BCLRB No. B442/93

(Reconsideration of BCLRB No.B97/93)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

WEST FRASER MILLS LTD.

("West Fraser")

-and-

IWA-CANADA, LOCAL UNION NO. 1-425

(the "Union")

-and-

SYLVA-FIBRE RESOURCES LTD. and VAN HORLICK CONTRACTING LTD.

("Sylva-Fibre" and "Van Horlick" respectively)

PANEL: Stan Lanyon, Chair
Keith Oleksiuk, Vice-Chair
Brent Mullin, Vice-Chair

COUNSEL: Donald J. Jordan, Q.C., for West Fraser
Denis T. LaCharité, for the Union
Donald L. Richards, for Sylva-Fibre and Van Horlick

CASE NO.: 14957 and 16470

DATE OF HEARING:	August 5, 1993
DATE OF DECISION:	December 23, 1993

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

West Fraser applies under Section 141 of the *Labour Relations Code* for reconsideration of BCLRB No. B97/93. In that decision, the original panel held that truck owners employed to haul logs on behalf of West Fraser were dependent contractors, but that a separate unit of dependent contractors was not an appropriate unit for bargaining. West Fraser has applied for reconsideration on a number of grounds. The Panel advised the parties at the hearing that leave was granted based on the submissions on file.

II. FACTS

West Fraser operates a sawmill and planer mill in Williams Lake, British Columbia. The Union is certified to represent the approximately 21 employees who work in the planer mill. The sawmill employs approximately 150 employees, who are not represented by a union. The Union applied for certification for a stand-alone bargaining unit of dependent contractors described as "truck owners whose trucks are employed to haul timber on behalf of West Fraser Mills Ltd." The truck owners haul logs from locations within West Fraser's forest licences to its mill in Williams Lake.

All of the persons at issue own their own trucks. Some of them own more than one truck and have employees drive the trucks. Those who hire additional drivers pay those drivers on a percentage basis. Because these additional drivers do not own the trucks they drive, they do not fall within the bargaining unit applied for by the Union.

In order to do West Fraser work, the truck owners must hold, or "own", seniority positions with West Fraser. The seniority positions determine the basis on which work is allocated. The seniority includes bumping rights.

Prior to the 1991-1992 logging season, West Fraser did not have written contracts with its log hauling contractors. Written contracts were first executed in 1992 due to a new regulation under the *Forest Act*, R.S.B.C., c.140. A further regulation, the Timber Harvesting Contracts

and Subcontracts Regulation, B.C. Reg. No. 258/91, requires that West Fraser have fifty percent of the timber harvested under its forest licenses harvested by persons with "replaceable contracts". West Fraser complied by issuing "stump-to-dump" contracts to several of its major logging contractors, including Sylva-Fibre and Van Horlick. The truck owners who chose to work for these contractors would have to enter into contractual relations with them. However, neither West Fraser nor the stump-to-dump contractors informed the truck owners about those arrangements. From the truck owners' perspective, nothing had changed as a result of the Regulation and the stump-to-dump contracts.

III. CONCLUSIONS OF THE ORIGINAL PANEL

The original panel considered eight of the approximately 21 truck owners. It found that all eight drive, to some extent, the trucks they own. It concluded that they perform work or services for West Fraser for compensation. As well, the seniority position with each truck constitutes a form of job security. Overall, the panel concluded that the 28 trucks with seniority positions constitute a steady or core group of truck owners hauling logs for West Fraser.

The panel found that the provisions in the *Forest Act* and its Regulations and the issuance of the stump-to-dump contracts did not impact on the day-to-day working relationship between the truck owners and West Fraser. The direction and control exercised by West Fraser over the truck owners remained the same.

The panel also rejected West Fraser's position that the bargaining unit description in the application was defective. It found that the unit could be defined in terms of the ownership of the trucks.

IV. ARGUMENT OF THE PARTIES ON RECONSIDERATION

West Fraser

West Fraser argues that the original panel exceeded its jurisdiction by finding that persons who are "employers" may also be dependent contractors, and therefore employees, under the

Code. West Fraser notes that many of the persons found to be dependent contractors by the original panel themselves employ persons to drive trucks. Those persons cannot be included within the definition of "employee" in the Code.

