IN THE MATTER OF AN ARBITRATION

BETWEEN

ENTERPRISE RENT-A-CAR CANADA COMPANY
(The Employer)

AND

CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 378
(The Union)

Grievance: Representation of YVR Airport Employees

Arbitrator:	Ronald S. Keras
Counsel for the Employer:	Mr. Craig T. Munroe
Counsel for the Union:	Mr. Allan E. Black, Q.C. Ms. Rachel H. Roy
Hearing:	April 28, 29 & May 11, 2015
Published:	May 27, 2015

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The parties agreed that this arbitration board was properly constituted with the jurisdiction to hear and decide the matter in dispute.

The Union's grievance was based on an assertion as described by Glen MacInnes in his letter of November 21, 2014, which reads as follows:

> Dear Mr. Wilk:
>
> **Re: 2014 Airport Car Rental Bid – Enterprise Rent-A-Car Canada Company**
>
> We write to confirm our position in regards to the Employer's position that counter staff at the Airport under the Enterprise brand will be non-union.
>
> To be clear, the Union's position is that any staff performing bargaining unit work at the Airport (including counter staff) for Enterprise Rent-A-Car Canada Company under any brand, are union members and covered under the collective agreement.
>
> If your position differs, please advise the Union.
>
> Sincerely,
> Glen MacInnes
> Senior Union Representative

The Employer's response from Mr. Wilk, dated November 26, 2014 reads as follows:

> Dear Mr. MacInnes,
>
> Thank you for your letter of November 21, 2014. We write to confirm our position that the scope of the Union's certification/collective agreement for the National/Alamo branded business would not include any personnel relocated to the YVR terminal that are part of the long standing Enterprise-branded business.

You have previously advised that you do not accept the Company's position. Assuming that remains the case, then it would appear necessary to have the matter adjudicated. Please contact Company counsel with respect to next steps:

…

Sincerely,
Stephen Wilk
Vice President/General Manager

The following is the job description of Management Trainees (MT's):

Proposed Job Title: **Management Trainee (MT)**	Supervisor/Manager: **Assistant Branch Manager and/or Branch Manager**	Date: **2014**

GENERAL JOB SUMMARY:

The Management Trainee (MT) gains hands-on experience and knowledge to learn the business, to learn how to ultimately manage the branch and to support the entire business, The MT performs duties in all aspects of a branch - to become familiar with line and staff functions, operations, management viewpoints and company policies and practices that affect each aspect of1he business. The objective of the MT assignment is to educate MT's as to all aspects of the business so that he or she can ultimately run the branch unit

PRINCIPAL DUTIES AND RESPONSIBILITIES:

Customer Service and Operations

• Provide a high level of customer service by assisting customers and assessing their rental needs In person and/or by phone
• Effectively market the company while picking up and/or dropping off customers in a safe and courteous manner and assisting customers as needed
• Conduct follow-up with various businesses and customers, Including insurance adjusters or agents, dealerships, auto body shops, road-side assistance and national reservations to obtain appropriate information regarding the status and availability of rentals and customers' vehicles
• Clean vehicle interior and exterior by hand or by operating washing equipment when needed
• Notify Management of any known customer problems

• Sales and Marketing/Financial Performance
• Apply appropriate rental charges and handle all forms of customer payment
• May collect and receive branch receivables or vehicles
• Understand, communicate and sell optional protection products, rental terms and conditions, vehicle features and benefits, 'fuel options and additional equipment
• Assist in Branch sales and marketing efforts to increase business and income

Fleet Management and Maintenance
• Notify Management of any known vehicle problems and *any* required vehicle maintenance

Miscellaneous
• Continuously build ·knowledge and skills, pursue training and development opportunities, and attend required company-sponsored training classes
• Maintain a regular and reliable level of attendance
• Perform miscellaneous job-related duties as assigned

JOB SPECIFICATIONS:

Education -
• Bachelor's Degree or Associate's Degree and/or equivalent educational background (I.e., credit hours)

Experience -
• Customer service experience
• Sales environment experience

Other -
• Current and valid driver's license
• Satisfactory driving record
• Satisfactory background check

The following are the job descriptions found within the current Collective Agreement:

APPENDIX "B" - JOB DESCRIPTIONS
Enterprise Rent-A-Car Canada Company
POSITION TITLE: Customer Service Agent (CSA)
REPORTS TO: Station and Brand Manager

JOB FUNCTIONS:
Maintains and follows procedures as set by local management and Enterprise Rent-A-Car Canada Company in the following areas:

1. Completes all forms related to the renting and returning of vehicles.
2. Performs all job functions as specified in the Service Agent (SA) job description.
3. Responds to all customer inquiries.
4. Carries out paperwork, clerical, and auditing duties as required.
5. Follows instructions from managers and lead agents regarding operational needs.
6. Ensures the security of company assets.
7. Keeps work area clean and orderly. Responsible for maintaining a safe and clean work environment. Immediately reports any unsafe or hazardous conditions to the lead agent and/or manager.
8. Performs other minor related duties as assigned which do not affect the value of the job.

POSITION TITLE: Rental Sales Agent (RSA)
REPORTS TO: Station and Brand Manager
JOB FUNCTIONS:
Maintains and follows procedures as set by local management and Enterprise Rent-A-Car Canada Company in the following areas:

1. Completes all forms related to the renting and returning of vehicles.
2. Responds to all customer inquiries.
3. Carries out paperwork, clerical, and auditing duties as required.
4. Follows instructions from managers and lead agents regarding operational needs.
5. Ensures the security of company assets.
6. Keeps work area clean and orderly. Responsible for maintaining a safe and clean work environment. Immediately reports any unsafe or hazardous conditions to the lead agent and/or manager.
7. Performs other minor related duties as assigned which do not affect the value of the job.

POSITION TITLE: Service Agent (SA)
REPORTS TO: Station and Brand Manager
JOB FUNCTIONS:
Maintains and follows procedures as set by local management and Enterprise Rent-A-Car Canada Company in the following areas:

1. Prepares vehicles for rental by:
   a) Cleaning inside and outside of vehicles.
   b) Providing minor maintenance on vehicles.
   c) Inspects vehicles for damage and mechanical condition.

2. Assists fleet department in:
   a) Pulling vehicles eligible for turnback.
   b) Keying and de-keying vehicles.
   c) Plating and de-plating vehicles.
3. Delivers vehicles to customer or other Enterprise Rent-A-Car Canada Company locations.
4. Provides pick up and drop off service for customers as required.
5. Responds to all customer inquiries.
6. Completes all forms and documents as required.
7. Ensures the security of company assets.
8. Keeps work area clean and orderly. Responsible for maintaining a safe and clean work environment. Immediately reports any unsafe or hazardous conditions to the lead agent and/or manager.
9. Performs other minor related duties as assigned which do not affect the value of the job.

POSITION TITLE: Hand-Held Return Agent (HH)
REPORTS TO: Station and Brand Manager
JOB FUNCTIONS:
Maintains and follows procedures as set by local management and Enterprise Rent-A-Car Canada Company in the following areas:

1. Completes all forms related to the returning of vehicles.
2. Checks all returning vehicles for damage/maintenance problems and completes the related forms.
3. Responds to all customer inquiries
4. Carries out paperwork, clerical, and auditing duties as required.
5. Follows instructions from managers and lead agents regarding operational needs.
6. Ensures the security of company assets.
7. Keeps work area clean and orderly. Responsible for maintaining a safe and clean work environment. Immediately reports any unsafe or hazardous conditions to the lead agent and/or manager.
8. Performs other minor related duties as assigned which do not affect the value of the job.

POSITION TITLE: Administration Clerk
REPORTS TO: Station and Brand Manager
JOB FUNCTIONS:
Maintains and follows procedures as set by local management and Enterprise Rent-A-Car Canada Company in the following areas:

1. Completes all forms and duties related, but not limited, to the following back office functions:
   a. Fleeting and de-fleeting vehicles
   b. Fleet insurance renewals and cancellations

c. Insurance claims
d. Accident damage/mechanical repair invoices
e. Photo radar/parking ticket invoices
f. General accounts payable and receivable
g. Auditing rental locations paperwork
h. Banking of monies
i. Payroll
j. Reception/lost and found

2. Responds to all customer inquiries.
3. Follows instructions from managers regarding operational needs.
4. Ensures the security of company assets.
5. Keeps work area clean and orderly. Responsible for maintaining a safe and clean work environment. Immediately reports any unsafe or hazardous conditions to the lead agent and/or manager.
6. Performs other minor related duties as assigned which do not affect the value of the job.

POSITION TITLE: Utility Service Agent
REPORTS TO: Maintenance and Damage Manager
JOB FUNCTIONS:

Maintains and follows procedures as set by local management and Enterprise Rent-A-Car Canada Company in the following areas:

1. Responsible for building and equipment maintenance.
2. Performs minor mechanical repairs including but not limited to the following:
   a. Replacement of fuses and bulbs
   b. Minor adjustments to secure loose parts
   c. Changing and repairing tires
   d. Oil and filter changes
3. Prepares vehicles for turnback.
4. Assists Fleet Department as required.
5. Assists in the movement of vehicles.
6. Completes all forms and documents as required.
7. Ensures the security of company assets.
8. Keeps work area clean and orderly. Responsible for maintaining a safe and clean work environment. Immediately reports any unsafe or hazardous conditions to the lead agent and/or manager.
9. Performs other minor related duties as assigned which do not affect the value of the job.

POSITION TITLE: Mechanic
REPORTS TO: Maintenance and Damage Manager
JOB FUNCTIONS:

Maintains and follows procedures as set by local management and Enterprise Rent-A-Car Canada Company in the following areas:

1. Responsible for all vehicle diagnostic and repair work in the following areas:
   a. transmission
   b. engine
   c. electrical and electronic/computer controls
   d. suspension and steering
   e. air conditioning
   f. brakes and anti-lock system
   g. minor body/chassis/frame repair
2. Responsible for warranty and recall repair work on all vehicles in the areas mentioned in job function #1 a-g.
3. Directs the work of **Utility Service Agents** on small mechanical repairs.
4. Carries out paperwork, clerical, and auditing duties as required.
5. Follows instructions from managers regarding operational needs.
6. Ensures the security of company assets.
7. Keeps work area clean and orderly. Responsible for maintaining a safe and clean work environment. Immediately reports any unsafe or hazardous conditions to the lead agent and/or manager.
8. Performs other minor related duties as assigned which do not affect the value of the job.

POSITION TITLE: Shuttler
REPORTS TO: Station and Brand Manager
JOB FUNCTIONS:
Maintains and follows procedures as set by local management and Enterprise Rent-A-Car Canada Company in the following areas:

1. The safe and efficient movement of vehicles between specified locations of the Airport operations.
2. Complete accurately and in legible manner all necessary vehicle movement documentation.
3. Upon delivery to the rental location, prepare the vehicle for the next customer by following established steps.
4. Responds to all customer inquiries.
5. Plating and de-plating of vehicles.
6. Driving vehicles through mechanical car washes.
7. Ensures the security of company assets.
8. Keeps work area clean and orderly. Responsible for maintaining a safe and clean work environment. Immediately reports any unsafe or hazardous conditions to the lead agent and/or manager.
9. Performs other minor related duties as assigned which do not affect the value of the job.

POSITION TITLE: Greeter
REPORTS TO: Assistant Brand Manager

JOB FUNCTIONS:

- Work proactively with shuttlers, service agents, handheld return agents and managers to ensure proper vehicle supply
- Welcome members to the facility when they exit the bus or arrive on the lot
- Direct customers to exit booth, provide local directions and maps and provide return directions where applicable
- Assist members with questions and concerns to minimize counter visits
- Communicate customer service issues to management
- Ensure that hangtag information is completed correctly
- Maintain clean low mileage fleet mix requirements
- Maintain emerald aisle for cleanliness
- Thank member for their business
- Provide upgraded vehicles on request
- Perform other customer service related duties in addition to those listed, to ensure our service meets the needs of our customers
- Maintain a regular and reliable level of attendance and punctuality
- Perform miscellaneous job-related duties as assigned
- An individual contributor; not responsible for supervising others

Articles 5 and 6 from the current Collective Agreement read as follows:

ARTICLE 5: UNION RECOGNITION & BARGAINING UNIT DESCRIPTION

5.01 Union Recognition

The Employer recognizes the Union as the sole and exclusive collective bargaining agent for all persons to whom the Certification issued to the Union on August 15, 1996 applies, including any changes to said Certification made from time to time by the Labour Relations Board of British Columbia, or any of its successors, but excluding those persons expressly excluded by the Labour Relations Board of British Columbia, or any of its successors.

5.02 Application Of Agreement

(a) This Agreement applies to all employees within the bargaining unit as defined in this Agreement and covered by the certification or any amendments thereto, issued by the Labour Relations Board of British Columbia, or any of its successors.

(b) Where the Employer establishes a new position and a dispute arises as to whether the new position is within the bargaining unit covered by this Agreement, either party may submit the issue to the Labour Relations Board. Where such positions are determined to be within the

bargaining unit, these positions will be posted in accordance with the provisions of the collective agreement.

(c) Employees who are subject to this Agreement shall continue to be subject to this Agreement and the Union shall continue to be their sole and exclusive collective bargaining agent where such employees are required to perform their work functions anywhere within the province of British Columbia, or elsewhere when on temporary assignment and performing such work functions on behalf of the Employer.

ARTICLE 6: SECURITY OF BARGAINING UNIT WORK

6.01 Exclusivity Of Bargaining Unit Work
Duties normally performed by employees within the bargaining unit will not be assigned to or be performed by non-bargaining unit employees except to overcome immediate, short term cases of absenteeism, emergencies, training and peak rental periods when bargaining unit employees capable of performing the work are not available.

6.02 No Contracting Out
The Employer will not contract out any bargaining unit work if such contracting out will result in the displacement or lay-off of any bargaining unit employees.

On February 5, 2015 the BC Labour Relations Board amended the certification as follows:

Dear Sirs/Mesdames:

Re: Enterprise Rent-A-Car Canada Limited/Enterprise Location D'Autos Canada Limitee –and- Canadian Office and Professional Employees Union, Local 378
(Variance of Certification – Case No. 64728/12T)

This is further to the Board's letter dated January 29, 2015

The Board, on its own motion, has varied the name of the Employer

From: Enterprise Rent-A-Car Canada Limited/Enterprise Location D'Autos Canada

To: **Enterprise Rent-A-Car Canada Company / La Compagnie de Location D'Auto Enterprise Canada**

Attached, is a copy of the certification.

That amendment included a copy of the Certification dated December 6, 2012, which in terms of the original Certification included the bargaining unit description from August 15th, 1996:

LABOUR RELATIONS CODE
BRITISH COLUMBIA LABOUR RELATIONS BOARD

CERTIFICATION

The LABOUR RELATIONS BOARD being satisfied the employees named herein constitute a unit appropriate for collective bargaining and that all necessary requirements of the Labour Relations Code are-met

HEREBY CERTIFIES

Canadian Office and Professional Employees Union, Local 378

as the bargaining agent for the employees in a unit composed of

employees at and from 3545 Lougheed Highway and 1185 West Georgia Street, Vancouver; Vancouver International Airport Terminal; 3866 McDonald Road South, Richmond, BC except sales persons and managers

and those excluded by the Code, employed by

Enterprise Rent-A-Car Canada Company/La Compagnie De Location D'Autos Enterprise Canada
3866 McDonald Road South
Richmond, BC
V7B 1L8

Given at Vancouver, British Columbia, this **15th** day of **August**, A.D. **1996**.
As varied under Section 142 of the Labour Relations Code by the Board this 6th day of December, A.D. 2012.

LABOUR RELATIONS BOARD

KEN SAUNDERS
Vice-Chair

II

The Union witness, Ms. Cathy Hirani, advised that she has been a Union Representative at COPE since 2012, that she originally started with Tilden

Rent-A-Car in 1993, that Tilden was acquired by National, and when working at Tilden she was a Rental Sales Agent (RSA). She testified that integration of Enterprise Rent-A-Car (ERAC) Managers occurred in 2009, that National and Alamo Managers left, and ERAC Managers came into the Group C4 integration. She testified that current Managers all come from Enterprise from various locations and that they don't wear identification as to which brand.

She advised that the computer system was used to manage all brands and that cars are not labelled by brand. Ms. Hirani testified that ERAC Human Resources (HR) takes care of all three brands, job postings for the C4 group; that payroll is integrated and that pretty much everything is integrated. She advised that Enterprise was not at the Airport and that Enterprise customers come to the counter instead of the shuttle bus after Beckwith hours, when Beckwith is closed. She testified that several times a day Enterprise customers come to the National/Alamo counter and that the counter employees honour the Enterprise reservation, that bargaining unit members have access to the computer system, that they pull up the reservation on the computer system, and send the customer out to the rental lot or give them keys at the rental counter.

Ms. Hirani advised that customers interact with employees that Shuttlers bring up the vehicles and park at the curb that there is also a Greeter that helps customers of the Emerald Club, and that Greeters and Shuttlers are bargaining unit employees. She advised that the Quick Turnaround (QT or QTA) facility is close to the parkade, that the Service Center is a little further away, and that bargaining unit service agents clean the cars, etc. She

testified that the Admin Office employees and Mechanics who repair vehicles are in the bargaining unit.

Ms. Hirani identified the Job Description for Customer Service Agents (CSA's) and advised that CSA's work at YVR Airport as well as at the YVR South Terminal. She also identified the various job descriptions for employees in the bargaining unit. Ms. Hirani identified an e-mail from a member concerned with non-bargaining unit Shuttlers shuttling cars to Beckwith. She advised that cars have a generic number at the Airport and that Enterprise is part of the same fleet mix as National and Alamo. She testified that Enterprise customers can return cars to YVR and that the cars go back into the fleet mix by bargaining unit Shuttlers. She advised that Enterprise returns are not treated differently than at National or Alamo and that at YVR there are two counters, National and Alamo. Ms. Hirani testified that back-end staff provides vehicles to the front-end staff and that returned vehicles are cleaned and serviced by bargaining unit employees.

Ms. Hirani identified the Management Trainee (MT) job description and described it as the same work as work done by the RSA's, Greeters, and Shuttlers. She advised that RSA's sell products to increase income, such as optional coverage, collision coverage, gas, personal up-sale to a larger car, and that there is no distinction between brands. Ms. Hirani advised that employees have one-day (1) training sessions once or twice a year on how to improve sales. Ms. Hirani advised of the November 5th, 2014 meeting with ERAC as they were successful in a bid to bring the Enterprise brand to the Airport. She advised that ERAC gave the Union a game plan and that the counter for National and Alamo would be reduced to make room for

Enterprise at the Airport. She also advised that the Enterprise brand would have a separate area at the Airport parking lot. She advised that the ERAC plan was to staff the Enterprise counter with Management Trainees from Beckwith. She said the meeting ended in a tense manner as the Union's position was that Enterprise employees at the Airport would be within the bargaining unit. She identified a letter to the Employer about management performing bargaining unit work and a grievance about contracting out.

In cross-examination, Ms. Hirani identified the National Collective Agreements of 2003 and 2006. She advised that Hertz and Avis sometimes refer customers to National or Alamo and that on occasion, National and Alamo refer some customers to Hertz and Avis. She advised that RSA's were bargaining unit positions and were so since the 1996 Certification. She advised that Management Trainees perform essentially the same duties as RSA's.

Union witness, Mr. Glen MacInnes, testified that he was a Senior Union Representative, and that since 2008 he represented all car rentals at YVR, the Collective Agreement was to expire in 2008 at National and Alamo, that ERAC had taken over National and Alamo and was involved in bargaining. He advised that in 2013 he was the lead negotiator and that he had been at the Airport, McDonald Road and Beckwith locations. Mr. MacInnes identified in Exhibit 1, the Canadian operation of ERAC.

In reference to the Agreed to Statements of Facts (ASF) he testified that there was a revolving door of Managers from 2009 when ERAC took over, that Managers all came from the Enterprise brand and that they rotated in

and out every six (6) months. He described this as an integration of Managers. He said the Managers looked generic; that they all looked the same, and that Managers were not assigned to a particular brand and that Managers gave direction to all employees.

He advised of the Odyssey computer system that came in 2009 and that the long term goal was to integrate. He described the integration process as a two (2) year process from 2007 to 2009 and that currently the fleet is completely integrated with emphasis on the sales model from ERAC.

He advised that the Certification excluded Sales and Managers. He advised that ERAC purchased the franchise car rental at the YVR South Terminal and the parties agreed that those employees at the South Terminal would fall under the COPE Certification. Mr. MacInnes advised that there was nothing in the Collective Agreement that limited the scope of the Certification and that Article 5.01 was the scope clause. Mr. MacInnes said the Union position is that anything on the Airport is within the jurisdiction of the COPE Certification. Mr. MacInnes advised that at the meeting of November 5th, 2014 the Union took the position that anyone at YVR was part of the COPE bargaining unit and that he wrote a letter to Mr. Stephen Wilk outlining that position on November 21st, 2014 and that Mr. Wilk's November 26th, 2014 reply was that Management Trainees at the counter at YVR would not be part of the bargaining unit. Mr. MacInnes described the YVR Certification as exclusively COPE work. He also advised that he had never heard of non-union Shuttlers, which the Union would describe as a violation of the Collective Agreement.

