

BRITISH COLUMBIA LABOUR RELATIONS BOARD

HIGHLAND VALLEY COPPER

("Highland Valley Copper")

and

CAMPBELL RIVER AND DISTRICT GENERAL
HOSPITAL SOCIETY

("Campbell River Hospital")

and

HEALTH EMPLOYERS ASSOCIATION OF BRITISH COLUMBIA

("HEABC")

and

ELEPHANT AND CASTLE GROUP (ROSIE'S ON ROBSON)

("Elephant and Castle Group")

-and-

UNITED STEELWORKERS OF AMERICA, LOCAL NO. 898

(the "Steelworkers")

and

BRITISH COLUMBIA NURSES' UNION

("BCNU")

and

NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS UNION OF CANADA (CAW-CANADA), LOCAL 3000

("CAW, 3000")

and

B.C. FEDERATION OF LABOUR, BUSINESS COUNCIL OF B.C.
COALITION OF B.C. BUSINESSES,
CONFEDERATION OF CANADIAN UNIONS B.C. COUNCIL

("Intervenors")

PANEL: Keith Oleksiuk, Chair
Lisa Hansen, Registrar and Vice-Chair
Emily Burke, Vice-Chair
Barbara Junker, Vice-Chair
Brent Mullin, Vice-Chair

COUNSEL: Adam S. Albright, for Elephant & Castle Group
John Bowman, for Canadian Auto Workers
Gavin H.G. Hume, Q.C., for Highland Valley Copper
David L. Blair, for Steelworkers, Local 898 & B.C.
Federation of Labour
Frances R. Watters, for Campbell River and District
General Hospital and HEABC
Catherine Wedge, for BCNU
Alan J. Hamilton, for Business Council of B.C.
Peter A. Gall, for Coalition of B.C. Businesses
Peter Locke, for Confederation of Canadian Unions B.C.
Council
Bruce Loughton, for Longshoremen and Warehousemen,
Local 514

CASE NOS.: 33144, 31163, 32571

DATES OF HEARING: November 17 & 18, 1997

DATE OF DECISION: July 21, 1998

DATE OF DISSENTING
REASONS: July 21, 1998

TABLE OF CONTENTS

	PAGE
I. NATURE OF APPLICATION	5
II. MANAGERIAL EXCLUSIONS AND SUPERVISORY UNITS POLICY	6
HIGHLAND VALLEY COPPER	14
A. Section 141 Grounds	14
B. Jurisprudential Background	14
C. The Original Decision	16
(i) Hiring	17
(ii) Labour Relations Input	17
D. Analysis	20
CAMPBELL RIVER HOSPITAL	22
A. Section 141 Grounds	22
B. Analysis	22
(i) VGH Principles	22
(ii) Evidentiary Base For The Original Panel's Determination	25
ELEPHANT AND CASTLE GROUP (Rosie's on Robson)	32
A. Background	32
B. Section 141 Grounds	34
C. Analysis	34
III. CONCLUSION	35
Policy Summary on Managerial Exclusions/Supervisory Units	35
A. Managerial Exclusion/Employee Status	35
B. Section 29 Appropriateness	36
C. Management Team	37
D. Comment	37
Highland Valley Copper	38
Campbell River Hospital	38
Elephant and Castle Group (Rosie's on Robson)	39

	Page
<u>DISSENTING REASONS</u>	40
I. INTRODUCTION	40
II. POLICY ON MANAGERIAL EXCLUSIONS	41
1. Supervisory Bargaining Units	45
2. Tests for Different Sectors	52
3. Discipline and Discharge	53
4. Established, Working Practices	54
III. DISPOSITION OF ORIGINAL DECISIONS	55
1. Highland Valley Copper	55
2. Campbell River	55
3. Elephant and Castle Group (Rosie's on Robson)	55

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 This decision concerns three separate and distinct applications under Section 141 of the *Labour Relations Code*. Each of the three original decisions involved the issue of managerial exclusions. In light of the significance of this issue and the related issue of separate supervisory units, intervenors were provided with an opportunity to participate in the policy aspect of the hearing.

2 The Board provided the parties with a draft outline of key concepts for argument and analysis which the Board wanted the parties to address. The outline stated:

1. Management exclusions

- i) conflict of interest/undivided loyalty
- ii) the arms length premise in collective bargaining
- iii) *indicia* of managers
- iv) management team concept

2. Appropriate bargaining units (*IML*)

- i) how is the presumption against multiple bargaining units applied where managerial exclusions or supervisory roles (conflict of interests) have been advanced.
- ii) the relationship between the concepts of community of interest and conflict of interest

3. What impact should factors which are characteristic of particular sectors, industries or operations (e.g. size) have, on either the articulation or the application of the test?

3 The Business Council of British Columbia (the "Council"), the Coalition of B.C. Businesses (the "Coalition") and the British Columbia Federation of Labour (the "Federation") each participated. In addition a request by the International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 ("Local 514") to participate was granted on the basis of its significant experience with supervisory units under the Federal Code.

II. MANAGERIAL EXCLUSIONS AND SUPERVISORY UNITS POLICY

4 Each original decision will be specifically addressed later in this decision. We first set out the relevant statutory provisions and then briefly review key policy and jurisprudential cases concerning managerial exclusions and supervisory bargaining units.

5 The current statutory provisions concerning managerial exclusions and supervisory units read as follows:

Section 1(1)

"employee" means a person employed by an employer, and includes a dependent contractor, but does not include a person who, in the board's opinion,

- (a) performs the functions of a manager or superintendent, or
- (b) is employed in a confidential capacity in matters relating to labour relations or personnel;

Section 29

If a trade union applies for certification as the bargaining agent for a unit consisting of

- (a) employees who supervise other employees,
- and
- (b) any of the other employees,

the board may certify the trade union for the unit, for a unit consisting only of employees who supervise or for a unit composed of some or all of the other employees.

From Burnaby to Cowichan

6 The foundation case in this area, *The Corporation of the District of Burnaby*, BCLRB No. 1/74, [1974] 1 Can LRBR 1 ("*Burnaby*") considered the purposes underlying the then new statutory provisions concerning managerial exclusions and supervisory bargaining units. It set out several basic propositions that established the Board's policy framework in applying these provisions:

- (i) True collective bargaining requires an arms-length relationship between management and the employees represented by the union.
- (ii) The rationale for requiring an arms length relationship rests firstly, on acceptance of the principle that the employer wanted the undivided

loyalty of the senior people responsible for ensuring that the work is done and that the collective agreement is adhered to. Secondly, there is a protection for employees in ensuring that the leadership of the union is not dominated by individuals from senior management.

- (iii) Potential, not actual, conflict of interest is measured in determining if a statutory exclusion is required. An objective examination of the actual responsibilities and authority of the individual is necessary to determine whether the conflict of interest is sufficient to require the undivided loyalty of the individual.
- (iv) The fact that senior management need to be excluded from employee status does not lead to a requirement of exclusion whenever there is any vestige of managerial function.
- (v) Section 47 (now 29) of the Code was an explicit statutory response to concerns about the denial of access to collective bargaining to lower echelon managerial employees such as supervisors. Persons who are employed as supervisors might be included in a unit with persons whom they supervise. Alternatively, if there are still concerns about potential conflict of interest in creating a unit that combines supervisors and employees a separate supervisory unit is to be created rather than deny collective bargaining rights to supervisors.

7 *Burnaby* specifically acknowledged the existence of tension between the various legislative objectives and indicated that these tensions would have to be worked out on the basis of concrete situations as they emerged. It is implicit in the *Burnaby* analysis that one of the tensions, if not the central tension, is between the right of access to collective bargaining and the objective of stability in collective bargaining.

8 The statutory language concerning the definition of employee has changed since *Burnaby*. However, the Board has found that changes to the relevant statutory provisions have not had any significant impact on the basic principles of managerial exclusions. *Vernon Jubilee Hospital*, BCLRB No. 33/78 specifically rejected submissions that the 1977 changes in the definition of employee were indicative of significant changes to the concept of an employee and in particular the line of demarcation between an employee and a manager. More recently, *Cowichan Home Support Society, Tree Island Industries Ltd., Westfair Foods Ltd. (Western Grocers Division)*, BCLRB No. B28/97, (1997), 34 CLRBR (2d) 121 ("*Cowichan*") extensively reviewed the statutory history of the definition of employee. Nothing in *Cowichan* indicates that changes to the definition of employee since 1977 have had any significant impact on the policy concerning the line between managerial status and employee status.

9 *Cowichan* also reviewed the statutory history of the provisions concerning supervisory bargaining units and concluded that the legislative history of this section

provided no basis to support a change in policy concerning supervisory units. There have however been significant jurisprudential developments since *Burnaby*.

10 *Vancouver General Hospital*, BCLRB No. B81/93 (Reconsideration of IRC. No. C179/91), (1993), 18 CLRBR (2d) 161 ("*VGH*"), markedly impacted on the Board's policy on managerial exclusions. The panel in *VGH*, in considering contemporary workplaces, recognized the emergence of trends such as greater employee involvement in the management of firms and innovative legislative concepts such as joint consultation and co-management. It then set out three distinct jurisprudential developments which were consistent with and built upon the policy framework established in *Burnaby*:

- (i) It clarified and simplified the non-exhaustive list of management functions provided in *British Columbia Ferry Corporation*, BCLRB No. 65/78, [1979] Can LRBR 116 ("*B.C. Ferry*"). While the *B.C. Ferry* test was generally affirmed, *VGH* established that greater weight was to be placed upon the two factors:
 - (a) discipline and discharge;
 - (b) labour relations input
- (ii) It considered the application of the factor of discipline and discharge in the context of collegial and cooperative workplaces which tend to have less adversarial tendencies than the traditional hierarchical industrial workplace. Professional settings such as nursing were particularly mentioned as an example of this type of workplace. In this context, the panel confirmed the approach established in *Burnaby* that potential, not actual, conflict is the proper measure of conflict of interest. This use of the term "potential conflict of interest" captures the need to identify the source of actual authority, regardless of the frequency or amount of the exercise of that authority. Consistent with this, the proposition that a lack of incidents of imposition of discipline in professional settings necessarily dilutes the weight to be given to the factor of discipline and discharge was specifically rejected:

...It is incorrect to conclude that because the power to discipline and discharge is invoked less often in a professional setting, this criteria is diluted and is of little weight in determining the managerial status of head nurses. To set a labour relations criterion that actually requires greater discipline be imposed in order to exclude an employee as a manager in any workplace setting -- industrial or professional -- would not serve the interest of any party. ... (p. 205)

- (iii) It also considered the management team concept. That concept was described as a narrow exclusionary ground which arises separate and distinct from the issue of managerial status. It only applies to people found to be included within the definition of employees. It results in a person being excluded from a bargaining unit despite the fact that they have employee status. The basis of the exclusion is that of potential conflict of interest. It is not however, the potential conflict of interest arising from the *B.C. Ferry* factors. Rather, it is a potential conflict of interest based on other special characteristics that place a person in a position of potential conflict with employees in the bargaining unit and, as the flip side of this coin, establish a specific community of interest with management. Examples of circumstances that may give rise to such an exclusion from inclusion in the bargaining unit include: an ownership interest in the business; operating on a professional capacity in providing confidential advice to management; and a specific personal (i.e. familial) or professional relationship, to management.

11 While *VGH* built on, but did not alter, the basic policy framework set out in *Burnaby*, it did represent a significant refinement of the application of that framework in a contemporary environment. First, the focus on two *B.C. Ferry* factors plus the management team clarification simplified the process of determining managerial status. By providing clearer and simpler guidance to the community it paved the way to a reduction in the need to litigate managerial exclusions and, if litigation was required, to reduce the length and cost of litigation. Secondly, *VGH* used the example of nurses in hospital settings to provide specific guidance in the application of managerial exclusion principles in contemporary workplaces with less adversarial settings.

12 The recognition by the *VGH* panel of the trend toward greater employee involvement in the management of firms, along with new legislative concepts in Sections 53 and 54 of the Code, such as joint consultation, is important. That recognition, along with the purposes of the Code, provides guidance when considering an individual who participates in the trend for more employee involvement in the management of the enterprise. The Board must be careful not to undermine the positive development inherent in this trend by putting into place a test that effectively excludes these individuals from employee status.

13 Finally, we note *VGH* did not consider the issue of supervisory units.

14 *Cowichan* considered the managerial exclusion issue as well as the issue of supervisory units. In so doing it addressed several key themes including: conflict of interest; the relevant factors in measuring conflict of interest; the "effective determination" test; and the appropriateness of supervisory bargaining units.

