

(Leave for Reconsideration of BCLRB Nos. B102/93 & B178/93)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

B.A.T. CONSTRUCTION LTD.

(the "Employer" or "BAT")

-and-

TUNNEL AND ROCK WORKERS, UNION, LOCAL NO. 168
CONSTRUCTION AND GENERAL WORKERS' UNION, LOCAL NO. 602
CONSTRUCTION AND GENERAL LABOURERS' UNION, LOCAL NOS. 1070 & 1093
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 115

(the "Unions")

-and-

J. OVIATT CONTRACTING LTD.

(the "Employer" or "Oviatt")

-and-

TUNNEL AND ROCK WORKERS, UNION, LOCAL NO. 168
CONSTRUCTION AND GENERAL WORKERS' UNION, LOCAL NO. 602
CONSTRUCTION AND GENERAL LABOURERS' UNION, LOCAL NOS. 1070 & 1093
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 115
TEAMSTERS LOCAL UNION NO. 213
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, 22 LOCALS

(the "Unions")

-and-

BRITISH COLUMBIA AND YUKON TERRITORIES BUILDING
AND CONSTRUCTION TRADES COUNCIL

(the "Building Trades")

-and-

INDEPENDENT CONTRACTORS AND BUSINESSES ASSOCIATION
OF BRITISH COLUMBIA

(the "ICBA")

PANEL: Stan Lanyon, Chair
Maria Giardini, Vice-Chair
Keith Oleksiuk, Vice-Chair

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CASE NOS.: 14926 and 15841

DATE OF HEARING: July 27, 1993

DATE OF DECISION: November 18, 1994

DECISION OF THE BOARD

I. NATURE OF THE APPLICATIONS

The Unions have applied under Section 141 of the *Labour Relations Code* for leave to apply for reconsideration of BCLRB Nos. B102/93 and B178/93. Each of these decisions concerned a "polyparty" application for certification by the Unions under Section 20 of the Code. In both cases the original panels ruled that certain individuals who were laid off and not working on the date of the Unions' applications were employees under the Code, and were entitled to be included on the employee list for the purposes of determining the level of support for the Unions. In BCLRB No. B102/93 (the BAT case) the panel determined that after including the individuals in the bargaining unit the Unions lacked sufficient support for automatic certification and a vote was ordered. In BCLRB No. B178/93 (the Oviatt case) the panel determined that after including the individuals in the bargaining unit the Unions lacked sufficient support for the ordering of a representation vote and dismissed the Unions' application.

The Unions submit that the original panels erred in including individuals in the bargaining unit who were not working on the date of their applications. They argue that the panels misinterpreted and misapplied earlier jurisprudence and policy concerning the conditions under which laid off individuals will be considered to be employees in an application for certification where there is no collective agreement in force. They further argue that the earlier cases arose in the context of applications for certification in the industrial sector and that, given the unique nature of the construction industry, a more stringent test for determining employee status ought to be applied. Finally, the Unions argue that the panels ignored or failed to fully appreciate significant facts in reaching their decisions.

These two applications were set down for hearing at the same time as they raised the same issue; namely, the appropriate test to be applied in determining whether laid off individuals are employees in an application for certification in the construction industry where there is no collective agreement in force. The Board also considered this issue to be of significant importance to the labour relations community, and granted intervenor status and invited submissions from the Construction Labour Relations Association (the "CLRA"), the B.C. and Yukon Territories Building and Construction Trades Council (the "Building Trades"), and the Independent Contractors & Businesses Association of British Columbia (the "ICBA"). The latter

two intervenors filed submissions and participated in the hearing.

II. BACKGROUND

(i) BAT

BAT is normally in the business of rock scaling and slope stabilization. In 1992 it obtained a contract to construct a hydro tunnel to provide private power. This was the first time that it had undertaken this type of work. It started work on the tunnel with its usual crew. However, they did not have the mining skills required for the job. As a result, some employees were laid off and a mining crew was hired. BAT does not intend to bid tunnel work in the future because of problems encountered on this job.

BAT's scaling and slope maintenance work is highly seasonal because of weather constraints. It completed most of its contracts in 1992 but had remaining work to do on contracts with the CPR and Parks Canada. The crews were all laid off in November, 1992 'because of weather. A crew of five employees was sent back to service one of the CPR contracts in March, 1993.

The Unions' application for certification was for a unit of "employees in British Columbia except office and supervisory staff". The application covered the employees at the tunnel and the five employees working on the CPR contract.

BAT asserted that it would soon send more crews out to complete its 1992 contracts and that it expected to obtain its normal share of scaling and stabilization work in 1993. It argued that it had a core group of employees that it called back to work from year to year. In addition to the employees working on the CPR contract there were seven other employees in this core group who were still on lay off. BAT argued that these other core employees should be included in the bargaining unit.

The original panel reviewed the Board's past jurisprudence on the issue of whether persons on lay off are employees under the Code. It stated that, as a matter of general principle,

employees on lay off who are not covered by a collective agreement are normally not permitted a voice in a certification campaign because they have no legal right to be recalled by the employer. The panel cited *Glen River Industries (Delta) Ltd.*, BCLRB No. 70/77, [1978] 1 Can LRBR 168, for the proposition that where there is no collective agreement in place, laid off employees will only be considered to be "employees" for the purposes of a certification application if there is a tangible, felt relationship between the persons on lay off and the employer. The Board must conduct a searching inquiry to determine if such a relationship exists. The Board's judgment must be made on the facts of each case. The panel also cited *Britco Structures Ltd.*, BCLRB No. 62/84 (Reconsideration of BCLRB Nos. 295/83 & 332/83), (1984), 5 CLRBR (NS) 352, in noting that a laid off employee would only be an "employee" for the purpose of a certification application in very exceptional circumstances where there is no existing collective agreement. Again, "exceptional circumstances" was based upon the existence of a continuing, tangible, felt relationship between the individual and the employer, established at the date of the lay off and continuing during the period of the lay off.

After reviewing the above jurisprudence the original panel considered whether the tests applied to seasonal employees. Relying upon *Fraser Valley Farms*, BCLRB No. 330/83, and *Later Chemicals Ltd.*, BCLRB No. 376/84, it concluded that the tests are applicable to seasonal employees but that the transitory and fleeting nature of seasonal employment makes the decision as to who is to be included in an application very difficult. The original panel articulated the following test to be applied in the case of seasonal employees:

It is at this juncture that the policy concerning the conduct of a searching scrutiny come into play. There must be evidence of the tangible and felt relationship with an employer before a seasonal employee will be permitted to express a choice. In my view, there must be a demonstrable and ongoing commitment to the industry from which the seasonal employment is derived as well as to the Employer and there must be a real expectation of obtaining seasonal employment. Otherwise, a person cannot claim to be an "employee" for the purpose of the application. (p. 8)

Applying this test, the panel ruled that two of the seven laid off persons of BAT (Steve Campbell and Mike Treis) were "employees" under the Code and were to be included in the Unions' certification application. The panel found that these employees did not work, except

with the Employer. They did not look for work in the off season. Treis was called to work on the CPR contract and agreed to report for work if necessary, but requested more time off as his house had just burned down. The Panel concluded:

After considering the evidence, I conclude Steve Campbell and Mike Treis demonstrate a tangible and felt relationship with the Employer sufficient to warrant their inclusion as "employees" for the purpose of the Unions certification application. Both demonstrated an attachment to the industry and to the Employer. Their commitment to the industry is demonstrated by the fact that the work is their only source of income. Both are committed to employment with the Employer and both have real prospects for continued employment. Treis was already recalled to work but took a leave of absence because of personal problems when his house burned down. Campbell has worked with the Employer and elsewhere in the industry for the past eight years. (p. 8)

(ii) Oviatt

Oviatt has been a general construction contractor for approximately twelve years. The Unions applied to be certified for a unit of "employees of the Employer consisting of all employees except office and sales staff". The application was based on membership support of employees of Oviatt working on construction at a Methanex plant near Kitimat. The work was performed at the start of Oviatt's construction season in March (the Union's application was received by the Board on March 25, 1993). Oviatt objected to the application, in part, because it excluded a number of its "regular group of employees" who were on lay off on the date the Unions applied for certification.

Oviatt is, in many respects, a typical construction contractor. Due to the difficulty of doing construction work in the winter months, its construction season usually runs from March to November of each year. It hires its employees when it has work and lays them off when there is no work. In other respects, Oviatt's work and work-force are somewhat unique. In the last five years, 70% to 80% of its work has been for Indian Bands in its area of operation. With the equipment it has, Oviatt could not survive without the work it obtains from the Indian Bands. In the last three years, 60% of its work has been for the Gitanmaax Band in Hazelton. In exchange for the Band giving work to Oviatt without going through a tendering process, Oviatt has agreed

to hire Band members not merely for Oviatt's work for the Band, but also in respect to its other work. This arrangement is essential to Oviatt obtaining the Band's work.

