BCLRB No. B146/94

(Leave for Reconsideration of B193/93)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

SLOCAN FOREST PRODUCTS, VAVENBY DIVISION

("Slocan")

-and-

INTERIOR FOREST LABOUR RELATIONS

("IFLRA")

-and-

FOREST INDUSTRIAL RELATIONS

("FIR")

-and-

COUNSEL OF NORTHERN INTERIOR FOREST EMPLOYMENT RELATIONS

("CONIFER")

-and-

INTERNATIONAL WOODWORKERS OF AMERICA

(the "IWA")

-and-

TEAMSTERS LOCAL UNION NO. 213

(the "Teamsters")

PANEL: Stan Lanyon, Chair
Richard S. Longpre, Vice-Chair
Keith Oleksiuk, Vice-Chair

COUNSEL: Frances R. Watters, for Slocan
Thomas Roper, for the IFLRA
Gavin Hume, for FIR
Gary Catherwood, for CONIFER
J. Miriam Gropper, for the IWA
Edgar Norman, for the Teamsters

CASE NO.: 15925

DATE OF HEARING: November 22 and 23, 1993

DATE OF DECISION: April 12, 1994

DECISION OF THE BOARD

I. INTRODUCTION

This matter involves an application by Slocan for reconsideration of BCLRB No. B193/93. In that case the applicant Teamsters successfully applied under Section 28 for a stand-alone unit of dependent contractors. The issues before the original panel were set out in its decision as follows:

> 1. Does the Code require the applicant to establish that the stand-alone unit applied for is more appropriate than a variance into the existing IWA bargaining

unit?

2. What criteria should the Board apply when determining whether inclusion of the dependent contractors into the existing IWA unit would result in a unit more appropriate for collective bargaining?

3. Would inclusion of the dependent contractors in the existing IWA unit be more appropriate for collective bargaining? (p. 2)

The original panel granted a stand-alone unit to the Teamsters.

The decision was of considerable importance to the forest industry which routinely employs dependent contractors to haul logs from the forest to the mill. Accordingly, the panel granted intervenor status to FIR, IFLRA, and Conifer.

The original panel's decision was issued on June 25, 1993. Slocan filed its appeal on July 7, 1993. The final reply submission was filed August 25, 1993. The reconsideration Panel set the matter down for a hearing which was scheduled for November 22 and 23, 1993. On September 21, 1993, the Board issued *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. That decision represents a comprehensive review of certification principles; a review that had not been undertaken to this extent since *Insurance Corporation of British Columbia,* BCLRB No. 63/74, [1974] 1 Can LRBR 403. The instant decision addresses Section 28 in light of the principles set out in *Island Medical Laboratories*.

II. ORIGINAL DECISION

The facts can be reviewed briefly. The IWA is certified for a unit composed of "employees in the logging and sawmill operations...except office staff, sales staff, foremen, and those above the rank of foreman" employed by Slocan. The Teamsters applied for a unit of dependent contractors described as "log haulers from the Vavenby Division, Slocan Forest

Products Limited". Prior to the original hearing the parties agreed the log haulers were outside the IWA's bargaining unit. There was no dispute that the Teamsters had sufficient membership support. As we note in our introduction, the issue before the original panel was the appropriate test to be applied in the case.

Before the original panel the Teamsters argued that they need only establish that the proposed bargaining unit was appropriate for collective bargaining. They argued the unit was appropriate because of the "distinct community of interest arising from the [dependent contractors] historical exclusion from the IWA bargaining unit and their unique working conditions and needs" (p. 7). Further, the Teamsters noted the IWA's failure to organize these employees in the past.

Slocan argued that the Teamsters had to establish that a stand-alone unit was more appropriate than a variance of the existing IWA unit including the dependent contractors. It relied particularly on the importance of industrial stability in the forest industry. That stability, it argued, would be adversely affected by a second unit of employees at the Vavenby Division. Slocan argued the IWA was under no onus to prove it could organize the dependent contractors or that reasonable procedures were in place to integrate them into the IWA bargaining unit. Slocan also argued that the language of Section 28(1)(b) of the Code elevated the *ICBC* principles to a presumption favouring all employee bargaining units.

The IWA supported the arguments advanced by Slocan.

III. ORIGINAL PANEL'S DECISION

The original panel concluded it need not address the issue of onus. It noted that the parties agreed that the inclusion of the dependent contractors in a stand-alone unit was appropriate. It then turned to the issue at hand: whether varying the dependent contractor into the IWA's bargaining unit was more appropriate than the Teamsters' proposed unit.

