

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

BRINCO COAL MINING CORPORATION

(the "Employer")

-and-

UNITED STEELWORKERS OF AMERICA, LOCAL NO. 1037

(the "Union")

-and-

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

(the "Intervenors")

PANEL: John B. Hall, Associate Chair (Adjudication)  
Emily M. Burke, Vice-Chair  
Joan Gordon, Vice-Chair

COUNSEL: Thomas D. Schiller and David Moonje, for the Employer  
David K. Pidgeon, for the Union  
Nancy A. Trott, for the B.C. Business Council  
Phillip Bryden, for the Coalition of B.C. Businesses  
Wayne Moore, for the Confederation of Canadian Unions

CASE NO.: 13964

DATE OF HEARING: February 26, 1993

DATE OF DECISION: March 22, 1993

## **DECISION OF THE BOARD**

### **I. NATURE OF APPLICATION**

Brinco has applied under Section 141 of the *Labour Relations Code* for leave to apply for reconsideration of BCLRB No. B6/93. The panel in that decision granted "automatic" certification to the Steelworkers under Section 23(1) of the Code. The membership cards on which the certification application was based were signed prior to proclamation of the Code on January 18, 1993. The cards did not contain the statement set out in Section 3(b) of the Labour Relations Regulation. The Employer argues the original panel should therefore have ordered a representation vote under Section 162 of the Code.

This leave application is one of the first received by the Board under the reconsideration provisions of the new Code. It was therefore set down for oral argument at the same time as two other applications: a request by the International Association of Machinists and Aerospace Workers, Lodge No. 692 for leave to appeal<sup>1</sup> *Proflex Systems Ltd.*, IRC No. C16/93; and a request by the Service Employees' International Union, Local No. 244 for leave to appeal *British Columbia Housing Management Commission*, IRC No. C2/93. The parties in all of the applications were asked by the Board to address the following issues:

1. What test should be applied, and what process should be followed, where the Board is requested to grant leave to apply for reconsideration?
2. Where leave is granted, upon what basis or grounds should the Board now review decisions on reconsideration (i.e., do all of the grounds in Western Cash Register (1955) Ltd. BCLRB No. 84/77, [1978] 2 Can LRBR 532 (reconsideration of BCLRB No. 38/77); and Overwaitea Foods - A Division of Jim Pattison Industries Ltd., IRC No. C86/90 (reconsideration of IRC No. C51/90), still apply)?

---

<sup>1</sup>We may at times in this decision use the term "leave to appeal" as a short form for the phrase "leave to apply for reconsideration" found in Section 141 of the Code. The provision does not, of course, allow for a true right of appeal.

3. Should leave to apply for reconsideration be granted with respect to the present applications?

The Board subsequently extended invitations of intervenor status to the B.C. Federation of Labour, the B.C. Business Council, the Coalition of B.C. Businesses, and the Confederation of Canadian Unions. The latter three attended the hearing and made submissions regarding the first and second issues.

This decision will deal with the Panel's conclusions regarding the approach which the Board should take to applications under Section 141 of the Code requesting leave to apply for reconsideration. It will also address Brinco's application for leave on the merits. Separate decisions will be issued respecting the leave applications in the *Proflex Systems* and *B.C. Housing Management* cases. However, in examining the policy issues, we have considered together the submissions made by all parties to the three applications, as well as the submissions made by the intervenors.

## II. POSITIONS OF THE PARTIES AND INTERVENORS

The submissions made to the Panel disclosed substantial agreement and consensus in a number of areas: unlike the *Industrial Relations Act*, an unrestricted right to seek reconsideration has been replaced by the requirement to obtain leave; reconsideration of a reconsideration decision is no longer possible; the basis for leave must be tied to the substantive grounds for review; and the new provision should be interpreted so as to avoid delay and enhance finality in the Board's decision-making process. There were areas of disagreement. Some parties argued that the substantive grounds for reconsideration are now narrower than those found in *Overwaitea Foods, supra*, while others argued that all of the pre-existing grounds have been retained, if not broadened. In terms of process, some parties suggested the Board adopt a relatively formal "Chambers" approach as followed by the Courts; others argued that leave and reconsideration applications should generally be handled on the basis of written materials alone.

