

# The Appropriate Bargaining Unit: The Need for Policy Consistency by Canadian Labour Boards

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## Résumé de l'article

Les décisions touchant la structure de l'unité de négociation appropriée ont beaucoup d'influence sur les parties dans le domaine des relations du travail et le présent article soutient qu'il existe au Canada un grand manque d'uniformité à l'intérieur des Commissions des relations du travail de même qu'entre elles lorsqu'elles ont à disposer de ces questions. D'une manière plus précise, l'approche des commissions, non seulement en rendant la décision initiale sur la structure de l'unité de négociation, mais aussi sur les regroupements, les fragmentations, les fusions, les consolidations, les maraudages partiels, est fondée sur des objectifs variés. Les trois objectifs que retiennent les commissions des relations du travail sont les suivants : 1) respecter la notion de liberté de choix de la part des salariés (leur volonté); 2) faciliter et peut être encourager l'organisation des travailleurs en syndicats (encouragement); 3) inciter à la stabilité industrielle en établissant un cadre viable et potentiellement permanent de négociation collective, tout en maintenant un équilibre réaliste entre les parties (stabilité). Ces trois objectifs ne sont pas considérés uniformément quand les commissions, au moment d'apprécier ces critères, paraissent changer d'attitude selon les types de requêtes qui se présentent.

Dans les accréditations initiales, les commissions semblent d'abord s'attacher à la stabilité et ainsi favoriser la négociation collective. La volonté des salariés n'est pas considérée comme particulièrement importante; lorsque l'accréditation existe, les désirs des travailleurs concernant la structure de l'unité semblent explicitement reconnus par les commissions.

Dans les cas de regroupements, on tient compte des trois objectifs. Lorsque les commissions sont en présence d'une requête pour élargir l'unité existante, celle-ci est considérée comme conforme à la philosophie de l'unité élargie et l'objectif premier de la stabilité se trouve favorisé en accordant de telles requêtes. De plus, lorsque le regroupement a pour conséquence d'assujettir un plus grand nombre de salariés à la négociation collective, on tient compte de la volonté des travailleurs sans hésitation par le recours à la tenue d'un vote à l'intérieur du groupe qu'on voudrait ajouter. Dans le cas de fragmentations, la « stabilité » n'est pas atteinte à moins que le groupe qui demeure dans l'unité ne soit si réduit qu'il perde son pouvoir de négociation ou qu'il y ait une requête subséquente de la part du groupe sectionné pour adhérer à une autre association. Il en résulte que, dans de semblables requêtes, les commissions ont accordé un poids considérable aux désirs des employés. La question qu'il faut se poser, c'est si l'unité « résiduelle » en est une qui est appropriée, ce qui est le critère utilisé dans la plupart des autres catégories. Dans une accréditation initiale où les commissions ont le choix de plus d'une unité appropriée, la plus petite unité ne sera retenue que là où il est nécessaire d'instaurer la négociation collective. On se sert du principe de l'« encouragement » pour justifier cette exception. Cependant, dans les cas de fragmentations où une unité plus étendue demeure plus appropriée (même si l'unité résiduelle peut aussi être une unité appropriée) pourquoi les commissions permettent-elles à l'unité plus restreinte de devenir une unité valable? La seule raison en est la volonté des employés. En fait, une commission ne devrait pas accorder une forme d'accréditation de nature à rendre cette unité moins appropriée que la structure de négociation déjà existante.

Les requêtes, dans lesquelles on demande la consolidation, ne réussiront que si les commissions estiment que cette mesure extraordinaire est nécessaire. Les requêtes en fusion sont généralement acceptées pour des motifs de stabilité; cependant, il existe des exceptions quand la situation antérieure démontrait que les relations déjà existantes peuvent assurer un fonctionnement efficace. Dans ce cas, les commissions sont disposées à se rendre à la volonté des salariés désireux de garder leurs représentants. S'il y a fragmentation dans ces circonstances, pourquoi y aurait-il pareille réticence à accréditer au départ des unités séparées lorsqu'il n'y a aucun entremêtement notable des travailleurs, les unités étant délimitées selon des frontières clairement justifiables et chacune représentant une portion raisonnable de la main-d'œuvre totale?

Les requêtes partielles consécutives à un maraudage échouent à cause du critère de la stabilité. Toutefois, si l'on considère la volonté des salariés d'obtenir une représentation distincte à la suite d'une fusion, il pourrait y avoir lieu, à l'intérieur d'une unité de négociation élargie, de permettre une représentation séparée d'une certaine partie de la main-d'œuvre. En outre, si l'on est disposé à autoriser une révocation partielle quand les employés choisissent de n'être plus représentés, les commissions ne devraient-elles pas, de façon à « encourager » la négociation collective, autoriser des groupes frustrés à choisir un représentant plus valable lorsque le sous-groupe lui-même répond aux exigences d'une unité de négociation appropriée? Cette politique a suscité des problèmes, soit la perception d'illogisme et d'injustice, parmi les membres de la communauté des personnes engagées dans le domaine des relations professionnelles. Les commissions des relations du travail canadiennes doivent proclamer leurs priorités fondées sur les trois objectifs énoncés précédemment.

D'un point de vue pratique, il y a trois approches possibles. La première consiste à choisir l'objectif de la stabilité comme mesure directrice, tout en se montrant plus hésitante à faire des exceptions à la règle de l'unité globale. La deuxième approche potentielle est de considérer qu'un degré normal de fragmentation ne fait pas de problème, quand il y a lieu de mieux répondre aux désirs des salariés. Dans ce cas, une unité appropriée devient viable et cette approche pourrait s'appliquer à tous les genres de requêtes. La troisième option serait d'adopter le critère de « plus approprié » et d'imposer la plus appropriée de toutes les unités possibles. Chacun de ces objectifs est légal. Ce qui importe, c'est une véritable politique des relations du travail.

En résumé, l'auteur soutient qu'il y a des contradictions manifestes entre les différentes commissions des relations du travail et ce qui est plus grave, à l'intérieur d'un même organisme quand il faut trancher la question de l'unité de négociation appropriée. Ce qu'il faut particulièrement noter, c'est l'approche différente que l'on choisit selon la nature de la requête. Les commissions des relations du travail au Canada doivent rendre leurs décisions selon un ordre des priorités (les objectifs) et ensuite appliquer cet ordre d'une façon uniforme pour tous les types de requêtes où la question du caractère approprié de l'unité est en jeu. Autrement, l'opportunité devient le seul objectif et il s'ensuit finalement une sérieuse confusion.

# *The Appropriate Bargaining Unit*

## *The Need for Policy Consistency*

### *by Canadian Labour Boards*

David C. McPhillips

*This paper discusses the policies of the Boards with regard to administrative changes, consolidations, accretions, mergers, partial raids and partial decertifications.*

Prior analyses of the decisions of Canadian labour boards with regard to appropriate bargaining units have emphasized the process of initial certification. However, decisions relating to subsequent changes in the bargaining unit have equal impact on the parties but for the most part have been overlooked. It is submitted that there exists in Canada a serious lack of consistency within and across boards when dealing with subsequent changes. As Abodeely notes, «when a standard is loosely defined and applied as to allow it to be used to *support* a conclusion rather than to *reach* one, then its continued effectiveness must be questioned»<sup>1</sup>.

The three objectives labour boards consider when structuring bargaining units are:

- (1) To respect the notion of freedom of choice on the part of the employees («wishes»).
- (2) To facilitate and perhaps even encourage the organization of workers into trade unions («encouragement»).
- (3) To encourage industrial stability by establishing a viable and potentially permanent framework for collective bargaining while maintaining a realistic balance of power between the parties («stability»).

Instead of all three objectives being treated consistently, the boards' weighing of the criteria seems to shift depending on the type of application before it.

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<sup>1</sup> John E. ABODEELY, *The NLRB and the Appropriate Bargaining Unit*, Industrial Research Unit, University of Pennsylvania, 1976, p. 12.