The original panel's analysis began with a review of the principles in *Insurance Corporation of British Columbia, supra*. Specifically, that original panel noted "the virtues of an

all employee unit, although significant, are not compelling" (p. 12). The original panel framed the issues as follows:

> This Panel must decide whether the distinct interests and needs of this group of dependent contractors are strong enough to outweigh the factors favouring a variance of this group of dependent contractors into the IWA bargaining unit. (p. 13)

The original panel then considered the four factors from *Insurance Corporation of British Columbia*: administrative efficiency, lateral mobility, a common framework of employment conditions and industrial stability. The original panel acknowledged that the Teamsters' certification would result in two sets of negotiations. It noted, however, that Slocan already had a "mechanism for carrying on negotiations with the log haulers" (p. 14). In the original panel's view, a varied unit would not significantly improve administrative efficiency. It also concluded the distinct interest and demands of the two groups would require two "quite different" sections in a collective agreement in order to reflect their distinct interests and demands. The parties agreed lateral mobility was not a relevant factor in the case. With respect to the fourth factor, a common framework of employment conditions, the original panel concluded this was tied to community of interest:

> …However, as pointed out by the panel in *Insurance Corporation of British Columbia,* the establishment of an employer-wide common framework of employment conditions is not always desirable, as it may not reflect real differences in employees' needs and wishes. This factor is closely related to the community of interest between the two groups. The closer the community of interest, the more desirable it is to achieve a common framework. (pp. 14-15)

The original panel then turned to industrial stability. It noted that with two bargaining units, a strike by either would shut the mill. After reviewing the jurisprudence, the original panel concluded, however, that there was not a direct correlation between the number of bargaining units and industrial unrest (p. 17). Furthermore, the original panel decided that it must consider the evidence before it, before deciding what weight should be given to this factor. The original panel then stated:

> There is no evidence before this Panel that increases this Panel's concern about the potential for industrial instability. The certification of the Teamsters could potentially increase industrial instability in the forest industry, but there is no evidence leading us to conclude that the certification of the Teamsters will create a <u>real</u> or <u>substantial</u> potential for industrial instability. ... (p. 18 emphasis in original)

The original panel then looked at community of interest. In its view, the divergence between the dependent contractors and the existing IWA bargaining unit significantly outweighed their common interests. The original decision reads:

> The differences between the interests of the employees covered by the IWA certification and the dependent contractor log haulers may be such that the inclusion of the dependent contractors in the IWA bargaining unit would result in the larger varied unit not being an appropriate unit at all. ... (p. 19)

The original panel went on to find that the differences between the two groups would make it difficult to incorporate both into a single bargaining unit:

> In every single key collective bargaining area the terms and conditions of employment of the IWA employees, and the terms and conditions of the contracts between the dependent contractors and Slocan, are different. They are paid in accordance with different formulas, their benefit packages and the amount paid by Slocan towards these benefits is different. The vacation, holiday and leave provisions in the IWA contract don't accord with the conditions under which the log haulers work, and as noted, the discipline and discharge provisions would likely be different. The log haulers concept of seniority could not be much more different at a most basic level than that which applies to the IWA unit. (p. 25)

Finally, the original panel addressed employee wishes. It adopted the test in *West Star Timber Ltd.,* BCLRB No. 47/87: wishes of the applicant employees, while a factor, are not determinative. It noted, however, the applicants had no wish to be members of the IWA.

In reaching its ultimate conclusion, the original panel noted that it was required to compare the proposed unit to a variance of the existing IWA bargaining unit notwithstanding that the latter application had not been made. It noted that "the Code expressly reserves an element of judgment as to whether it would be more appropriate to vary the dependent contractors into the existing unit" (p. 28). The original panel summarized its decision to grant the certification to the Teamsters as follows:

> This Panel must weigh the importance of industrial instability in this industry, against the significant differences in the interests of the log haulers and the IWA employees to determine

> whether it would be more appropriate to require the log haulers to join the IWA in order to obtain collective bargaining rights. It is noteworthy that the IWA witness stated that the IWA would welcome the log haulers into the IWA.
>
> Industrial instability is not only a concern of employers in the forest industry. It is in the interest of other employees, independent contractors, and in the interest of the public that shutdowns and job action be minimized in the forest industry. The introduction of the Teamsters will increase the potential for industrial instability in this industry. Consequently this factor has been given significant weight by this Panel.
>
> Balanced against this is our determination that these dependent contractors have little material community of interest with the IWA employees. This Panel finds that requiring these two groups of employees to be represented in the same bargaining unit would be less appropriate for collective bargaining than permitting the dependent contractors to be represented in their own unit. (pp. 29-30)

III. ARGUMENT

The Panel received extensive written and oral submissions from the parties and intervenors. We will briefly review each of those submissions.

(a) Slocan

Slocan says that the original panel initially at least, correctly set out the test under Section 28(1)(1) of the Code:

> …The Panel will move to the question: Is a varied IWA bargaining unit, including the dependent contractors more appropriate for collective bargaining than the unit proposed by the Teamsters? (p. 12)

The articulation of the test was consistent with *Lemare Lake Logging Ltd.,* BCLRB No. B34/93. However, the original panel erred in applying the test. It considered whether the "distinct interest and needs" of the log haulers "outweighed the factors favouring a variance" (p. 13).