We do not intend to recite individually the positions advanced by each of the parties and the intervenors. All made considered submissions which have been of benefit to the Panel. Our decision comprises an amalgam of views -- largely reflecting areas where there was consensus, and making determinations where required which best accord with policy and labour relations

objectives under the Code. We have attempted to set out a relatively comprehensive analysis of reconsideration under Section 141; however, there will no doubt be occasion to refine the approach over time. That is most likely to be the case regarding the process for reconsideration, as the Board gains experience with the new legislative provisions.

### III. GENERAL OBSERVATIONS

For the discussion which follows, it is useful to set out Section 141(1) and (2):

141. (1) On application by any party affected by a decision of the board, the board may grant leave to that party to apply for reconsideration of the decision.
- (2) Leave to apply for reconsideration of a decision of the board may be granted if the party applying for leave satisfies the board that
- (a) evidence not available at the time of the original decision has become available, or
  - (b) the decision of the board is inconsistent with the principles expressed or implied in this Code or in any other Act dealing with labour relations.

Section 141 of the Code in large measure replaces Section 36 of the former *Industrial Relations Act*. Elements of Section 36 are also found in Section 142 of the Code. Section 141(1) eliminates reconsideration as of right and gives the Board an unfettered discretion to "grant leave to [a party affected by a decision] to apply for reconsideration of the decision". Subsection (2) then establishes parameters as to the circumstances in which leave may be granted.

We say the provision "establishes parameters" because it is readily apparent the Legislature has continued to leave the actual exercise of the reconsideration power to the discretion of the Board: *Corporation of the District of Burnaby*, BCLRB No. 25/74, [1974] 1 Can LRBR 128, at p. 129. Section 141(2) states in part that "leave to apply for reconsideration...*may* be granted if the party applying for leave *satisfies the board*..." that certain prerequisites have been met. This discretion (and, more specifically, the basis on which leave applications are adjudicated) should be exercised in a manner which best allows attainment of the purposes set out in Section 2(1) of the Code: *Lorne W. Camozzi Co. Ltd. et al* (1986), 68 BCLR

338 (BCCA). Thus, for example, one cannot seriously suggest the Board should grant leave to apply for reconsideration under Section 141(2)(a) where new evidence has become available, without any consideration of its relevance or impact on the original decision. Likewise, it was acknowledged in the submissions before this Panel that a meaningful leave process would be eliminated if the Board only granted leave under Section 141(2)(b) where "the decision of the Board *is* inconsistent with the principles expressed or implied in this Code"; there would be nothing left for a hearing on the merits. The reconsideration provisions must be construed in their entirety, in the context of the Code as a whole, according to their object and intent: E.A. Driedger, *Construction of Statutes* (Second Edition), at pp. 82-87.

Unlike Section 36 of the *Industrial Relations Act*, some limitations have been expressly included in the Code. The Legislature has directed that reconsideration cannot be carried on *ad infinitum*. Under Section 141(3), leave may only be granted once with respect to a decision of the Board; further, under Section 141(4), the power to grant leave does not extend to either leave or reconsideration decisions. The time period for seeking leave has now been enshrined in Section 141(5) of the statute (it was previously in the Regulations) and has been reduced to fifteen (15) calendar days from the date of reasons. While Section 141(2)(a) and (b) have been characterized as establishing parameters for the exercise of the Board's discretion, they also represent a limitation by focusing on certain grounds for leave.

The notion of "leave to apply for reconsideration" might readily draw an analogy to "leave to appeal" in the judicial context. However, practices and procedures developed by the Courts should not necessarily have automatic application in the labour relations context. The Board has the jurisdiction under Section 126 of the Code to establish its own practice and procedure.