In particular, West Fraser argues that one person found to be a dependent contractor, Barry Pigeon, cannot be an "employee". Pigeon owns three trucks. He employs three full-time drivers to operate the trucks. He pays the drivers and derives income from their services. He himself is merely a spare driver for the trucks. Therefore, West Fraser says, Pigeon cannot be considered to be a dependent contractor.

West Fraser argues that the original panel confused the factors which indicate what it calls "a normal customer/service relationship" with the type of control and direction which exists between an "employer" and an "employee". Application of the true employer test in *York Condominium Corporation*, [1977] OLRB Rep. 645 indicates that West Fraser is not the employer of the truck owners.

West Fraser also argues that the original panel exceeded its jurisdiction by not properly applying the *Forest Act* and its Regulations. In finding that the truck owners covered by the stump-to-dump contracts are dependent contractors of West Fraser, the panel effectively placed West Fraser in violation of the *Forest Act*. The *Forest Act* requires West Fraser to issue replaceable stump-to-dump contracts to its major logging contractors; if the panel had properly considered that requirement, it would have concluded that the stump-to-dump contractors were the true employers of the truck owners.

West Fraser says as well that the original panel erred in granting certification on the basis of ownership of vehicles.

Lastly, West Fraser says that the original panel denied it natural justice by excluding the stump-to-dump contractors Sylva-Fibre and Van Horlick from the hearing and then relying on the lack of evidence as to their relationship with the truck owners as support for the conclusion that an employer/employee relationship exists between West Fraser and the truck owners. In a preliminary ruling, the original panel held that it would "not make any determination in this proceeding that the truck owners are 'dependent contractors' who are dependent on Sylva-Fibre

for the purposes of the Code". It was on that basis, and untimeliness, that Sylva-Fibre and Van Horlick were not granted interested party standing. West Fraser says that the original panel contradicted itself when it concluded that West Fraser is in a dependent contractor relationship with the truck owners. In reaching that conclusion, the original panel had to determine the issue it said it would not decide; namely, whether the truck owners are in a dependent contractor relationship with Sylva-Fibre and Van Horlick. By holding that there is a dependent contractor relationship with West Fraser, the original panel concluded in effect that there is not a dependent contractor relationship with Sylva-Fibre and Van Horlick. Therefore, Sylva-Fibre and Van Horlick should have been granted standing. As well, although West Fraser acknowledges it could have itself called evidence in relation to Sylva-Fibre, Van Horlick, and the truck owners, it says it was denied natural justice through the panel deciding an issue it said it would not decide.

Sylva-Fibre and Van Horlick

Further to the last argument of West Fraser above, Sylva-Fibre and Van Horlick say that the denial by the original panel of their request for standing is a breach of natural justice. They say they are affected by the proceedings and thus had a right to be present and have counsel at the hearing. As stump-to-dump contractors, the determination that the truck owners are dependent contractors of West Fraser directly, materially, and legally affects Sylva-Fibre's and Van Horlick's contractual relations with both West Fraser and the truck owners. They rely on what they characterize as the Board's usually liberal approach to interested party status and, in particular, on the decision of the Ontario Court of Appeal, upheld by the Supreme Court of Canada, in *I.A.T.S.E. v. C.B.C.* (1990), 70 D.L.R. (4th) 175 (Ont.C.A.); [1992] S.C.R. 7. They say that these decisions reject a narrow or technical approach to standing and stress the practical effect of a determination to be made on a party.

In a further proceeding in this matter (BCLRB No. B311/93), the original panel once again denied interested party standing to Sylva-Fibre and Van Horlick. It did so on the same basis as formerly. Sylva-Fibre and Van Horlick appeal that determination as well, also on the same basis.

Sylva-Fibre and Van Horlick acknowledge, however, that they are not saying that they are the employer of the alleged dependent contractors. That is a position they have consistently

maintained: see BCLRB No. B311/93, at pp. 9-10.

The Union

The Union argues that nothing in the statutory definitions in the Code prevents persons who are employers from also being considered dependent contractors. The Union cites earlier decisions of the Board in which owner/operators with employees were held to be dependent contractors: *Fownes Construction (No. 2)*, BCLRB No. 133/74; *Inland Natural Gas*, BCLRB No. L236/82; and *Dannburg Floors (Vernon) Ltd.*, BCLRB No. B125/93.

