabs* specifically said that the issue of an all-employee application versus a single craft application for a smaller group of employees in the construction industry "is yet to be decided by the Board" (at p. 9).

66 Instead, we look first to the statutory language and then to the purposes of the Code. Our review of the overall legislative scheme, including both the language and the purposes, does not convince us that the language is as narrow or as restrictive as argued by the IUOE.

67 First, the language of Section 23(1) is capable of bearing more than the literal interpretation argued by the IUOE. According to Section 23(1), the Board must be satisfied: (1) "that on the day it receives an application" the trade union has the membership evidence; and (2) "that the unit is appropriate for collective bargaining". The fact that the two clauses are prefaced by "that" supports an interpretation that the review of membership evidence is keyed to the date of the application, but the review of appropriateness is not: see *Highland Valley Copper*, BCLRB No. B307/99, at para. 36.

68 Second, Section 23(1) is not the only provision which gives the Board jurisdiction to review appropriateness of a bargaining unit. Sections 18(1) and (2), 19(1), 20, 21(1), 22(1) and 23(1) all require the Board to determine appropriateness. Section 139(i) confirms that the Board has the exclusive jurisdiction to make that determination. Of all these statutory provisions, Section 23(1) is the only section which arguably establishes a time frame for the assessment of appropriateness.

69 Thus, the statutory language is not as unequivocal as argued by the IUOE. It is capable of bearing more than one interpretation. In considering which interpretation to apply, the Board must have regard to the policy considerations at play and adopt an approach which best meets the purposes set out in the Code.

70 The determination of an appropriate bargaining unit on an application for certification is at the heart of the Board's jurisdiction. The Code makes clear that whether a unit is appropriate for collective bargaining is for the Board to determine: see *Trans Air Ltd.* (1976), 67 DLR (3d) 421 (SCC). Indeed, determining the appropriate bargaining unit is arguably one of the most important decisions the Board is called upon to make. It is the linchpin which supports virtually every other decision of the Board:

supervision of the collective agreement, regulation of collective bargaining, monitoring labour disputes, and responding to efforts to change a union's certification through a raid or decertification. It also establishes the bargaining relationship between the parties. The parties are free to negotiate changes to that relationship in the years following certification, but they start with the bargaining unit as certified by the Board.

71 It is therefore of fundamental importance that the Board certify a unit which will be appropriate and viable for collective bargaining, and which is consistent with the purposes of the Code. Section 2(1) promotes the need to:

- (a) encourage the practice and procedure of collective bargaining between employers and trade unions as the freely chosen representatives of employees;

* * *

- (d) promote conditions favourable to the orderly, constructive and expeditious settlement of disputes between employers and trade unions;

72 Confining the Board's review to the actual date an application for certification is filed does not meet these objectives. Artificially selecting a specific moment in time as the definitive point at which to assess appropriateness also impairs the Board's ability to certify a unit which is responsive to the realities and needs of a functioning workplace.

73 Further, the IUOE's literal interpretation, if correct, has significant implications for more than just the consideration of competing applications for certification. It means, for example, that the *Dayross* rule would not apply to competing applications. The IUOE agrees that where two unions apply for substantially the same unit, the Board can consider the two applications because the membership support is rendered equivocal such that a vote must be ordered pursuant to Section 24 of the Code to determine the wishes of the employees. However, membership support can only be rendered equivocal if the Board has the jurisdiction to consider the second application. A literal interpretation of Section 23(1) prevents the Board from considering any events subsequent to the date of application.

74 Likewise, the Board could not apply the build-up principle. The Board applies the build-up principle where the proposed bargaining unit is not yet representative of the ultimate workforce, even though the applicant union has, on the day of the application, the requisite support and the description of the bargaining unit (e.g., "all employees") is otherwise appropriate. The IUOE says the Board is restricted, in its review of the appropriateness of the unit, to the date of the application. If so, the application must proceed even though the employee complement does not reflect the true nature of the workplace, and the majority of the employees will be bound by the choice of the few.

75 A further example of a policy which may be called into question by the IUOE's argument is the Board's practice on certification applications of excluding employees from the proposed bargaining unit, and therefore not allowing them to vote, where they

are employed on the date of the application but will not be working shortly thereafter: *Surtek Industries Inc.*, BCLRB No. B109/95 (Leave for Reconsideration of BCLRB No. B346/94), (1995), 27 CLRBR (2d) 64.