Leave to appeal in the Courts essentially results in a bifurcated process: there is a hearing to determine whether to grant leave; if granted, there is a separate hearing for the merits of the appeal. This bifurcation reflects the reality that substantially different determinations are typically being made at each stage. For example, in determining whether to grant leave to appeal, the Supreme Court of Canada is primarily concerned with whether the issues "are of sufficient national importance to warrant a grant of leave": *MacDonald v. City of Montreal*, [1986] 1 SCR 460, at p. 509. The question of national importance can quite readily be

distinguished from the potential legal issues on appeal. Under Section 141 of the Code, the basis for granting leave and the grounds for reconsideration will inevitably be intertwined. That was certainly the case with the three applications before the Panel, and was generally conceded in the submissions.

The goal of avoiding, where possible, a two-stage process is entirely consistent with the policy objectives underlying the use of Section 141; that is, the avoidance of delay and the enhancement of finality to Board decisions. Section 2(1)(d) of the Code expressly directs the Board "to promote conditions favourable to the orderly, constructive and expeditious settlement of disputes between employers and trade unions". A more simplified process also assists the objective of reducing the time and expense of litigation before the Board. In general terms, the concerns expressed in the *District of Burnaby* case, *supra*, remain valid:

It goes without saying that an individual's right of appeal is an important mechanism for securing due process under the Labour Code. It can serve as a means of correcting error, bringing new matters to the attention of the Board, and ensuring that the principles of natural justice are fulfilled. It should be equally clear that the right of appeal is not an unmixed blessing. Every time there is an appeal, a burden is imposed on the party which has been successful in the original decision. As well, it requires the Board to spend time reviewing a matter regarding which it has already reached a decision, thus diverting its attention from other pressing cases, and so imposing a burden on those other parties as well.

Under the Labour Code, there are two reasons why this problem with appeals is aggravated. First of all, speed and finality of decisions are especially imperative in labour relations. Of no area of law is it truer to say that justice delayed is justice denied. If an employer can delay bargaining by appealing a certification decision, it may be able to erode the real position and strength of the union. If a union can appeal a cease and desist order against unlawful picketing, it may be able to force the employer to give in to its economic demands. In either case, the party with the valid claim under the law may end up winning the battle but losing the war. Secondly, it is extremely easy to lodge an appeal within the current arrangements under the Code. Nothing more is required than a letter sent within fifteen days. In our experience, a letter follows the decision in just about every seriously contested case.



(i) New Evidence

A longstanding policy in British Columbia labour relations jurisprudence has been a reluctance to review decisions on factual grounds. The rationale was well expressed in *Robinson Little and Co. Ltd.*, BCLRB No. 32/75, [1975] 2 Can LRBR 81:

Before considering the specific objections to the decisions under appeal, we should say something about the Board's approach under s.36 in reviewing decisions made by a Panel. In this case a lengthy hearing was held, a great deal of evidence was offered, and there was a sharp conflict in the testimony. On that basis, the Vice-Chairman arrived at a number of specific conclusions -certain findings about the disputed facts and then several judgments about the exercise of the Board's discretion in making orders under the Code. The function of the power of reconsideration of such decisions under s.36 is to ensure that different Board Panels properly interpret the law of the Labour Code and consistently apply the principles developed by the Board in the use of its powers. But it is not feasible in the review process to substitute new judgments about the concrete details of the case. We cannot assess the credibility of witnesses, appraise particular items of testimony within the context of the testimony as a whole, or obtain a sure sense of the atmosphere of the situation within which Board orders may have to operate. The Board has consistently refrained from overturning that type of conclusion on appeal, even in unfair labour practice cases which attracted vigorous dissents from one member of the original Panel... . (p. 85)

This policy has been followed with relative consistency since the *Robinson Little* decision. Some recent cases include *Roberta Scott et al*, IRC No. C169/92, (1993), 16 CLRBR (2d) 65 (Reconsideration of IRC No. C104/92); and *West Kootenay Power Ltd.*, IRC No. C182/92, (1993), 16 CLRBR (2d) 75 (Reconsideration of IRC No. C199/91). The Board has similarly been reluctant to review (and in our opinion should not review) the inferences which might be drawn from facts found by an original panel: *PCL Industrial Constructors Inc.*, IRC No. C151/89, at p. 7; *West Kootenay Power Ltd.*, *supra*. Except as now directed by Section 141(2)(a), the circumstances in which evidentiary matters are dealt with on reconsideration are properly limited to cases where questions of procedural fairness or natural

justice arise: *Board of School Trustees of School District No. 39 (Vancouver)*, BCLRB No. 16/87; *Ocean Construction Supplies Limited*, IRC No. C244/89.