In the case of initial certifications, Canadian boards have adopted the position that the wishes of the employees are not critical and concentrated on the other two objectives. The boards have generally taken the view that «stability» is the more critical objective and that large-single units are the best means for accomplishing that goal. Therefore, «all-employee» units have in fact become «the» most appropriate unit despite claims that any appropriate unit can be certified. Only rarely have the wishes of the employees been a factor in the establishment of the scope of the bargaining unit<sup>2</sup>.

However, Canadian labour boards have the power to vary existing units under their reconsideration powers<sup>3</sup> but their approach to accretions, decretions, mergers, consolidations and partial raids is far more inconsistent. Some alterations to existing bargaining units will not ultimately affect the number of employees covered by collective bargaining. Included in this category would be changes related to simple housekeeping matters, consolidations of units, mergers, and raids on sub-sections of units (partial raids). On the other hand, other types of alterations, such as accretion or partial decertification, do affect the actual scope of collective bargaining coverage.

This paper discusses the policies of the Boards with regard to these other, often neglected areas, specifically, administrative changes, consolidations, accretions, mergers, partial raids, and partial decertifications. Then the paper presents an overall analysis of the problems, discusses alternatives, and offers some concluding remarks.

## ADMINISTRATIVE CHANGES

*Change of Name or Location:* The simplest alteration occurs where an employer changes name or locations and the trade union can apply for a simple name or address change on the certification. The use of variance procedures for such housekeeping or bookkeeping matters does not involve proof of membership support<sup>4</sup>. These technical variances are intended to be no more than a record of administrative changes and not a vehicle to accomplish expansion or contraction of the bargaining unit.

2 E.g. *A & A Service Company*, BCLRB 158/86; *Loomis*, BCLRB 407/84; *Wesco*, BCLRB 312/85.

3 *Olivetti Canada Ltd.*, [1975] 1 Can LRBR 60 (B.C.); *Oliver Co-Operative Growers Exchange*, (1962) 40 W.W.R. 333 (S.C.C.); *Canadian National Railways (Employees of the Regional Comptroller)*, 9 di 20, [1975] 1 Can LRBR 327, 75 CLLC 16,158 (Federal); *British Columbia Telephone Company*, 38 di 14; [1979] 3 Can LRBR 350; *Teleglobe Canada*, 32 di 270, [1979] 3 Can LRBR 86, 80 CLLC 16,025 (Federal); *McCoshan Van Lines*, Decision No. 474 (Federal); *Canadian Pacific Limited Vancouver*, Decision No. 482 (Federal).

4 *Imperial Optical*, BCLRB 151/78.

*New Location Added to Existing Operations:* A more difficult situation occurs where the employer retains the existing location and opens up a new location. In cases where a board finds that the new location is simply being used to perform work which has been done by employees of the existing bargaining unit, then the bargaining rights will be protected and the certification will be varied to include the new location<sup>5</sup>. However, if the changes are deemed to involve expansion or contraction of a unit, then the boards will apply the appropriate principles that are discussed later in this paper.

*Revision of Descriptions:* Occasionally there are applications from trade unions or employers to adjust a description to more accurately represent what is actually occurring in the operation. Often this is a case of merely clarifying or simplifying the description of the bargaining unit<sup>6</sup>.

## CONSOLIDATION OF BARGAINING UNITS

The boards' reconsideration powers have been held to include the authority to order the consolidation of bargaining units<sup>7</sup>. An application to consolidate a number of existing bargaining units will be viewed with suspicion if it involves the loss of bargaining rights for a trade union. The British Columbia Board has set out pre-conditions to a consolidation application being successful:

«...First, it is clear that the Board will not lightly interfere with established bargaining structures, particularly in cases where to do so would result in the loss of bargaining rights for one of the trade unions involved. Rather, consolidation of existing bargaining units is an extraordinary measure which the board will resort to only in situations where there is a serious labour relations problem for which consolidation is the result most able to further the principles and policies of the Labour Code.

Second, the board will not consider s.36 consolidation applications in the same way in which it considers fresh applications for certification, where it is writing on a

<sup>5</sup> *Inglis Limited*, BCLRB 125/86; *Imperial Optical*, *id.*

<sup>6</sup> *Canada Ports Corporation*, Decision No. 507 (Federal); *Teleglobe Canada*, *supra*, note 3; *British Columbia Telephone Company*, *supra*, note 3; *Canadian Broadcasting Corporation* (1982), 44 di 19; and 1 CLRBR (NS) 129, recently confirmed by the Federal Court of Appeal (as yet unreported judgement no. A-467-82, Jan. 22/85).

<sup>7</sup> *MacMillan Bloedel (Alpulp)*, [1982] 2 Can LRBR 115, upheld [1982] 2 Can LRBR 488; *B.C. Ice*, [1978] 2 Can LRBR 545; *B.C. Equipment Ltd.*, BCLRB No. 156/74; *Re Office and Technical Employees' Union*, *Loc. 15* (1982), 40 B.C.L.R. 59, 140 D.L.R. (3d) 685 (S.C.B.C.); *Re C.U.P.E., Local 41 and Board of Industrial Relations for Alberta*, (1971) 17 D.L.R. (3d) 302; *Winnipeg Clinic v. The Manitoba Labour Relations Board and Manitoba Paramedical Association*, [1980] 6 W.W.R. 122; *Canadian Pacific Limited*, [1976] 1 Can LRBR 361; *Re CUPE Local 41 and Board of Industrial Relations for Alberta*, (1978) 84 D.L.R. (2d) 710 (Alta. C.A.).

'clean slate' insofar as a bargaining unit configuration is concerned... The Panel might well conclude that, for historical and practical reasons, a large, all employee unit would not be an appropriate response.

Third, the kind of jeopardy which an Employer or other applicant relies on in support of such an application must be of a real and profoundly serious nature. A consolidation application based on mere speculation about the industrial relations consequences of fragmented bargaining will not succeed... The Board must be satisfied that effective industrial relations have been virtually, frustrated by the impugned bargaining structure.»<sup>8</sup>

In situations where a proliferation of small groups has occurred due to a board's desire to encourage collective bargaining, consolidation can be used to avoid excessive fragmentation. The Federal Board has indicated that it favours the amalgamation of units «primarily to prevent the fragmentation of existing appropriate units when there are no compelling reasons to fragment them»<sup>9</sup>.

The British Columbia Board has rejected consolidation applications based on merely historical patterns and the absence of jeopardy to the employer<sup>10</sup>. The Federal Board has similarly refused such applications<sup>11</sup>.

The boards will not permit the unions to use the consolidation process to overcome failures in collective bargaining. For example, the Federal Board rejected such an application in *Bank of Montréal*,<sup>12</sup> where the union attempted to consolidate single branch units on the basis that a merged unit would give more emphasis to the collective bargaining process rather than the organizational opportunity which the single branch unit facilitated.

However, Ontario Board has indicated that, in its view, its powers of consolidation are different from those of the British Columbia and Canada Boards:

«The different approaches of the B.C. and Canada boards can be justified on institutional and historical considerations that do not apply in Ontario. Because certificates in the federal jurisdiction originally listed the categories of employees in-

<sup>8</sup> *MacMillan Bloedel Limited (Alpulp)*, (1985) 8CLRBR (NS) 42 at 65-66; see also *B.C. Ice*, *supra*, note 7; *Canadian Cellulose Company Limited*, BCLRBR 24/77; *MacMillan Bloedel Limited (Alpulp)*, *supra*, note 7; in the case of the IBEW and *Johnston Terminals Limited*, BCLRBR L168/81.

<sup>9</sup> *National Harbors Board*, No. 414 (Federal), p. 15; *Canadian Pacific Limited, Vancouver*, *supra*, note 3; *C.B.C.*, [1977] 2 Can LRBR 481; *Conseil des Ports Nationaux*, (1983) 52 di 34 (Federal).