76 When we read the words of the Code in their entirety and consider the purposes of the Code, we find no sound reason to confine the Board's consideration of appropriateness to a specific day with no flexibility to consider subsequent events which may impact on its assessment. Events subsequent to the date of application will therefore continue to be considered by the Board. Consistent with the Board's approach to date, this review will continue to be carefully circumscribed. If subsequent events are to be considered, they must be sufficiently immediate or imminent at the time the application is received: see, for example, *Surtek Industries, supra*; *Highland Valley Copper, supra*.

77 Thus, where one application for certification is received, the Board will normally address appropriateness based on the day the application is received. However, as in *Dayross*, the Board will continue to consider two applications where they are filed contemporaneously and are for substantially the same unit. The term "contemporaneously" was defined by the Board in *Dayross* as received within ten days.

78 We heard argument from CLAC that there is no need to maintain the ten day time frame. Instead, CLAC argues that the Board should consider all applications for certification filed up to the time the certification is issued. We do not agree. The ten day time frame in *Dayross* reflected the statutory scheme of the day which required a vote of employees within ten days of receipt of an application for certification. The requirement for a certification vote on every application has been deleted from the Code, but as a matter of policy, the ten day window has been maintained: see, for example, *Glennbrook Contracting, supra*; *G.B. Mécanique Ltée, supra*; *Marriott Corporation of Canada Ltd.*, BCLRB No. B269/94. It is consistent with the Board's normal practice of scheduling hearings for applications for certification within ten days of their receipt and is consistent with the requirements of the Code that where a vote is required, it must be held within ten days (Section 24(3)). It also provides certainty and finality to the process of certification, both of which are important objectives, and it minimizes the potential for manipulation or unfair labour practices. Accordingly, we confirm that "contemporaneously" will continue to be defined as received within ten days. Thus, if a second application is received contemporaneously with the first, it is an event sufficiently immediate or imminent such that it should be considered.

79 Based on this analysis, the Board has the jurisdiction to consider not only competing applications for certification filed for substantially the same bargaining unit (per *Dayross*), but also competing applications received generally for the same workplace. In either case, the second application, providing it is filed contemporaneously, is an event sufficiently immediate or imminent that it should be considered with the first. Thus, we confirm that the Board has the jurisdiction to consider applications for certification for the same workplace where they are received within ten days of each other or prior to the date the certification is issued, whichever occurs first.

(ii) Applicable Principles on Competing Applications for Certification

80 Returning to our review of the original panel's decision, we find therefore that the original panel did have the jurisdiction to consider the applications filed by the IUOE and by CLAC, because they were filed contemporaneously and were for the same workplace. The next issue is whether the original panel erred in processing the second application first, given that it was for an all-employee unit rather than a craft unit. To answer this question we need to review first how applications are processed generally and then consider how applications should be processed in the unique setting of the construction industry.

81 The Board's general approach to appropriateness is set out in *IML, supra*, where the Board revisited and confirmed its preference for all-employee units. In doing so, it recognized two important principles as guiding the Board's approach to the determination of appropriate bargaining units: (1) ensuring access for employees to collective bargaining; and (2) minimizing the potential for labour relations instability. Within this framework, the Board will certify a less than all-employee unit providing that a rational and defensible line can be drawn around the proposed unit. This approach anticipates that the balance of the employees who choose to organize will be represented by the same union through a variance of the existing unit. There is a presumption against a second or additional bargaining unit given the axiomatic potential for industrial instability with additional units. Thus, a union applying for a second unit in the same workplace must overcome the presumption against additional bargaining units.

82 The Board has not had extensive experience with competing applications filed contemporaneously where they are not for the same bargaining unit. There is therefore little case law to offer guidance on this point. One decision, *Teleflex, supra*, did consider competing applications filed in similar circumstances. In *Teleflex*, the CAW applied first for a smaller production unit. Seven days later, CLAC applied for a larger all-employee unit. The panel ordered a vote of the employees given "the general equivocation in the choice of trade unions which seemed to have manifested itself" in the proceedings, and the panel's objective of ensuring that "at the end of the day, the employees express their true feelings on these matters" (para. 9). The panel ordered that the vote be conducted in the all-employee unit, even though that application was received seven days after the application for the production unit was filed. The decision provides a pragmatic solution to a complex problem and the analysis is not extensive. Nevertheless, the panel offered two reasons for proceeding the way it did: first, application of the Board's preference for all-employee units and, second, administrative efficiency of processing the larger unit first. As set out by the panel:

