

BRITISH COLUMBIA LABOUR RELATIONS BOARD

VANCOUVER GENERAL HOSPITAL

("VGH" or the "Employer")

-and-

BRITISH COLUMBIA NURSES' UNION

("BCNU" or the "Union")

-and-

HEALTH LABOUR RELATIONS ASSOCIATION

("HLRA")

-and-

CERTAIN EMPLOYEES

("Certain Employees")

PANEL: Stan Lanyon, Chair
Maria Giardini, Vice-Chair
Brent Mullin, Vice-Chair

COUNSEL: M. Patricia Gallivan and Ben Singer for VGH
Raymond E. Cocking, Q.C. for BCNU
John McConchie for HLRA
Frances Watters for Certain Employees

CASE NOS.: 8929, 8930 and 8965

DATES OF HEARING: December 15, 16, 17 and 18, 1992

DATE OF DECISION: March 25, 1993

DECISION OF THE BOARD

I. NATURE OF APPLICATION

Vancouver General Hospital applies under Section 36 of the *Industrial Relations Act* for reconsideration of IRC No. C179/91. The original application by VGH was filed on September 21, 1989, under Section 34 of the Act, to exclude 69 head nurses from the British Columbia Nurses' Union bargaining unit. VGH also joined this Section 34 application with a Section 36 application to vary the head nurses out of the BCNU's bargaining unit.

On February 27, 1990, the original panel decided that evidence would be heard in respect of only eight of the 69 head nurses. However, its decision would provide guidelines regarding the remaining nurses. The original panel's decision concerns only six of the eight head nurses. One of the head nurses (Lois Cox) resigned, and the other (Vada Poirier) went on educational leave during the course of the hearing. The panel did, however, indicate what its decision would have been in respect of these two head nurses had they remained in the employment of VGH. Of the remaining six head nurses the original panel excluded only one.

The hearing took place between the dates of April 1990 and July 1991, lasting 45 days. A transcript was taken for 31 of those 45 days, amounting to 27 volumes. The appeal submissions occupy several hundred pages. Interested party status was granted to the Health Labour Relations Association and Certain Employees, pursuant to IRC No. C149/92. The actual appeal hearing occupied four days of argument.

This reconsideration raises significant issues of natural justice and labour law policy regarding management exclusions. These issues arise in a case which took up significant resources of both the parties and the Council. We have taken the exceptional step of setting aside findings of fact made by the original panel after 45 days of hearing. We do so because of breaches of the rules of natural justice and misinterpretation and misapplication of the Board's law and policy.

Notwithstanding that we have set aside the findings of fact, we have, at the request of the parties and because we believe it serves a useful labour relations purpose, set out policy guidelines with regard to issues of natural justice and management exclusions.

II. TRANSITION LANGUAGE

The *Labour Relations Code*, S.B.C. 1992, c.82, (Bill 84) came into force on January 18, 1993, pursuant to Section 176 of the Code and B.C. Regulation 6/93. Section 115(1) of the Code continues the Industrial Relations Council as the Labour Relations Board; Section 115(2) provides that all business pending before the Council shall be continued before the Board. Section 161 of the Code further provides that:

161. All applications, proceedings, actions and inquiries commenced under the *Industrial Relations Act* shall be continued to their conclusion and treated for all purposes under and in conformity with this Code so far as it may be done consistently with this Code.

The reconsideration proceedings were filed under the *Industrial Relations Act* and the hearing held pursuant to that statute. As such, we are not concerned with the new *Labour Relations Code*. This decision, therefore, is issued under the provisions of the former statute.

III. FACTS

The findings of fact found by the original panel are in dispute. VGH argues that the findings of fact are tainted by breaches of the rules of natural justice and by incorrect evidentiary rulings.

In regard to its findings of fact, the original panel states that they recite only "the salient points" (p. 3). At the outset of their reasons they deal with three procedural points which relate to the "scope of the evidence". First, the original panel refused to rule on Poirier and Cox. However, they did provide guidance to the parties as to how they may have ruled had they

remained employees of VGH. Second, an evidentiary ruling was made on day 18 of the hearing (October 15, 1990) as to the scope of evidence which the panel would hear. The result of this ruling was that the panel heard evidence regarding "VGH's management structure and the specific evidence regarding the responsibilities of the eight head nurses". Third, the panel stated that it found it unnecessary to interpret the scope of a particular agreed statement of fact between the Union and the Employer concerning an issue of prejudice arising from the Employer's delay in bringing its Section 34 application. Only one of these issues arose on appeal, the evidentiary ruling. It will be addressed in the course of these reasons.

The findings of fact made by the original panel are set out at pages 6 to 15 of its decision. A summary of these facts is as follows:

1. The nature and structure of the Hospital distinguishes it from a "typical industrial setting". External controls (i.e. legislation, government agencies, collective bargaining structure), and the employment of a significant number of professional employees, limits the degree to which head nurses function as managers.
2. The Nursing Division is one of six major divisions and is headed by Dr. Inge Schamborzki, Vice-President of Nursing. Reporting to the Vice-President of Nursing are four Directors of Nursing ("DONs") and three Clinical Nurse Specialists ("CNSs") who are senior managers in charge of seven Clinical Nursing Departments (Critical Care Nursing, Medical Nursing, Operating Rooms, Surgical Nursing, Geriatric Nursing - Family Practice, Geriatric Nursing - Discharge Planning and Extended Care, and Mental Health/Psychiatry, including STAT Centre). There is a Nursing Executive Committee consisting of 24 people which includes the Vice-President, four DONs and three CNSs and other administrative positions (i.e. staff development, information systems, etc.). Head nurses are not on the Nursing Executive Committee. The seven Nursing Departments are comprised of sixteen nursing units. A head nurse is in charge of each unit. The head nurses have been represented at VGH since the Registered Nurses Association of British Columbia (the "RNABC") was certified in January 1956. In 1981, the BCNU became the successor to the RNABC and since that time, it has represented all head nurses employed at VGH. The BCNU unit is

comprised exclusively of nurses who are governed under the *Nurses' (Registered) Act*, R.S.B.C. 1979, c. 302, which licences nurses to practice and provides disciplinary powers. Nurses are therefore professionals who exercise a great deal of independence.

3. The parties each chose four head nurses, for a total of eight, to be the subject of the Council's inquiry. They were Tricia Lesavage, Vada Poirier, Sharon Ritmiller, Mary Anne Wythe, Lois Cox, Lois Francis, Ina Geekie and Debbie Laflamme. Vada Poirier and Sharon Ritmiller manage the OR and the emergency units respectively; Poirier manages more than 120 staff members, including nine assistant head nurses, 98 general duty nurses, and 38 other (HEU) employees; Ritmiller oversees a staff of 102 employees relying on an assistant head nurse and an in-charge nurse for supervision of staff.
4. Lois Francis, Lois Cox, Mary Anne Wythe, Tricia Lesavage, Debbie Laflamme, and Ina Geekie each operate a smaller unit and each is involved in the direct supervision of up to six staff during the course of their regular work hours. In addition, they have 24-hour per day, seven-day per week responsibility for unit staff complements of 21, 29, 23, 19, 36 and 30, respectively.
5. The extent of direct clinical involvement with patient care varies in amount and in character amongst the head nurses. Geekie spends approximately 40% of her time "making the rounds" for a direct "hands on" assessment of patient care. Wythe, Lesavage, Cox, LaFlamme and Francis spend less time doing rounds but all make patient assignments based on information gathered from nurses and their own observations of patients.
6. The panel, at page 8, then begins a summary of the evidence "relative to the management functions set out in [B.C. Ferry Corp., BCLRB No. 65/78, [1979] 1 Can LRBR 116], at 133":

(a) Supervising Work

General duty nurses operate with professional independence and require limited supervision by head nurses. Once the head nurse makes a patient assignment nurses attend to these assignments without further direction.

(b) Discipline and Discharge

Head nurses have been delegated the authority to discipline and discharge. This significant function has been diminished in importance because it has been "so rarely exercised". In addition, any discipline which is exercised is done so in consultation with the Employee Relations Department.

In regard to the eight head nurses, evidence of discipline was as follows:

...seven of the head nurses have issued written warnings; three head nurses have imposed suspensions, and the two terminations were of probationary employees. The eighth nurse, Lois Francis, has never given any discipline over a period of 30 years. In addition, nurses have resigned in the face of possible disciplinary action on at least two occasions in the past seven years. (p. 9)

(c) Hiring and Promotion

Head nurses have the authority to hire. Given the fairly high level of turnover among nursing personnel, the exercise of this hiring authority is not infrequent. In contrast with hiring there is little scope for promotion and reclassification of nurses. Nurses can be promoted at the discretion of the head nurse to "in-charge" assignments. These "in-charge" assignments are temporary.

(d) Independence of Operation

The evidence of the DONs was that head nurses were expected to oversee their units independently and act without prior approval on decisions necessary for unit operations. DONs testified that the head nurses have responsibility for all matters affecting the unit including, but not limited to, hiring and firing. Despite this apparent responsibility of the head nurses, actual independence varies. In general, this independence and discretion is curtailed by the institutional structure of the hospital, i.e. doctors' orders, accreditation standards and policy decisions which are made at a higher level than the head nurse. Although head nurses have some responsibility for developing and containing unit budgets, head nurses generally only contribute data.

(e) Supervising Subordinate Supervisors

In-charge nurses are not subordinate supervisors "in the relevant sense because they are rotational and temporary in nature". The supervision of subordinate supervisors is a significant criterion and a distinguishing feature among the head nurses in this case. Only Poirier and Ritmiller have permanent assistant head nurses.

(f) Labour Relations Input

Head nurses' involvement in labour relations matters is limited by the structure of collective bargaining in the hospital industry and, to a lesser degree, by the existence of a separate Employee Relations Department at VGH. The head nurses have no influence on collective bargaining notwithstanding that they have input into the preparation of contract proposals for the Employer. Head nurses have been delegated the authority to pursue grievances through to arbitration, however, on the evidence, this authority is rarely, if ever exercised. The head nurses provide the Hospital

with essential services levels required to operate during a strike. However, the "ultimate determination" of essential service levels is made without direct input from the head nurses. With respect to confidential labour relations matters the head nurses have access to and do contribute to personnel files which include employee evaluations and references. In addition, they have input into strike planning, budgetary discussions and staff reductions. However, they are not privy to the decision-making process which occurs at the level of the Director of Nursing.

(g) Evaluating Employee Performance

Head nurses prepare evaluations on probationary employees and all other employees generally.

(h) Ordering Overtime

Head nurses approve overtime. There were no examples of overtime being denied.

(i) Policy Setting

Head nurses are asked to make contributions to policies affecting the Nursing Division. However, policies are ultimately approved by the Vice-President before being implemented. The units' specific policies are implemented by head nurses. These pertain to the standards of patient care. Head nurses also sit on hospital committees which set policy.

(j) Authorizing Leave

Head nurses have the authority to grant leaves of absences.

IV. GROUNDS OF APPEAL

VGH relies upon three of the accepted grounds for reconsideration set out in *Western Cash Register (1955) Limited*, 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). These three grounds are as follows:

1. The original decision turned on a conclusion of law or general policy under the Act which law or policy was not properly interpreted by the original panel.
2. The decision is tainted by breaches of the rules of natural justice.
3. The original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon or otherwise change.

In respect of ground one, VGH states that the original panel misinterpreted and misapplied the test for determining whether a person is an employee within the meaning of the Act in that:

- (a) the panel confused executive and managerial decision-making;
- (b) the panel misapplied the proper test for determining whether individuals are managers or superintendents in the direction and control of employees; and
- (c) the panel misstated and misapplied the test to determine whether an individual should be excluded from the bargaining unit on the basis that he or she is a member of the Hospital's management team.

In respect of ground two, VGH states the panel denied a fair hearing by:

- (a) making findings of fact for which there was no evidence;

- (b) reaching conclusions which lack an evidentiary basis or which do not flow from rational inferences which can be reasonably and properly drawn from the evidence before the panel; and
- (c) refusing or failing to consider relevant evidence and considering irrelevant evidence.

In respect of ground three, VGH states that the original panel misinterpreted and misapplied the decisions in *B.C. Ferry Corporation*, BCLRB No. 65/78, [1979] 1 CLRBR 116; and *Kootenay Savings Credit Union*, BCLRB No. 94/76, [1978] 1 CLRBR 36, in respect of the management team concept.

The Council set the matter down for reconsideration for several reasons. First, while Section 34 applications are fairly common in the health care industry, none have directly dealt with the issue of head nurses. All parties agreed that this particular decision in respect of the eight head nurses is significant with regard to the other 61 head nurses at VGH. In addition, both have said that this case is critical to the issue of the status of head nurses at other hospitals throughout the Province.

Second, there are significant allegations of breaches of the rules of natural justice. In our view these must be carefully considered. Therefore, VGH meets the reconsideration grounds as set out in *Overwaitea, supra*, and *Western Cash Register, supra*.

V. **ARGUMENT**

A. **Vancouver General Hospital**

1. **Breaches of the Rules of Natural Justice**

Both in its written submission and in oral argument, VGH addressed ground two of its appeal first - the breaches of the rules of natural justice.