In meeting its employment obligations to the Band, Oviatt has employed the same group of Band members since 1989: Darlene Fargey, Daryl Matthews, and Ray Matthews. The income earned from Oviatt by these individuals represents at least 80% of their employment income and, in one case, virtually 100%. When these employees complete their work for Oviatt at the end of the construction season, they are not given a definite rehire date for the start of construction for the following Spring. The exact date of rehire depends upon the weather and the actual work that Oviatt obtains. The evidence was clear that the laid off workers expect to be rehired by Oviatt and, under its agreement with the Gitanmaax Band, Oviatt expects to rehire the employees. According to Oviatt, the laid off workers were not rehired to work at its Methanex project because it was uneconomical to bring them from Hazelton, where they resided, to Kitimat, the site of the project. The employees were, however, rehired to work on a different project on March 28, 1993, several days after the Unions' certification application. At that time Oviatt also rehired Dennis Smirl. Smirl is not a Band Member, but the evidence established that the amount and pattern of his work with Oviatt since 1989 had been similar to the Band Member employees. The original panel was satisfied that there was a likelihood that Oviatt would have further work for these individuals during the coming year.

The panel concluded that the laid off individuals were employees and part of the bargaining unit constituency for the purpose of the Unions' certification application:

The Employer says that Fargey, the two Matthews, Smirl, and Minifie are part of its regular workforce, and they should be included in the constituency of the bargaining unit. In general, I agree. The Employer's business and workforce is seasonal in nature. The Employer is not operational on construction sites from November to March of each winter. As well, it has been and, inasmuch as anything can be foreseen in the construction industry, will be in the future relying on Indian Band work for the majority of its business. The majority of that work has been and will likely continue to be with the Gitanmaax Band. In relation to that work, the Employer has kept, and I am satisfied will continue to keep, true to its obligation to employ Band members both in regard to Band work and non-Band work. ...

The Gitanmaax Band members at issue here are Fargey and the two Matthews. In the context of the Employer's seasonal construction

operation, I am satisfied that their work has been, and will likely continue to be, regular, part-time work, particularly in light of the work on the Silverking project. These employees rely upon this work for virtually all of their employment income. They reasonably expect to continue to get this work with the Employer based on the past experience in that regard, the agreement between the Band and the Employer, and the likelihood of the Employer continuing to get further Band work. Thus, in contrast to the situation in *Britco Structures Ltd., supra*, these employees have previous work experience establishing a regular pattern of employment dependent upon the seasonal nature of the Employer's work and there is an expectation and likelihood of recall following their seasonal lay-off. As a consequence, Fargey and the two Matthews are part of the bargaining unit constituency.

Smirl is not a Band member, but his work with the Employer is of a pattern similar to and consistent with Fargey and the two Matthews. On that basis, I find that he should also be included in the bargaining unit constituency. (pp. 9-10)

III. POSITIONS OF THE PARTIES/INTERVENORS

(i) Unions in the BAT Case

The Unions argue that, in ruling that the persons on lay off (Campbell and Treis) were employees, the original panel misinterpreted and misapplied the Board's existing jurisprudence concerning the employment status of laid-off persons. The decision is, therefore, inconsistent with the law and policy of the Code.

First, it is argued that the original panel ignored or failed to appreciate many significant facts, including the fact that both Campbell and Treis had been laid off for five months and that Treis' last job with BAT was not the one to which he was to be recalled.

Second, the original panel erred in stating that the Board has rejected the "thirty day rule" used in Ontario to determine whether laid off employees are eligible to participate in a certification application in the industrial sector. The Board, in *Western Canada Steel*, BCLRB No. 79/75, [1976] 1 Can LRBR 25, stated that the approach in Ontario of placing a maximum limit of thirty days on the length of lay off during which an employee is eligible to vote may be sensible in applications to certify previously unorganized employees. The Unions did not

advocate a figure of 30 days but they do argue that there must be some reasonable basis for assessing the significance of a prolonged period of lay off where there is no specified date of return.

Third, the original panel correctly stated the ratio in *Later Chemicals Ltd., supra*, that a decision must be made on the facts of each case. It then erred in relying upon *Fraser Valley Farms, supra*, which the Unions view as clearly distinguishable. In that case the laid off employees were returning to work for their fourth consecutive year and had received a letter upon their lay off indicating that the Employer intended to rehire the employees in the coming year. There was no similar evidence before the original panel.

Fourth, the original panel erred by applying the Board's existing jurisprudence in the context of a construction case.

Finally, the original panel erred in concluding that the two employees shared a tangible, felt relationship with the Employer. The five month lay off alone is enough to deny a tangible, felt relationship. This conclusion is strengthened by the fact that the employees' separation slips showed the date for return to work as "unknown", there was no definite start up date, no correspondence between the Employer and the employees during the lay off, no collective agreement and no seniority or recall rights. The Employer had the sole discretion as to whether to rehire the employees and, in the case of Treis, the job he is being recalled to is not the job from which he was laid off.

The Unions note that it is not unheard of in the construction industry for jobs to be delayed for over a year due to budgetary, economic, seasonal or other considerations. If the original decision stands, the Unions would be prevented from organizing for a further year. Employers in the construction industry could easily arrange their affairs so as to effectively prevent unions from ever organizing their employees.

(ii) **BAT**

BAT argues that the Unions' application should be dismissed because it does not raise a legitimate ground for review under Section 141(2) of the Code. It states that the Unions have not

disagreed with the legal test or principle applied by the original panel; namely, whether Campbell and Treis had a tangible, felt relationship with BAT, but rather they dispute whether, on the evidence, the test has been met. In effect, the Unions are really seeking to review the panel's findings or conclusions based on the evidence presented rather than alleging any error of principle in the approach taken by the panel in reaching its findings or conclusions. Relying upon *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), (1993), 20 CLRBR (2d) 44, 93 CLLC ¶16,043, the Employer argues that this is not a legitimate ground for reconsideration under the Code.

(iii) Unions in the Oviatt Case

The Unions argue that the original panel's decision that Fargey, the two Matthews and Smirl were to be counted as employees in the bargaining unit is inconsistent with the principles expressed or implied in the Code. They assert that the Oviatt and BAT decisions raise a significant issue of law and policy under the Code; namely, under what conditions should persons on lay off in the construction industry be counted as employees in an application for certification.

In advancing their argument the Unions rely upon facts which are not apparent on the face of the original decision. These facts are set out in the Statutory Declaration of Bruce Ferguson who deposes that the additional facts were entered in evidence at the original hearing. In summary form, the facts are that the four employees who are the subject of this appeal worked between five and seventeen weeks each in 1992 and that the employees had been laid off for periods ranging from four to nine and one-half months at the time that they recommenced work with the Employer on March 28, 1993. The Records of Employment issued to each of the employees in 1992 indicated that their expected date of recall was "unknown".

The Unions argue that the Board's existing test for determining whether laid off persons are "employees" under the Code is a stringent test. The test is that only in very exceptional circumstances will an individual who has been laid off be found to be an employee for the purposes of an application to represent unorganized employees who are not covered by a collective agreement. They note that the existing test was developed in cases involving applications for certification in the industrial sector. They submit that, given the unique nature of the construction industry, an even more stringent test ought to apply.

The ability of unions to organize in the construction industry is already impaired by the fluctuating nature of construction work and the fact that the workers are only on site for brief periods. Further, time is of the essence in an organizing drive in the construction industry because of the short duration of each project. The practical effect of the original panel's decision is to require the Unions to secure a much higher level of support than the 55% required by Section 23 of the Code in order to be certified. A construction employer will almost always be able to argue that some person who worked for them on previous projects has a tangible, felt relationship with them and, therefore, ought to be considered an employee for the purposes of the union's application.

Given the following facts, the Unions further argue that it cannot reasonably be concluded that the four persons in issue were employees under the Code: none of the four had any contractual rights of recall; the application for certification is in the construction industry; they were laid off for lengthy and indefinite periods ranging from four to nine and one-half months; the four persons worked only intermittently for the Employer in 1991 and 1992 (only Smirl worked in 1990); and they were not working on the Methanex project when the Unions applied to be certified. Such a conclusion is inconsistent with the principles expressed or implied in the Code, including Sections 2(1) and 23 and the definition of "employee" in Section 1(1) of the Code.

(iv) Oviatt

Oviatt argues that the Unions' application for reconsideration should be dismissed. The Unions agree that the correct legal tests were applied by the original panel. They simply disagree with the outcome of the application of those tests to the unique facts of the case. In essence, the Unions are relying upon the same case law argued at the original hearing and are asking the Board to overturn or ignore findings of fact made by the original panel so as to reach a different outcome. This is not a valid ground for reconsideration.

Oviatt argues that the Unions have not established that the original decision is inconsistent with the principles of the Code. The Unions state that the decision is inconsistent with Section 2(1) of the Code. This provision, however, deals with purposes and objects and does not confer

substantive rights. See *Vancouver Fancy Meats*, IRC No. C85/89 (Reconsideration of BCLRB No. 135/87), (1989), 2 CLRBR (2d) 234. Similarly, the Unions allege that the decision is inconsistent with the principle expressed in the definition of "employee" in Section 1(1) of the Code. The Unions emphasize that the definition provides that "an employee means a person *employed* by an employer" but cannot articulate the principle expressed in the definition that is violated by the original decision.