Regarding the *Forest Act* and its Regulations, the Union supports the determinations of the original panel. The panel held that West Fraser's decision to restructure its contractual relations to comply with the provisions of the *Forest Act* and Regulations had no practical impact on the day-to-day working relationships between the truck owners and West Fraser. It also found that although the *Forest Act* and its Regulations provide a dispute resolution mechanism for certain classes of contractors, that does not give these contractors the right to collectively bargain or take collective action in support of that right.

The Union says that the purpose of the *Forest Act* is quite distinct from the purpose of the Code. The purpose of the *Forest Act* is to protect contractors' capital investments, whereas the purpose of the Code is to protect labour. The two Acts are thus complementary. The Union also says that the decision of the original panel will not place West Fraser in violation of the *Forest Act* because it does not necessarily prevent West Fraser from entering into replaceable stump-to-dump contracts.

The Union argues that West Fraser is incorrect in applying the *York Condominium* test to determine who is the true employer of the dependent contractors. Relying on *Canada Crushed Stone*, [1980] 3 Can. LRBR 66 (OLRB), the Union says that the *York Condominium* test does not apply in a dependent contractor determination. The Union further says that the original panel did not conclude that West Fraser was an "employer" and the log haulers were "employees"; rather, the determination was that they were in a dependent contractor relationship somewhere along the spectrum between a traditional employer-employee relationship and an independent contractor relationship. In any event, even if the original panel were to have found that the relationship was

that of "customer/service provider", that would not have precluded a finding that the service provider was a dependent contactor.

Finally, with respect to West Fraser's allegation that the original panel violated the rules of fundamental justice, the Union argues that West Fraser has no status to object that some other party was denied natural justice. If West Fraser is arguing that it was denied the benefit of the contractors' evidence, it was free to call the representatives of the contractors to testify. As well, the Union notes that West Fraser did not argue that the truck owners were dependent on the logging contractors.

In response to the position of Sylva-Fibre and Van Horlick, the Union says first that they were originally out of time in their application for standing before the original panel. Second, there would be no purpose served under the Code in giving Sylva-Fibre and Van Horlick interested party status because they have forthrightly stated they are affected only in terms of their commercial contracts, not in terms of any relationship under the Code.

V. ISSUES ON RECONSIDERATION

The issues raised on reconsideration are whether the original panel erred in law or policy under the Code:

1. because an "employer" cannot also be a "dependent contractor", and thus an "employee", under the Code? Did the original decision give collective bargaining rights to employers contrary to the Code?

2. in improperly interpreting and applying the provisions of the *Forest Act* and the Timber Harvesting Contracts and Sub-contracts Regulations (B.C. Reg. No. 258/91)?

3. in the denial of interested party standing to Sylva-Fibre and Van Horlick?

4. in granting certification to persons on the basis that they own vehicles?

5. by confusing matters which are indicative of "a normal customer-service provider relationship" with the type of control and direction which exists between an "employer" and an "employee" under the Code?

6. by in effect inferring an intention of the Legislature in the Code (Bill 84) to expand the category of persons who would be considered dependent contractors?

7. in finding that Pigeon is a dependent contractor and employee under the Code?

West Fraser characterizes the matters in the first two issues as jurisdictional errors. Both West Fraser and Sylva-Fibre/Van Horlick characterize the third issue as a natural justice matter.

VI. ANALYSIS

We will consider each issue in turn:

1. Being Both an Employer and Dependent Contractor at the Same Time

West Fraser says that a person cannot at once be an employer and a dependent contractor, and thus an employee, under the Code. It says that in reaching that conclusion, the original panel committed a jurisdictional error.

That is not correct. Firstly the specific definitions of "dependent contractor", "employer", and "employee" in the Code do not foreclose a person being at once both an employer and dependent contractor under the legislation. A dependent contractor is defined as follows:

> "dependent contractor" *means a person*, whether or not employed by a contract of employment or furnishing his or her own tools, vehicles, equipment, machinery, material or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he or she is in relation to that person in a position of economic dependence on, and under an obligation to perform duties for, that person *more closely resembling* the relationship of an employee than that of an independent contractor;... . (Section 1; emphasis added)

A dependent contractor is included within the definition of "employee", but is not specifically included or excluded from the definition of "employer" (Section 1 of the Code). A "person" in the Code includes both an "employer" and an "employee", and thus a "dependent contractor". There is nothing in these provisions which explicitly prevents a person from being both an employer and a dependent contractor under the Code.

