BRITISH COLUMBIA LABOUR RELATIONS BOARD

McDONALD & ROSS CONSTRUCTION LTD.

(the "Employer")

-and-

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 170

(the "Union")

PANEL: Brent Mullin, Chair
       Michael Fleming, Associate Chair, Adjudication
       Mark J. Brown, Associate Chair, Mediation

APPEARANCES: Israel Chaftez, Q.C., for the Employer
              Donald W. Bobert, for the Union

CASE NO.: 57029

DATE OF DECISION: February 29, 2008
DECISION OF THE BOARD

I. NATURE OF APPLICATION

The Employer applies under Section 141 of the Labour Relations Code (the “Code”) for leave and reconsideration of BCLRB No. B228/2007 (the “Original Decision”). The Original Decision ordered under Section 133(3) of the Code that the parties comply with the terms of a settlement agreement they had reached. In doing so, the Original Decision rejected the Employer’s request that the settlement agreement be vacated because the bargaining unit established under it is not appropriate for collective bargaining.

II. POSITIONS OF THE PARTIES

The Employer argues the original panel erred in applying a less stringent and different standard of review for voluntary recognition bargaining units than the principles of appropriateness for certification. The Employer submits the requirement of appropriateness should apply equally to both voluntary recognition agreements and certified bargaining units.

The Employer argues that voluntary recognition does not make an inappropriate unit appropriate because the parties have agreed to such a unit. The Employer says that evidence of a voluntary recognition agreement should not be accorded any greater deference than any other piece of evidence. The Employer says an inappropriate unit is an improper foundation for collective bargaining.

The Employer states that the voluntary recognition agreement has never been implemented. When the Union complained to the Board that it was not implemented, the parties reached a settlement agreement in June, 2004 (the “Settlement Agreement”). The Employer says the Settlement Agreement was never implemented and then two and one-half years later, the Union has returned to the Board to implement the Settlement Agreement. The Employer says that the parties have never functioned under the voluntary recognition agreement or the Settlement Agreement because the voluntary recognition agreement is unworkable because the bargaining unit is fundamentally flawed.
The Employer argues the Settlement Agreement was never implemented because the employees did not fit within the standard industry bargaining unit description, as the employees were simultaneously performing work both in and out of the unit, with the majority of work being outside the Union’s jurisdiction. The Employer argues the Board has recognized that these circumstances do not allow for viable collective bargaining: *Lifestyle Retirement Communities Ltd.*, BCLRB No. B452/97 (Leave for Reconsideration of BCLRB No. B163/97) (“Lifestyle Retirement Communities”).

The Employer argues that if the unit cannot be certified because it is inappropriate, the voluntary recognition agreement arising from that unit cannot be enforceable under the Code. The Employer says that the agreement between the parties cannot make an otherwise inappropriate bargaining unit appropriate and that inappropriateness invalidates the voluntary recognition agreement and the Settlement Agreement.

The Union opposes the application for leave and reconsideration of the Original Decision. The Union says it would not be equitable for the Board to allow the Employer to resile from the Settlement Agreement in the circumstances of this case: *B.C. Rail Ltd.*, BCLRB No. B128/93 (Reconsideration of IRC No. C152/92) and *Wayne Watson Construction Ltd.*, BCLRB No. B150/96.

III. ANALYSIS AND DECISION

An application under Section 141 must meet the Board’s established test before leave for reconsideration will be granted. An applicant must establish a good, arguable case of sufficient merit that it may succeed on one of the established grounds for reconsideration: *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), 20 C.L.R.B.R. (2d) 44 ("Brinco").

We find that a good arguable case has been raised and leave for reconsideration is granted.

There are two avenues by which a union can be recognized as the bargaining agent for a group of employees in a bargaining unit. The first is through certification by the Board. In that regard, where the Board is satisfied the requirements of the Code have been met, it issues a certification to the union, which initiates a collective bargaining relationship.

One of the Code principles considered in that exercise is the appropriateness of the proposed unit. The Board utilizes the factors in *Island Medical Laboratories Ltd.*, BCLRB No. B308/93 (Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), (1993), 19 CLRBR (2d) 161 in determining appropriateness in the context of an application for certification.
The alternative means of acquiring collective bargaining rights is where an employer voluntarily recognizes a union and enters into a voluntary recognition agreement with the union. It is part of the private ordering of labour relations affairs between parties in which the nature and parameters of the collective bargaining relationship are determined by the parties themselves rather than the Board. That scheme is well-described in the Board’s seminal decision on voluntary recognition:

> Each of the two routes to legal recognition of a trade-union -- recognition by compulsion of a certificate and recognition by agreement -- has its own advantages. The principal advantage of the first is that it is an orderly, statutory process and one which is overseen or monitored by an independent tribunal having the responsibility to protect the legitimate interest of employers, trade-unions, and employees. The most commonly noted advantages to recognition by agreement are that the parties have come together initially on amicable terms rather than as adversaries; that the parameters of the bargaining relationship are determined by the parties themselves rather than by some external agency which may or may not fully understand the intricacies of their work situation; and that expense and delay are avoided. (In some industries, most notably the construction industry, these advantages have resulted in the second route being almost as prevalent as the first.)