In cross-examination, Mr. MacInnes described the Union's position, that it 'didn't want to preclude ourselves if ERAC moves again from Beckwith'. He said that as far as he knew, Shuttling to Beckwith was all done by bargaining unit members. Mr. MacInnes said that the Union reserved its right to claim successorship if employees moved from Beckwith to YVR Airport. He advised that the number of members in the bargaining unit was seventy (70) and that the total number of employees moving from Beckwith to the Airport was thirty-five (35).

III

Employer witness, Mr. Stephen Wilk, is the current British Colombia Vice-President and General Manager and started with Enterprise in 1994 in Delaware. He is responsible for the complete operation in BC (C4). Mr. Wilk advised that Jeff Findlater is now responsible for Environmental and Real Estate and was the former QT Manager. He also advised that Mr. Mo Mayyahzi is the Branch Manager at Beckwith and has no responsibility for National or Alamo. He also advised that in terms of the bargaining unit, there would be no changes post June 1, 2015. He advised that the Beckwith hours are 0630 to 2130 hours. He advised that, at times, at the Airport Enterprise customers are directed to the National and Alamo counter and that their reservation with Enterprise becomes a National or Alamo contract. He testified that in the summer and on holidays rental companies exchange rentals; that is, that Enterprise goes to Avis and vice versa.

With regard to the Management Trainee (MT) Program on the Enterprise brand, the training is eight (8) months with three (3) days in Surrey and one (1) day book training. The trainees learn the Enterprise computer system and are then placed in rental branches. He advised that there are three (3) career levels of advanced training: 1) is 45-75 days, 2) is after three and one half (3 ½) months and 3) is between months six (6) and seven (7). MT's learn the business from the ground up, 'hands on' from every perspective, including a financial perspective. He described their duties as meeting the customer at the door, take the customer to the counter, take them to the car and offer up-sales. They also clean and wash cars. MT's and bargaining unit employees have relatively similar duties, with the exception of the marketing aspect. Mr. Wilk testified that MT's go through a rotation including at Brian Jessel. The Company moves them through locations or airports based on a 'Best of the Best' program, which gives them a multitude of experience and he advised that not every employee goes through the 'Best of the Best' program. Mr. Wilk described the Beckwith location in Richmond and the Enterprise YVR Airport location, and that shuttle buses transport customers to Beckwith. He testified that Enterprise always had the desire to be an 'onsite' provider and that on September 2nd, 2014 Enterprise bid as one collective brand, which included Enterprise, National and Alamo, and were successful. He advised that they would now move the Enterprise brand onsite at YVR Airport. He advised that the National and Alamo counter at YVR would be divided into three sections with a pony wall between each of them. He advised that there would be no reduction of National and Alamo employees. Mr. Wilk also testified that the Enterprise counter would be run by Management Trainees from Beckwith, with no changes to their duties and that, beginning June 1, 2015, Enterprise would be

at YVR, MT's would take customers to the lot, their customers would return cars to the parkade and be met by MT's and Enterprise Shuttlers would take cars back to Beckwith for cleaning. He advised that the Enterprise Branch Manager would manage the Enterprise operation at YVR and that these changes would have no impact on National or Alamo employees at the counter or at the back-end. Mr. Wilk attended the November 5th, 2014 meeting with the Union and there was a discussion about the future. He explained the bid and a seamless transition including the back-end of the business and that the front-end Enterprise MT's would run the Enterprise rental counter. He said the Union believed that the Enterprise counter employees should be bargaining unit employees and that he didn't agree with the Union.

In the Union cross-examination of Mr. Wilk, he advised that within the Enterprise corporate entity, National, Alamo and Enterprise profit goes into Enterprise; that profits filter into the Enterprise corporate entity. With regard to the December 18th, 2009 Labour Relations Board Certification, he advised that he was not in BC at that time. With regard to the acquisition of Vanguard by Enterprise, he advised that the name change was to Enterprise. He also said that there was no provision in the Collective Agreement that limits the Collective Agreement to National and Alamo. Mr. Wilk also advised that he was not at the bargaining table for the current Collective Agreement and that the corporate name change identified Enterprise as Enterprise Rent-A-Car Canada Company, which is the current Certification.

With regard to the ASF at paragraph 78, he said that was correct and that vehicles were moved to the Service Center by bargaining unit employees.

He also advised that Enterprise cars return to Beckwith by non-union Shuttlers and sometimes by bargaining unit employees. Mr. Wilk testified that the new plan would have the work performed by non-union employees with regard to cleaning and washing at Beckwith or at YVR. He also advised that the Union believed it was all bargaining unit work and that Glen MacInnes disagreed with his opinion. He said that the McDonald Road center is staffed by bargaining unit employees with respect to repairs and maintenance.

Mr. Wilk confirmed that when the company at the South Terminal was taken over by ERAC, employees were covered by the Collective Agreement and the COPE agreement. He said there was an agreement made to put them into the bargaining unit. Mr. Wilk testified that Enterprise does not get its vehicles serviced by bargaining unit employees at the McDonald site. He also advised that they will eliminate three (3) shuttle buses. He confirmed that the Enterprise core business is the rental car business, that the counter is used to facilitate the rental of cars, and that the back-end is all part of the rental service. He said that moving cars is part of the rental experience so that cars are available. Mr. Wilk testified that ERAC is still the employer at YVR Airport after these changes and at McDonald Road and that ERAC will facilitate the rental of vehicles at YVR or at Beckwith. He said the core purpose is to rent cars. Mr. Wilk testified that the Enterprise counter at YVR involves similar work as employees at National and Alamo and that washing cars is the same kind of work as bargaining unit employees. He testified that MT's do the same kind of work as bargaining unit Hand-Held (HH) Return Agents at National and Alamo. He advised that MT's do Shuttler work similar to bargaining unit employees at National and Alamo.

He also advised that MT's are entry level positions and do not supervise. Mr. Wilk testified that at Beckwith there is one Manager and two Assistant Managers who will supervise the MT's for four (4) months. In terms of training, Mr. Wilk advised that counter people at Alamo and National received about one (1) week of training, that washing requires little training, and that HH's receive a couple of days training.

Mr. Wilk confirmed that at Beckwith there are thirty-five (35) employees, including ten (10) front-end staff, fifteen (15) Shuttle Bus drivers, seven (7) Service Agents, and three (3) Management staff. He advised that there would be a reduction in the size of the existing National and Alamo counter space at YVR. Mr. Wilk testified concerning a potential option of having bargaining unit employees do the back-end and MT's do non-union counter work for Enterprise. He advised that he has 485 employees in BC. Mr. Wilk testified that the game plan for YVR is not finalized and is dependent on the arbitration outcome.

In the Employer re-direct, Mr. Wilk advised that there is a separate Profit and Loss Statement for all locations. He said that since 2009, the McDonald Road site has bargaining unit employees who do repairs and that there is now an additional Mechanic and that there will be no impact on the number of Mechanics at the McDonald site.

IV

The Union's closing argument read as follows:

1. This grievance concerns:

   a) the scope of the Union's bargaining unit comprised of employees employed by Enterprise Rent-A-Car Canada Company ("ERAC") working at and from Vancouver International Airport ("YVR"); and
   b) a challenge to the Union's exclusive jurisdiction over bargaining unit work.

2. If you find that the disputed employees are included within the scope of the Union's bargaining unit, then they will be bargaining unit employees covered by the Collective Agreement, including Article 6.01 - Exclusivity of Bargaining Unit Work.

3. However, if you do not find that the disputed employees are within the scope of the Union's bargaining unit, then you must go on to determine whether the work they will be performing is, in fact, bargaining unit work. That is, whether non-bargaining unit employees will be performing duties normally performed by bargaining unit employees in breach of Article 6.01 of the Collective Agreement.

4. The Union's position is that all employees employed by the Employer, ERAC, working at and from YVR are bargaining unit members and are covered under the Collective Agreement, regardless of the rental car brand.

5. Through its evidence, the Union established that the scope of its certification encompasses Enterprise brand employees working at or from YVR, not only on the face of the certification but also when looking beyond the words of the certification and considering the work they will be doing, having regard for all the relevant factors.

6. Further, there has been no agreement, express or implied, to diminish or exclude Enterprise brand employees employed by the Employer from the scope of the Union's certification and bargaining unit at YVR. In fact, the opposite is true.

7. The Collective Agreement prohibits the assignment or performance of bargaining unit work by non-bargaining unit employees. The Union has jealously guarded its exclusivity over bargaining unit work through numerous grievances. This exclusivity encompasses all the "front-end" and "back-end" functions related to the Employer's rental car operations at YVR.

The Union has continuously objected to the repeated attempts by non-bargaining unit ERAC employees to perform bargaining unit work.

BACKGROUND FACTS

8. The Union's existing certification, as initially granted and as varied by the Labour Relations Board (the "Board") from time to time thereafter, certifies COPE as the bargaining agent for the employees in a unit composed of employees at and from Vancouver International Airport Terminal (YVR) and 3866 McDonald Road South, Richmond, BC (the "Service Centre"), except sales persons. Sales persons do not work at YVR and they sell used cars, rather than rent cars. [Joint Book of Documents ("JBD") at Tabs 3,5, and 9; Agreed Statement of Facts ("ASF") at para. 44]

9. None of the certifications issued by the Board for this bargaining unit contain any reference to ERAC doing business as ("DBA") National Rental Car (Canada) Inc.

10. ERAC and COPE bargained and entered into a collective agreement with a term of August 1,2008 - July 31, 2013. Article 1 - Parties of this collective agreement does not contain any reference to ERAC DBA National Rental Car (Canada) Inc. [JBD at Tab 7]

11. The Board declared ERAC the successor employer to National Rental Car (Canada) Inc. with respect to the Union's certification in 2009. [JBD at Tab 9]

12. Subsequently, ERAC and COPE bargained and entered into a collective agreement with a term of August 1,2013 - July 31,2016 (the "Collective Agreement"). Article 1 - Parties of the Collective Agreement does not contain any reference to ERAC DBA National Rental Car (Canada) Inc. [JBD at Tab 9]

13. Article 5 - Union Recognition & Bargaining Unit Description of the Collective Agreement reflects the parties' agreement that the Union is the sole and exclusive bargaining agent for, and the Collective Agreement applies to, all persons covered by the certification, as amended by the Board from time to time. [Exhibit 2]

14. The job descriptions in Appendix B of the Collective Agreement do not contain a reference to the National or Alamo brands. [JBD at Tab 15]

15. The Union strongly rejected, and was successful in opposing, ERAC's March 2015 attempt to unilaterally change bargaining unit members' job descriptions to descriptions that included reference to the National and Alamo brands. [JBD at Tab 8]

16. ERAC is the current employer of all the bargaining unit members at YVR, which includes the main and south terminals, and the Service Centre.

17. ERAC is also the employer of the employees working at 9051 Beckwith Road in Richmond (the "Beckwith Branch"). The Beckwith Branch is not located on Sea Island, unlike YVR and the Service Center. [Exhibit 4] Some employees currently working at the Beckwith Branch will be transferred to YVR (the "Disputed Employees") under the Employer's proposed plan to work at the new Enterprise brand rental counter. [Agreed Statement of Facts ("ASF")] The Beckwith Branch will remain open. [Employer's evidence through Stephen Wilk].

18. Under the Employer's proposed plan, the YVR main terminal rental counter currently staffed by bargaining unit members will be physically reduced to accommodate a new rental counter staffed by the Disputed Employees, who the Employer asserts will not be bargaining unit members (the "Employer's Game Plan"). Disputed Employees will also work in the YVR main terminal parking lot currently staffed by bargaining unit members. Work formerly done by bargaining unit members with respect to cleaning, washing, and shuttling Enterprise brand rental cars returned to YVR will be now be done by the Disputed Employees [ASF at paras. 78, 79, and 133; Employer's evidence through Stephen Wilk]

19. ERAC's core business is rental cars. National, Alamo, and Enterprise are simply rental car brands. ERAC uses a fully integrated fleet of rental cars and accompanying computer system that can be used interchangeably for all three brands. [ASF at para. 74]

20. ERAC's non-unionized employees perform the same duties related to all rental cars in the integrated fleet at non-union locations, such as the Beckwith Branch, as ERAC's unionized employees perform at YVR. [ASF at para. 75]

21. Under the Employer's Game Plan, Enterprise brand employees will be performing duties at YVR that are similar, if not almost identical, to the duties performed by bargaining unit members. Enterprise brand employees will be using the same Odyssey computer system at YVR as bargaining unit members. [Employer's evidence through Stephen Wilk]

22. Under the Employer's Game Plan, Enterprise brand employees will be performing duties at YVR that are currently performed by bargaining unit members. [Employer's evidence through Stephen Wilk]

23. The skills necessary to perform these duties are similar, regardless of brand. [ASF at paras. 93 and 108; JBD at Tabs 13 and 16; Employer's evidence through Stephen Wilk]

24. The Enterprise brand is a core part of ERAC's rental car business. Enterprise brand employees are fully integrated into ERAC's core rental car business.

25. The Union has launched numerous grievances alleging breaches of the Collective Agreement as a result of non-bargaining unit ERAC employees performing bargaining unit work at YVR. [ASF at para. 80; JBD at Tab 11]

ISSUES

I. Whether the disputed employees are included within the bargaining unit.

A. Whether the existing certification as initially granted already encompasses the disputed employees, and, if so, whether this been diminished by agreement.

B. If the disputed employees are not already encompassed, whether the parties have in fact agreed to include these employees in the bargaining unit.

II. Whether the work to be performed by the disputed employees is bargaining unit work.

SUBMISSIONS

26. The Union's position is that rental car employees employed by the employer ERAC working at and from YVR (and the Service Centre), regardless of brand, are included within the scope of its bargaining unit. Accordingly, the Collective Agreement applies to the Disputed Employees. ERAC disagrees.

27. If the Union's position is correct, then ERAC's Game Plan will result in the breach of numerous provisions of the Collective Agreement, including but not limited to:
    - Article 5.01 - Union Recognition;
    - Article 5.02 - Application of Agreement;
    - Article 6.01 - Exclusivity of Bargaining Unit Work; and
    - Article 7 – Union Membership Dues

28. Article 12.03 of the Collective Agreement provides for the arbitration of grievances related to "contemplated action" that will become a dispute between the parties, which is why you are being asked to adjudicate this dispute on the basis of ERAC's Game Plan.

29. As such, we are asking you to determine whether or not the Disputed Employees are within the scope of the bargaining unit. If they are, then the Collective Agreement applies to them and adjudication of whether or not the Disputed Employees will be performing bargaining unit work in breach of the Collective Agreement under the Employer's Game Plan will be rendered

moot.

30. If you find that the Disputed Employees are not included within the bargaining unit, then we are asking you to determine whether ERAC's Game Plan will result in non-bargaining unit employees performing duties normally performed by bargaining unit employees in breach of the Collective Agreement.

I. WHETHER THE DISPUTED EMPLOYEES ARE INCLUDED WITHIN THE BARGAINING UNIT.

31. The Labour Relations Board confirmed its approach for adjudicating disputes over the inclusion or exclusion of particular groups of employees in relation to an existing bargaining unit in ***North Shore Neighbourhood House Society***, [1999] BCLRBD No. 361 (QL) ("***North Shore Neighbourhood House Society***"):

> We confirm that Vancouver Museum and Automatic Electric constitute the applicable law in this matter. The two cases are the flip sides of the same coin. Vancouver Museum sets out four ways in which a union may obtain representation rights for employees. These are as follows:
>
> > [F]irst, by organizing the unrepresented employees and applying for a new certificate under s. 39(1) of the Act; second, by organizing the unrepresented employees and applying for a variation pursuant to s. 36 based on the Olivetti principle; third, by convincing the appropriate labour relations tribunal that the parties have in fact agreed to include these employees in the bargaining unit; or finally, by convincing the appropriate labour relations tribunal that the existing certification as initially granted already encompasses the unrepresented employees and that it has not been diminished by agreement. ... (pp. 8-9, CLRBR)
>
> These are actually set out in reverse order to that in which they would be considered in a case where a dispute arose over the inclusion or exclusion of a particular group of employees.
>
> Both Automatic Electric and Vancouver Museum proceed from the premise that one has to first determine the scope of the certification. The fact that a certification may read "all employees" is not determinative. The Board must bring a sophisticated analysis to the question and understand the assumptions that were in place at the time the certification was applied for and granted. It is from this latter point that Vancouver Museum and Automatic Electric proceeded.
>
> Vancouver Museum proceeded down the avenue where the initial

certification did not encompass the disputed employees. In that case, the onus lay with the union to convince the Board that the parties had in fact agreed to include the employees in the bargaining unit. Such an agreement may be found in conduct, documents or the scope clause of the collective agreement. Where the union fails to convince the Board that such an agreement exists, then the union's sole remaining options are to organize the employees and either apply for a separate certification pursuant to Section 18 of the Code or for a variance, pursuant to Section 142 of the Code. In Vancouver Museum the underlying assumptions demonstrated that the disputed employees were not encompassed by the initial certification and there was no subsequent agreement for expansion of scope in the collective agreement to include these employees. As a consequence the union again was placed in the position of having to organize the employees and apply for an Olivetti variance. Parenthetically, an agreement to expand the scope to include a group of employees not covered by the original certification may raise issues canvassed in Delta Hospital BCLRB No. 76177, [1978] 1 Can LRBR 356. However, that is not a matter which needs to be addressed in this case.

Automatic Electric proceeded down the avenue where the initial certification was broad enough in scope to encompass the disputed employees. In those circumstances the onus rested with the employer to demonstrate that scope had been diminished by agreement. .An employer may do so in much the same way as the union: through conduct, variety of documents or the scope provision in the collective agreement. Automatic Electric was a case where in fact the scope in the certification had been diminished over time and the union was thus forced to organize and apply for an Olivetti variance. Again, whether a subsequent agreement to expand the scope to its original limits as defined by the certification raises Delta Hospital issues is not a matter that we need to decide in this case.

We agree with the Employer that the fact that the employees may have existed at the time of the initial certification of both Vancouver Museum and Automatic Electric is irrelevant and has no basis upon which to distinguish the law set out in those cases. Whether they existed may be a factor brought into the mix but is certainly not determinative and certainly not dispositive of the legal principles. It is by and large, as the Employer has argued, a distinction without a difference.

Having said that, we have also concluded that the result reached by the original panel in this case was the correct result. There is no question that the assumptions present at the time the certification was granted to CUPE's predecessor encompassed employees working in the Employer's core business which was the delivery of social and recreational programs. Consequently, the "all employee" certification would be expected to include employees that are functionally related to if not fully integrated

into the Employer's core business.

(paras. 27-33; emphasis added)

32. Accordingly, in adjudicating the present dispute, the Union's four options for establishing inclusion of the Disputed Employees in the existing bargaining unit should be considered analytically in the following order:

- First, consider whether the existing certification as initially granted already encompasses the Disputed Employees; and, if so, whether this has been diminished by agreement.
    - o The onus rests on ERAC to demonstrate that the scope has been diminished by agreement through conduct, documents, or the scope provision of the collective agreement.
- If a determination is made that the Disputed Employees are not already encompassed within the certification, then, secondly, consider whether the parties have in fact agreed to include these employees in the bargaining unit.
    - o The onus lays on the Union to demonstrate that the parties agreed to include these employees through conduct, documents, or the scope provisions of the collective agreement.
- If a determination is made that there is no agreement to include these employees, it is at this point that the Union turns to the remaining options of organizing the unrepresented employees and applying for a variation (based on the Olivetti principle) or a new certificate.

33. For the purpose of adjudicating the dispute before you, only the first two analytical steps are relevant. Accordingly, assertions by the Employer with respect to the Olivetti principle or requirements and principles related to organizing drives and employees' wishes are not relevant to the adjudication of this matter. These assertions are a red herring as the Union has not yet reached the point of pursuing the remaining two options of organizing new, unrepresented employees or applying for a variation.

34. As such, the Union will establish that the Disputed Employees are covered by the Collective Agreement either by showing that the existing certification encompasses them; or, in the alternative, that the parties agreed to expand the bargaining unit to include them, following certification: ***Vancouver Museum and Planetarium Assn. (Re)*** , [1990] BCLRBD No. 191 (QL) at pp. 6-7; ***North Shore Neighbourhood House Society,*** [1999] BCLRBD No. 361 (QL) at paras. 27-28.

A. Whether the existing certification as initially granted already encompasses the disputed employees, and, if so, whether this been diminished by agreement.

35. In deciding whether disputed employees fall within an existing certification, an adjudicator must also look behind the words of the certification, to determine the intent of the Labour Relations Board (the "Board") at the time of the certification. The Board in ***North Shore Neighbourhood House Society, supra***, stated the following in that regard:

> ... The fact that a certification may read "all employees" is not determinative. The Board must bring a sophisticated analysis to the question and understand the assumptions that were in place at the time the certification was applied for and granted ....
>
> (para. 29)

36. The analysis must be "made from a substantive labour relations perspective and is not determined by the form of the business arrangements" (***Days Hoteliers Inc.***, [2011] BCCAAA No. 37 (QL) at para. 64, (2011), 206 LAC (4th) 373 (Moore), upheld on Section 99 Review, [2011] BCLRBD No. 77).

37. For example, in ***Days Hoteliers Inc., supra***, the Arbitrator held that the fact that the disputed employees performed work in "a separate operation and under a different service model", wore "different uniforms", and worked on "different equipment" than the undisputedly certified employees was irrelevant (para. 67).