15 *Cowichan* identified the factor of hiring, promotion and demotion of employees, to the extent that this was not already captured by the discipline and discharge heading, as the only other factor beyond the two *VGH* factors that would materially assist the Board in determining whether the grounds for a managerial exclusion exist. This refinement combined with the focus on the two factors established in *VGH* crystallized the earlier analysis in *Tahsis Company Limited, Gold River Division*, BCLRB No. 46/77, that drew a line between operational decision making in the interest of an enterprise and that portion of decision making which evokes the potential conflict of interest that can lead to managerial exclusion:

Of the myriad decisions made in the work place involving the interests of an enterprise and its profitability, only a portion will present a potential conflict of interest between the organized work force and the decision makers. Those decisions or functions will predictably arise in the exercise of decision making powers "over" other employees. When a person is employed primarily to regularly make such decisions, he will be excluded under Section 1(1) of the Code.

The benchmark for distinguishing between management functions must involve an assessment of particular management functions as they relate to the employer's and the union's interests as collective bargaining adversaries.

For example, at Tahsis the S.O.S. may decide to shut down the entire process due to the malfunctioning of a particular piece of machinery. That involves the clear exercise of a management prerogative and is a crucial decision for Tahsis and its employees. At the same time it is an operational decision made solely on the basis of technical information and expertise and one which membership in a trade-union should not compromise. We may compare that type of decision with the termination of an employee. Albeit that decision has far less cost repercussions on a company, it does expose the decision maker to a potentially compromising situation in which his loyalty to the company is buffeted by his competing interest in the welfare of fellow union members. It is that type of conflict which provides the rationale for the management exclusions under the Code and when it can be said that a particular member of the work force is primarily engaged to exercise the latter type of function, then he will be denied the benefits of collective bargaining. The amount of such functions which a person must exercise in each instance to fit within the exemption of Section 1(1) of the Code is a question of fact in each case. (pp. 12-13)

16 "Effective determination" was confirmed in *Cowichan* as the appropriate test for drawing the line in matters of discharge and discipline. The concept of effective

determination respects the fundamental observation in *Burnaby* that the line to be drawn is one that honours the need for senior managerial staff to be located in a position of undivided loyalty on the side of management. It also provides for the flexibility required to accurately capture different types of workplace realities. The Board's experience has demonstrated the need for a test that recognizes that the degree of independent authority to discipline may well differ significantly from sector to sector. Organizational attributes or practices can significantly circumscribe or expand the true authority of persons with disciplinary responsibilities.

17 *Cowichan* also addressed the concept of conflict of interest as it related to separate supervisory units stating:

First, a separate unit cannot be created under the heading of conflict of interest because that would result in a varying scale in regard to who is a manager. It is unacceptable to have a policy that would allow persons, performing the same functions, to be treated as "employees" where they are placed in a separate bargaining unit, but conversely, treated as "managers" where a separate bargaining unit is inappropriate. The Board in *VGH* rejected such a varying or sliding scale in regard to the management team concept for analogous reasons. Previously, if an individual did not fulfill the criteria of a "manager", then the employer was able to argue that an individual was a "near manager" and nonetheless excluded. This sliding scale of what constituted a manager under the management team concept, in effect, lowered the test for managerial exclusion. In this case, the effect would be to raise the test for managerial exclusion; and this would inevitably result in a policy that would be in conflict with the principles expressed in both *VGH* and *IML*.

Second, the placement of an individual into a separate bargaining unit does not address the issue of a potential conflict of interest in dealing with the issue of undivided loyalty or commitment. As stated, the issue is one of dual loyalties between the employer and a bargaining unit. A supervisor who is simply placed in a separate bargaining unit does not resolve the issue of conflict of interest for the employer. That is because the potential conflict of interest, which is of concern to the employer in regard to the issue of managerial exclusion, is not the one which is internal to the bargaining unit (which will be dealt with under appropriateness); but rather, is directed at maintaining an arm's length relationship between supervisors and *any* unionized bargaining unit. (paras. 116-117; emphasis in original)

18 We agree with the comment in *Cowichan* that the appropriate policy should not use a sliding scale which would lead to different conclusions on whether an individual is an "employee" based on whether they are placed in a separate unit or not. The

approach we have adopted, based on the Board's jurisprudence from *Burnaby* through to and including *VGH* avoids any such concerns.

19 Potential conflict of interest is measured through the application of the *VGH* and *Cowichan* factors. A determination is made as to whether there is sufficient conflict of interest to justify the granting of undivided loyalty to the employer by the exclusion from employee status under the Code. If a person is excluded from the Code due to managerial status that ends any consideration of that person under the Code. At that point the issue of undivided loyalty has been addressed. If, however, it is determined that there is not sufficient potential conflict of interest to justify undivided loyalty, the person is an employee under the Code. The potential conflict of interest, as already measured, is then considered for the purposes of determining the appropriateness of including the person in a unit which includes the employees supervised by that person. If it is determined that concern about the potential conflict of interest requires exclusion from that bargaining unit, and if there is an application for a separate supervisory unit the appropriateness of that separate supervisory unit will then be considered pursuant to the Board's policy 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*").

20 This approach integrates both the definition of employee in Section 1(1) and the the statutory charge in Section 29. It also continues the policy framework as established in *Burnaby* and refined in *VGH*. *Burnaby* specifically recognized that persons who were not managers but were employed as supervisory employees may well have duties that demonstrated sufficient conflict of interest to exclude them from a unit containing employees whom they supervised. It stated:

Section 47 (now 29) of the Code was an explicit statutory response to concerns about the denial of access to collective bargaining to lower echelon managerial employees. Persons who are employed as supervisors might be included in a unit with persons whom they supervise. Alternatively, if there are still concerns about potential conflict of interest in creating a unit that combines supervisors and employees a separate supervisory unit is to be created rather than deny collective bargaining rights to supervisors.

21 This approach ensures that persons with responsibilities and authority that carry sufficient potential conflict of interest to require undivided loyalty to management are excluded from employee status. However, it also ensures that the simple existence of conflict of interest does not necessarily result in a managerial exclusion. Supervisory employees may occupy positions that entail potential conflict of interest. Concern about conflict of interest that does not justify managerial exclusion is met by the potential for separate supervisory units where this is appropriate rather than by a blanket denial of collective bargaining rights to supervisors whose positions entail conflict of interest. Thus, to the extent that the analysis in *Cowichan* concerning conflict of interest can be interpreted to mean that the simple existence of any potential conflict of interest

necessarily requires exclusion from employee status, we disagree. Such an analysis would use Board policy to effectively write out of the part of Section 29 that establishes the possibility of separate supervisory units. The Board must adopt an analysis that respects the statutory language. The approach which we have set out recognizes that Section 29 must be given life. It does so, however, in a way that balances the interests of access and stability as these interests have been expressed in the Board's jurisprudence.

22 *Cowichan* also described the two step process involved in a consideration of a unit of supervisory employees. The first step, as described above, is a determination as to the status of the individuals as either employees or as managerial exclusions. This involves an application of the *B.C. Ferry* criteria consistent with the *VGH* and *Cowichan* guidance as to the weight to be accorded the criteria that most directly assists in determining the issue of managerial status. This is done in order to determine whether there is sufficient potential conflict of interest to justify exclusion from the Code due to managerial status. If as a result of this first determination all the affected individuals are excluded from employee status no appropriateness issue arises. However, if some individuals are found to be employees, the second step involves an examination of the potential conflict of interest in order to determine whether that conflict can be accommodated within a bargaining unit which also contains supervised employees.

23 This second determination will be done in a way that reflects the Board's preference for blended units. If all the employees in question can be accommodated in an existing bargaining unit without threatening stability that ends the appropriateness issue. If, however, the potential conflict of interest threatens industrial stability the employees in question must be excluded from the existing unit. In such cases a further issue that may emerge is the appropriateness of a separate supervisory bargaining unit based on *IML* considerations.

24 The determination of the appropriateness of a separate supervisory unit will depend on all the circumstances of the case. However, consistent with *IML*, a significant factor to be considered will be the size of the employer. The Board's policy of seeking to avoid a proliferation of bargaining units in the interest of stability of collective bargaining is likely at its highest when the employer is a small employer. In such cases the objectives of stability may well outweigh the right of access to collective bargaining. Given that most applications for certification involve bargaining units of less than fifty employees we expect this consideration to be significant. On the other hand, if the separate supervisory unit issue arises in the context of a large employer, access to collective bargaining may outweigh the stability concerns.

25 We now turn to the three concrete examples at issue. Each demonstrates different applications of the weighing and balancing involved in reaching a determination as to managerial exclusions.

HIGHLAND VALLEY COPPER

A. Section 141 Grounds

26 The Steelworkers allege that the original decision is inconsistent with principles expressed or implied in the Code. Their application asserts four specific errors. One is that the original decision failed to properly consider some of the relevant considerations in making a determination on the managerial status of the persons in question. The second is a failure to distinguish between the existence of any conflicts that would justify separate bargaining unit supervisors and the level of conflict required to justify exclusion on the basis of managerial status. The third error alleged by the Union is a failure to recognize the inconsistency between the Employer's position that the level of conflict of interest was such as to justify exclusion on the basis of managerial status with its alternate position that the level of conflict was not sufficient to exclude the persons from inclusion in the employees' bargaining unit. The fourth error alleged by the Steelworkers is a failure to understand correctly the evidence concerning the role of supervisors in grievances.

B. Jurisprudential Background

27 A review of key industrial workplace decisions helps to establish experiential and jurisprudential reference points for our determination of this case.

28 In *Yarrows Limited*, BCLRB No. 22/75, [1975] 2 Can LRBR 26, the Board, in applying the *Burnaby* principles, excluded from employee status foremen who exercised a large degree of independence in carrying out responsibilities involving authority to fire, suspend and otherwise discipline employees stating:

Despite the fact that the name "foreman" caused the Board some concern, the evidence is quite clear that these shipyard foremen are an arm of management and do exercise "management functions over other employees". They are very different from the usual foreman found in other walks of life and indeed might properly be called "hard-hat superintendents" in this industry, and are similar to the "Bull of the Woods" found in the forest industry. ... (pp. 31-32)

29 Significantly, *Yarrows*, also considered the issue of proliferation of bargaining units. The supervisory group personnel who were found to be employees were not granted an independent certification. Rather they were included within the existing council and certification.

30 In *B.C. Ferry* the Board concluded that masters of Major Vessels were excluded from the definition of employees. However, persons employed as masters of Minor

Vessels as well as each of the positions of master, chief officer/master, chief engineer, second engineer/chief engineer and chief steward were determined to be employees under the Code. The Board, in considering the special features of navel workplaces, relied on: the existence of disciplinary powers including effective determination of the dismissal of an employee; final authority for interpreting the collective agreement on board the ship; and authority to deal with grievances at the first stage.

31 In *Cominco*, BCLRB No. B33/75, the Board excluded from employee status 129 of 169 "first line supervisors". The forty remaining supervisors were to be placed in a separate local from the existing industrial bargaining unit. Those excluded had the right to discipline but could only discharge outright in extreme cases. They did not hire but could expel new hires from their area of responsibility. They alone determined promotions. As well, the panel relied on the fact that they carried out aspects of most of the other responsibility areas set out in *B. C. Ferry*.

32 In *Tahsis, supra*, some 40 "first line supervisors" were found to be employees. The decision making authority of the individuals at issue in *Tahsis* involved a general responsibility for first stage grievances but only limited and infrequent involvement at the second stage. They also imposed discipline up to and including sending employees home. More serious discipline was referred to the personnel department.

33 *Tahsis* also addressed the issue of the potential inclusion of supervisory employees in a bargaining unit with the employees whom they supervise:

...supervisory employees will often exercise limited management functions over other employees -- functions which do not suffice to exclude them from the Code's definition of employees under Section 1(1) of the Code, but functions which nevertheless may on occasion challenge their loyalty to their employers. In each case the Board will have to decide whether the elimination of such potential conflicts outweighs the advantages to be gained by a single plant-wide unit. ... (p. 21; emphasis added)

34 *Cowichan* upheld the employee status of supervisors as found in *Tree Island Industries Ltd.*, BCLRB No. B179/95. The supervisors in question operated at the first and second steps of the grievance procedure. They could send people home and issue warnings without consulting a superior and have given suspensions pursuant to an established formula concerning absenteeism. However, at the more serious levels of discipline senior managers played the most significant role in the disciplinary decision-making.

C. The Original Decision

35 The relevant description of the proposed bargaining unit in the original decision was:

all employees at or from Highland Valley Copper operations in the Highland Valley and operations related thereto except those employed either as security guards or in a certified bargaining unit.