...I ruled that the filing of CLAC's all-employee unit application did not automatically result in the dismissal of the smaller production unit applications. However, I noted that larger unit applications which meets [sic] the Board's requirements in keeping with *Island Medical Laboratories Ltd.* ...will encompass a smaller unit and be preferred. If a certification issues for that larger unit, it results in the

cancellation of the certification for the smaller unit. That was one of the possible results in this case as well. But, given that I had all of the applications before me, it would make little sense to proceed with the production unit, on a first in, first out basis, as urged by CAW, only to cancel it if CLAC's all-employee unit application was to be ultimately successful. (para. 12)

83 Although the analysis in *Teleflex* is brief, it does accord with the principles of *IML*. We confirm that for the policy reasons set out in *IML* and in the interests of administrative efficiency, the *Teleflex* approach will normally be followed where competing certification applications are received; that is, where competing applications are received for bargaining units in the same workplace, the Board will process the application for the larger bargaining unit first.

(iii) Applicable Principles on Competing Applications for Certification in the Construction Industry

84 Having confirmed the Board's approach to competing applications for certification in most workplaces, the next issue is whether the original panel erred in applying the *Teleflex* approach to the construction industry.

85 This was a case of first instance. For the first time, the Board was faced with the issue of how it should process an application for certification in the construction industry where two (or more) applications are filed contemporaneously and one is for a craft bargaining unit while the other is for an all-employee unit. On one hand, the IUOE argues that the original panel erred in applying the Board's preference for all-employee units and the principles set out in *IML* to the construction industry. On the other, Vertex and CLAC argue that the original panel correctly preferred the application for the all-employee unit over the application for the smaller craft unit. Consistent with *IML*, they say the approach used in *Teleflex, supra*, should be applied in the construction industry. To answer this question it is necessary to understand the specific nature of the construction industry and examine why it differs from the more typical industrial workplace.

(iv) The Nature and History of the Construction Industry

86 We turn then to a brief review of the construction industry. Historically, the construction industry has been considered to be unique, warranting policies tailored to meet its special needs. For example, policies specific to the construction industry have been developed by the Board for non-affiliation clauses (*R.M. Hardy & Associates Ltd., supra*); employee status on a certification application (*B.A.T. Construction Ltd.*, BCLRB No. B444/94 (Leave for Reconsideration of BCLRB Nos. B102/93 & B178/93), (1995), 25 CLRBR (2d) 1); raids (*Cicuto, supra*); and the scope of the craft unit (*Houston Construction Ltd.*, BCLRB No. 116/85).

87 Traditionally, what has made the construction industry unique is the nature of the work and the role of the craft unions in supplying the labour to perform that work. Twenty-five years ago, craft unions were dominant. Consequently, the face of the

construction industry was very different from most workplaces as described in *R.M. Hardy*:

The typical construction project involves erection of a single, large, permanent structure at a fixed location. Thus, the production rhythm in construction differs markedly from the manufacturing industry: where the employees all work together at one location, at one time, in one integrated operation, mass producing goods which are sold for use elsewhere. Construction remains a *quasi*-handicraft industry. In order to secure some of the virtues and economies of the division of labour, there has developed a complex network of actors, each specializing in some segment of the operation. The owner is the client, the purchaser of the new structure. It hires an architect and/or an engineer to design and oversee construction. The overall contract is put out for bid by a general contractor which does much of the basic work itself and manages the entire construction process. In turn, the general contractor subcontracts skilled technical work - such as electrical, plumbing, or painting - to trade contractors who come on site to make that specific contribution to the undertaking. Construction workers exhibit the same variety of specialized skills and tasks, which are required at different phases in the project. The normal working pattern is for tradesmen to come to the project site to perform the function required of them and, when they are finished, to go on to another project at another site.

Most of the workmen in the construction industry are skilled tradesmen, usually having obtained tradesmen's qualification certificates after years of apprenticeship. Each of the distinctive trades has its own craft union, which may have a century-old tradition of representing its members in collective bargaining with the contractors who employ members of that trade. But most building trade unions have another role besides the customary representation of employees in collective bargaining: the hiring hall function. The reason is the highly cyclical nature of employment in the construction industry stemming both from the rhythm of individual projects and the intermittent and erratic pattern in which major construction investments are brought on stream. In response to that pattern, contractors - whether general or specialty contractors - normally do not maintain a regular work force. They may retain a nucleus of key employees, but the bulk of their workmen are recruited as and when they are needed for a specific project for which the employer has obtained a contract. Where do they get these tradesmen? Through the union which represents that craft. The union office keeps a list of available tradesmen; the contractor phones the union office for certain kinds and numbers of workmen; and the crew is then dispatched through the union hiring hall to the job site. In effect, the trade union performs the basic personnel function in the construction industry, by allocating jobs among the members of the work force. Any one tradesman may be employed by a number of contractors in a number of areas in any

one year. Besides paying the immediate take-home wages to the tradesmen on the job, the contractor also forwards directly to the union hourly contributions for health and welfare, vacation, and pension benefits, and these funds are administered by the union for its members. And the consequence is that the primary and enduring relationship in construction is between craft unions and tradesmen-members, not between employer and employee. (at pp. 365-366)