38. Factors indicating that disputed employees are covered by an existing certification include the following:

    a) the function, nature, and purpose of the work performed by the disputed employees and the originally certified employees is similar: ***Days Hoteliers Inc., supra,*** at para. 63;

    b) the duties of the disputed employees and the originally certified employees are similar: ***North Shore Neighbourhood House Society, supra,*** at para. *35;* ***Days Hoteliers Inc., supra,*** at para. 63;

    c) the skills required to perform the work of the disputed employees are similar to those required to perform the work of the originally certified employees: ***Days Hoteliers Inc., supra,*** at para. 63; and

    d) the disputed employees are functionally related to, or fully integrated into the employer's core business in which the originally certified employees work: ***North Shore Neighbourhood House Society, supra,*** at paras. 33, 35.

39. In ***North Shore Neighbourhood House Society, supra***, the Board held that the disputed employees were covered by the initial certification (paras. 33 and 35). The employer's core business was the delivery of social and recreational programs. The disputed employees performed similar if not almost identical duties to the other social workers employed by the employer. They shared clients, exchanged information, and were functionally related. They were functionally integrated into the employer's core business. The onus then shifted to the employer to prove that the parties had agreed to diminish the scope of the bargaining unit, such that the disputed employees were to be excluded. It was unable to do so.

40. In ***Days Hoteliers Inc., supra***, Arbitrator Moore held that the disputed employees (persons employed by a Starbucks outlet located within the hotel), were performing work that "would have been in the contemplation of the parties at the time the original certification was issued" (para. 69). The historical and current job descriptions showed that the employees in the bargaining unit performed a wide range of duties to provide all of the services one would expect from a hotel, including food and beverage services (para. 64). While there were differences in the individual tasks that had to be performed to produce coffee at Starbucks, as opposed to brewed coffee at the hotel, the differences were not determinative (para. 66). The function and purpose of serving food and beverages to customers at Starbucks and at the hotel was substantially similar (para. 66).

41. In the present case, the Union's predecessor was first certified for rental car employees at YVR in 1996. The Board issued a certification for the employees at YVR employed by National Car Rental (Canada) Inc. except sales persons. The duties of the exempted sales persons relate to the selling, rather than renting, of cars, which does not take place at YVR.

42. At the time of the initial certification, the employees in question were performing bargaining unit work related to the named employer's rental car business at the YVR main terminal.

43. The corporate entity that owned National Car Rental (Canada) Inc. acquired the Alamo Rent A Car location at YVR and the Union's certification was varied in 2005 to include Alamo Rent A Car employees. At the time of this variation, the employees in question were performing bargaining unit work related to the named employer's rental car business at YVR, even though National and Alamo initially operated as distinct, non-integrated entities.

44. In 2007, the corporate entity that owns the Enterprise brand purchased the corporate entity that owned the National and Alamo brands. In 2009, the Board declared ERAC the successor employer to National Car Rental (Canada) Inc. and amended the Union's certification accordingly. At the time of the successor declaration, the employees in question were performing

bargaining unit work related to the named employer's rental car business at YVR. The named employer thus became ERAC.

45. Of even greater significance is the fact that, in 2009, ERAC took over the operation of the National rental counter, and thus its employees, located at the YVR south terminal location from a franchisor. The National brand YVR south terminal employees "were encompassed within the scope of COPE's existing certification and became bargaining unit members". [ASF at para. 61] ERAC's Tri-Brand Manager for YVR at the time, Stephen Rebuck, [ASF at para. 86] contacted the Union, indicating that, as a result of taking over this location, it was his understanding that ERAC needed to discuss a shift bid for a Rental Sales Agent ("RSA") at the location as part of the transition [UBD at Tab 3].

46. Shift bids are required by Article 22 of the Collective Agreement and an RSA is one of position titles for the job descriptions contained in Appendix B of the Collective Agreement.

47. The National brand YVR south terminal employees were encompassed within the scope of the Union's certification when they became employees of ERAC because they were performing work related to ERAC's rental car business at YVR. Thus, they became bargaining unit members covered by the Collective Agreement.

48. The current certification declares COPE the bargaining agent for employees in a unit composed of employees except sales persons at YVR employed by ERAC, with absolutely no express limitation as to brand. [JBD at Tab 9, p. 5].

49. Notwithstanding the clear wording of the Union's certification with respect to ERAC employees working at and from YVR, looking behind the certification further strengthens the Union's position.

50. The factors that the Board and arbitrators consistently consider in determining whether or not an existing certification encompasses a group of employees (at para. 38 above) clearly support the inclusion of the Disputed Employees within the Union's existing bargaining unit:

    a) The function, nature and purpose that the Enterprise brand Disputed Employees will be fulfilling at YVR is similar to the function, nature and purpose that the originally certified National and Alamo brand employees currently carry out. In both cases, the function, nature and purpose of these employees is to facilitate the rental of cars at YVR. Indeed, the Employer's evidence, through the cross-examination of Stephen Wilk, is that there was <u>no difference</u> between the purpose of employees at the Beckwith Branch and YVR, which is to facilitate the

rental transaction in is totality.

b) The duties that will be performed by Enterprise brand Disputed Employees at YVR are similar to the duties currently performed by the originally certified National and Alamo brand employees. It is undisputed that ERAC's non-unionized employees perform the same duties related to all rental cars in the integrated fleet at non-union locations as ERAC's unionized employees perform at YVR. [ASF at para. 75] In fact, the Employer's evidence, through the direct examination of Mr. Wilk, was that Management Trainees duties are similar to bargaining unit duties, with the exception of the marketing aspect. In addition, the Employer introduced the job descriptions from collective agreements between 2000 and 2008 into evidence [Exhibits 5 and 6], which are virtually identical to the current collective agreement job descriptions [JBD at Tab 15].

c) The skills and qualifications required to perform the work of the Enterprise brand Disputed Employees are similar to those required to perform the work of the originally certified National and Alamo brand employees. Management Trainees must be at least 18 years old, have a valid driver's license and have no recent driving-related infractions. National and Alamo brand unionized employees must have a high school diploma or equivalent, a valid driver's license and a safe driving record. [ASF at paras. 93 and 108] Preferred qualifications for both include completion of a post-secondary degree and customer service experience. [JBD at Tabs 13 and 16]

d) The Enterprise brand Disputed Employees are functionally related to, or fully integrated into ERAC's core business in which the originally certified National and Alamo brand employees work. ERAC's core business is rental cars. National, Alamo, and Enterprise are all rental car brands and all form part of ERAC's core business. It cannot be seriously disputed that ERAC's rental car employees are fully integrated into ERAC's core business of rental cars, regardless of brand, especially in light of the Employer's agreement that the very purpose of Enterprise and National/Alamo employees is to facilitate the rental of cars. In addition, it is undisputed that ERAC uses a fully integrated fleet of rental cars and accompanying computer system that can be used interchangeably for all three brands. [ASF at para. 74].

51. There is generally a presumption that disputed employees are not covered by an existing certification in the following circumstances:

a) the employer has started a wholly new endeavour unrelated to its previous business, and the disputed employees work in that endeavour: *North Shore Neighbourhood House Society, supra*, at para. 34.

b) the original certification was geographically limited, and the employer opened a new geographic location at which the disputed employees work: *North Shore Neighbourhood House Society, supra*, at para. 34.

52. In ***Vancouver Museum and Planetarium Assn., supra***, a case heavily relied upon by the Employer in its opening, the Board held that a union's certification for all employees at a specific address did not in fact include the cafeteria employees working there. When the certification was initially granted, the employer neither employed employees to work in a cafeteria nor operated a cafeteria. Rather, at that time, the cafeteria was leased to a third party whose employees were certified to another union. Despite the "generic wording" of the original certification, the cafeteria employees were not covered by it.

53. Presumptions that might point to the exclusion of the Disputed Employees from the Union's existing certification are not present in this case:

a) Clearly, ERAC is not starting a wholly new endeavour unrelated to its previous business. The Disputed Employees work in ERAC's core business of renting cars. They will continue to do so regardless of their transfer to YVR. ERAC is not, for example, opening up a cafeteria at YVR and presumably does not intend to do so. Instead, it is continuing its core business at YVR and employees working in this core business at YVR have been certified for nearly two decades, which makes ***Vancouver Museum and Planetarium Assn., supra,*** entirely distinguishable.

b) The certification in this case does in fact contain geographic limitations but this actually strengthens the Union's position. The Union is certified for rental car employees at and from YVR. As is clearly evident from the map introduced into evidence by the Employer [Exhibit 4], the Employer's current Enterprise brand operations are not located at YVR but over a bridge, off Sea Island, at the Beckwith Branch. ERAC is proposing the creation of a new rental counter within the geographic scope of the Union's certification, YVR. This new rental counter will not only be within the geographic scope of the Union's certification generally, but it will also physically overlap with the current location of the rental counter staffed by unionized employees. The Employer will be placing Enterprise brand employees in the actual physical space that unionized employees currently work from in order to perform virtually the same work. By contrast, when ERAC became the employer of the National YVR south terminal location employees, these employees were encompassed within the scope of the Union's certification for employees at and from YVR.

54. Further, the Enterprise brand is not a wholly new enterprise unrelated to the Employer's previous business. It is a business performing exactly the same overall function as National and Alamo. The fact that it potentially serves a different market than National does not mean it is a wholly new enterprise. In ***Days Hotelier Inc., supra***, Starbucks provided specialty coffee as opposed to the brewed coffee provided by the hotel, but the purpose and function of serving coffee to the customers was exactly the same.

55. The fact that the employees working under the Enterprise brand wear different clothing than the employees working under the National and Alamo brands is irrelevant, as that factor was in ***Days Hotelier Inc., supra***.

56. The fact that, when the certification was initially issued, the only employees within the bargaining unit worked under the National brand is not a deciding factor either. At the time that the certification was issued in ***Days Hotelier Inc., supra***, there were no employees working under the Starbucks brand, but the latter employees were still held to be covered by the certification.

57. In ***Automatic Electric (Canada) Ltd.***, [1976] BCLRBD No. 26, the Board held that the union's initial certification was broad enough to include sales staff. However, the employer was able to establish that the parties had specifically agreed to diminish the scope of the bargaining unit to exclude them. The collective agreements which they had negotiated set out the terms and conditions of employment for clerical staff. The parties had never applied the collective agreement to the sales staff, and the sales staff were never required to pay union dues. That practice had been accepted by the union for more than 10 years.

58. ERAC has failed to discharge the evidentiary burden of showing that there has been any agreement to diminish the scope of the bargaining unit to exclude Enterprise brand employees working at the Union's certified location, YVR. In fact, the very opposite is true, which will be canvassed in the next section.

B. If the disputed employees are not already encompassed, whether the parties have in fact agreed to include these employees in the bargaining unit.

59. If a determination is made that the scope of the certification as initially granted does not include the disputed employees, a union can still establish that its bargaining unit includes them, by proving that the parties agreed to extend the unit to include them. Evidence of an agreement will be necessary before an employer could be prevented from relying on the certification as it was initially granted: ***Vancouver Museum and Planetarium Assn. (Re)*** , supra, at p. 8. Relevant evidence may include the scope clause of the collective agreement, other provisions of the collective agreement, other

documents, and the parties' conduct: ***North Shore Neighbourhood House Society, supra***, at para. 30.

60. In ***Vancouver Museum and Planetarium Assn., supra***, the Board explained that the scope of a bargaining unit may evolve over time:

> While the notion that the certificate is spent for all purposes [once collective bargaining is underway] is perhaps overstated, it is certainly spent in terms of the bargaining unit description. The parties are free from that point forward to adjust the scope of the bargaining unit as they see fit and as their relationship develops. This type of adjustment invariably begins almost immediately after certification and is embodied in successive collective agreements.
>
> (at p. 6; emphasis added)

61. Article 5 - Union Recognition & Bargaining Unit Description is the scope clause of the Collective Agreement.

62. Article 5.01 - Union Recognition of the Collective Agreement states as follows:

> The Employer recognizes the Union as the sole and exclusive collective bargaining agent for all persons to whom the Certification issued to the Union on August 15, 1996 applies, including any changes to said Certification made from time to time by the Labour Relations Board of British Columbia, or any of its successors, but excluding those persons expressly excluded by the Labour Relations Board of British Columbia, or any of its successors.
>
> (emphasis added)

63. Article 5.02 - Application of the Agreement of the Collective Agreement states as follows:

> (a) This Agreement applies to all employees within the bargaining unit as defined in this Agreement and covered by the certification or any amendments thereto, issued by the Labour Relations Board of British Columbia, or any of its successors.
>
> (emphasis added)

64. The Collective Agreement, in Article 5, clearly reflects an agreement between the parties that the scope of the bargaining unit and the application of the Collective Agreement will mirror COPE's certification as it is amended from time-to-time by the Board. For the purpose of this section of the analytical framework, the focus is on current circumstances, rather than the certification as initially granted. The Board has made various changes to the certification since 1996, including most recently on February 5, 2015.

65. These changes were canvassed in depth at paras. 42-48 above. The current certification clearly covers employees at YVR employed by ERAC. Further, the scope clause establishes the parties' agreement that the Employer recognizes the Union as the sole and exclusive bargaining agent for all persons covered by this amended February 5, 2015 certification.

66. With respect to other documents or the parties' conduct, the parties agreed in 2009 that the Union would not file a successorship application in response to the Employer's movement of its off-airport operations to the Beckwith Branch. Both parties acknowledged that this agreement would not apply to any work moved from the Union's certified locations to the Beckwith Branch. The Union's evidence through Glen MacInnis, both in direct and cross- examination, was that the Union's intent was to not preclude itself from making future applications with respect to the Enterprise brand employees, should ERAC move its off- airport operations again. The reasonable inference to be drawn from this is that the Union was being vigilant with respect to both the potential movement of bargaining unit work from YVR to the Beckwith Branch and the Employer's off-airport non-union operations creeping closer to YVR.

67. Further, as noted above, when considering the parties' conduct when ERAC took over operation of the National counter located at the YVR south terminal in 2009, resulting in these employees becoming employees of ERAC, these employees were included within the scope of COPE's certification and became COPE members covered by the collective agreement between ERAC and COPE.

II. WHETHER THE WORK TO BE PERFORMED BY THE DISPUTED EMPLOYEES IS BARGAINING UNIT WORK.

68. The Union submits that the Employer is in breach of Article 6.01 of the Collective Agreement by failing to apply the terms of the Collective Agreement to the Disputed Employees that will be working at YVR under the Employer's Game Plan.

69. Article 6.01 - Exclusivity of Bargaining Unit Work is a union work jurisdiction clause. It provides as follows:

> Duties normally performed by employees within the bargaining unit will not be assigned to or be performed by non-bargaining unit employees except to overcome immediate, short term cases of absenteeism, emergencies, training and peak rental periods when bargaining unit employees capable of performing the work are not available.

70. The Employer is thus prohibited from assigning "bargaining unit work" to non-bargaining unit employees, except in the specified circumstances. No

such exceptions have been identified by the Employer in its oral evidence or in the ASF.

71. The purpose of a work jurisdiction clause is to protect the integrity of the bargaining unit:

> While it is sometimes difficult to understand how the performance of several seemingly unimportant job functions normally done by one of the [bargaining unit] employees ... could possibly threaten the integrity of the bargaining unit, in fact it may. To fully appreciate this it is necessary to take a wider view.
>
> If every supervisor began performing small parcels of bargaining unit work conceivably, the work of one employee could be threatened.
>
> ***(Re Carling O'Keefe Breweries of Canada Ltd.***, [1987] AGAA No. 13, (1987) at para. 44, 31 LAC (3d) 69 (Beattie))

72. In ***Days Hotelier, supra***, in addition to unsuccessfully arguing that the Starbucks brand employees were not within the scope of the Union's certification and that the Union was trying to sweep employees into its bargaining unit, the Employer also unsuccessfully argued that the Starbucks brand work was not bargaining unit work. Arbitrator Moore disagreed with the Employer, as did the Board on review. The following relevant passage is contained in both the arbitration award, at pp. 21-22 and the Board decision, at para. 18:

> While there are differences in terms of the individual tasks that must be per- formed to produce a specific specialty coffee from Starbucks as opposed to a brewed coffee at Coach's Comer, those differences are not determinative of the matter (see Canfor, supra). <u>Looking at the issue from a labour relations perspective</u>, I find that the function and purpose of serving beverages to customers at Starbucks and the Hotel is substantially similar. The same can be said about serving food items to customers, regardless of how the food was prepared prior to being presented to customers. In this regard, I agree with the analysis and comments of the Panel in the Richmond Inn case.
>
> In coming to this conclusion, I have considered the fact that the work performed at Starbucks is performed on different equipment, in a separate operation and under a different service model. In my view, that the fact that the coffee is produced from a more sophisticated espresso machine, or is made in an outlet that is operated by employees wearing different uniforms, or is provided to customers at the counter as opposed to at a table, does not bring the work outside the very broad scope of that performed by the members of the all-employee bargaining unit. If it did,

> simple changes in the service model, price point, or menu focus at one [of] the Employer's established food and beverage operations could result in the erosion of the bargaining unit. ...
>
> (emphasis added)

73. The issue of what constitutes bargaining unit work and whether the Disputed Employees will be performing the same or substantially similar duties to bargaining unit members has been fully canvassed above.

74. The Collective Agreement clearly prohibits the assignment or performance of bargaining unit work by non-bargaining unit employees. The Union has jealously guarded its exclusivity over bargaining unit work through numerous grievances. This exclusivity encompasses all the "front-end" and "back-end" functions related to the operation of rental counters at YVR. The Union has objected to the repeated attempts by ERAC managers to perform bargaining unit work.

75. While there remain some disputes between the parties about whether or not specific duties have been or will be performed by the Disputed Employees as opposed to the bargaining unit members, it is undisputed that bargaining unit work currently performed by bargaining unit members with respect to Enterprise brand customers will instead be performed by the Disputed Employees.

76. Currently, when Enterprise brand customers return rental vehicles to YVR, these cars are taken by bargaining unit shuttlers to either be cleaned/washed by bargaining unit members or repaired/ serviced by bargaining unit members. [ASF at para. 78] Under the Employer's Game Plan, when Enterprise brand customers return rental vehicles to YVR, this cleaning and washing will now be performed by the Disputed Employees. The Employer confirmed and explicitly agreed, in cross-examination, that in the future under its Game Plan, work currently performed by bargaining unit members will no longer be performed by them.

77. While the Union's position is that a significant amount of work currently performed by bargaining unit members will no longer be performed by them, as explained in ***Re Carling O'Keefe Breweries of Canada Ltd***, parcelling out even small bits of bargaining unit work may threaten the integrity of the bargaining unit. Accordingly, arbitrators must take a wider view when considering this issue.

78. In any event, both through the ASF and its evidence, the Union has established that Management Trainees clearly cannot perform the duties they are currently performing at the Beckwith Branch at YVR without impinging on numerous bargaining unit job descriptions, and, accordingly, duties normally performed by bargaining unit members.

79. The Employer is asserting that rental car duties performed by employees in a different combination, in a different uniform, under a different service model and for a different brand is sufficient to distinguish these duties from work performed by bargaining unit members. As Arbitrator Moore explained in ***Days Hotelier, supra***, accepting this premise could lead to the erosion of the Union's bargaining unit.

CONCLUSION

80. In conclusion, the Union has clearly established that Enterprise brand employees working at or from YVR in the Employer's rental car operations are included within the Union's bargaining unit. The uncontradicted material facts support this conclusion.

81. The scope of the Union's certification, as initially issued, is broad enough to encompass the Enterprise brand employees, and there has been no agreement to diminish this scope. In the alternative, the parties have clearly agreed through the scope clause of the Collective Agreement that the bargaining unit encompasses all employees in the Union's certification as amended over the years by the Board.

82. In the unlikely event that you determine Enterprise brand employees are not included within the bargaining unit, it is undisputed that the Disputed Employees will be performing bargaining unit work. This is a flagrant violation of the Collective Agreement.

REMEDIES SOUGHT

83. The remedies that the Union is seeking are declarations of the following:

    a) Non-managerial employees employed by ERAC working at or from YVR are bargaining unit employees and are covered by the Collective Agreement, regardless of rental car brand.
    b) The proposed transfer of the Disputed Employees from the Beckwith Branch to the proposed Enterprise brand rental counter at the YVR main terminal would breach Article 5.01 - Union Recognition, Article 5.02 - Application of Agreement, Article 6.01 - Exclusivity of Bargaining Unit Work, and Article 7 - Union Membership and Dues of the Collective Agreement if these employees were not bargaining unit members.

    c) Further remedies or declarations that the arbitrator may deem appropriate.

84. Further, the Union requests that you retain jurisdiction in the event of any future disputes regarding the implementation of the resulting award.