Secondly, the Code does not implicitly or by inference prevent a person who employs another from being a dependent contractor. This argument has, in fact, long been rejected by the Board in *Fownes Construction Co. Ltd.*, BCLRB No. 116/74, [1974] Can LRBR 510, at p.512 (upheld on reconsideration in an "Opinion of the Board" in *Fownes Construction Co. Ltd.*, BCLRB No. 133/74). The Legislature, which is taken to be aware of that interpretation of the legislation (see, for instance, *B.C.G.E.U. v. Industrial Relations Council* (1988), 33 BCLR (2d) 1, at p. 7 (BCCA)), has not since the time of those decisions amended the legislation in any way which would substantively affect that determination. As a consequence, the conclusion of the Board in the *Fownes Construction* cases remains, and a person can at once be a dependent contractor (and thus an employee) and an employer under the Code.

2. *The Forest Act* and Regulations

West Fraser argues that the conclusions of the original panel constitute a further jurisdictional error in that they ignore the provisions of the *Forest Act* and its Regulations. Specifically, West Fraser says that the relevant portions of the *Forest Act* and its Regulations provide the kind of countervailing power which is the policy basis for concluding that persons are dependent contractors and thus employees. West Fraser says it was incumbent on the original panel to consider these provisions and it was a jurisdictional error to not conclude on the basis of them that the log haulers in the present case were not dependent contractors under the Code.

Argument on the basis of the *Forest Act* and its Regulations was primarily put forward before the original panel by one of the intervenors, Forest Industrial Relations. It did not argue that these provisions precluded the application of the dependent contractor provisions of the Code to the present circumstances. The original panel agreed with that, adding that "had the legislature intended to exclude individuals such as truck owners in the forest industry from the right to

bargain collectively under the Code [as a result of the *Forest Act* and its Regulations], it could have done so expressly" (p. 25). It held that whether the truck owners in the present case are dependent contractors was a "question. . . of fact, rather than one of the relationship between the Code and the *Forest Act* and Regulations" (p. 16).

We agree. While the policy bases in the relied on provisions in the *Forest Act* and its Regulations may be similar (but in different contexts) with the policy bases for dependent contractor status under the Code (namely, attempting to achieve a more equal bargaining power between the dependent contractor and the employer, and stability in the industry), this in no way results in the provisions in the *Forest Act* and its Regulations negating the dependent contractor provisions in the Code. Instead, the provisions in the *Forest Act* and its Regulations are simply another factor to be considered in the determination under the Code, and that is the approach adopted by the original panel. As a consequence, this ground of reconsideration is dismissed.

3. Natural Justice

West Fraser says that both it and Sylva-Fibre/Van Horlick were denied natural justice in the proceedings before the original panel: West Fraser in that the original panel reached a determination which, in its preliminary ruling, it said it would not make, and Sylva-Fibre/Van Horlick in being denied interested party status. We will deal with each argument in turn.

In its preliminary ruling, the original panel stated that it would "not make any determination in this proceeding that the truck owners are 'dependent contractors' who were dependent on Sylva-Fibre for the purposes of the Code" (letter to Interested Parties dated March 12, 1993). West Fraser says that the original panel, however, did just that when it concluded:

> It is apparent that West Fraser's decision to re-structure the various phases of its operation in terms of the type of contract it entered into with its various contractors was to comply with the *Forest Act* and Regulations. *The decision had no practical impact on the day-to-day working relationship between the truck owners and West Fraser.* The direction and control exercised by West Fraser over the truck owners remained the same throughout. (p.21; emphasis added)

West Fraser says that the emphasized portion of that conclusion could not be reached without

enquiring into the relationship between the truck owners and Sylva-Fibre; i.e., what the original panel said it would not do in its preliminary ruling.

We do not agree. The original panel did not make any determination in its decision regarding Sylva-Fibre and Van Horlick and their employment relationships under the Code. As noted in *Canada Crushed Stone, supra*, in respect to making a dependent contractor determination:

> The Board does not determine dependency and then undertake a separate enquiry in order to determine the identity of the employer. If the persons who are the subject of this application are found to be dependent, the person on whom they are dependent is the employer for purposes of the Act. (p. 73)

That was, in fact, exactly what the original panel did in the present case. Its enquiry throughout was, as stated in the preliminary award, entirely with respect to the relationship between the truck owners and West Fraser. It was not enquiring into the employment relationships (if any) of Sylva-Fibre and Van Horlick under the Code, and it did not reach any conclusions in that regard.