<sup>10</sup> *B.C. Equipment Company Limited*, *supra*, note 7; *MacMillan Bloedel (Alpulp)*, *supra*, note 8; *Cancer Control Agency of British Columbia*, BCLRBR L64/83; *Mainland Manufacturing*, [1981] 3 Can LRBR 70 (B.C.); and *J.S. Galbraith and Sons Limited*, BCLRBR 156/74.

<sup>11</sup> *National Harbors Board*, *supra*, note 10, pp. 16-17.

<sup>12</sup> [1982] 2 Can LRBR 380.

cluded in a bargaining unit rather than describe the unit as 'all employees save and except...', there was no scope for natural accretion. As new job classifications became established it was necessary to update the certificate accordingly. In British Columbia, on the other hand, the jurisdiction to rationalize existing bargaining units stands on the legislative underpinning of that Board's jurisdiction to establish councils of trade unions. Section 57 of the B.C. Labour Code gives the B.C. Labour Relations Board express authority to consolidate bargaining units, whether or not they are held by the same union and to establish a council of trade unions as bargaining agent for a consolidated unit. An integral part of the B.C. Board's consolidation power is the express legislative authority to amend, extend, nullify or establish, in whole or in part, the terms of collective agreements as required in the circumstances. Those are powers which this Board does not have. We do not see, moreover, how such powers can be implied from the Board's reconsideration power in light of the decision of the Supreme Court of Canada, unanimous on this point, that a Board certificate is spent once a collective agreement is entered into. (See, *Terra Nova Motor Inn Ltd.*, *supra*)<sup>13</sup>

For this reason, the issue of consolidation (as with partial decertification) has not been the subject of much analysis by the Ontario Labour Board.

## ACCRETION

In order to add a new group of employees to an existing unit, the trade union must first demonstrate that the proposed larger unit will be appropriate. If the new application is to add all presently unrepresented employees, then the bargaining unit would likely be appropriate as the new unit will correspond to the Board's preference for all-employee units.

However, if the application is for the addition of only a segment of the unrepresented portion of the workers then the boards will carefully examine the appropriateness of the proposed unit. The B.C. Board has rejected as being too rule-oriented the argument that «where an application is made to add a new group of employees to an existing bargaining unit, and where the employees referred to in the application amount to only a portion of the presently unrepresented work force, the trade-union should be required to satisfy the Board that the group which it seeks to add, standing alone, would constitute a unit appropriate for collective bargaining»<sup>14</sup>. Instead, the Board chose to adopt the approach that «the Board must be satisfied that the component parts of the suggested structure — including the proposed additional employees — can combine to make up an appropriate bargaining unit; however, that does not mean that each of those component groupings must individually be appropriate»<sup>15</sup>.

<sup>13</sup> *City of Toronto*, [1982] 1 Can LRBR 68, p. 71.

<sup>14</sup> *Canadian Kenworth*, [1979] 2 Can LRBR 64, p. 66.

<sup>15</sup> *Id.*, p. 67.

The second issue relating to an accretion application relates to the question of majority support. There is a different approach among jurisdictions concerning whether it is a majority of the «new enlarged unit» or of only the «added» group which is relevant. In British Columbia, the union must organize the new employees and demonstrate that a *majority of the new employees* it seeks to represent wish to be represented in collective bargaining by the trade union<sup>16</sup>.

The Alberta and Saskatchewan Boards have in effect adopted the same approach although it is described in those jurisdictions as a «double test». First, the applicant must be able to demonstrate majority support in the group of employees to be added. Second, it must also be demonstrated that majority support exists in the new, enlarged unit. The second test, however, is easily satisfied because of the Board's acceptance of the presumption of majority support in the original unit. Therefore, in the absence of evidence to the contrary, overall majority support can be assumed<sup>17</sup>. However, this can be a dangerous assumption; the original unit might in fact prefer no unit at all to a merged one.

George Adams indicates that the authorities are divided, even within various jurisdictions:

«...One line of authority states that the incumbent union can expand an existing unit to include a further group of employees only where it has organized a majority of employees in the new group. [See *Olivetti Canada Ltd.*, [1975] 1 Can LRBR 60 (B.C.); *Bestview Holdings*, [1983] OLRB Rep. Aug. 1250; *University of Saskatchewan v. CUPE Local 1975 et al.*, 78 CLLC 14,159, [1978] 2 S.C.R. 834, 22 N.R. 314.] An opposing line of authority holds that it is sufficient if the union can show it has majority support in the enlarged unit. [See *Metcalfe Realty*, [1965] OLRB Rep. Sept. 385; *C.N.R. Co.*, 76 CLLC 16,003 (Can. Lab. Rel. Bd.); *John Biggins*, [1981] OLRB Rep. Dec. 1803.] Other cases draw a distinction between the employees pre-existing the original certification and those hired at a later time. In the latter case, the accretion argument based on support in the enlarged unit is enhanced and has been adopted. [See *Beechgrove Regional Children's Centre*, [1978] OLRB Rep. Aug. 716; *Foyer Lac et Chemin*, [1980] 1 Can LRBR 496 (Que.)»<sup>18</sup>

The Federal Board appears to use a more flexible approach<sup>19</sup>. In *Teleglobe*, the Board summarized its policy related to employee support:

<sup>16</sup> *Olivetti Canada Ltd.*, *supra*, note 3; *Automatic Electric (Canada) Ltd.*, [1976] 2 Can LRBR 97 (B.C.); *University of British Columbia*, BCLRB L144/80; *Reliance Lumber*, [1975] 1 Can LRBR 101 (B.C.); *B.C. Forest Products Ltd.* (1984), 7 CLRBR (NS) 309; *Ksan House Society*, BCLRB 25/86.

<sup>17</sup> *Town of Claresholm*, (1983) 4 CLRBR (NS) 385 (Alta.); *Prince Albert Co-operative Association Limited v. Retail, Wholesale and Department Store Union, Local 496 and the Labour Relations Board of the Province of Saskatchewan*, [1983] 1 W.W.R. 549 (Sask.).

<sup>18</sup> G. ADAMS, *Canadian Labour Law*, Canada Law Book, 1985, Toronto, p. 345.

<sup>19</sup> *British Columbia Telephone Company*, *supra*, note 3; *Teleglobe Canada*, *supra*, note

«...[T]his Board will take into account only the overall majority status of the applicant union following an application for revision which does not affect the nature of an existing bargaining unit but we will require proof of majority support among the employees added when the application for revision would radically change the bargaining unit.»<sup>20</sup>

The Board reiterated that view in *Canadian Pacific Limited, Vancouver*<sup>21</sup> wherein they stated that in the event that the changes do not affect the essential or fundamental nature or the object of the original certification order, then the board will not canvass the wishes of the employees sought to be represented<sup>22</sup>.

The reason for these various requirements by the boards is to preclude a «beach-head» approach whereby the trade union could obtain certification for a small group and then simply «add on» other employees without organizing them<sup>23</sup>.

In the case of voluntary recognition units where the parties have adopted longstanding arrangements which differ from the scope of the formally designated bargaining unit the boards will vary the certificate to represent the actual reality of the arrangement. For example, in *Automatic Electric (Canada) Ltd.*, where the union had never represented the sales staff (although they were not excluded in the original certification), the B.C. Board varied the certificate to explicitly exclude the sales staff and then, on the basis of the *Olivetti* principles, held that the union would have to organize those sales employees before they would be included in the unit. Similarly, the Canada Board has noted that it would be difficult to apply *Teleglobe* accretion principles where a trade union's bargaining rights have derived from voluntary recognition<sup>24</sup>.

The Ontario Board is particularly reluctant to alter voluntary arrangements through the reconsideration process:

«...A fundamental principle applied by this Board is that a certificate granted ceases to have the same legal significance once a first collective agreement is entered into. From that point it is, *prima facie*, the collective agreement which embodies the description of the bargaining unit and which determines the scope of the bargaining rights exercised by the union. Working from the original certificate the parties may expand or contract the scope of the bargaining unit by agreement, and the certificate gives way to the recognition clause in their collective agreement. [Beverage Dispensers and Culinary Workers' Union, Local 835 v. *Terra Nova Motor Inn Ltd.*, 74 CLLC para. 14,253 (S.C.C.); *Gilbarco Canada Ltd.*, [1971] OLRB Rep. Mar. 155

<sup>20</sup> *Id.*, p. 332.