The Union's submissions included the following case law:

Re North Shore Neighbourhood House Society and Canadian Union of Public Employees, Local 389 and Certain Employees of North Shore Neighbourhood House Society, [1999] B.C.L.R.B.D. No. 361; 53 C.L.R.B.R. (2d) 304 (Oleksiuk, Pylypchuk, Van Dyck), September 8, 1999

Re Vancouver Museum and Planetarium Association and Vancouver Municipal and Regional Employees' Union, [1990] BCLRBD No. 191; 10 C.L.R.B.R. (2d) 1 (Albertini, Devine, Pylypchuk), October 5, 1990

Re Automatic Electric (Canada) Ltd. and Federation of Telephone Workers of B.C. (Clerical Division) and Brian Hopps, et al, [1976] B.C.L.R.B.D. No. 26, [1976] 2 Can. L.R.B.R. 97 (Weiler, Peck, Baigent), April 20, 1976

Re Days Hoteliers Inc., a General Partner for Days Prince George Limited Partnership and Unite Here, Local 40 (Contracting Out Grievance), [2011] B.C.C.A.A.A. No. 37; 206 L.A.C. (4th) 373 (Moore), March 11, 2011 [(upheld on Section 99 review, [2011] B.C.L.R.B.D. No. 77 (Saunders), May 17, 2011]

Re Carling O'Keefe Breweries of Canada Ltd. and Western Union of Brewery, Beverage, Winery & Distillery Workers, Local 287, [1987] A.G.A.A. No. 13; 31 LAC (3d) 69 (Beattie), July 31, 1987

V

The Employer's closing arguments read as follows:

Introduction

1. With this grievance, the Union is seeking to expand its representational rights to include employees it does not currently represent, at a separate and distinct operation for which it is not currently certified.

2. The Union is seeking to do this without determining whether these employees wish to be swept into the existing unit.

3. To allow the Union to succeed in this attempt to expand its representational rights would be inconsistent with the well-established law and policy of the *Code,* as well as the collective agreement.

4. The Union defined the scope of its grievance in Glen MacInnes' letter of November 21, 2014, as follows:

> We write to confirm our position in regards to the Employer's position that counter staff at the Airport under the Enterprise brand will be non-union. To be clear, the Union's position is that any staff performing bargaining unit work at the Airport (including counter staff) for Enterprise Rent-A-Car Canada Company under any brand, are union members and covered by the collective agreement.

5. The Employer responded in a November 26, 2014 letter from Stephen Wilk, Vice President and General Manager, as follows:

> We write to confirm our position that the scope of the Union's certification / collective agreement for the National! Alamo branded business would not include any personnel relocated to the YVR terminal that are part of the long standing Enterprise-branded business.

6. This sets out the scope of the grievance between the parties, and this was confirmed by the Union's counsel, in his letter of December 4, 2014.

Facts and Background

7. The facts are as set out in the agreed statement of facts and in the evidence we have heard.

8. We will not repeat all of the facts set out in the Agreed Statement of Facts,

but ask you to review them in your consideration of these issues. We will just highlight a few material facts at this time.

9. The history of the various companies is set out in the Agreed Statement of Facts and this history paints a picture of long-standing businesses with different brands that ultimately came under common ownership, and then continued to operate in the same manner as separate businesses with different brands.

10. In 1996, National purchased Tilden Rent-a-Car Company, and its fleet of cars in Canada (including in British Columbia).

11. Soon after National's purchase of Tilden, a number of branches in and around Vancouver were certified by a predecessor union to the Canadian Office and Professional Employees Union, Local 378 ("COPE").

12. On August 15, 1996, the Labour Relations Board (the "Board") certified COPE as the bargaining agent for the employees employed by National Tilden Operations Inc. in a unit composed of:

    ...employees at and from 3545 Lougheed Highway and 1185 West Georgia Street, Vancouver; Vancouver International Airport Terminal and 3866 McDonald Road South, Richmond, BC except sales persons and managers.

13. COPE and National Tilden Operations Inc. negotiated a collective agreement with a term commencing in 1996. (See collective agreement at Tab 4)

14. National acquired Alamo Car Rental and on June 7, 2005, the Board declared National Car Rental (Canada) Inc. the successor employer to the bargaining unit at Alamo Rent A Car (Canada), Inc. The previous certification was cancelled and COPE's August 15, 1996 certification was expressly varied to include the former Alamo brand USW bargaining unit employees (Agreed Statement of Facts, Tab 5).

15. Eleven years after the initial certification, on August 1, 2007, Enterprise Rent-A-Car purchased Vanguard Car Rental ("Vanguard") and its National Car Rental and Alamo Rent A Car businesses. (Agreed Statement of Facts, para. 26)

16. Chronology of certification and variances:
    - 1996 National Tilden Operations. Inc. (per Statement of Facts, para. 43)
    - 2005 Successorship variance, Alamo employees expressly included in National unit as a result of purchase of Alamo by National and successorship declaration and employer named as National Car Rental (Canada) Inc. No other changes to unit.

2007 Enterprise Holdings purchases parent company of National Car Rental (Canada) Inc. and then transfers National rental operations to Enterprise Rent-A-Car Canada Limited.

2009 Successorship variance, Enterprise Rent-A-Car Canada limited declared successor to the existing bargaining unit as a result of the purchase of National. No other changes to the unit.

2012 Administrative variance (on the Board's own motion) +to update the name of the corporate employer to Enterprise Rent-A-Car Canada Company. No other changes to the unit.

17. It must be noted that all varied certifications are expressly based on the certification, "Given at Vancouver, British Columbia, this 15th day of August, A.D. 1996".

18. These are not new certifications. The certification is always the one granted in 1996, except as expressly varied by the Board.

19. This, of course, is why *Vancouver Museum* refers to the "existing certification as initially granted" under the fourth branch of its test and requires an agreement by the parties to expand that unit or a variance that has the support of the employees per *Olivetti*.

20. None of the variances were *Olivetti* variances. They were either administrative variances or successorship variances that simply preserved the existing bargaining unit as it was certified in 1996.

21. The only exception is the addition of the Alamo bargaining unit in 2005, where it was made expressly clear that the Alamo employees were being included in the National bargaining unit as a result of the purchase, successorship and intermingling of employees.

22. The Alamo variance shows how the Board alters the scope of the bargaining unit when it amends its essential nature. It does so expressly, and not as a result of an administrative variance to simply update the corporate name of the employer of the employees in the bargaining unit as certified.

23. This contrasts with the 2009 successorship variance from by the Board simply amended the corporate name of the employer under s. 35 and did not amend the essential nature of the unit.

24. If anything, the Alamo variance serves to demonstrate that the variances being relied upon by the Union to alter the scope of the bargaining unit (for future groups of employees at that) did no such thing.

25. Other than in the case of the Alamo variance, the Board has at no time expanded or amended the essential nature of the bargaining unit.

Administrative variances cannot be presumed to have been intended by the Board to completely abandon the Board's well-settled jurisprudence in this area.

26. Glen MacInnes, on behalf of COPE, also made it expressly clear in his January 2010 e-mail that the only reason for listing the Enterprise corporate entity on the collective agreement was because there was no other legal corporate name and Mr. MacInnes claimed that this was a requirement under the *Code*. (Agreed Statement of Facts, at Tab 8)

27. There was no agreement to expand the scope of the bargaining unit as set out in the certification, nor to amend its essential nature. Rather, the name change simply preserved the existing bargaining unit by reflecting the name of the corporate employer for that bargaining unit.

28. On the one occasion that the parties have expanded the application of the collective agreement to new employees, they have done so consciously and expressly. In 2009, the parties met to discuss the fact that the National franchise at South Terminal had reverted to corporate control. It is clear from the evidence that the parties discussed and expressly agreed to apply the existing collective agreement to the South Terminal operation as the employer was not opposed to this expansion of the unit.

29. While there may in theory be a Delta Hospital or Olivetti issue with such an agreement, these issues have not arisen and it is a useful illustration of the type of discussion and agreement that must occur before a new group of employees will be included within the scope of the bargaining unit, discussion and agreement that have not occurred here.

30. In the meantime, from 2002 until the present date, the Enterprise YVR car rental business continued to operate out of the YVR branch out of the Beckwith location, and the National YVR car rental business carried on operating out of the YVR branch at the main terminal.

31. And Branch Managers and/or Assistant Branch Managers for the Brands of those businesses continued to be responsible for managing the individual branches. (Agreed Statement of Facts, para. 6)

32. Flashing forward, in 2014 ERAC put in a bid with the YVR Airport Authority (See Bid Document at Tab 17) in order to move its front-end YVR operation to the main terminal.

33. Importantly, the plan is for these branches to **remain operationally distinct**, and to **continue to operate separately**. (Agreed Statement of Facts, para. 121)

34. It must be noted at this time that this would not be an "expansion" of the National-branded car rental business currently serviced by the employees in the bargaining unit. Rather, as the parties have agreed in the statement of facts, it would be a continuation of the operationally distinct and separate branches.

35. The only reason why the Enterprise operation and the National! Alamo operation were bid together was that it made it easier for ERAC to meet the revenue threshold under the bid. The bid and the ultimate relocation would not have an impact on ERAC's strategy of "keeping the National! Alamo and Enterprise brands and branch operations distinct" and the plan allowed the operations "to continue operating as they had been" (Agreed Statement of Facts, paragraph. 122-124).

36. Once again, the parties have expressly agreed that the relocation of the Enterprise front-end operations to the YVR terminal is not an "expansion" of the National operations.

37. The schematics of this re-location are set out in Tab 18.

38. The uncontradicted evidence is that, in addition to the agreed facts above, there will be no reduction in bargaining unit staff, vehicles or parking spaces as a result of the relocation and continued operation of the Enterprise branch out of the YVR main terminal, nor any other impact on the bargaining unit.

39. The Enterprise branch will continue to have its counter and parking area work (both on vehicle departure and return) done by management trainees.

40. Shuttling of vehicles to the Beckwith Branch will continue to be done by Enterprise Branch employees, as it was done before. (Agreed Statement of Facts, paragraph. 79 and Hirani evidence)

41. The washing and processing of vehicles for the Enterprise YVR Branch will continue to be done at the Beckwith location.

42. The Enterprise YVR Branch will continue to service Enterprise customers arriving at the airport.

43. The only change will be the location from which the front-end of the Enterprise branch is operated.

44. Once again, this is a re-location of the front-end of the Enterprise YVR Branch and not an expansion of the National Branch.

Law and Policy of the *Code*

45. The Board has established several principles that must be considered and followed when considering this grievance.

46. The first is that a certification, even if broadly worded at the time at which it was granted, does not have the effect of later sweeping in employees that were not contemplated to be included at the time it was granted.

47. The second is that a Union cannot sweep in a group of employees in a separate operation without determining their wishes through an organizing drive.

48. It is fundamental to the system of collective bargaining that individuals have the opportunity to choose to be represented, and by whom.

49. The Board explained this principle in the well-known and often cited case of *Delta Hospital*, BCLRB No. 76/77, at pages 9 -10:

> The assumption of particular provisions of the Code is that a trade-union will represent employees in their employment relationship. A trade-union is a vehicle through which employees can come together and have some meaningful input into the terms and conditions under which they will work. This is implicit in several provisions of the Code. Section 1(1) defines collective agreement as "an agreement in writing between an employer ... and a trade-union, containing rates of pay, hours of work, or other conditions of employment ... ". It is employees who receive the pay established, work the hours set, and live under the other provisions negotiated. Presumably, it was intended that the trade-union would be representative of the employees during the bargaining which produced those terms. Many of the Code's unfair labour practice prohibitions have as their purpose the preservation of employee freedoms: to opt for collective bargaining and to select a bargaining agent. Section 43(1) provides that "the Board may, in any case, for the purpose of satisfying itself as to whether employees ... wish to have a particular trade- union represent them as their bargaining agent, order that a representation vote be taken ... ". Section 46 sets up as conditions precedent for certification either that a majority of employees are members of the trade-union or that there is other evidence that a majority wish to be represented by the trade-union. Section 52 says that the Board may cancel a certificate where it is satisfied that the trade-union "has ceased to represent a majority of employees in the unit".
>
> The assumption referred to above is made explicit in Section 27 of the Code.

> 27.(1) The board, having regard to the public interest as well as the respective rights and obligations of parties before it, may exercise its powers and shall perform the duties conferred or imposed on it under this Act so as to develop effective industrial relations in the interests of achieving or maintaining good working conditions and the well-being of the public, and for those purposes the board shall have regard to the following purposes and objects:
>
> (a) securing and maintaining industrial peace, and furthering harmonious relations between employers and employees;
>
> (b) improving the practices and procedures of collective bargaining between employers and trade-unions as the freely chosen representatives of employees;
>
> (c) promoting conditions favourable to the orderly and constructive settlement of disputes between employers and employees or their freely chosen trade-unions..." (emphasis added)

50. As explained, the fundamental principle of employee choice is built into the fabric of the *Labour Relations Code* and this arbitration panel is required by Section 2(c) of the Code to exercise its powers and perform its duties "in a manner that encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees."

51. This is a principle that finds articulation and application in many different contexts, and is one that must guide this panel's consideration of the Union's grievance.

52. The Union's attempt to sweep in the Enterprise-brand employees without seeking their support fails to respect these principles.

The Scope of the Bargaining Unit

53. The certification language names the corporate entity (Enterprise Rent-A-Car Canada Company) and the "Vancouver International Airport Terminal". The Union argues that this means that any employee of any car rental business operated by the Company at the Airport is within the scope of its bargaining unit.

54. The Board established long ago that such an approach was incorrect and inconsistent with the Code.

55. The Board has regularly held that if a group of employees existed at the time of certification, and were the employees of another employer at that time,

they could of course not have been in the contemplation of the parties at the time of certification, because they were employed by someone else.

56. On this basis, a number of cases have flatly rejected the argument that just because this set of employees is now employed by the relevant Employer, and fall within the literal and geographic scope of a broadly worded certification order, the Union is relieved of its obligation to organize them under the *Olivetti* principle.

57. If the set of employees were not within the contemplation of the parties at the time of the certification, these cases hold that is essentially the end of the matter, in the absence of an express or implied agreement to expand the scope of the bargaining unit.

58. Some of the first (and oft-cited) comments about the application of a scope clause in a certification came in 1976 from Paul Weiler in *Automatic Electric (Canada) Limited,* BCLRB No. 26/76 (at page 3):

> The Board should not take a broad unit description, written a long time ago in a certification which served to get collective bargaining underway, and apply it in a literal fashion in the real-life employment environment which has been shaped by later agreement by the parties about the precise scope of the unit. If, in fact, the effective unit specified by the collective agreement is a coherent and appropriate one and if the union has not violated its duty of fair representation in negotiating it, then this Board should accept that unit as the basis for further proceedings and, if necessary, vary the wording on the certification so that it will effectively reflect the current realities. If the Union then wishes to expand the scope of its bargaining authority over a group of employees whom it has not hitherto represented, such as the sales staff in this case, it should first organize these employees (see Olivetti Canada; 1975 1 Canadian LRBR 60).

59. The Industrial Relations Council later decided *Vancouver Museum and Planetarium Assn.*, BCLRB No. C194/90, (reconsideration of No. C214/89) ("*Vancouver Museum*") and this case remains the leading decision in this area and has been cited by every relevant case since it was decided.

60. *Vancouver Museum* was a decision of a Second Reconsideration Panel, overturning the First Reconsideration Panel, which had itself overturned of the original decision of the 'McDonald Panel'.

61. *Vancouver Museum* makes it clear that there are only four ways in which a new employee or group of employees can be found within the scope of an existing bargaining unit. At page 7, the Council explains:

> If the Employer refuses to agree to an expansion of the bargaining unit, a union wishing to encompass other unrepresented employees may only do so in one of four ways: first, by organizing the unrepresented employees and applying for a new certificate under Section 39(1) of the Act; second, by organizing the unrepresented employees and applying for a variation pursuant to Section 36 based on the *Olivetti* principle; third, by convincing the appropriate labour relations tribunal that the parties have in fact agreed to include these employees in the bargaining unit; or finally, by convincing the appropriate labour relations tribunal that the existing certification as initially granted already encompasses the unrepresented employees and that it has not been diminished by agreement.

62. The Union here has not sought to organize the unrepresented employees. Accordingly, the Union has to either convince this panel that the parties have in fact agreed to include the Enterprise employees in the National/Alamo bargaining unit, or to convince this panel that the existing certification as initially granted already encompasses the unrepresented employees.

63. The fourth option was described in *Vancouver Museum* in the following terms at page 7:

> Consideration of the last option begins with a determination of the scope of the bargaining unit when the certificate was initially granted. We recognize that the scope may change a moment after the certification issues because of the voluntary activity of the parties. Nothing, however, affects the scope which existed at the moment of certification. That is the moment of conception of the bargaining unit, as determined by the authority of the responsible labour relations tribunals. It is from this unique point in time that all else flows in a labour relations sense. The McDonald panel adopted the correct approach when it considered the scope of the Union's bargaining unit at the time the original certification was granted. Since a determination of the scope of the bargaining unit is necessary in order to issue a certification, the McDonald panel was able to ascertain the scope of the bargaining unit covered by the original certification by determining who the "employees at 1100 Chestnut Street" were at the time of that certification, subject to the specifically stated exclusions. The McDonald panel relied on the payroll records to determine the boundary of the bargaining unit at the time of the certification application and concluded the cafeteria workers fell outside that boundary. It found that persons who worked in the cafeteria at the time of the certification order "were not even contemplated by the parties or the Labour Relations Board, obviously because the Employer did not employ (nor had its predecessor) any cafeteria employees" (at 6; emphasis added). (...)

64. The Council further explained, at page 8:

> Employees who are employed by a different employer could not be covered, in the labour relations sense, by the original certification despite its generic wording. Nor could they be covered by the certification in a legal sense because they were not "employees" of the employer for which the certification was issued. The Council's jurisdiction under the Act is to certify "employees" of an employer. The certification does not attach to a business or to work. Instead, it attaches to the employees of an employer.

65. Thus, the relevant inquiry involves a determination of the employees within the scope of the bargaining unit when the certificate was initially granted.

66. The Council also considered the possibility of an agreement by the parties to alter the scope of the unit and made it clear that there must be a "specific agreement to extend the bargaining unit" to employees outside the scope of the original certification order.

67. The Council explained, at page 9 -11:

> The reconsideration panel further erred when it relied upon evidence of the actions of the parties after the certification was granted to determine the scope of the original certification order. The reconsideration panel began correctly by stating that evidence of an agreement to extend the scope of the bargaining unit was required before a party could be prevented from relying on the certification as it originally was granted. The reconsideration panel found there was a framework in place, both in terms of the collective agreement and the parties' previous practice, for the expansion of the bargaining unit. The reconsideration panel did not find, however, a specific agreement to extend the bargaining unit to include cafeteria workers so as to deprive the Association of the right to rely on the scope of the original certification. The reconsideration panel said:
>
>> Finally, it is important to note that while the parties may not have specifically turned their minds to the cafeteria employees at the time of the certification, the parties did address the possibility of new groups of employees at the bargaining table by including a reclassification and a new classification procedure in the collective agreement.
>
> Nor did it find that the conduct of the parties since 1980 in any way established that the scope of the unit covered by the original certification was so broad as to already encompass new classifications of employees including the cafeteria workers. It found evidence only of an intention to extend the scope of the bargaining unit. Indeed, the reconsideration panel said:
>
>> While the work performed by the cafeteria employees is different from the duties of other Association employees, the conduct of the parties

since 1980 reflects an intention to extend the scope of the unit to a broad range of classifications.

In spite of these findings, the reconsideration panel erroneously concluded that because the parties had in their collective agreement a framework which could accommodate an expansion of the bargaining unit, that language of the original certification was therefore ab initio broad enough to cover such future expansion.

Providing a framework for new classifications to accommodate new groups of employees from time to time is only evidence of a mechanism for reaching agreement to extend the scope of the bargaining unit. It is not, by itself, evidence of an agreement to extend the scope of the bargaining unit. When an agreement is concluded for each new group of employees, the framework of the bargaining unit extends to encompass them. Framework agreements alone, do not oblige the employer to agree to the union as the bargaining representative of a new group of employees, the issue becomes, as here, whether the existing certification compels the Employer to bargain with the Union in respect of this new group of employees.

The reconsideration panel further erred when it relied upon Western Magazine Reshippers Ltd., IR(No. (287/88 (upheld IR(No. (108/89); and W.G. McMahon Limited, B(LRB No. 13/78, [1978] 2 (an LRBR 222 for the proposition that the VMREU was merely seeking to preserve its jurisdiction over employees who are reasonably included in the existing bargaining unit under the existing certification. In our view, neither decision applies to the facts of this case. In Western Magazine, supra, the employer moved part of its business which was previously performed by bargaining unit employees. The Union in that case was simply trying to retain jurisdiction over employees who were doing the same work at the time of the transfer. Here, the work was never performed by employees of the Association within the bargaining unit established by the original certification.

... given our conclusion that the original certification could not possibly have extended to cover cafeteria workers who were never employees of the Association or its predecessor, it follows that the acquisition by the Association of a cafeteria workforce could not but constitute an extensive labour relations change so as to materially affect the labour relations assumptions present when the original certification was granted. Thus, the general wording of the original certification order is of no assistance to the VMREU. Instead, it is precisely the kind of case to which Olivetti Canada Ltd., supra, must be applied.

To summarize, the parties' agreements since the original certification are not determinative of the scope of the original certification. Even if the collective agreement provided a framework for the inclusion of the cafeteria workers at some point, the parties are required to reach an agreement in the collective bargaining process to include these workers. It was not alleged nor argued that such an agreement existed. Indeed, the issue between the parties in this case was never whether the current collective agreement contained an agreement to include the cafeteria workers but, rather, whether the original certification was broad enough to encompass them. The findings made by the reconsideration panel concerning the parties' agreement from time to time to expand the bargaining unit simply confirmed that the original certification order issued by the Board encompassed less than the present configuration of the bargaining unit. The certification order could not include cafeteria workers, who at that time, were not even a glint in the eye of either the VMREU or the Association.