For instance, had the original panel concluded that there was not a dependent contractor/employee relationship between West Fraser and the truck owners, there would have been no findings of fact or determinations upon which the Union could rely in relation to Sylva-Fibre or Van Horlick in subsequent proceedings. If the original panel had been making that further enquiry regarding Sylva-Fibre and Van Horlick, it would have been required to give them interested party status, and to clarify the terms of that broader enquiry in its preliminary ruling. However, it chose not to make that further or broader enquiry and no party pressed the point. What is determinative in relation to West Fraser's ground of reconsideration is that the panel stuck to what it said it would do in its preliminary ruling: it made determinations only in relation to West Fraser and the truck owners. As a result, this ground of reconsideration by West Fraser is dismissed.

Supplementary to that issue, it should be noted that West Fraser conceded in the reconsideration hearing that it was not foreclosed from calling evidence before the original panel. It is, as well, a matter of record before the Board that West Fraser had obtained summonses for the principals of Sylva-Fibre and Van Horlick, but did not call them as witnesses at the hearing

before the original panel. There was, as a result, no denial of natural justice to West Fraser in terms of its ability to call evidence. We have already concluded that there was nothing contradictory between the original panel's preliminary ruling, the enquiry it undertook, and the decision it reached.

Sylva-Fibre and Van Horlick argue that they were denied natural justice in not being granted interested party standing by the original panel.

The Board will take a liberal approach to natural justice rights. However, the natural justice rights to be protected must be an interest which speaks to (i.e., is material to) the legal issue before the Board under the Code. Otherwise, the party has nothing to add to the determination and the Board's processes will simply be bogged down by parties who admittedly may be directly affected by the outcome of the proceeding, but do not have an interest in the legal issue *per se*.

The Board's judicially approved test for interested party status is that the party must be affected by the proceedings in a direct and legally material way: *Marian High School*, IRC No. C168/88; upheld on reconsideration, IRC No. C170/88; application for judicial review dismissed (June 16, 1988) A881729 (B.C.S.C.). Legally material means material to the essence of the dispute under the *Labour Code*. "Legally refers to the rights of the applicants under the Act": *Westfair Foods Ltd.*, IRC No. C154/89, at p. 10. As a result, not all parties which may be directly affected by the outcome of a determination by the Board are granted standing. For instance, in communities in British Columbia where the economy is dependent on a single mill or operation, many (perhaps even most) persons within that community will be affected by a strike or lockout determination made under the Code. Nonetheless, those persons would not be given standing, (unless they could meet the legally material test) even though they may be directly affected by the Board's determination in the form of impact on their contractual relations with the mill or their economic dependence on the income of the community derived from the mill. Similarly, the parents in the *Marian High School* case were directly affected by the outcome of the tribunal's determination, but were not granted standing because that impact, and their concern about that impact, was not material to the legal determination to be made under the Code.

That is a key distinction in relation to the position put forward by Sylva-Fibre and Van

Horlick. At no time in any of the proceedings before the Board have Sylva-Fibre and Van Horlick said that they have a legally material interest under the Code at stake in the proceedings. The most they have said is that they have commercial relations with both West Fraser and the alleged dependent contractors.

Critically, both Sylva-Fibre and Van Horlick have not said that they are the employers of the alleged dependent contractors. They did not say to the original panel that they were in that, or any other kind of employment relationship under the Code with the alleged dependent contractors. That position was confirmed in the hearing before this Panel, and again confirmed before the original panel in proceedings leading to the Board's decision in BCLRB No. B311/93 (pp. 9-10).

As a consequence, Sylva-Fibre and Van Horlick are in no different position than any other person or party who has contractual relations with either West Fraser or the alleged dependent contractors, and thus may be affected by determinations which affect those parties. In the result, they are not entitled to standing, because they are not asserting interests which are legally material to the issue being determined under the Code.