Oviatt submits that it is trite law that individuals need not be working in order to be "employees" under the Code. Even where all of the employees have been given notices of termination prior to an application for certification the Board does not disenfranchise such individuals. See *British Pacific Restaurants Ltd.*, BCLRB No. 176/87 (Reconsideration of BCLRB No. 244/86). In that case it was clear that more than 50% of the employees had no expectation of continued employment, yet the union was granted certification rights to speak on their behalf. In the case of Oviatt, the four disputed individuals did have a reasonable expectation of continued work. If persons who clearly will not be working are included in a unit, those who will be working must be included.

Finally, Oviatt emphasizes the unique historical employment relationship between itself and its Band employees. It argues that the Unions seek a certification based upon a single project, in the face of clear evidence that other projects and employment were in the offing. In effect, the Unions ask the Board to ignore evidence of imminent and obvious increases in the work-force which created reasonable expectations of continued employment on the part of both the Employer and the Band Members. The Unions are asking the Board to import, into the Code, a provision similar to that in the Ontario legislation which provides that the Board need not consider increases in the number of employees in the bargaining unit after a certification application in determining whether the union has majority support of the employees.

(v) Building Trades

The Building Trades characterize the issue under consideration as being whether, on an application for certification in the construction industry, the Board should add persons to the employee list who are not working on the date of the application and who have no contractual right of recall. This issue raises two sub-issues: namely, whether the Board has jurisdiction to

add such persons and, if so, whether it is appropriate to do so.

The Building Trades argue that the Board has no jurisdiction to include persons such as the disputed individuals in the present cases in the bargaining unit because they are not employees. Section 23(1) of the Code provides that the Board shall certify a trade union if "not less than 55% of the employees in the unit are members in good standing of the trade union". Further, Section 1(1) of the Code defines an employee as "a person *employed by an employer*" (emphasis in the Building Trades' submission). A person who has been discharged from employment and who has no contractual right of recall is not an employee and any reasonable expectation of re-employment does not confer employment status on him or her.

The Building Trades recognize that the definition of employee in the Code is "singularly unhelpful in defining the categories of persons who may be encompassed by the definition". However, they argue that, at a minimum, the definition requires an engagement or mutual obligation between the employer and the employee. The definition cannot reasonably be said to encompass situations where the person sought to be included in the definition is neither working nor entitled to work.

The Building Trades argue that the disputed individuals lack the indicia of employment set out in earlier Board decisions: *Cranbrook and District Hospital*, BCLRB No. 128/74, [1975] 1 Can LRBR 42; *Cominco Ltd.*, BCLRB No. 49/79, [1979] 2 Can LRBR 322. The Building Trades note that these early Board decisions emphasized the difference between employees with the right of recall under a collective agreement and employees with no legal right of recall: *Western Canada Steel*, *supra*. Subsequently, in *Glen River Industries*, *supra*, the Board held that after a particularly searching inquiry, employees might be added to the bargaining unit if there was a tangible, felt relationship between the persons on lay off and the employer. The Building Trades argue that the context of the Board's comments in *Glen River Industries*, *supra*, are relevant to the proper application of the "tangible, felt relationship" test. In that case a labour committee of the employees had reached a written agreement that laid off employees would have recall rights for a period of six months. In short, that case considered the status of persons with recall rights and, in the circumstances, still declined to add them to the employee list. Subsequent Board decisions that have applied the "tangible, felt relationship" test to situations where there were no recall rights have overlooked the factual context of the test. In doing so the

Board has assumed, without analysis, its jurisdiction to include employees in the bargaining unit who are not working and who lack contractual recall rights.

The Building Trades argue that the Board's power under Section 139(a) of the Code, to determine whether a person is an employee, is constrained by the statutory definition of "employee". The Board has a wide discretion to decide whether a person exercises managerial functions or is employed in a confidential capacity but only after it is established that the person is employed. The Board has no jurisdiction to determine that a person with no contractual right to work is nevertheless an employee for the purposes of an application for certification.

In the alternative, the Building Trades argue that, as a matter of policy, it is inappropriate to include nonworking persons on employee lists in the construction industry. They note that in *Britco Structures Ltd.*, *supra*, the Board stated that such persons should be added to the employee list "only in very exceptional circumstances". The Building Trades argue that in the construction industry such persons should never be added to an employee list. They provide several reasons in support of this argument.

First, the work-force in the construction industry is transient and mobile. Because the work site is not fixed, former workers are seldom found near current work sites. Also, the constantly changing composition of the work-force makes it practically impossible for the union to ascertain the identity or location of persons whose inclusion in the unit may well deprive the current employees of their right to be certified. In short, "the task of organizing is held hostage to an unknown and geographically removed constituency".

Second, the inclusion of non-working persons in the construction industry is inconsistent with the Board's rejection of the build-up principle in this industry. The Building Trades note that in *Cicuto and Sons Contractors Ltd.*, IRC No. C271/88 (Reconsideration of BCLRB No. 52/87), (1989), 1 CLRBR (2d) 63, the Board rejected the application of the build-up principle in the construction industry because it made it virtually impossible for construction trade unions to organize. They argue that the panel in *Cicuto*, *supra*, acted inconsistently in proceeding to include ten persons to the employee list because they had a reasonable expectation of recall.

Third, a policy of including former construction workers on the employee list is an

invitation to abuse. Faced with an application for certification an employer can always come up with the names of former employees as a means of defeating or delaying the application.

Fourth, any test devised by the Board to measure the relationship between a non-worker and his/her employer will be manifestly unfair to the trade union. The Union is never in a position to question whether there is a "tangible, felt relationship" between an employer and its former employees. The Union can only ascertain the objective fact of whether the relationship resulted in employment. There is no practical way for a union to challenge an employer that asserts that it relies upon a particular person and intends to recall that person to work in the near future. The Board should, as a matter of policy, ground its decisions on an objective assessment of the facts, rather than in a subjective assessment which is prone to manipulation.

Finally, the Building Trades argue that there is no sound policy or jurisprudential basis for distinguishing seasonal lay offs from "normal" lay offs, and for deciding that the *Britco Structures Ltd.* policy against including laid off employees on the employee list except in "very exceptional circumstances" applies only in the case of the latter.

(vi) ICBA

ICBA and BAT were represented by the same counsel throughout this proceeding. Separate written submissions were filed on behalf of each party prior to the hearing of the Unions' applications. Further, counsel made a number of additional arguments at the hearing on behalf of both BAT and ICBA. To avoid duplication, we have incorporated these additional arguments into the following summary of ICBA's initial submissions.

ICBA argues that the Unions' appeals should be rejected because they do not raise a legitimate ground for review. The Unions have not argued that the tests applied by the original panels were wrong as a matter of law or policy. They simply disagree with the exercise of judgment by the original panels based upon the evidence before them.

ICBA argues that the Building Trades' submission raised two new grounds of appeal that were not raised by the Unions at first instance or in the Unions' appeal submissions. Relying upon *Brinco, supra*, they argue that the Board should reject these arguments out of hand. The

Board's reconsideration power is not intended to be used to advance new arguments which could have been made to the original panel. Since it would not be open to the Unions to advance these new arguments, even in their appeal submissions, it is not open to the Building Trades, as an intervenor, to raise them: *Canada (Attorney General) v. Aluminum Company of Canada* (1987), 10 BCLR (2d) 371 (C.A.). Accordingly, even if the Board wishes to consider the issues raised by the Building Trades it should do so solely on the basis that they are policy issues concerning future cases only, and not as an appeal of the original decisions.

ICBA also made the following submissions on the merits of the arguments made by the Building Trades.

ICBA argues that the Board has jurisdiction to treat laid off employees, who do not have formal recall rights, as employees for the purposes of the Code. It submits that the fact the definition of employee in Section 1(1) of the Code provides little guidance to the Board merely confirms that the Legislature has left it to the Board to determine, as a matter of labour relations policy, when a person is employed by an employer. The "continuing, tangible, felt relationship" test applied by the Board to determine whether a given person on lay off is an employee makes sound labour relations sense. In certain situations, like in the case at hand, people on lay off who do not technically have recall rights under a collective agreement are expected and understood to be returning to the employ of the company, and therefore still have a sufficient continuing, tangible, felt relationship with the company to be considered an employee of the company. In so ruling, the Board has done exactly what the Legislature expected - fashioned a rule or test for determining who is an employee that is consistent with sound labour relations policy.