VGH breaks down these allegations of the breaches of the rules of natural justice into the following categories:

- (a) making findings of fact for which there was no evidence;
- (b) reaching conclusions which lack an evidentiary basis or which do not flow from rational inferences which can be reasonably and properly drawn from the evidence before the panel:
 - (i) irrational conclusions on evidence cited by the panel;
 - (ii) irrational conclusions in light of undisputed evidence not cited.
- (c) refusing or failing to consider relevant evidence and considering irrelevant evidence:
 - (i) failure to consider relevant evidence;
 - (ii) considering irrelevant evidence.

(a) Making Findings of Fact For Which There Was No Evidence

VGH relies upon *B.C. Hydro & Power Authority*, BCLRB No. 64/81 and *Surrey Ironworks Ltd.*, BCLRB No. 244/84, for the basic or trite proposition that a tribunal can only make findings of fact based upon the actual evidence before it.

VGH cites four instances in which the panel made findings of fact where no evidence had been adduced:

- (i) at page 7 of the decision, the panel refers to the amount of time head nurses wear their uniforms;

- (ii) at page 10 of the decision, reference is made to the Hospital being obliged to achieve certain standards established by the Canadian Council of Hospital Accreditation;
- (iii) at page 11 of the decision, the panel refers to the capital budgeting policy; and
- (iv) at page 20 of the decision, the panel refers to the fact that the paging system did not extend to the Emergency Department.

VGH states there was no evidence before the panel in respect of any of these matters. Further, these matters were considered significant because at page 3 of its decision the panel states that it would not recite all the evidence but only emphasize "the salient points". Thus, any matter specifically mentioned in the decision is of particular significance.

(b) Conclusions Lacking an Evidentiary Base

This ground is broken into two categories:

- (i) Irrational conclusions on evidence cited by the original panel; and
- (ii) Irrational conclusions in light of undisputed evidence not cited.

VGH relies upon *Wall Bros. Construction Company*, IRC No. C239/88, for the proposition that the Council will not sustain a decision which lacks evidentiary foundation or conclusions which do not reasonably follow from evidence.

(i) Irrational Conclusions on Evidence Cited by the Panel

The original panel concluded that there was a "dearth of disciplinary measures" required by the head nurses (p. 7). Further, they stated that head nurses "rarely exercised" disciplinary authority (p. 9).

The original panel reviewed the following disciplinary measures by the eight head nurses:

...seven of the head nurses have issued written warnings; three head nurses have imposed suspensions, and the two terminations were of probationary employees. The eighth nurse, Lois Francis, has never given a written reprimand or dismissed anyone in 30 years as a head nurse. (p. 9)

First, VGH states that the undisputed evidence was that the number of written warnings issued by the eight head nurses between 1986 and 1990 was 19 (15 of them in a one and a half-year time period). This, along with three suspensions and two dismissals cannot sustain the conclusion that disciplinary authority is "rarely exercised".

Second, at pages 12 to 14 of the decision, the panel reviews the evidence with respect to the head nurses involvement in the grievance procedure. The panel correctly sets out the evidence that four out of the eight head nurses had dealt with approximately 12 grievances. VGH submits that 12 grievances handled by four head nurses cannot be properly construed as a "few grievances". Further, based on the evidence, head nurses attend grievance meetings and have the authority to settle unit grievances.

Third, in relations to the management hierarchy, the panel's finding that head nurses are situated "a long way down the management hierarchy" is not a supportable conclusion on the evidence. The Nursing Division is headed by the Vice-President of Nursing. Reporting to her are four DONs and three CNSs. At the next stage of the management ladder is the head nurses.

(ii) Irrational Conclusions in Light of Undisputed Evidence Not Cited

VGH argues that the panel reached irrational conclusions notwithstanding uncontradicted evidence before it. The difference between this heading and the

prior one is that the uncontradicted evidence relied upon was not recited in the decision. VGH argues that in addition to the disciplinary action taken by the head nurses who gave evidence, there was uncontradicted evidence about other disciplinary action taken by the other head nurses in every one of the clinical areas of the Nursing Division. Listings of the actual grievances filed by the Nursing Division from 1985 through the end of 1990 were set out in Exhibit 2, Tab 20 and Exhibit 17, Tab 7. (The 1990 figures represent a combined total of Exhibits 2 and 17). These included both unit specific grievances and policy grievances. The totals are as follows:

<u>YEAR</u>	<u>HEU</u>	<u>BCNU</u>
1990	43	24
1989	27	19
1988	47	17
1987	23	27
1986	34	42
1985	40	40

Thus, VGH first argues, it is clear that head nurses regularly face grievances filed by staff members and that the head nurses are often required to exercise their authority and responsibility with respect to grievances under the collective agreement. The collective agreement names head nurses as the individuals to deal with grievances at Stage 1 of the grievance procedure.

Second, although head nurses do consult with the Employee Relations Department, the decision-making authority in respect of a unit grievance, rests with the head nurse.

Third, the original panel determined that "Six of the head nurses spend a good deal of their time engaged in the professional work of their respective units" (p. 7). If by professional work the panel means "hands-on" patient care, the uncontradicted evidence is that no head nurse has any direct patient care

assignments.

Fourth, at page 12 of the decision, the original panel determined that in-charge nurses were utilized on a rotational, temporary basis. VGH states the uncontradicted evidence was that the head nurse has complete discretion to determine who will be appointed to the in-charge position and for how long.

Fifth, the panel's finding that "essential service levels were ultimately determined without direct input from the Head Nurses" (p. 13) is directly contrary to the uncontradicted evidence that the Hospital obtained its estimates for essential service levels from head nurses. Those estimates were used in the negotiations with the Union.

Finally, in regard to the head nurses' involvement with confidential decision-making, VGH points to two examples where the evidence was undisputed. First, head nurses made up a committee which determined whether the positions of Orderlies and Licensed Practical Nurses Division should be deleted from the Hospital. Second, head nurses participated in a task force in 1990 that dealt with budget deficits and the impact of these deficits on the Nursing Division.

(c) Failure to Consider Relevant Evidence/Considering Irrelevant Evidence

(i) Failure to Consider Relevant Evidence

VGH relies upon *Selkirk Tunnel Constructors*, IRC No. C244/88, for the principle that a refusal to admit or consider relevant evidence results in a denial of a fair hearing. Also cited is *Roberval Express Limitee*, [1982] 2 S.C.R. 88, for the principle that a refusal to hear admissible and relevant evidence is a clear case of excess of or refusal to exercise jurisdiction.

The most significant issue that arises under this ground of appeal is the original panel's evidentiary ruling of February 27, 1990. This particular ruling

and the clarification of it which occurred on April 26, 1990, resulted in an order that the Hospital and the Union would each call evidence from four incumbent head nurses. That ruling was initially appealed on March 21, 1990. As a result of the clarification on April 26, 1990, that appeal was withdrawn on May 2, 1990. The clarification was that the decision concerning the first eight head nurses would serve as a guide for the remaining 61 head nurses at VGH. It was also understood that the Section 34 application would proceed in the "normal way".

VGH states that as a result of this evidentiary ruling and the subsequent clarification, it led evidence under two headings: first, specific evidence in relation to the eight head nurses; and second, evidence common to all 69 head nurses. For example, a Director of Nursing testified as to the duties of head nurses and if one of these duties was not performed by any of the named eight head nurses, then an example of one of the other 61 head nurses would be used. After 18 days of hearing, the Union objected to this manner of adducing evidence, stating that evidence could only be called which related directly to the eight head nurses. The panel upheld the objection. Union counsel then made a motion to have the previous 18 days of testimony "struck", with regard to any evidence which did not directly relate to the eight head nurses. However, the Union later withdrew this motion.

VGH states that this ruling had the following result: first, the Hospital was not permitted to lead evidence regarding the specific exercise of head nurses' authority unless one of the eight head nurses was directly involved; and second, the 18 days of evidence which had been adduced by the Hospital was not considered by the original panel. This, VGH states, is clear from the original panel's decision:

...we will have regard to the general evidence regarding VGH's management structure and the specific evidence regarding the responsibilities of the eight head nurses. We do not intend to determine the status of the eight head nurses on the basis of authority exercised by other head nurses at VGH. This was made clear in the Panel's ruling of

April 26, 1990 referred to above, regarding the scope of the evidence to be adduced. (pp. 3-4)

VGH submits that the evidentiary ruling was incorrect for the following three reasons. First, the evidence in question was relevant and legally admissible in Section 34 cases: *Corporation of the District of Burnaby*, BCLRB No. 1/74, [1974] 1 Can LRBR 1. Second, the evidence was admitted by the panel at the time that it was tendered without objection from the Union. Third, the Union had a full opportunity to call evidence to counter the evidence adduced by the Employer. Therefore, the original panel, in both refusing to admit and to consider relevant evidence, denied VGH a fair hearing.

An additional instance of relevant evidence not considered by the original panel concerns grievance administration. The original panel found that head nurses have the authority to impose discipline and administer the collective agreement at the unit level. As previously noted in the VGH grounds of appeal, Exhibit 2, Tab 20 and Exhibit 17, Tab 7, set out the number of grievances administered by head nurses between 1985 to 1990, some 270 in total. These include both unit specific grievances and policy grievances (a policy grievance is administered by the Employee Relations Department, although head nurses may remain involved). At the appeal hearing all parties agreed that this evidence was relevant and properly admissible pursuant to the original panel's evidentiary ruling of April 26, 1990 under the heading of evidence common to all head nurses. VGH argues that this evidence would lead one to a very different conclusion than that reached by the original panel (i.e that head nurses "rarely exercise authority to discipline or that they administer "few grievances").

(ii) Considering Irrelevant Evidence

Briefly, three points were raised:

1. The fact that Ms. Francis had not exercised discipline in thirty years was not relevant because no authority to discipline had been delegated to head nurses until

1984 and indeed, to some head nurses, not until 1987.

2. The fact that it would take "an auditorium" to hold a management meeting should head nurses be excluded from the bargaining unit is not relevant. There are 2,764 Nurses in the Nursing Division, and the exclusion of 69 head nurses is not out of proportion to this total number.
3. The fact that the style of nursing management is collegial does not detract from the authority which head nurses ultimately exercise with regard to discipline.

(d) Plagiarism

One final area which arises under the heading of natural justice but was not addressed in the written submissions of the parties, is the issue of plagiarism. At the hearing, VGH read passages from *Victoria General Hospital*, BCLRB No. 31/75, [1975] 2 Can LRBR 34, and compared these passages to paragraphs written by the original panel. Specifically, pages 40 to 45 of *Victoria General Hospital*, *supra*, were compared to the sentences and paragraphs at pages 7 to 19 of the original panel's decision. VGH argues that the plagiarism was not merely a case of unattributed quotes, but in effect, it amounted to the substitution of findings of fact made in *Victoria General Hospital*, *supra*, for those which ought to have been made in this decision.

This completes the appeal grounds with regard to issues of natural justice.

2. Misinterpreted And Misapplied The Test of Who Is An Employee?

The second ground of appeal (the first alleged) is reproduced for the sake of convenience. VGH states that the original panel misinterpreted and misapplied the test for determining whether a person is an employee within the meaning of the Act in that the panel:

- (a) confused executive and managerial decision-making;
- (b) misapplied the proper test for determining whether individuals are managers or superintendents in the direction and control of employees; and
- (c) misstated and misapplied the test to determine whether an individual should be excluded from the bargaining unit on the basis that he or she is a member of the Hospital's management team.

VGH argues that the original panel confused managerial and executive decision-making.

In order to be excluded the original panel required head nurses to exercise management powers normally reserved to senior executives. The distinction between managerial and executive decision-making is set out in *Vernon Jubilee Hospital*, BCLRB No. 33/78, [1978] 2 Can LRBR 467.

By requiring such a high standard the panel in essence read out Section 1(1)(a) of the Act. This in turn led the panel to misinterpret and misapply the *B.C. Ferry* test (which interpreted Section 1(1)(a)). The most significant error was the undue weight which the original panel gave to two factors - the large number of employees required to be supervised, and the requirement of supervising subordinate supervisors. The two head nurses who were excluded, Poirier and Ritmiller, both oversaw staffs of more than a hundred employees and both had assistant head nurses and in-charge nurses under their supervision. The remaining head nurses had somewhere between 21 and 36 employees and supervised in-charge nurses. VGH argues that it is clear that all head nurse are responsible for directing the day-to-day activities of subordinate staff (general duty nurses, in-charge nurses and HEU employees) and thereby meet the requirements established in *B.C. Ferry, supra*.

VGH further argues that the original panel has made sufficient findings of fact in respect of the various duties and responsibilities performed by these head nurses, under the *B.C. Ferry* test, to justify the exclusion of the head nurses from the BCNU bargaining unit. For example, the original panel found that head nurses are involved in the direct supervision of unit staff. It also found that they are delegated the authority to discipline and discharge unit employees. Head nurses have the authority to hire. Further, they operate independently and do not seek prior approval for decisions that directly affect their specific units. They appoint and supervise in-charge nurses. They are involved with labour relations including the administration of the collective agreement (grievances), offer collective bargaining proposals, and assist in essential service designations. They prepare employee evaluations, approve overtime, authorize leaves of absence and make contributions to policies affecting the Nursing Division. There was, therefore, sufficient evidence to meet the *B.C. Ferry* criteria for exclusion.