<sup>21</sup> *Supra*, note 3.

<sup>22</sup> *Id.*, p. 13.

<sup>23</sup> *Board of School Trustees of Prince George v. International Union of Operating Engineers*, [1974] 1 W.W.R. 197 (S.C.B.C.); *Reliance Lumber*, *supra*, note 16.

<sup>24</sup> *Canadian Pacific Limited, Vancouver*, *supra*, note 3, p. 14.



at 157.] In recognition of the importance of voluntarism and consensual outcomes in the collective bargaining process this Board has never considered that its jurisdiction to reconsider the scope of a certificate extends to it the authority to amend the scope of bargaining rights that have been incorporated in collective agreements. Its approach in that regard is to be contrasted with the jurisdiction exercised by the Canada Labour Relations Board and the B.C. Board [cf. *B.C. Ice & Cold Storage Ltd.*, [1978] 2 Can LRBR 541 (B.C.); *Teleglobe Canada*, [1979] 3 Can LRBR 86 (Can.); *B.C. Telephone Company*, [1979] 3 Can LRBR 350 (Can)].»<sup>25</sup>

A related problem is posed by the subsequent voluntary agreement to add members to an existing unit. The Ontario Board dealt with this problem in *Bestview Holdings Limited*, *supra*, and held that a voluntary agreement to add additional employees is distinguishable from voluntary recognition of a new unit, and is not valid unless a majority of the *additional* employees support the union<sup>26</sup>. On this basis, it was held that accretion by voluntary recognition must be treated differently.

«Future» employees, of course, are a different matter and have been added voluntarily by the parties in Ontario<sup>27</sup>. The notion of «anticipatory accretion» has also arisen in British Columbia. In some instances where that Board has chosen to initially certify a sub-section of the employees rather than an all-employee unit, a proviso has been added that, if and when other employees wish to be represented by a trade union, they would have to seek representation through the union which was already certified to that employer<sup>28</sup>.

Interestingly, this approach can be compared to that in the United States, where the problem of accretion is viewed differently. Applications are distinguished on the basis of whether the additional employees constitute an accretion to the existing bargaining unit or a new grouping of employees which requires a section 9(c)(1) representation election:

«The determination of the status of the additional employees centers upon an examination of certain factors in order to ascertain the presence or absence of a common community of interests. Consideration is given to such factors as the history of the bargaining unit, the geographic proximity or isolation of the new employees, the functions, duties, and skills of the entire work force, and the administrative territories or sub-divisions of the employer. Should the Board determine that an accretion has occurred the new employees will immediately become members of an existing unit. On the other hand, if no accretion is found, a section 9(c)(1) representation election will be directed. It is this latter situation in which the *Globe* doctrine may find applicability. For example, when an employer creates a new department and the Board, through an examination of the relevant factors, determines that the new department could appropriately be a separate unit or an addition to the existing

<sup>25</sup> *City of Toronto*, *supra*, note 13, at 71.

<sup>26</sup> *Bestview Holdings Limited*, [1981] OLRB Rep Sept. 185 (Ont), p. 241.

<sup>27</sup> *Id.*, p. 246.

<sup>28</sup> *Amon Investments Ltd.*, BCLRB 39/78; *J & L Meats*, BCLRB 328/84.

unit, a self-determination election will become the controlling determinant. Should the Board conclude that the new department could not separately constitute an appropriate bargaining unit, the *Globe* election would be inapplicable. Similar results have been reached in cases involving 'new operations' and 'new plants'.»<sup>29</sup>

Therefore, it appears that, in the United States, unless the new employees really belong in the «middle of the existing unit», then a vote is required.

## MERGERS, SUCCESSORSHIP OR TRANSFERS OF JURISDICTION

The boards may have to deal with bargaining rights following a sale or transfer of a business. In some instances, the merger or successorship of operations will not give rise to an integration of operation and there will be no intermingling of employees. In those cases, the pre-succession bargaining units will likely be preserved<sup>30</sup>.

Section 144(3) of the *Canada Labour Code* sets out explicit statutory prerequisites to the effect that the board must initially determine that there has been an intermingling, although the Board has held it does not need to be a total integration<sup>31</sup>. Similarly, in Ontario, there is also a statutory prerequisite of «intermingling of employees» under Section 55(6) of the *Labour Relations Act* before a merger of units can occur. Even if the intermingling does not occur until some time after the sale, the Ontario Board still has jurisdiction to order a merger of the units<sup>32</sup>. Similarly, in B.C. the Board may merge the units at a later date<sup>33</sup>. In Ontario, «negligible» intermingling has been overlooked<sup>34</sup>.

Therefore, bargaining unit appropriateness will become an issue where there is an intermingling of employees from two separate organizations. The first scenario involves cases when union and non-union workers are intermingled. Adams observes that the boards have discretion to adopt one of several approaches:

«It may characterize the situation as one where the union's bargaining rights should be terminated if the union represents only a small percentage of employees, or a vote may be ordered to determine the union's status; or the union's status may be continued without a vote if it has sufficient support among the employees in the relevant

<sup>29</sup> ABODEELY, *supra*, note 1, pp. 72-73.

<sup>30</sup> *B.C. Equipment*, *supra*, note 7.

<sup>31</sup> *Quebecair*, No. 447, (Federal); *Eastern Canada Towing Ltd.*, 24 di 152 (Federal); *Seaspan International*, [1979] 2 Can LRBR 213 (Federal); *Airwest Airlines Ltd.*, [1981] 1 Can LRBR 427 (Federal).

<sup>32</sup> *Bryant Press Limited*, [1972] OLRB Rep. Apr. 301.

<sup>33</sup> *Bridge YWCA*, [1975] 2 Can LRBR 253 (B.C.).

<sup>34</sup> *City of Peterborough*, [1979] OLRB Rep. Feb. 133; *Oshawa Wholesale Ltd.*, [1965] OLRB Rep. Feb. 584.

bargaining unit. On the other hand, where a unionized firm purchases a non-unionized firm, it has been held that the intermingling provisions have no application because there are no bargaining rights of the predecessor employees to preserve. The status of the predecessor employees then is a matter for arbitration.»<sup>35</sup>

The second possibility is that the merger involves companies which each have a unionized workforce. In those cases, the boards will initially have to determine what constitutes an appropriate unit under the new circumstances. The boards must determine whether the employees constitute one or more units for collective bargaining, determine which trade union shall be bargaining agent for the employees in each unit, and amend certificates to that effect.

The basic options available were outlined in *Inter-City Express Ltd.*; namely (i) the continuation of both units as they were before; (ii) the absorption of the smaller unit into the larger if only one unit is appropriate; or (iii) if only one unit is appropriate and the Board cannot determine which bargaining agent should represent the new unit without a vote, the holding of a vote among the employees to determine the new bargaining agent for the new unit<sup>36</sup>.

Although there is a strong argument for giving priority to accommodating existing bargaining unit rights within the new structure, from a review of these decisions, it is clear that Canadian labour boards prefer to merge the existing units<sup>37</sup>.

However, the Canada Board has indicated that, the larger the merged employer, the more need there may be for specialized units<sup>38</sup>. In *Pacific Western Airlines Ltd.*, *supra*, a vote was conducted notwithstanding a significant disparity in the size of the units. In *Airwest Airlines Ltd.*, *supra*, historical patterns dictated that three separate bargaining units should be established within the seven merged airlines and a vote was ordered in each intermingled unit to determine representation.

Once a board decides that one combined unit is appropriate, then the issue of which trade union is to be certified arises. If the units are heavily disproportionate in size, no vote will be necessary and the smaller unit will

<sup>35</sup> ADAMS, *supra*, note 18, pp. 420-1.