36 There is an existing bargaining unit which contains approximately 1,000 employees. The proposed bargaining unit potentially covered approximately 60 foremen, 4 senior foremen and 5 general foremen. The Steelworkers submitted that all the potentially included individuals were employees. In the alternative they submitted all but the senior and general foreman were employees.

37 All of the foremen report either to senior foremen, general foremen or superintendents. The original decision described the reporting structure as follows:

There are approximately 60 Foremen, four Senior Foremen and five General Foremen in the proposed unit. Two of the Foremen report to the Superintendent: Materials Handling. Sixteen of the Foremen report to the Shift Superintendent Mine Services. Nine of the Foremen report to one Superintendent. Seven of the proposed Foremen report to the Field Superintendent, Mine Maintenance: two of these Foremen are Senior Foreman Electrical and two of the Foremen report to them. Thirteen of the proposed Foremen report to the Superintendent, Mill Operations: eight of these Foremen report to four Senior Foremen. Twenty-five of the proposed Foremen report to the Superintendent Mill Maintenance: 20 of these Foremen report to five General Foremen. The Superintendents report to Managers. These Managers report to the President and General Manager of Operations. On night shift, the shift Foremen are the senior management presence in Mine Operations. Foremen are the overall senior management presence on weekends. (para. 13)

The original decision found that the primary responsibility of foremen in the Mine and Mill Departments was to assess work, direct employees in their work and ensure proper work performance as well as being responsible for safe work operations.

38 General foremen normally supervise the foremen who report to them. They do not supervise other employees. Above the general foremen are superintendents. Above the superintendents are managers. Above the managers are the President and General Manager of Operations.

39 As established in *VGH* and *Cowichan* the three factors to be considered in making a determination of employee status are those of discipline and discharge,

labour relations input, and hiring, promotion and demotion to the extent that this third factor is not captured by the first factor. Each will now be reviewed against the facts found by the original panel.

(i) Hiring

40 The original panel found that the foremen had a limited role in the hiring of new employees. In certain areas they would choose a person to be hired from three or four people who had previously been approved by the Industrial Relations Department. Secondly, they would be asked for approval before a person who had previously been terminated could be re-hired.

(ii) Labour Relations Input

(a) Bargaining

41 The panel concluded that involvement in collective bargaining was minimal. The foremen had no direct involvement in bargaining. They would be asked before bargaining about possible issues.

(b) Grievance Procedure

42 The Industrial Relations Department is responsible for grievances that involve contract interpretation matters.

43 Prior to initiating step one of the grievance procedure employees raise complaints verbally with the foreman. Most problems in the workplace are resolved at this stage. As a result, there are few grievance meetings.

44 Step one of the grievance procedure involves a written complaint. The foremen are responsible for this level including responsibility for writing the reply letter. The superintendent reviews the letter before it is sent out. On occasion the Industrial Relations Department also reviews it.

45 Step two of the grievance procedure is the responsibility of the superintendent. The foreman attend at that level and take part in caucus discussions. The superintendent writes the reply letter.

46 Step three is the responsibility of one of the managers. Step three and one-half is the responsibility of the operations manager.

(c) Discipline and Discharge

47 Allegations of theft are dealt with by the Industrial Relations Department. There are policies such as progressive discipline that direct a specific penalty for

other disciplinary matters. The foremen are involved in discipline arising from operation matters. Termination letters are signed by a Superintendent or by the Industrial Relations Department.

48

The original decision also contained the following comments on the role of the foreman in disciplinary and grievance matters:

...The Foremen play a primary role in deciding what discipline should be imposed on an employee. The Foremen undertake the initial investigation. Any suspension given by the Foremen is given so pending further investigation. The matter is most often discussed with senior management. The Foremen write a letter of discipline to the employee. The Superintendent and/or Industrial Relations Department review the grammar and the content of the letter. ... (para. 23)

Guild and Rondevstedt acknowledged that in exercising their responsibilities they often had assistance. The Industrial Relations Department and superintendents vetted letters of discipline. There were policies, such a progressive discipline, that directed the Foremen to impose a specific penalty. These policies gave directions to all levels of management. Consistency throughout the site in discipline and collective agreement interpretation is essential. *As in this case, however, the facts of a case often determine its resolution. That made the role of the Foreman in the investigation of the incident, including interviews with employees, a deciding factor in the outcome.* All and any assistance or direction given to a Foreman influenced but did not dictate a Foreman's decisions. In later discussions with management the Union may raise new evidence that must be considered. In most cases, changes were not made to a Foreman's decision without his agreement: that is the evidence before me. (para. 50); emphasis added

Westerby and Boyce added an important point. *They stated that Foremen only write letters of warning. Letters of suspension are drafted and signed by the superintendent.* Had there been other evidence, their evidence may have had an impact on the case; the level of management that signs a disciplinary letter, attends a grievance meeting and speaks at a meeting is significant. Their evidence, however, did not dispute that the Foremen play a significant role in determining just cause and determining the extent of discipline. They did not dispute that Foremen play a direct role in resolving over 65% of all disputes in the first and second stages of the grievance procedure. Their evidence could not dispute the Employer's evidence that the Foreman's role continues throughout the grievance procedure regardless of who meets the Union or writes letters to the Union. (para 56; emphasis added)

49 In addition, the evidence set out one example of a foreman who issued a letter of suspension.

50 As well, the foremen had been trained under the Canscott Management Program. This program had been introduced primarily in response to foremen's complaints about problems of inconsistency in investigations and in the issuance of discipline due to a lack of training.

51 The above responsibilities occur in the context of a large private sector industrial workplace with approximately 1,000 employees in an existing certified unit. The foremen are the fourth or fifth rung down the managerial chain. Foremen report to superintendents in most cases or to general or senior foremen who then report to the superintendent. Superintendents report to a manager. The managers report to the general manager of operations or the president.

52 The original decision after reviewing key evidentiary aspects of the case stated:

In summary, well before the Union's application for certification the Employer introduced the Canscott program. The purpose of the program was to develop skills amongst Foremen to carry out their managerial authority. Some of the Foremen exercise their duties more often than others. Certain Foremen have some involvement in hiring new employees. All Foremen are given a significant role in rehiring persons who have been terminated for cause.

The Foremen have a direct role in discipline. Many issues are resolved prior to the grievance procedure commencing. Most grievances are resolved in the first two stages of the grievance procedure. The Foreman remain active when management meets to discuss the resolution of grievances in later stages of the grievance procedure. In all of these matters the Foremen receive assistance from senior management and the Industrial Relations Department. *That assistance, however, does not eliminate the Foremen's responsibilities nor the conflict of interest between Foreman and employees in the other bargaining unit.* (paras. 60-61; emphasis added)

D. Analysis

53 The original decision, as exhibited in the highlighted portion of paragraph 61 supra, has applied a policy analysis that requires an elimination of (potential) conflict of interest between foremen and employees in the other bargaining unit. Since the conflict had not been eliminated in this case the original panel concluded that the foremen were managers and thus excluded from the Code.

54 As set out in our policy review, the policy applied by the original panel is not the correct policy. The proper policy approach is to determine whether the position in question exhibits responsibilities and authority that demonstrate sufficient potential conflict of interest so as to require their undivided loyalty to management and thus exclusion from employee status under the Code. Ordinarily where the policy analysis applied by the original panel is incorrect, the matter will be remitted to the original panel to review the factual findings in light of the correct policy formulation. However, since here the original panel is not available for referral back, that review will be conducted by this Panel.

55 The evidentiary base set out in the original decision provides a reasonably detailed appreciation of the locations of authority and responsibility for the factors of discharge and discipline and labour relations input as well as the role of the foremen in hiring. As a result, a relatively comprehensive composite picture of the relevant topic areas is available.

56 Of the areas in question, the foremen had very limited or minimal involvement in two areas: hiring and collective bargaining. Thus, the original panel properly focused its attention, in part, on the foremen's role in the grievance procedure, but mainly on their role in the disciplinary procedure.

57 The foremen's responsibilities in the grievance procedure were also limited. First, the Industrial Relations Department is responsible for grievances that involve contract interpretation matters. Secondly, for the remaining grievances, the foremen's responsibility stops at step one. Even at step one the letters they write are reviewed by a superintendent. Step two of the grievance procedure is the responsibility of the superintendent, however, agreement to a change in management's position is sought from the foremen. Step three, and, what was described as step three and a half were the responsibility of even more senior managerial positions.

58 Ultimately it was the area of discipline that was critical for the original panel. Within the area of discipline the foreman's disciplinary authority is quite limited. First, the Industrial Relations Department is responsible for matters of theft. The foremen do have disciplinary authority arising from operational matters. However, termination letters arising from operational matters are signed by a superintendent or the Industrial Relations Department. As well, policies, such as a progressive discipline policy, direct specific penalties.

59 The other evidence concerning the role of the foremen in discipline in operational matters was:

- 1) foremen investigate incidents;

- 2) foremen write warning letters, which are vetted by superintendents or the Industrial Relations Department;
- 3) foremen give suspensions pending further investigation;
- 4) superintendents are responsible for writing suspension letters;
- 5) foreman Ron Guild issued a letter of suspension to an employee.

60 As noted, the original panel, in the face of this evidence, found the role of the foremen in the investigation and review process to be decisive. In so doing it substituted the concept of what it characterized as a primary role in discipline (see para. 23 of the original decision, cited above), in place of the test of effective determination. When the evidence, as found by the original panel, is considered in light of the proper test, we find that the foremen do not exhibit effective determination. Their authority is so circumscribed, both in the kind of discipline for which they are responsible and for the limited role they play in such situations, that they cannot fairly be understood to be the source of effective determination in disciplinary matters. They stand in the shadow of both the superintendents and the Industrial Relations Department. When this is combined with the even more limited authority displayed with regard to the other factors the overall picture presented is one of a junior level of management. Accordingly, we find the foremen to be employees under the Code.

61 In reaching its decision the original panel did not seek to differentiate between the foreman and the senior foreman or the general foreman. This Panel is thus left with uncertainty as to what differences, if any, exist between the foreman and the senior and general foreman. Accordingly, our conclusion above applies only to the foreman. If the parties are unable to agree on whether the results should be the same or different for the senior and general foreman that matter will be addressed by the panel that deals with the appropriateness issue as outlined below.

62 The issues concerning appropriateness which were identified in the original decision were not decided by the original panel. Those issues must now be addressed by a new original panel. The Board will be in contact with the parties in the near future in this regard.

CAMPBELL RIVER HOSPITAL

A. Section 141 Grounds

63 The BCNU asserts that the original decision erred in the application of law or policy under the Code by mis-applying the principles set out in *VGH*. Specifically, the BCNU says that the original decision erred by concluding that the issuing of any

discipline by a nurse however minor, may result in exclusion of the nurse from the Code due to managerial status.

64 The BCNU also submits that the original decision erred in its application of policy by not requiring the party seeking exclusion to tender evidence of the actual authority exercised by the individuals in question or that the real and final authority for labour relations matters rested with these individuals.

B. Analysis

(i) VGH Principles

65 *VGH* addressed the application of the factor of discharge and discipline in the context of workplaces such as professional settings, which have a less adversarial framework overall and which tend to require less discipline than traditional industrial workplaces. *VGH* recognized that in such a context the determination of the actual exercise of authority might require a more subtle judgment than in a more traditional adversarial workplace. However, the fact that a more subtle judgment may be required in order to determine the actual exercise of authority does not result in a lessening of the significance of this factor in determining managerial status. Thus, *VGH* stands for the proposition that, if the evidence establishes that effective determination for discipline rests with a position in a professional setting the result will weigh as significantly as if that determination had been made in a more traditional setting, notwithstanding the fact that discipline and discharge may be required less often in a professional setting.