The four grounds for reconsideration established by the Board in *Western Cash Register, supra*, were repeated by the Council in *Overwaitea Foods, supra*, with the addition of two further bases for review. The second ground in both decisions was as follows:

2.if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons;... (*Overwaitea Foods, supra*, p. 7)

This ground in *Overwaitea Foods* has now been recast under Section 141(2)(a). The provision does not refer to evidence which was "not adduced". Rather, it speaks of evidence which was "*not available* at the time of the original decision".

It is not necessary to show under subsection (2)(a) that the evidence came into existence after the original decision. However, a party seeking to introduce new evidence on reconsideration must satisfy the Board that the evidence was not available to it at the time of the original hearing, and could not have been earlier obtained through the exercise of reasonable diligence: *Lowell More et al*, BCLRB No. 426/83 (Reconsideration of BCLRB No. 14/83). Parties are expected to devote due care and effort to the preparation and presentation of their cases. Further, new evidence must be brought forward at the earliest practical opportunity; there must also be a strong probability that it will have a material and determinative effect on the original decision. Finally, Rule 29(2) requires verification by statutory declaration. Only in these circumstances will a decision be reconsidered on the basis of evidence having become available.

(ii) Principles Expressed or Implied in the Code

The remaining grounds for reconsideration under Section 36 were set out as follows in the *Overwaitea Foods* case:

1. If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce

evidence; or, ...

3. if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect in its particular application; or,
4. if the original decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel; or,
5. if the original decision is tainted by a breach of natural justice; or,
6. if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change. (p. 7)

The submissions before us differed as to whether all of these remaining grounds are captured by Section 141(2)(b), which refers in part to a decision being "inconsistent with the principles expressed or implied in this Code".

The fourth ground for review in *Overwaitea Foods* (i.e., matters of law or policy) was generally regarded as the most important use of the reconsideration power. We agree. The ability of the Board to review decisions based on principles expressed or implied in labour relations statutes is critical to ensuring effective and consistent interpretation of the Code. This jurisdiction goes to the heart of the Board's role in shaping and developing sound labour relations policy. The responsibility takes on added dimensions with the introduction of amended legislation containing new purposes as set out in Section 2(1) of the Code. Matters of law and policy are clearly captured by the phrase "principles expressed or implied in this Code".

Parties appearing before the Labour Relations Board are entitled to be dealt with in accordance with the rules of natural justice: *Harrison Block*, BCLRB No. 171/84 (Reconsideration of BCLRB No. 49/84). These concepts apply generally to administrative tribunals, and are also captured by the phrase "principles expressed or implied in this Code": *District of Burnaby*, *supra*, at p. 129; *Construction Labour Relations Association*, BCLRB No. 315/84 (Reconsideration of BCLRB No. 213/83); and *Peace Arch District Hospital et al* (1989), 57 D.L.R. (4th) 386 (BCCA), at p. 395. See also Section 126(1) of the Code. Issues of

procedural fairness and natural justice (i.e., the fifth ground in *Overwaitea Foods*) therefore constitute a basis for reconsideration.

The first ground in *Overwaitea Foods* (i.e., no hearing was held and the decision turns on disputed findings of fact) continues to exist as a result of the foregoing. However, it is not the absence of a hearing alone which merits the reconsideration; there must be material findings of fact in controversy, such that a decision made without hearing evidence would be contrary to principles of natural justice: *District of Burnaby, supra*, at p. 131.

The third ground in *Overwaitea Foods* (i.e., original decision operating in an unanticipated manner) continues only where an original decision has operated in an unanticipated manner *which is inconsistent with the principles expressed or implied in the Code*, or is contrary to principles of procedural fairness and natural justice. An example of the latter would be a decision which directly and materially affects the rights of a third party who was not given notice of the original proceeding.