88 The Board went on in *R.M. Hardy* to record that a number of players, (e.g., the owner, general contractor, sub-contractor, etc.), were required on any construction project. Given the nature of craft unions, a number of crafts, usually employed by different contractors, were also required. Each player and each craft was seen as performing a necessary function in a single integrated operation, the construction project. Relations between the various craft unions were coordinated and managed by the Building Trades Council. Protection against non-union or non-affiliated unions was enforced through non-affiliation clauses (i.e., a clause in each collective agreement which gives the union the right to refuse to work with non-union employees or those represented by a non-building trades union).

89 The result, in the days of *R.M. Hardy*, was a choice. Owners, contractors and employees had to choose between working on a building trades union project or a non-union project. There was no mixture of the two: *R.M. Hardy, supra*, at p. 368. Thus, when employees chose to belong to a craft union, their membership offered more than just a card to a particular union; it offered participation in the overall craft union structure.

90 A Construction Review Panel, composed of Stephen Kelleher, Q.C. and Stan Lanyon, Q.C. undertook a comprehensive review of the industry in 1997, and issued a report which reviewed the state of construction in this province and made a number of recommendations for change (the Kelleher/Lanyon Report). In a fact sheet accompanying the report, the authors reaffirm the complex and unique nature of the construction industry, two of the dominant features being its project nature and the specialized competitive structure in which it operates. They also confirm it continues to merit "separate consideration" in the Code.

91 The authors confirm that a typical construction project continues to be of a fixed duration requiring an array of skilled workers who may only be active on the project for a short duration. The work is seasonal and cyclical. Workers usually work for a number of employers over a short period of time, and many employers may be dormant for long periods of time and have only a few employees when operating.

92 The authors also recognize that the construction industry today has changed significantly from the past, both in terms of the technology and methods of work, and the complexity of contractual and financial relationships. The authors note that the industry today is highly competitive. All companies, whether union or non-union, are subject to the same bidding process and market forces. The construction contractor must quickly adapt to new materials and techniques in order to remain competitive. The efficiency of

a contractor is reflected in its ability to obtain and shift needed resources for the job. The special skills required must be assembled for each project. The location, materials used and design of projects ensure that no two construction projects are exactly alike. Resources are continually being assembled and disbanded as projects are started and completed.

93 Perhaps as a result of the competitive and evolving nature of the industry, it is clear that the *R.M. Hardy* notion that a construction site will be either union or non-union is no longer the case. As the building trades unions confirmed before us, building trades unions now work alongside non-union companies and companies with wall-to-wall unions on a regular basis without enforcing their non-affiliation clauses (i.e., the so-called "mixed bag" worksite).

94 Although this was a case of first instance, it is not the first time the parties have debated how the industry should operate given the Board's policies and the nature of the industry. In *Cicuto, supra*, the Industrial Relations Council decided a number of important questions that were troubling the construction industry in the mid to late 80's. The decision was significant and several of the determinations made in *Cicuto* form the foundation of our decision. They are therefore worth repeating:

1. Craft unions are a valuable and well established part of the construction industry. Craft units which bear the standard unit description are *prima facie* appropriate (at pp.80, 81 and 94).
2. Given the problems unique to the construction industry, each case must be assessed on its merits; nevertheless, all-employee units are also appropriate in the construction industry:

We know that craft units have been appropriate in construction, having been used for many years as a collective bargaining structure through which to accomplish the objectives of the Act. We also know that all-employee units can be appropriate in construction because they too have been granted and have existed for many years in British Columbia and in other provinces, at least on a limited scale. (at p. 90)

The argument that the only appropriate bargaining unit or the preferred bargaining unit in the construction industry is a craft unit was rejected.