<sup>36</sup> [1974] 1 Can LRBR 471 at 474.

<sup>37</sup> *Kelly Douglas*, [1974] 1 Can LRBR 77 and [1974] 1 Can LRBR 426; *F & W Wholesale*, BCLRB 1/77; *Bridge YWCA*, *supra*, note 33, LRBR 253; *Provost Cartage Inc.*, (1983) 4 CLRBR (NS) 248; *Quebecair*, *supra*, note 31; *Teleglobe Canada*, *supra*, note 3; *Seaspan International*, *supra*, note 31; *CNR*, No. 468, (Federal); *Canadian Pacific Limited*, *Vancouver*, *supra*, note 3; *Alliance Dairy*, [1966] OLRB Rep. Aug. 336; *City of Mississauga*, [1974] 1 Can LRBR 167 (Ont); *Regional Municipality of Halton*, [1978] OLRB Rep. Aug. 750.

<sup>38</sup> *Pacific Western Airlines Ltd.*, [1980] 3 Can LRBR 180, (Federal).

simply be absorbed into the larger one<sup>39</sup>. In *Boston Bar Lumber*,<sup>40</sup> the B.C. Board did give the smaller unit the opportunity to vote as to whether they wished to be included within the larger unit or to relinquish collective bargaining rights completely<sup>41</sup>.

In Ontario, where the disparity in size is small, a vote will be required. Although no strict guidelines have been set out, it appears that if the smaller unit comprises 25% or more of the merged unit, the Ontario Board will likely require a vote<sup>42</sup>.

As is the case with other types of alterations to an existing unit, the boards will not permit successorship applications to become a disguised application for certification; successorship is not to be used as a substitute for organization<sup>43</sup>.

## PARTIAL RAIDS

Partial raid applications *prima facie* flow against the current of single all-employee units and so there are not many examples of successful applications of this nature in Canadian labour law. The general approach of the labour boards was described by George Adams:

«Boards regularly refuse to carve out a craft group because of their aversion to fragmentation and their deference to a history of relatively satisfactory collective bargaining. The carving out of a smaller unit is very much an exception. [See *Mac-Millan Bloedel Ltd., Harmac Division* (1982), 2 Can LLRBR (N.S.) 91 (B.C.)] Nevertheless, constitutional concerns may cause a federal unit to be carved out of a provincial enterprise. [See *Johnston Terminals & Storage Ltd.*, [1980] 2 Can LRBR 390 (Can.)] Geographic factors can also be relevant. [See *Hydro-Electric Power Com'n of Ontario*, [1969] OLRB Rep. May 169] Or there may be an exceptionally strong community of interest argument in favour of a separate and smaller unit. [See where the Quebec Labour Court permitted the carving out of paramedical craft units from a larger bargaining unit in *CLSC de Trois-Saumons*, [1980] 2 Can LRBR 319 (Que.)] Nevertheless, the general governing rule is that the appropriate bargaining

<sup>39</sup> *Kelly Douglas*, *supra*, note 37; *Bridge YWCA*, *supra*, note 33; *Smithrite Disposal*, BCLRB 86/83.

<sup>40</sup> BCLRB 23/76.

<sup>41</sup> See also *Stadco Forest Products*, [1979] 3 Can LRBR 477; *Western and Williams*, BCLRB 22/86.

<sup>42</sup> *Alcan Building Products Ltd.*, [1968] OLRB Rep. May 212; 28% in *Borden*, [1970] OLRB Rep. Jan. 1244; and 33% in *Bryant Press Limited*, [1972] OLRB Rep. Apr. 301 and *Canadian Trailmobile*, [1969] OLRB Rep. Jan. 1077; *Silverwood Dairies* [1981] 1 Can LRBR 442; *Middlesex-London District Health Unit*, [1971] OLRB Rep. Sept. 560; *The Regional Municipality of Waterloo and the Corporation of the City of Cambridge*, [1973] OLRB Rep. June 302.

<sup>43</sup> *Interior Diesel*, [1980] 3 Can LRBR 563 (B.C.); *Canadian Appliance Manufacturing Company Ltd.*, BCLRB L22/79.

unit in a raid is the pre-existing unit. [See *Metro Transit Operating Co.*, [1982] 1 Can LRBR 113 (B.C.); *Harding Carpets*, [1975] OLRB Rep. July 566; *IMP Group Ltd.*, [1979] 3 Can LRBR 264 (N.S.); *City of Regina*, *supra*, footnote 8; *Canada Cement Lafarge Ltd.*, [1983] OLRB Rep. Feb. 214; and see *Labour Relations Act*, S.M. 1972, c.75, as amended, s.31(2).»<sup>44</sup>

The Federal Board has adopted the policy that the fragmentation of an existing unit is generally not desirable<sup>45</sup>. Similarly, in Ontario the basic requirement is that the raiding union make application for the entire existing unit. The general practice is to view the established bargaining structure as appropriate; there is a reluctance to carve up an already existing broad-based structure<sup>46</sup>. However, the Ontario Board has set out the potential exception to this principle:

«...the incumbent trade union may clearly have failed to represent a distinct and cohesive group adequately, a problem that has sometimes reared its head in the relationship of skilled and unskilled employees. This problem of unsatisfactory representation may be combined with a capacity in the employer to tolerate somewhat greater fragmentation, particularly if the smaller unit sought can meet the principles of appropriateness generally applied to certification cases...»<sup>47</sup>

The Saskatchewan<sup>48</sup> and Nova Scotia<sup>49</sup> boards have been equally reluctant to balkanize existing units in the absence of very compelling reasons. The Labour Code of Newfoundland (Section 38) sets out four specific statutory requirements which must be met before the board can find the sub-group appropriate:

- (a) the sub-group meets the standards of appropriateness that the Board normally applies;
- (b) the applicant for certification has established a clear basis for mutuality in the sub-group distinct from the group as a whole;
- (c) the residual part of the existing unit would itself make an appropriate unit; and

<sup>44</sup> *Supra*, note 18, p. 314.

<sup>45</sup> *Canadian Pacific Limited, Vancouver, supra*, note 3; see also *CNR, supra*, note 37, No. 468; *Atomic Energy of Canada Limited*, [1978] 1 Can LRBR 92.

<sup>46</sup> *Ontario Hydro*, [1980] OLRB Rep. June 882; *Scarborough General Hospital*, [1984] OLRB Rep. Dec. 1765; *Bestview Holdings Limited, supra*, note 26; *Toronto Star Ltd.*, [1974] OLRB Rep. July 416; *Harding Carpets Ltd.*, [1975] OLRB Rep. July 566; *Gilbey Canada Ltd.*, [1974] OLRB Rep. Apr. 257; *Ontario Hydro*, [1978] OLRB Rep. Aug. 754; *Ethyl Canada Ltd.*, [1979] OLRB Rep. Oct. 965; *Toronto East General and Orthopaedic Hospital Inc.*, [1981] Rep. Feb. 225; *Scarborough Public Utilities Commission*, [1982] OLRB Rep. June 929; *Canada Cement Lafarge Ltd.*, [1983] OLRB Rep. Feb. 214; *Canadian Red Cross Society Blood Transfusion Service*, [1978] OLRB Rep. May 408; *Milltronics Ltd.*, [1980] OLRB Rep. Jan. 56; *WMI Waste Management of Canada Inc.*, [1981] OLRB Rep. Mar. 409; *Scarborough Public Utilities Commission*, [1982] OLRB Rep. June 929.

<sup>47</sup> *Ontario Hydro, id.*; see also, *University of Guelph*, [1975] OLRB Rep. Aug. 327.

<sup>48</sup> See: *City of Regina*, [1980] 3 Can LRBR 390; *Westfair Foods Limited*, File No. 086-80, May 26, 1980; *Province of Saskatchewan* (1975), 76 CLLC para. 16,043.