ICBA argues that the cases relied upon by the Building Trades in making their jurisdictional argument do not support the propositions for which they were advanced. ICBA submits that *Cranbrook and District Hospital, supra*, and *Cominco Ltd., supra*, are not relevant to the issue at hand as they dealt with the employment status of people who, even when working, were not employees. ICBA also disputes the Building Trades' assertion that the "tangible, felt relationship" test was applied in *Glen River Industries, supra*, because the employees in that case had legally enforceable recall rights. ICBA argues that in that case the Board ultimately found that the employees' recall rights were not specifically enforceable and that if the rights were not respected they would only form a basis for a claim for damages but not for reinstatement.

Further, it submits that the Board in *Glen River Industries, supra*, and in subsequent cases, has always recognized that the determination of who is an employee under the Code goes further than a consideration of whether an employment relationship in the strict common law sense exists.

In the alternative, ICBA argues that there is no sound labour relations reason for carving out an exception for construction workers from the Board's standard test for determining who is an employee for the purposes of the Code.

ICBA relies upon a survey that it commissioned which it claims establishes that a majority of construction workers in the open shop sector have long term stable relationships with one employer. It argues that the survey shows that the traditional model of employment relationship in the Building Trades sector of the construction industry does not pertain to the open shop sector. Employment relationships in the open shop sector are like those in the industrial sector. Open shop contractors attempt to keep their employees on full time. This is not always possible, especially, as in the cases at hand, where a contractor cannot continue to work on its projects during the winter months. This does not mean that the employment relationships are necessarily severed for the purposes of the Code when a lay off occurs. If it is understood that the employees will return when work recommences the employment relationship survives as a matter of law and policy under the Code. The reason is readily apparent. People on lay off who are expected to return when work resumes have a very real stake in whether the company becomes unionized. This policy rationale is just as applicable in the construction industry as in any other industry. Therefore, the same test should apply regardless of the industry.

ICBA further argues that treating laid off employees as employees under the Code is not unfair to unions attempting to organize the employees of a construction company that is in a slow period. If the union cannot organize a majority of all of the employees of a company, then it should not be granted bargaining rights. Collective bargaining is based upon the wishes of a majority of the employees, not a minority who happen to be working on a particular day. If the union has the support of a majority of the employees on a particular project but not an overall majority of the company's employees then it should apply to obtain a certification for that project.

It would therefore have been grossly unfair in the BAT case if the regular employees of

BAT were excluded from a decision on a permanent certification. These employees would be working with BAT in the future, on other projects, and would be subject to the certification. The employees working on the tunnel project were, for the most part, hired only for that project and would not be working at any other projects for BAT. The regular employees should not have the question of their long term bargaining rights determined exclusively by employees hired only for one project. In these circumstances, where the Unions did not represent and had made no effort to represent the workers on BAT's other uncompleted projects, a project certification was the appropriate route for the Unions to take.

ICBA disagrees with the reasons advanced by the Building Trades in support of a construction industry exception that would preclude laid off employees from ever being added to the employee list. First, it argues that its survey suggests that employment in the construction industry is not as fleeting as suggested by the Building Trades. In any event, the Board's standard test can take this factor into account in each case. Second, in response to the assertion that the inclusion of laid off employees is inconsistent with the Board's rejection of the build-up principle in the construction industry, ICBA argues that the situation in the present cases is not analogous to the build-up situation. In build-up situations the future employees are not yet known; there is simply an expectation or plan that other employees will be hired in the future. By contrast, when construction workers are laid off with the expectation of recall, their identities are known and if they have a continuing, tangible, felt relationship with the employer through the period of lay off they should be treated as employees and given a say on any certification or decertification applications that may be made while they are on lay off. Finally, while it agrees that the Board's standard test does not always result in expeditious decisions, it argues that the legitimate interests of workers in such an important matter as trade union representation should not be sacrificed to ensure the speedy disposition of certification applications.

ICBA submits that the "continuing, tangible, felt relationship" test can actually benefit the Building Trades unions and that unions have, in the past, sought to include laid off Building Trades members on the employee list. See *Cicuto, supra; Wheaton Construction Ltd.*, BCLRB No. 327/84; *Pacific Engineered Concrete Waterproofing*, IRC No. C78/92; and *David Oppenheimer*, BCLRB No. 3/79.

ICBA submits that while it is more difficult to satisfy the test when the lay off is for a

longer duration, it is still better to deal with each case on its facts, rather than drawing an arbitrary line, such as the thirty day cut off rule used in Ontario for certification applications in the industrial sector. With seasonal workers, a thirty day cut off could disentitle a person who truly has a sufficient continuing relationship with the company from having a say on trade union representation. The Board's current test is sufficiently flexible to exclude anyone who should not be considered an employee, without having to draw a rigid or arbitrary line either with respect to time periods or type of workers.

In support of its opposition to a thirty day cut off rule ICBA notes that the Board does not apply a rigid formulistic approach to determining other issues under the Code. The Board has stated that it will look beyond formal employment relationships to determine the identity of a true employer for labour relations purposes.

The underlying rationale for the Board's approach in these cases is that, under the Code, the formal or common law treatment of a relationship does not prevail over the labour relations reality or substance of the relationship. As in these cases the Board has refused to make arbitrary rules to decide the employment status of persons on lay off.

ICBA argues that it would be a mistake, as a matter of labour relations policy, for the Board to deviate from its well established approach by adopting a rigid rule never to treat laid off construction workers as employees. Further, it argues that if the Board were to adopt such a rule it would amount to an improper fettering of the Board's discretion. The Board is entitled to develop policies to guide it in the exercise of its discretion but, if the policy becomes rigid and inflexible so that it results in the pursuit of consistency at the expense of the merits of individual cases, this will amount to an illegal fettering of discretion: *Yhap v. Minister of Employment and Immigration* (1990), 9 Immigration L. R. (2d) 243 (F.C.T.D.) citing J. Evans, *de Smith's Judicial Review of Administrative Action*, 4th ed. (London: Stevens, 1980) at p. 312.

IV. LEAVE DECISION

After reviewing the written submissions and considering the arguments made by the parties, we are satisfied that the Unions in both the BAT and Oviatt cases have demonstrated a

good arguable case of sufficient merit such that leave to apply for reconsideration should be granted. In both cases the Unions have asserted that the application of the "continuing, tangible, felt relationship" test to include laid off employees on the employee list has, in the context of the construction industry, the practical effect of denying access to collective bargaining. They argue that this result is inconsistent with the principles expressed or implied in the Code which has, as one of its purposes, the encouragement of the practice and procedure of collective bargaining between employers and trade unions as the freely chosen representatives of employees. Thus, these applications satisfy the test for leave set out in *Brinco, supra*. Accordingly, the Unions are granted leave and their applications will now be considered on their merits.

V. ANALYSIS AND REASONS

(i) Jurisdiction of the Board

The Building Trades argue that the Board lacks jurisdiction to add persons to the employee list who are not working on the date of the application for certification and who have no contractual right of recall. In short, the Building Trades submit that such individuals are not "employees" as defined in Section 1(1) of the Code and the Board's power under Section 139(a) of the Code (to determine whether a person is an "employee") is constrained by the statutory definition.

ICBA and the Employers argue that the objection to the Board's jurisdiction should be dismissed out of hand as it was not argued by the Unions at first instance and, as such, is not a valid ground for reconsideration. Since it is not open to the Unions to advance these new arguments, it is not open to the Building Trades, as an intervenor, to do so.

Ordinarily the Board will not consider arguments on reconsideration that could have been, but were not made at first instance. This policy of the Board cannot, however, be relied upon in the face of a challenge to the Board's statutory jurisdiction to enter into the original inquiry. The fact that it was an intervenor, rather than one of the parties, that raised the jurisdictional issue

also does not deprive the Board of the opportunity, or indeed the obligation, to consider the scope of its statutory mandate. The Board must always be vigilant to ensure that it is acting within the scope of its statutory authority even if the issue is not raised by the parties. As noted in *Wesley J. Fales*, BCLRB No. B317/93:

The Board does not gain jurisdiction over a matter merely by accepting or processing an application. Jurisdiction is an issue that is determined by the relevant legislation. If a tribunal determines at any time that it does not have jurisdiction over a matter, it cannot proceed to determine the issues before it. (p. 7)

Having found that it is appropriate to consider the jurisdictional issue we now turn to the merits of the Building Trades' objection.

Section 1(1) of the Code defines an employee as "a person employed by an employer". Likewise, the term employer is defined as "a person who employs one or more employees". As noted by the Board in earlier cases, these definitions provide little guidance as to who is intended to be subject to the Code: *Cranbrook and District Hospital, supra*, at p. 49 and *Western Canada Steel, supra*, at p. 27.

The question raised by the challenge to the Board's jurisdiction is whether, at a minimum, the definition of employee necessarily requires that there be a formal contractual relationship existing between an individual and an employer in order for that individual to fall within the definition of employee.

The Building Trades argue that such a contractual relationship, involving an engagement or mutual obligations between the employer and the employee, must exist in order for the individual to be an employee under the Code. They acknowledge that Section 139(a) of the Code grants the Board exclusive jurisdiction to decide whether a person is an employee but submit that this power is limited by the definition of employee. In short, the Board cannot find a person to be an employee if that person does not have a formal common law contract of employment with the employer.