68. The Board in *Vancouver Museum* referred to the long-established principle in *Olivetti* that the Board will not allow a union that has established itself among one group of employees to use that as a base for sweeping other employees into the unit, in that case through a variance. Rather, the Union must show that it has sought and obtained membership support in that new grouping and the Board follows its ordinary certification process (*Olivetti*, at p. 4)

69. The *Vancouver Museum* and *Olivetti* principles have repeatedly been applied by the Board.

70. The *Vancouver Museum* decision was central to the decision in Alaskan Copper and 8raass Company Ltd. (Re) [2005] BCLRBD No. 183, which involved a dispute over the wording of a certification (all parties agreed as to which employees were to be certified).

71. The Employer wanted a certification that either specifically defined the group of workers who all parties agreed would be the union members ("(w)arehouse employees and truck drivers"), or an 'all- location' unit which expressly excluded "sales, office, maintenance, cleaning and security" staff.

72. The Union wanted an 'all employee' unit which only excluded "managers, office and sales staff".

73. At the time of certification, the maintenance, cleaning and security services at the location were contracted out by the Employer, and the Union argued that there was no reason to exclude employees in the certification who were not even employees of the Employer at the time.

74. The dispute then, was over whether the certification should expressly exclude "maintenance, cleaning and security" staff, despite the fact that at the time of certification, none of the parties considered those employees to be members of the unit.

75. The Employer's concern, obviously, was that if they were to eventually bring those operations in house, they would be automatically included in the bargaining unit with the Union's proposed certification.

76. The Board brushed aside the Employer's concerns, in these terms, emphasizing the difference between 'work jurisdiction' and 'bargaining unit scope', at para. 18:

> The parties appear to be concerned that the unit description might impact how bargaining unit work is defined in the future. To reiterate, the Union's description does not define the unit in terms of job duties but regardless, this concern is misplaced insofar as certification only confers the right to represent employees. The unit description in a certification defines the group of employees the Union represents, not the scope of bargaining unit work. A good exposition of these principles is set out in *Vancouver Symphony Society,* IRC No. C3/93, at p. 18, as follows:
>
>> It is somewhat trite to observe that a trade union is certified to represent employees, and not to exercise jurisdiction over a certain type of work: see *A.S. King Logging Ltd.,* BCLRB No. 14/79, [1979] 1 Can LRBR 551, at pp. 552-54, citing *Cariboo Memorial Hospital,* BCLRB No. 47/74, [1974]1 Can LRBR 418. Even where a bargaining unit is defined in terms of certain job classifications or work functions, it does not automatically follow that the employees have a proprietary right to the work they perform. The typical response to such claims is that the union must negotiate contractual language in order to establish and protect its work jurisdiction: see *The Hobart Manufacturing Company Limited,* BCLRB No. 33/77, followed in *E.B. Horsman & Son Ltd.,* IRC No. C76/87. Thus, no one can question the appropriateness of jurisdictional proposals which are designed to preclude the performance of work by persons outside the bargaining unit, to restrict contracting out of bargaining unit work, or to protect against other assignments of bargaining unit work. However, there may come a point where a "work jurisdiction" proposal is really representational in nature. As stated in a somewhat different context, work jurisdiction and bargaining rights cannot be equated: see *Toronto Star Newspapers Limited,* supra, at p. 427.

77. The Board described the Employer's concerns as "misplaced", for the following reasons. At para. 20- 21:

First, the Union does not contend that persons who may be employed in these capacities are employees in the unit it seeks to represent. The Union seeks to describe the unit based on facts that currently define the workplace. The Union's description does not generate a lingering ambiguity about the status of persons currently employed at the identified worksite-they are either in or out of the unit. Further, I accept the Union's submission that no useful purpose is served by recording the exclusion of persons who may never be employed. The Employer and the Union know whom the Union represents so there is little reason for bargaining to stall over the scope of the unit.

Second, the Employer's concern is misplaced as a matter of law and policy under the Code. The mere fact a unit description refers to "all employees" does not necessarily determine whether future employees are in the bargaining unit. Rather, the Board examines the assumptions in place at the time the certification was granted to determine whether employees are in the certified unit.

78. The Board then cited the following from *North Shore Neighbourhood House Society,* BCLRB No. B361/99 (Reconsideration of BCLRB No. Bl03/99) which includes this oft-repeated passage:

Both *Automatic Electric* and *Vancouver Museum* proceed from the premise that one has to first determine the scope of the certification. The fact that a certification may read "all employees" is not determinative. The Board must bring a sophisticated analysis to the question and understand the assumptions that were in place at the time the certification was applied for and granted. It is from this latter point that *Vancouver Museum* and *Automatic Electric* proceeded.

Vancouver Museum proceeded down the avenue where the initial certification did not encompass the disputed employees. In that case, the onus lay with the union to convince the Board that the parties had in fact agreed to include the employees in the bargaining unit. Such an agreement may be found in conduct, documents or the scope clause of the collective agreement. Where the union fails to convince the Board that such an agreement exists, then the union's sole remaining options are to organize the employees and either apply for a separate certification pursuant to Section 18 of the Code or for a variance, pursuant to Section 142 of the Code. In *Vancouver Museum* the underlying assumptions demonstrated that the disputed employees were not encompassed by the initial certification and there was no subsequent agreement for expansion of scope in the collective agreement to include these employees. As a consequence the union again was placed in the position of having to organize the employees and apply for an *Olivetti* variance. Parenthetically, an agreement to expand the scope to include a group of employees not

covered by the original certification may raise issues canvassed in *Delta Hospital* BCLRB No. 76/77, [1978] 1 Can LRBR 356. However, that is not a matter which needs to be addressed in this case. (paras. 29 and 30)[1]

79. The Board in *Alaskan Copper* continued:

> In the present case, like the cafeteria employees at the moment of certification in *Vancouver Museum, supra,* the cleaning, maintenance and security personnel are employees of a third party. They are not employees of the Employer. No one seeks to include them in the unit. As noted above, this is a key assumption governing the scope of the unit described by the Union. If the Employer chooses to cancel the contract and do this work using its own employees, then in accordance with the analysis in *Vancouver Museum,* the Union will have to show that there is an agreement to include those employees in the unit, or organize them and apply to vary the unit to include them. For these reasons, I find the Employer's stated concern about the status of persons that might be employed in these capacities is unfounded.

80. The Board makes it clear in this case that an Employer cannot seek to carve out employees in an "all employee" certification on the basis that there may be such employees in the future, but in the same vein, a Union cannot rely on an "all-employee" certification to sweep in employees in the future that were not employed by the employer at the time of the certification.

81. These principles were repeated, and reinforced, in a recent Board decision, *Coastal Community Financial Management Inc.,* BCLRB No. B138/2013, at paras. 32 - 38:

> The Board's policy is to issue certifications that convey the essential character and preserve the integrity of bargaining units: *Wintresle Intermediate Care Inc.,* BCLRB No. B195/94; *Gasmaster Industries Inc.,* BCLRB No. B99/2000; *Nanaimo Credit Union (Parksville & District Credit Union),* BCLRB No. B6/2001.
>
> A unit description referring to employees at the each work site address typically achieves the foregoing goals unless employees frequently work at different or changing locations. In the latter case, a broader geographic description may better preserve the integrity of the unit. In sum, the appropriate unit description depends on the facts of the specific work environment, measured against the goals of accuracy and the preservation of the unit. The Board strives to make the description as accurate as possible.
>
> There is no immediate problem driving this dispute. That is because there is no difference about who is presently in the respective units. Nor is it

suggested that the continued use of site-specific descriptions will generate ambiguities in that regard due to the nature of the business operations. Rather, the central issue is whether a proposed description might impact the Union's right to represent future employees.

The Board has held that unit descriptors like "employees", "all employees", "employees at and from" specific worksites, and even broad geographic descriptions, are not determinative of a union's right to represent future employees: *British Columbia Forest Products Limited,* BCLRB No. 8/82, *International Simultaneous Translation Services Ltd.,* IRC No. C110/91; *Valley Rite-Mix Ltd. et al.,* IRC No. C175/88, *ETL Environmental Technology Ltd.,* BCLRB No. B200/93. Rather, the answer to that question is found by defining the relationship of the unit to the employer's operations at the moment the certification is issued or last varied. In sum, a certification confers the right to represent a unit of employees of an employer, as opposed to work or a business: *Vancouver Museum and Planetarium Association,* IRC No. 194/90, 10 CLRBR (2d) 1, at p. 11. Bargaining rights are attached to that group of employees and follow the relocation or expansion the employer's existing operations.

...

In this context, the Board defines an employer's existing business operations by reference to the assumptions in place the moment the certification was issued or varied, recognizing that the parties may subsequently adjust the scope of the unit established by certification. This point was underscored in *North Shore Neighbourhood House Society,* BCLRB No. B361/99 (Leave for Reconsideration of BCLRB No. B103/99) where the Board reiterated that the scope of a union's bargaining rights is not dictated by the unit description:

> Both *Automatic Electric* and *Vancouver Museum* proceed from the premise that one has to first determine the scope of the certification. The fact that a certification may read "all employees" is not determinative. *The Board must bring a sophisticated analysis to the question and understand the assumptions that were in place at the time the certification was applied for and granted.* It is from this latter point that *Vancouver Museum* and *Automatic Electric* proceeded. (para. 29, emphasis added)

In *North Shore Neighborhood House Society, supra.,* the Board concluded that the disputed group of employees was in the union's "all employee" bargaining unit, not simply because the description read "all employees", but because the employees at issue were tied to the employer's existing operations (at the time of certification) as opposed to a wholly new endeavour, unrelated to those operations:

> ...
>
> The Board has applied this approach in a variety of contexts. See for example, *Compass Group Canada (Health Services) Ltd./Groupe Compass Canada (Services De Sante) Ltee,* BCLRB No. B328/2003, at para. 70 and *Health Employers Association of British Columbia on behalf of Coast Foundation Society* (1974), BCLRB No. B235/2005.

82. See also *International Simultaneous Translation Services Ltd.,* 13 C.L.R.B.R. (2d) 68, at p. 11-12.

83. The Board has also further commented negatively on attempts to sweep in an unrepresented group of employees "by variance".

84. In *ETL Environmental Technology Ltd.,* BCLRB No. B200/93, the Board repeated the principle that an expansion or re-location of an existing certified business within a geographic certification would include the applicable employees, but that the employees of a new and separate operation of the employer would not be included, even if they fall within the geographic scope of the certification.

85. The analysis is the same, whether or not the employees are performing similar duties. The "similar duties" analysis only comes into the picture in the case of a re-location or expansion of an existing certified business. It is irrelevant if the group of employees in question are not part of a re-located or expanded business.

86. For example, the employees in a new sawmill, per *British Columbia Forest Products Ltd., supra,* would be performing the same duties as the bargaining unit employees at the existing sawmill within the scope of the geographic certification, and the employer is in "the business of sawing logs" but that is irrelevant as the new sawmill is not a re-location or expansion of the existing sawmill.

87. In the course of rendering its decision in *ETL Environmental Technology Ltd.,* the Board also commented as follows, at page 3:

> The Board is without jurisdiction to unilaterally amend the essential character of the proposed unit *(Fraser Lake Sawmills, supra).* Whether the description is site specific or geographic, however, does not alter the character of the unit. It remains the same employees working at the same locations. Equally important, the rights of the Union to represent future employees is not materially affected *(British Columbia Forest Products Ltd.,* BCLRB No 8/82, *International Simultaneous Translation Services Ltd., supra* and *Valley Rite-Mix Ltd.,* IRC No. C175/88).

88. As referenced by the Board, the BC Courts have held that the ability of the Board, on its own motion, "to augment or reduce the unit is restricted to those instances where it does not change the essential character of the unit." See *Fraser Lake Sawmills Ltd.* (1980), 20 B.C.L.R. 210, at para. 28, and the cases cited therein.

89. Accordingly, a variance by the Board on its own motion cannot expand a bargaining unit beyond the scope for which it was originally certified as this would change the essential character of the unit.

90. A similar issue arose in Ledcor Resources & Transportation Limited Partnership, BCLRB No. B124/2013, (Leave for reconsideration denied, B171/2013). CLAC initially received a certification for "masters, deckhands, shipboard personnel and labourers at and from 1200-1067 West Cordova Street, Vancouver, BC" employed by Pacific Western Navigation LP. Pacific Western was an entity within the Ledcor Group.

91. Pacific Western later applied to vary the certification to reflect its name change from Pacific Western to "Ledcor Marine Limited Partnership" and the variance was granted by the Board.

92. The following year, CLAC applied to vary the certification to change the name of the employer from Ledcor Marine to Ledcor Resources & Transportation Limited Partnership. CLAC also applied to change the bargaining unit description to reflect all "employees" rather than classifications.

93. The Board granted the variance application without a hearing or a vote.

94. In 2010, the parties had also negotiated a collective agreement with a term stating as follows:

    2.01 The Employer recognizes the Union as the sole bargaining agent of all employees in the bargaining unit as defined in Article 2.02.

    2.02 This Agreement covers those employees of the Employer working in the Province of British Columbia as described in the certification issued by the British Columbia Labour Relations Board.

95. It is worth noting at this point how similar Article 2.02 is to the relevant provisions in the collective agreement in this case.

96. Ledcor then began operating a cant mill and significantly increased its employee complement.

97. The Steelworkers Union then applied for certification of the cant mill and CLAC and Ledcor relied on the variance and collective agreement terms to say that the new cant mill employees were part of the CLAC unit and so the application was an untimely raid.

98. The Board rejected this position and commented as follows, at para. 36 - 41:

> In *Vancouver Museum and Planetarium Association,* IRC No. C194/90 (Reconsideration of No. C214/89), 10 C.L.R.B.R. (2d) 1 *("Vancouver Museum"),* the Board noted that "the purpose of a certification is to get collective bargaining underway", and that once collective bargaining is underway, the certification is "for most purposes, spent" (p. 7). The Board added that once the certification has been issued, the parties are "free from that point forward to adjust the scope of the bargaining unit as they see fit and as their relationship develops", adding that this type of adjustment "invariably begins almost immediately after certification and is embodied in successive collective agreements" (pg 8). Thus, the Board has long recognized that parties may adjust the scope of the bargaining unit from that stated in the certification, that this can begin immediately upon certification, and that the adjustment is often embodied in their collective agreement.
>
> In the case at hand, CLAC and the Employer point to Sections 2.01 and 2.02 of the Collective Agreement, set out earlier, as evidence of their agreement to adjust the scope of the original bargaining unit. In addition, they rely on the fact that the Board varied the certification to reflect "employees" rather than classifications. They submit that, accordingly, CLAC has represented all of the Employer's employees, including the employees at the Cant Mill.
>
> The Steelworkers, however, submit that CLAC cannot sweep employees into its unit without their support. It notes that when CLAC was originally certified, the 2010 bargaining unit contained four employees; CLAC now purports to represent approximately 200 employees, none of whom have had an opportunity to vote on representation. It relies on the principles stated in *Olivetti.*
>
> In *Olivetti,* the Board stated that it "does not allow a union which has established itself in one location or among one group of employees to use that as a base for sweeping in other employees into the unit through applications for variance. The union must also show that it has sought and obtained membership support in that new grouping and the Board follows its normal investigative procedures on certification applications to establish that fact" (p. 64). In *Vancouver Museum,* the Board reiterated this principle, noting the fact that the parties have agreed to adjust the scope of the bargaining unit does not "set in motion the expansion of the

certification *ad infinitum* to sweep in all other employees of the employer" (p. 8).

While unions and employers are free to agree to adjust the scope of the bargaining unit after certification has taken place, and bargaining units expand automatically to include new employees that fall within the scope of the unit, the Board does not permit unions who are established only at one location or among one group of employees to "use that as a base for sweeping other employees into the unit through applications for variance". *(Olivetti* at p. 64).

In the case at hand, on the basis of the history of the initial certification and the absence of a vote before the variance was granted to change the bargaining unit description from one identifying specific job titles to a generic description of "employees", I do not accept the position of CLAC and the Employer that the bargaining unit was expanded by the November 25, 2011 variance such that it can now be said to include the Cant Mill employees. I find that to do so would allow a sweeping in of those employees by variance, something not permitted under the *Olivetti* principle.

99. As explained by the Board, parties can neither rely on an administrative variance, nor on provisions of their collective agreement incorporating the varied certification, to sweep in a distinct group of unrepresented employees without seeking their support in the ordinary way.

100. It should also be noted that the Board rejected CLAC and Ledcor's position despite finding that employees in Ledcor's operations (including the cant mill and marine division) shared a community of interest due to their "strong interdependence" and the cant mill was not a "stand-alone, self-sufficient operation". (See para. 53)

101. Arbitrator Kinzie was required to determine work jurisdiction in *Simon Fraser University*, [2002] B.C.C.A.A.A. No. 288 which necessitated a definition of lithe scope of the bargaining unit as certified by the Labour Relations Board" in order to determine whether the work in the disputed positions was bargaining unit work or not.

102. In doing so, Arbitrator Kinzie applied the above jurisprudence and principles, as follows at paras. 78 - 80:

Again, the central question that I have to determine is whether the work involved in the 11 disputed positions falls "within the scope of the bargaining unit as certified by the Labour Relations Board". See Appendix G. This question is similar to the one the Board has to address in respect of applications under Section 139 (I) of the Labour Relations Code when it is

asked to determine whether "a person is included or excluded from an appropriate bargaining unit". The question is not the same because my focus is on work performed in various positions and whether it is properly bargaining unit work, while the Board's focus in Section 139 (I) applications is on employees and whether they are properly included in a bargaining unit. The questions are similar because their answers depend to a large extent on the Board's description of the appropriate bargaining unit.

In this proceeding, the Union is claiming that the work involved in the 11 disputed positions, which has been regarded by the Employer as being outside the scope of the Union's bargaining unit for some period of time, is in fact work within the scope of its bargaining unit. While the parties have agreed to undertake a review of these positions, they remain in disagreement on the question of whether the work in each of the positions is bargaining unit work or not.

I am of the view that in these circumstances, the comments of the Industrial Relations Council in Vancouver Museum and Planetarium Association, IRC No. C 194/90 are instructive:

> While the parties may from time to time adjust the scope of their bargaining unit by agreement, it is also trite law that employers are not obliged to agree to all proposed adjustments. The fact that the parties have agreed from time to time since the certification to adjust the scope of the bargaining unit neither obliges the parties to continue to agree for all time to adjust the scope of the bargaining unit, nor does it set in motion the expansion of the certification ad infinitum to sweep in all other employees of the employer. If the employer refuses to agree to an expansion of the bargaining unit, a union wishing to encompass other unrepresented employees may only do so in one of four ways; first, by organizing the unrepresented employees and applying for a new certificate under Section 39(1) of the Act; second, by organizing the unrepresented employees and applying for a variation pursuant to Section 36 based on the Olivetti principle; third, by convincing the appropriate labour relations tribunal that the parties have in fact agreed to include these employees in the bargaining unit; or finally, by convincing the appropriate labour relations tribunal that the existing certification as initially granted already encompasses the unrepresented employees and that it has not been diminished by agreement (see Automatic Electric (Canada) Limited and Federation of Telephone Workers of B.C. (Clerical Division) and Brian Hopps et al., [1976] 2 Can LRBR 97).
>
> If the evidence does not establish agreement to expand the scope of the bargaining unit, or the union does not undertake any organizing effort,

then the last option is the only way additional employees may be included in the bargaining unit. Consideration of the last option begins with a determination of the scope of the bargaining unit when the certificate was initially granted. We recognize that the scope may change a moment after the certification issues because of the voluntary activity of the parties. Nothing, however, affects the scope which existed at the moment of certification. That is the moment of conception of the bargaining unit, as determined by the authority of the responsible labour relations tribunals. It is from this unique point in time that all else flows in a labour relations sense."

(Quicklaw, at 6)

See also North Shore Neighbourhood House Society, [1999] B.C.L.R.B.D. No. 361, BCLRB No. B361/99, where the Board commented that:

Vancouver Museum proceeded down the avenue where the initial certification did not encompass the disputed employees. In that case, the onus lay with the union to convince the Board that the parties had in fact agreed to include the employees in the bargaining unit. Such an agreement may be found in conduct, documents or the scope clause of the collective agreement. Where the union fails to convince the Board that such an agreement exists, then the union's sole remaining options are to organize the employees and either apply for a separate certification pursuant to Section 18 of the Code or for a variance, pursuant to Section 142 of the Code. In Vancouver Museum the underlying assumptions demonstrated that the disputed employees were not encompassed by the initial certification and there was no subsequent agreement for expansion of scope in the collective agreement to include these employees. As a consequence the union again was placed in the position of having to organize the employees and apply for an Olivetti variance."

(Quicklaw, at 5)

I am of the view that the circumstances of this case are captured by the fourth alternative described in Vancouver Museum and Planetarium Association, supra. The Union is claiming that the work of the 11 disputed positions should be covered by its collective agreement with the Employer and the Employer disagrees. Consequently, the burden is on the Union to establish "that the existing certification as initially granted already encompasses the [work] and that it has not been diminished by agreement .... "

103. Another example in which an arbitrator applied the *Vancouver Museum* and *North Shore Neighbourhood House* analysis to a bargaining unit work

question is in *Vancouver Island University*, [2012] B.C.C.A.A.A. No. 81, (at para. 42):

> As set out in *NSNH,* the onus at this stage is on the Union "to convince the [adjudicator] that the parties [have] in fact agreed to include the employees in the bargaining unit" (para. 30). This agreement may be found in the scope clause, other provisions of the Collective Agreement, or the parties' conduct generally.