3. Craft unit certifications have a measure of protection not afforded other types of certifications (at p. 78). Section 21(2) (as it now is) requires that a union seeking to represent a bargaining unit which includes an established craft unit can only absorb the craft unit if it has both the requisite support in the larger unit and majority support in the craft unit.
4. The Board's longstanding preference for large integrated bargaining units is "alive and well in the construction setting", recognizing that the considerations

underlying this preference "must be tempered with other considerations which are unique in the construction environment":

The preference for large integrated bargaining units is alive and well in the construction setting; however, it is only one of many considerations and it is not an immutable law. This preference cannot be applied to the sacrifice or distortion of other labour relations considerations which are unique in the construction environment. (at p. 94)

* * *

An "appropriate bargaining unit" is a dynamic notion and we reject any proposition that what was an appropriate unit in the past in the construction industry is necessarily still appropriate. Among the many forms of bargaining unit descriptions that have been drawn and redrawn, perhaps the most constant is the "all-employee" version. While we disagree with the proposition that it is the "perfect" unit, long experience has shown that it is the form which is the best vehicle through which to deliver the objectives of the Act. Anything less than a broad-based all-employee unit is a compromise which requires drawing much finer distinctions between competing interests. (at pp. 89-90)

5. The Board's aversion to fragmenting larger bargaining units means that a craft union will not normally be able to "raid back" or "carve out" its own craft unit from a larger all-employee unit (at pp. 103, 106).²

95 The *Cicuto* decision reinforced the uniqueness of the construction industry. The result of the *Cicuto* decision was a confirmation that there are two appropriate models of representation in the construction industry: the craft union model and the all-employee model. The longstanding craft unit structure allows crafts to separately represent their own constituency, and to collectively offer representation through the building trades unions to the site and workplace as a whole. Also appropriate is the wall-to-wall or all-employee bargaining unit, where individual unions also offer representation to the workplace as a whole. The two offer very different structures for representation and bargaining, but both are appropriate. Finally, *Cicuto* confirmed that the Board's longstanding preference for large integrated bargaining units co-exists with these two models of representation. The result is that the Board's longstanding preference for all-employee units does apply in the construction industry, but it does so in a way which recognizes and is compatible with the dual models of representation which co-exist in the construction industry.

² We note that the building trades unions did argue before the Construction Review Panel that the Board's policy which does not permit a craft union to raid one part of a all-employee unit should be changed; however, that submission was not accepted (Kelleher/Lanyon Report, at p. 14).

96 While the *Cicuto* panel squarely faced and decided several critical issues of the day, it stopped short of determining what would happen in the event that competing applications by a craft union and by a generic or wall-to-wall union were filed on the same day or contemporaneously.

97 Since the decision in *Cicuto*, there have been two important and highly relevant events. First, recognition that both types of units are appropriate in the construction industry was confirmed in the Kelleher/Lanyon Report. There, the authors again specifically rejected the submissions made by the building trades unions that the most appropriate bargaining unit in the construction industry should be the craft unit. Without the reservation expressed in *Cicuto, supra*³, they unequivocally affirmed the *Cicuto* approach:

Two models of trade union representation currently exist within the construction industry in British Columbia. We view both these models as legitimate and believe that choice should rest with employees. (at p. 19, see also p. 18)

98 Second, the Kelleher/Lanyon Report led to a number of legislative changes in 1998: see Part 4.1 of the Code. By accepting the recommendations of the Kelleher/Lanyon Report, the Legislature affirmed the unique character of the industry. However, we do not see the recent legislative amendments as deviating from the principles established in *Cicuto* and affirmed in the Kelleher/Lanyon Report. Consistent with the tone of the Report, the amendments provide a bargaining structure for the certified craft ICI construction sector by putting in place exclusive bargaining agents in the certified ICI construction sector for both employers and the craft unions; covering all building trade union contractors and their construction employees by the standard collective agreements negotiated; and requiring that strikes and lockouts in the ICI sector occur only where the majority of the employees or employers agree. The amendments offer a measure of stability for the craft unions; they do nothing to interfere with the notion that there are two valid models of union representation in the construction industry, the craft union model and the wall-to-wall union model, both of which are appropriate.

99 Before leaving our review of the industry, we note that, in the *Cicuto* proceeding, the building trades unions argued vigorously against all-employee units, saying that they would lead to the demise of the craft structure. The building trades unions continue to make the same arguments before this Panel. They say, for example, that the original decision will open the way for abuse as employers "dial a union of convenience".

100 The argument that allowing wall-to-wall units in the construction industry will pose a serious threat to the craft unions and the considerable benefits they bring to the construction industry (such as benefit plans, apprenticeship training, contribution to specialized training, etc.) was considered and rejected by the *Cicuto* panel (see p. 104).