Slocan relies upon *Island Medical Laboratories Ltd., supra,* the Board's recent review of appropriateness. Specifically, Slocan notes that access to collective bargaining is critical in first applications for certification. In subsequent applications, however, industrial stability is the "most important factor" (p. 37).

The original panel erred again in considering industrial stability. First, the original panel rejected the notion that two or more units "invariably" lead to an increase in industrial instability. The original panel concluded:

> ...The Board will consider all the evidence to determine the weight to be accorded the factor of industrial stability. ... (p. 17)

The original panel continued its error in concluding that while the Teamsters' certification could "potentially increase industrial instability" (p. 18) there was no evidence a second unit would create a "real or substantial potential for industrial instability" (p. 18). Slocan argues this is an entirely new test which elevates employee choice. It is axiomatic that an increase in bargaining units on a site increases industrial instability. Evidence that such is the case is simply not available prior to the certification of the second bargaining unit.

Slocan argues the original panel's second error results from its elevation of the factor community of interest, to an overriding importance. *Island Medical Laboratories, supra*, defines community of interest as the similarity of skills, administrative structure of the employer, functional integration and geography (p. 36). Each of these factors supports the conclusion that a community of interest does exist between the log haulers and the members of the IWA bargaining unit. Furthermore, the IWA represented this group before and represents similar groups of other employer operations.

Finally, Slocan argues that *Lemare Lake* is directly on point. In *Lemare Lake,* the panel

concluded that log haulers were part of the "chain of production" in the employer's operation (p. 7). The original panel ignored this decision and improperly relied upon *Aspen Planers Ltd.,* BCLRB No. 250/83, and *Aldergrove Lions Seniors Housing Society,* IRC No. C157/87. *Aspen Planers* is clearly distinguishable from the facts of this case. *Aldergrove Lions Society* is similarly distinguishable. It involved a health care facility under what is now Section 23 of the Code.

(b) IFLRA

The IFLRA argues that Slocan's operations replicate the industrial enterprise. From the forest operations to the manufacturing of product, including road maintenance, it is one integrated enterprise. IFLRA notes that in *Island Medical Laboratories, supra,* the Board advised that in second applications for certification, two additional factors should be considered:

> the practice and history of the current collective bargaining scheme…[and]…the practice and history of the current collective bargaining scheme in the industry or sector. (p. 32)

Both of these factors favour the varied bargaining unit. The IWA represents a wide divergence of skills generally within geographical bargaining units.

The IFLRA argues a separate unit is entirely inconsistent with the law and policy of the Code. Section 65 is a legislative response to limit labour disputes within the forest industry. This approach was reviewed in *MacMillan Bloedel, Harmac Division,* BCLRB No. 61/82 (1982), 2 CLRBR (NS) 91, and *MacMillan Bloedel (Alberni Pulp and Paper Division),* BCLRB No. 393/84 (1984), 8 CLRBR (NS) 42. The original panel's decision undermines the Board's policy by imposing a second bargaining unit into an integrated line of production. The IFLRA argues the Board's policies should be the same for both employees and dependent contractors.

Finally, the IFLRA argues the original panel erred in failing to follow the approach set out in Section 28(1)(b) as articulated in *Lemare Lake Logging:*

> That it is not more appropriate to vary the group of falling contractors into the existing bargaining unit. (p. 7)

This approach is consistent with the presumption in *Island Medical Laboratories* against second bargaining units.

(c) FIR

FIR also argues the original panel's decision is inconsistent with the law and policy of the Code. Its conclusion that a "real and substantial" potential for industrial instability must be shown is clearly inconsistent with *Island Medical Laboratories* and the general law against proliferation of bargaining units. FIR argues the original decision acknowledged the concerns regarding proliferation and then proceeded to ignore these concerns.

(d) CONIFER

Supporting the other submissions, Conifer argues the original panel's decision is inconsistent with the policy distinction made in *IML* between initial applications for certification and the second or subsequent applications. Specifically, the original panel failed to place the appropriate weight on industrial stability. Conifer argues the issue is not representation by the Teamsters or by the IWA. Rather, the issue is whether a variance is more appropriate than a second stand-alone bargaining unit.

(e) IWA

The IWA supports Slocan's application and advances the following points. First, the original panel accepted that the IWA had represented employees "with very diverse backgrounds, experience and work environments" (p. 26), including log haulers. It noted that the IWA would welcome the log haulers into the IWA (p. 29). Accordingly, the original panel was incorrect to conclude that the log haulers shared no community of interest with the IWA members.

Second, in *Lemare Lake Logging* and *West Fraser Mills Limited,* BCLRB No. B266/93, the Board concluded that the variance of log haulers into the existing IWA bargaining unit was more appropriate. One collective agreement could cover both groups. The original panel's attempt to distinguish these two decisions does not bear scrutiny. A consistent approach in this issue is critical to the forest industry.