<sup>49</sup> *I.M.P. Group Limited*, [1979] 3 Can LRBR 264, (N.S.).

- (d) the employees in the proposed unit, in a vote by secret ballot conducted by the Board, in which they expressed their preference for the sub group or the larger existing unit, has favoured the sub-group by a two thirds majority of those entitled to vote.»

These principles were applied in *McNamara Corporation of Newfoundland Limited*<sup>50</sup>.

The British Columbia Board has adopted the basic proposition that the attempted fragmentation of a unit by means of a raid will generally be unsuccessful, unless the applicant can show a «substantial basis why the integrity of the existing unit which has lasted over many years warrants such a drastic change»<sup>51</sup>.

In summary, partial raids are unlikely to be successful in the absence of some very extraordinary circumstances. But this rigid approach gives rise to a potential inconsistency, namely, a «one-way» raiding situation:

«...The International Union of Operating Engineers is certified to represent units of stationary engineers in several of the province's hospitals. However, the number of these units is declining because of applications made by the Hospital Employees Union to expand its broader units of hospital employees to include the stationary engineers. These applications amount to raids by means of the vehicle of a variance, but the board will not permit the same process in reverse. That is to say, the continued existence of some craft units of stationary engineers is not sufficient to persuade the board to carve out such a unit from a Hospital Employees Union unit. Relying upon its policy against fragmentation of existing units, the board rejected such an application in *G.R. Baker Memorial Hosp. and I.U.O.E., B.C.L.R.B.* Decision No.. L106/82. The net result is described by the International Union of Operating Engineers as 'one way raiding' but the board's decision withstood an application for judicial review.»<sup>52</sup>

## PARTIAL DECERTIFICATION

Partial decertification is the term used to refer to the process by which part of the trade-union's certification is cancelled. It is a misnomer as the process is really a variation by way of «decretion» or «deletion». The certification order is not «cancelled» in the sense that a trade union ceases to have bargaining rights. The certificate is merely varied to remove some employees or jobs; it is a change or variance in the definition of the appropriate bargaining unit.

<sup>50</sup> [1979] 2 Can LRBR 193, (Nfld.).

<sup>51</sup> *Metro Transit Operating Company*, BCLRB 77/81, [1982] 1 Can LRBR 113; see also, *B.C. Forest Products Limited*, [1982] 1 Can LRBR 472; *Hudson's Bay Company*, BCLRB L23/82; *Corporation of the District of West Vancouver*, BCLRB L26/82; *White Spot Ltd.*, [1976] 1 Can LRBR 241; *Mainland Manufacturing*, BCLRB 21/86.

<sup>52</sup> R. GERMAINE, «The Structure of Bargaining under the Labour Code», *The Labour Code of B.C. in the 1980's*, Carswell Legal Publications, Vancouver, 1984, pp. 77-98 at p. 86.

Most jurisdictions do not overtly recognize this process. Certainly, decertification provisions do not apply to partial decertifications on the basis of the statutory requirement that a decertification must be supported by a «majority of employees in the unit»<sup>53</sup>.

There are provisions in the Codes in Prince Edward Island (s.17), New Brunswick (s.22-1), and Nova Scotia (s.26-1) to the effect that a certificate can be amended to «exclude specific classifications of employees from the unit». Whether this can be interpreted as a partial decertification provision or whether it merely refers to variance for exclusions (e.g., managerial, confidential) is uncertain.

Similarly, in the United States, the *National Labour Relations Act* provides for an election where it is asserted that «the individual or labor organization, which has been certified or is being recognized by their employer as the bargaining representative, is no longer a representative...»<sup>54</sup> The NLRB has held that the decertification petition must be «coextensive with the currently recognized contract unit»<sup>55</sup>.

However, the structure of a work force can change over time and what was once an appropriate bargaining unit may no longer be so. British Columbia is the only jurisdiction in which this issue has been thoroughly canvassed<sup>56</sup>. Before a variance will be granted, the Board must be convinced that the residual unit would remain an appropriate unit<sup>57</sup>. Further, partial

<sup>53</sup> J. DORSEY, *Canada Labour Relations Board; Federal Law and Practice*, Carswell, 1983, p. 152; ADAMS, *supra*, note 18, p. 435ff.

<sup>54</sup> S.9(c)(1)(A)(ii).

<sup>55</sup> *W.A. Foote Memorial Hospital, Inc.*, 1977, C.C.H. NLRB para. 18,317, Case No. 7-RD-1329, June 27; (at p. 30413); *W.T. Grant Company*, 1969 C.C.H. NLRB para. 21,370; *General Dynamics Corp. (Electric Boat Division)*, 1962 C.C.H. NLRB para. 11,918, Case No. 1-RD-379, August 31; *Erickson Transportation Company*, 1964 C.C.H. NLRB para. 12,980, Case No. 18-RD-321, March 19; *Gould National Batteries, Inc.*, 1964 C.C.H. NLRB para. 13,301, Case No. 18-RD-319, May 5; *Standard Oil Company of California (Western Operations, Inc.)*, 63-1 C.C.H. NLRB para. 12,100 Case No. 21-RD-639, February 7.

<sup>56</sup> *Canadian Appliance Manufacturing*, BCLRB L22/79; *Vancouver City Savings*, BCLRB L5/83, upheld on appeal BCLRB L66/83; *B.C. Teachers Credit Union*, BCLRB 362/84; *Woodwards Stores*, BCLRB L124/79; *Martin Bower of Canada Ltd.*, BCLRB 214/84; *Van Horne Electric Ltd.*, BCLRB 180/85, upheld in BCLRB 12/86; *All West Glass Smithers Ltd.*, BCLRB 200/85; *Famous Players Limited (Guilford Theatre)*, BCLRB 228/85; *Borden Company Limited*, BCLRB 15/86; *Pacific Brewers Distributors Ltd.*, (1985) 9 C LRBR (NS) 29; *Westar Timber Ltd.*, BCLRB 47/86 (reversed on appeal on a question of fact, BCLRB 67/86).

<sup>57</sup> *Overwaitea Foods*, BCLRB 55/80; *Vancouver City Savings*, *id*; *Westar Timber Ltd.*, *id*; *Vancouver Cold Storage*, [1980] 1 Can LRBR 388; *Van Horne Electric*, *id*; *All West Glass Smithers Ltd.*, No. 200/85; *Famous Players Limited (Guilford Theatre)*, *id*.

decertifications, thus far, have involved cases where the disenchanted employees had previously been varied into the original certification,<sup>58</sup> although there have been a couple of exceptions to this<sup>59</sup>.

In *Westar Timber Ltd.*,<sup>60</sup> an application for a partial decertification was made by the office workers, who had previously been consolidated into the bargaining unit. This particular application was dismissed by the Board but the possibility of such variances was clearly acknowledged:

«To reiterate, the issue in applications of this nature is one of the appropriateness of the bargaining unit, and more particularly, whether the existing unit continues to be appropriate. Starting from the point of view of respect for the existing bargaining unit, the Board will consider in such applications the usual factors it considers in any appropriate bargaining unit determination: administrative efficiency and convenience in bargaining, industrial stability, lateral mobility of employees, common framework of employment conditions, community of interest amongst employees, geography, bargaining history, the structure of bargaining units generally in the particular industry, employee wishes, and so forth.

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In summary, an application which seeks to exclude a group of employees from a bargaining unit will have to show that it is no longer appropriate for them to be included in that unit. For example, experience may demonstrate that the employees' interests cannot be adequately represented as part of the existing unit. Other conditions, such as geographic location or the structure of bargaining units in the particular industry, may have changed giving rise to different conclusions with respect to the factors of administrative efficiency and convenience in bargaining and the community of interest amongst the employees in respect of their inclusion in the bargaining unit.<sup>61</sup>

The effect of a partial decertification must be distinguished from that of the partial raid. The effect of partial decertification is that the subgroup ends up non-unionized, at least for the immediate future<sup>62</sup>. Further, in the case of a partial raid, the employer would be left to deal with more than one unit and more than one bargaining agent. It is the proliferation of bargaining agents that has been held to be major reason for disallowing partial raids.