The outcome would be different had Sylva-Fibre and Van Horlick asserted some form of employment relationship under the Code with the alleged dependent contractors. The result would also be different if a panel found it either necessary or desirable to determine the relationship between parties such as Sylva-Fibre and Van Horlick and the alleged dependent contractors. In that circumstance, Sylva-Fibre and Van Horlick would be entitled to standing. As it is now, without standing having been granted, there would have been no issue estoppel against Sylva-Fibre and Van Horlick had the original panel not concluded that West Fraser is the employer of the dependent contractors. Where it is appropriate that all issues with respect to other alleged or potential employers be resolved, notice and standing must be given to those employers. However, where (as in the present case) the panel is only concerned with the determination of whether the party named in the application is in a dependent contractor relationship, it is not a breach of natural justice rights for other parties to not be granted standing, unless they can assert interests and rights under the Code legally material to the dispute.

As a result of the above determination, it is unnecessary to consider the original panel's

second basis for not granting Sylva-Fibre and Van Horlick interested party status. That second basis was the untimeliness of their application.

4. Bargaining Unit Description

West Fraser next attacks the bargaining unit description. It says:

> The legislation was not intended to provide certification to persons on the basis that they own vehicles which are operated by persons who might or might not be dependent contractors... . The fact of ownership has nothing to do with the concept of dependent contractor and a bargaining unit cannot be certified on this basis.

The original panel answered this argument as follows:

> Two of the Employer's arguments are answered immediately on a consideration of the definition of dependent contractor. First, ownership of the trucks is not fatal to the application; such ownership is contemplated by the Code (see *Fownes Construction, supra*, at pp. 461-2). Thus, the fact that these individuals use the term truck owner in the bargaining unit description rather than log hauler or owner-operator does not reveal a fundamentally misconceived application. Indeed, the use of this term helps to distinguish them from their own drivers. Moreover, it is not an accurate portrayal of the facts to say that the truck owners here lack the "operator" component of owners-operators. All eight individuals who testified operate the trucks they own to haul logs for West Fraser, albeit the amount of driving time varies depending on their particular operation. (p.17)

We agree with the original panel's analysis. As a result, this ground of reconsideration is dismissed.

5. "Customer-Service Provider" vs. Employer-Dependent Contractor

West Fraser says that the original panel confused "those things which are indicative of a normal customer/service provider relationship with the type of control and direction which exists between an 'employer' and an 'employee'". It relies upon the test in *York Condominium Corporation, supra*, to distinguish between what it submits is "the customer/service provider relationship" between West Fraser and the alleged dependent contractors, as opposed to the employer/employee (dependent contractor) relationship found by the original panel.

As explained by the Ontario Labour Relations Board in *Canada Crushed Stone, supra*, the *York Condominium Corporation* test is not the test in a dependent contractor determination. The Ontario Board explained in *Canada Crushed Stone* that the Board does not determine dependent contractor status and then examine who is the employer as a two-step process. Instead, the enquiry is a single enquiry regarding the employer-dependent contractor relationship. The Board went on to consider the nature of that enquiry in relation to the *York Condominium* test in the following manner:

> We are referred in argument to the criteria listed in *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645, which has been used by the Board to determine which of two or more entities is the employer for purposes of an application brought under *The Labour Relations Act*. A "dependent contractor" inquiry, however, does not focus on the identification of a traditional employer/employee relationship but rather, the identification of a relationship which more closely resembles that of employer/employee than that which would exist between two independent businesses. While these criteria may be utilized in a "dependent contractor" inquiry, it is important to recognize that the object of the inquiry is less specific than identifying a party exhibiting all the necessary indicia of an employer. Rather, if the relationship more closely resembles an employment relationship than that which would exist between two independent businesses, a finding that a "dependent contractor" relationship exists will result. The statutory definition forces the Board to engage in a comparative exercise; to determine on which side of the mid point of an imaginary line between independent contractor and employee the disputed persons fall. (p.73)

We agree with the Ontario Board's analysis. The *York Condominium* true employer test is not

the test for a dependent contractor relationship, nor is it one-half of a two-stage process in that test. Although some of the criteria overlap, it is a different test. It does not provide a proper basis upon which to challenge a dependent contractor determination.

As well, we find that the original panel properly made the dependent contractor kind of enquiry noted above, as opposed to a *York Condominium* true employer determination. As a consequence, this ground of reconsideration is also dismissed.