Lastly, we do not see the sixth ground in *Overwaitea Foods* (i.e., original decision precedential) as continuing to be a separate ground for reconsideration. Indeed, it is doubtful whether it was ever intended to constitute an extension of the *Western Cash Register* grounds: *Construction Labour Relations Association*, BCLRB No. 61/79, [1979] 3 Can LRBR 153, at p. 158. A precedential and significant policy adjudication may well be reconsidered on the basis that it is inconsistent with principles of the Code. Section 141(2)(b) does not preclude development and refinement of these principles.

#### V. LEAVE TO APPLY FOR RECONSIDERATION

There are various standards or tests which might be developed for determining whether leave to appeal should be granted. Given the underlying objectives of the new provisions, a party seeking leave to apply for reconsideration must be able to satisfy the Board that there is considerable merit to the application. We articulate the test as follows, drawing on the judicial standard: a party requesting leave must demonstrate a good arguable case of sufficient merit that it may succeed on one of the established grounds for reconsideration.

This standard requires more than a *prima facie* case. Similarly, an applicant must do more than point to an ability to advance reasonable arguments. The Board's reconsideration power has never been used to "rehash" or augment submissions made to an original panel; nor is the reconsideration process intended to allow a party to advance new arguments which could have been made to the original panel: *White Spot Limited*, IRC No. C242/88 (Reconsideration of Letter Decision dated July 6, 1988); *Mustang Engineering and Construction Ltd.*, IRC No. C4/90 (Reconsideration of IRC No. C226/89). Under Section 141, there must be a serious question raised as to the correctness of the original decision. Obviously, a leave application which does not fall within an established ground for review will be summarily rejected.

Even where the test *per se* is satisfied, the Board retains the discretion to deny leave based on other relevant factors. These may include the importance of the original decision to the parties and to the labour relations community; any prejudice which may be occasioned to the respondent; and, most notably, the practical utility of the appeal (e.g., whether the matter is academic: *Health Labour Relations Association et al*, BCLRB No. B69/93). By way of illustration, under the first-mentioned factor, leave will more probably be granted if a decision is one of first impression, or there are conflicting authorities.

On the other hand, leave will rarely be granted where a party seeks to reconsider a procedural, evidentiary or other "interlocutory" determination by a panel. An exception might be where a procedural ruling raises a serious matter of jurisdiction or could result in irreparable harm. The normal course will be to require the proceeding to continue to conclusion: *Century Plaza Ltd.*, BCLRB No. L55/80; *Delview Forest Industries Ltd.*, IRC No. C57/88 (and cases referred to therein). Likewise, leave will rarely be granted where a party seeks to challenge the fashioning of a discretionary remedy: *Roberta Scott, supra*; *Ron Hatfield*, IRC No. C148/90 (Reconsideration of IRC Nos. C63/90 and C54/89). We have already noted the Board's policy against reviewing decisions on factual grounds, as well as against entertaining applications which amount to no more than a reformulation of previously advanced arguments.

The fifteen (15) calendar day time limit under Section 141(5) of the Code for filing a leave application (as well as the time period under Section 141(6) for filing leave applications for a "cross-appeal") will be quite strictly enforced. A request for an extension should be made within the specified limits. The absence of prejudice to other parties is not determinative in the

exercise of the Board's discretion to enlarge the time period: *Carling O'Keefe Breweries Limited*, BCLRB No. 122/86 (Reconsideration of BCLRB No. 35/86).

As a pre-condition to granting leave, the Board will generally require an applicant to comply with the original panel's decision: *Erco Construction*, BCLRB No. 303/83; *Trillium Lodge*, BCLRB No. 53/84 (Reconsideration of BCLRB No. 398/83). A party wishing to avoid immediate compliance must seek and obtain a stay of proceedings in accordance with established jurisprudence: *Burns International Security Services Ltd.*, BCLRB No. 40/86, (1986), 12 CLRBR (NS) 129; *Board of School Trustees of School District No. 44 (North Vancouver)*, IRC No. C133/92.