Third, where a presumption exists, as in Section 28 against proliferation of bargaining units, it is not unusual that the applicant must prove a negative. That is, that a varied unit is not more appropriate. A similar approach is required in Section 14(7):

> (7) On an inquiry by the board into a complaint under section 6 (3) (a) or (b), the burden of proof that the employer did not contravene paragraph (a) or (b) lies on the employer.

Lack of information is also not unusual. The applicant must, at least, raise a *prima facie* case.

(f) Teamsters

The Teamsters agree that a review of *Island Medical Laboratories,* is the starting point of the analysis under Section 28(1)(b). While *Island Medical Laboratories* points out that industrial stability is a critical factor, facilitation and encouragement of collective bargaining is at least as important. Furthermore, as then Chair Weiler noted in *Insurance Corporation of British Columbia, supra*, the Board's task is to design an appropriate framework for collective bargaining which promotes industrial stability. In this case, the original panel concluded a single varied unit would not increase industrial instability.

The Teamsters argue the inquiry under Section 28(1)(b) is the two step process followed by the original panel. Is a stand-alone unit appropriate and, if so, is a varied unit more appropriate? In arriving at the first decision the Board is only required to consider the four factors reviewed in *Island Medical Laboratories*: similarity of skills etc., administrative structure of the employer, functional integration, and geography. Where the unit is found to be appropriate, the Board should move to the next step: is a varied unit "more appropriate"? The remaining two factors discussed in *Island Medical Laboratories* would then be considered.

The Teamsters acknowledge that under Section 28(1)(b) the stand-alone unit must be able to stand the "compelling reasons" test. That is, there must be compelling reasons to allow a separate unit of dependent contractors. However, the Teamsters take issue with the panel in *West Fraser Mills Ltd.,* BCLRB No. B266/93 which suggests there must be "very compelling reasons" to certify a stand-alone unit (p. 14). Further, the Teamsters argue that industrial stability does

not replace the compelling reasons test. The original panel was correct in concluding that Section 28(1)(b) requires "a balancing, a weighing, and an evaluation function" to be performed by the Board (p. 28).

Turning to industrial stability, the Teamsters argue the Board should not simply assume larger units increase industrial stability. It has been recognized since *Insurance Corporation of British Columbia,* that incorporating two divergent groups into a single unit may well increase industrial instability. The original panel reviewed the evidence and giving industrial stability the proper weight, concluded the log haulers interests could not be addressed in a larger unit.

Turning to the factor community of interest, the Teamsters argue that the presumption or preference for large bargaining units can be rebutted by the facts before the Board. That was the conclusion in the instant case. Despite attempts to the contrary, the IWA has not managed to convince the log haulers that they share a community of interest with the IWA.

In this regard, the Teamsters note that in several previous decisions under Section 48 of the former Labour Code, employees in the forest industry argued that dependent contractors should not be varied into existing IWA bargaining units: *Aspen Planers Ltd., supra*.

The Teamsters argue that the picketing provisions of the Code assist its argument. With restrictive rights to picketing the Board should facilitate organizing of unrepresented employees, particularly under Section 28 of the Code.

The Teamsters argue that the original panel concluded industrial stability would not be increased by incorporating dependent contractors with diverse interests into the IWA bargaining unit. The original panel further concluded the two groups shared little community of interest. Functional integration from a labour relations perspective was negligible. Administratively, Slocan has negotiated terms and conditions of employment with the log haulers. The Teamsters' certification would continue that distinct representation. The Teamsters argue that the distinct interest of the log haulers would be subsumed by an IWA unit.

Turning to onus, the Teamsters argue they should not be required to prove that the bargaining unit is more appropriate. As the applicant, it knows little or nothing of the

circumstances which currently exist within Slocan. Similarly, Slocan must bear the onus to prove a second unit will increase industrial instability.

(g) Slocan - Reply Argument

Slocan addressed the decision-making process. The Board must first decide whether, on the four criteria set out in *Island Medical Laboratories,* a stand-alone unit is appropriate. If so, the Board must then decide whether on the six criteria set out in *Island Medical Laboratories,* a varied unit is appropriate. If both are appropriate, the Board must decide whether the varied unit is more appropriate. Slocan argues the decision should not turn on whether there are "compelling reasons" for a second unit.

IV. ANALYSIS

Section 28(1) reads:

> 28. (1) If an application for certification is made for a unit consisting of, or including, dependent contractors, and the application meets the requirements of section 23 or section 24 and 25, the board shall
>
> (a) if there is no other certified unit of employees of the same employer, determine whether the unit applied for is appropriate for collective bargaining and, if so, certify that unit, or
>
> (b) if there is a certified unit of employees of the same employer, determine whether inclusion of the dependent contractors in the existing unit would be more appropriate for collective bargaining and, if so, require that an application be made to vary the certification.