6. Dependent Contractors: An Expanded Category under the Code?

West Fraser further says that the original panel erred, in effect at least, in inferring an intention of the Legislature in the Code (Bill 84) to expand the category of persons who can be dependent contractors. It says that the original panel did so at pages 15-16 of the decision, based upon a reference to the Legislative debates.

We find that to be an inaccurate description of the original panel's decision. In the very next sentence following the quotation from Hansard, the original panel very correctly states "while the nature of the bargaining unit wished to be applied for has changed with the recent legislative amendments, the definition of dependent contractor remains unchanged" (p. 16). The panel then sets out the definition of dependent contractor in the Code and, at the bottom of that same page in its decision, refers to the Board's early jurisprudence on dependent contractors in the *Fownes Construction Co. Ltd.* decisions, *supra.* As a result, the original panel simply does not do what is alleged by West Fraser. This ground of reconsideration is dismissed as well.

7. Barry Pigeon

Lastly, West Fraser focuses on the original panel's determination of a dependent contractor relationship between Barry Pigeon and West Fraser. In short, it says that Pigeon is an owner/businessman who is not in a dependent contractor relationship with West Fraser. It says that Pigeon owns a company and vehicles through which he provides income to three drivers, his son, his wife and himself. West Fraser acknowledges that Pigeon has no other customers and

that his operations in that sense are dependent on West Fraser. However, it says that Pigeon's own driving is peripheral to the business, and the cases are legion that dependent contractor certification is not to be granted to a business enterprise simply because it puts all its eggs in one basket, as Pigeon has done with West Fraser. It is on this point that West Fraser relies on the Ontario Labour Relations Board's distinction between an entrepreneurial business and a dependent contractor in *Canada Crushed Stone, supra*.

Canada Crushed Stone can be read to stand for the proposition that a person who (or which) employs others cannot be a dependent contractor. That is because such a determination would create a conflict of interest; i.e., a person in a bargaining unit who is at once an employer and employee.

The Ontario Board has gone further than that early position, but only marginally. In *Alpa Wood Mouldings Company*, [1992] OLRB Rep. August 891, the Board declared two partners in a carpentry business dependent contractors even though, at times, they employed a helper (upheld on judicial review, *Alpa Wood Moulding Company*, [1993] OLRB Rep. February 154 (Ont. Div. Ct)). However, that is as far as the Ontario Labour Relations Board has gone in allowing persons who (or which) employ others to be dependent contractors.

The distinction between an employer and an employee is the essence of West Fraser's first ground of reconsideration above. Although we have not accepted that argument on the jurisdictional basis on which it was put forward, there is some force to the position in general. Overall, the Code sets up an arm's length, adversarial relationship between an employer and the union/employees. It is the arm's length and necessarily adversarial (though not necessarily non-cooperative) nature of that relationship which, for instance, forms the Board's recent policy decision on inclusions and exclusions in *Vancouver General Hospital*, BCLRB No. B81/93 (Reconsideration of IRC No. C179/91), (1993) 18 CLRBR (NS) 161. The rationale is that it is a potential conflict of interest for a person to represent management and be a member of a bargaining unit at one and the same time. That is fundamental to the Code.

However, that clear distinction generally in the Code between employers and employees is inherently and uniquely blurred with respect to dependent contractors. The very term itself is indicative of that blurring: an employee is usually dependent (on an employer) and a contractor is

usually independent. A dependent contractor is thus somewhere between being clearly an employee, on the one hand, and clearly a contractor, on the other: *District of Salmon Arm,* BCLRB No. 223/87, at p. 19. The statutory test reflects the blurring of fundamental concepts also. The test is comparative; does the relationship more closely resemble that of an employer-employee than that of an independent contractor? The dependent contractor relationship is not clearly either.

This blurring or mixing of fundamental concepts in a dependent contractor relationship is reflected in whether dependent contractors can themselves have employees. Generally, employees do not hire other employees. In contrast, independent contractors may very well hire any number of employees. Again, dependent contractors fall somewhere between.