It is most important, however, that policy be consistent in these two areas as a partial decertification followed by a new application could be used in an attempt to end-run the existing policy against partial raids. Ap-

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<sup>58</sup> *Westar Timber Ltd.*, *id*; *Martin-Brower of Canada Ltd.*, BCLRB 214/84; *B.C. Teachers' Credit Union*, BCLRB 361/84; *Pacific Brewers Distributors Ltd.*, *supra*, note 56.

<sup>59</sup> *Vancouver City Savings*, *supra*, note 56, and *Van Horne Electric Ltd.*, *supra*, note 56.

<sup>60</sup> *Westar Timber Ltd.*, *supra*, note 56.

<sup>61</sup> *Id.*, at p. 16 and 19.

<sup>62</sup> *Vancouver City Savings*, *supra*, note 56, p. 3.



plications for partial decertification have been dismissed where it was felt the applications are merely a transparent attempt to change bargaining units<sup>63</sup>.

Further, it is questionable whether it is relevant how the applicant group originally became certified. What difference is there whether the group was added to an existing certificate, whether it was the original group certified to which another group had been later added, or whether it was merely a section of the original certification? Conceptually, this seems to be a specious issue.

Certification is «not a property right» vesting in the trade union and therefore a certificate should be subject to alteration under variance provisions. The real issue before the boards in «partial decertification» cases is what is «an appropriate bargaining unit» but it appears that the many Canadian boards have failed to focus on this consideration.

## ANALYSIS

At the stage of an initial certification, the boards must pay closer attention to the true «appropriateness» of the bargaining unit. Excessive flexibility at this juncture will cause later inconsistencies to arise. In initial certifications the boards appear to first look to stability and then to encouragement of collective bargaining. The wishes of the employees are not considered as particularly important. Once a certification exists, however, the wishes of the employees relating to the structure of the unit seem to be more explicitly acknowledged by the boards.

In cases of accretion, all three objectives seem to be considered. When the boards are faced with an application to broaden an existing unit, the application fits in with the large unit philosophy, and the primary stability objective is furthered by granting such applications. Additionally, accretion results in more employees being covered by collective bargaining. The wishes of the employees concerning bargaining structure are considered quite openly through a vote of the segment to be added. Therefore, anomalies can be created because the «wishes» of the employees are treated differently in accretion cases and initial certification applications. Further, the accretion principles assume not only that the *existing* group wants the present bargaining structure (which in the absence of a decertification application should be true) but also would wish to be unionized within the larger unit (which may not be so). If the boards feel that a larger unit is

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63 *Columbia Tire*, BCLRB L36/82; *Barnard Management*, BCLRB 19/86.

more appropriate, then perhaps the entire unit should vote with the certification at risk. If the boards are willing to accept either the larger or the smaller existing unit as being appropriate, then the entire unit can vote and in the event of failure, then the smaller, existing unit stands.

In the case of decretions, «stability» is not be affected unless there is a subsequent application by the severed group to join another union (or, if the remaining group is so small it loses its strength). As a result, the boards have afforded significant weight to the wishes of the employees. The question which has been posed is whether the «residual» unit is «an» appropriate one, which is the criterion used in most other categories. In an initial certification where the boards have a choice of more than one appropriate unit, the smaller unit will only be chosen where there is a need to establish collective bargaining. It is the «encouragement» principle which is used to justify the exception. However, in «partial decertifications» where the larger unit remains appropriate even though the smaller residual would also be «an» appropriate unit, why should the boards allow the smaller unit to become the operative unit? In fact, the only rationale in this situation is the «wishes» of the employees. The B.C. Board stated that «it would be unusual for the Board to grant a variance of a certificate which would render the varied unit less appropriate than the existing bargaining structure»<sup>64</sup>. That should be the critical issue that the boards address.

Consolidation applications will succeed only if the boards feel an «extraordinary measure» is necessary. Merger applications are generally successful for «stability» reasons; however, exceptions do exist when history has shown that the existing relationships could function effectively. In that case, the boards have been prepared to accommodate the «wishes» of the employees to retain their existing representatives. If fragmentation can and does exist in those circumstances, why should there be such reticence to initially certifying separate units where there is no significant intermingling of employees, units are drawn on clearly defensible boundaries, and each unit represents a «reasonable portion» of the entire workforce?

Partial raid applications will generally fail. This position is adopted on «stability» grounds. However, if the wishes of employees to have separate representation are considered after a merger, there may also be grounds in an existing large unit to allow separate representation of a certain portion of the workforce. Further, if one is prepared to allow partial decertifications where employees opt for no representation, should the boards not, on the basis of «encouraging» collective bargaining, allow disenfranchised groups to choose a more desirable representative when the subgroup itself meets the requirements of «an» appropriate bargaining unit?

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64 *Vancouver City Savings, supra*, note 56, p. 8.

These inconsistencies definitely cause problems, including perceived injustices by members of the labour relations community.

## ALTERNATIVES

With respect, Canadian labour boards must declare their order of priorities in terms of the three objectives. This has been done in other jurisdictions. For example, the British Labour Board known as the «Commission on Industrial Relations» has expressly stated its priorities as follows:

«The objectives which are to be pursued and their order of priority are policy matters which have to take account of the particular circumstances of a case. Possible objectives in the determination of bargaining units include the following:

- (i) establishing units which are acceptable to the parties including the employees;
- (ii) ensuring that union recognition will be achieved;
- (iii) establishing units which will be viable in the long term;
- (iv) ensuring that units accord with the management organization of a company;
- (v) ensuring that units accord with a trade union organization structure;
- (vi) maintaining existing bargaining arrangements where they are working well.»<sup>65</sup>

In terms of the three objectives discussed, there are theoretically a myriad of combinations. However, from a practical point of view, it seems that there are really three possible approaches. The first is to adopt the stability objective as the guiding force but be more reluctant to make exceptions to *the* all-employee unit rule. The second potential approach is to take the view that, in order to better accommodate the wishes of employees, a reasonable level of fragmentation is not a problem. In that case, «an» appropriate unit becomes viable and that reality would then be applied to all types of applications. Finally, the third option is to adopt «a more appropriate» test. There is legal authority for each of these approaches; the issue is one of labour relations policy.

### «The» Most Appropriate Unit

If the boards are prepared to adopt the «all-employee» unit as *the* appropriate unit, then a number of positions follow. First, the boards might still accept the certification of smaller units but only in extreme cases of organizational difficulty. Further, it is submitted that the boards would have to «police» agreements between the parties to ensure that the largest

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<sup>65</sup> *Trade Union Recognition; CIR Experience Study 5* (London: HMSO 1974), p. 14, para. 44).

possible unit was the focus of the agreement. Accretions would be granted as a matter of course. Decretions would be strictly limited to cases where the existing structure can be shown to be no longer appropriate. Consolidations and mergers should flow as a matter of course and partial raids would be prohibited under this option.

### **«An» Appropriate Unit**

If one is prepared to somewhat relax the «all-employee» unit theory to better accommodate the wishes of the employees, then a number of results follow. First, in initial certifications, the wishes of the employees are to be considered apart from the objective of encouraging collective bargaining. In that case, separate units, as long as they are «an» appropriate unit or even a «minimum appropriate unit» could be certified. This would then involve a more thorough canvassing of the various factors such as community of interest, history, etc. Under this scenario, accretions would not occur as frequently as, in some circumstances, separate units would be just as appropriate. In fact, councils of unions may develop in some circumstances. Partial decertifications (decretions) could then better be justified as being a function of the wishes of the employees involved. The present policy of consolidations and mergers fits in with this approach but partial raids would have to be permitted where the «raided» sub-group is, in itself, «an» appropriate unit.