ICBA argues that Section 1 of the Code does not dictate who should be considered an

employee for the purposes of the Code. Rather, the Legislature has left it to the Board to determine, as a matter of labour relations policy, when a person is employed by an employer.

In our view, the scheme of the Code makes it clear that the Legislature has left it to the Board to determine who is an employee under the Code, and that this jurisdiction is not constrained by common law notions of employment. Section 139(a) grants the Board exclusive jurisdiction to decide whether a person is an employee. Further, there is nothing in the phrase "a person employed by an employer" that specifically requires the Board to adopt the common law notion of employment in reaching its decision. Rather, the Board is entitled to rely upon its labour relations expertise to fashion a test of who is an employee, that is applicable in a labour relations context, and is consistent with sound labour relations policy.

This flexible approach to determining whether a person is an employee is consistent with the Board's practice and with judicial pronouncements concerning the scope of the Board's jurisdiction. The acceptability of this approach was discussed in *Citation Industries Limited*, IRC No. C299/88 (upheld on Reconsideration in IRC No. C165/89), where it was stated:

It is apparent from an examination of these authorities that the Board has adopted a flexible application of the term "employee" in cases where the statutory definition does not provide a complete answer to the problem. As the Board said in Glen River Industries (Delta) Ltd., BCLRB No. 70/77 (1978), 1 Can LRBR 168:

...In every case where the issue of whether persons are "employees" is contested a judgment will be required on a variety of factors and an appreciation of the context in which the issue arises...

Provided the flexible concept of "employee" does not go beyond what is legally permissible (see, John McNeilly, BCLRB No. 39/82) it is appropriate, as a matter of policy, for the Council to continue to rely upon this common sense approach. This approach does not create legislation as was the case in Wall and Redekop Corporation v. United Brotherhood of Carpenters and Joiners of America, 27 Locals et al. (1986) 5 BCLR (2d) 325; upheld in part (June 16, 1988) No. CA006424 (BCCA); and Section 1(1) does not provide such a clear and unambiguous

definition of "employee" that there is no logical or rational basis for importing a certain flexibility into its meaning (see, British Columbia Government Employees' Union v. Industrial Relations Council et al. (1988), 23 BCLR (2d) 306; upheld (October 27, 1988) CA008881 (BCCA)). (p. 15)

In deciding whether a person is an employee this Panel takes the same "purposive approach" adopted by the Board in *Columbia Hydro Constructors*, BCLRB No. B36/94 (Leave for Reconsideration denied in BCLRB No. B167/94). In that case the Board discussed the purposive approach in the context of determining the identity of the true employer. The Board's comments are equally applicable when considering the proper approach in determining whether a person is an employee. The Board stated:

The issue of "who is the employer" arises, and has been dealt with in many contexts, both at common law and by legislation. Definitions of "employer" in a wide variety of legislation governing the workplace provide minimal guidance. (Adams, *Canadian Labour Law*, 2d ed. (Aurora: Canada Law Book Inc., 1985) and Innis Christie et al., *Employment Law in Canada*, 2d ed. (Toronto/Vancouver: Butterworths, 1993).) As a result, administrative tribunals initially turned to concepts articulated in the common law. An analysis of these and other cases demonstrates that both the common law and statutory definitions of employer are construed purposively: i.e., the purpose of the inquiry influences the resolution of the issue and dictates the framework under which it is considered. The appropriate framework in which to examine the issue of the identity of the employer will accordingly vary. Once this is recognized, we agree with the authors of *Employment Law in Canada*, when they state that the policy dimensions of the inquiry should be openly acknowledged and dealt with (p. 20). The relevant factors, and the weight accorded to each, must "take account of the concerns which lie in the background to the Labour Code": see *Cranbrook and District Hospital and Selkirk College*, BCLRB No. 128/74, [1975] 1 Can LRBR 42, at p. 51. Finally, we note that Section 139(a) of the Code sets out the Board's exclusive jurisdiction to decide whether a person is an employer. (p. 42)

The decision in *Cranbrook and District Hospital*, *supra*, which is referred to in the above

passage, is illustrative of the purposive approach in determining whether a person is an employee. In that case the Board recognized that in deciding what test ought to apply, or what factors needed to be balanced in order to determine whether a person was an employee, the Board had to consider the context in which the question arose. The Board stated:

Finally, this balancing process does not take place in a legal vacuum. Most of the reported decisions involve problems of tort liability - should someone have to pay for injuries caused in an accident? Here we must reach our conclusion in quite a different context - should someone be part of a bargaining unit, represented by a trade-union, and covered by a collective agreement? In selecting the relevant factors in the situation...and deciding the weight to be given to each, we must take account of the concerns which lie in the background to the Labour Code. (pp. 50-51)

In taking a purposive approach to the issue of whether a person is an employee, the Board is concerned with determining whether the person is an employee *for labour relations purposes*. The Board is entitled to rely on its labour relations expertise in making this determination and has the exclusive jurisdiction to find a person to be an employee under the Code even if they may not strictly be an employee according to common law principles.

Support for this view of the Board's jurisdiction can be found in the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Public Service Alliance of Canada* (1991), 80 D.L.R. (4th) 520. In that case the Court ruled that the Public Service Staff Relations Board lacked the jurisdiction to determine who was an employee under the *Staff Relations Act*. In doing so, the Court contrasted the provisions of the *Staff Relations Act*, which did not include a provision granting the Board exclusive jurisdiction to determine who is an employee, with other labour statutes that contained such a provision. The Court stated:

...In the absence of a definition of employee, it could be argued that the Board could determine who is an employee on the basis of tests that are generally employed in labour matters. These tests are customarily employed to resolve a dispute as to whether a person is an employee or an independent contractor. The express definition of employee, however, shows a clear intention by Parliament that it has decided the category of employee over which the Board is to have jurisdiction. It is restricted to persons employed in the public

service and who are not covered by the *Canada Labour Code*. The Board's function by the very words of s. 33 is not to determine who is an employee but rather whether employees who come within the definition provided, are included in a particular bargaining unit.

There is no provision in s. 33 or indeed in this statute that gives the Board exclusive jurisdiction to determine who is an employee on the basis of the Board's expertise. Such provisions are not uncommon in labour statutes when it is intended that the Board have the final word as to whether persons employed by the same employer are employees or independent contractors. ...examples of this express grant of jurisdiction to determine who is an employee are:... *Industrial Relations Act*, R.S.B.C. 1979, c.212, s. 34(1); ... (p. 530-531)

Accordingly, we find that the Board has the jurisdiction to find a person on lay off to be an employee even though they may not have a formal contractual right to return to work. The issues to be decided are whether it is appropriate to ever make such a finding in the context of a certification application in the construction industry and, if so, whether it is consistent with sound labour relations policy to make the determination on the basis of the "continuing, tangible, felt relationship" test.

(ii) Test For "Employee" in Certification Applications

A. Policy Considerations

In deciding whether a person should be added to the employee list on an application for certification, the Board must be concerned with a number of policy considerations arising out of the Code. On the one hand, Section 2(1)(a) of the Code establishes that one of the purposes of the Code is to encourage the practice and procedure of collective bargaining. In order to advance this purpose it is essential that the Board develop policies that facilitate rather than impair access to collective bargaining.

The importance of access to collective bargaining was emphasized in the Board's recent decision on appropriateness of bargaining units: *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. In the same way that the test developed for determining the appropriateness of bargaining units had implications for access to collective bargaining, so does the test for determining who should be considered to be an employee in the bargaining unit. Clearly, if too liberal a test is applied, allowing a broad range of individuals with only a tenuous connection to the employer to be considered employees, this may well have an unacceptable adverse impact on access to collective bargaining. Trade unions may be required to organize individuals who they cannot reasonably identify or individuals who, although identifiable, are not readily accessible to the union. Obtaining the support of a majority of the employees in the bargaining unit in such a circumstance would be difficult; in the context of the construction industry, where jobs tend to be of short duration, this may, for all practical purposes, amount to a denial of access to collective bargaining.

In addition to access to collective bargaining, the Board must also be concerned with the rights of individual employees to participate in the decision as to whether they wish trade union representation and, if so, by which union. In *McCallum Motors Ltd.*, BCLRB No. 16/79, [1979] 1 Can LRBR 557, the Board recognized that the whole scheme of the Code is based on the fundamental proposition now found in Section 4(1) of the Code:

4. (1) Every employee is free to be a member of a trade union
and to participate in its lawful activities

In *McCallum Motors Ltd.*, *supra*, the Board also noted that implicit in this freedom is the right not to join a union. In establishing a test for determining who should be considered to be an employee in the bargaining unit, the Board must be careful to balance this fundamental right of individuals to choose how they wish to interact with their employer with the policy objective of the Code of encouraging collective bargaining. If too narrow a test is applied, it will certainly result in easier access to collective bargaining but may well disenfranchise individuals who have a substantial and legitimate interest in their long term bargaining relationship with their employer. This would be an unacceptable result.