Finally, VGH relies upon the following decisions of the Council and Labour Relations Board as persuasive with regard to the correct application of the *B.C. Ferry* test in the health care

industry. In these decisions our attention is directed to the specific factors of discipline and discharge, labour relations input and the supervision of subordinate supervisors. The decisions are: *Royal Inland Hospital*, BCLRB No. 11/77, [1977] 1 Can LRBR 466; *Juan de Fuca Hospital Society*, BCLRB No. L239/82; *Surrey Memorial Hospital Society*, BCLRB No. L258/82; *Three Links Care Society*, BCLRB No. 269/84; *Queen Alexandra Hospital*, BCLRB No. 72/87; and *B.C. Cancer Control Agency Society*, IRC No. C5/90.

VGH argues that none of these decisions required the supervision of 100 or more employees. Indeed, the number of employees supervised by excluded managers in these decisions is similar to the number supervised by head nurses at VGH. Moreover, little weight was given to the requirement of supervising subordinate supervisors (and indeed, many supervisors in these decisions exercised no such authority). Furthermore, few supervisors in these cases exercised the labour relations input which, on the evidence before the original panel, the eight head nurses exercised.

3. Management Team Concept

It was VGH's final ground of appeal that if the head nurses are employees within the Act, they are still not appropriately included in the bargaining unit because their community of interest lies with management. That is, the head nurses at VGH are part of the management team.

VGH argues that the management functions which head nurses exercise in accordance with the *B.C. Ferry* test must also be considered as evidence in coming to a conclusion as to whether or not head nurses form part of the management team. The significant management responsibilities which the original panel found head nurse do actually exercise, results in their community of interest lying with management, (*Children's Hospital, supra*).

VGH further argues that the original panel misapplied the management team concept by requiring either an actual conflict of interest or an adverse effect on the head nurses' decision-making abilities. This is inconsistent with *Kootenay Savings Credit Union, supra*, and *Children's Hospital, supra*, which require only a potential conflict of interest.

4. Remedy

VGH states that as a result of the errors of the original panel, the Board must do one of the following:

- (a) set aside the original decision and substitute its own decision for that of the original panel and exclude all eight head nurses;
- (b) Alternatively, set aside the original panel's decision and provide policy guidance as to the correct test to be applied to the head nurses at VGH.

B. Certain Employees

The Certain Employees argue that the issue of plagiarism is deeply disturbing and shows evidence of bad faith. Further, they submit that the findings of fact made by the original panel reflect those made in *Victoria General Hospital, supra*, rendered some 15 years ago. These factors reflect a fundamental denial of natural justice.

The Certain Employees argue that the original panel placed too much weight on the specific hospital setting, incorrectly comparing it to a "typical" industrial setting. The fact that the Hospital's *raison d'etre* is patient care, that it is a public sector work place and that it is staffed by professionals whose management style is collegial, is not enough to detract from the actual authority exercised by head nurses. However, the Certain Employees argue that this is precisely what the panel did. It imposed a typical industrial model, with its adversarial trappings, as the measure for the hospital setting. Although it is clear that collective bargaining in the hospital industry operates within an adversarial framework, it is equally clear that the professional independence exercised by nurses does not require the same degree of disciplinary measures which may be associated with other work forces. Ironically, this more professional and collegial model of labour relations, which ought to receive the encouragement of this Board, has in fact been applied to the detriment of head nurses.

Third, the Certain Employees argue that the original panel made the following seven errors of law and policy:

1. The hospital setting was improperly distinguished. This overlaps with the general criticism expressed above that the hospital setting was inappropriately compared to an industrial setting. However, in addition, reliance is placed upon the *B.C. Ferry, supra*, and the *Corporation of the District of Burnaby* decisions.
2. The size of the unit supervised was improperly emphasized. This echoes the VGH argument that the original panel required a high number of employees to be supervised before the head nurses could be excluded.
3. Assuming the correctness of the original panel's finding that discipline was "rarely exercised", there is in a professional setting, there is less need for discipline. However, this says nothing about the actual exercise of, or the delegated authority to discipline. These issues were confused by the original panel and resulted in the panel erring with regard to the *B.C. Ferry* test.
4. The original panel stated that since the majority of work performed by head nurses was clinical or professional, they were not managers. First, the head nurses argue, they do not have patient assignments, but only supervise the clinical work of nurses who are assigned patients. Second, it is not uncommon for managers to perform bargaining unit work as a matter of policy (*Three Links Care Society*, BCLRB No. 269/84; also, *Weyerhaeuser*, BCLRB No. 23/87).
5. The original panel incorrectly distinguished the nurse managers in *Children's Hospital, supra*, from the head nurses at VGH.
6. The original panel failed to consider the wishes of the head nurses. The head nurses see themselves as excluded from the bargaining unit. This is a factor to be considered in weighing whether the head nurses ought to be included in the BCNU bargaining unit.

7. The reality of the hospital work place must be reflected in the application of the *B.C. Ferry* test. The hospital represents a much flatter managerial structure. It is more collegial than typical industrial settings and requires a balancing of both co-operation and adversarial interests because of its professional setting. The line between management and the bargaining unit cannot be drawn so high that first level managers are placed in a conflict of interest. As well, the *B.C. Ferry* test ought to be applied to the management team concept in determining where that line is to be drawn.

Finally, the Certain Employees argue that in determining whether a person is a manager, the Board should not require evidence that decisions made by head nurses have been "adversely affected". Conversely, if an individual is found to be an employee, in order to be excluded under the management team concept, there would have to be evidence that inclusion in the bargaining unit would or does adversely affect that employee's ability to make decisions.

C. **HLRA**

HLRA argues that the original decision trivializes effective management practices in the health care industry. The decision, it argues, holds health care managers to a higher standard of exclusion than is reflected either in the case law or the statute. Further, there is no more fundamental principle than the statutory rule that only employees can be members of bargaining units and that the employer is entitled to the undivided loyalty of its managers. The original panel presented hospital managers as operating in an atmosphere characterized by collegiality and professionalism and, as a result, incorrectly concluded that decision-making and discipline in such an environment was a highly diluted exercise. However, HLRA argues that the management functions which head nurses exercise at VGH clearly meet the requirements set out in *B.C. Ferry, supra*.

Further, the reason for the statutory exclusion of managers is the potential for difficulty which is inherent in the position of manager. One of the fundamental aspects of the scheme of the Code is that there is an arm's length relationship between an employer and a union. In order to preserve that arm's length relationship, any employee who exercises the powers of a manager must be removed from the bargaining unit. Notwithstanding the style of management employed

by the Hospital and the fact that these are professional employees, any person who is actually delegated the authority to hire and fire, and to affect the economic lives of employees, must be excluded from the bargaining unit.

D. BCNU

The BCNU argues that a tribunal is entitled to make even a serious mistake in a finding of fact and only loses jurisdiction if that mistake goes to the very foundation of the decision: *Union des Employees des Service, Local 298 (FTQ) v. Bibeault*, [1988] 2 S.C.R. 1048.

In response to the allegation that the original panel made four findings of fact which were not adduced in evidence the Union replied as follows:

1. Head Nurses Wearing Uniforms

The Union states that this evidence was obtained during a view of the Hospital taken by the panel at its own request on February 13, 1991.

2. Hospital Accreditation

The evidence regarding accreditation was obtained from Exhibit 7, IV Organization-Org. 5.

3. Capital Budgeting Policy

The evidence of Capital Budgeting Policy was obtained from Exhibit 2, Tab 22, page 14 and Exhibit 7, Category: Finance and Purchasing, No.: F & P5.

4. Hospital Paging System

This evidence was obtained in the view taken on February 13, 1991.

Alternatively, the Union claims that even if this evidence was not obtained as above, it is

all true and could not have been challenged by the Employer in any event.

In response to the allegation that the panel reached conclusions of fact not supportable on the evidence, the Union submits that the Employer is simply asking the appeal Panel to review the findings of fact and the inferences drawn from those facts. In effect, the Employer is simply asking the appeal Panel to substitute its own conclusions regarding the facts. The Board's policy is clearly not to review findings of fact: *Wall Bros. Construction, supra*.

In regard to "undisputed evidence" that was not cited by the original panel, the Union argues that the Employer's submission only show that there was "some evidence" adduced by the Employer on various matters. The Union asserts that the original panel was not required to refer to all the evidence in its reasons. Nor was it required to accept the Employer's evidence, whether or not other evidence existed to contradict it. The original panel was simply required to exercise its judgment in accordance with the *B.C. Ferry* test. It did precisely that.

In regard to the allegation that the panel failed to consider relevant evidence, the Union states that the panel was entitled to establish its own practice and procedure under Sections 19 and 21 of the Act. Pursuant to these sections, the original panel decided, on February 27, 1990, that the parties ought to address only eight of the head nurses. This was done in furtherance of effective case management. It is clear from the evidentiary ruling that the Employer and Union could only adduce evidence with regard to the specific eight head nurses. Any other evidence had to be of a general nature and not related specifically to any other Head Nurse. The Union relies upon the original panel's following remarks dated October 15, 1990, at page 597, of the transcript:

The evidence was to be limited to specific evidence about the eight head nurses who are the subject of this application, and common evidence relating to the role of head nurses generally, and any common evidence of that type that relates to the head nurses subject to this application.

Therefore, in regard to all the evidence that had been adduced over the first 18 days, the Union argues that the prejudice, if any, has been to itself, not to the Employer. This is because the original panel had evidence before it which it should not have heard.

The Union's response to the Employer's allegation that the original panel confused executive and managerial decision-making, is that it is clear from the Board's jurisprudence that there is no distinction made between executives and managers. The Act only makes reference to managers as does the Board's jurisprudence.

In regard to the Employer's argument that the *B.C. Ferry* test has been inappropriately applied, the Union asserts that this amounts to nothing more than an attempt by the Employer to reverse the findings of fact made by the original panel. The original panel took into consideration the unique features of the Hospital, evidence of the actual exercise of authority by head nurses, evidence of subordinate supervisors, and the labour relations functions performed by head nurses. The original panel concluded, on the basis of that evidence, that head nurses' managerial functions were so diluted as to make them nothing more than administrative coordinators of employees.

Further, with regard to the whole of the issues of natural justice and law and policy, the Union states that the Employer has simply refused to recognize that the original panel rejected the evidence to which the Employer refers to as "uncontradicted evidence". The original panel was the sole judge of fact and was entitled to accept or reject any evidence, especially oral testimony, which depended upon the assessment of the credibility of the witnesses. The Union contends that there were numerous issues of credibility in oral testimony and numerous matters of judgment which had to be made by the original panel. The original panel was not compelled to draw the inferences which the Employer argues it should draw from the evidence.

Finally, with regard to the issue of plagiarism, the Union argued repetition of language from one decision to another is not sufficient to conclude that there was what amounts to an allegation of fraud. There is no evidence that findings of fact were made by substituting the facts of *Victoria General Hospital, supra*, for the facts of this case.

E. VGH REPLY

The Employer replies that the Union is incorrect when it states that a serious error in relation to findings of fact must go to the very foundation of the decision before it will be set aside. VGH states that a denial of natural justice results simply from the presence of the

impugned facts in the decision. Indeed, the Employer states that this is what the decision in *Surrey Ironworks Ltd.*, BCLRB No. 244/84, relied upon by the Union, properly stands for.

The Union states that at least two pieces of evidence were obtained during a view - the wearing of uniforms by head nurses and a paging system not connected to the Emergency Department. The Employer states that if the panel had in fact obtained this evidence during the view, it did so through the questioning of Hospital personnel, which was done in the absence of the parties.

In regard to the two sets of documents outlining Hospital accreditation, Exhibit 7, IV Organization, Org. 5 and Capital Budgeting Policy, Exhibit 2, Tab. 22, page 14, the Employer asserts that these documents were put in "only for the purposes of identification" and, therefore, were not properly before the panel.

VGH states that the Union's submission confirms the impugned nature of the evidence obtained during the view. This impugned evidence need not go to the root of the decision. In *Kane v. The Board of Governors of the University of British Columbia*, (1980), 110 D.L.R. (3d) 311, the Supreme Court of Canada held that a Court need not inquire as to the actual prejudice resulting from the admission of an impugned piece of evidence. Instead, it is sufficient that in the eyes of reasonable person there is a possibility or likelihood of such prejudice: "it is sufficient if it might have done so" (p. 324).

Further, the Employer replies that when it refers to uncontradicted or undisputed evidence, it means that all evidence adduced by all witnesses (both Union and Employer) was consistent and that there exists no contrary evidence upon which a finding of fact could be made. VGH relies upon *R. v. Covert*, [1917] 28 C.C.C. 25 (Alta. S.C. App. Div.), for the proposition that a trier of fact cannot simply disbelieve or disregard evidence arbitrarily. It specifically relies upon the following passage from *R. v. Covert, supra*:

It will be objected, of course, that the magistrate may have disbelieved entirely the evidence on behalf of the accused, and that it was open to him to do so; but in my opinion it cannot be said without limitation that a Judge can refuse to accept evidence. I think he cannot, if the following conditions are fulfilled:

- (1) The statements of the witnesses are not in themselves improbable or unreasonable;
- (2) That there is no contradiction of them;
- (3) That the credibility of the witnesses has not been attacked by evidence against his character;
- (4) That nothing appears in the course of his evidence or of the evidence of any other witness tending to throw discredit upon him; and
- (5) That there is nothing in his demeanour while in Court during the trial to suggest untruthfulness.