Submissions

104. The facts are clear.

105. The Union was certified to a bargaining unit of employees working for National Rent-A-Car at, *inter alia*, the YVR terminal.

106. At the time of that certification, Enterprise Rent-A-Car was a competitor company with a long history of its own.

107. Accordingly, it was obviously neither in the contemplation of the Board, nor the parties, that the scope of the certification would include Enterprise employees should they be moved to the YVR terminal at some time in the future.

108. The possibility that, one day, Enterprise might purchase National, and that Enterprise might then move some of its airport personnel to the YVR terminal, was "not even a glint in the eye" of the Union and National when the bargaining unit was certified in 1996, to paraphrase the Board in *Vancouver Museum.*

109. And, for the same reason, it would not, and could not, have been the intention of the Union and National to include the work of future Enterprise employees at the airport terminal within the scope of "bargaining unit work" when they negotiated the provisions of Articles 5 and 6 in 1996, provisions which have remained unchanged.

110. This is particularly so given the wording of the collective agreement and the express reliance on the certification for setting out the scope of the unit.

111. Put another way, when the parties negotiated the scope of the bargaining unit work provisions, the "employees within the bargaining unit" were employees engaged in the rental of cars on behalf of their employer, National.

112. And the work performed by the Management Trainees at the Enterprise-branded operations for the Enterprise business has never been the "Duties normally performed by employees within the bargaining unit," that is, the

bargaining unit certified by the Board.

113. The National & Alamo branded operations came under the same corporate umbrella of the Enterprise branded operations in 2008.

114. And these three brands had each been in operation for decades prior to that time.

115. Enterprise had been operating an airport branch in Richmond since 2002. The only reason why it was not operating directly out of the airport terminal was that Enterprise's 2002 bid for an airport concession was unsuccessful.

116. From 2002 until today's date, both before and after the purchase of National & Alamo on 2007, the Enterprise-branded YVR operation, now located at Beckwith, has continued to service Enterprise's airport business.

117. For that entire period, National & Alamo have also continued servicing National and Alamo's airport business.

118. And these two separated airport care rental businesses were operating at the time the certification was varied in 2005 to name National Car Rental (Canada) Inc., in 2009 to name Enterprise Rent-A-Car Canada Limited, and in 2012 to name Enterprise Rent-A-Car Canada Company.

119. At the times of those variances, the assumptions remained, pursuant to the authorities, that the certification still applied only to the group of National brand employees at the airport and not to the already existing Enterprise employees engaged in Enterprise's airport rental business.

120. The operations, and their employees, have been carrying on in parallel for many years with no suggestion that the Union had any bargaining rights at the Enterprise-branded operations, either before or after the 2007 purchase of National and Alamo.

121. All that has happened now is that the Employer has successfully bid to have its Enterprise-branded operation also work (in part) out of the airport terminal to service its already existing airport business.

122. So, the Employer has decided to move some of its employees from its existing Enterprise YVR branch at Beckwith to the YVR terminal itself to continue to servicing its Enterprise YVR customers.

123. The Employer is simply carrying on with the business of the Enterprise branch with the MT's working out of the airport terminal, rather than at the Beckwith location.

124. The Enterprise Management Trainees will be continuing to do the work they have always been doing for the Enterprise branded operation, just in a different location.

125. As the parties have expressly agreed, the plan is for these branches to remain operationally distinct, and to continue to operate as operationally distinct and separate branches.

126. The Employer is not "expanding" the National & Alamo car rental business at the airport terminal. Nor is it contracting it. The Employer is carrying on that business and the Enterprise business with no material changes.

127. The Union is now claiming that the Enterprise employees from Beckwith that will be working out of the YVR terminal should be included in its bargaining unit, without any necessity to seek their support or apply for a variance to sweep them into its unit.

128. In order to succeed with its grievance, the Union has to convince you that the parties have agreed in their collective agreement, to expand the scope of the bargaining unit beyond the scope of the certification initially granted by the Board (and even then the principles set out in *Delta Hospital* may preclude such an agreement), or that the unit already included these employees.

129. The Union cannot do either of these things and the grievance must fail.

130. Given that the scope of the bargaining unit has been expressly tied to the certification in the collective agreement, it is necessary to ask, what is the bargaining unit that was certified by the Board?

131. The Board, in *Vancouver Museum*, made it clear that there are four ways that a Union can encompass unrepresented employees in its bargaining unit:

    1. by organizing the unrepresented employees and applying for a new certificate under Section 39(1) of the Act;
    2. by organizing the unrepresented employees and applying for a variation pursuant to Section 36 based on the Olivetti principle;
    3. by convincing the appropriate labour relations tribunal that the parties have in fact agreed to include these employees in the bargaining unit; or,
    4. by convincing the appropriate labour relations tribunal that the existing certification as initially granted already encompasses the unrepresented employees and that it has not been diminished by agreement.

132. The Union has not sought to organize the Enterprise Management Trainees and apply for a certification or variance.

133. Accordingly, the Union must "convince the appropriate labour relations tribunal", i.e. this arbitration panel, either that the parties have in fact agreed to include these employees in the bargaining unit or that the existing certification as initially granted already encompasses the unrepresented employees.

134. There is no evidence that the parties ever agreed to expand the scope of the bargaining unit beyond the one granted in 1996 to include the employees of the Enterprise-branded operations.

135. Indeed, the wording of the collective agreement indicates the opposite.

136. The Union Recognition clause of this collective agreement is somewhat unique.

137. It specifically, explicitly, and exclusively ties the Union's bargaining unit to the certification granted by the Board. Article 5.01 reads as follows:

> **5.01 Union Recognition**
> The Employer recognizes the Union as the sole and exclusive collective bargaining agent for all persons to whom the Certification issued to the Union on August 15, 1996 applies, including any changes to said Certification made from time to time by the Labour Relations Board of British Columbia, or any of its successors, but excluding those persons expressly excluded by the Labour Relations Board of British Columbia, or any of its successors.

138. Article 5.02 then again ties the application of the collective agreement to the certification in the same way:

> **5.02 Application of Agreement**
> (a) This Agreement applies to all employees within the bargaining unit as defined in this Agreement and covered by the certification or any amendments thereto, issued by the Labour Relations Board of British Columbia, or any of its successors.

139. Article 6 then sets out as follows:

> **6.01 Exclusivity of Bargaining Unit Work**
> Duties normally performed by employees within the bargaining unit will not be assigned to or be performed by non-bargaining unit employees except to overcome immediate, short term cases of absenteeism, emergencies, training and peak rental periods when bargaining unit employees capable of performing the work are not available.

6.02 No Contracting Out

The Employer will not contract out any bargaining unit work if such contracting out will result in the displacement or lay-off of any bargaining unit employees.

140. Accordingly, bargaining unit work is defined as those duties performed by employees within the bargaining unit. And both parties agree that the bargaining unit is defined as the employees within the certification granted by the Board.

141. It should be noted at this point that the above language was agreed to by the parties in their first collective agreement in 1996. This is the agreement that resulted from the 1996 certification.

142. What is clear from the collective agreement is that the parties have not agreed to expand the scope of the bargaining beyond that set out in the certification. As in *Simon Fraser University*, the scope of the certification sets out the scope of the bargaining unit given the language of this agreement.

143. As a result, it is necessary to review the Board's jurisprudence on the scope of a certification, and how this panel should consider the union's claim to now represent the existing Enterprise group of employees, as this will determine the outcome of the grievance.

144. The bargaining unit at the time of certification was a unit of employees certified to National Car Rental (Canada) Inc. and the duties normally performed by these employees were those duties performed in providing rental services for customers of that certified business.

145. The parties have not altered this language at any time to expand these provisions.

146. The Board has varied the name of the corporate employer on the certification over the years, both before and after the 2007 purchase of Vanguard, but this does not represent an agreement to expand the scope of the unit to include the employees at the Enterprise operations.

147. Rather, the variances were administrative, made only to reflect the fact that the named corporate entity was no longer the employer and naming the new corporate entity in order to preserve the existing bargaining unit. There is no suggestion that the scope of the certified bargaining unit was being changed, and nor could there be.

148. The intent of the variances was simply to replace the name of the previous corporate employer with the name of the new corporate employer, and no more.

149. This was also the clearly stated intent of the Union's representative, Glen MacInnes, behind the change of name of the employer on the collective agreement from the National corporate entity to the Enterprise corporate entity subsequent to the purchase of National from Vanguard by Enterprise Holdings.

150. This was made expressly clear by Mr. MacInnes, in his March 26, 2010 e-mail to Esther Stanley. Mr. MacInnes stated:

> The BC Labour Code requires a legal Corporation Name on the Collective Agreement. The only legal Corporate Name I have on the corporate registry is **ENTERPRISE RENT-A-CAR CANADA LIMITED / ENTERPRISE LOCATION D'AUTOS CANADA LIMTEE.**
>
> As I don't see any other legal corporate entity as you described, it cannot be added to the CBA.

151. There was no agreement to expand the scope of the collective agreement to include employees at Enterprise branded operations, present or future. The clear intent, as communicated by the Union, was simply to update the name of the corporate employer of the existing employees at the National and Alamo branded operation. Nothing more.

152. As stated above, the certification was varied for the same reason and in the same fashion to name the new corporate employer of the existing bargaining unit.

153. Even had the Employer sought to exclude from the varied certification (for example) the Management Trainees performing duties for Enterprise-branded operations at the airport terminal, the Board would have rejected that amendment on the basis of the principles explained in *Alaskan Copper and Brass Company Ltd.* and *Coastal Community Financial Management Inc.* given that there were no such employees at the airport at the time of the variance and the certification does not determine whether "future employees" are in the bargaining unit.

154. As explained by the Board in *Alaskan Copper*, the Employer's concern about any future employees would have been "misplaced as a matter of law and policy under the *Code*."

155. Had the Employer sought to exclude future Enterprise employees at the time of the variances, even just out of an abundance of caution in order to avoid exactly this type of situation, the Employer would not have been granted that exclusion, because it would have been so obvious according to the "law and policy under the Code" as articulated by the Board that these employees

would not have been covered by the original certification. In other words, taking such prophylactic measures would have been misguided given the Board's consistent and decisive direction that circumstances such as the mere relocation of the Enterprise brand employees into the airport terminal, with the employees then technically within the geographic scope of the certification, obviously does not mean they are actually covered by the certification.

156. To now hold that these employees are in fact included in the scope of the bargaining unit after all would be to put the lie to the Board's assurances that employers do not need to worry about these sorts of future events.

157. Accordingly, the fact that the Employer did not object to amending the certification and the collective agreement to replace one corporate entity with another corporate entity is not an indication that there was an "agreement" to expand the scope of the unit to include employees of the Enterprise-branded operation should they be relocated to the YVR terminal.

158. To paraphrase *Vancouver Museum*, at p.9, amending the certification and collective agreement to update the proper corporate name of the employer is evidence only of the fact that there was a new corporate name for the employer. It is not, by itself, evidence of an agreement to extend the scope of the bargaining unit to include a group of employees from the separate and distinct Enterprise operation should they work out of the airport at some undefined time in the future.

159. To conclude otherwise would be inconsistent with the law and policy of the *Code* and the principles set out in all of the authorities, particularly with the conclusions of the Board in *Ledcor Resources*, when the Board determined that an administrative variance and reliance on collective agreement provisions incorporating that certified bargaining unit would not be allowed to overcome the requirement by a union to seek the support of the new employees that had purportedly been added to the unit.

160. It is useful to also consider this issue through another lens.

161. Consider circumstances in which, prior to 2008, Enterprise Rent-A-Car Company was already operating its airport rental business, not just out of Beckwith, but with the front-end work already being performed at the airport terminal, as the Employer intends to do now.

162. Enterprise Holdings then purchases National Car Rental, as it did, and then the certification and collective agreement are amended to name the new corporate employer, Enterprise Rent-A-Car Canada Limited, as they were.

163. Would this mean that the Union and the Employer had agreed to sweep the existing Enterprise employees at the airport into the National bargaining unit and the Union did not need to seek their support before varying them into the unit?

164. Clearly not.

165. It is even more absurd, then, to say that the change to the certification and collective agreement to name the new corporate employer would sweep in employees that had not yet even been moved to the airport terminal, as these employees were even further outside of the contemplation of the parties and the Board at the time that these changes to the collective agreement and certification were made.

166. The absurdity becomes even more apparent were one to reverse the situation.

167. The Union rests a great deal on the wording of the certification that provides it with bargaining rights for employees at the "Vancouver International Airport Terminal". It is saying that, in the event that the Employer moves the group of Management Trainees from Beckwith to the airport, the parties have agreed that those Management Trainees are in the bargaining unit.

168. If so, then the reverse must also be true.

169. If the Employer decides to move the National/Alamo employees off of the airport property to the Beckwith Branch, then the parties have agreed that these employees are excluded from the unit.

170. You cannot find one without the other.

171. But of course the parties have not agreed to either of these propositions. The scope of the bargaining unit is that which was defined in the original certification. And the certification was granted for a group of employees that was engaged in the car rental business for National.

172. The geographic scope of the certification provides no foundation for the Union's grievance, and yet this is what it is relying upon.

173. This lack of foundation for this position was made clear by the Board when considering the geographic scope of certified bargaining units in *Alaskan Copper and Brass Company, Coastal Community Financial Management Inc.* and the cases cited therein. One such case arose out of the forest industry, in which the Board held that the establishment of a new mill within the scope of a geographically defined unit, with employees performing the same or similar duties, does not automatically sweep such employees into the bargaining unit

and the scope of the collective agreement.

174. The Board noted in *Coastal Community Financial Management Inc.* that, "The Board has held that unit descriptors like "employees", "all employees", "employees at and from" specific worksites, and even broad geographic descriptions, are not determinative of a union's right to represent future employees."

175. It is simply not possible to say that there has been the "specific agreement to extend the bargaining unit to include" the Enterprise Management Trainees, "so as to deprive the Association of the right to rely on the scope of the original certification," as is required pursuant to *Vancouver Museum* (at page 9).

176. The Union appears to be seeking to rely on Article 6.01 to override all of the clear principles set out in the cited cases, an article that is nothing more than a traditional provision preventing the performance of existing bargaining unit duties by non-bargaining unit employees.

177. It is simply a "supervisory work clause," as they have come to be known, and there is no evidence that the parties ever intended to, or agreed to, have it apply in any other way or as some form of "accretion clause".

178. Indeed, the evidence is that the Union has regularly relied on this clause as a "supervisory work clause". This is quite understandable, as that is precisely what it is.

179. One thing that Article 6 is clearly not, is an agreement to expand the bargaining unit.

180. By attempting to rely on Article 6 to sweep in the group of employees at the Enterprise branded operation, the Union is asking you to find that the clause carries an unintended amount of contractual freight.

181. The Union has not satisfied the requirement to provide evidence of a specific agreement required by *Vancouver Museum* to sweep in the group of employees in question.

182. The only remaining way that the Union can say that the Enterprise front-end employees are union members and covered by the collective agreement is, per *Vancouver Museum*, to convince this panel that the existing certification as initially granted already encompasses the unrepresented employees and that it has not been diminished by agreement.

183. This avenue is equally easy to dismiss.

184. As all are aware, at the time the certification was granted, National and Enterprise were arms- length competitors with no corporate relationship. They were separate employers.

185. As a result, the original certification order could not include the Enterprise Management Trainees at the YVR terminal as they, "were not even a glint in the eye" of either the Union or National.

186. The mere fact that the certification refers to "all employees" does not mean that future employees not contemplated at the time of certification would be swept into the unit.

187. Nor could the subsequent variances, which simply updated the corporate name of the employer of the employees in the bargaining unit have that result.

188. Yet this is what the Union is now alleging that the Board has done when it granted its variances to update the corporate name of the Employer. The Union is claiming that the variances did not just protect the existing bargaining unit, but also expanded it to include any future employees of the employer within the geographic scope of the certification, whether or not they are part of a re- location or expansion of the existing certified operation.

189. The scope of the bargaining unit has not changed as a result of the variances to include future employees, and nor would the Board have had the jurisdiction to make such an order on its own motion.

190. Such a result would be in clear conflict with the law and policy of the *Code*, as set out in the cited decisions, including *Olivetti*, *Vancouver Museum*, and *North Shore Neighbourhood House*.

Conclusion

191. There has been an Enterprise branded car rental business at the YVR terminal since 2002. That business has been serviced from the Beckwith Branch.

192. Non-union employees of that Enterprise branded business have ben servicing the YVR market that entire time from the Beckwith Branch.

193. The non-union employees have been servicing the YVR market during this period at the same time that the National! Alamo bargaining unit employees have been servicing that market.

194. All that is happening now is that a group of the non-union employees servicing Enterprise's YVR market are being re-located from Beckwith to the main terminal in order to continue servicing Enterprise's YVR market (not the

National! Alamo market).

195. The National! Alamo and Enterprise branches will continue to operate as operationally distinct and separate branches.

196. The Union now seeks to sweep the pre-existing group of employees at the operationally distinct and separate Enterprise branch into its unit without seeking their support under the *Code*.

197. And it is seeking to do so on the basis of collective agreement language and a certification that was never intended by the parties or the Board to have that result.

198. At the end of the day, and despite the length of the parties' arguments and the nooks and crannies on which the Union would have you focus, this is a very simple case. The Union says that you should apply its collective agreement to a separate group of employees at a separate and distinct operation that it has never represented, without the Union having to show that this group of employees wishes to be represented by the Union.

199. To allow such a result would clearly conflict with the law and policy of the Code that requires the Union to seek the support of these employees if it wishes to represent them and would rob these employees of their right to freely choose their bargaining representative under s. 2(c) of the *Code*.

200. The grievance should be dismissed.

The Employer's submission included the following case law:

Re Delta Hospital and Health Labour Relations Association of British Columbia, and Hospital Employees' Union, Local No. 180 and International Union of Operating Engineers, Local 882 [1977] B.C.L.R.B.D. No. 74 (Munroe, Brown and Fritz), November 16, 1977

Re Automatic Electric (Canada) Ltd. and Federation of Telephone Workers of B.C. (Clerical Division) and Brian Hopps, et al, [1976] 2 Can. L.R.B.R. 97 (Weiler, Peck and Baigent), April 20, 1976

Re Vancouver Museum and Planetarium Association and Vancouver Municipal and Regional Employees' Union [1990] I.R.C. No. C194/90 (Reconsideration of No. C214/89) (Albertini, Devine, Pylypchuk), October 5, 1990

Re Alaskan Copper and Brass Company Ltd. and United Steelworkers of America, Local 2952 [2005] B.C.L.R.B. No B183/2005 (Saunders), July 6, 2005

Re Olivetti Canada Ltd. and International Brotherhood of Electrical Workers, Local 213 [1974] B.C.L.R.B.D. No. 112 (Weiler), August 12, 1974

Re Coastal Community Credit Union and Coastal Community Financial Management Inc. and Coastal Community Insurance Services (2007) and Canadian Office and Professional Employees Union, Local 378 [2013] B.C.L.R.B. No. B138/2013 (Saunders), June 28, 2013

Re International Simultaneous Translation Services Ltd. Tel Av Inc. and National Association of Broadcast Employees and Technicians, Local 830, [1991] I.R.C. No. C 110/91 (H. McDonald), May 31, 1991

Re ETL Environment Technology Ltd. and Construction and General Workers' Union, Local No. 602, [1993] B.C.L.R.B.D. No. 221 (Longpre), June 29, 1993

Re Fraser Lake Sawmills Ltd. v. *International Woodworkers of America, Local 1-424,* [1980] 20 B.C.L.R. 210 (Wallace), March 18, 1980

Re Ledcor Resources & Transportation Limited Partnership (Cant Mill Operations - Chilliwack) and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 2009 [2013] B.C.L.R.B. No. B124/2013 (Terai), June 12, 2013

Re Simon Fraser University and Canadian Union of Public Employees, Local 3338 and Administrative and Professional Staff Association ("APSA") [2002] B.C.C.A.A.A. No. 288 (Kinzie), June 7, 2002

Re Vancouver Island University and Vancouver Island University Faculty Association and British Columbia Government and Service Employees' Union (University Credit/Continuing Education Grievance) [2012] B.C.C.A.A.A. No. 81 (Hall), June 5, 2012

VI

In the Union's reply, the Union made reference to the Agreed Statement of Facts (ASF), paragraph 61, 77, and 78 with regard to Mr. Wilk's cross-examination. Stating in cross, Mr. Wilk said washing of cars may be moved to the Service Centre and carried out by a non-bargaining unit sub-contractor ATS.

The Union argued that this Board is required to look beyond the face of the Certification in accordance with arbitral law and look at the situation from a labour relations perspective per the Board and arbitral law. The Union made reference to the fact that ERAC was the named Employer and that the scope of the bargaining unit included employees performing the work. The Union stated that its case is about the employees at YVR. The Union referred to the Certificate successorship of December 6, 2012 and Varied Certificate of December 18, 2009.

The Union made reference to *North Shore Neighbourhood House (supra)* in relation to the four ways to vary a Certification. The Union argued that the Collective Agreement is an agreement and a reasonable inference is that there are no limitations with regard to ERAC.

In review of the Employer's case law the Union commented that in *Delta Hospital (supra)* one party sought voluntary recognition and with respect to a number of other Employer cases the Union commented that many involved raids by other Unions.