In addition to the above policy considerations, it is necessary that the test used for

determining who is an employee under the Code be tailored to suit the nature of the application before the Board in this case, an application for certification in the construction industry. The test must be practical and functional from a labour relations perspective. Time is generally of the essence in certification applications. Any delays in the certification process tend to have a significant adverse impact on the establishment of collective bargaining rights. In order to minimize the likelihood of such delays, it is essential that the test for determining who is an employee be sufficiently objective and predictable in its outcome so as to enable the parties themselves to determine the bargaining unit constituency without the necessity of costly and time consuming litigation.

Minimizing delay is especially important in the context of the construction industry where the duration of jobs tends to be measured in days or weeks rather than months or years. Much has been written about the unique nature of the construction industry. As is evident from the submissions of the parties in this case, there are differences of opinion as to the extent of this uniqueness. Still, in comparison with a typical industrial setting, there is no doubt that an application for certification in the construction industry brings with it many unique problems which impact on the determination of who is considered to be an employee in the bargaining unit for the purposes of the application.

A construction site is a temporary work site. A project is often completed in phases, with different tradesmen employed at different stages. The general contractor subcontracts out different parts of the project to employers who employ specialized trades: electrical, plumbing, carpentry, etc. A single construction site may contain many different companies and trade unions and the length of time that each remains on the construction site can vary markedly. Weather is a factor, and some construction is seasonal. Unlike the industrial employer (ie. manufacturing) the construction employer will keep at most only a core group of employees and recruit other employees when construction work is available. Further, an employee in the construction industry may work for the same employer on an intermittent basis or for many different employers. We accept the ICBA submission that this general outline of the industry has changed to the degree that open shop contractors have provided longer term employment prospects for employees in the construction industry through retaining a larger number of core group employees and re-employing the same group of intermittent employees on a more regular basis.

However, these general comments highlight the importance of having a test for determining who is an employee that is responsive to the specific industry before the Board. In this case we will consider the appropriate test to be applied in the context of an application for certification in the construction industry. The same test will not necessarily be applied in the context of other applications for certification in other industries.

B. Alternative Tests

Before assessing the appropriateness of the "continuing, tangible, felt relationship" test to the construction industry, it is helpful to examine how other jurisdictions assess whether a person is an employee in the context of an application for certification in the construction industry.

(a) Ontario

The Ontario Board applies different tests for determining employee status depending upon whether the application for certification is made in the construction industry or in an industrial setting.

In the industrial setting the Ontario Board applies a test known as the "30/30" rule. With this rule, persons who are not at work on the application day are still considered to be employees if they worked in the unit at any time during the thirty day period preceding the application date *and* return to work or are expected to return to work in the unit within the thirty days following the application date. The rule is applied more as a guideline than a "hard and fast" rule, although there is a heavy onus on a party seeking exemption from it: J. Sack, Q.C. and C.M. Mitchell, *Ontario Labour Relations Board Law and Practice* (Toronto: Butterworths, 1985) at pp. 122-123.

The Ontario Board does not apply the "30/30" rule in the case of an application for certification in the construction industry. Rather, the Board counts as employees only those persons actually working in the bargaining unit on the date of the application. In *Smith's Construction Company, supra*, the Board discussed the rationale for applying a different test in the construction industry:

To cope with these special problems in the construction industry, the Board has developed a particular rule of thumb as to the way in which it should ascertain the number of employees in the bargaining unit at the time the application was made. The Board determines the employee complement to be that which exists on the application date - fully realizing that the number may well be different the day before, or the day after and that, for example, if the application date is a rainy day, the union may find that its members are not at work so that its application may be dismissed. This "rule of thumb" has been accepted and applied by unions and employers in the construction industry for thirty years - and for a very practical reason: anything else would lead to costly and time-consuming litigation on every certification application causing delay which would severely prejudice the establishment of bargaining rights purportedly guaranteed by the statute. If time is of the essence generally in labour relations, that maxim is particularly true in the construction industry. (p. 522)

Clearly, the "rule of thumb" applied by the Ontario Board for construction certifications would exclude, from the employee list, any employees on lay off regardless of the length of the lay off. The rule has the advantage of providing a very predictable objective measure of who is an employee, thereby avoiding delay that could render a certification academic. In this way the test can be seen as promoting access to collective bargaining. The disadvantage of this test is that, in application, it appears to place a great emphasis on expediency, sometimes at the expense of the interests of persons who would appear to have a legitimate and substantial interest in the certification application. At the very least, we have some concerns with the results that can arise when strictly applying such a narrow test. For example, in an early decision of the Ontario Board, it rejected a union's application for certification because, on the date the union filed the application, there was a snow storm that prevented the employees from reporting for work. Despite the fact that the employees had reported for work on the day before and the day after the application for certification, the Board ruled that they were not in the employ of the employer on the date of the application and the application was dismissed: *Keystone Contractors Limited*, [1966] OLRB Rep. Feb. 821.

(b) Alberta

Another approach for determining employment status is that used by the Alberta Labour

Relations Board. In Alberta, employees absent from work on the day the Board receives an application for certification are considered to be employees for the purpose of the application if they are found to have a significant continuing interest in their job. In an industrial setting the Board identifies such employees by applying a "thirty day rule". This rule is similar to Ontario's "30/30" rule. The person must have worked within the thirty days before the application date *and* worked or is likely to return to work at any time in the thirty days following the application date in order to be considered an employee. Both conditions must be satisfied. The rule usually allows persons who are absent due to casual illness, annual vacation or temporary lay off to vote. Persons absent due to long-term disability, extended sick leave, long-term lay off or a major suspension will usually be ineligible.

In the construction industry the Alberta Board applies a similar "fourteen day rule". The shorter time frame is in recognition of the more short-term nature of employment in the construction industry. The Board has a discretion to depart from these rules in appropriate cases: Rules 16 and 17 of the Alberta Labour Relations Board Voting Rules and Alberta Labour Relations Board Information Bulletin #14 - Representation Votes. The "fourteen day rule" applied by the Alberta Board is somewhat more flexible than the Ontario approach and would, in many cases, result in more individuals being added to the employee list.

It appears that the Alberta Board has attempted to expand the right of individuals to determine whether they wish trade union representation, presumably at the expense of a reduction in access to collective bargaining in some cases. Like the Ontario approach, the "fourteen day rule" in Alberta would appear to provide a predictable outcome that would avoid delays in the certification process while the parties litigate the employment status issue.

(c) British Columbia

In British Columbia, the Board has taken a different approach to determining whether persons on lay off are considered to be employees for the purposes of a certification or decertification application. Contrary to the approaches of the Ontario and Alberta Boards, our Board has relied upon a more subjective assessment of whether the individuals in question have a sufficient continuing interest in the bargaining unit to be eligible to have a say on the question of

trade union representation. In the case of an application to represent previously unorganized employees, the "sufficient continuing interest" of persons on lay off is assessed by determining whether there is a "continuing, tangible, felt relationship" between the individuals and the employer (*Western Canada Steel, supra; Glen River Industries, supra; Britco Structures Ltd., supra; Ratcliffe & Sons Construction Company*, BCLRB No. 456/84; (1984), 8 CLRBR (NS) 343; *Cicuto, supra*; and *Superior Contracting*, IRC No. C313/88).

The "sufficient continuing interest" test first arose in *Western Canada Steel, supra* (a non-construction industry case). The Board considered whether laid off employees with recall rights under their existing collective agreement were entitled to participate in a representation vote involving a raiding union. The Board discussed the rationale for allowing persons to vote who were not actually working for the employer on the day of the application:

Representation votes are conducted to discover the wishes of the employees about whether a trade union will be their exclusive bargaining agent to negotiate the terms and conditions of their employment and then to administer the resulting collective agreement. Essentially all of those persons who have a significant interest in that choice because they will have to live under the contract should be categorized as employees eligible to vote. From that premise it is apparent why a person may be perfectly entitled to vote in a representation election although not actually at work on that day. The presence of a trade union as the exclusive bargaining agent will be an enduring fact of the working life of the members of the unit. Though certain persons may be absent from work by reason of vacation, scheduled day off, illness, accident, or leave of absence, they have as vital an interest in the representation contest as the employees who are actually at work. If they are denied the right to vote, not only will they have a legitimate sense of grievance but the authority of the union to speak on behalf of the unit as a whole may be seriously impaired. For these reasons, such persons must be treated as "employees" eligible to vote. (p. 28)

The Board then went on to consider whether persons on lay off should be treated the same as persons absent for other reasons. The Board started with the assumption that lay off is distinguishable from other absences because when a person is laid off it is understood that they are entitled to seek employment elsewhere. The Board concluded that:

...On this assumption, one possible view is that only those persons laid-off for short, definite periods - perhaps because of a seasonal shutdown, a maintenance program, or temporary shortages of material - should be eligible to vote. Apparently the practice in Ontario is to place a maximum limit of thirty days on the length of lay-off during which the employee is eligible to vote. ...That approach may well be the sensible one in certain situations, for example where the Board has to determine the percentage of union membership for purposes of an application to represent unorganized employees who are not covered by a collective agreement. In that type of operation, a lengthy, indefinite lay-off because of market conditions is tantamount to discharge. The laid-off employee has no legal right of recall and if he is asked to return, this is at the sole discretion of the employer. Accordingly, there is little reason to treat the person who has been and will continue to be laid off for a lengthy period as having a sufficient interest in the outcome of the certification application that he should be treated as an "employee" under s. 45 of the Code. (pp. 28-29)

The Board dealt with the "employee status" issue in the circumstances of an application to represent previously unorganized employees in *Glen River Industries, supra*. In that case the employer argued that prior to the union's application, the employer and a labour committee of the employees had negotiated an agreement that provided the employees with recall rights for a period of six months following a lay off. The employer relied upon the decision in *Western Canada Steel, supra*, to argue that because a number of laid off employees had recall rights they were to be treated as employees in the bargaining unit for which the union had applied to be certified. The Board rejected this argument and in doing so distinguished *Western Canada Steel, supra*, on three grounds: first, the right of recall was not "specifically enforceable" - it may have provided for right to damages, but gave no right of reinstatement; second, a substantial number of employees regarded their lay off as severance; and third, because the unit was uncertified the Board felt compelled to conduct a searching inquiry to ascertain if there was "tangible, felt" relationship between the persons on lay off and the employer.

The "tangible, felt relationship" test was further refined by the Board in *Britco Structures Ltd., supra*. In that case, the Board considered the earlier jurisprudence and stated that it would only find a laid off individual to be an employee in an application to represent unorganized

employees in "very exceptional circumstances". The Board went on to conclude that:

... Such exceptional circumstances might occur where it can be established that there really does exist a continuing, tangible felt relationship between the individual and the employer. That relationship must be established at the date of the lay-off and it must be shown to be a continuing one during the period of the layoff. ... (pp. 364-365)

In effect, in the case of seasonal lay offs, in order for the laid off person to be considered an employee, there must be actual evidence of a contractual agreement between the employer and the employee at the time of the lay off in which the employer acknowledges a continuing obligation to rehire the laid off employee following the seasonal shut down. Further, there must be evidence both at the time of the lay off and at the time of the certification application that the employee has a realistic expectation of recall. Applying the Board's existing test, such a person would be considered to be an employee under the Code even though the right of recall may not be specifically enforceable and only gives rise to a claim for damages.

Finally, it should be noted that the test of who is an employee in British Columbia was established in cases that did not involve the construction industry (*Western Canada Steel, supra*; *Britco Structures Ltd., supra*; and *Glen River Industries, supra*).

Comparing the British Columbia approach with the approaches used in Ontario and Alberta, it is apparent that the British Columbia approach places less of an emphasis on access to collective bargaining and timeliness and a greater emphasis on determining the rights of individuals to participate in the certification or decertification process. Given the nature of the approach, it may, on average, result in more individuals with lesser attachments to the employer being included on the employee list. This, in turn, will have an adverse impact on access to collective bargaining in some situations.

C. Appropriate Test For Construction Industry

The above review of the British Columbia case authorities provides a general overview of the approach that this Board has taken in determining whether a person on lay off is an employee under the Code. The "continuing, tangible, felt relationship" test has been applied regularly in applications for certification and decertification in the industrial sector. The test has also been applied in the case of a decertification application in the construction industry: *Wheaton Construction Ltd., supra*. We are satisfied that the original panels in the cases before us correctly interpreted the Board's jurisprudence in this area. The question that we must decide is whether it was appropriate, as a matter of policy, to apply the Board's existing approach to determining the status of laid off employees in the context of a certification application in the construction industry.

As with each of the approaches that we have reviewed, any test for determining who is an employee in a certification or decertification application will involve a balancing of three factors: access to collective bargaining, individual rights, and the timeliness of the certification or decertification process. In determining whether a given test is appropriate for use in the construction industry we are really making a labour relations judgment as to how to balance these factors in the context of that industry. In making this judgment we are guided by the Code and our own practical experience as to how best to achieve the purposes of the Code.

Upon close scrutiny of the Board's jurisprudence it is evident that the definition of who is an employee in the construction industry is framed quite restrictively. However, what might be termed the "representative period" (the eligibility period in which a person qualifies as an employee for the purposes of certification or decertification) has at times been quite expansive - as the instant cases illustrate, for periods of four to nine months.

The Board's past decisions have stated that even where a collective agreement is in place, reference must be made not only to the individual's specific rights of recall contained in their collective agreement, but also to the fact that there must be a real prospect of those rights being exercised: *Western Canada Steel, supra* at p. 29.

In the absence of a collective agreement (and notwithstanding other written agreements giving seniority or rights of recall) a "searching inquiry" must be conducted to ascertain whether

an individual at the date of their lay off, and continuing throughout the lay off period, has established a "sufficient, continuing", "tangible felt relationship" with the employer; if so, this may result in "very exceptional circumstances" such that an individual may be included as an employee in the bargaining unit (*Glen River Industries, supra* and *Britco Structures Ltd., supra*). Outside the construction industry the test remains a "sufficient continuing interest". The expression a "tangible felt relationship" may simply be a defining characteristic of what constitutes a sufficient continuing interest, but these additional words do not establish any different or separate test.

However, the use of the sufficient continuing interest test in construction (with the exception of one factor) has been less effective in resolving disputes over the issue of who is an employee; and secondly, perhaps more importantly, it has not achieved a consistent balance between individual rights and access to collective bargaining.

Therefore, we need to deal with who is an employee in the construction industry in two different circumstances: first, where there is a collective agreement; and, second, where there is no collective agreement or, if there is a collective agreement in place, the agreement contains no rights of recall.

There is little controversy over the general principles to be applied when the issue of who is an employee arises in the context of a collective agreement that provides for rights of recall. However, the second circumstance, where there is no collective agreement in place or the collective agreement contains no rights of recall, has resulted in perhaps more litigation than is desirable and an assertion that the current test is too subjective.

As stated in *Western Canada Steel, supra*, the presence of a collective agreement provides an objective basis for determining the employee status of a person who is on lay off. Most often, the seniority and lay off provisions in a collective agreement specify an individual's rights of recall. These rights of recall grant to an individual the right to be recalled to work in order of seniority if the return to work takes place within a certain period of time (eg. six months). The only additional factor imposed in past decisions is that there must be a realistic expectation of recall. For example, if some part of an employer's operation has been closed and there is no realistic prospect that the individuals who worked in the closed plant will ever be recalled, it is

unlikely that such individuals will be included as employees in the bargaining unit.

Therefore, where there is a collective agreement in place the test will be the "reasonable expectation of recall". The circumstances in which this will most often arise will be in applications for certification such as raids, polyparty and joint council applications, and in decertification applications. Finally, persons who are not at work on the date of the application for certification or decertification for reasons other than lay off, such as vacation, days off, illness, accidents, etc., are included as employees in the bargaining unit. In determinations of this kind the sufficient continuing interest test continues to apply.

However, the presence of a collective agreement in the construction industry does not answer fully the difficulties of determining who is an employee. Construction bargaining units that are organized along industrial lines (one all-employee unit as opposed to craft lines) will fit more easily within the test of a reasonable expectation of recall. However, a review of the Board's jurisprudence in regard to the history, organization, employee status and collective agreements (*R.M. Hardy & Associates Ltd.*, BCLRB No. 41/77, [1977] 2 Can LRBR 357; *Cicuto, supra*; *Britco Structures Ltd., supra* and *Ratcliffe, supra*) in the construction industry and the Board's records (all collective agreements are required to be filed with the Board) demonstrate that when employees are "laid off" in the construction industry this amounts, both in legal and labour relations terms, to an actual termination of employment.

Many collective agreements in the construction industry contain no seniority or rights of recall. Indeed, as illustrated in the *Ratcliffe, supra*, decision, the only ability of an employee to return to a specific employer is under a clause known as the "name request" provision: a clause in the collective agreement that entitles the employer to name request a certain individual from the hiring hall. The only usual restriction on this clause (which is exercised at the sole discretion of the employer) is on the number of individuals that any one employer can name request (*Ratcliffe, supra*). The result is that laid off employees in the construction industry possess no legally enforceable right to return to employment with their employer. Therefore, where the Board has before it collective agreements such as those contained in the *Ratcliffe* decision, they will be treated for policy purposes in the same manner as where there is no collective agreement present.

Employers in the construction industry hire and retain employees only when they have been successful in their attempts to bid for work. The construction industry is very competitive and costs are continually reassessed to ensure success in bidding. One of the most significant ways in which costs are reduced and contained is to ensure that when the employer has not been successful in obtaining work it does not retain employees on its payroll. For employees in the construction industry this has meant a number of things: first, a lifetime of intermittent work; second, lay off is in fact termination and there is no legal right to claim employee status when the employer has no work; third, the need for every individual to be productive and competitive in order to obtain future work requests from that employer; fourth, a constant search for employers who have work; fifth, the necessity to leave home and a willingness to work anywhere in the province on both short notice and for short periods of time; and finally, long periods of unemployment.