To permit a trial Judge to refuse to accept evidence given under all of these conditions would be to permit him to determine the dispute arbitrarily and in disregard of the evidence, which is surely not the spirit of our system of jurisprudence. (p. 37)

The Employer argues that the original panel has in essence ignored this fundamental rule and thereby made perverse findings of fact. Further, the Employer does not concede that it was calling evidence over an 18 day period contrary to the procedure which had been established as a result of the original panel's evidentiary ruling of April 26, 1990. It states that it was calling evidence in accordance with its understanding of that evidentiary rule and, indeed, in furtherance of its agreement with the Union about the interpretation of that ruling. VGH further says it was adducing evidence in accordance with the established jurisprudence as to what was relevant evidence in a Section 34 hearing. The *Corporation of the District of Burnaby, supra*, case makes it clear that in Section 34 applications, evidence of what other occupants of a post have done is not only relevant but persuasive in making a judgment about a particular incumbent. Furthermore, in this case, the Employer's application related to all head nurses at VGH. Although the panel determined that it would only make a decision in respect of the eight named head nurses, the decision in respect of the eight was to set the guidelines which the parties would use to determine the status of all 69 head nurses.

Finally, the Employer re-asserts its understanding of the *B.C. Ferry* test and the

management team concept. It once again states that relevant evidence with regard to these issues was not considered and that the test was improperly applied.

VI. ANALYSIS AND REASONS

In view of the result of this appeal, we thought it necessary to set out in some length (although only a summary) the positions and arguments of the parties. However, our analysis and reasons will focus only on the following six areas: the Transcript, the Impugned Evidence/View, the Evidentiary Ruling, Plagiarism, the *B.C. Ferry* test, and the Management Team concept.

A. Transcript

The Employer in its appeal makes repeated references to the transcript of the evidence taken during the original hearing. It does so to buttress almost all of its grounds of appeal -the breaches of the rules of natural justice and the misapplication of law and policy.

The transcript does not represent all the evidence adduced at the hearing. It was not until day 15, October 9, 1990, that a transcript of the evidence began to be taken. Therefore, 14 days of evidence was adduced without transcription.

We conclude that we cannot prefer the partial evidence in the transcripts over the findings of fact made by the original panel. It is our understanding that the long-established practice in our Court of Appeal with respect to findings of fact is to review the entire transcript of evidence to see whether there is *some* evidence to support the findings of fact made by the trial judge. If there is some evidence to support the findings, then they will not be disturbed. The reviewing Court will not overturn the trial judge's findings of fact unless it has been established that some "palpable or overriding error" has been made. This error must have affected the trial judge's assessment of the facts, resulting in findings of fact having been made where there was no evidence to support the findings. The underlying rationale for this test is that the trial judge is in the best position to determine the primary facts because he or she has had the opportunity to observe the witnesses, assess credibility, and determine the weight of any particular piece of evidence and/or the whole of the evidence of any particular witness or several witnesses: *Stein v.*

Kathy K, [1976] 2 S.C.R. 802 and *Wire Rope Industries of Canada (1966) Ltd. v. B.C. Marine Shipbuilders Ltd.*, [1981] 1 S.C.R. 363. This approach is consistent with this Board's jurisprudence: *Western Canada Steel*, IRC No. C185/91 (Reconsideration of IRC No. C242/90).

On the facts of this case, where we have only a partial transcript, deference to the original panel in respect of its findings of facts is even more compelling. However, there is an obvious exception. Where a transcript supports an allegation of the breach of the rules of natural justice, or a clear error of law and policy, or a refusal to exercise jurisdiction or an excess of jurisdiction, it shall be given considerable weight.

B. Impugned Evidence/View

This ground of appeal is based upon an allegation of a breach of the rules of natural justice: the original panel erred in making findings of fact for which there was no evidence. The Employer characterizes the following four findings of fact as the "impugned evidence": hospital accreditation, capital budgeting, nurses' uniforms and the paging system.

1. Hospital Accreditation/Capital Budgeting

In reviewing the *B.C. Ferry* test, the original panel found, first, that the "...hospital is obliged to achieve all reasonable standards established by the Canadian Council on Hospital Accreditation in order to maintain its accreditation" (p. 10), and, second, that with respect to capital expenditures, "...the Capital Budgeting policy provides that items over \$500 'are submitted to hospital administration for consideration and eventually nursing is advised what items...have been approved'" (pp. 11-12).

The conclusion of fact drawn by the original panel from these two findings of fact (and other evidence such as the organizational structure of the Hospital) was that the head nurses' independence and discretion were necessarily "curtailed" by a number of factors, largely those arising from "the nature of the enterprise". With regard to hospital policy, it was the requirements of hospital accreditation and the legal regime under which the hospital operates; with regard to budget or capital expenditures, it was that the head nurses were limited to submitting merely a "wish list" and had only nominal spending power limited to \$500.

Therefore, the conclusion was that the head nurses did not show sufficient managerial independence to meet the *B.C. Ferry* test. However, VGH challenges these findings of fact (and, therefore, the conclusions of law and policy) stating that these two pieces of evidence cannot be found in either counsels' notes, or in the transcripts, or in any of the documents entered as exhibits.

The Union disagrees and says that both facts can be found in documents entered by the Union. The Union and VGH agree that two books were entered into evidence. One book was described as the blue book (Hospital Administrative Policy) and the second was described as the red book (Nursing Division Management Manual). During the hearing there was debate as to how these documents would be marked in evidence. The Union wanted each book marked as one exhibit. The Employer wanted each document within each book marked as a separate exhibit. For instance, if there were 50 documents in the red book, the Employer wanted each document marked as a separate exhibit - 50 exhibits in all. The panel ruled that each book would be marked as one exhibit. The blue book (Hospital Administrative Policy) became Exhibit 7 and the red book (Nursing Division Management Manual) Exhibit 8.

Should VGH have been successful with regard to its evidentiary motion, the panel would have marked each book either Exhibit 7 or 8, "for the purposes of identification only". Then as each document was identified it would have been entered into evidence as a separate exhibit. This is the normal way in which a document book is handled when there is a disagreement about the admissibility of documents within that document book. The Employer agrees that neither book was marked for "identification purposes only"; both were marked in their entirety as one exhibit.

The Employer states, however, that notwithstanding that the books were marked as one exhibit, no individual document became evidence until a witness testified to that document. We do not agree with this proposition. Routinely, business documents are put in for the completeness of that particular document. It is rare that every page of a document or indeed every paragraph of a document is attested to by a witness. Nonetheless, the entire document is admitted into evidence. The issue, therefore, is not one of admissibility but simply one of weight.

With regard to the issue of Hospital Accreditation, the Union states that that evidence is to be found in Exhibit 7, IV. Organization-Org. 5. With regard to Capital Budget Policy, evidence was to be found in Exhibit 2, Tab. 22 at page 14. With regard to the issue of \$500 expenditure, that is to be found in Exhibit 7, Category: Finance and Purchasing No.: F & P5.

We find, as argued by the Union, that there is some evidence in these exhibits to justify the findings of fact made by the original panel regarding Hospital Accreditation and Capital Budgeting Policy. These findings of fact have, therefore, not been impugned. Consequently, there has been no breach of the rules of natural justice with regard to Exhibits 2, 7 and 8.

2. Nurses' Uniforms and Paging System

The original panel found that the head nurses wore their "uniforms the majority of the time which is indicative of their clinical role". (p. 7) It was agreed by the parties that this evidence was not to be found either in the transcripts, counsels' notes, or in the documents. The Union postulated that it was adduced through a view which the panel took of the site and through the panel's observations and questions of nurses at the site. VGH also concludes that this is the only likely explanation as to where this evidence may have been adduced. VGH argues that the significance of this finding formed, in part, the original panel's basis for the following conclusion of fact:

...In our judgment the primary thrust of the Head Nurses' position at Vancouver General Hospital is not the management of employees under them. Rather, it is the exercise of professional competence and knowledge of the nursing functions of the unit. (p. 16)

In effect, the original panel held that head nurses practice their profession of nursing first and only manage or co-ordinate staff second. The fact that they wear their uniforms "the majority of the time" supported this conclusion.

In regard to the paging system, the original panel found that:

...Finally, the distinctiveness of the department is also illustrated partly by the fact that internal communications between the Emergency Department and the rest of the Hospital are restricted,

in that the hospital's paging system does not extend to the Emergency Department. (p. 20)

VGH argues that the original panel used this finding to distinguish the head nurses in the Emergency Department from head nurses in other departments. Therefore, Ms. Ritmiller, head nurse in the Emergency Department, was excluded from the Nurses' bargaining unit because the Emergency Department was "...a hospital within the hospital" (p. 20) and this "distinctiveness" (p. 20) was further illustrated by its separate internal communication. Once again, this evidence can only have been adduced from the view and there is no explanation as to how it was obtained during the view.

3. View

Neither party requested a view. It was conducted at the request of the original panel. It took somewhere between half a day and a full day to complete. The panel visited the work sites of all the head nurses. The parties agreed that the panel members were often separated from one another and from the parties themselves. It was further agreed that they talked to different people in the absence of each other and in the absence of the parties. Moreover, it was agreed that witnesses were not sworn prior to the view and that no one took the stand after the view to give evidence regarding information gathered at the view. As counsel for the BCNU so aptly put it, the view (which raises issues of natural justice) would not have "passed muster in the Supreme Court".

The Union, however, argues that Section 19 of the Act gives the Board discretion to hear evidence that might be inadmissible in a court of law. This is correct; however, it is clear that Section 19 is subject to fair hearing and natural justice requirements: *Cheni Gold Mines Inc.*, IRC No. C36/90.

The Council's authority to take a view stems from Section 35(g) of the Act (now Section 140(g) of Code). The Minister has a similar power under Section 145 and an arbitration board has the same power under Section 92(g) of the Code.

The statutory power of inspection given to this tribunal and to arbitration boards parallels

similar powers given to judges and juries in the British Columbia Rules of Court (Rule 30(4) and (5)). In criminal cases the same power is given by Section 189 of the *Criminal Code*. The practice of inspection or taking a view is a long-standing one as is illustrated by the comments in *Phipson on Evidence*, 14th ed. (1990), page 6, para. 1-11:

Inspection has been defined as a substitution of the eye for the ear in the reception of evidence, and as a general rule is allowed whenever it is practicable, and will assist the tribunal in arriving at a decision. The practice dates back for some seven centuries to the old trials by inspection, which were the appropriate means of determining certain questions, e.g. age, identity, the genuineness of records, mayhem, pregnancy, etc. At first some of these were tried by the court itself, but in doubtful cases reference was made to the jury, and gradually this became the usual rule.

We have been unable to find any Council or Board decisions which discuss the proper parameters of a view. In *Louisiana Pacific*, IRC No. C73/92, the panel's view of the employer's premises was used to assess the evidence given at the hearing. However, the issue of whether a view is evidence or simply clarification of a witness's testimony was not discussed.

The prevailing view in some provinces seems to be that a view is for the purpose of "enabling the tribunal to understand the evidence, and not for the purpose of using the observations made as evidence upon which to base conclusions": Reid and David, *Administrative Law and Practice* (2d), p. 92; (see also *Re: Dept. of Labour and University of Regina* (1975), 62 D.L.R. (3d) 717 (Sask.); *Chambers & Murphy* [1953], 2 D.L.R. 705 (Ont. C.A.); *Calgary and Edmonton Ry Co. v. MacKinnon* [1910], 43 S.C.R. 379 (S.C.C.)).

However, in other provinces the courts have accepted that a judge is entitled to use his or her observations as evidence: *Meyers v. Government of Manitoba* (1960), 33 W.W.R. 461 (Man. C.A.); *G & J Parking Lot Maintenance* (1978), 16 A.R. 293; *Power v. Winter* (1952), 30 M.P.R. 131 (Nfld. C.A.). Some commentators believe that the distinction does not have much practical impact: Sopinka and Lederman, *The Law of Evidence in Civil Cases*, (1974) at p. 384.

In terms of the administration of the *Code* and specifically Section 140(g), we prefer the conclusion that the trier of fact is entitled to use his/her observations as evidence. We adopt the

following comments of Mr. Justice Schultz of the Manitoba Court of Appeal in *Meyers v. Government of Manitoba, supra*.

I think it is a matter of everyday practice in our courts that scale models, or similar objects, are tendered and accepted as real evidence. Such evidence may offer stronger and more convincing proof of the fact claimed than the oral evidence of witnesses. The judge who views them in the courtroom is in no different position there than when, with all the necessary safeguards and conditions met, he views them outside the courtroom. When, as in the case of a road, it is impossible to bring the object into the courtroom, he is entitled to consider such a view as evidence. To hold otherwise seems to me unrealistic, for what better evidence could be offered to judges than what they can see with their own eyes? This is so whether the evidence is produced in court or at the scene of an accident. (pp. 469-70)

However, such an approach requires, as Mr. Justice Schultz stated, the "necessary safeguards". Those safeguards were not present when the original panel took a view in this case. Further, when a labour relations tribunal or arbitration board takes a view the following procedures ought to be followed:

1. All parties must be present: *R. v. McDonald*, [1939] 4 D.L.R. 60 (Ont. C.A.);
2. All members of the tribunal or board must be present: *R. v. Fine, ex p. Sheraton*, [1968] 2 O.R. 490;
3. If it is contemplated that questions are to be asked, any witnesses questioned must be sworn prior to the view; no questions may be asked of unsworn witnesses;
4. Questions must be asked only in the presence of all parties and their counsel;
5. A record of any and all such questions must be kept by both the Board and the parties; and
6. Upon returning to the hearing room, an opportunity must be given to all parties to examine such witnesses. Further, if new areas of evidence have been opened

(e.g., as a result of questions by the Panel) an opportunity must be given to both parties to address these new areas of evidence. As a result, a view may have the potential to broaden a hearing.