### **«A More Appropriate Unit» Test**

Under this approach, the boards would under any type of application attempt to determine which is the «more appropriate» unit in the circumstances. In initial certifications, the «bigger is better» policy can be preserved and the «toe-hold» exception employed as a true basis to encourage collective bargaining. In an accretion application, the Board would ask itself whether the new larger unit is «more appropriate» rather than merely rubber-stamping any enlargement application. In many cases, separate units may indeed be «more appropriate» than a combined unit.

Consolidations and mergers applications would essentially be decided as they are at the present time. Deletions (partial decertifications) would then be handled in this way; the critical question would be whether «the reduced unit» and a non-union group would in fact be «more appropriate» than the existing large unit. Similarly, for partial raids, the operative question is whether two separate unionized units would be «more appropriate»

than the existing large units. Under this approach, it is suggested that applications for both partial raids or partial decertifications would in most cases be unsuccessful. The burden in either situation would be on the applicant to demonstrate a substantial basis why such an alteration to the integrity of the existing unit would be warranted.

## CONCLUSION

This paper has demonstrated that there are glaring inconsistencies across and more importantly even within the various labour boards in dealing with the issue of the appropriate bargaining unit. Particularly noticeable is the different approach taken depending on the nature of the application, that is between initial certifications, consolidations, accretions, mergers, partial raids and partial decertifications. Canadian labour boards must decide on a ranking of the priorities (the objectives) and then apply that priority in a consistent fashion throughout all types of applications dealing with the appropriate unit. Otherwise, expedience becomes the sole objective and serious confusion will ultimately result.

### *L'unité de négociation appropriée: la politique d'uniformité des Commissions des relations du travail canadiennes*

Les décisions touchant la structure de l'unité de négociation appropriée ont beaucoup d'influence sur les parties dans le domaine des relations du travail et le présent article soutient qu'il existe au Canada un grand manque d'uniformité à l'intérieur des Commissions des relations du travail de même qu'entre elles lorsqu'elles ont à disposer de ces questions. D'une manière plus précise, l'approche des commissions, non seulement en rendant la décision initiale sur la structure de l'unité de négociation, mais aussi sur les regroupements, les fragmentations, les fusions, les consolidations, les maraudages partiels, est fondée sur des objectifs variés. Les trois objectifs que retiennent les commissions des relations du travail sont les suivants: 1) respecter la notion de liberté de choix de la part des salariés (leur volonté); 2) faciliter et peut être encourager l'organisation des travailleurs en syndicats (encouragement); 3) inciter à la stabilité industrielle en établissant un cadre viable et potentiellement permanent de négociation collective, tout en maintenant un équilibre réaliste entre les parties (stabilité). Ces trois objectifs ne sont pas considérés uniformément quand les commissions, au moment d'apprécier ces critères, paraissent changer d'attitude selon les types de requêtes qui se présentent.

Dans les accréditations initiales, les commissions semblent d'abord s'attacher à la stabilité et ainsi favoriser la négociation collective. La volonté des salariés n'est pas considérée comme particulièrement importante; lorsque l'accréditation existe, les désirs des travailleurs concernant la structure de l'unité semblent explicitement reconnus par les commissions.

Dans les cas de regroupements, on tient compte des trois objectifs. Lorsque les commissions sont en présence d'une requête pour élargir l'unité existante, celle-ci est considérée comme conforme à la philosophie de l'unité élargie et l'objectif premier de la stabilité se trouve favorisé en accordant de telles requêtes. De plus, lorsque le regroupement a pour conséquence d'assujettir un plus grand nombre de salariés à la négociation collective, on tient compte de la volonté des travailleurs sans hésitation par le recours à la tenue d'un vote à l'intérieur du groupe qu'on voudrait ajouter. Dans le cas de fragmentations, la «stabilité» n'est pas atteinte à moins que le groupe qui demeure dans l'unité ne soit si réduit qu'il perde son pouvoir de négociation ou qu'il y ait une requête subséquente de la part du groupe sectionné pour adhérer à une autre association. Il en résulte que, dans de semblables requêtes, les commissions ont accordé un poids considérable aux désirs des employés. La question qu'il faut se poser, c'est si l'unité «résiduelle» en est une qui est appropriée, ce qui est le critère utilisé dans la plupart des autres catégories. Dans une accréditation initiale où les commissions ont le choix de plus d'une unité appropriée, la plus petite unité ne sera retenue que là où il est nécessaire d'instaurer la négociation collective. On se sert du principe de l'«encouragement» pour justifier cette exception. Cependant, dans les cas de fragmentations où une unité plus étendue demeure plus appropriée (même si l'unité résiduelle peut aussi être une unité appropriée) pourquoi les commissions permettent-elles à l'unité plus restreinte de devenir une unité valable? La seule raison en est la volonté des employés. En fait, une commission ne devrait pas accorder une forme d'accréditation de nature à rendre cette unité moins appropriée que la structure de négociation déjà existante.

Les requêtes, dans lesquelles on demande la consolidation, ne réussiront que si les commissions estiment que cette mesure extraordinaire est nécessaire. Les requêtes en fusion sont généralement acceptées pour des motifs de stabilité; cependant, il existe des exceptions quand la situation antérieure démontrait que les relations déjà existantes peuvent assurer un fonctionnement efficace. Dans ce cas, les commissions sont disposées à se rendre à la volonté des salariés désireux de garder leurs représentants. S'il y a fragmentation dans ces circonstances, pourquoi y aurait-il pareille réticence à accréditer au départ des unités séparées lorsqu'il n'y a aucun entremêlement notable des travailleurs, les unités étant délimitées selon des frontières clairement justifiables et chacune représentant une portion raisonnable de la main-d'oeuvre totale?

Les requêtes partielles consécutives à un maraudage échouent à cause du critère de la stabilité. Toutefois, si l'on considère la volonté des salariés d'obtenir une représentation distincte à la suite d'une fusion, il pourrait y avoir lieu, à l'intérieur d'une unité de négociation élargie, de permettre une représentation séparée d'une certaine partie de la main-d'oeuvre. En outre, si l'on est disposé à autoriser une révocation

partielle quand les employés choisissent de n'être plus représentée, les commissions ne devraient-elles pas, de façon à «encourager» la négociation collective, autoriser des groupes frustrés à choisir un représentant plus valable lorsque le sous-groupe lui-même répond aux exigences d'une unité de négociation appropriée?

Cette politique a suscité des problèmes, soit la perception d'illogisme et d'injustice, parmi les membres de la communauté des personnes engagées dans le domaine des relations professionnelles. Les commissions des relations du travail canadiennes doivent proclamer leurs priorités fondées sur les trois objectifs énoncés précédemment. D'un point de vue pratique, il y a trois approches possibles. La première consiste à choisir l'objectif de la stabilité comme mesure directrice, tout en se montrant plus hésitante à faire des exceptions à la règle de l'unité globale. La deuxième approche potentielle est de considérer qu'un degré normal de fragmentation ne fait pas de problème, quand il y a lieu de mieux répondre aux désirs des salariés. Dans ce cas, une unité appropriée devient viable et cette approche pourrait s'appliquer à tous les genres de requêtes. La troisième option serait d'adopter le critère du «plus approprié» et d'imposer la plus appropriée de toutes les unités possibles. Chacun de ces objectifs est légal. Ce qui importe, c'est une véritable politique des relations du travail.

En résumé, l'auteur soutient qu'il y a des contradictions manifestes entre les différentes commissions des relations du travail et ce qui est plus grave, à l'intérieur d'un même organisme quand il faut trancher la question de l'unité de négociation appropriée. Ce qu'il faut particulièrement noter, c'est l'approche différente que l'on choisit selon la nature de la requête. Les commissions des relations du travail au Canada doivent rendre leurs décisions selon un ordre des priorités (les objectifs) et ensuite appliquer cet ordre d'une façon uniforme pour tous les types de requêtes où la question du caractère approprié de l'unité est en jeu. Autrement, l'opportunisme devient le seul objectif et il s'ensuit finalement une sérieuse confusion.

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