66 In specifically considering the application of the factor of discharge and discipline in the context of head nurses in a hospital setting *VGH* further commented:

In the decisions which we have reviewed, it has been recognized that in a hospital there may not be the same degree of discipline required in order to find that actual authority to discipline exists. The Board in *Royal Inland Hospital, supra*, stated: "The evidence indicated that discharges are rare in the hospital industry" (p. 470 Can LRBR). Further, in *B.C. Cancer Control Agency, supra*, it was stated that the need to impose the higher penalties of suspension and discharge were "rarely present" (p. 7). The panel went on to state that the "preferred and most common mode of addressing such problems is oral discussion with staff leading at times to reprimands"... (p. 203)

67 The panel in *VGH* then related these observations to its earlier comments about the need for a subtle judgment by reference to *Toronto East General and Orthopedic Hospital and O.N.A.*, [1975] 1 Can LRBR 224, at p. 229, [1974] OLRB Rep. Oct. 671 at p. 679:

The instant case raises the further problem of the exercise of managerial authority in professional or semi-professional situations. It is patent that if this head nurse exercises managerial authority over the other nurses that she would not exercise that authority in a manner similar to the traditional foreman. *The manner of authority in this kind of situation is more subtle, if at all.* It must be remembered that the employees in the bargaining unit are responsible and highly trained personnel; they may on the one hand require very little direction or authority in performing their tasks while on the other hand, direction and authority may arise from such subtle mannerisms as voice inflections; yet again direction may arise out of group discussion or participation. *The task confronting the Board is to evaluate the evidence in a manner that captures authority and it is a most difficult task indeed.* (emphasis added)

68 Thus, *VGH* established that neither a lesser frequency of incidents nor a lesser degree of discipline will necessarily result in lesser weight being given to the factor of discipline and discharge in such settings. In considering the *VGH* analysis the original decision stated:

Having considered the law in *VGH*, I confirm that a more subtle judgment has to be made in [sic] professional setting with respect to discipline. The infrequent exercise of discipline, which may be only in the nature of warnings - something that would carry very little weight in an industrial environment, is an entirely different matter in a professional setting. *Such discipline, even of the lightest variety, may be viewed as a serious and significant matter in a professional setting.* ... (para. 13; emphasis added)

To the extent that this paragraph can be read to provide a policy approach other than that set out above we affirm that *VGH* policy approach.

69 Some further discussion of the factor of discipline or discharge is useful at this point. Discharge is relatively easily defined. "Discipline" however is not easily defined. Some complexity is evident in the jurisprudence because of the consequence of the characterization of the actions. The issue is relatively complex because certain rights and obligations flow from the characterization of an action as disciplinary or not. Issues such as culpable behaviour, the ability to have a union representative at a meeting and others may be contingent on this definition. The jurisprudence appears to show that verbal reprimands are to be excluded from the concept of discipline. Written warnings which may have a

prejudicial effect on the employee's continued employment will likely be regarded as disciplinary.

70

Palmer & Palmer, *Collective Agreement Arbitration in Canada* (3d, 1991) at page 6.34 and 6.35 provides the following commentary:

6.33 The normal role of discipline is to correct behaviour. It is to be regarded as corrective and rehabilitative rather than retributive. The normal progression of discipline is to have verbal warnings, written warnings, and suspensions first of from one to three days and second of from three days to a week. If these steps fail to correct the behaviour in question, it is assumed that the object of the undertaking has failed and discharge from employment is the inevitable consequence. *Several problems arise from this. First, there is the practical issue of when friendly advice becomes a matter which can form the subject of a grievance. Clearly, suspension from work, however slight, can be considered arbitrable. It is in the area of verbal and written warnings, however, where the problems arise and these are generally dealt with differently from other forms of discipline.*

6.34 *The general resolution of this problem has been to stress that to be considered discipline the warning must be one creating tangible loss in the future. In short, it must have "a prejudicial effect upon the employee's position in future grievance proceedings" to be arbitrable. Practically, this has led to the exclusion of verbal reprimands as subjects of discipline. Especially in the quasi-professional fields verbal warnings are not considered discipline although they may constitute knowledge on the part of the grievor...*

6.35 Often these statements are more in the area of an "appraisal", and hence not disciplinable, than actual discipline itself. (pp. 243-4; emphasis added)

We note further the comment in *Lady Minto Gulf Islands Hospital -and- British Columbia Nurses Union*, May 17, 1989 (Thompson):

The need for formal warnings when an employee's job is at risk may be especially important in the hospital work setting. When nursing staff are working together, they quite appropriately prefer to deal with many problems, including the correction of errors, informally, based on a mutual membership in a profession. Supervisors usually have been in a subordinate position themselves and remember their own difficulties at earlier stages in their careers. Employers rely heavily on the sense of responsibility of nurses, who often work quite independently. While this type of arrangement works to the benefit of all concerned in most

situations, they also pose risks in cases in which the Employer wishes to impose discipline.

In an informal setting, it is especially easy for supervisors to communicate their concerns about job performance in terms that are open to misinterpretation. Employees may similarly underestimate the degree to which their performance is below acceptable standards. Thus, the overriding principle in *Edith Cavell* and the other cases cited above, are especially applicable. When an employer is sufficiently dissatisfied with an employee's performance that a dismissal for a non-culpable reason is contemplated, the employee involved must understand his or her situation unambiguously. Written warnings and suspensions are the accepted means of communicating such concerns. (pp. 60-61)

It is the *VGH* approach, assisted by the above observations, that we will now apply in considering the remainder of the BCNU application for reconsideration.

(ii) Evidentiary Base For The Original Panel's Determination

71 At the outset we note that no hearing was held in this matter. It was determined solely on the basis of written submissions. At the end of the day this approach to the evidentiary base has turned out to be problematic. The following analysis is intended to provide greater guidance in establishing the nature of evidence and type of analysis that will be of the greatest assistance in expeditiously and accurately addressing this type of issue.

72 We start first with a review of the evidentiary elements that were considered in the original decision. The original decision concerned an application by HEABC under Section 139 to exclude five "Nurse Managers" from the BCNU bargaining unit. It was decided on the basis of written submissions. Campbell River District Hospital had approximately 475 employees of which 241 are in nursing under the direction of the five disputed Nurse Managers. Each of the Nurse Managers was responsible for specific operational areas such as the operating room or the obstetrics in other departments. The organizational structure of the hospital begins with a board of trustees that is responsible for the overall operations. An executive director is responsible for the management of day to day operations of the hospital. An assistant director of patient care, a director of finance, a director of material management and a director of human resources each report to the executive director. The five Nurse Managers in question report to the assistant director of patient care. The original panel reviewed the role of the Nurse Manager in several areas of responsibility: hiring; WCB appeals; the grievance procedure; and discipline and discharge. Nurse Managers were identified as playing a role in hiring. They along with the General Duty Nurse conducted interviews of potential hires. This team approach was part of a shared governance model. The hiring was done in

accordance with both the collective agreement and policies and guidelines developed by the Human Resources Department.

73 The original decision also established that two Nurse Managers attended WCB appeals on behalf of the Employer. The original decision however identified the role of the Nurse Managers in discipline and in the grievance procedure as the key elements in its determination.

74 In examining the role of the Nurse Managers and the grievance procedure the original panel found, and neither party contested, that the Nurse Managers were the designated management representative at steps one and two of the grievance procedure. However, the steps of the grievance procedure and the incumbent responsibilities attained thereto were not described. It also found that few grievances actually go to step two or three.

75 The original decision then examined one example of a grievance that proceeded to step three and stated:

...One grievance which is conceded to have gone to stage 3 was a selection grievance. A Nurse Manager did attend that third stage grievance meeting. Her attendance was, according to BCNU, "only to present evidence regarding her decision which was the subject of the grievance". BCNU submits two letters arising out of that grievance which was ultimately settled, signed by the Assistant Executive Director. BCNU says therefore, it is the Assistant Executive Director who has the real authority to settle these grievances.

Having examined these letters I cannot conclude that they stand for the proposition advanced by the BCNU. The letters communicate the settlement on behalf of the Hospital, but do not expressly disclose by whom and how the decision was taken. Further, there is a clear recognition in BCNU's submission that it was the Nurse Manager's original decision which was the subject of the grievance. *Since the Nurse Manager had the authority to make the decision in the first place, nothing leads me to believe that the Nurse Manager would not have the authority to settle the grievance as well.* While there is no doubt the Nurse Manager would engage in extensive consultation with Human Resources and her own superior, the Assistant Executive Director, the fact of consultation alone does not detract from that authority: *VGH* at p. 205. (paras. 21-22; emphasis added)

76 A finding of fact concerning the role of the Nurse Manager in the grievance procedure in the absence of positive evidence is troublesome. The

preferred approach would be to set out the steps of the grievance procedure and any responsibilities or authority set out therein as well as any evidence regarding the actual exercise of authority.

77

The other key area in the reasoning of the original panel was that of discipline. In considering discipline the original panel considered policies submitted by the Employer:

BCNU says that Nurse Managers have no autonomous authority to discipline. It further argues that the variety of policies which were submitted by HEABC are not evidence of any authority to discipline. *I agree with BCNU that these policies are not evidence of authority to discipline. ...However, they were not submitted as evidence for authority to discipline, but rather an illustration of areas where a Nurse Manager is responsible for issuing discipline.* One of the policies dated April 2, 1991 and revised in February of 1993, prohibits the abuse of the patient/resident/client. I note that the one-day suspension and warning issued by Pat Scott September 15, 1992 deals with precisely this subject.

I note as well that the policies submitted were examples and not intended to be exhaustive. An examination of the March 1993 five-shift suspension and warning letter reveals that it deals with improper administration of medications. There are extensive policies given as examples of policies developed by Nurse Managers in regard to various procedures in emergency, operating room and obstetrics. *I am sure that there must be policies, although none have been submitted, that deal with administration of medication on the wards. Regardless, it is obvious that the Nurse Manager has the responsibility for issuing discipline when medications are improperly administered.* (paras. 15-16; emphasis added)

78

The original decision also considered two examples of actual imposition of discipline. Both examples were of discipline imposed by a previous incumbent in the Nurse Manager's position. In both incidences there was imposition of suspensions, one for one day and one for five days. In addition both incidences also involved warnings of further discipline and possible termination. In considering these examples the original panel stated:

I have examined the attachments that were provided and find that in both examples Pat Scott imposed the discipline in her capacity as the Nurse Manager of the Surgical Unit in one case, and as the Nurse Manager of 2 North in the other case. Further, while both letters have been referred to as warnings (and, indeed,

they do contain warnings of further discipline and possible termination), the first imposes a one-day suspension while the second imposes a five-shift suspension. *In my view, not a great deal turns on the fact that these were suspensions because, as I have said, warnings in a professional setting, particularly a nursing environment, are a serious matter. Nevertheless, the fact of discipline being imposed is significant.* (para. 14; emphasis added)

79 Based on all the above considerations the original panel concluded:

As a result I have concluded that the Nurse Manager positions carry authority to impose materially significant discipline in the Hospital environment. The Nurse Managers participate significantly as the Hospital's representatives in the hiring process and represent the Hospital's interests in WCB hearings. *These are all matters which raise a significant potential for conflict which is at the core of the rationale for exclusion: VGH.* This, taken along with all of their other supervisory duties, leaves no doubt in my mind that they are not employees within the meaning of Section 1 of the Code and must be excluded from the bargaining unit. (para. 26; emphasis added)

80 The original panel's decision to exclude Nurse Managers from employee status is based on the finding of "significant potential for conflict". The existence of a significant potential for conflict is based on the nurse manager's participation in: the hiring process; representation of the hospital's interest in WCB hearings; and "authority to impose materially significant discipline".

81 In determining whether there is sufficient potential conflict of interest to justify the granting of undivided loyalty to the Employer, neither the role in hiring nor the WCB role would be sufficient in and of themselves or even when combined, to justify such a result. The critical aspects in this case were the disciplinary role of the Nurse Managers, and their role in the grievance procedure.

82 In order to determine whether the evidence concerning disciplinary authority justifies the granting of undivided loyalty to the Employer by excluding individuals from the Code due to managerial status, it is necessary to examine how disciplinary authority is actually exercised within the Employer's organization. As part of this examination, the role of the Nurse Managers in the disciplinary decision making process would be considered as would the role of other persons within the Employer's organization who were involved in the disciplinary process. Once this is done a determination can be made as to whether the nurse manager demonstrates an authority of effective determination.

83 In considering the disciplinary role of the Nurse Managers the original panel reviewed policies submitted by HEABC as evidence of authority of the Nurse Managers to discipline and stated:

...I agree with BCNU that these policies are not evidence of authority to discipline. However, they were not submitted as evidence for authority to discipline, but rather an illustration of areas where a Nurse Manager is responsible for issuing discipline. ... (para. 15)

84 The panel also had before it evidence of the actual imposition of discipline. That record consisted of two instances of disciplinary action by a previous incumbent in the position of Nurse Manager. The instances occurred in late 1992 and early 1993. The original panel, after noting that both instances involved letters which warned further discipline and possible termination imposed, in one case a one day suspension and in the other case a five shift suspension stated:

...In my view, not a great deal turns on the fact that these were suspensions because, as I have said, warnings in a professional setting, particularly a nursing environment, are a serious matter. Nevertheless, the fact of discipline being imposed is significant. (para. 14)

85 In considering these disciplinary instances the original panel rejected the BCNU's argument that they are irrelevant because they happened at an earlier time and were imposed by an incumbent who is not one of those currently occupying a disputed position. We concur with the original panel's approach in the circumstances, as in this case, of a position where the duties had not changed over the relevant period of time.