These procedures can only be modified or deleted by the consent of all parties.

All parties acknowledge that they are unable to find in their own notes, in the transcript, or in any of the exhibits, the findings related to the nurses' uniforms and the paging system. We therefore find that the most reasonable explanation as to how this evidence was adduced is that offered by the parties themselves - it was obtained during the view.

The finding of fact that the head nurses wear their uniforms the majority of the time and the conclusion that this was indicative of a professional rather than a managerial role was cited and relied upon by the panel in coming to its decision. We do not know how much weight the panel assigned this factor in arriving at its decision (or in regard to the paging system, which seems more peripheral to the panel's final judgment). In addressing this issue we rely upon the comments of Chair Stephen Kelleher in *Surrey Iron Works, supra*, which in turn relied upon *Kane v. Board of Governors of the University of British Columbia, supra*:

Must the Union establish that the Board actually relied upon the impugned facts? Sometimes, it is clear from the face of the award that there has been such reliance. See B.C. Hydro & Power Authority, BCLRB No. 64/81. However, more often one could not determine the extent, if any, to which the Board relied on a matter without polling each member of the Board. For that reason the courts do not require that a party prove the tribunal was influenced by such facts: see Kane v. Board of Governors of the University of British Columbia, (1980) 110 D.L.R. (3d) 311 at 324:

...[it is sufficient that there is], [sic] the possibility or the likelihood of prejudice in the eyes of reasonable persons.
(pp. 3-4)

In *Surrey Ironworks, supra*, there was no weighing of the impugned evidence to determine how significant it was to the final determination of the tribunal. The mere presence of the impugned evidence was sufficient to find a breach of the rules of natural justice.

There is clear reliance upon the impugned facts in this case. In accordance with *Kane, supra*, we do not need to determine the significance of these impugned facts to the panel. Accordingly, we find a breach of the rules of natural justice.

However, another factor plays an even more crucial role in our considerations. The issue of the view in this case is not simply a matter of two pieces of impugned evidence - although sufficient in themselves to find a breach of the rules of natural justice.

The original panel spent somewhere between a half-day and a full day conducting a view without any procedural or evidentiary safeguards. Evidence was heard from unsworn witnesses, in the absence of the parties, and indeed in some instances, in the absence of some members of the panel itself. We therefore have no idea what evidence was heard. To pose the question: can a tribunal conduct a hearing for part of a day (or all of a day) in breach of the rules of natural justice is, of course, to answer it in the negative. The process which a tribunal adopts to determine findings of fact goes to the very core of our legal safeguards - the rules of natural justice and the rules of evidence. Clearly, the panel breached the rules of natural justice and the decision is therefore set aside.

C. Evidentiary Ruling

On February 27, 1990, the original panel informed VGH and the BCNU that it would hear evidence with regard to only eight head nurses. This was done in order to reduce the hearing time required as well as to reduce the delay and expense that would be involved in hearing 69 individual cases. On March 21, 1990, VGH filed a Section 36 application with regard to this ruling. On April 26, 1990, the panel gave a "clarification" of its ruling, resulting in an order that the Hospital and the Union each call evidence from four incumbent head nurses, and that evidence relevant only to those eight head nurses would be adduced. As well, any evidence common to all head nurses at VGH would be relevant. The final point of clarification was that any decision rendered with regard to the eight head nurses would set guidelines for the parties in determining the status of the remaining 61 head nurses. As a result of this "clarification", VGH on May 2, 1990, withdrew its Section 36 application.

VGH commenced the hearing by calling evidence concerning the general authority and responsibility of head nurses. The Vice-President of Nursing and the Director of Nursing gave evidence as to the structure of the Nursing Division and the respective duties of those head nurses who fell within their authority. Whenever a Director of Nursing was giving evidence with regard to the duties of head nurses generally, they would use one of the eight head nurses to illustrate those duties or functions. However, if none of the eight head nurses performed that function then that Director of Nursing would refer to one of the other 61 head nurses to illustrate that particular duty or function. In addition, each of the eight head nurses gave evidence concerning their specific duties and functions.

VGH proceeded to call evidence in this manner for the first 18 days of the hearing. The Union, after 18 days of evidence, objected to the admissibility of this evidence being led by VGH which involved using head nurses other than the eight chosen to illustrate the duties and functions of head nurses. The panel ruled in favour of the Union. As a result, VGH was not permitted to lead evidence regarding the specific exercise of the authority of the head nurses unless one of the eight head nurses was directly involved. The panel's evidentiary ruling is reproduced from the transcript dated October 15, 1990 at pages 597-598. The parties agreed that the transcript accurately records the ruling:

THE CHAIRMAN: All right. First of all, regarding the scope of general evidence, just to make matters clear, hopefully, is that evidence that relates to head nurses as a group, and is, therefore, relevant to the eight head nurses who are the subject of this application.

Our initial ruling of April the 26th was that the parties would treat the application regarding the eight named head nurses as they would any application. The evidence was to be limited to specific evidence about the eight head nurses who are the subject of this application, and common evidence relating to the role of head nurses generally, and any common evidence of that type that relates to the head nurses subject to this application.

If the evidence we are hearing here is specific evidence about individuals other than the four selected by the employer, as such it's beyond the scope of our initial direction, and would, in our

view, unduly prolong and complicate the hearing.

Obviously, any evidence relating to conflict of interest relating to the four -- rather, the eight individuals, or the four individuals selected by the employer, will be admissible.

In regards to Porter, her evidence can be evidence of a general nature as relates to head nurses, and/or evidence specific that she may have to offer about the eight head nurses that are the subject of this application. (pp. 597-598)

Finally, the Union sought a ruling that any of the evidence that had been called by the Employer prior to the evidentiary ruling (the first 18 days of evidence that related to head nurses other than the eight) ought to be struck or disregarded by the panel. However, the Union subsequently withdrew this motion. VGH therefore took the view, in legal argument, that all the evidence adduced during the first 18 days, was relevant, admissible and properly before the panel. However, the panel from its decision appears not to have considered any of this evidence:

In this decision the Panel will examine the status of eight particular head nurses. In doing so, we will have regard to the general evidence regarding VGH's management structure and the specific evidence regarding the responsibilities of the eight head nurses. We do not intend to determine the status of the eight head nurses on the basis of authority exercised by other head nurses at VGH. This was made clear in the panel's ruling of April 26, 1990 referred to above, regarding the scope of the evidence to be adduced. (pp. 3-4)

In seeking guidance as to what evidence is admissible with regard to Section 34 applications, the comments of Chair Paul Weiler in *Corporation of the District of Burnaby, supra*, are instructive. This was a Section 36 review of a Section 34 application where the Board found that a number of persons were not employees and, therefore, were excluded from the bargaining unit. The Board found that the evidence of a former occupant of a supervisory position was relevant. In addition, evidence of fellow supervisors and evidence of employees both above and below the position in contest was also relevant. The quote is lengthy but it is

reproduced in its entirety given the significance of this issue in this hearing:

There is one other issue raised by the Union about which I would make some comment. In its reply to the Employer's brief, the Union elaborated on a point it made in its original appeal submission:

...the Labour Code of British Columbia Act [sic] requires the case of each employee to be decided as a separate issue on its own facts. That is to say that the evidence with respect to other employees must not be permitted to influence the decision in the particular case. We submit further that the employer on the hearing treated the employees who were claimed to be employed primarily to exercise management functions over other employees as a group and tacitly invited the Board to treat all the evidence as relevant to all of the cases submitted.

In the view we did take of the facts in the earlier hearing, that argument is not directly pertinent to this case but should still be clarified.

If the point of the Union argument is that the Board must make a *judgment* about the status of each individual employee, then I agree. However, if its point is that, in arriving at that conclusion, it cannot consider or be influenced by *evidence* with respect to other employees, then I disagree. Certainly, the latter proposition is untenable, if taken literally and without restrictions. How could one decide whether a person is managerial without looking at the responsibilities of those employees above him or the activities of those below him? I assume that what the Union is seeking to exclude is evidence relating to the duties of other occupants of the same or comparable positions. Even put in this narrower fashion, the proposition is wrong. [I should also note that a major part of the Union case at the original hearing, especially as to Stevens, Hunter, and Janelle, consisted of exactly that kind of evidence from a Mr. Jack Naylor as to his own duties in a comparable job in the same department. Naylor presently is an "employee" in the bargaining unit and the point of his testimony was that the responsibilities of the three persons in question did not differ materially from him and so should also be included. We treated that evidence as relevant to the matter and Mr. Moore, in his dissenting opinion as to these three persons, relied strongly on it. While I disagreed as to the weight to be attached to the evidence, I

certainly believe it was proper for the Union to present it and the Board to consider it.]

In any sizable organization, the position occupied by one employee normally endures for some period and may have several occupants at any one time. I think it is not only legally permitted, but also only sensible, to consider evidence of what other occupants of that post have done in making a judgment about a particular incumbent. Suppose, for example, that three persons, all described as Supervisors, are the subjects of a s. 34 application. It is agreed by everyone that the power to discharge is a crucial indicia of managerial status. One of these persons is newly promoted to the position and has not yet had occasion to fire anyone. However, the evidence is that a fellow Supervisor has recently discharged someone and so also did the predecessor to the particular Supervisor in question just before he was succeeded by the latter. That evidence is not only relevant but also persuasive as to the powers of the present incumbent. Of course, the evidence is not decisive and the Board must reach a final judgment about whether the person in question actually does have that same power. However, in arriving at that conclusion, it would be artificial to treat every position in an ongoing organization as if it were a totally watertight compartment, in which nothing that happened around it had any influence on the status of the immediate occupant. (pp. 133-134, emphasis in original)

We agree with this analysis. The Board, must make a judgment about the actual exercise of managerial powers by a specific person. However, evidence that relates to similar persons in similar positions (and previous incumbents) within the same *institution*, is relevant. This is the case even where those other "similar" persons are not specifically the subject of any Section 34 application. In this case, all 69 nurses were the subject of VGH's Section 34 application.

Therefore, as a result of the original panel's evidentiary ruling of October 15, 1990, VGH was not permitted to call relevant and admissible evidence covering the extent of managerial responsibilities and authority delegated to head nurses. Further, as a result of the ruling, evidence (which had already been admitted), was improperly disregarded. This may explain the discrepancy between the original panel's finding of a "dearth" of discipline meted out by the eight head nurses, and the very large number of grievances (approximately 270) handled by the entire Nursing Division (all 69 head nurses) between 1985 - 1990 - precisely the same time period

examined by the original panel in relation to the eight head nurses.

At the appeal hearing all parties agreed this evidence was admissible, uncontradicted and within the parameters of the panel's original evidentiary ruling of April 26, 1990. The parties further agreed that at stage one of the grievance procedure head nurses have the responsibility for handling these grievances on behalf of management (with the exception of policy grievances). Quite clearly, this evidence fell within the category of evidence common to all head nurses. It is particularly relevant to one of the more significant *B.C. Ferry* criterion - discipline and discharge.

It must be remembered that the application filed by VGH was in relation to 69 head nurses. The Council limited the application on its own motion to eight head nurses. In some respects, the original panel did what the Union in the *Burnaby* case attempted to do and which Chair Weiler rejected; each position was treated as a "totally watertight compartment".

The original panel understandably attempted to restrict the hearing in order to expedite a resolution of the issues. However, in limiting the evidence to eight head nurses there ought to have been a recognition by the original panel that inevitably some evidence beyond that relating directly to the eight would be required in order to make a proper determination under Section 34. That is simply the result of the Board's law and policy with regard to managerial exclusions. This may well have expanded the scope of the hearing but it would have consumed far less time than having heard all 69 head nurses.

Therefore, the original panel's evidentiary ruling that it would not hear any other evidence concerning the managerial responsibilities and authority delegated to the head nurses other than the eight, and its refusal to consider the first 18 days of testimony in relation to this managerial authority and responsibilities, resulted in a denial of a fair hearing to the Employer.

D. Plagiarism

VGH alleges that the original panel plagiarised from the decision in *Victoria General Hospital, supra*, specifically pages 40 to 45, and that these sentences and paragraphs correspond to pages 7 to 19 of the original panel's decision. The Employer argues that this plagiarism

amounts not simply to unattributed passages or quotes but in effect to a substitution of findings of fact, resulting in a breach of natural justice. This is a serious allegation. The allegation arose only during the appeal hearing itself and involved comparing similar passages from each decision.

If indeed a panel were to plagiarise findings of fact from a prior decision and actually substitute these for the findings of fact it ought to have independently made in its own hearing, that would amount to a breach of natural justice. This would certainly be grounds for setting aside a decision. We are concerned with the integrity of the adjudication process and the confidence of the parties in that process. Parties coming to the Board must be assured that they will receive an independent adjudication of their case on its own merits. That requires that there be not merely the reality of an independent adjudication but the appearance and perception that that has taken place. Therefore, the test does not require that there be an actual failure of independent adjudication. It will be sufficient if on the face of the award findings of fact and conclusions appear to be adopted from other sources. We adopt the remarks of Chair Kelleher in *Surrey Ironworks, supra*, and the test he cites from *Kane, supra*, with regard to the issue of plagiarism.