³ See point 2 in paragraph 94 above

We have no evidence before us that the decision in *Cicuto* regarding wall-to-wall units has dramatically changed the landscape in the construction industry to the detriment of the craft unions. The construction industry has changed significantly in the intervening years since *Cicuto*, but certain features of union organizing in the construction industry have not. The Kelleher/Lanyon Report contains statistics which show that between 1988 and 1996, contractors with a bargaining relationship with the building trades unions dropped from 40% to 27% of the construction industry payroll. However, the Report also shows that for the same time period the industrial-style bargaining unit structure only increased from 2% to 4% of the industry payroll. The difference was due not to the wall-to-wall units, but to the "substantial increase" in the non-union sector which grew from 57% to 69% of the industry payroll. Thus, in 1996, contractors whose employees were represented by craft trade unions made up 27% of the industry; contractors whose employees were represented by wall-to-wall unions were 4% of the industry; and the remainder (two-thirds) were non-union (at pp. 7-8). The growth of the non-union sector is therefore a significant challenge for the unionized construction sector. We agree then with the findings in the Kelleher/Lanyon Report that the answer is not promoting the craft structure over the wall-to-wall structure. We add that concerns about improper interference with a craft union's organizing drive will continue to be addressed through the unfair labour practice complaint provisions: see, for example, *Harbour Electric, supra*.

101 The building trades unions also argue before us that craft unions are superior to wall-to-wall unions, given their record of training and apprenticeship opportunities. The IUOE put before this Panel evidence which it said supported its argument. A reconsideration is normally not the appropriate forum for new evidence and we have not considered it in this case. However, we do accept that craft unions have made and will continue to make significant contributions to the industry. Again, however, that issue was squarely addressed in the Kelleher/Lanyon Report (as it was by the *Cicuto* panel). Both forms of representation were determined to be appropriate. The Kelleher/Lanyon Report specifically rejected a proposal from the building trades unions to specify that the most appropriate unit within the construction industry should be a craft unit (at p. 18). The *Cicuto* panel said "there are no compelling labour relations reasons ... to lend support to an effort to hold back the tide of change" (at p. 99). Today, we are of the same view.

102 If the building trades unions are concerned that wall-to-wall unions pose a threat to their continued survival, there are a number of options available to them including all-employee units or poly-party units. As early as the Board's decision in *R.M. Hardy* and as recently as the original panel's decision, the Board has repeatedly pointed to the need for craft unions to work together in order to ensure greater integration and a common and coordinated approach to the challenges facing both the industry and craft unions: *R.M. Hardy, supra*, at p. 367; *Cicuto, supra*, at pp. 92, 95-96; original decision, at para. 25. The industry has evolved and will continue to do so. The non-union sector continues to be a significant competitor for the same work. The Legislature has, through Part 4.1 of the Code, provided a measure of stability for certain components of the construction industry represented by craft units. It is now up to the building trades

unions themselves to strengthen and improve their position in the industry using the options available.

(v) Application of the Principles to the Case at Hand

103 Against this backdrop, we turn to the case at hand and consider how the two applications should proceed in light of these co-existing principles; that is, the longstanding recognition that the craft and all-employee structures are both appropriate, and the Board's historic preference for all-employee units. What do we mean when we say that the Board's preference for all-employee units applies in construction but it does so in a way which recognizes and is compatible with the dual models of representation? Was the original panel correct when it applied the *IML* principles without specifically recognizing the nature of the industry and the dual models of representation?

104 The arguments of the parties are of limited assistance in this regard. On the one hand, the IUOE argues we are bound by *IML* which it says exempts the construction industry from the preference for all-employee units. It says the original panel therefore erred in considering *IML* at all. However, we do not agree that the Board went so far in *IML* as to exempt the construction industry from its long standing preference for all-employee units or the *IML* principles of appropriateness. Consistent with the findings in *Cicuto, supra*, the Board did confirm in *IML* that craft units in the construction industry are exempt from the initial community of interest assessment based on the four *IML* criteria: similarity and skills, interests, duties and working conditions; the physical and administrative structure of the employer; functional integration; and geography. *Cicuto* establishes that craft units which comply with the standard bargaining unit descriptions are *prima facie* appropriate. Accordingly, there is no need to consider the first four *IML* criteria to determine whether craft units are appropriate. That decision has already been made.