Section 28 is unique. The Legislature has directed the Board to consider which unit is the "more

appropriate for collective bargaining". When the Board considers the issue of whether one proposed bargaining unit is more appropriate than another proposed unit, it does so against the backdrop of literally hundreds of cases which have analyzed the concept of appropriateness. The seminal decision on appropriateness was *Insurance Corporation of British Columbia, supra*. That decision contains two observations which are noteworthy to the issue at hand. First, the special character of the enterprise must be considered in implementing policies of appropriateness. (We will return to this principle when we look at the forest industry in this province, including how it is structured and its importance to the economic well being of the province.) Second, within the context of the public sector, there is a presumption in favour of all employee units.

In *B.C. Coal Ltd.,* BCLRB No. 36/82, [1982] 3 Can LRBR 177, then Chair Kelleher reiterated the Board's preference for broad based bargaining units. Of assistance to our Section 28 inquiry, Kelleher concluded that a varied unit including the employees of Elk River Valley and Greenhills would be the most appropriate unit "considering the particulars of the case" (p. 183). Those particulars included the impact on industrial stability, the functional integration of the two operations, and the community of interest between the employees. Further, Kelleher noted the importance of B.C. Coal to the area:

> …Moreover, the economic welfare of the community can suffer. BC Coal is among the largest employers in southeastern British Columbia. The rippling effect of an industrial relations dispute involving this employer on the economic well being of the area is substantial. (p. 182)

Also of assistance to the Panel in this case are the comments of then Chair Donald Munroe, Q.C. in *Canadian Kenworth Division of Paccar of Canada Ltd.,* BCLRB No. 22/79, [1979] 2 Can LRBR 64. There, the union applied to vary its existing certification of plant and production employees to include employees in the data processing plant. The original panel rejected the application, *inter alia,* on the grounds that it would be inappropriate to include office employees in the existing production bargaining unit. The original panel concluded there was no community of interest between the two groups. Munroe rejected this argument and concluded that the working conditions of the two groups could be incorporated into a single document.

As noted, there are literally hundreds of decisions which apply the basic principles expressed in these decisions. In our view, it is precisely these basic principles that the Legislature considered and contemplated when it chose to use the term "more appropriate" in Section 28: experience demonstrates that the collective bargaining process is flexible enough to incorporate or allow a broad range of communities of interest within a single bargaining unit structure; there is a preference for all-employee units; and, the facts and circumstances of the bargaining realities of certain industries can heighten or lessen this preference.

At the time the original panel issued its decision, the Board's decision in *Island Medical Laboratories,* had not been issued. That decision addressed in considerable detail the principles reviewed above in an attempt to resolve conflicting authorities concerning appropriate principles to be applied in determining whether a proposed unit is an appropriate bargaining unit (p. 3). *Island Medical Laboratories* specifically addressed principles to be applied where a second or additional unit is applied for. The principles expressed in *Island Medical Laboratories* are directly applicable to Section 28; it is therefore useful to briefly review that decision.

Island Medical Laboratories recognized that access to collective bargaining and industrial stability are the two fundamental principles in the determination of an appropriate bargaining unit. On an initial application for certification access to collective bargaining is the more important principle. However, in a second or additional application for certification on a single site, industrial stability is the more important principle. In any inquiry, the Board will look to how community of interest advances or hinders these principles.

In our view, the principles expressed in *Island Medical Laboratories* are consistent with the overall design of Section 28 of the Code. Both emphasize access to collective bargaining at the initial phase and industrial stability where a bargaining unit presently exists. Section 28(1)(a) extends collective bargaining rights to dependent contractors in circumstances where, under the former legislation, they were not entitled to the benefits of collective bargaining. In extending certification rights to dependent contractors in circumstances where there are no other certified units of employees of the employer, greater access to collective bargaining is being provided. This is directly analogous to a first instance application for certification under the *Island Medical Laboratories* standard, where access to collective bargaining is the fundamental principle. The standard for a unit of dependent contractors where no other unit exists is simply appropriateness

and involves the application of the four factor community of interest test for initial units as described in *Island Medical Laboratories*.

Section 28(1)(b) deals with situations where there is already a certified unit of employees of the employer. Here, a stand-alone unit of dependent contractors will not be certified if the inclusion of the dependent contractors in the existing unit would be more appropriate. This is analogous to the approach in *Island Medical Laboratories* which raises industrial stability to the most important principle in instances of an application for a second or additional bargaining unit. It is consistent with the idea of a presumption against multiple units. In looking at community of interest, the six factors described in *Island Medical Laboratories* will apply at this stage.

Consistent with the normal practice in applications for certification, the applicant seeking a stand-alone unit must show that the varied unit is not more appropriate. Practically, the inquiry undertaken by individual panels will involve two main stages. We will describe the first stage under the broad title of "access to collective bargaining". The second stage will consider the community of interest between the existing unit and the dependent contractors and its affect on industrial stability. Finally, the Board will consider any other relevant factors which go to the issue of appropriateness.