We have serious concerns with the impugned passages in light of the above test. Given, however, that the decision as a whole has been set aside on other grounds, we find that we need not reach a determination on this point.

It has been the practice of this Board, and it shall continue to be the practice, that all passages which are adopted directly from previous decisions shall be attributed. This is essential in establishing the perception of this Board's good faith in respect of its administrative, legal, and quasi-judicial duties.

E. B.C. Ferry Test

The parties seek guidance as to how the *B.C. Ferry* test ought to be applied to head nurses at VGH. Normally, after setting aside a decision (especially after setting aside findings of fact), the Board will not set out issues of law and policy which would best be left to future applications and new findings of fact. However, this is an unusual case - 45 days of hearing have been set

aside. This is the first time in the Board's history that a hearing of such magnitude has been set aside. The difficulty in setting out some policy guidance is that we must assume the facts as found by the original panel - findings of fact that we have just set aside.

However, it is the Employer who is most insistent that we provide such guidance. Since it is the Employer (not the Union) who is most disadvantaged in such circumstances, and yet most insistent, we will consider some limited policy review. First, we will limit ourselves to policy conclusions reached by the original panel in the following five areas: institutional setting, size of unit, supervising subordinate supervisors, discipline and discharge, and labour relations input. Second, we will restrict our comments to policy statements made by the original panel which relate to prior decisions rendered by the Board and which have been argued on this appeal. These decisions relate specifically to the exclusion of persons from bargaining units in the health care industry.

1. General Comments: B.C. Ferry Test

First, we affirm the *B.C. Ferry* test. The following factors are to be weighed in determining whether a person is a manager or superintendent: supervising work, discipline and discharge, hiring and promotion, independence of operation, supervising subordinate supervisors, labour relations input, evaluating employee performance, authorizing overtime and leave, and policy setting. We also affirm the principle that these criteria are not simply a checklist to be mechanically applied. However, in the future greater weight will be placed upon two of the *B.C. Ferry* criteria, namely: discipline and discharge, and labour relations input.

The workplace of the 1970's when the *B.C. Ferry* test evolved cannot serve as a template for the workplace of the 1990's. The simple fact of supervision, the involvement in policy setting or the ability to authorize leaves of absence and overtime are not as indicative of managerial duties and responsibilities as may have been the case in the 1970's. With greater employee involvement in the management of the firm and with new legislative concepts such as joint consultation and co-management, the most important factor, and one which we view as consistent with the overall scheme of the Code, is the participation of individuals in two areas - collective bargaining and the administration of the collective agreement. It is participation in these two areas which underlie the rationale for exclusion - the potential for conflict of interest

and the requirement of an arm's length relationship in collective bargaining.

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

A comparison of these criteria, discipline and discharge and labour relations input, cannot simply be made to an industrial setting. The fact that discipline or discharge may be required less in a professional setting does not result in this factor having less significance. Therefore, there is no minimum requirement in regard to discipline and discharge in order to meet this *B.C. Ferry* criteria. Indeed, it would seem counterproductive in terms of developing effective labour relations, to impose the degree of discipline and discharge which seems prevalent in industrial settings, upon a professional setting.

2. Case Law

In examining the following five factors set out in *B.C. Ferry, supra*, institutional setting independence of operation, size of unit, supervising subordinate supervisors, discipline and discharge, and labour relations input, (it was these five criteria which VGH states the original panel misapplied), we reviewed the following eight decisions: *Royal Inland Hospital*; *Victoria General Hospital*; *Vernon Jubilee Hospital*; *Juan de Fuca Hospital Society*; *Surrey Memorial Hospital Society*; *Three Links Care Society*; *Queen Alexandra Hospital Society*; and *B.C. Cancer Control Agency*.

This review is a factual review of these decisions. It is not a review to extract past policy statements, but rather to set out a comparative factual examination of managerial exclusions in the health care industry. The purpose is to see what facts were required to meet the *B.C. Ferry* criteria.

In *Royal Inland Hospital*, there were five individuals at issue: Director of Maintenance, Director of Textile Services, Materials Manager, Director of Housekeeping and Director of Finance. These people supervised between 16 and 45 employees. Only three of the five had subordinate supervisors. The Board found that "discharges are rare in the hospital industry" (p. 470). However, certain forms of discipline, such as reprimands, were administered on a more regular basis. Each of these five individuals exercised "considerable independence". They hired and promoted, evaluated employees, authorized both leave and overtime, and participated in policy making. However, none made any "significant contribution to collective bargaining". All were excluded.

In *Victoria General Hospital*, eight individuals occupied senior positions in seven different paramedical departments. These eight were representative of a larger group of department heads (some 450) throughout the province who were "active supporters of the union" and, indeed, provided the "original impetus for creation of HSA and occupy its current leadership". These individuals supervised between three and 82 persons. They spent a good deal of their time engaged in professional work. They had the power to hire and conducted employee evaluations. However, the Board found that "the functions of promotion and demotion,

discipline and discharge are almost totally dormant" (p. 42). Further, there had been only "one grievance filed in the entire history of the hospital". However, two individuals were excluded notwithstanding that they continued to exercise professional functions.

In *Royal Jubilee Hospital*, the Chief Laboratory Technologist, supervised 26 employees. He had the ability to authorize leave, to purchase supplies, he had input into collective bargaining and the budget, and had the ability to review overtime sheets. He represented the hospital at the first stage of the grievance procedure but had no authority to settle grievances. Instead, the doctor who headed the department had the final authority with regard to hiring and firing, discipline and promotion. The individual was not excluded from the bargaining unit.

In *Juan de Fuca Hospital Society*, the Board excluded the Director of Re-activation. This individual supervised 25 employees in physiotherapy and occupational therapy. She did not supervise subordinate supervisors. She had final decision-making responsibilities in the areas of discipline and discharge (there was no evidence reviewed by the panel as to the actual exercise of discipline), hiring, promotion, employee evaluation, approving overtime and leave of absences. Finally, she had significant input into policy and budget.

In *Surrey Memorial Hospital Society*, two employees were at issue: the Admitting Supervisor and the Accounting Supervisor. Neither person supervised subordinate supervisors. The Admitting Supervisor supervised 22 employees and had final authority in the areas of discipline and discharge, employee evaluation, recruitment, approval of overtime and leave of absences. In addition, she was management's representative in the grievance procedure and had "input into policy and planning". She also had the responsibility for budget in her area. There was no evidence of the nature or frequency of discipline. The Accounting Supervisor supervised 13 employees and also had final management authority in the areas of recruitment, discipline, discharge, employee evaluation and approval of overtime and leaves of absence. Both supervisors were excluded.

In *Three Links Care Society*, the employer was successful in having the Director of Maintenance Services excluded from the HEU bargaining unit. The Director did not supervise subordinate supervisors. He supervised three full-time employees and one part-time employee. He spent approximately two-thirds of his time doing basic physical maintenance work. He had not discharged any employees but had laid off, issued written warnings and imposed suspensions on several employees. He prepared his own budget but required authorization for expenditures

over \$2,000.00. Finally, he evaluated employees, authorized overtime and leaves of absence. He also attended regular management meetings.

In *Queen Alexandra Hospital Society*, eight Department Heads were responsible for between six and 20 employees. Only four of the eight supervisors had been involved in disciplinary action and only one had recommended "termination". All eight had the authority to hire. Only one of the eight supervised subordinate supervisors. All eight supervisors had been canvassed for their input into collective bargaining proposals and the collective agreement required them to be involved in the grievance procedure. The decision does not canvass the degree of involvement or the number of grievances. Each were involved in administrative committees which formulated policies and procedures within the hospital. Finally, most evaluated employees and authorized overtime and leaves of absences. All eight were excluded from the HSA bargaining unit.

Finally, in *B.C. Cancer Control Agency*, five Nursing Unit Managers were found to be managers and excluded from the BCNU bargaining unit. There is no mention of the number of persons supervised by these Nursing Unit Managers but each manager supervised Charge Nurses, met regularly with these Charge Nurses to deal with staffing, and patient care (the charge nurses dealt directly with the general duty nurses). Each had the ability to discipline but not to discharge. With regard to discharge, each only had the power of recommendation. Over a four year period total discipline had been several reprimands, one suspension and one termination. Each had the power to hire and promote, evaluate employees, prepare and implement administrative policies for their unit, authorize overtime and leaves of absences (with the exception of family responsibility), and represented management in the grievance procedure. The Board found that grievances were "infrequent".

This comparative factual examination will now be incorporated into our discussion of the five criteria which VGH states the original panel misinterpreted and misapplied: institutional setting/independence of operation, size of unit, supervising subordinate supervisors, discipline and discharge, and labour relations input.

3. Institutional Setting/Independence of Operation

The original panel correctly sets out the policy consideration that the nature and structure of a particular institution must be considered when applying the *B.C. Ferry* test. The original panel, at pages 6 and 10 of its decision, outlines those factors that it states distinguish the hospital from other settings, primarily an industrial setting. The panel then explains how the uniqueness of a hospital setting curtails both the independence and the discretion exercised by head nurses. In the view of the original panel, factors such as government or government agencies, legislation, accreditation requirements, the employment of professionals, the need to follow doctors' orders, and finally, the primary purpose of the Hospital - patient care - all impact on the independence and discretion of head nurses.

Although the evidence of the Director of Nursing was that head nurses "...independent of higher authority make the decisions that affect unit staff and operations" (pp. 10-11), this amounted to only "apparent responsibility". Actual independence varied from head nurse to head nurse. Finally, the original panel stated that "basic management decisions are made at the senior management committee level or higher". (p. 10)

In reviewing the original panel's characterization of this issue, it is difficult to understand why external controls such as legislation, accreditation or the presence of other government agencies make the hospital setting unique. There are few institutions in the public sector (or indeed the private sector) that are unaffected by these same factors. The presence of accreditation procedures, legislation or government agencies seem too remote to be given the weight which the original panel assigned to this particular criterion. These factors affect the overall structure or organization of the hospital, but the original panel has not set out how they relate to specific *B.C. Ferry* criteria exercised by these eight head nurses.

The original panel found that the head nurses did exercise many of the *B.C. Ferry* criteria: supervising employees, disciplining and discharging, hiring and promoting, supervising in-charge nurses, preparing employee evaluations, approving overtime and leaves of absence and contributing to policy. It is these factors which are normally referred to as the "basic management decisions" in the cases we have just reviewed - indeed, in all the jurisprudence in this area. The independence of any particular manager is related primarily to the exercise of the specific criteria set out in the *B.C. Ferry* decision. For example, does a particular manager have the ability to hire and fire independently from any other management personnel?

Therefore, the original panel, in its review of the *B.C. Ferry* criterion regarding independence of operation ought to have directly related "institutional factors" or "external controls" to the specific managerial powers exercised by the head nurses. For example, what effect, if any, did following doctors' orders have on the ability of head nurses to discipline or discharge, to assign duties, to approve overtime or leaves of absence? What effect, if any, did hospital accreditation have on the ability of head nurses to discipline and discharge, or to have input into collective bargaining? And what effect, if any, did particular pieces of legislation (and which legislation) have on the head nurses' ability to discipline or discharge?

Therefore, the question is whether the exercise of the managerial powers is conditional or dependent upon another person, or are these powers exercised independently? This is the proper way to frame the issue.

4. Size of Unit

The original panel, at page 7 of its decision, reviewed the size of each unit supervised by the head nurses. The two head nurses who were excluded supervised units of 120 and 102 nurses. The remaining head nurses supervised up to six nurses during their shift but had responsibility 24 hours a day, seven days a week, for between 19 and 36 employees. The number of employees supervised in the eight cases reviewed range from three to 82. The 19 to 36 employees supervised by the head nurses at VGH is almost in the middle range of employees supervised in all the above cases. Simply, on a rough quantum basis, the number of employees supervised by the eight head nurses would more than meet the *B.C. Ferry* requirement. However, the size of a unit should not be given much weight. It is very likely that in small businesses there may be only one manager and several employees. Therefore, in this Panel's view, the size of the unit is not a crucial factor in applying the *B.C. Ferry* test.

5. Supervising Subordinate Supervisors

The original panel assigned this factor significant weight. It stated:

We do view the supervision of subordinate supervisors as a significant criterion, and a distinguishing feature among the Head

Nurses in this case. (p. 12)

Of the two head nurses who were excluded, Poirier supervised nine assistant head nurses and the other, Ritmiller, supervised one assistant head nurse and an in-charge nurse. These assistant head nurses were permanent appointments. The original panel, however, concluded that the other head nurses who supervised "in-charge nurses" were not supervising subordinates in a "relevant sense" (p. 12). This finding is difficult to reconcile with another finding of fact made by the original panel at page 8 of its decision: "For the most part, the in-charge nurse runs the unit during the Head Nurse's off-duty hours". One factor that seems to have led the original panel to this conclusion is that the in-charge nurses were temporary appointments.

In our view, it can be argued that in-charge nurses are subordinate supervisors. More importantly, however, in more than half of the decisions which we have reviewed, the managers that were eventually excluded did not supervise subordinate supervisors. In the previous jurisprudence of the Board, this factor has not been given the weight assigned to it by the original panel. Indeed, if past cases had assigned a similar weight to this factor, many managers who otherwise met the *B.C. Ferry* test, would not have been subsequently excluded.