As is evident therefore, employers in the normal application of this employment scheme are not compelled to recall or rehire employees by certain dates; and any failure to do so is not subject to orders of reinstatement or lost compensation. Indeed, such business costs would be anathema to the construction industry.

Therefore, in circumstances where there is no collective agreement or where a collective agreement is present but there is no enforceable right to return to employment, the test of who is an employee in the construction industry is more accurately described as a "reasonable expectation of re-employment".

This test recognizes that lay offs in the construction industry amount to termination and that the employment relationship with the employer therefore ceases at the time of lay off. Further, the subsequent re-employment of an employee is at the sole discretion of that employer. Thus, the circumstances under which the Board ought to find such persons an employee must be "exceptional".

The current test - "sufficient continuing interest" and a "tangible, felt relationship" is certainly more subjective than the tests established in either Ontario or Alberta. Whatever its past merits, we no longer find this language effective in resolving disputes which come before us.

Therefore, in an effort to bring some increased objectivity and predictability to the definition of who is an employee in the construction industry, the Board will establish and monitor a rule similar in approach to that adopted in the Alberta and Ontario jurisprudence.

This rule will be as follows: a person will meet the definition of employee if they are working in the bargaining unit on the date of application for certification; second, should a person not be at work on the date of the application for certification but have worked at any time during the thirty days preceding the application, and further, have a reasonable expectation of being re-employed during the thirty days following the date of application, they will qualify as an employee. Both of these conditions must be met if an individual is not working on the date of the application for certification.

This rule will be employed under the Code to determine who is an employee for the purposes of calculating the numerical percentages required for certification and decertification. Such persons would also be entitled to vote should the Code require a vote. Other persons who are eligible to vote, although not calculated into the statutory threshold requirements are "new hires" under Section 39 - new employees who have been hired (*bona fide*) after the date of the application for certification but prior to the vote (in the reverse in decertification). Finally, individuals who are on days off, vacation, illnesses, accident, etc. also qualify as employees for the purposes of calculating the threshold requirements. These determinations we see as an exception to the 30/30 rule. They will continue to be made on the basis of the sufficient continuing interest test; however, the first consideration in these situations is to determine whether the person would have been at work for the purposes of the 30/30 rule but for the illness, accident, etc.

We will now outline the reasons for this policy choice.

First, as we have previously stated it has been recognized by both employers and employees that past work experience for a particular employer did not give an individual either permanent full time employment or a contractual right to future employment. This is true even in cases of significant past experience or numerous name requests. The past experience of an individual, combined with a realistic expectation of successful contractual bids by an employer, has not created a legally enforceable right to re-employment. In *Ratcliffe, supra*, the Board

stated the following:

...The fact that they have worked for a considerable period of time for the Employer in the past cannot override the clear legal effect of the [name request] provisions of cl. 9.01 of the Agreement. (p. 351)

In *Cicuto, supra*, the Board stated the following:

...We do not accept that the possibility of an employer obtaining new contracts is a sufficient ground upon which "a reasonable expectation of recall" could be based. In this regard we recognize that there are long term former employees who are not presently working but we are unable to consider them as employees for the purposes of this application because they have not been called back to work and the reality of the construction industry is that they only have a hope that they will be called back if and when Cicuto obtains further work. (pp. 8-9)

Although at first glance construction may seem to fall within the category of seasonal employment (some construction is not carried out in winter), upon a closer examination it is evident that the labour relations scheme in construction does not fit so neatly within it. This is because a person may work for several different employers in one construction season or over several different seasons. Also significant is the fact that employers and employees have committed themselves to an employment scheme which does not recognize seasonal employment rights. Thus, a period of time which is less than a seasonal time frame must be the measure in our determination of who is an employee in the construction industry.

We have considered the ICBA submission that the majority of open shop construction companies have employment policies which reflect less the traditional pattern of intermittent hires and more the industrial pattern of retaining a core group of employees. However, a fair reading of ICBA's submission is that most, if not all, open shop contractors are "hybrid employers" - a mix of some core employees and some intermittent employees. The employment scheme of both core and intermittent employees in the open shop sector remains under the exclusive control of the employer (as was the case in *Oviatt* and *BAT*). Individuals have no legally enforceable right of re-employment from one season to the next. However, in devising the 30/30 rule we have given consideration to this hybrid employer situation.

Second, having concluded that seasonal employment rights do not reflect the realities of the labour relations scheme of construction, what is the rationale for a 30/30 rule? For example, why not forty-five or sixty days or some other figure? It is obvious that no rule or formula will be fool proof. In choosing a time frame the unique nature of the construction industry is a significant determinant. Employment in the construction industry is transitory and the work flow on a single project can fluctuate from week to week. The duration of any construction project can also be uncertain. It is often completed in different phases with a different mix of employees at each phase. Therefore, there is no assurance that even those employees who are at work on the date of the application for certification will be there at a different phase of the construction project, or employed on the next project with that same employer.

Thus, an application for certification necessarily occurs at one moment in the history of that employer's work-force. The life of that work-force is often measured in weeks or months, not years. In our view the total of sixty days (thirty days on either side of the application for certification) covers a span of time which corresponds to the realities of the fluctuations in the work-force and the length of construction projects. Although the Ontario and Alberta policies have lesser representative periods (the date of application and a 14/14 rule, respectively) for construction and a similar representative period in Ontario for industrial units, the choice of a 30/30 rule clearly falls within a normative labour relations time frame for the determination of who is an employee in both construction and industrial units. Finally, this rule attempts to balance the right of individuals who are currently employed and those who have been employed and have a substantial likelihood of being re-employed, with those persons who may have worked for the employer in the past but neither have a right of re-employment nor, in fact, have been re-employed.

Third, it is hoped that the use of a specific time frame or formula will provide a more objective and predictable measure for determining employee status. This has the desirable goal of reducing the litigation of issues (eg. long lists of former employees whose status is in dispute) in certification and decertification applications. It must be remembered that in BAT the employer's initial position was the Union had to organize an additional twenty employees. This was later reduced to seven. As Vice-Chair Munroe stated in *Glen River, supra*; "The fact of non-membership is not a neutral fact". Anyone who is placed in the unit, who has not signed a

membership card, is calculated against the union in its application for certification.

This, in turn, raises the issue of timeliness in these applications. Time is of the essence in certification applications. In construction it is even more critical because of the possibility of a project ending prior to the completion of a disputed certification application. Thus, in order to limit delays the test for determining who is an employee should be sufficiently objective and predictable in its outcome that the parties themselves are able to determine the bargaining unit constituency without the necessity of time consuming and costly litigation.

Fourth, long term or "core employees" who, for whatever reason, have not been re-employed by the employer (and that is under the exclusive control of the employer) have not lost significant long term rights under the Code. As has been repeatedly stated by this Board, certification is only the first step in the acquisition of collective bargaining rights. The most critical step is of course the obtaining of a collective agreement. That is usually achieved some time after the certification. The time period varies considerably. However, we recognize that the employer has the opportunity to re-employ those core employees who were not captured by the 30/30 rule prior to the time that a collective agreement is finalized. Therefore, although the particular bargaining unit may have been certified in the absence of such employees, once the employer has finally decided to re-employ that core employee, that employee retains the following rights under the Code: the ability to participate in collective bargaining and strike votes; the ability to change unions; and the right to decertify the union. Thus the long term rights of that core employee are safeguarded under the Code without disenfranchising the current employees' access to collective bargaining.

Fifth, those employers (as the ICBA argues) who no longer hire on a project by project basis but are rather organized along industrial lines (thus keeping a core group of employees) will, in the main, not be affected by this rule. If no employee qualifies under this rule, the workforce is presumably stable and the representative pool will not be augmented by intermittent employees. If the employer is a "hybrid employer", as many are, the representative employee pool will be adjusted only to reflect those additional intermittent employees. Thus, this formula does not exclude core employees.

Although the rule we have adopted establishes a longer representative period than either

Alberta or Ontario (and thus is more inclusive of individual employee rights) it is our policy conclusion that it offers a fair balance between access to collective bargaining, individual rights and timeliness. As stated, we will monitor the policy experience of this new rule. The rule is not rigid and there may be individuals who fall outside the rule but who the Board would nonetheless find to be an employee. However, there will be a substantial onus on the party who wishes to establish that a person who falls outside the 30/30 rule is, in fact, an employee.

VI. DECISION

We have stated that the two decisions under appeal correctly applied the previous policy as to who is an employee in the construction industry. We have now changed that policy. Counsel for BAT and ICBA argues that if the original policy was applied correctly any change to that policy ought to be only prospective. We have considered remitting these two appeals to the original panels to be reconsidered in light of this new policy. However, it is our view that the better course is to make this policy change prospective and not to revisit the conclusions which have been correctly reached under the old policy. Thus, the reconsideration applications of the Unions are denied.

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