86 The original panel then considered the argument that the Nurse Managers did not exercise sufficient independence in decision making in disciplinary matters to be excluded from the definition of employee, since disciplinary and staff functions were traditionally done in concert with the Human Resources Department. The relevant part of the original decision states:

BCNU argues that discipline and staffing functions have traditionally been carried out by the Nurse Manager in concert with the Human Resources Department. This leaves a Nurse Manager little or no opportunity to exercise sufficient independence in decision making so as to exclude her from the definition of employee in Section 1(1) of the Code. Further, BCNU says that the selection process often involves other BCNU personnel as part of the Shared Governance approach. The Nurse Manager and the General Duty Nurse conduct interviews of potential hires as a team. BCNU says that such team interviews are part of Shared Governance model and any selection or hiring is done in accordance with the collective agreement and policies and guidelines developed by the Human Resources Department.

I reject that argument. The fact that these functions may be performed in concert or in consultation with the Human Resources Department or as part of Shared Governance does not reduce the potential for conflict for the Nurse Manager involved in discipline and staffing nor does it diminish the ground for exclusion. On this very point the panel in *VGH* cautioned as follows:

To set a labour relations criterion that actually requires greater discipline be imposed in order to exclude an employee as a manager in any workplace setting - industrial or professional - would not serve the interest of any party. Indeed, a labour relations policy that encourages independence, collegiality and cooperation, in lieu of greater disciplinary responses, is the most desirable policy. (p. 205)

I agree with the panel in *VGH*. For the Board to say that Shared Governance, or consultation with unions or within management, undermines managerial functions to the point of precluding exclusion from bargaining units would be retrogressive. No employer would want to participate in enlightened managerial models if, as a result of such participation, it was to be deprived of the resources whose undivided loyalty it was hitherto entitled to have. (paras. 18-20)

87 Our concern with this analysis arises from the application of the "Shared Governance" analysis in *VGH* to the issue of the impact of the role of the Human Resources Department on the Nurse Managers' ability to exercise independent judgment in disciplinary matters.

88 In order to establish the existence of an authority of effective determination it is necessary to examine the actual decision making process and the role of the relevant players in that process. In this case that requires an understanding of the role of both the Human Resources Department and the Nurse Managers in the exercise of disciplinary authority, particularly since the policies submitted by the Employer were found not to be evidence of an authority to discipline. However, the original panel effectively rejected the argument that the role of the Human Resources Department should be examined in order to determine whether the Nurse Managers had authority of effective determination. We find this to be in error.

89 When the lack of understanding of the impact of the Human Resources Department role in disciplinary matters on the authority of the Nurse Managers is combined with our earlier concern about the lack of factual certainty available in reviewing the grievance procedure the result is insufficient evidence on the relevant *VGH* factors to make a determination. Accordingly, we find that this matter must be

remitted back in order to obtain the necessary evidentiary background, consistent with the above policy framework.

90 In making the referral back we add the observation that if further evidence establishes that Nurse Managers effectively determine the discipline described in the original decision the result may well be that of exclusion from the Code due to managerial status.

ELEPHANT AND CASTLE GROUP (ROSIE'S ON ROBSON)

A. Background

91 The original decision dealt with an application for certification of a unit of approximately sixty employees at Rosie's on Robson except supervisors and managers. As part of an informal pre-hearing process the Union agreed to the inclusion of three individuals, Wong, Algara and Madison, on the list of employees. They did so without prejudice to their inclusion in the bargaining unit being a matter for collective bargaining for the parties.

92 The original decision then reviewed the duties of five individuals Schaaf, Smyth, Bell, Wong and Algara to determine whether they were persons who should be excluded as employees under the Code due to their managerial status. In conducting this review the original panel found that there were no significant differences in the duties and responsibilities of the five individuals. The original panel then reviewed the evidence concerning the five individuals:

...They all perform front line staff duties, direct the work flow, schedule employees, and supervise their work performance. They also attend regular management meetings at which such matters as labour costs and employee discipline are discussed as the need arises.

Diaz gave evidence of the supervisors' involvement in discipline, discharge, hiring, and employee evaluation. The primary responsibility for these duties rests with the senior managers. However, Diaz agreed that supervisors have the authority to discipline employees by sending them home with instructions to see him [Diaz] before returning to work. He said Algara has sent an employee home on this basis. He further agreed he involves supervisors in terminations. By way of example, he testified that bar manager Smyth "had a lot of involvement" when he [Diaz] terminated an employee named Marlowe. He also agreed that Smyth has terminated a second employee on his own. Diaz upheld this discipline and allowed the termination to stand.

Diaz testified on the supervisors' involvement in hiring. They refer job applicants to him after they do initial screening interviews, and they "sometimes" sit in on his interviews of applicants. He agreed that deli manager Wong interviewed and hired Bryan Shillingford on her own. Further, he said former deli manager Anna Maddison interviewed and hired an employee called Jay on her own. He agreed supervisors discuss work performance with employees.

Diaz said all supervisors except Algara work full time and are on salary. Algara works four days a week and is paid hourly. Front line staff are paid hourly. They are scheduled by their supervisors who also sign them in and out on their time sheets. The supervisors, including Algara, are scheduled separately by Diaz. Benefits also differ. Supervisors receive benefits automatically after three months. They receive free meals at the restaurant. Front line staff receive benefits after 6 months, if requested, and receive meals at half price. The supervisors have their own tip pool. (paras. 20-23)

93 Based on the above factual framework the original decision then considered the two *VGH* factors of discipline and discharge and labour relations input. In so doing the original decision stated:

Two factors are critical to an arm's length relationship between the employer and union: discipline and discharge, and labour relations input. The involvement of employees in either of these functions will result in their exclusion from the bargaining unit on the basis of a potential conflict of interest with employees in the unit.

I accept General Manager Diaz's evidence that the supervisors at Rosie's regularly perform front line staff work. I accept his evidence that they share the same duties and responsibilities and cannot be distinguished on this basis. I also accept his description of the supervisors as "junior management". As such, I appreciate that they operate on the boundary between the Code's definitions of "manager" and "employee". Determinations of managerial or employee status in these circumstances are difficult to make and must be carefully considered in light of the specific evidence in each case.

* * *

I am persuaded on Diaz's evidence that the supervisors at Rosie's are involved in the discipline and discharge of employees. I am satisfied that these responsibilities -- particularly in a restaurant workplace and in combination with hiring, scheduling, signing employees in and out of work, and discussing work performance with them -- result in the supervisors exercising a sufficient measure of control over these restaurant employees and their livelihoods, such that they should be excluded from the bargaining unit because of the potential conflict of interest with employees in the unit.

In the adversarial context of collective agreement administration Smyth, Algara and Wong, for example, could not

simultaneously represent the Employer's position on grievances over their discharge, discipline, or hiring of employees and also be members in the bargaining unit. Nor would it be appropriate for the supervisors to simultaneously attend both management and union meetings where staff matters, including discipline, are discussed. These are precisely the situations in which management is entitled to the undivided loyalty of its managers and in which the Union is entitled not to have these persons involved in its internal affairs. (paras. 50, 51, 53, 54)

94 In addition, and critically, the original decision set out an alternative basis for reaching a conclusion on the matters before it:

If I am wrong in my conclusion that these supervisors should be excluded from the bargaining unit on managerial grounds, I am persuaded they are excluded on the basis that a rational line, based on a distinguishable community of interest, can be drawn between them and the employees in the bargaining unit on a first application for certification. (para. 60)

B. Section 141 Grounds

95 We do not find it necessary to set out or make a determination on the grounds raised by the Employer in this matter since none of the grounds challenged the alternative determination in the original decision that a rational and defensible line could be drawn around the unit sought by the Union. The unit as originally sought excluded supervisors. Thus, whether the individuals were ultimately found to be managers and thus excluded from employee status under the Code or whether they were supervisory employees and covered by the Code the result would not affect the outcome insofar as a rational and defensible line conclusion is concerned. However, while it is not necessary to decide the grounds raised in the Employer's Section 141 application, we do find it useful and appropriate to take this opportunity to comment briefly on the policy analysis used in the original decision and on the issue of separate supervisory units in the context of a small employer.

C. Analysis

96 The policy analysis used in the original decision stands for the proposition that any involvement in discipline and discharge or labour relations input necessarily results in exclusion from the definition of employee under the Code due to managerial status because the simple existence of potential conflict of interest entitles management to the undivided loyalty of the individuals in question. This is not the correct policy in the establishing of managerial status. As expressed previously, managerial status arises from a finding that there is sufficient potential conflict of interest so as to require the

undivided loyalty of the individuals in question. This policy and its application has been set out previous to our consideration of this case.

97 In dealing with issues of managerial exclusion and separate supervisory units in a small business context there is a particular policy consideration that has a very significant practical effect. In most cases involving a small business, if a supervisory employee is excluded from the unit because of a potential conflict of interest with the employees they supervise, this would probably be the end of the matter. First, there are very few instances of applications for separate supervisory units in the small business context. Secondly, and far more importantly, if such applications are made they would have to overcome the Board's IML based presumption against the proliferation of bargaining units. One of the important factors in such considerations is the size of the employer. The presumption is more difficult to overcome when the employer is a small employer. Consistent with this general application of IML principles we do not anticipate many circumstances in which the Board would be inclined to consider a separate supervisory unit in this area. We expect the impact of this approach to be quite significant for the community and the Board. Over eighty-five percent of applications for certification before the Board involve workplaces with less than fifty employees. In such cases a finding of the existence of meaningful potential conflict of interest in the role and authority of the persons in question will probably be decisive for all practical purposes in light of the substantial policy hurdles to the granting of an application for a separate supervisory unit in this context.

98 The application under Section 141 is dismissed.

III. CONCLUSION

POLICY SUMMARY ON MANAGERIAL EXCLUSIONS/SUPERVISORY UNITS

A. Managerial Exclusion/Employee Status

1. One of the fundamental purposes that guides the Board is stability in collective bargaining. The Board has supported that goal by interpreting the definition of employee in Section 1(1) of the Code in a way that preserves the arms length relationship in collective bargaining. It does so by granting employers the undivided loyalty of the senior people responsible for ensuring that work is done and that the collective agreement is adhered to while at the same time ensuring that the leadership of unions is not dominated by individuals from senior management.
2. The other fundamental purpose that guides the Board is access to collective bargaining. The Board has supported that purpose in its acknowledgment that Section 29 of the Code represents a statutory recognition of the fact that the need for exclusion of senior management from employee status does not lead to the denial of access to collective bargaining for "supervisory" employees.

3. A determination as to inclusion in or exclusion from employee status is based on a measurement of the potential conflict of interest. An objective examination of the actual responsibilities and authority is necessary to determine this issue. If the potential conflict of interest is sufficient to justify the need to grant to the employer the undivided loyalty of the individual in question, the individual is excluded from employee status under the Code.
4. The two factors of discipline and discharge, and labour relations input, carry the greatest weight in determining whether there is sufficient conflict of interest to justify exclusion from the Code due to managerial status. The only other factor that would materially assist the Board is that of hiring, promotion and demotion to the extent it is not already covered by the first factor.
5. In measuring the factor of discipline and discharge the test of "effective determination" is used in deciding whether there is sufficient potential conflict of interest to justify exclusion from employee status.
6. The measurement of the relevant factors as well as the application of the test of "effective determination" must be done in a way that accurately reflects the contextual realities of particular organizational and managerial structures. An example of this is the Board's approach to professional workplaces and the recognition that a lower incidence of disciplinary activity in less adversarial workplaces does not lessen the weight to be given to the factor of discipline and discharge.
7. If the measurement of potential conflict of interest leads to the exclusion from employee status under the Code no further issues need to be decided concerning the individual in question.

B. Section 29 Appropriateness

8. If the measurement of the potential conflict of interest results in a determination that a person is a supervisory employee under the Code, a further determination on the appropriateness of including that person in a bargaining unit that contains persons who are supervised by that person will normally be required. If there are concerns about potential conflict of interest with bargaining unit employees in including the supervisory employee in a unit with the persons whom they supervise, the supervisor will be excluded from that unit. In making this determination, the Board is also be guided by the *IML* based preference of inclusion, taking into account the particular history and characteristics of the industry or sector in question.
9. If the supervisory employee is included in the unit with the employees they supervise that ends that issue.