## VI. THE RECONSIDERATION PROCESS

We made several observations in Part III of this decision which provide direction in fashioning an appropriate process for the adjudication of most leave and reconsideration applications. More specifically, the concerns of delay, finality and cost, together with the intertwining of issues at both stages, all combine to suggest a process which avoids duplication whenever possible. At the same time, the process must allow for adequate reflection on reconsideration, as urged by one of the intervenors.

Where a party requests leave to apply for reconsideration, the Board will require that the written application fully set out submissions with respect to *both the leave request and the merits of the reconsideration*. The requirements in Rule 2(2) of the Labour Relations Board Rules in particular apply. The un rebutted application will be reviewed by a panel to determine whether it falls within an established ground for reconsideration and satisfies the "good arguable case" test for leave. If not, the request will be denied without putting other parties to the time and expense of filing a reply.

If a leave request is not dismissed on the face of the initial application, the usual course will be to invite submissions from the other affected parties within seven (7) working days of the leave request initially being considered by the Board. This is consistent with the time for replies set out in Rule 4(1). Again, submissions will be invited with respect to both the leave request and the merits of the reconsideration. A final response will then be received from the applicant.

The leave application (and, where granted, the reconsideration on the merits) will most often be adjudicated on the basis of these written materials. Leave decisions themselves (either granting or denying the request) will normally be quite brief. It follows from this process that reconsideration proceedings are limited to the ground(s) for review upon which the leave was granted.

While the foregoing establishes the general process on reconsideration, there must of necessity be flexibility in the Board's practices. An obvious elaboration is that leave may be denied in part, with the result that submissions are only sought from the respondent(s) on specified issues. Some reconsideration applications may be set down for hearing notwithstanding full written submissions have been filed. Further, the urgency of a matter may warrant the Board setting down an expedited leave and/or reconsideration hearing for oral submissions.

## VII. SUMMARY OF RECONSIDERATION POWER

Under Section 141 of the *Labour Relations Code*, there are now three bases or grounds on which a decision made by a panel of the Board will be reconsidered:

- (a) where "new evidence" has become available to a party, if the evidence could not have been earlier obtained through the exercise of reasonable diligence, and there is a strong probability that it will have a material and determinative effect on the decision;
- (b) where the decision is said to be inconsistent with the principles expressed or implied in the Code, or in any other statute dealing with labour relations; and
- (c) where the original panel is alleged to have acted contrary to principles of procedural fairness and natural justice.

The remaining grounds for reconsideration, previously articulated in the *Western Cash Register* and *Overwaitea Foods* decisions cited above, continue to exist insofar as they can be encompassed within one of these three grounds. Decisions made without a hearing, where there are material facts in dispute, may be reviewed if there has been a denial of natural justice. A decision which is said to have operated in an unanticipated manner will only be reconsidered

where the unexpected consequences are inconsistent with the Code, or are contrary to principles of procedural fairness and natural justice.

There is no longer an absolute right to reconsideration under the Code. A party must first seek leave, and bears the onus of satisfying the Board that the discretion found in Section 141(1) and (2) should be exercised in its favour. This means a party requesting leave must demonstrate a good arguable case of sufficient merit that it may succeed on one of the established grounds for reconsideration. The test for leave requires an applicant to go beyond establishing a *prima facie* case, by raising a serious question as to the correctness of the original decision. An application which does not fit within any of the grounds will be summarily dismissed.

In exercising its discretion to grant or deny leave where the test has been met, the Board may consider other factors relevant in the labour relations context. These include the importance of the original decision; whether there are conflicting authorities; any prejudice which might be caused to other parties to the proceeding; and the practical utility of the appeal. Leave will rarely be granted where a party seeks to reconsider a procedural or pre-hearing ruling, seeks to challenge a discretionary remedy, or is simply quarrelling with findings of fact made by an original panel. The Board will similarly not allow reconsideration to be used as the vehicle for advancing arguments which were, or could have been, made in the first instance. Applications for leave (as well as applications for leave to file a "cross-appeal") must be brought within the statutory time periods, and there must be compliance with the original decision in the absence of a stay having been obtained.