Access to collective bargaining in a dependent contractor situation has two components. First, the Board must be satisfied that a stand-alone unit and a variance to an existing bargaining unit are both appropriate. The onus is on the applicant seeking the stand-alone unit to demonstrate that the separate unit is appropriate for collective bargaining. The onus to show the varied-in unit is also appropriate will fall to the employer and/or the incumbent trade union. We accept the Teamsters' argument that the applicant trade union will normally have little or no knowledge about the existing bargaining unit: none of its members would be in that unit. Both of these inquiries will proceed on the four factors of appropriateness reviewed in *Island Medical Laboratories*. If the stand-alone unit is not appropriate for collective bargaining, the application obviously fails. If the varied-in unit is found to be inappropriate, the stand-alone application, if appropriate, would normally succeed; the Board will not deny access to collective bargaining rights to dependent contractors.

The second step in the inquiry into access to collective bargaining starts from the assumption that both the stand-alone and varied-in units are appropriate. The inquiry then reviews whether there are any actual impediments to the dependent contractors being varied into the existing bargaining unit. This would be an unusual circumstance; however, there may be cases where it is not possible or practical for the dependent contractors to apply for a variance to the existing bargaining unit. For example, we can foresee that the Board may have to decide whether an unwillingness by an existing unit to organize the dependent contractors constitutes a denial of access such that a variance is not an option. Likewise the Board may have to consider whether a lack of reasonable procedures to accommodate the dependent contractors into the existing unit would lead to a conclusion that a variance is not a realistic option. However, once the Board determines that the dependent contractors have access to collective bargaining through both a stand-alone and a varied unit, the inquiry will then proceed to the second stage.

In the second stage the Board will consider community of interest and its impact on industrial stability. The applicant for a stand-alone unit must, in bearing the ultimate onus to prove its case, address the presumption against multiple bargaining units at a single site. An examination of industrial stability is almost always a speculative exercise. Neither the parties nor the Board can predict with certainty what unrest will result from an additional bargaining unit. However, *Island Medical Laboratories* provides some parameters as to how the examination of industrial stability is to proceed. The Board does not need evidence of "actual unrest" to establish a concern of industrial instability. The Board will presume that industrial stability is adversely affected by a second unit. To rebut that presumption the applicant will be required to bring cogent evidence to the contrary. For example, the evidence may establish that a labour dispute in one unit will not affect the second unit. Or, the evidence may establish that because of the lack of a community of interest, industrial stability would actually decrease if the dependent contractors were varied into the existing unit.

In considering community of interest at this stage of the inquiry the Board will look at all six factors set out in *Island Medical Laboratories*. The employer's structure "physically, administratively, and operationally" is the critical factor in determining community of interest. Geographic proximity is also an important factor. Where there is functional integration between dependent contractors and employees in the existing unit, the varied unit will invariably be found to be more appropriate.

Different views and interests do not *per se* establish a lack of community of interest. Indeed, by their very nature, dependent contractors will usually have different skills, interests, duties, and working conditions from the employees in the existing bargaining unit. The Board's experience demonstrates that different and even divergent views can be accommodated within a single bargaining unit. While various groups may have interests specific to their group, and thus have an easily identified community of interest, this does not necessarily affect their ability to achieve a collective agreement that is responsive to, and accommodating of, various interests.

There is another element to the integration of employees and dependent contractors into a single unit with a single collective agreement: Section 28(2) of the Code. The Board's authority to implement a variance of dependent contractors into an existing unit was recently reviewed in *West Fraser Mills Ltd.*, BCLRB No. B51/94. There, the Board found a variance of dependent contractors into the existing IWA bargaining unit was more appropriate. The panel noted that the Board's authority in Section 28(2) is analogous to our authority under the successorship provisions of the Code. The panel went on to conclude:

> On its face, the language of Section 28(2)(a), (c) and (d) indicates that the Legislature contemplated the application of the existing collective agreement to the newly-included dependent contractors. Section 28(2)(a) speaks of rights, privileges, and duties *acquired or retained*. Section 28(2)(c) expressly authorizes the Board to modify or restrict the operation or effect of *a collective agreement* to determine the seniority rights *under it* of employees *or dependent contractors*. Section 28(2)(d) permits the Board to give directions as to the interpretation or *application* of *a collective agreement affecting* the employees *and dependent contractors* in a unit determined *under this Section* to be appropriate for collective bargaining (emphasis added). This interpretation of Section 28(2) is consistent with both the Board's policy pertaining to appropriate bargaining units and the former Board and Council's views of virtually identical language in the successorship provisions of the statute. (p. 15; emphasis in the original)

These powers ensure that the Board has a broad ability to fashion the integration of the two groups so as to ensure fair and equitable treatment to both.

What scope is there for stand-alone units of dependent contractors under Section 28(1)(b) once it has been demonstrated that access to collective bargaining is available through a varied-in unit? In our view, it is limited to where the applicant can demonstrate that within a varied bargaining unit, the interests of the two groups entail such a direct conflict of interest that industrial stability would likely decrease if the dependent contractors were varied into the existing bargaining unit.

