IN THE MATTER OF AN ARBITRATION

BETWEEN:

A.D.T. SECURITY SERVICES CANADA INC.

(the "Employer")

AND:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 213

(the "Union")

ARBITRATOR:	John Kinzie
COUNSEL:	Paul Devine and David Rice, for the Employer
	Brandon Quinn, for the Union
DATES OF HEARING:	June 11, 12 and 13 and July 24 and 25, 2008
PLACE OF HEARING:	Vancouver, British Columbia

AWARD

I

This proceeding is concerned with a grievance by the Union dated September 20, 2007 claiming that three employees working for the Employer in the interior of British Columbia should be covered by the terms and conditions of the collective agreement in

force between the Employer and the Union and that the Employer should be remitting dues on their behalf to the Union.

I have been appointed as arbitrator under the Branch 80 collective agreement. The Union's certification in respect of this bargaining unit and this collective agreement apply to employees engaged in the installation and servicing of alarm systems in commercial operations. The certification issued by the Labour Relations Board (hereinafter the "Board"), as of the date the hearing into this grievance commenced, described the bargaining unit as

> "employees at and from Branch 80, 8535 Eastlake Drive, Burnaby, BC, except administrative and sales staff . . . ."

Shortly after the commencement of the hearing, the Board acknowledged a change in Branch 80's address to 8500 Baxter Place in Burnaby.

Article 1.01 (a) of the Branch 80 collective agreement provides that:

> "The Company agrees to recognize the Union as the sole bargaining unit for such employees as are defined in the Certificate issued by the British Columbia Industrial Relations Council at and from Burnaby, B.C."

Article 1.01 (b) requires that all employees must become, and must remain, members of the Union as a condition of employment.

The Union also holds a separate certification in respect of the Employer's employees. The bargaining unit in that certification is now described as:

> "employees at and from Branch 79, 8500 Baxter Place, Burnaby BC except administrative and sales staff . . . ."

This certification and collective agreement cover employees engaged in the installation and service of alarm systems in residential premises. The Branch 79 collective agreement contains an Article 1.01 (a) and (b) whose wording is to the same effect as the wording in Article 1.01 (a) and (b) of the Branch 80 collective agreement.

In support of the grievance, the Union maintains that although the three employees work in the British Columbia interior, they report to and are directed by managers and supervisors located in the Employer's Burnaby offices. There is not a separate branch located in the interior. On this basis, it says the employees are working "from" the Burnaby office and therefore should be covered by the Branch 80 collective agreement. It relies, *inter alia*, on *Canpar Industries*, BCLRB No. B150/94 and *Interior Diesel and Equipment Ltd.*, BCLRB No. 68/80; [1980] 3 Can LRBR 563.

The Employer disputes the grievance. It maintains that the Branch 80 certification and collective agreement have traditionally encompassed employees who have been performing commercial installation and service work within the geographic area bounded by Hope to the east and Squamish to the north. Interior employees are outside the geographic scope of the certification and collective agreement and therefore should not be treated as being covered by them. Instead, it submits if the Union wishes to represent these three employees, it has to organize them and seek a variance of its certification from the Board to represent them. In this regard, it relies, *inter alia*, on *Olivetti Canada Ltd.*, BCLRB No. 113/74. In fact, the Employer contended that this matter should properly be before the Board and that I did not have jurisdiction to deal with it. I will come to that preliminary objection in the next section of my Award.

In the alternative, if I did conclude that the interior employees came within the scope of the Branch 80 collective agreement, the Employer submits that the Union should be estopped from making that claim. It says that it has had an employee, Bert Lemke, in Kelowna since 2002 and that the Union has not asserted in bargaining or by way of grievance until 2007 that its interior employees should be covered by the collective agreement. In response, the Union says that in 2002 Lemke was performing a range of functions, including sales, which would have excluded him from the Union's bargaining unit. It was only when those duties were removed from him that it would have been appropriate to bring him under the collective agreement and that was when the grievance was filed.

In the further alternative, if its estoppel argument fails and interior employees can be covered by the Branch 80 collective agreement, the Employer contends that one employee, Owen Saunders, should not be included because the bulk of his work entails residential service work. It says he only spends a minority of his time performing commercial service work. In response, the Union maintains he is still performing an amount of commercial work sufficient for him to be included in the Branch 80 collective agreement.

II

The Union has also filed an application with the Board to vary its certification in respect of the Branch 80 bargaining unit to include the three interior employees. This application was made on April 8, 2008. As of the date of the hearing into the grievance before me, the Board had not yet made a decision on that application.

Based on that application to the Board, the Employer submitted that I should defer to the Board because its decision would resolve the entire dispute that is before me and because arbitration would be incapable of providing an adequate remedy. Further, it maintained that a resolution of this dispute was inextricably intertwined with the law and policy of the Labour Relations Code. It relied on *Repap Carnaby Inc.*, BCLRB No. B31/94; 22 CLRBR (2d) 100, amongst other cases.