In reference to *Days Hoteliers (supra)* the claim was inside the hotel and involved the scope of the bargaining unit and Union exclusivity. The Union assertion was that the Certification covered all employees at YVR. The Union argued that the scope of the Certification and bargaining unit become distinct and that the Certification is spent once bargaining is underway; then the parties proceed to describe the scope per *Vancouver Museum (supra)* paragraph 66. The Union assertion was that the Collective Agreement applies to rental employees at YVR and that there is exclusivity per Articles

5 and 6 of the Collective Agreement and that the Certification covers all employees except Sales and Management. With reference to *Olivetti Canada (supra)* and the Nanaimo location, the Union states all employees are at the some counter at YVR. In *Alaskan Copper (supra)* the Union makes the distinction that, in that case, office and sales people were contracted out but that in this case all employees are ERAC employees, not contractors.

VII

In terms of background, the following, from the Agreed Statement of Facts, outlines the Employer's business as described in the overview:

> **A. The Brands - Overview**
>
> 1. Enterprise Holdings Inc. ("Enterprise Holdings" or "EHI") is a privately-owned multinational corporation, which owns vehicle rental businesses operating in several countries, including Canada. It rents vehicles through a corporate entity that is now called Enterprise Rent-A-Car Canada Company ("Enterprise Rent-A-Car" or "ERAC") under three distinct brands: Enterprise, National, and Alamo.
>
> 2. The parent company's website at: http://www.enterpriseholdings.com/ includes the following summary:
>
>> With annual revenues of $17.8 billion and more than 83,000 employees, Enterprise Holdings and its affiliates own and operate more than 1.5 million cars and trucks. Enterprise Holdings – the largest car rental service provider in the world measured by revenue, employees and fleet – and its affiliates together offer a total transportation solution and are all united by a common mission:
>>
>> To be the best transportation service provider in the world ... to exceed our customers' expectations for service, quality and value ... to provide

our employees with a great place to work ... and to serve our communities as a committed corporate citizen.

3. Through these brands, ERAC rents vehicles to the public and businesses through outlets located at airport terminals, and in business districts and community sites. Some of the outlets are directly owned and operated by ERAC and others are franchise outlets operated by third parties. The exception to this is that there are no franchises under the Enterprise brand.

4. Enterprise, National, and Alamo are presented as three distinct brands, each targeting a specific market niche. Each brand has its own website and is marketed separately from the others.

5. ERAC has a Canadian nationwide management layer, as well as a group management layer, with the province of British Columbia being one of 8 operating groups. Each operating group has a Vice-President/General Manager that reports to the Senior VP.

6. Below the Vice President/General Manager are Group Rental Managers that are responsible for managing all three brands. Reporting to the Group Rental Managers are Area Managers that oversee a general area or multiple branches that each have Branch Managers and/or Assistant Branch Managers. Branch Managers and/or Assistant Branch Managers are responsible for managing individual branches. Branches are branded either National/Alamo or Enterprise. Assistant Managers within the Branches report to the Branch Managers. (See Org Charts at Tab 1)

7. Enterprise Holdings also has Tri-Brand Managers that oversee all three brands.

Enterprise Brand

8. The Enterprise brand is an internationally recognized brand with more than 7,000 neighborhood and airport locations throughout North America and parts of Europe.

9. The Enterprise brand is operated in Canada by ERAC, which is owned by a privately held company, Enterprise Holdings, with a head office in St. Louis, MO.

10. The Enterprise brand is currently operated in the United States, Canada, UK, Ireland, Germany, France and Spain by Corporate-owned entities.

> 11. The Enterprise brand is operated on a franchise-model in parts of Europe, Middle East, Asia, Latin America and Caribbean, and Asia Pacific (Australia/New Zealand).
>
> 12. The Enterprise brand primarily provides community and airport car rental services. Historically, the Enterprise brand's innovation was to provide replacement or short term vehicles to customers in neighbourhoods and communities, as opposed to merely operating for the benefit of business persons or travelers.
>
> 13. The Enterprise brand primarily caters to customers seeking both value and high level of service. As described on its website:
>
> With Enterprise, your needs come first. Whether your car is in the shop, you need to save your company a few dollars, or you're just looking to get away, Enterprise offers award-winning customer service, everyday low rates and convenient neighborhood locations that make it easy to get where you're going.
>
> 14. Enterprise's trademark consists of a white green lower case 'E' on a green background, with white letters "Enterprise" imposed on a black background: …

A review of the case law is a critical component of this case.

In *Re Delta Hospital and Health Labour Relations Association of British Columbia, (supra),* beginning at page 19, the Donald R. Munroe BC Labour Relations Board panel concluded the following:

> Quite obviously, the Operating Engineers were not representative of the employees for whom they were purporting to act in the negotiations which produced the September agreement. They were selected as the employees bargaining agent essentially by the employer. Thereafter, negotiations occurred as a private exercise between the Operating Engineers and H.L.R.A. and there is simply no evidentiary basis for believing that the former is at all representative of the employees it has purported to bind to a set of working conditions. It was argued that the August 24 meeting amounted to ratification and was adequate to cast aside any doubts about the representative nature of this uncertified trade-union. It was said, too, that the poor turnout was the fault of the employees and not the Operating Engineers. In some cases those kinds of arguments could well lead to a

different outcome. In this case, however, the employees concerned were theretofore completely in the dark and the trade-union made no effort to inform them of the precise purpose and significance of the meeting. As well, the meeting cannot be looked at in isolation. Events before and after clearly indicate that as a measure of the Operating Engineers' representative character it is of little or no value.

We have already said that the agreement which is the focus of this hearing is not a collective agreement within the meaning of the Code. The Board may therefore entertain and proceed with the H.E.U.'s application for certification under Section 39(1) of the Code.

V

Having reached those conclusions, a determination must now be made as to the proper, ultimate disposition of this case.

We have made these decisions: First, a representation vote will be conducted. The ballot will ask two questions:

(1) Do you wish any trade-union to represent you as your bargaining agent?

(2) If a majority of employees vote in favour of trade-union representation, do you wish that representation to be through the Operating Engineers or the H.E.U.?

Secondly, the voting constituency will be all employees at the Hospital except graduate nurses and para-medical staff. Thirdly, whether or not the small unit for which the Operating Engineers are presently certified will continue to exist will depend on the outcome of that vote.

Our rationale for each of these three directions is as follows.

It is a foregone conclusion in this case that a certificate of bargaining authority will not be issued without a representation vote first being conducted. Neither trade-union has requisite membership support for the issuance of an automatic certification under Section 45 of the Code. The only serious issues are whether the Operating Engineers as well as the H.E.U. should have a place on the ballot and whether the first question indicated above is properly included. The employees who gave evidence, some of whom were called by the H.E.U. and others by the Operating Engineers, were singular in their assertion that their concern, and the concern of their colleagues, was that they be given a choice with respect to whether there should be trade-union representation at all and, if so, which trade-union should be their bargaining agent. This expression of general

> employee opinion, although in some respects founded on hearsay, came from all sides and was not seriously challenged. The employees conveyed the impression that there were no factionalized animosities between opposing employee groups but rather there exists a desire throughout the staff for the widest possible expression of choice. We accept this testimony as being representative of the tenor of employee sentiment. While the content of the ballot we have ordered will be highly unusual, and not likely to be often repeated, this case is nothing if not atypical. And it was for atypical situations that the Code contains Section 43(1), which empowers the Board to hold a representation vote in any case (c.f. Plateau Mills Ltd. [1977] 1 Can. L.R.B.R. 82).

This Board agrees with the Munroe panel decision as it makes Labour Relations sense from the standpoint of two Unions attempting to represent the same group of employees. The appropriate conclusion as decided by the Munroe panel was for the employees to make their choice through a vote.

In the instant case the circumstances are different as there is only one Union involved and the primary question is: Does the original Certification cover all non-management employees working at YVR Airport?

In *Re Olivetti Canada Ltd. (supra),* Mr. Paul C. Weiler's BCLRB panel concluded the following:

> That still leaves the question whether this application should be granted on the merits. The Employer made two submissions in objection to the appropriateness of the wider bargaining unit sought by the Union: first, there is separate supervision of the employees in Nanaimo and thus their working conditions differ somewhat from those in Vancouver; second, the union members on the Island will find it difficult to participate effectively in the affairs of a bargaining unit dominated by a larger group of employees in Vancouver. In the abstract, these certainly are relevant factors in determining the appropriateness of a bargaining unit. In the concrete situation we face here, they do not make a persuasive case for a separate bargaining unit for the employees at Nanaimo. As the Board stated in a somewhat similar situation in the W.S. Tyler case, "one always has to keep a sense of proportion in the use of such principles. Even more

> important than a community of interest is the viability of collective bargaining itself". If the two servicemen in Nanaimo are to have any chance of participating in meaningful collective bargaining, exercising some real leverage with the Employer, they will have to do so as part of the larger bargaining unit. **It is quite common for the Board to judge that multi-location units are appropriate for collective bargaining and I so find here.** (Emphasis added)
>
> As I stated earlier, the Board does not allow a union which has established itself in one location or among one group of employees to use that as a base for sweeping other employees into the unit through applications for variance. The union must also show that it has sought and obtained membership support in that new grouping and the Board follows its normal investigative procedures on certification applications to establish that fact. Here, as the Union stated in its submission, both of the employees in Nanaimo are members of Local 213 and want to have the Union represent them as their bargaining agent. In these circumstances, the Board is satisfied that the application for variance of the certification should be granted. In accordance with the Board's standard description for bargaining units of this kind, the new unit will read, "employees at and from 960 Howe Street, Vancouver, and 606 Comox Street, Nanaimo, B.C., except office and sales staff".

Olivetti Canada is a leading case with respect to the requirement for a Union to demonstrate membership support for the application of a variance. The Employer's argument was that COPE is required to show membership support in order to advance its case. In this case however the Union is relying on the original Certification, which describes the bargaining unit as including "employees at and from Vancouver International Airport Terminal".

In that regard the Union cited: *North Shore Neighbourhood House Society (supra)* at para. 27:

> ...Vancouver Museum sets out four ways in which a union may obtain representation rights for employees. These are as follows:

> [F]irst, by organizing the unrepresented employees and applying for a new certificate under s. 39(1) of the Act; second, by organizing the unrepresented employees and applying for a variation pursuant to s. 36 based on the Olivetti principle; third, by convincing the appropriate labour relations tribunal that the parties have in fact agreed to include these employees in the bargaining unit; or finally, **by convincing the appropriate labour relations tribunal that the existing certification as initially granted already encompasses the unrepresented employees and that it has not been diminished by agreement.** …
> (pp. 8-9, CLRBR) (Emphasis added)

The Union relied on the highlighted portion of the *North Shore Neighbourhood House* decision and on the original Certification, which included the words "employees at and from Vancouver International Airport Terminal." The Union assertion was that there was no diminishment of the existing Certification by agreement of the Parties. The Union also relied on paragraph 61 of the Agreed to Statement of Facts which reads as follows:

> 61. The current National YVR south terminal location was previously owned and operated as a franchise. In 2009, ERAC took over operation of the National south terminal location. The National south terminal employees were encompassed within the scope of COPE's existing certification and became bargaining unit members. ERAC representative Mr. Rebuck and Enterprise Holdings General Manager and Vice-President Tim Driscoll met with COPE representatives Glen MacInnes and Brad Bastien on August 19, 2009 to discuss this transition.

The evidence was that the Airport South Terminal employees were swept into the bargaining unit by an agreement between the Parties and the Union's position is that when the Beckwith employees come to work at the Airport, such employees would be part of the bargaining unit, given the original Certification, which included the term "employees at and from Vancouver International Airport Terminal." The Employer's position was that the Beckwith employees working at YVR remain non-union as they

were when they serviced airport customers from the Beckwith location, which is not at the airport.

At paragraph 71 the ASF read as follows:

> 71. Following its purchase of Vanguard, Enterprise Holdings began a two year integration process. The integration process was primarily at the corporate level – the operations of each distinct brand (National, Enterprise and Alamo) were not further integrated at the branch level during this two year process. Enterprise continued to operate as a separate brand and the National/Alamo brands continued to operate as they did previously, in light of their distinct strengths, corporate cultures, and customer base. Enterprise Holdings made an effort to create operational efficiencies between the brands without integrating all of the company's branded functions entirely.

Paragraph 77 through 79 read as follows:

> 77. National and Alamo brand employees are frequently and routinely asked to accommodate Enterprise brand customers at the National and Alamo counter at YVR when flights have been delayed and the Beckwith Branch will be closed at the time of the customer's arrival. The three brands now use the same integrated computer system, allowing National and Alamo brand employees to access and honour Enterprise brand reservations. In addition, Enterprise brand customers are permitted to return their rental vehicles to YVR, regardless of the Enterprise branded location where the vehicles were picked up.
>
> 78. When Enterprise brand customers return rental vehicles to YVR, they pull into the National/Alamo return lane and deal with National/Alamo Hand-Held Return Agents who take possession of the Enterprise brand customer's rental vehicle and pull it into a designated area in the customer return area. These vehicles are typically set aside for a National/Alamo manager to inspect. The Hand-Held Return Agents mark down details such as mileage and returning gas level and provide these to the National/Alamo manager. The manager checks the vehicle for damage and then provides the necessary unit information to the Enterprise brand employees for them to complete all the necessary paperwork and to close the rental contract in the computer system. Once the vehicles are inspected by the National/Alamo brand manager, they are taken by bargaining unit Shuttlers to the appropriate facility, being either the QTA for cleaning/washing by the National/Alamo bargaining unit Service Agents

> or the maintenance facility for the bargaining unit Mechanics/Utility Agents to complete any necessary repairs or service.
>
> 79. When vehicles in the integrated fleet need to be moved from YVR to other locations, National/Alamo Shuttlers deliver the vehicles to the Service Centre located at 3866 MacDonald Road South. These vehicles are then picked up by Enterprise brand employees or ATS and delivered elsewhere. Enterprise brand employees frequently pick up cars from the Service Centre to deliver to the Beckwith Branch.
>
> ....
>
> 91. Branch and Assistant Managers at the Beckwith Branch do not supervise or direct employees at the National & Alamo YVR locations, and nor do the Branch Managers and Assistant Managers at the National & Alamo YVR locations supervise or direct employees at the Beckwith Branch. However, as indicated above, the Branch and Assistant Managers that supervise or direct National & Alamo employees always come from, and generally return to, Enterprise brand locations after their term at the National & Alamo brand locations.

With respect to training the ASF reads as follows:

> 99. Management Trainees have no supervisory duties or responsibilities. Management Assistants have no direct supervisory duties or responsibilities. However, Assistant Branch Managers have human resources management supervisory duties and responsibilities. (See job descriptions at Tabs 13 and 14)
>
> 100. The Enterprise brand initial training process involves a 3 day new hire orientation followed by an 8 month designated Management Trainee program.

In *Re Vancouver Museum and Planetarium Association (supra)* at Section VI, beginning at page seven, the IRC panel of Mr. Ken Albertini concluded the following:

> We begin by observing that the Council adopts the reasoning set out in <u>Beverage Dispensers and Culinary Workers Union, Local 835 v. Terra Nova Motor Inn Ltd</u>. (1974), 50 D.L.R. (3d) 253 (S.C.C.) where it was clearly established that the purpose of a certification is to get collective

bargaining underway. Once collective bargaining is underway, the certification is, for most purposes, spent. The dissenting decision of the late Chief Justice Laskin is relevant to the issues before us:

> Certification of a trade union as bargaining agent qualifies it to compel an employer to bargain collectively with it on behalf of employees for whom the union has been so certified. Those employees, collectively, form the "unit" in respect of which collectively bargaining is compelled....If a collective agreement results from the bargaining, it may cover additional or fewer classes of employees, as the parties may mutually decide; but, of course, each may insist that the bargaining be confined on behalf of, or be in relation to only that unit for which certification was obtained.
>
> ...
>
> At the risk of being unnecessarily obvious, I must point out that the taking of a count of employees in order to satisfy certification requirements of proof that a majority are members of the applicant union does not mean that the certification and the union's status as bargaining agent continue to depend on the very employees remaining in the employer's employ. Fixing the number of employees as of a particular time to enable a count to be made does not mean that the certificate which a union may obtain on that basis is tied to the identical employees or to that number. The subsequent enlargement or contraction of the work force does not alone affect the validity of the certificate and indeed, once a collective agreement is negotiated the certificate has served its purpose and is, for all practical purposes, spent.
>
> (at 254-255; emphasis added)

While the notion that the certificate is spent for all purposes is perhaps overstated, it is certainly spent in terms of the bargaining unit description. The parties are free from that point forward to adjust the scope of the bargaining unit as they see fit and as their relationship develops. This type of adjustment invariably begins almost immediately after certification and is embodied in successive collective agreements.

. . .

If the evidence does not establish agreement to expand the scope of the bargaining unit, or the union does not undertake any organizing effort, then the last option is the only way additional employees may be included in the bargaining unit. Consideration of the last option begins with a determination of the scope of the bargaining unit when the certificate was initially granted. We recognize that the scope may change a moment after the certification issues because of the voluntary activity of the parties. Nothing, however, affects the scope which existed at the moment of

> certification. That is the moment of conception of the bargaining unit, as determined by the authority of the responsible labour relations tribunals. It is from this unique point in time that all else flows in a labour relations sense.
>
> . . .
>
> Employees who are employed by a different employer could not be covered, in the labour relations sense, by the original certification despite its generic wording. Nor could they be covered by the certification in a legal sense because they were not "employees" of the employer for which the certification issued. The Council's jurisdiction under the Act is to certify "employees" of an employer. The certification does not attach to a business or to work. Instead, it attaches to the employees of an employer.

The distinction between *Vancouver Museum* and the current case is that in the current case the Beckwith employees are employed by ERAC, as are the bargaining unit employees at YVR Airport which distinguishes the current case from the *Vancouver Museum* case. In the current case the Certification was amended on February 5, 2015 as follows:

> Dear Sirs/Mesdames:
>
> Re: Enterprise Rent-A-Car Canada Limited/Enterprise Location D'Autos Canada Limitee –and- Canadian Office and Professional Employees Union, Local 378 (Variance of Certification – Case No. 64728/12T)
>
> This is further to the Board's letter dated January 29, 2015
>
> The Board, on its own motion, has varied the name of the Employer
>
> From: Enterprise Rent-A-Car Canada Limited/Enterprise Location D'Autos Canada
>
> To: **Enterprise Rent-A-Car Canada Company / La Compagnie de Location D'Auto Enterprise Canada**
>
> Attached, is a copy of the certification.

That amendment included a copy of the Certification dated December 6, 2012, which in terms of the original Certification included the bargaining unit description from August 15th, 1996:

LABOUR RELATIONS CODE
BRITISH COLUMBIA LABOUR RELATIONS BOARD

CERTIFICATION

The LABOUR RELATIONS BOARD being satisfied the employees named herein constitute a unit appropriate for collective bargaining and that all necessary requirements of the Labour Relations Code are-met

HEREBY CERTIFIES

Canadian Office and Professional Employees Union, Local 378

as the bargaining agent for the employees in a unit composed of

employees at and from 3545 Lougheed Highway and 1185 West Georgia Street, Vancouver; Vancouver International Airport Terminal; 3866 McDonald Road South, Richmond, BC except sales persons and managers

and those excluded by the Code, employed by

Enterprise Rent-A-Car Canada Company/La Compagnie De Location D'Autos Enterprise Canada
3866 McDonald Road South
Richmond, BC
V7B 1L8

Given at Vancouver, British Columbia, this **15th** day of **August**, A.D. **1996**.
As varied under Section 142 of the Labour Relations Code by the Board this 6th day of December, A.D. 2012.

LABOUR RELATIONS BOARD

KEN SAUNDERS
Vice-Chair

As a result of the amendment, the Employer's name within the Certification is Enterprise Rent-A-Car Canada Company. From the evidence there has been no diminishment of the scope of the original Certification by agreement. To the contrary, by agreement of the parties, the parties included employees from the YVR Airport South Terminal within the bargaining unit.

The employer argued that this fact is not relevant to the non-union Beckwith employees working at YVR Airport.