We return to an important theme in both *ICBC* and *B.C. Coal:* the nature of the industry and its effect on the economy of the province is also to be taken into consideration. As recognized in both *ICBC* and *B.C. Coal,* in determining appropriateness the Board must consider the impact a labour dispute would have on the region of the province in which the employer operates. This is not to say that the test for appropriateness amongst small employers is not applied. It is. However, it must be acknowledged that within the province, labour disputes in certain industries, such as forestry, construction, the public sector, and health, have wide ranging effects. Tens of thousands of employees are affected. Many small businesses who do business with these larger employers are adversely affected as are the communities, towns, and cities in which they operate. Applicants under Section 28(1)(b) must look at the issue of "more appropriate" within this broader framework. Further, the Board will examine the existing bargaining structure within the industry and assess the impact of another bargaining unit on that structure. In applying for a separate certification in one of these industries, particularly where the application will introduce a new union into that industry, the applicant carries a significant onus to prove a variance to the existing unit is not more appropriate.

In summary, the inquiry begins with ensuring both a varied unit and a stand-alone unit are appropriate. If so, and there are no actual impediments to access to collective bargaining in a variance application, the Board will consider how the six factors of the community of interest test affects industrial stability. The examination begins with the presumption that industrial stability is adversely affected by two or more units. The applicant union bears the onus to demonstrate that the presumption does not apply in the case and/or, the presumption is outweighed by a conflict between the interests of the existing unit and the dependent contractors. Finally, the Board will consider any other relevant factors addressing the issue of appropriateness, specifically, the nature of the industry at issue.

V. DECISION

We turn now to the original panel's decision. The decision was issued prior to the policies enunciated in *Island Medical Laboratories*; obviously, the decision does not follow the approach discussed above. Specifically, the original panel did not expressly find that a varied unit would be appropriate for collective bargaining. We have reviewed the facts as found by the original panel and we are satisfied, for three main reasons, that a varied unit is appropriate. First, at one time the log haulers were employed by Slocan and included in the bargaining unit. We can therefore assume that at least at one time these parties shared a community of interest sufficient to make a varied unit appropriate. Second, the Board has found a varied unit to be appropriate in similar circumstances (*West Fraser Mills Ltd.,* BCLRB No. B51/94). Third, for the reasons discussed below, the original panel's conclusion that a community of interest did not exist between the dependent contractors and the existing bargaining unit, is based on an incorrect view of the inquiry.

Finally, the original decision does not address whether there are any actual impediments to the IWA organizing the dependent contractors. On the submissions before us, we see no impediment to the IWA making an application to certify the dependent contractors if it had the necessary support. We now turn to a review of the original panel's reasoning.

The nature of the original panel's inquiry is succinctly summarized towards the end of its decision:

> …In accordance with the Board's jurisprudence on proliferation and fragmentation, the most critical factors must be the industrial stability, administrative efficiency, and community of interest. Certainly if these are not the critical factors in other cases, they are in the case before this Panel. (p. 29)

The original panel reviewed several decisions which emphasized the importance of industrial stability in determining the appropriateness of the proposed unit (*Crest Motor Hotel Ltd.,* BCLRB No. 335/86 (appeal of BCLRB No. 319/86), and *MacMillan Bloedel Ltd., Harmac Division,* BCLRB No. 61/82, (1983), 2 CLRBR (NS) 91). The original panel then concluded:

> …Although the potential for industrial instability increases as the number of bargaining units increases, this does not mean that the Board will never permit more than one unit to be certified for one employer. The Board must carefully examine the evidence concerning the likelihood of industrial unrest and consider whether compelling reasons exist to permit the certification of more than one unit. (p. 17)

This analysis is generally consistent with the approach we discussed above. There is a presumption against multiple bargaining units and "this presumption markedly increases with the number of units" (*Island Medical Laboratories,* p. 37). The Teamsters' application, if successful, would be the second bargaining unit and, more importantly, would introduce a new bargaining agent into an established bargaining structure of the forest industry. These circumstances require compelling reasons to refute the presumption that a varied unit is more appropriate. The original panel appeared to recognize this when it stated:

> Industrial stability is not only a concern of employers in the forest industry. It is in the interest of other employees, independent contractors, and in the interest of the public that shutdowns and job action be minimized in the forest industry. The introduction of the Teamsters will increase the potential for industrial instability in this industry. Consequently this factor has been given significant weight by this Panel. (pp. 29-30)

The original panel then considered whether there was any evidence that created a "<u>real</u> or <u>substantial</u> potential for industrial stability" (p. 18). It is here that we begin to take issue with the original panel's analysis. The Board will consider evidence and decide whether there are any facts which alter the presumption that multiple units increase industrial instability. We disagree, however, that a "real or substantial" potential for industrial instability need be established. As we have already noted, the presumption against multiple units exists with the application for a second unit and "increases markedly" with applications for additional bargaining units or with new bargaining agents to an established bargaining unit structure. The applicant seeking the stand-alone unit under Section 28(1)(b) must establish, at a minimum, that the concern over industrial stability that flows from the existence of a second unit is not supported by the evidence.