10. If the supervisory employee is excluded from the bargaining unit due to the potential conflict of interest no further issue concerning that supervisory employee needs to be determined unless a separate supervisory unit is sought.
11. If a separate supervisory unit is sought the Board will balance the *IML* based proliferation concerns against access to collective bargaining considerations. For small employers the concern about the proliferation of bargaining units would be high. In such circumstances supervisory employees who are excluded from a unit which includes the employees whom they supervise would likely be denied access to collective bargaining rather than have a second unit created. If however the employer is a large employer the Board will determine on the facts whether a separate supervisory unit is appropriate.

C. Management Team

12. The management team concept will continue to be a "relatively rare" ground for exclusion.

D. Comment

The above described outline of the Board's approach to managerial exclusion issues and supervisory units issues provides a practical framework that will clarify and simplify these matters for the Board and the parties.

The overwhelming majority of cases at the Board which give rise to the issue of managerial exclusions involve small bargaining units. Persons whose duties give rise to a conflict of interest sufficient to justify the granting to the employer of their individual loyalty will be excluded from the definition of employee in the Code. Persons who are found to be supervisory employees whose duties give rise to a concern about the potential conflict of interest with the employees they supervise will be excluded from a bargaining unit which includes employees whom they supervise. In addition, consistent with the Board's concern about proliferation in situations involving small employers, a separate supervisory unit is not likely to be allowed. Thus, in most cases involving small employers whether persons are found to be managers or whether they are found to be supervisory employees where there is a remaining concern about the potential conflict of interest, the practical outcome is the same. There will only be one bargaining unit and persons whose duties give rise to potential conflict of interest will be excluded from that bargaining unit.

In those few instances of applications involving large employers an issue will emerge only: if the individuals in question are found to be supervisory employees; and if the supervisory employees are excluded from a unit containing the employees they supervise; and if the supervisory employees seek a separate bargaining unit. Such a case would be handled consistent with Section 29, the Board's policy in *IML* and the need to balance the twin objectives of, access to collective bargaining and the need for stability in collective bargaining.

The above analysis applied to the three cases has produced the following results.

HIGHLAND VALLEY COPPER

99 The application under Section 141 is granted. The original panel erred by applying a policy that would require exclusion from employee status if there is any potential conflict of interest. In applying that policy the original panel also erred in assessing the role of the foremen by utilizing a test of "primary role" in discipline rather than the test of "effective determination" of discipline as set out in *Cowichan*. The proper policy approach is to determine whether the position in question exhibits responsibilities and authority that demonstrate sufficient potential conflict of interest so as to require their undivided loyalty to management and thus exclusion from employee status under the Code. A review of the facts set out by the original panel under the appropriate test leads us to conclude that the foremen are employees under the Code. Their authority is so circumscribed, both in the kind of discipline for which they are responsible and for the limited role they play in such situations, that they cannot fairly be understood to be the source of effective determination in disciplinary matters.

100 The issues concerning appropriateness which were identified in the original decision were not decided by the original panel. Those issues must now be addressed by a new original panel. The Board will be in contact with the parties in the near future in this regard.

CAMPBELL RIVER HOSPITAL

101 The application under Section 141 is granted. The original panel erred in not assessing the impact of the role of the Human Resources Department in determining whether the Nurse Managers had the ability to exercise independent judgment in disciplinary matters. This combined with our concern about the lack of factual certainty available in reviewing the grievance procedure, means there is insufficient evidence to reach a conclusion on the issue of effective determination.

102 Accordingly this matter is remitted back to the original panel in order to obtain the necessary evidentiary background consistent with the policy framework set out earlier. If further evidence establishes that Nurse Managers effectively determine the discipline described in the original decision the result may well be that of exclusion from the Code due to managerial status.

ELEPHANT AND CASTLE GROUP (ROSIE'S ON ROBSON)

103 We do not find it necessary to make a determination on the grounds raised by the Employer in this matter since none of the grounds challenge the alternative determination that a rational and defensible line could be drawn around the unit sought by the Union. The unit as originally sought excluded supervisors. Thus whether the

individuals were ultimately found to be managers and thus excluded from employee status under the Code or whether they are supervisory employees and covered by the Code the result would not affect the outcome insofar as a rational and defensible line conclusion is concerned.

104

Accordingly, the application under Section 141 is dismissed.

LABOUR RELATIONS BOARD

KEITH OLEKSIUK
CHAIR

A handwritten signature in black ink that reads "Emily Burke". The signature is written in a cursive style with a large, looping initial "E".

EMILY BURKE
VICE-CHAIR

A handwritten signature in black ink that reads "Lisa Hansen". The signature is written in a cursive style with a large, looping initial "L".

LISA HANSEN
VICE-CHAIR

DISSENTING REASONS

I. INTRODUCTION

105 The panel in *Cowichan Home Support Society*, BCLRB No. B28/97, (1997) 34 CLRBR (2d) 121 ("*Cowichan*") considered the extensive arguments of the respective parties in three original decisions: *Cowichan Home Support Society*, BCLRB No. B100/95 (the original *Cowichan*); *Westfair Foods Ltd. (Western Grocers Division)*, BCLRB No. B217/95; and, *Tree Island Industries Ltd.*, BCLRB No. B179/95 ("*Tree Island*"). The *Cowichan* reconsideration panel took two years to render its decision. That decision has been in effect only 17 months.

106 The debate on the Board's policy regarding managerial exclusions and supervisory bargaining units actually began in March 1995 when the original *Cowichan* decision was rendered. That debate and the parties' positions are set out in the *Cowichan* reconsideration decision at paras. 21 through 70. Those paragraphs also set out the submissions from three intervenors in the hearing. Those intervenors were from the labour relations community at large.

107 The *Cowichan* reconsideration decision rejected the reasoning in the original *Cowichan* and *Tree Island* decisions and the notion that there is a "level" or "sliding scale" of conflict of interest associated with potential conflict of interest. We were therefore of the view that the policy of the Board on conflict of interest, managerial exclusions, and supervisory bargaining units was basically concluded.

108 We understood that the purpose of the present proceedings was simply to resolve certain internal inconsistencies in the *Cowichan* reconsideration decision and the difficulties those inconsistencies were causing in matters before the Board. We were not of the view that the purpose of these proceedings was to generally review the policy of the Board on inclusions/exclusions or supervisory bargaining units, nor do we believe it appropriate, given the history of these issues at the Board, that the Majority does so.

109 As well, substantively we do not agree with the Majority for the following reasons.

110 First, the underlying reasoning contained in the policy analysis of the Majority was expressly rejected in the *Cowichan* reconsideration decision. Although the Majority's analysis at pps. 12 and 13 has the appearance of rejecting a sliding scale, we are unable to distinguish their *level of potential* conflict or *sufficient potential* conflict of interest analysis as anything other than that. The analysis of the Majority therefore resurrects what was expressly rejected in *Cowichan*. It is simply a repeat of the analysis in the original *Cowichan* and *Tree Island* decisions, which had been convincingly, and we thought finally, rejected in the *Cowichan* reconsideration decision.

111 Second, and more importantly, the decision of the Majority represents a major
shift in the approach in British Columbia to managerial exclusions and supervisory
bargaining units when the long established approach, properly based in our statute,
was so recently reaffirmed in the *Cowichan* reconsideration decision. The Majority
simply thereby re-creates the fundamentally problematic results in the original decisions
in *Cowichan* and *Tree Island*.

112 Our statement of the appropriate policy on managerial exclusions does not
repeat the entire *Vancouver General Hospital*, BCLRB No. B81/93 (Reconsideration of
IRC No. C179/91) ("*VGH*") and *Cowichan* reconsideration decision analyses, except to
explain how the Majority's reasons and analysis constitute an error in law in the
interpretation of the *Labour Relations Code*.

113 We adopt the reasoning set out at paras. 115 through 117 of the *Cowichan*
reconsideration decision as the appropriate policy of the Board on supervisory
bargaining units.

114 Further, our approach to the policy on managerial exclusions is an attempt to
correct the inconsistencies in the *Cowichan* reconsideration decision, which arose in
that panel's disposition of the original decisions before it.

115 We provide a test that parties appearing before the Board could apply with
certainty. That was the purpose of the *VGH* decision, which attempted to provide clear
direction and certainty after a decade of lengthy and costly litigation on the issue.

116 Lastly, we find the reasoning set out by the Majority provides an uncertain test
which will lead to increased litigation on the matters addressed in its reasoning.

II. POLICY ON MANAGERIAL EXCLUSIONS

117 The Board moved its policy in respect to managerial exclusions into the 1990's
with its decision in *VGH*. That decision recognized the need to move forward and set
new policy grounds for determining the basis upon which the Board would determine if
individuals were excluded from the definition of employee under the Code:

The workplace of the 1970s when the *B. C. Ferry* test evolved cannot serve as a template for the workplace of the 1990's. The simple fact of supervision, the involvement in policy setting or the ability to authorize leaves of absence and overtime are not as indicative of managerial duties and responsibilities as may have been the case in the 1970's. With greater employee involvement in the management of the firm and with new legislative concepts such as joint consultation and co-management, the most important factor, and one which we view as consistent with the

overall scheme of the Code, is the participation of individuals in two areas -- collective bargaining and the administration of the collective agreement. It is participation in these two areas which underlie the rationale for exclusion -- the potential for conflict of interest and the requirement of an arm's length relationship in collective bargaining.

Second, we recognize the distinctiveness of professional settings (or other workplaces which may demonstrate the same attributes as professional settings). These workplaces usually employ a highly skilled work force. The employees in such a workplace generally exercise more independence than employees in an industrial setting, and often work in a more collegial and cooperative framework. It is recognized that such settings may require less discipline and discharge. Indeed, the overall framework may be less adversarial. A more subtle judgment may be required in order to determine the actual exercise of authority, especially in regard to such areas as discipline and discharge. (p. 197)

We support that reasoning and believe reliance on the law and policy of the Board preceding *VGH* is not a progressive approach to the issue of managerial exclusions. Past decisions of the Board were reviewed in *VGH*. The elements contained in those decisions relevant to the 1990s were considered and formulated into the policy in *VGH*.

118

In the *Cowichan* reconsideration decision the Board confirmed in general the approach in *VGH*. It went on to affirm that three criteria would be considered by the Board in determining managerial status: discipline and discharge; labour relations input; and, less importantly, hiring, promotion or demotion. The *Cowichan* panel (the "Panel") also noted the following about changing workplaces and workforces:

Further, many changes over the last several decades have taken place in the organizational and management structures of employers. Some of these new economic arrangements have flattened traditional hierarchical structures, resulting in changes to the workplace and to the nature of work itself; and some of the changes have included employees, individually and collectively, exercising greater authority over work that was formerly in the hands of managers. The old, industrial model no longer dominates. Workplaces may be quite different, and so may particular workforces. (para. 94)

The Panel re-confirmed that the rationale for exclusion of individuals from a bargaining unit is *potential conflict of interest*. It rejected the notion of a *level* of potential conflict of interest, which it referred to as the sliding scale of conflict of interest set out in the original *Cowichan* and *Tree Island* decisions.

119 Further, the Panel rejected the notion that placement in a separate supervisory unit addresses the issue of undivided loyalty (the premise upon which managerial exclusion is based):

...As was originally stated in *Burnaby* and affirmed in *VGH*, the conflict of interest that is at the heart of the collective bargaining scheme is a "potential conflict of interest". No actual conflict need be shown. This conflict of interest arises directly from an objective examination of the actual responsibilities and authority of the individual at issue. Further, that potential conflict of interest is simply not an internal conflict of interest that may arise by the establishment of a blended unit -- a unit containing supervisors and the employees they supervise. The concept of conflict of interest within the managerial exclusion issue, is a reference to the existence of dual loyalties resulting from the duties performed for the employer and membership in a bargaining unit. (para. 115)

As well, the Panel acknowledged there may be differences in workplace settings where the nature and exercise of managerial authority may differ. It pointed to three settings in particular: professional employment settings; large industrial settings; and small, private sector workplaces.