The Union sees its application to the Board differently. Its primary position is that the three interior employees are already included in its Branch 80 certification and covered by its collective agreement because they work "at and from" the Employer's Burnaby Branch 80 offices. Accordingly, it says, the Employer should be deducting and remitting dues on their behalf. It explains that the variance application was only made as a fallback position in the event it was not successful in arbitration in respect of its grievance. If it is successful in that grievance, the variance application would be moot.

After considering the submissions of counsel, I concluded that the Employer's preliminary objection to my proceeding in this matter should be dismissed. In my view, the Labour Relations Code and the authorities support the proposition that I had the jurisdiction to hear and determine this grievance even though it might involve issues concerning the law and policy under the Code. In this regard, see Section 89 (g) of the Code, *Repap Carnaby Inc., supra*, and *Elk Valley Coal Corp.*, BCLRB No. B29/2005.

Some authorities have suggested that if there is a concurrent application before the Board raising the same issues as are before the arbitrator that the arbitrator should defer to the Board. See for example *B.C. Hydro and Power Authority*, Award dated July 29, 1996 (Larson). The reason given is to avoid the potential for conflicting decisions. However, I note that the Board's decision in *Elk Valley Coal Corp., supra*, seems to suggest otherwise.

In any event, I am of the view that the issues before me in this proceeding are not the same as the issues before the Board in the Union's variance application. The central issue before me is whether the three interior employees are captured by the Union's current Branch 80 certification and whether they are covered by the Branch 80 collective agreement. The application before the Board proceeds on the assumption that they are not and then seeks to have them included in the Branch 80 certification based on an application of the principles set out in *Olivetti Canada Ltd., supra.*

Finally, I was not persuaded that this matter fits within any of the recognized exceptions to the Board's policy concerning the respective jurisdictions of the Board and arbitrators set out in *Repap Carnaby Inc., supra*, at 109. I was satisfied that if the Union is successful in persuading me of the merits of its case, I could afford it an adequate remedy. Secondly, while a resolution of the grievance may necessitate the application of the law and policy under the Labour Relations Code, arbitrators have the jurisdiction to apply that law and policy, subject of course to the potential for review by the Board under Section 99 of the Labour Relations Code on a standard of correctness.

III

The background facts to this proceeding are as follows.

The Employer is engaged in the sale, installation and service of alarm systems and other security services throughout British Columbia. It operates from two branch locations, one located in Burnaby and another in Victoria. The Burnaby branch location

actually encompasses two branches as discussed above, i.e., Branch 80 involving employees engaged in the installation and service of alarm systems for commercial customers and Branch 79 capturing employees engaged in the installation and service of alarm systems for residential customers. The Union represents the employees in both the Branch 80 bargaining unit and the Branch 79 bargaining unit.

The Branch 80 certification dates back to the late 1940s. The Branch 79 certification arose out of the Employer's purchase of Knill's Alarm Systems Ltd. in or about 1989. The Union applied for certification to represent these employees engaged in the residential alarm system business shortly after the purchase. Knill's Alarms was located in North Vancouver and the Employer maintained that location for some time after the purchase. However, in or about 2000, it moved that branch to the same premises in Burnaby where its commercial branch was located. Both branches are now located at 8500 Baxter Place in Burnaby.

The Employer's second location in the Province is in Victoria. The employees working from that location provide service to the Employer's customers on Vancouver Island. The employees working at and from the Victoria location were as of the date of the hearing not represented by any certified trade union.

For some time, the Employer provided service to its customers in the interior of the Province through a web of authorized dealers and subcontractors. Then, in 2002, it purchased the security alarm business of Honeywell Protection Services and retained its employee, Lemke, in its employ after the purchase. Lemke was employed by Honeywell as an area representative and he was retained in that position by the Employer after the purchase. The Employer published a job description in 2002 describing Lemke's duties and responsibilities as follows:

> "**Primary Function:**
>
> The Area Rep. is accountable to the Operations Manager and is responsible for National Account customer service, inspections, installations, and new/supplementary National Account business sales.
>
> **Normal Entrance Requirement:**
>
> Electronics degree or equivalent, a TQ license from the Province of BC, with a minimum of five (5) years experience in field service and field installation, plus demonstrated leadership ability and able to complete responsibilities with little supervision. Must have the interest and initiative to expand market share in the area of responsibility.

Principal Responsibilities:

- Provide service response with (sic) the prescribed time from receipt of trouble call.
- Ensure inspections are kept current.
- Ensure installations are scheduled and installed as per schedule and ensure job equipment is received with in (sic) the time frame required.
- Responsible to perform the on-call required for the National account systems in the area.
- Responsible for the customer relations in the area.
- Maintain a minimal, but adequate service and installation stock to ensure prompt customer service.
- Achieve sales targets as assigned through a mix of National Account Financial and Commercial Sales.