6. Discipline and Discharge

The original panel stated the following:

Even accepting that the final disciplinary decision rests with the head nurse, and despite the apparent delegation of authority, this usually significant function diminishes in importance where it has been so rarely exercised and where assistance is available and usually sought from significant others including the Employee Relations Department. Further, given the professional character of most of the employees the head nurse supervises, this factor is not likely to become significant as it is in other industrial settings. (p. 9)

In the decisions which we have reviewed, it has been recognized that in a hospital there may not be the same degree of discipline required in order to find that actual authority to discipline exists. The Board in *Royal Inland Hospital, supra*, stated: "The evidence indicated

that discharges are rare in the hospital industry" (p. 470). Further, in *B.C. Cancer Control Agency, supra*, it was stated that the need to impose the higher penalties of suspension and discharge were "rarely present" (p. 7). The panel went on to state that the "preferred and most common mode of addressing such problems is oral discussion with staff leading at times to reprimands" (p. 7). Chair Paul Weiler recognized this in *Victoria General Hospital, supra*. There, he quoted from a decision of the Ontario Labour Relations Board, *Toronto East General Orthopaedic Hospital* (1974), OLRB M.R. 671:

The instant case raises the further problem of the exercise of managerial authority in professional or semi-professional situations. It is patent that if this head nurse exercises managerial authority over the other nurses that she would not exercise that authority in a manner similar to the traditional foreman. The manner of authority in this kind of situation is more subtle, if at all.

It must be remembered that the employees in the bargaining unit are responsible and highly trained personnel; they may on the one hand require very little direction or authority in performing their tasks while on the other hand, direction and authority may arise from such subtle mannerisms as voice inflections; yet again direction may arise out of group discussion or participation. The task confronting the Board is to evaluate the evidence in a manner that captures authority and it is a most difficult task indeed.

(*Ajax and Pickering General Hospital* (1970), OLRB M.R. 1283).
(p. 43)

The nature and amount of discipline involved with the eight head nurses in this case falls within the range that is described in the other cases we have reviewed. Indeed, if one were to consider the evidence which was agreed upon at the appeal hearing, 270 grievances over a five year period is a significant number in any employment setting.

Nurses have their own professional code of conduct and are members of a professional association, the Registered Nurses' Association of British Columbia (the "RNABC"). Under the *Nurses (Registered) Act*, R.S.B.C. 1979 c.302, the RNABC has the statutory authority to licence persons to practice nursing in British Columbia and to take disciplinary action if a nurse is incompetent or otherwise not suitable to practice nursing. Many professionals, and many of those who manage them, do not operate on the traditional model of supervision and discipline. Supervision often involves discussion and corrective action frequently takes place simply through

discussion. It is fair to say that most professionals, and those who manage them, seek accommodations that avoid serious disciplinary action. Indeed, this may result in some individuals resigning rather than being dismissed. This point was made in the *B.C. Cancer Control Agency, supra*:

It is important to appreciate the response of Agency nurses generally to critical assessments of their performance. Nurses do not take criticism lightly. Where, as the result of performance deficiencies, serious discipline is indicated it is often the case that a nurse will either correct the problem or resign. Nursing Unit Manager McDermott expressed that common occurrence as follows:

I have had situations where I talk to nurses about performance and they move from the unit or the Agency. Nurses will either work on the problem or remove themselves. They can't afford not to perform well.

On at least four occasions in the last two years, disciplinary letters of reprimand issued by Nursing Unit Managers have resulted in the voluntary resignation of nurses. (p. 7)

It is incorrect, therefore, to conclude that because employees in a professional setting require less discipline, this factor is to be given less weight in determining managerial status. If the evidence in a professional setting is that an individual has authority and has exercised that authority, the amount of discipline required to meet the statutory test will be dependent upon the particular nature of the workplace.

Moreover, it must also be recognized that in a professional setting it is more likely that there will be fewer discharges of employees, and that other forms of discipline, such as reprimands, will be more common.

In our view, the original panel mistakenly required a discipline or discharge profile similar to that exercised by managers in an industrial setting. The result was to discount the actual authority of head nurses to discipline and discharge, and, as a result, give it less weight

than in an industrial setting. It is incorrect to conclude that because the power to discipline and discharge is invoked less often in a professional setting, this criteria is diluted and is of little weight in determining the managerial status of head nurses. To set a labour relations criterion that actually requires greater discipline be imposed in order to exclude an employee as a manager in any workplace setting - industrial or professional - would not serve the interest of any party. Indeed, a labour relations policy that encourages independence, collegiality, and cooperation, in lieu of greater disciplinary responses, is the most desirable policy.

7. Labour Relations Input

The original panel outlined four factors which arise under the heading of labour relations input: input into collective bargaining, involvement in the grievance procedure, access to confidential personnel files, and involvement in essential service designations.

Its findings were, first, that although head nurses had input into the Employer's collective bargaining proposals, there is no evidence that any policy changes had resulted from this input. Second, although head nurses handle grievances, there had been few grievances and no grievance had been taken to arbitration. Third, head nurses have access to and do contribute to personnel files, including employee evaluations. Finally, although they had input into essential service levels, the essential services "were ultimately determined" without direct input from the head nurses. (We have included employee evaluations under labour relations input because it arose under this heading in the original panel's decision. It could have just as easily fit, along with the issue of promotion, within the factor of discipline and discharge).

Labour relations input, and authority to discipline and discharge, are the essential criteria in the exclusion of management personnel under the *Labour Relations Code*. The reason for this is that labour relations input and discipline and discharge are the two areas in which conflict arises in the traditional collective bargaining scheme - the negotiation (collective bargaining) and the administration (grievance procedure) of the collective agreement. This legislative scheme contemplates that the parties will conduct collective bargaining in an arm's length fashion. Management is entitled to the "undivided loyalty" of its managers and the union is entitled to exclusion of management from its internal affairs. This was best expressed by Paul Weiler in *Corporation of the District of Burnaby, supra*:

The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management - on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for "cause" or passed over for promotion on the grounds of their "ability". The employer does not want management's identification with its interests diluted by participation in the activities of the employees' union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion

are also the very people who will likely rise in union ranks as well.

In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of the employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it. (p. 3)

The head nurses have access to and contribute to the employees' personnel files. They represent the Hospital in the grievance procedure. They are requested to put forward collective bargaining proposals for the Employer and they are asked to assist in designating essential services. This last issue - essential services - has a significant impact on the union's ability to prosecute a strike. This issue is extremely contentious. The unions only have a right to a controlled strike. If essential service levels are set high, management can resist a strike much more effectively; if levels are set low, the unions can more effectively prosecute a strike. The Board in all of this must make a judgment about patient care, separate and apart from the parties' tug of war over the level of essential services.

It is not sufficient to say in relation to any of the above noted labour relations factors, that head nurses are able, in the exercise of their professional duties, to overcome, or rise above this adversarial framework of collective bargaining. An individual may well feel that she is exercising professional or objective judgment in the performance of her duties. This may be in the form of judgments made about such things as patient care or about the care being provided by colleagues. However, there is no question that one of the most imposing constraints under which this professional judgment must take place is collective bargaining. Very few professionals are going to admit that collective bargaining issues influence their professional judgment. Indeed, they are most likely to say precisely the opposite. The authority to represent the Employer in the grievance procedure, the ability to settle a grievance or process it to arbitration, the ability to fashion settlements for one grievor and not another, the ability to evaluate employees and promote, hire or fire them, the ability to have an influence over the actual number of employees who can strike or must remain working, and the ability to have input into collective bargaining, all clearly put the head nurses in a potential conflict of interest. To be clear, however, the test for conflict of interest is with respect to potential conflict of interest, whereas the duties and authority to be exercised must involve the actual exercise of authority (see Section 1(1) of the

Act).

The policy issue that then arises is this: does the Code contemplate evidence of actual conflict of interest or simply a potential conflict of interest? The original panel dealt with this issue under the management team concept. It appears to have adopted an actual conflict of interest as the requirement:

Overall, the evidence is that head nurses inclusion in the bargaining unit has not affected her decision-making ability.
(p. 16)

First, we make no distinction with regard to the issue of conflict of interest between managerial exclusion and management team. In both cases it is our conclusion that the test is a potential conflict of interest. This conclusion is consistent with our view that the emphasis in applying the *B.C. Ferry* test must be on the factors of discipline and discharge and labour relations input. Second, we view this conclusion as consistent with both the past jurisprudence and the overall scheme of the Act.

We wish to emphasize that, unlike the original panel, we see the issue of conflict of interest not as a factor for exclusion, but as the rationale for exclusion. It is the policy conclusion which one derives after having examined an individual and concluded that she is a manager or part of the management team. This conclusion goes to the very root of the collective bargaining scheme - the statutory principle that "true collective bargaining" requires an arm's length relationship.

The employer is entitled to the "undivided loyalty" of its managers and the union is entitled *not* to have within its bargaining unit individuals whose community of interest lies with the employer (thereby affecting its own collective bargaining strength). In the circumstances of VGH, there is no need for the Employer to show an actual adverse effect on the decision-making of head nurses. A potential conflict of interest arises from both the scheme of the Act (the requirement of an arm's length relationship) and also from specific statutory provisions such as the managerial exclusion section. As Chair Weiler stated in *The Corporation of the District of Burnaby, supra*:

These are the reasons why we have the statutory exclusions in question. (To avoid any misconception of what I have been saying, there is one point I would make plain. The reasons for the statutory exclusion is a potential difficulty which is inherent in a position. There is no suggestion in the evidence here that these difficulties have actually occurred in the case of the subjects of this application. They have not interfered with the Union on behalf of the Employer, they have not let the Union membership affect the performance of their duties. However, proof that that has occurred is not a necessary condition for the operation of this provision. The Legislature has established a general rule requiring exclusion of *all* persons who occupy a position in which these special problems may arise in only *some* cases). (p. 4, emphasis in original)

Thus, the original panel erred in requiring evidence of decision-making by head nurses that had been adversely affected by their inclusion in the bargaining unit. The test is not evidence of an actual conflict of interest, but of a potential conflict of interest - which flows from a finding that an individual is a manager or is part of the management team.

F. Management Team

The primary argument of VGH and Certain Employees in relation to the management team concept, is to combine the *B.C. Ferry* and *Kootenay Savings Credit Union* tests into a two-step procedure. The first step, pursuant to Section 1(1), is to apply the *B.C. Ferry* test and determine if the individual is a manager. If that individual is found *not* to be a manager one then proceeds to the second step to determine if that individual is excluded under the management team concept. VGH and Certain Employees argue that at this second step, one once again applies the *B.C. Ferry* criteria to the management team concept to determine if an individual is "exercising significant responsibilities of an administrative nature" and/or "participating in work practices which form part of the management function". Support for this two-step procedure, they argue, is found in *Kootenay Savings Credit Union, supra*, and in *Children's Hospital, IRC* Nos. C159/90, C58/91 and C80/91. We will review these decisions.

Kootenay Savings Credit Union, supra, sets out the factors that the Board should consider in determining whether an individual is part of the management team:

The factors that signal participation in a management team include the following:

- exercising significant responsibilities of an administrative nature;
- participating in work practices which form part of the management function;
- sharing a community of interest with the management of the enterprise. (p. 39)

The original panel in *Children's Hospital, supra*, concluded that the "sprinkling of responsibilities" delegated by the Director of Nursing to nurse managers did not warrant their exclusion from the bargaining unit. The original panel also concluded that discipline and discharge were not significant factors - first, because of the presence of the RNABC, and second, due to the fact "that discipline is primarily a problem-solving exercise", thus distinguishing the nursing profession from "a non-professional setting" (p. 28). Finally, the panel stated that the duties of the nurse managers were basically the same as head nurses and that head nurses had always been included in the bargaining unit.

The employer appealed the original decision (IRC No. C159/90). Its allegations included breaches of natural justice and a loss of jurisdiction as a result of the manner in which evidentiary issues and conclusions of fact had been reached. The appeal panel in IRC No. C58/91 refused to set aside the findings of fact but did remit the case back to the original panel with instructions that it consider the management team concept as a ground for exclusion for these nurse managers. In doing so, the appeal panel cited the *Kootenay Savings Credit Union*, passage of "significant administrative responsibilities"/"management work practices". Since the appeal panel had not disturbed the findings of fact, the original panel once again determined the matter based upon its initial findings of fact. The original panel, in IRC No. C80/91, then again reviewed the *B.C. Ferry* criteria in light of its findings of fact and this time excluded the nurse managers on the basis of the management team concept. It stated the following:

In summary, we are satisfied that in the unique circumstances of

this case, the nurse managers, in carrying out their assignments, exercise significant responsibilities of an administrative nature and participate significantly in management work practices to a degree that warrants the conclusion their community of interest lies with management. As a result, their inclusion in the bargaining unit would produce the alien influence that requires us to exercise our discretion to exclude them from the bargaining unit. We do so in this decision. (p. 5)

We do not agree with the analysis in the three *Children's Hospital* cases. We decline to follow their interpretation of the management team concept, in particular, the application of the *B.C. Ferry* criteria to the management team concept. Such an application is an unwarranted extension of past decisions, unsupported by the statute, representing the high water mark of the management team concept.