#### VIII. BRINCO'S REQUEST FOR LEAVE

##### (i) Background

The Union applied on January 18, 1993 under Section 18(1) of the *Labour Relations Code* to be certified for a bargaining unit described as "all employees except foremen, fire bosses and persons above the rank of foreman and fire boss". This description was subsequently amended by agreement on January 25 to also exclude "office, professional and technical employees." The investigation by the Industrial Relations Officer assigned to the application determined that 55 percent or more of the employees in the proposed bargaining unit were

members of the Union. This would normally result in "automatic" certification under Section 23(1) of the Code. However, the investigation by the IRO also disclosed that all membership cards had been signed prior to January 18, 1993 and, further, did not contain the statement set out in Section 3(b) of the Labour Relations Regulation. In these circumstances, the Employer took the position that a representation vote should be ordered under Section 162 of the Code.

The evidence before the original panel was very brief, and is largely summarized by the following paragraph from the decision:

The Union called Roger Falconer, National Director of Organizing with the Union, to give evidence on the organizing campaign. Falconer stated that he personally ran the campaign and made it clear to every member, except one, before they signed an application for membership card that the Union would be applying for automatic certification. He noted that one member signed a card when he was not present; thus, he did not know what that employee was told. Falconer made it clear to employees that whether they signed a card or not, the Union would not apply for certification until the law had "changed" and automatic certification became an option. (p. 3)

It is common ground that no employees were called by either the Union or the Employer to testify as to their understanding regarding whether a vote would be held. The Employer called no evidence.

The original panel concluded that Section 162 provides the Board with a discretion to order a representation vote during a 90-day transitional period where a union applies for certification and relies on membership cards signed before proclamation of the *Labour Relations Code*. The panel went on to reason as follows:

I find that a vote should be ordered during this transitional period where an applicant trade union relies upon cards signed prior to January 18, 1993, unless the Board is satisfied that the membership evidence is truly supportive of automatic certification, and the cards can be relied upon for that purpose. For example, if cards signed before proclamation contain the required language in Section 3(b) of the Labour Relations Regulation, and no objection

is raised to question the purpose for which the cards were signed, automatic certification would likely be granted. Obviously, where "old" cards and "new" cards are filed in support of an application, and "new" cards comprise 55 percent or more of the employees in the unit, no vote should be held.

In the present case, the Union conducted its organizing campaign after the *Labour Relations Code* had been passed by the Legislature (but before proclamation). The Union offered uncontradicted evidence that when all employees signed up, with the possible exception of one (this would not affect the 55 percent threshold), they were advised *before* signing that their signature would mean the Union would apply for automatic certification. I am, therefore, able to rely on the cards as evidence that the employees wish to have the Union represent them in collective bargaining. Had this evidence not been led by the Union, a representation vote would have been ordered. (p. 5)

The Union's certification application was therefore granted.

(ii) Employer Argument

The Employer seeks leave to apply for reconsideration on several grounds, all of which have been considered. The Employer's major argument is that the original panel "made an error of law which is inconsistent with the implied principles of the Code by making an unwarranted assumption about employee wishes, contrary to the intention of Section 162". It submits more specifically that the original panel failed to give effect to the legislative intent in the new certification provisions that employees must understand a membership card may be used to apply for certification without a vote; Falconer's evidence of what he told the employees cannot be used to determine their actual understanding. The Employer argues that it was unable to adduce evidence of what employees understood because of the membership confidentiality restriction in Section 124(3) of the Code. Accordingly, the original panel inappropriately drew inferences without any evidentiary foundation.

The Employer also submits that reconsideration should be permitted because of information which it has been provided subsequent to the hearing. That information takes the form of a letter from an employee who alleges, among other things, that some of his "co-workers

have admitted to being coerced into signing or giving the [Union] permission to sign a membership card for them". The Employer suggests this information indicates that some of the membership evidence relied upon by the Union was tainted.

The Employer argued in its initial application for leave that some significance should be attached to a previous application for certification to represent employees at the mine in June 1992 by the United Mine Workers of America, Local 1291. This line of argument was not pursued in either the Employer's written or oral submissions at the leave hearing.

(iii) Analysis

The question before us is whether the Employer has demonstrated a good arguable case for the introduction of new evidence, or for its position that the original decision was inconsistent with implied principles of the Code. We will deal first with the latter issue.