105 We do not read *IML* as providing any further exemption for the construction industry. The brief reference to the construction industry (i.e., at pp. 177 & 182) cannot be read as saying the Board's preference for all-employee units stops short at the gates of the construction industry. Concerns about access to collective bargaining and industrial stability are as applicable to the construction industry as they are to other workplaces. The importance of these two principles is illustrated in this case where the smaller craft unit could be certified and the certification for the larger unit could be dismissed. The vast majority of employees would arguably be denied access to collective bargaining through the union of their choice. Should the balance of the employees seek certification through a non-craft unit, the concerns regarding industrial stability may well be raised by the Employer and perhaps the incumbent union. Thus, the *IML* principles apply in construction, for the same reasons they do outside construction, but they apply in the context of this unique industry and in a way which recognizes the dual models of representation. What that means will depend on the circumstances of each case and the interests at stake. For example, for the reasons set out below, the interests or concerns will be different in an initial application for certification than on a second application for certification or a "raid back".

106 On the other hand, the Respondents argue that the Board should follow its typical approach to competing applications, as illustrated in *Teleflex* and applied by the original panel, and proceed first with the all-employee application. However, we do not agree with the original panel that the *Teleflex* rationale applies in this case. First, *Teleflex* applied the *IML* preference for an all-employee unit but it did so outside the construction industry, with no consideration of how the *IML* principles co-exist with the dual models of representation. Second, unlike in *Teleflex*, CLAC would not be able to immediately apply for an all-employee unit if the IUOE was certified. It would face two hurdles not present on applications outside the construction industry: (1) it would be required to wait six months⁴; and (2) it would need majority support in the craft unit that had been certified. Accordingly, the option of processing the larger unit first based on administrative efficiency is not available in this case.

107 The Respondents also argue that the Board's preference for all-employee units should be the governing factor in this case. In and of itself, the argument that an all-employee unit is more responsive to the wishes of the employees may be compelling, particularly in this case, where certification on a "first in time" basis will give twenty-some employees access to collective bargaining through the union of their choice, at the expense of the remaining 140 employees. Certainly, that argument would be persuasive outside the construction industry.

108 However, the argument fails to appreciate the concept of the craft structure in construction. This is not an application brought by a union which can represent only a small number of employees and in the process disenfranchise the balance of the employees. The IUOE's application offers representation to twenty employees through one component of the craft structure. The balance of the employees are free to seek representation through the other components of the craft structure. Indeed, an application for certification has been filed by the Carpenters to represent their craft unit in this workplace. It is true that the IUOE craft application is for a relatively small group of employees. However, the balance of the employees are not without options. It is open to them to apply for certification through the craft union structure. That structure is different from the all-employee structure. It is based on component or craft collective agreements, jurisdictional plans, non-affiliation clauses, etc. But it too offers representation to the employees at that workplace. The same thing would happen if the Teamsters were certified to represent a less than all-employee unit in an industrial workplace. The balance of the employees have the option of seeking representation

⁴ A raid in Section 21(2) of the Code modifies the general raid provisions in the Code to recognize as a "raid" a form of application that would not otherwise be treated as such: see *Cicuto, supra*, at pp. 83-84. The result is that where a union seeks to absorb an existing craft unit into its proposed bargaining unit, the application is a raid. The raiding union must therefore satisfy the Board that it has as members in good standing not less than 45% of the employees in its proposed unit who are not represented by the craft union(s), and that it has as members a majority of the employees in the existing craft unit(s). Further, the application must be brought when it would fall within the time periods specified by the Code. In the circumstances where no collective agreement is in force, either six months must have elapsed since the date of certification or the Board must have consented to an application before the expiry of six months: see Sections 18(2)(a) and (b).

through the incumbent union. The Board has repeatedly said that employees are entitled to seek trade union representation, but not necessarily through the union, and it follows the structure, of their choice.

109 Thus, both models offer representation to the employees as a whole. That approach has been in place for several years. To now accept the argument that the Board's preference for all-employee units should automatically prevail, would be to fly in the face of *Cicuto*, the Kelleher/Lanyon Report and the implicit acceptance by the Legislature of the Kelleher/Lanyon approach. All three have, explicitly or implicitly, considered and rejected the argument that the craft structure should be given preference over the all-employee structure. Likewise, none have found that all-employee units are to be preferred. Instead, both models continue to be appropriate. Accordingly, we do not see it as our role to now interfere with and change the dual model of representation in the construction industry: see *Cicuto, supra*, at pp. 68-69.

110 The result is that in the general workplace, *IML* applies and all-employee bargaining units are preferred. Accordingly, in the general workplace an application for the larger bargaining unit will be preferred over the application for the smaller unit. However, in the construction industry both models are appropriate and there is no persuasive reason to prefer one application or model of representation over the other on an initial application for certification. Each application, considered separately or in isolation from the other, is for an appropriate bargaining unit. Neither disenfranchises employees. Neither results in industrial instability. It follows that if the two models are both appropriate, if both offer access to collective bargaining for all employees and if neither raises concerns about industrial stability, then the applications should be processed on a "first in time" basis regardless of the size of bargaining unit sought. In this case the IUOE's application was received first and it should therefore have been processed first.