In *Re Automatic Electric (Canada) Ltd. (supra)* at page 3:

> The issue of principle that is raised by this case is what attitude the Board should take to such agreed-to arrangements if a party later brings the matter back to the Board pursuant to a Section 34 application. Our judgment is that the Board should respect these arrangements. We add at the outset two caveats to that principle: first of all, that the inclusions and exclusions which have been agreed upon by the parties fit reasonably within the flexible policies which the Board follows in defining an appropriate unit; secondly, that the union, in negotiating a specific boundary to the bargaining unit, has not violated its duty of fair representation to certain employees by arbitrarily or discriminatorily excluding them from the benefits of collective bargaining. Clearly, each of these conditions was satisfied upon the facts of this case. Within these premises the parties would be entitled to come together by way of voluntary recognition to establish a collective bargaining relationship. So also should they be entitled to agree voluntarily to modify the scope of that relationship either by way of expansion or contraction. (We would refer here to the remarks of Chief Justice Laskin in the Supreme Court of Canada decision in Terra Nova Motor Inn (1975) 50 DLR (3d) 253.)
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> Once the parties have agreed to define the precise scope of the unit which the union will represent, there are good industrial relations reasons why the Board should respect that bargain. When the parties do put into effect an agreement which excludes a particular group from the scope of the bargaining unit, a group such as the sales employees in this case, then that decision has a real-life momentum of its own. The employees in question operate outside the bargaining unit, they do not participate in union affairs, they do not have their employment conditions set by collective bargaining. After a period of time, for this very reason, they perceive themselves as having quite a different community of a interest from the remaining employees who are included in the heart of the bargaining unit. Suppose some years later that one of the parties wishes unilaterally to upset that arrangement, perhaps because of a shift in personnel. That change of attitude can take place in a variety of situations; in each case, if the Board were to permit it, this could have an obviously unfair impact on the other party. Suppose a decertification application is brought, a vote is ordered, and excluded personnel such as this sales group show up to vote against the union. Should they be allowed to vote? Suppose that another union launches a raid against the incumbent, which then argues that the sales group should be counted as part of the total bargaining unit. Should the

> raiding union have to secure an overall majority membership among this larger unit before it can have a representation vote among those employees actually interested in which union should be the bargaining agent? Finally, as in this case, suppose the employees have for a long time operated outside the unit and have adjusted their affairs on that basis. Should they be suddenly swept into the unit and under the collective agreement by a Board decision, irrespective of whether the union has any significant support among that group of employees?
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> In our view, the proper answer in each of these situations is that the sales group should not be deemed to be included in the bargaining unit and involved in its affairs. The Board should not take a broad unit description, written a long time ago in a certification which served to get collective bargaining under way, and apply it in a literal fashion in the real-life employment environment which has been shaped by a later agreement by the parties about the precise scope of the unit. If, in fact, the effective unit specified by the collective agreement is a coherent and appropriate one and if the union had not violated its duty of fair representation in negotiating it, then this Board should accept that unit as the basis for further proceedings and, if necessary, vary the wording on the certification so that it will accurately reflect the current realities. If the union then wishes to expand the scope of its bargaining authority over a group of employees whom it has not hitherto represented, such as the sales staff in this case, it should first organize these employees (see Olivetti Canada (1975) I Canadian LRBR 60).
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> IV
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> In light of the above reasoning, we grant this appeal. We order the unit description the union's certification varied so as to exclude the sales staff and we find the individuals who are the subject of this appeal to be outside the scope of the bargaining unit represented by the union.

The current case is similar to *Automatic Electric* in that the Certification excludes "sales persons and managers". Notwithstanding that exclusion, the Union's argument is that the Certification covers all other non-excluded employees at YVR Airport. The original Certification also excluded "those excluded by the Code, employed by Enterprise Rent-A-Car Canada Company."

In *Re Simon Fraser University (supra),* beginning at paragraph 132 the Board stated:

> 132 In summary, I am of the view that the work of the following positions does fall within the scope of the Union's bargaining unit as certified by the Board:
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> 1. Systems Consultant II positions occupied by Lee and Rothenbush;
> 2. Systems Analyst position occupied by Ng;
> 3. Network Analyst position occupied by Gregory;
> 4. Registrar of the Collection position occupied by Menzies; and
> 5. Temporary Training Coordinator position for the Eastern Indonesia Universities Development Project occupied by Ross.
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> 133 I am of the further view that the work of the following positions does not fall within the scope of the Union's bargaining unit as certified by the Board:
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> 1. Program Administrator for the Gerontology Program occupied by Holtby;
> 2. Training Coordinator for the Eastern Indonesia Universities Development Project;
> 3. Manager, Media Resources and Instructional Media Centre Administration position occupied by West;
> 4. Assistant Director-Residence Life position occupied by McGrath; and
> 5. Assistant Director, Conference and Guest Accommodations occupied by Nazareno.
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> 134 Accordingly, I recommend that the six positions that I have found to be within the scope of the Union's bargaining unit as certified by the Board and their incumbents be dealt with in accordance with the provisions of Appendix G and, in particular, those that provide that:
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> > ". . . the incumbent shall have the option of remaining outside the bargaining unit or joining the bargaining unit within ten (10) working days of written notification. Where the incumbent elects to join the bargaining unit she/he shall have seniority calculated in accordance with the collective agreement.
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> > Where there is no incumbent, the position shall be posted and filled in accordance with the collective agreement."

In *Simon Fraser* Arbitrator Kinzie made an assessment of which functions are within the bargaining unit as certified by the Board and which are not. In the current case, the question is similar and decided by location pursuant to the original Certification. "Sales persons and managers" are excluded and employees at the "Vancouver International Airport Terminal" are included, pursuant to the original Certification. It is also important to note that employees working at the Beckwith location, which is away from YVR Airport, are not included in the parties Certification.

In *Re Days Hoteliers Inc., (supra),* Arbitrator Moore at paragraph 75 commented as follows:

> 75 With respect to the issue of whether the work was performed one behalf of or at the instance of the Employer, the Panel in *Richmond Inn* made the following comments which I find to be of assistance:
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>> Returning to the words of Article 2.04, we are of the view that they contemplate a situation where an employer bound by the provisions of the collective agreement determines that he wishes to have certain work coming within the Union's jurisdiction in his facility performed, and instead of undertaking it himself, he decides to have someone else perform it for him. In these circumstances, that someone else is performing the work as the "representative" of the employer and in his interest. Furthermore, he is performing it at the "request" or "suggestion" of the employer.
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>> In these circumstances, the employer bound by the collective agreement can be said in our view to have contracted the work out to the "someone else" performing it on its behalf. We note that this interpretation, while according with the normal and ordinary sense of the words used in Article 2.04, also accords with the generally understood arbitral notion of contracting out. (at p. 6-7)
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> 76 The facts here are distinguishable from those in the *Richmond Inn* case, where it was the coffee shop proprietor, operating at arms' length, who approached the hotel to negotiate an opportunity to locate his business in its lobby in order to test its viability. I note MacPhail's

evidence was that it was the Days Group that identified and pursued the opportunity to have a large coffee chain established in the lobby of the Hotel. The Days Group initiated discussions with Starbucks. The Days Group is not at arms' length from Days PG, which owns and operates the Hotel. Consequently, on the facts of this case, I conclude that the work performed at Starbucks came about at the instance of the Days Group, which includes Days PG as one of its corporate vehicles, as a potentially profitable and beneficial business investment and continues to be performed as such.

77 Finally, with respect to the third element of Article 2.04, I note the provision refers to work performed "directly or indirectly under contract or sub-contract". In my view, given the broad wording of the clause, the precise nature of the contractual relationship is not as significant as it might otherwise be. The Starbucks operation came about as the result of a number of contractual arrangements, which include the License Agreement, the Operating Agreement, and the Lease. I find that the interrelationships among the various corporate entities which are party to these arrangements leads to the conclusion that the work at Starbucks is more than adequately caught within the rubric of the language "indirectly under contract or sub-contract" and that the contractual arrangements, from a substantive perspective, satisfy the third element of Article 2.04.

78 Accordingly, the Union's grievance succeeds. Given that this matter was addressed on the evidence and submissions made during the Employer's preliminary objection, which did not include full submissions on the issue of remedy, I refer that matter back to parties for resolution and retain jurisdiction, should they be unable to reach an agreement in that regard.

In the BCLRB rehearing of *Days Hoteliers Inc. (supra)*, beginning at para. 28, Ken Saunders, BCLRB Panel, commented as follows:

28 I begin by distinguishing the "certified bargaining unit" and "bargaining unit work". Both terms include the word "bargaining unit" but they refer to different things.

29 The certified bargaining unit defines *the group of employees* a union is entitled to represent with the certified employer. The fact a union is certified as the exclusive bargaining agent for a group of employees, does not give that union an exclusive claim to *the work those employees perform: Vancouver Symphony Society*, IRC No. C3/93, 17 C.L.R.B.R. (2d) 161 at 175 and cases cited therein. The certified employer may contract out that work to a third party, unless the union has negotiated

contractual language that restricts that freedom. Those types of contractual restrictions establish a union's jurisdiction over work done by members of the certified bargaining unit. The work caught by such provisions is known as "*bargaining unit work*". This has become a term of art in arbitral jurisprudence. Article 2.04 of the Collective Agreement is an example of such a provision.

30 The Union claimed that Article 2.04 restricted the Employer's freedom to engage a third party to operate and employ persons to work at the Starbucks outlet. Framed in the words of Article 2.04, the dispute centered on whether the work at issue was "... work coming under the jurisdiction of this Union, in the certified area ...". Thus, the question of whether the work at issue was "bargaining unit work" is properly characterized as a matter of collective agreement interpretation.

31 The established test for reviewing an arbitrator's interpretation of a collective agreement is as follows: does the award show that the arbitrator has made a genuine effort to resolve the dispute on the basis of relevant provisions of the collective agreement? (*Lornex Mining Corporation Limited*, BCLRB No. 96/76, [1977] 1 Canadian LRBR 377 at 381). The Board has chosen this deferential standard in order to promote arbitration as an expeditious and final means of dispute resolution: *Lornex, supra*; *Canadian Corp of Commissionaires*, BCLRB No. B42/2009 (Leave for Reconsideration of BCLRB No. B5/2009), para. 7.

...

33 Further, I reject the contention that the Arbitrator erred by extending the scope of the Union's certification. Article 2.04 restricts the Employer's right to contract with third parties to do "... work coming under the jurisdiction of this Union, in the certified area ...". As noted above, the Arbitrator found it significant that the Union holds a "wall-to-wall" certification and that, "[t]he historical and current job descriptions show that the employees in the bargaining unit perform a wide-ranging array of work in order *to provide all of the services one would expect from the Hotel, including food and beverage services*": Award, p. 20, emphasis added. I find no reviewable error in the Arbitrator's analysis leading to his conclusion that food and beverage service is part-and-parcel of the certified business of the *Hotel.* I defer to the Arbitrator's weighing of the evidence in making that determination.

34 I add on an independent note, that the foregoing point answers the Employer's rhetorical argument about whether Article 2.04 would apply to the business of a grocery store at the Hotel. The Arbitrator remained focused on whether the work at issue was work performed by bargaining

> unit employees in furtherance of the certified business; namely that of the Hotel. I find no reviewable error in this aspect of the Award.
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> V. CONCLUSION
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> 35 The application is dismissed because it does not disclose a reviewable error.

The Union relied on Arbitrator Moore's decision in *Days Hoteliers* and the fact that the BC Board decision found that there was no reviewable error in Arbitrator Moore's decision. The Union's view was that the *Days Hoteliers* case was similar to the current issue in that the Enterprise counter will be at the "Vancouver International Airport Terminal", which is part of the description in the original Certification. The Employer argued that this is not relevant without the Beckwith employee support in terms of membership in COPE.

In *Re Carling O'Keefe Breweries of Canada Ltd. (supra)*, Arbitrator Beattie concluded the following beginning at para. 59:

> 59 I am satisfied that non-bargaining unit employees were performing bargaining unit work and that the work, after, at most, a few days, fell outside the exception of "reasonable purpose of training". The amount of work performed by supervisors would be, in total, considerable (and certainly not *de minimis*), and provides a meaningful example of a threat to the integrity of the bargaining unit.
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> 60 I find, therefore, that there was a grievable breach of s. 1.01.

The Union presented evidence of similar breaches of the current Collective Agreement at the Airport. Their point was that Management, from time to time, carried out bargaining unit work, which in the Union's opinion constitutes a violation of certain terms of the current Collective Agreement. The Employer argued that this point was not germane to the issue at hand.

In *Re Alaskan Copper and Brass Company Ltd. (supra),* beginning at paragraph 18, Vice-Chair Ken Saunders concluded the following:

> 18 The parties appear to be concerned that the unit description might impact how bargaining unit work is defined in the future. To reiterate, the Union's description does not define the unit in terms of job duties but regardless, this concern is misplaced insofar as certification only confers the right to represent employees. The unit description in a certification defines the group of employees the Union represents, not the scope of bargaining unit work. A good exposition of these principles is set out in *Vancouver Symphony Society*, IRC No. C3/93, at p. 18, as follows:
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>> It is somewhat trite to observe that a trade union is certified to represent employees, and not to exercise jurisdiction over a certain type of work: see A.S. King Logging Ltd., BCLRB No. 14/79, [1979] 1 Can LRBR 551, at pp. 552-54, citing Cariboo Memorial Hospital, BCLRB No. 47/74, [1974] 1 Can LRBR 418. Even where a bargaining unit is defined in terms of certain job classifications or work functions, it does not automatically follow that the employees have a proprietary right to the work they perform. The typical response to such claims is that the union must negotiate contractual language in order to establish and protect its work jurisdiction: see The Hobart Manufacturing Company Limited, BCLRB No. 33/77, followed in E.B. Horsman & Son Ltd., IRC No. C76/87. Thus, no one can question the appropriateness of jurisdictional proposals which are designed to preclude the performance of work by persons outside the bargaining unit, to restrict contracting out of bargaining unit work, or to protect against other assignments of bargaining unit work. However, there may come a point where a "work jurisdiction" proposal is really representational in nature. As stated in a somewhat different context, work jurisdiction and bargaining rights cannot be equated: see Toronto Star Newspapers Limited, supra, at p. 427.
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> 19 The Employer argues that the Union's unit description provides the Union with an opportunity to argue that security, maintenance and cleaning employees are in the unit if the Employer chooses to have its own employees do that work in the future. In my view this concern is misplaced for two reasons.
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> 20 First, the Union does not contend that persons who may be employed in these capacities are employees in the unit it seeks to represent. The Union seeks to describe the unit based on facts that currently define the workplace. The Union's description does not generate a lingering

ambiguity about the status of persons currently employed at the identified worksite-they are either in or out of the unit. Further, I accept the Union's submission that no useful purpose is served by recording the exclusion of persons who may never be employed. The Employer and the Union know whom the Union represents so there is little reason for bargaining to stall over the scope of the unit.

21 Second, the Employer's concern is misplaced as a matter of law and policy under the Code. The mere fact a unit description refers to "all employees" does not necessarily determine whether future employees are in the bargaining unit. Rather, the Board examines the assumptions in place at the time the certification was granted to determine whether employees are in the certified unit. The Board succinctly explained this approach in *North Shore Neighbourhood House Society*, BCLRB No. B361/99 (Reconsideration of BCLRB No. B103/99) as follows:

> Both *Automatic Electric* and *Vancouver Museum* proceed from the premise that one has to first determine the scope of the certification. The fact that a certification may read "all employees" is not determinative. The Board must bring a sophisticated analysis to the question and understand the assumptions that were in place at the time the certification was applied for and granted. It is from this latter point that *Vancouver Museum* and *Automatic Electric* proceeded.
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> *Vancouver Museum* proceeded down the avenue where the initial certification did not encompass the disputed employees. In that case, the onus lay with the union to convince the Board that the parties had in fact agreed to include the employees in the bargaining unit. Such an agreement may be found in conduct, documents or the scope clause of the collective agreement. Where the union fails to convince the Board that such an agreement exists, then the union's sole remaining options are to organize the employees and either apply for a separate certification pursuant to Section 18 of the Code or for a variance, pursuant to Section 142 of the Code. In *Vancouver Museum* the underlying assumptions demonstrated that the disputed employees were not encompassed by the initial certification and there was no subsequent agreement for expansion of scope in the collective agreement to include these employees. As a consequence the union again was placed in the position of having to organize the employees and apply for an *Olivetti* variance. Parenthetically, an agreement to expand the scope to include a group of employees not covered by the original certification may raise issues canvassed in *Delta Hospital* BCLRB No. 76/77, [1978] 1 Can LRBR 356. However, that is not a matter which needs to be addressed in this case. (paras. 29 and 30)

> 22 In the present case, like the cafeteria employees at the moment of certification in *Vancouver Museum, supra*, the cleaning, maintenance and security personnel are employees of a third party. They are not employees of the Employer. No one seeks to include them in the unit. As noted above, this is a key assumption governing the scope of the unit described by the Union. If the Employer chooses to cancel the contract and do this work using its own employees, then in accordance with the analysis in *Vancouver Museum*, the Union will have to show that there is an agreement to include those employees in the unit, or organize them and apply to vary the unit to include them. For these reasons, I find the Employer's stated concern about the status of persons that might be employed in these capacities is unfounded.
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> V. CONCLUSION
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> 23 The Employer's application to amend the unit description is denied.
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> 24 A certification will be issued with the bargaining unit described as follows:
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>> All employees of Alaskan Copper and Brass Company Inc. at and from 225 North Road, Coquitlam, BC excluding all managers, office and sales staff.

Similar to the *Alaskan Copper and Brass* case decision, in the current case the unit description includes "employees at and from Vancouver International Airport Terminal."

In *Re Vancouver Museum and Planetarium Association (supra),* in their summary and conclusion the panel stated:

> To summarize, the parties' agreements since the original certification are not determinative of the scope of the original certification. Even if the collective agreement provided a framework for the inclusion of the cafeteria workers at some point, the parties are required to reach an agreement in the collective bargaining process to include these workers. It was not alleged nor argued that such an agreement existed. Indeed, the issue between the parties in this case was never whether the current collective agreement contained agreement to include the cafeteria workers but, rather, whether the original certification was broad enough to encompass them. The findings made by the reconsideration panel

concerning the parties' agreement from time to time to expand the bargaining unit simply confirmed that the original certification order issued by the Board encompassed less than the present configuration of the bargaining unit. The certification order could not include cafeteria workers, who at that time, were not even a glint in eye of the either the VMREU or the Association.

In conclusion, not only was the approach adopted by the McDonald panel correct in light of the jurisprudence of the Council, it is clear there were no material facts in dispute on the issue which was properly before the McDonald panel.

In light of the foregoing, it is the decision of this Panel that the reconsideration decision in IRC No. C214/89 is incorrect and is therefore set aside. The original decision of the McDonald panel in IRC No. C63/89 was correct under both the law and policy of the Act and is reinstated.

In the original case, Ms. Heather McDonald's panel concluded the following:

… While the Council generally prefers all-employee bargaining units (see Insurance Corporation of British Columbia and Canadian Union of Public Employees, Local 1695, BCLRB No. 63/74, [1974] 1 Can LRBR 403) this would be a matter for the Council to assess in each particular case upon an application for variance brought by a union under Section 36 of the Act, in determining the appropriateness of the proposed unit.

V

Accordingly, for the foregoing reasons, the Panel makes the following declarations under Section 34 of the Act:

1) Cafeteria employees employed by the Employer are not bound by the collective agreement between the parties.

2) A collective agreement has not been entered into by the Union on behalf of cafeteria employees employed by the Employer.

3) Cafeteria employees employed by the Employer are not included in the Union's bargaining unit.

Given that the cafeteria is closed and no one is employed therein, the Council will not, at this time, vary the certification to expressly exclude cafeteria employees.

Vice-Chair McDonald's original decision was with respect to a cafeteria which had no employees as it was closed. The ERAC plan is to have the Beckwith employees working at the counter at the Airport and in the parkade at the Airport. ERAC also plans to continue its operation at the Beckwith location. These facts distinguish the current case from the original *Vancouver Museum* case.

It is this Board's conclusion that the original Certification was clear. The original Certification describes the bargaining unit as: "employees at and from 3545 Lougheed Highway and 1185 West Georgia Street, Vancouver; Vancouver International Airport Terminal; 3866 McDonald Road South, Richmond, BC, except Sales persons and Managers."

In addition, the original Certification also states: "and those excluded by the Code, employed by Enterprise Rent-A-Car Canada Company".

It is clear that at Beckwith and other locations, employees outside of "employees at and from 3545 Lougheed Highway and 1185 West Georgia Street, Vancouver; Vancouver International Airport Terminal; 3866 McDonald Road South, Richmond, BC", are not in the bargaining unit as described in the original Certification.

It is equally clear that "employees at and from Vancouver International Airport Terminal" are within the bargaining unit in a manner similar to those who were swept into the unit at the YVR Airport South Terminal.

On June 1, 2015, when MT's and Shuttlers are assigned to YVR Airport from Beckwith, they will be encompassed within the bargaining unit pursuant to the original Certification.

Management Trainees duties at YVR will be very similar to the duties of the bargaining unit Customer Service Agents as both will be responsible for renting vehicles to customers at the Airport. Beckwith Shuttler duties are also very similar to bargaining unit Shuttler duties. The Beckwith employees assigned to the Airport will essentially have the same duties and responsibilities as bargaining unit employees. These facts were confirmed primarily by Mr. Wilk in his testimony and cross-examination. One exception in Mr. Wilk's testimony was that MT's training includes a marketing component.

In the result, on a careful review of the evidence, submissions of counsel and the case law, the Union's grievance succeeds to the extent outlined herein:

1) ERAC employees at Beckwith and other locations outside of "employees at and from 3545 Lougheed Highway and 1185 West Georgia Street, Vancouver; Vancouver International Airport Terminal; 3866 McDonald Road South, Richmond, BC" are not in the bargaining unit pursuant to the description of the original Certification.

2) Non-management employees assigned to the YVR Airport location by ERAC are bargaining unit employees and are covered by the Collective Agreement, regardless of the rental brand.

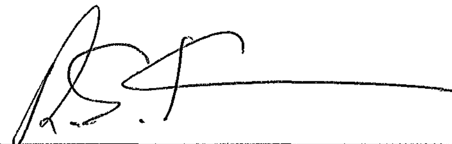
3) Management Trainees and Shuttlers assigned from the Beckwith location to YVR Airport are within the scope of the original Certification "Vancouver International Airport Terminal" and become members of the bargaining unit effective June 1, 2015.

All of which is so ordered.

This Board will retain jurisdiction in the event of any implementation difficulties.

I thank counsel for their helpful submissions.

Dated at Vancouver British Columbia this 27th Day of May 2015.



Ronald S. Keras
Arbitrator

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