We also take issue with the original panel where it examines the skills, interests, duties and working conditions which define a dependent contractor, and raises these factors as the basis upon which there is no community of interest between the two groups. This reliance on skills, interests, duties, and working conditions is inconsistent with *Island Medical Laboratories* which concluded less weight should be placed on this factor. Further, Section 28(2) ensures that the rights of dependent contractors are not subsumed by the existing unit. The original panel failed to consider this authority in determining whether a varied-in unit was more appropriate. It concluded, incorrectly, that the Board's authority under Section 28(2) should be considered "if and when a variance application is made by the IWA" (p. 13).

The original panel then considered industrial stability against the "distinctive needs" of the dependent contractors arising from the distinct communities of interest. It concluded these needs outweighed the factors favouring a large unit. A significant part of this consideration was the concern that the inclusion of such disparate bargaining interests in one unit might negatively impact on the ability to reach a collective agreement.

The simple existence of distinct communities of interest does not preclude the inclusion of the two groups within a single bargaining unit. Such a difference does not, by itself, overcome the presumption against multiple units that exists where the application is for a second or additional unit. To overcome that presumption the applicant must provide cogent evidence that supports the conclusion that the presumed risk to industrial stability that arises from a second unit is not supported by the evidence, or that the risk to industrial stability, in fact, increases if both groups are included in one unit. In all cases the Board will assess the level of conflict in both a stand-alone and varied-in units.

The original panel relied upon the existence of distinct communities of interest as evidence that the presumed risk to industrial stability was contradicted by cogent evidence. In our view, distinct communities of interest do no more than indicate a potential conflict in bargaining interests. It is not apparent from the original decision, how this potential conflict leads to the conclusion that a second unit favours industrial stability. To the contrary, the creation of a second unit capable of engaging in a strike may well increase instability as one group uses its individual right to strike to gain an advantage over the other group.

Turning to the question of the fifth and sixth factors of the second stage community of interest test in *Island Medical Laboratories*, the conclusion must be that industrial stability remains a significant concern. Both the significant role of the forest industry as a part of the provincial economy and the history of industrial disputes in this industry underline rather than decrease the concern about multiple units.

The original panel reviewed in some detail the types of issues that dependent contractors would wish to address in collective bargaining. It noted that the terms and conditions of employment between the dependent contractors and the IWA members were different. This difference raised concerns with the log haulers that their interests would not be adequately represented at the IWA bargaining table. The IWA testified that often diverse interests were represented at a single bargaining table but acknowledged that to date, the interests of dependent contractors had not been negotiated at the same time as IWA members. In deciding the interests of the two groups could not be represented at a single bargaining table, the original panel returned to community of interest:

> We are satisfied that there is little or no community of interest between the dependent contractor log haulers and the employees covered by the IWA certification. Including the two groups within one bargaining unit could well lead to the interests of the log haulers being submerged. This could ultimately undermine the effectiveness of the unit and lead to significant problems for all employees within the unit. (p. 27)

The issue to be decided is whether the terms of employment of the two groups could be covered by a single agreement. Again, given the preference for all employee bargaining units and Section 28(2), there must be cogent evidence that the two groups could not be covered by a single collective agreement. The log haulers' "concerns" are not sufficient to warrant a conclusion that the two groups could not be covered by a single collective agreement.

One further point should be made. The original panel noted that the dependent contractors testified that "log haulers would not apply to be varied into the IWA unit" (p. 25). That is their choice; however, it is not a choice that will affect the Board's determination of appropriateness, as it does not constitute a denial of access. If the incumbent union refused to accept the log haulers, the dependent contractors could properly argue that a stand-alone unit is

their only avenue to unionization. However, the dependent contractors cannot create the obstacle to a variance and then attempt to rely upon it.

In summary, we recognize that the original panel did not have the policy set out in *IML* to assist it. Applying *IML*, it is clear that the onus to present cogent evidence to overcome the presumption against multiple units rests on the applicant. The original panel erred in deciding that there must be evidence to demonstrate a "real or actual potential for industrial stability" (p. 18). We are satisfied the facts before the original panel as set out in its decision do not overcome the presumption against multiple units. Accordingly, the application for a stand-alone unit must fail.

Finally, this decision does not address the issue of employees of dependent contractors and whether it is appropriate to include them in the same unit as the dependent contractors. The Board recently reviewed this matter in *Lemare Lake Logging, supra,* and concluded that employees of dependent contractors are not to be included in the same bargaining unit as dependent contractors. We have not addressed this issue as it was not addressed by the parties in our hearing. However, we note *Lemare Lake Logging* relies on decisions rendered under the *Industrial Relations Act* which predate Section 28 of the Code as well as the policies articulated in *IML*. The Board will revisit this issue in light of the policy we have articulated in this decision when it arises.

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