111 As noted, the remaining employees can seek representation through other components of the craft structure. Can they also pursue representation through a non-craft union, such as CLAC? Certainly, the Building Trades Council argues that if the IUOE is certified for its standard bargaining unit, the balance of the employees could seek representation through CLAC. It says CLAC can apply to amend its application, to represent the balance of the employees not represented by the craft unit.

112 It is possible that if the IUOE is certified to represent its craft, the balance of the employees could seek representation through CLAC, or another generic union. However, as we have said, the Board's preference for all-employee units continues to co-exist with, and be applicable to, the concept of two models of representation in the construction industry. Application of the *IML* principles in this context means that if a union other than a building trades union applies to represent a second unit at this workplace, it would have to overcome the presumption against a second unit. This case provides an example of why there is a presumption against a second unit. There is the axiomatic potential for increased labour unrest including whipsawing, increased strike and picketing activity, etc. There will also be the increased cost that comes with administering more than one collective agreement. Further, the collective agreements

will have different terms; there will be no jurisdictional plan in place to resolve jurisdictional disputes; and the craft union will have, in its collective agreement, the right to exercise a non-affiliation clause.

113 Indeed, the Board dismissed as inappropriate precisely this type of an application brought by CLAC for a "tag end" group of employees following the certification of two craft units, on the grounds that the unit applied for was inappropriate even though the craft unions had waived the exercise of their non-affiliation clause: *G.B. Mécanique*, BCLRB No. B476/94 (Leave for Reconsideration of BCLRB No. B394/94). The Board held it would not certify "a checkerboard of bargaining units with the Employer consisting of craft units and a fragmented, all-remaining employee unit" (at p. 3).

114 We are not saying that this potential for instability will materialize in every case and it is therefore impossible for the two models of representation to co-exist with the same employer. While *IML* establishes a presumption against a second unit, that presumption can be overcome. We note the assurance made by the building trades unions that currently there is stability in the industry such that a CLAC application for a second unit could succeed. We therefore do not find that such a certification will never be issued, only that the *IML* principles will be applied if a non-craft union applies for certification in a workplace already represented by a craft union.

115 Finally, we note that the all-employee application may have an impact on the craft application, even though the craft application will proceed first. The Board does have a statutory obligation, under Section 23(1), to verify a trade union's "claim" that it has requisite support for its application. If a second application is received contemporaneously with another application, it may call into question the wishes of the employees. For example, the CLAC application may well include majority support from the group of employees which the IUOE seeks to represent. If so, the Board may exercise its jurisdiction under Section 24, and order a vote to verify the wishes of the employees covered by the craft application.

116 To briefly summarize our analysis and findings in this case, we conclude the original panel erred in determining that the CLAC application should be considered before the IUOE application which was filed first in time. While that approach is consistent with the *IML* principles, it failed to consider the specific nature of the construction industry and, in particular, that there are two models of representation in construction, both of which are appropriate. Outside construction, all-employee units and less than all-employee units may both be appropriate. Either may be certified, providing it is an appropriate unit. Where competing applications are filed contemporaneously, the application for the larger unit will be preferred and processed first given the concerns regarding access to collective bargaining, industrial stability and administrative efficiency. The *Teleflex* case is an example of the practical application of these principles.

117 In the construction industry, however, both craft units and all-employee units are appropriate. Because both structures offer access to collective bargaining and neither raise concerns about industrial stability on an initial application for certification, there is

no reason to prefer one application over the other on an initial application for certification. Further, the consideration for administrative efficiency (as in *Teleflex*) does not apply in construction. The result, in this case, is that the IUOE application should have been processed first.

118 Once the initial application is granted, the interplay between these co-existing principles changes. The Board's preference for all-employee units, and the policy considerations on which the *IML* principles are based, means that there is a presumption against a non-craft unit being certified where a craft unit is already in place. It also means that a craft union cannot "raid back" on an all-employee unit. In both cases, the concern regarding the potential for industrial instability means that the Board's preference for all-employee units will apply. In this way, the principles of the preference for all-employee units and the dual models of representation co-exist in the construction industry.

VII. CONCLUSION

119 For the reasons outlined above, the IUOE's application for reconsideration is allowed and the original decision is set aside. The case is remitted back to the original panel to consider the two applications afresh in light of the principles set out in this decision.

LABOUR RELATIONS BOARD

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