Under Section 23(1) of the *Labour Relations Code*, a trade union may be granted "automatic" certification where it has, as members in good standing, not less than 55 percent of the employees in a unit appropriate for collective bargaining. This provision marks a departure from the *Industrial Relations Act*, which required that a representation vote be conducted in the ordinary course of a certification application. A concomitant change has been a move from membership requirements contained in the Board's jurisprudence to express provisions in Section 3 of the Labour Relations Board Regulation. Section 3(b) requires that a membership card signed on or after January 18, 1993 contain the following statement:

In applying for a membership I understand that the union intends to apply to be certified as my exclusive bargaining agent and to represent me in collective bargaining.

The Code contemplates that membership cards signed prior to proclamation on January 18, 1993 may continue to be used to apply for certification for a period of 90 days. However, in these circumstances, the Board is provided with a discretion under Section 162 to order a representation vote. We agree with the original panel's conclusion that a representation vote should be ordered during the transitional period, where an applicant trade union relies upon cards signed prior to proclamation, "...unless the Board is satisfied that the membership evidence is truly supportive of automatic certification, and the cards can be relied upon for that purpose" (p. 5). The submissions made by the Employer do not constitute a good arguable case that this principle was misapplied.

The following sequence of events is relevant: the Union conducted its organizing campaign after the *Labour Relations Code* had been passed by the Legislature, but prior to proclamation (in fact, all cards were signed within ten days of the application for certification); the Union made it clear to the employees that, whether they signed a card or not, an application

for automatic certification would be made once the law changed; and, except for one member (which did not affect the 55 percent threshold), Falconer personally made this intention clear before the employees who supported the Union signed membership cards. These facts raise a reasonable inference that the legislative intent found in Section 3(b) of the Labour Relations Regulation was sufficiently met.

The normal practice of the Board has always been to adjudicate certification applications based, in part, on an examination of membership cards by an Industrial Relations Officer. The resulting report of the Officer might be seen as technically hearsay to the extent it discloses employee membership support for a trade union. This practice is contemplated by the legislation (see Section 124 of the Code) and is not challenged by the Employer. The Union obtained the signatures of employees on membership cards, after disclosing the purpose for which the cards would be used; it is reasonable to infer the employees understood and accepted that purpose. At a minimum, an evidentiary onus shifted to the Employer to offer some basis for its argument that the cards could not be relied upon as evidence of the employees' true wishes.

The Employer did not seek to lead evidence at the original hearing as to what employees understood or anticipated would occur. Nor do we agree that such evidence was precluded by reason of Section 124(3) of the Code. It is not confidential information "that may disclose whether a person is or is not a member of a trade union" which bears on the arguments made by the Employer. Rather, the question is what employees understood would happen with any membership cards being obtained by the Union. This evidence could have been elicited without breaching membership confidentiality, and regardless of whether employees called as witnesses supported the Union.

The further information offered by the Employer cannot be used as a basis for allowing reconsideration. The letter from the employee was not verified by a statutory declaration and is hearsay; it is clearly "double hearsay" to the extent it describes statements made to him by other employees. Additionally, no explanation was offered for the failure to offer this evidence (such as it is) at an earlier date, or why the allegations could not have come to light earlier through the exercise of reasonable diligence. Finally, we are not persuaded the information would have a material and determinative effect on the original decision.

(iv) Conclusion

We have concluded that the Employer does not satisfy the requirements for leave to apply for reconsideration as set out in Part V of this decision. More specifically, the Employer has not met the test for the introduction of "new evidence" in accordance with Section 141(2)(a) of the Code; it has not established "a good arguable case" under Section 141(2)(b) that the original panel's decision was inconsistent with principles expressed or implied in the Code; and there is no basis for arguing that the decision was tainted by a breach of natural justice.

The Employer's request for leave to apply for reconsideration is therefore dismissed.

LABOUR RELATIONS BOARD

JOHN B. HALL  
ASSOCIATE CHAIR (ADJUDICATION)

EMILY M. BURKE  
VICE-CHAIR

JOAN GORDON  
VICE-CHAIR