...  

If a collective agreement comes after a certificate of bargaining authority, no question of employee support arises: that question is vetted during the certification process. Nor is that question raised in most instances of voluntary recognition. That is because this alternative route to a bargaining agency is generally (although not exclusively) used in industries employing skilled craftsmen or tradesmen where placement on the job is through a hiring hall. Frequently, a voluntary arrangement is entered into even before employees are required. As and when they are required a request is made to the hiring hall, employees are dispatched and these, of course, are members of the trade-union. (*Delta Hospital*, BCLRB No. 76/77, [1978] 1 Canadian LRBR 356, pp. 367 and 371, emphasis added)

Voluntary recognition agreements are widely used and accepted in labour relations in B.C. and are consistent with Code principles; i.e., Section 2(d) and (e). The Board’s principle concern in the context of a voluntary recognition is whether the union represents the employees in the unit captured by the agreement. As well, the Board may not recognize a voluntary recognition agreement where certain kinds of mischief are present: see for example *Armeco Construction Ltd.*, BCLRB No. 270/84, 7 CLRBR (NS) 73 at p. 83.
The Employer argues that where a unit cannot be certified because it is inappropriate, then it cannot be a valid voluntary recognition agreement protected by the Code. We do not agree with that assertion. As noted above, voluntary recognition agreements are widely used and accepted in labour relations in B.C. Because voluntary recognition agreements are private agreements, the Board does not scrutinize these agreements for appropriateness when they are established.

The question is when will the Board exercise its discretion to release a party from a voluntary recognition agreement.

We agree with the original panel that upholding settlements is a foundational principle of good labour relations policy. We also agree that the deference extended to the boundaries of a unit governed by a voluntary recognition agreement is not without limits. For instance, where a party can demonstrate that a voluntary recognition agreement is unworkable or that the voluntary recognition agreement renders collective bargaining unviable or that there has been a material change in circumstances since the settlement was concluded, such that the agreement has become unworkable, the Board may then exercise its discretion to consider the appropriateness of the unit. This will depend on the individual circumstances of the case. This differs from an application for certification where a party may ask the Board, in making an appropriateness determination, to have regard to the labour relations difficulty arising from the proposed unit or the unworkability of collective bargaining without the need to adduce evidence which may not yet exist – see, for example, *Lifestyle Retirement Communities*.

Where a party seeks to be released from a voluntary recognition agreement, a simple assertion that the voluntary recognition agreement would be unworkable is not sufficient to trigger the Board’s discretion to inquire into the appropriateness of the voluntary recognition agreement.

Turning to the circumstances in the present case, the Union in this case is a construction union with a hiring hall. The parties entered into a Settlement Agreement in 2004 whereby the Employer agreed to be bound by a collective agreement arising from a voluntary recognition agreement. As noted in the Original Decision, there has been no material change in circumstances since the settlement was concluded. As well, aside from the general claim that employees work in and out of the unit, the Employer did not provide particulars showing how the structure of the unit has undermined stable collective bargaining or undermined viable collective agreement administration.

The Employer has stated that the Settlement Agreement has never been implemented. The Employer has not shown that it has attempted to abide by the terms of the Settlement Agreement and how it has failed. Instead, the Employer has argued that the voluntary recognition is unworkable because it does not meet the requirements for certification. The bare assertion that the voluntary recognition agreement is unworkable is not sufficient to trigger the Board’s discretion to inquire into the appropriateness of the unit. Before the Board will inquire into the appropriateness of
this unit, the Employer will need to demonstrate actual problems sufficient to persuade the Board that the voluntary recognition agreement is unworkable.

We find no error in the Original Decision's conclusion that the parties' agreement should be given effect in the circumstances of this case. We also agree with the conclusions at paragraph 40 of the Original Decision.

The application for reconsideration is dismissed.

LABOUR RELATIONS BOARD

“BRENT MULLIN”

BRENT MULLIN
CHAIR

“MICHAEL FLEMING”

MICHAEL FLEMING
ASSOCIATE CHAIR, ADJUDICATION

“MARK BROWN”

MARK J. BROWN,
ASSOCIATE CHAIR, MEDIATION