In essence, VGH's and Certain Employees' construction of the management team test, as applied in *Children's Hospital*, IRC No. C58/91 and IRC No. C80/91, amounts to this. An employer puts forward an application for the exclusion of a group of nurses, in the case of VGH, 69 head nurses. The application includes an alternative ground for exclusion - that the head nurses are part of the management team. The Employer presents evidence and, based on the *B.C. Ferry* test, seeks exclusion under Section 1(1) of the Act that the head nurses are managers. The evidence of the exercise of management functions is examined in accordance with the *B.C. Ferry* test and, if these individuals actually exercise those managerial responsibilities, they are excluded. However, if the Employer is unsuccessful in having the head nurses excluded as managers, it would then proceed to step two.

At this stage of the proceeding, VGH would reargue the *B.C. Ferry* criteria, stating that head nurses exercised sufficient "administrative duties" or "management work practices" to justify exclusion on the basis of the management team concept. The effect of this is either to read out the current requirements for managerial exclusion, or, conversely, to substitute a lower requirement by applying the *Children's Hospital* concept of management team. To illustrate, let us attach a fictional numerical equivalent to the *B.C. Ferry* criteria - in order to be excluded one must obtain 80% of the criteria. However, if one can immediately reargue precisely the same criteria (*B.C. Ferry*), stating that head nurses are in effect "near managers" because they perform sufficient administrative or management duties to make them part of the management team, the

standard for exclusion immediately drops to something less than the 80% - let us say to 70%. What statutory or policy purpose does the first standard serve? Why would anyone seek to exclude an individual based on the first standard, when clearly the second would be sufficient?

The *Children's Hospital, supra*, construction of the management team is antithetical to the scheme of the Act. It has long been recognized that supervision in itself is not a ground for exclusion: "There can be no question that supervision *per se* is not a ground for exclusion" - *B.C. Ferry, supra* (p. 131). Moreover, the scheme of the Act provides for separate bargaining units for supervisors. This is at the option of the employees themselves who would otherwise be in the main bargaining unit. Under the management team concept these individuals are employees and so the scheme of the Act entitles these individuals to collective bargaining.

Therefore, individuals who do not meet the test of managers but indeed may amount to "near managers", do not become excluded under the management team concept. In this analysis, the management team concept would simply eat up the first level of supervision. If an individual is found not to be a manager, she remains in the bargaining unit in accordance with the scheme of the Act. Therefore, on the facts of this case one does not take a class of employees such as the 69 head nurses, find them not to be managers, but find that they perform significant administrative or management duties, and thereby exclude them under the concept of management team. Thus, the *Kootenay Savings Credit Union* criteria of significant administrative or management duties will not be employed to deliberately read down the statutory provisions in Section 1(1) (managerial exclusions). In our view, this is what happened in the *Children's Hospital* cases, and it is rejected by this Board.

What then are the parameters of the management team concept? The Board sees it as a very narrow exclusionary ground. It would be a relatively rare occurrence when an individual is excluded under the concept of management team. This is in keeping with the past jurisprudence. A history of the management team concept is set out in two decisions, *Legal Services Society*, BCLRB No. L224/82; and *Native Court Workers and Counselling Association of British Columbia*, BCLRB No. L322/82. In *Legal Services Society, supra*, Chair Kelleher makes the following comment:

The concept of "management team" has had a somewhat chequered career at the Labour Relations Board. It is a phrase which has

been sometimes overused and sometimes misused. (p. 5)

Vice-Chair Sheen in the *Native Court Workers*, decision characterized the management team concept as follows:

We have grave reservations about the legitimacy of the "management team" concept. After considering the 1977 amendments themselves, the decisions of the Board in Vernon Jubilee Hospital, supra, and Board of School Trustees School District No. 61 (Greater Victoria), supra, we would prefer to put our conclusion on a somewhat different footing. This is because, despite a statement to the contrary in Board of School Trustees, School District No. 61 (Greater Victoria), supra, we are of the opinion that the concept is now embodied in sub-section (ii) of the definition of "employee"... . (p. 13)

Chair Kelleher, in *Legal Services Society, supra*, sets out the early management team decisions (*Alpine Land Development Ltd.*, [1975] 1 Can LRBR; *Kootenay Savings Credit Union, supra*; and, *District of Coquitlam*, BCLRB No. 72/76), and cites the specific paragraph from *Kootenay Savings Credit Union, supra*, which sets out the management team test. The early cases referred to factors such as familial relationships, the size of a business (e.g. a small business) and the ownership of a business. It is fair to say that both Chair Kelleher and Vice-Chair Sheen saw that the rationale for exclusion lay in determining an individual's community of interest. Chair Kelleher adopted the following remarks from *Diversey (Canada) Limited*, [1979] 3 Can LRBR 77:

What is important for us to extract from these familial relationship cases is that these employees were excluded not because of their familial relationship with the employer, rather because they lack community of interest with their fellow bargaining unit members because their presence in the bargaining unit might give rise to a conflict within the unit. (p. 10)

Further, both Chair Kelleher and Vice-Chair Sheen shared Chair Weiler's view that the management team concept had been incorporated in the 1977 Code amendments and those amendments were simply a codification of the Board's then current policy. In *Vernon Jubilee*

Hospital, [1978] 2 Can LRBR, decision Chair Weiler stated the following:

...the main purpose of the amendments to the management exclusion was to incorporate that specific, jurisprudential development of the Board into the statutory definition of employee itself. (p. 472)

In the Fall of 1977 the Legislature had amended Section 1 of the Code. The original definition was as follows:

"employee" means a person employed by an employer...but does not include a person who, in the opinion of the Board,

- (i) is employed for the primary purpose of exercising management functions over other employees; or
- (ii) is employed in a confidential capacity in matters relating to labour relations.

The definition was amended to read:

"employee" means a person employed by an employer...but does not include a person who, in the opinion of the board,

- (i) is employed to exercise the functions, and does exercise the functions, of a manager or superintendent in the direction or control of employees, or
- (ii) is employed in a confidential planning or advisory position in the development of management policy for the employer, or

- (iii) is employed in a confidential capacity in matters relating to labour relations or personnel.

Therefore, our view is consistent with the early formulation of the concept which the 1977 amendment simply codified. And consistent with this early formulation, the *B.C. Ferry* test was never been imputed into the management team concept.

Further, we adopt Chair Kelleher's remarks in *Legal Services Society, supra*, that the management team concept is a narrow exclusionary ground:

Whether one uses the term "management team" or not, it must also be recognized that the definition of employee as amended in 1977 should make such exclusions relatively rare. (pp. 10-11)

The management team concept will be a "relatively rare" ground for exclusion. It must be remembered that these individuals are employees, and, therefore, entitled to collective bargaining. However, in working as a senior confidential secretary, because of personal or familial relationships, in a professional capacity as a confidential advisor to management, or because of ownership or partial ownership of the business, a conclusion is reached that their community of interest lies with management, and not the union. The rationale for exclusion is community of interest. (This may in fact be no more than the opposite side of the conflict of interest coin). This is a policy construction, but one consistent with the overall scheme of the Code - the need in collective bargaining for an arm's length relationship.

A second issue raised by VGH under the management team concept was conflict of interest. VGH argues that the original panel required an actual conflict of interest - a real or adverse effect on the actual decision-making ability of head nurses. We have already addressed this issue in this decision under the *B.C. Ferry* test. We make no distinction between managerial exclusions and the management team concept with regard to conflict of interest. The test in each case is a potential conflict of interest.

Finally, VGH argues that the original panel placed too much weight on the position of head nurses in the organizational chart. VGH also objected to the original panel's comment that

should head nurses be excluded, management would have to hold their meetings in an "auditorium". At page 23 of the decision, the original panel stated the following:

At VGH, the head nurses are situated a long way down the management hierarchy. They are not part of a policy-making core management group, and the committees they participate in are largely clinically oriented rather than management committees. Head nurses, in our view, operate on the periphery of management.

We agree first with the Employer that the organizational chart and the number of managers are not determinative factors with regard to who is to be excluded. This applies equally to managerial exclusions as well as to the management team concept.

Further, the Board has recognized that in determining managerial exclusions there is no particular ratio of excluded members to bargaining unit members. Vice-Chair Sheen in *Native Court Workers & Counselling Association of British Columbia, supra*, stated:

...the Board will not use a test based on the ratio of employees to excluded staff to determine who should be excluded from the bargaining unit". (p. 7)

This conclusion applies to both managerial exclusions and to the management team concept.

Finally, a general comment about managers, management structure, the *B.C. Ferry* test, and the management team concept.

VGH represents a mix of the traditional and non-traditional workplace. Specifically, it has a mix of professional and non-professional employees. In both types of workplaces it is of course the employer who chooses the management structure and the style of managing. The employer has the sole authority to delegate managerial powers. And it has the option, at any time, to change its management structure, and to introduce new duties and responsibilities.

There are usually three basic element of managing a workforce - direction of the workforce, evaluation of the workforce, and discipline. In terms of managerial structure and style, there may be at one end of the spectrum, a highly autocratic individual, whose managerial structure and style, is nothing more than a reflection of his/her personality. Conversely, at the other end of the spectrum there may be a more democratic mode of managing - the setting of goals, and the co-ordination of employees to achieve those goals (while still retaining the powers of a manager). Further, an employer may adopt a managerial framework or structure, e.g. "Taylorism" (scientific management), bureaucratic or hierarchial control, or a human resource strategy.

VGH, in its Nursing Division, says that it has chosen a less hierarchial management structure than the traditional industrial model. Managerial powers have been invested in the head nurses who are placed two steps from the Vice-President of Nursing. General duty nurses, are employees who are committed to the goals of the hospital - providing patient care to the best of their professional abilities. These general duty nurses work independently, and are collegial and co-operative in carrying out their duties. Comparatively speaking, there appears to be little need for discipline in trying to achieve the best professional standard of patient care. Any corrective action that is required is often the result of discussion and agreement.

The *B.C. Ferry* test must adapt to this kind of management structure, to this kind of workplace, and to this kind of workforce. By focusing the *B.C. Ferry* test on discipline and discharge, and on labour relations input, we begin the process of adapting the Board's policies to the changes taking place in the workplace of the 1990's.

Therefore, individuals who work independently, and who may perform some of the functions set out in the *B.C. Ferry* test, still may not be managers. The effect of this is to allow more employee involvement (e.g. setting policy) without the fear of losing such individuals from the bargaining unit - indeed, the very value of the involvement of such individuals is that they are from the bargaining unit. Conversely, an individual may be involved in only one or two of the *B.C. Ferry* criteria and be excluded - discipline and discharge, or labour relations input. An evidentiary hearing to decide managerial exclusion under Section 1(1) is therefore a more focused exercise. The absence or presence of factors other than discipline and discharge and labour relations input will still be relevant. However, the weight to be attached to these other factors will only be to tip the balance in a close call.

The result is this: first, the employer, in establishing its management structure, will know which managerial powers to properly delegate to ensure that those managers fit comfortably within its management structure. An employer's delegation of these powers and responsibilities must, of course, be *bona fide*. Any obligation which amounts to a mere "sprinkling" of powers and responsibilities, in an effort to achieve a managerial exclusion, will not find favour with this Board. Second, the *B.C. Ferry* test will be adapted to non-traditional workplaces, such as professional settings but not limited to them. Third, this adjustment will narrow the test for exclusion, giving greater weight to the factors of discipline and discharge and labour relations input. Fourth, the remaining factors in the *B.C. Ferry* test will not be given significant weight in the exclusion of employees when the other two factors are absent. Fifth, employees can be delegated responsibility in the other areas, and would most likely remain in their bargaining units - i.e. supervision *per se* is not a ground for exclusion. Sixth, the management team concept will not be used as a ground for exclusion of first level supervisors who may perform administrative or supervisory duties.

VII. CONCLUSION

The Panel has come to the following conclusions:

1. The view taken by the original panel breached the rules of natural justice because it failed to build in the necessary evidentiary safeguards.

2. The original panel breached the rules of natural justice in that it failed to allow the Employer to call evidence and failed to consider evidence consistent with *Corporation of the District of Burnaby, supra*.
3. Of the factors listed in the *B.C. Ferry* test, the greatest weight is to be given to the issues of discipline and discharge and labour relations input. This is consistent with the underlying rationale of the Act which is that collective bargaining must be conducted in an arms' length manner.
4. The professional setting is not to be equated to an industrial setting with regard to the *B.C. Ferry* criteria of discipline and discharge;
5. In regard to the management team concept, the Board will not apply the *B.C. Ferry* test. The *Children's Hospital* cases are distinguished. The management team concept will be applied only in relatively rare circumstances.
6. Conflict of interest is the rationale for managerial exclusion. The test is a potential conflict of interest, not an actual conflict of interest.

The result is that the original decision is set aside and the matter must be reheard. The Board will contact the parties to discuss how this case is to be managed and what agreement can be reached with regard to facts.

It is the desire of the Board to not simply repeat the 45 days of hearing. To that end, in our meetings with the parties, we will explore avenues for an agreed statement of facts and using the Board's Special Investigating Officers to prepare reports on the matters in issue. This approach has been used with success by the Canada Labour Relations Board.

Finally, this decision cannot be read as concluding that all 69 head nurses at VGH should be excluded. Each head nurse must be looked at individually and her/his duties and responsibilities assessed in light of our policy conclusions. Further, VGH represents a specific management structure. This structure may not exist at other hospitals in the province.

Consequently, the duties and responsibilities of head nurses at these other hospitals may not be similar to those at VGH.

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