120 The need for uncomplicated, straightforward tests for managerial exclusions crystallized with the experience of the parties in *VGH*. There were 45 days of hearing in the original case. On reconsideration, all of the parties requested that the Board provide clear, simple guidelines for determining managerial exclusions. The request arose out of a decade of turmoil in this area, including repeated, extensive litigation, protracted appeal processes, and confusion in the law and policy of the Code: *Chilliwack General Hospital*, BCLRB No. 349/84; *Chilliwack General Hospital*, BCLRB No. 110/85; and, *Chilliwack General Hospital*, BCLRB No. 164/85; *Queen Alexandra Hospital for Children*, BCLRB No. 72/87; *Health Labour Relations Association (Cancer Control Agency)*, A363/88, (1988), 3 LAC 4th 35, H. A. Hope; *Health Labour Relations Association (Cancer Control Agency)*, A363/88(a); *Health Labour Relations Association (Cancer Control Agency)*, A363/88(b) (Application for Reconsideration denied in IRC No. C192/89); *B.C. Cancer Control Agency*, IRC No. C5/90; *Children's Hospital*, IRC No. C159/90, [1990] CLLC ¶16,064; *Children's Hospital*, IRC No. C58/91, [1991] CLLC ¶16,050; *Children's Hospital*, IRC No. C80/91; and, *Vancouver General Hospital*, IRC No. C179/91.

121 *VGH* attempted to address the parties' concerns by clarifying and simplifying the Board's approach to managerial exclusion issues.

122 As noted, *Cowichan* then affirmed that the test for determining managerial exclusions would be the three factors of discipline and discharge; labour relations input; and, hiring, promotion or demotion. In doing so, the Panel designed a test that more accurately reflected workplace realities, and from a practical perspective, also attempted to establish an objective and predictable outcome so that parties themselves

could determine who constitutes an "employee" under Section 1 of the Code. We believe the intent of the Panel, as had been the case in *VGH*, was to eliminate the necessity for time-consuming and costly litigation.

123 However, the Board's experience subsequent to *Cowichan* was that internal inconsistencies in the decision, arising from the actual dispositions in the specific cases before the Panel, resulted in difficulties in subsequent proceedings involving managerial exclusion issues. That has been particularly true in respect to certification and decertification applications. The inconsistencies have provided parties the opportunity to argue different portions of *Cowichan* depending on their desired outcome in such matters as determinations on appropriate bargaining units and bargaining unit constituency lists.

124 Thus, in this one respect, *Cowichan* did not adequately clarify the law and policy of the Code nor effectively decrease litigation before the Board. As we have stated, we understood that this was the particular matter to be addressed in the present proceedings.

125 The Board was originally established and designed to be a specialized, expert tribunal, responsive and sensitive to labour relations realities. The Board is entrusted with the power and responsibility to make practical judgments regarding labour relations problems. We need a practical focus to the judgments we make and our policies should be clear and understood by those who must live under them. It is only in this way that the Board can address the overriding purposes in Section 2 of the Code and achieve the express goal of a fair, balanced, and progressive labour relations system.

126 The following are the policy areas requiring clarification in order to meet those purposes:

1. Supervisory bargaining units;
2. Tests for different business/economic sectors;
3. Discipline and Discharge.

Except as expressly noted otherwise in these reasons, we affirm the three *Cowichan* criteria, the Panel's analysis regarding conflict of interest under the Code, and the *VGH* analysis regarding potential conflict of interest in the context of Section 1 managerial exclusions.

1. Supervisory Bargaining Units

127 We agree with the interpretation and application of Section 29 of the Code as set out in *Cowichan*.

128 The statute mandates a two step approach to certification applications where a proposed bargaining unit contains supervisors and managerial status is in dispute. First, the Board must determine under Section 1 of the Code whether any proposed bargaining unit members are properly excluded from the definition of employee as a manager. Section 1 of the Code provides:

"employee" means a person employed by an employer, and includes a dependent contractor, but does not include a person who, in the board's opinion,

- (a) performs the functions of a manager or superintendent, or
- (b) is employed in a confidential capacity in matters relating to labour relations or personnel;

The statute thus expressly excludes managers and superintendents from the definition of employee.

129 Potential conflict of interest is the test used to determine if an individual is excluded from the statutory definition of employee. The potential conflict of interest at issue is in respect to the dual and conflicting loyalties to the employer and the union/bargaining unit, which would arise by having an individual acting as a "manager" while simultaneously being in a bargaining unit.

130 If an individual is excluded from employee status under Section 1 of the Code, that is the end of the inquiry. The individual is either an employee under the statutory definition or not.

131 Where an individual falls within the definition of employee under the Code, the Board must, as is required in all certification applications, move to step two: consideration of the appropriateness of the proposed bargaining unit. Where some employees are supervisors, step two will entail a consideration of Section 29 of the Code. It provides:

29. If a trade union applies for certification as the bargaining agent for a unit consisting of

- (a) employees who supervise other employees, and
- (b) any of the other employees,

the board may certify the trade union for the unit, for a unit consisting only of employees who supervise or for a unit composed of some or all of the other employees.

Section 29 of the Code becomes relevant at step two, when the Board determines the appropriateness of the applied for unit of employees. (see *Cowichan* paras. 84-86)

132 The appropriateness of a bargaining unit is determined under the Code in accordance with the Board's policy 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*").

133 The test for determining appropriateness is separate and distinct from the Section 1 employee/manager determination, arising from and in respect to different statutory provisions, primarily those in Part 3 of the Code. Appropriateness is *not* determined by reference to or on the basis of the statutory definition of "employee" in Section 1 of the Code.

134 The Majority has not approached the Section 29 issue of supervisory units from this perspective.

135 Rather, the Majority relies on a "*level* of potential conflict of interest" analysis. Underlying their analysis is the finding that that the presence of more or less conflict of interest in terms of employer versus union loyalties determines both the initial question of whether an individual is excluded from the definition of employee under Section 1 of the Code *and* the subsequent determination under Section 29 of the Code whether a separate supervisory bargaining is appropriate.

136 The Majority's approach constitutes an error of law in the interpretation of the Code. It wrongly applies the Section 1 "employee" test (potential conflict of interest), in terms of employer versus union loyalties, to the separate and different appropriateness issue under Section 29 of the Code.

a) The Error In Law

137 The Majority's error arises from its reliance on the following passage in *Tahsis Company Limited, Gold River Division*, BCLRB No. 45/77, [1977] 2 Can LRBR 452 ("*Tahsis*");

...supervisory employees will often exercise limited management functions over other employees - functions which do not suffice to exclude them from the Code's definition of employees under Section 1(1) of the Code, but functions which nevertheless may on occasion challenge their loyalty to their employers. In each case

the Board will have to decide whether the elimination of such potential conflicts outweighs the advantages to be gained by a single plant-wide unit... (p. 21; emphasis added by the Majority)

138 It should first be noted that the 1977 *Tahsis* decision has never been considered a leading decision in the development of the Board's law and policy on inclusions/exclusions or supervisory bargaining units. As an example, it was not even included in the joint Brief of Authorities provided to us by the parties to this hearing. Presumably that Brief included what the parties saw as the important previous decisions relevant for our consideration.

139 More importantly, the above passage in *Tahsis* is in error. Whether to have one or more bargaining units amongst employees does not rest on supervisors having "functions which nevertheless may on occasion challenge their loyalty to their employers". The issue of undivided loyalty to the employer is the subject matter of the Section 1 conflict of interest issue and test. In contrast, the issue under Section 29 of the Code, whether to have two bargaining units amongst employees, is a question of the *appropriateness* of the bargaining units.

140 The determination of bargaining unit appropriateness rests on the *IML* criteria in respect to community of interest. At a conceptual or theoretical level there may be a relationship between community of interest and potential conflict of interest. For instance, it has been recognized that community of interest "may in fact be no more than the opposite side of the conflict-of-interest coin" (*VGH*, p. 214). But, crucially, even if conflict of interest would thus be relevant under Section 29 of the Code (as the flip side of community of interest), the conflict of interest at issue under Section 29 is that between the supervisors and other employees. It is *not* the potential conflict of interest between "supervisory" employees and the employer in respect to conflicting loyalties. It is an error to confuse these different potential conflicts of interest, which arise separately and distinctly under Sections 1 and 29 of the Code.

141 The error in *Tahsis* may seem like a small or technical error in the expression of the reasons in that case. However, the Majority has seized upon this minor error as a foundation upon which they construct a whole, new theory of inclusions/exclusions and supervisory bargaining units under the Code. What thus entered the Board's jurisprudence as a minor or technical error of expression in 1977, has now, two decades later, been expanded by the Majority into an entire construct which confuses the clearly separate and distinguishable Sections 1 and 29 issues and tests.

142 The first consequence of the Majority's approach is that the Section 1 test for potential conflict of interest in terms of employer versus union loyalty is wrongly applied to the Section 29 bargaining unit issue.

143 The second consequence is an incorrect reassessment of the step one, and Section 1 determination of "employee" status under the Code. This repeats the error in the original *Cowichan* and *Tree Island* decisions. That error was previously, specifically

identified and rejected in *Cowichan*. We find the second paragraph in the following passage from *Cowichan* to be particularly explanatory:

First, a separate unit cannot be created under the heading of conflict of interest because that would result in a varying scale in regard to who is a manager. It is unacceptable to have a policy that would allow persons, performing the same functions, to be treated as "employees" where they are placed in a separate bargaining unit, but conversely, treated as "managers" where a separate bargaining unit is inappropriate. The Board in *VGH* rejected such a varying or sliding scale in regard to the management team concept for analogous reasons. Previously, if an individual did not fulfill the criteria of a "manager", then the employer was able to argue that an individual was a "near manager" and nonetheless excluded. This sliding scale of what constituted a manager under the management team concept, in effect, lowered the test for managerial exclusion. In this case, the effect would be to raise the test for managerial exclusion; and this would inevitably result in a policy that would be in conflict with the principles expressed in both *VGH* and *IML*.

Second, the placement of an individual into a separate bargaining unit does not address the issue of a potential conflict of interest in dealing with the issue of undivided loyalty or commitment. As stated, the issue is one of dual loyalties between the employer and a bargaining unit. A supervisor who is simply placed in a separate bargaining unit does not resolve the issue of conflict of interest for the employer. That is because the potential conflict of interest, which is of concern to the employer in regard to the issue of managerial exclusion, is not the one which is internal to the bargaining unit (which will be dealt with under appropriateness); but rather, is directed at maintaining an arm's length relationship between supervisors and *any* unionized bargaining unit. (paras. 116-117; *emphasis* in original; underlining added)

That analysis in *Cowichan* is entirely correct and the Majority's disagreement with it is in error.

144 The above passages in *Cowichan* explain and reject the error in approach regarding inclusions/exclusions in the original *Cowichan* and *Tree Island* decisions. The passages thereby also in effect explain and reject the basis of the error in *Tahsis*.

145 The error in *Tahsis*, appears to be a misreading of *The Corporation of the District of Burnaby*, BCLRB No. 1/74, [1974] 1 Can LRBR 1 ("*Burnaby*"), which is relied upon by the Majority along with *Tahsis*, as support for their novel approach to inclusions/exclusions and supervisory bargaining units. The analysis in *Burnaby* does

not provide a basis for the error in *Tahsis*, or the Majority's decision. After quoting the supervisory bargaining unit provision in the Code (then Section 47), Chair Weiler states:

I don't think this constitutes any radical breach with the earlier legal tradition. The provision deliberately refers to "employees who supervise other employees". This directs us back to the statutory definition of "employee", and the latter in turn excludes those "employed for the primary purpose of exercising management functions over other employees". Management is still excluded. What we do have is statutory recognition that a person who is employed as a supervisor is not thereby also a manager. To the extent that supervision and control of employees have hitherto been considered a significant indication of management functions, the law's policy is to be changed for the future. Should there still be concern about the potential conflict of interest in a unit composed of supervisors and employees, that concern is to be met by design of separate units where this is appropriate, rather than by a total denial of collective bargaining rights to supervisors. (p. 5)

146 This passage affirms that "[m]anagement is still excluded". Chair Weiler simply concludes that the supervisor, employee bargaining unit provision, in effect confirms "that supervision and control of employees" do not constitute managerial duties. He then adds that *if* that wasn't the case before, it was to be, henceforth. That has been the case ever since and continued to be the case under *VGH* and *Cowichan*.

147 This passage in *Burnaby* also addresses the possibility that if there is still a concern about potential conflict of interest "in a unit composed of supervisors and employees" that is to be resolved, "where this is appropriate", by a separate bargaining unit, "rather than by a total denial of collective bargaining rights to supervisors". The phrase "potential conflict of interest" is thus specifically referring to and in respect of the supervisors and the other employees. It is not referring to potential conflict of interest as between the employees/supervisors and the employer. It would, of course, be a total *non sequitur* to conclude that the potential conflict of interest at issue in respect to the *employer* could simply be resolved by a separate bargaining unit for the supervisors. That in no way would address the question of the potential divided loyalties of the supervisors *vis-a-vis* their employee/bargaining unit status and their duties as a "manager" on behalf of the employer. That is why they are to be excluded initially if they have managerial duties which create a potential of conflict of interest with the employer.