In British Columbia, the Labour Relations Board has held as a matter of principle that a person can be an employer and a dependent contractor (and thus employee) at one and the same time. As already noted, that was stated early in the Board's jurisprudence in the *Fownes Construction Co. Ltd.* decisions, *supra.* In making that determination, the Board allowed for the possibility of an individual who owns two trucks, operating one and employing a driver to operate the other, not necessarily being removed from the category of dependent contractor. That would turn on a judgment based on the facts in the particular case. In setting some parameters, however, the Board noted:

> [a] person who owns quite a few trucks, whose main concern is renting the trucks with a driver, and who does not regularly drive a truck himself, would not come within the scope of the 'dependent contractor' provision because he does not 'perform work or services' in a manner analogous to an employee. (*Fownes Construction Co. Ltd.*, BCLRB No. 116/74, [1974] Can LRBR 510, at p. 512)

In effect, the Board proposed a spectrum, with pure employees at one end, independent contractors at the other, and dependent contractors between the two.

The kind of spectrum identified by the Board *Fownes Construction* has also been referred to by the Ontario Labour Relations Board: see *Adbo Contracting Company Ltd.*, [1977] OLRB Rep. April 197, referred to at pp. 893-895 of *Alpa Wood Mouldings Company, supra*. The

spectrum ranges from an individual worker at one end to a truly entrepreneurial business at the other. We think that is an accurate description of what, in reality, can be varied and complicated arrangements and relationships. We further agree with both the Board's early view in *Fownes Construction* and the decision of the original panel in the present case, that the determination of dependent contractor status must be made on an analysis of the particular facts in any given case. Lastly, we are not willing to adopt the principle in Ontario that a person cannot be an employer and a dependent contractor (unless it is merely with a helper) at one and the same time. We think that too narrowly restricts the inherently somewhat contradictory nature of a dependent contractor relationship, which is neither clearly an employer-employee relationship, nor an independent contractor-customer relationship. It could also defeat the

purpose of the legislation, which has long been recognized in British Columbia to allow for the certification of persons who are in a position of dependence upon another entity that more closely resembles that of an employee than that of an independent contractor.

Having said that, however, we cannot accept that Pigeon and his business more closely resemble that of an employee than that of an independent contractor. It is worth looking at the spectrum in the second *Fownes Construction* decision in more detail:

> What is to be done with owner-operators who own more than one truck and thus employ other drivers to operate them? A person who owns quite a few trucks, whose main concern is renting the trucks with a driver, and who does not regularly drive a truck himself would not come within the scope of the "dependent contractor" provision because he does not "perform work or services" in a manner analogous to an employee. Another person with several trucks may drive one of these trucks regularly, but because of the total character of his business, should not be considered to be "dependent". However, we do not believe that an individual who owns perhaps two trucks, and thus employs a driver to operate one of them, is necessarily removed from the category of "dependent contractor". There is nothing illogical about finding that an individual is, at one and the same time, both an employer and an employee and it can also be true that an individual is both an employer and a dependent contractor. That always turns on a judgment about the facts of the particular case. (p. 512)

Given the findings of fact of the original panel with respect to Pigeon, the conclusion that he is in a dependent contractor relationship with West Fraser constitutes an error of law and policy under the Code. Pigeon is clearly at the entrepreneurial end of the spectrum. With three trucks and three employees, Pigeon cannot be found to be a dependent contractor. That is so even though he acts as spare driver for the 3 trucks. We note the actual amount of that driving differs in the original decision between eight weeks in 1992, at page 3, and 180 days in 1992, at page 22. That discrepancy does not affect our decision. Pigeon cannot be found to be a dependent contractor. As a result, this ground of reconsideration is upheld and the conclusion of the original panel that Pigeon is a dependent contractor is overturned.

VII. DECISION

The reconsideration applications are dismissed with the exception of Pigeon being declared not to be a dependent contractor.

VIII. ADDENDUM

We add that the Board is concerned about the delay and cost which can accompany the determination of a dependent contractor relationship. That delay and cost may legitimately arise because the determination can be factually complex and may be opposed person by person. It may also have arisen here because the amended dependent contractor provision in the Code, though seemingly simple on its face, has in fact initially produced a number of issues. However, we are concerned that the delay and cost may ultimately result in the denial of access to collective bargaining to dependent contractors entitled to it under the Code, because organizing may become practically unfeasible. We think that the best way to address this concern is procedurally through effective case management techniques. The community should be aware that the Board will continue to aggressively use case management as a means to address the concerns of delay and cost which can accompany these applications.

LABOUR RELATIONS BOARD

STAN LANYON
CHAIR

KEITH OLEKSIUK
VICE-CHAIR

BRENT MULLIN
VICE-CHAIR