148 Further, we note that the Majority's approach at the end of the day in fact contradicts the assertions in *Burnaby* it purports to rely on. In dealing with supervisors, *Burnaby* says that if there is a problem in respect to those supervisors being in the same bargaining unit with the other employees, they should have their own bargaining unit rather than be denied collective bargaining rights. Dealing with true supervisors (i.e. employees, not managers), we concur with that view, as the panel in *Burnaby* states, "where this is appropriate".

149 However, the Majority has allowed supervisors who perform managerial duties to
be employees. That creates a situation where the Majority then feel compelled at times
to deny access to collective bargaining to these individuals, as they note in their
discussion about small business employers. That flip-flop becomes necessary because
the Majority has wrongly determined these individuals to be employees in the first
instance, when the individuals should be excluded under the Code from being
employees because of their duties as a manager. In the result, the Majority says on the
one hand they would grant more access to collective bargaining through a separate
supervisory unit, yet, they ultimately must also limit access to this further, supervisory
unit. They thus are forced to take away the access to collective bargaining which they
say they have just granted. This is complicated, anomalous, and simply wrong.

150 The short answer to these difficulties in the Majority decision is to simply and
properly exclude these individuals in the first instance, if they meet the established
criteria which reflect the potential conflict of interest rationale.

b) Consequences of the Error

151 Again we note that it was not our understanding that all of the above was at
issue in these proceedings. Neither do we believe that was the understanding of the
parties to these proceedings nor the community at large. It is our belief that the
community had understood, and even largely accepted, that the Board had established
its policy on inclusions/exclusions and supervisory bargaining units in the *VGH* and
Cowichan policy decisions.

152 *Tahsis*, and certainly the error in it, was not a part of the Board's clarification and
simplification of its law and policy in *VGH* and *Cowichan*. It was not our understanding
that *Tahsis* was the issue in these proceedings and would again be used, in error, to
overturn the two recent, seminal policy decisions of the Board in this area, *VGH* and
Cowichan.

153 The Majority has thereby reversed the Board's attempts, commencing with *VGH*,
to clarify, simplify, and move these issues forward in a progressive way. That reversal
is clearly a regressive step.

154 The Majority's decision will also, we believe, lead to expensive and time-
consuming litigation and appeals. For instance, as members of this panel, we do not
know what will constitute a "*sufficient level of potential* conflict of interest". We do not
know how the determination(s) will be made or with what outcome(s).

155 Lastly, the Majority does not explain how the *IML* presumption against a
multiplicity of bargaining units will operate, particularly in respect to a supervisory unit
as a second bargaining unit. The "markedly increasing presumption" in *IML* (p. 193)
has always been less certain in its outcome in respect to second bargaining units, as

opposed to third or fourth units where the impact is more certain. As a result, we can expect more, difficult and contentious litigation on this front as well.

156 While the Board, the parties, and the community are engaged in these litigation exercises, we will be collectively distracted from addressing the progressive amendments in the 1993 Code as epitomized by Sections 2(1)(b) and (f) of the Code's purposes section. Again, the Board will thereby fall short of its statutory mandate: *KFCC/Pepsico Holdings Ltd.*, B225/98, para. 27.

157 We believe that these regrettable consequences rest on the Majority's reliance on the error in *Tahsis* and their unwarranted expansion of that decision into their theory of inclusions/exclusions and supervisory bargaining units. Irrespective of the reliance on *Tahsis* that theory itself simply revives the original *Cowichan* and *Tree Island* decisions, contrary to the reconsideration decision in *Cowichan*.

158 We add that the *VGH/Cowichan* approach to inclusions/exclusions and, latterly, supervisory bargaining units, does not "write out" Section 29 of the Code as the Majority asserts (para. 21). It simply, properly limits the question of supervisory bargaining units to an ancillary issue once the Section 1, potential conflict of interest determination as to which individuals are employees and which are excluded as managers, has been made under the Code. This is the long-standing approach taken in British Columbia, as we have mentioned earlier. If it is determined that some of the "employees" are in fact supervisors, the Section 29 appropriateness issue may arise. Such individuals can, of course, act in a supervisory capacity in any number of ways short of being actual "managers" under the Code, as defined by the criteria in *Cowichan*.

2. Tests for Different Sectors

159 The small business, service sector has been the focus of unionization in recent years. The Board has as a result has been faced with an increasing number of cases where the employee status of supervisors or managers in these workplaces is brought into question. Often these individuals are actually referred to as "managers" in the workplace. The question is whether these individuals should be considered managers excluded under the Code definition of employee, and in a context where they are found to be employees, whether they are appropriately included in the particular bargaining unit at issue.

160 These individuals typically perform such functions as supervising staff, scheduling employees for work, and approving overtime. The employees reporting to them often see these individuals as being aligned with management and acting on management's behalf. (However, this subjective perspective will not itself form part of the Board's test for managerial exclusion. The test must be based on more objective criteria.)

161 Some of these individuals may not exercise authority over the two predominant criteria set out in *VGH*: discipline and discharge, and labour relations input. Often they do, however, exercise authority over hiring and promotion or demotion. The exercise of other duties, such as the scheduling of work or overtime, may also materially affect the economic lives of the employees in the proposed bargaining unit. These individuals thus exercise a power equivalent to discipline in these workplaces, through such matters as scheduling or changing duties and shifts. As a result, they are in a potential conflict of interest with the employees. If so, these individuals should be excluded from the statutory definition of employee in accordance with the underlying rationale for managerial exclusion.

162 It may also be appropriate to resolve the issues arising before the Board in respect to these positions in this sector through specific bargaining unit descriptions excluding persons with such titles in the workplace as "manager" or "supervisor". Such a description could generically be accepted where these individuals exercise authority over the economic lives of employees in the manner we have described. Thus, in a certification context, for instance, the applicant union could recognize and explicitly exclude these individuals in the bargaining unit description. (If, however, these persons are not excluded by way of bargaining unit description and are ultimately included in the unit under the Board's exclusionary tests, the Board will treat these individuals the same as any other bargaining unit member. There must be consistent, equal treatment in the various proceedings before the Board.)

3. Discipline and Discharge

163 Discipline and discharge is probably the single most important criterion for
determining managerial exclusions.

164 *VGH* clarified the test for managerial exclusions. In doing so, it focused on two
criteria: discipline and discharge; and, labour relations input. *Cowichan* expanded that
focus to a third criterion: hiring, promotion, or demotion.

165 *Cowichan* held that "effective determination" was the Board's standard to be met
for discipline or discharge powers requiring exclusion. In nominally applying the
"effective determination" standard, in reality the Majority has applied its level of conflict
of interest analysis. In doing so it has moved away from potential conflict of interest as
the rationale for exclusion. The result of the Majority's application of its "effectove
determination" standard, in particular to the facts in *Highland Valley Copper*, is that the
Majority changes the *potential* conflict of interest test into an *actual* conflict of interest
test.

166 The Board's practice in what was called in *Cowichan* the "effective
determination" standard has applied as follows: if an individual recommends discipline
or discharge, and the recommendation is normally or regularly accepted and followed,
that effectively constitutes a determination of the discipline to be meted out. However
the recommendation need not always be followed in order to meet rationale for
exclusion: potential conflict of interest. It is sufficient that the recommendations
normally or regularly are followed. If the recommendation is not regularly or
consistently accepted it would not be an "*effective* recommendation". Consistent with
that, we find that "effective recommendation" is in fact the actual test the Board has
applied.

167 Within the potential conflict of interest rationale for exclusion, the "effective
recommendation" would play out as follows.

168 Where an individual investigates an incident and disciplines an employee, that
creates a conflict of interest. It makes no difference if the individual follows a formula
established by policy for the type of discipline meted out. Many workplace settings
have formulas for types of offenses and successive disciplinary penalties. These types
of formulas or policies lead to consistent application of disciplinary action which can be
key in grievance arbitration. Progressive discipline is in and of itself a kind of
established formula for issuing discipline.

169 Following the *VGH* tests, there is no minimum amount of discipline required in respect to the rationale for exclusion on the basis of potential conflict of interest. Either there is a potential conflict of interest as a result of an individual's potentially conflicting loyalties between the employer and being in a bargaining unit, or there is not. For instance, discipline in professional settings may involve discussions and corrective actions before more serious disciplinary steps are taken. In that work context, those actions can constitute the first stage of disciplinary action.

170 As well, where an individual is responsible for investigating an incident which could result in discipline, and the individual recommends some form of disciplinary action, that creates a potential conflict of interest. If that recommendation is then discussed with a superior, or a human resource or labour relations consultant, and after discussion, the individual modifies the recommendation and acts upon it, that does not lessen the conflict of interest which remains. The individual would be excluded from the definition of employee.

171 All of this was established in *VGH*.

172 It also assists in defining what constitutes "discipline". In particular, it is helpful to do so in light of the cooperative approaches in contemporary work places (again, all of which was dealt with in *VGH* and *Cowichan*). In our view, where warnings that are meted out by an individual form no part of an employee's record for the purposes of determining the severity of future discipline, or there is no change in status of the employee or monetary loss, or where a warning merely indicates what disciplinary or other action might be taken in the future, that does not constitute discipline. Where, however, the action taken is intended to form part of an employee's employment record, or affect employment status, and the action may have a prejudicial effect on the individual in the future, including grievance proceedings, those actions are disciplinary in nature

4. Established, Working Practices

173 Lastly, we believe that the Board should not dictate exclusions to parties that have agreed upon, established, working practices. Those arrangements should be respected and, from a practical perspective, not disrupted. That may include arrangements such as those existing for provincial government agencies or services, the foremen in Building Trades units, the HSA bargaining unit in the health sector, and others.

III. DISPOSITION OF ORIGINAL DECISIONS

1. Highland Valley Copper

174 The Original Panel made findings of fact which led to the determination that the individuals at issue were managers under any recognizable test of the Board to date for managerial exclusion. In overturning the decision, the Majority has wrongly overturned the findings of fact of the original panel and wrongly rewritten the law under both Sections 1 and 29 of the Code. As we have explained earlier, the latter is an error of law in the interpretation of the statute.

175 We would uphold the original decision.

2. Campbell River

176 We find that the Original Panel's decision should be upheld.

177 The Original Panel rendered its decision on the basis of the principles established in *VGH* and the policies of the Board set out therein. In particular, we refer to the Original Panel's comments in respect to the changing workplace where shared governance applies, or where there is a cooperative workplace:

I agree with the panel in *VGH*. For the Board to say that Shared Governance, or consultation with unions or within management, undermines managerial functions to the point of precluding exclusion from bargaining units would be retrogressive. No employer would want to participate in enlightened managerial models if, as a result of such participation, it was to be deprived of the resources whose undivided loyalty it was hitherto entitled to have. (para. 20)

We find that the Original Panel's decision is consistent, both substantively and procedurally, with the leading case at the time its reasons were issued, *VGH*.

178 The thrust of *VGH* was to clarify and focus the substantive tests, recognize the cooperative nature of professional and emerging workplaces, and end the costly and seemingly interminable litigation of these inclusion/exclusion issues. The outcome and procedure of the Original Panel in *Campbell River* is exactly what was intended in *VGH*. There is no basis for the decision to be either overturned or revisited.

3. Elephant and Castle Group (Rosie's on Robson)

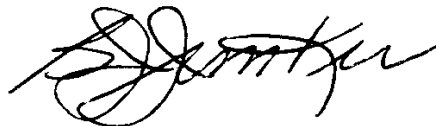
179 The test applied by the Original Panel in this case is in fact what we now believe to be appropriate for the small business, service sector of the economy. However, that

test was not the Board's law and policy on managerial exclusions applicable at the time. In accordance with the labour relations community's need for certainty in respect to the Board's law and policy (as reflected in the *B.A.T. Construction Ltd.*, BCLRB No. B444/94 (Reconsideration of Nos. B102/93 and B178/93), (1995), 25 CLRBR (2d) 1 approach to remedy), we find that the original decision was in error in respect to the then existing Board law and policy. Therefore, the original decision on the inclusion/exclusion issue should be overturned. Because the alternative, rational and defensible line determination rests essentially on the same findings now found to be in error, we would find that the matter as a whole should be re-addressed.

180

However, in our reasons, we have endorsed the approach taken by the Original Panel. In similar cases in the future, we would find the Original Panel's decision correct.

LABOUR RELATIONS BOARD



BARBARA J. JUNKER
VICE-CHAIR



BRENT MULLIN
VICE-CHAIR