Level of Accountability:

Responsible for the achievement of the approved objectives as stated to the performance standards required by our clients and outlined by the Five Commandments of Service issued by ADT."

Lemke testified that these duties were essentially the same as he had been performing for Honeywell and he had been excluded from that company's certified bargaining unit. His primary responsibility was to provide the full range of services offered by the Employer to its national accounts customers which included various financial institutions and businesses such as Home Depot located in the interior. When required, he made use of the Employer's authorized dealers in the interior to assist him. At that time, he estimated that he spent approximately 20% of his time on sales, another 20% of his time on office and managerial responsibilities, and finally 60% of his time on technical work involving the installation and service of alarm systems.

Lemke said that sometime in 2003 he met with Mike Flynn, an Assistant Business Manager with the Union, to discuss his becoming a member of the Union for the purposes of its representing him in collective bargaining. They reviewed his duties as an area representative for the Employer and Flynn advised him that he felt that Lemke was not doing enough technical work to be brought within its bargaining unit.

Lemke continued as the Employer's only technical employee in the interior until September 25, 2006 when Ron Heinze was hired to work as a commercial installer. On occasion, he would also perform some service work on commercial alarm systems. In August, 2007, the Employer hired its third technical employee in the interior, Owen Saunders. Saunders was hired to perform service work, principally on residential alarm systems, but also on some smaller commercial systems.

In late 2007, Lemke's duties changed following discussions he had with Janine Bozanin, the new manager of the Burnaby branch. Lemke felt he was being pulled in too many different directions. He was responsible for national accounts in the interior, but was also having to cover off Heinze's work while he was off work due to an injury. Additionally, he was still being expected as an area representative to handle sales calls. In the end, Bozanin agreed that he would focus in on the national accounts while Heinze, on his return, would devote his energies to the other commercial accounts. Further, his sales responsibilities would be removed and transferred to the Employer's sales representatives in Kelowna who had just been recently hired. The result was that after these changes, Lemke in effect became just another commercial installer with a specific responsibility for the Employer's national accounts in the interior.

I now turn to look at the make-up of the Burnaby branch and how the members of the bargaining unit go about performing their duties. The branch as a whole is headed up by Bozanin, the Branch Manager. Reporting to her are four team managers. There is a Team Manager, Install (Commercial) who is Mark Tkachuk, a Team Manager, Install (Residential) who is Richard Tyers, a Team Manager, Service who is Steve Bourgon, and an Operations Support Team Manager who is responsible for the clerical and administrative support employees. As of the date of the commencement of the hearing into this matter, 21 commercial installers reported to Tkachuk, 18 residential installers and eight subcontractors reported to Tyers, and 22 service technicians including 11 residential and 11 commercial servicemen reported to Bourgon.

Each installer and service technician has his own company van which he uses to travel from job to job. They spend much of their time on the road and in customers' premises installing and servicing alarm systems. The commercial and residential installers are scheduled to their work from the Burnaby branch. Tyers explained that with respect to the commercial installers, the Employer tried to schedule them to jobs close to where they lived, but that most of the time, the assignments were based on the individual installers' skill sets. The residential installers, on the other hand, are assigned to various geographical areas within the boundaries of the Lower Mainland stretching from Squamish to Hope. Tyers said that work was assigned to them largely on the basis of their geographical areas although some exceptions were made if a special skill set was required or volumes dictated. The Employer also employed two coordinators at its Burnaby offices to facilitate the scheduling and coordination of installation work, one for commercial installations and another for residential installations.

The service technicians, both commercial and residential, are also assigned to various geographical areas. A customer requiring service or repair to his alarm system

calls into the Customer Monitoring System which then routes the call to the Employer's Regional Dispatch Centre in Ontario. Jobs are then assigned by the Centre to a service technician based on whether the customer is commercial or residential and then on the customer's postal code. The job is given to the appropriate technician responsible for the geographic area in which the customer is located. Each technician has an established number of available service and repair slots per day and the customer's job is assigned to the first available slot. Finally, an employee in Toronto known as the optimizer will arrange each service technician's jobs for the day with a view to keeping his driving time to a minimum. As a technician finishes one job, he phones the Regional Dispatch Centre for his next job and he proceeds on that basis throughout the day. There is also a coordinator for service work located in the Burnaby office.

The installers and service technicians do not spend a lot of time at the Burnaby offices. They carry their tools and the parts and supplies they will need to perform their work in their trucks. Most of them take their trucks home with them in the evening. They do come into the Burnaby premises to restock their trucks with parts from time to time, to attend monthly tool-box meetings, to attend training sessions, and for social activities such as the Christmas party. They also have to attend at the Burnaby offices from time to time to complete paper work, but time sheets can be submitted by e-mail or fax.

There is very little crossover between the residential side and the commercial side. Each is governed by its own collective agreement and the terms and conditions contained in them are not the same. When crossovers have occurred, it has generally been in circumstances where business is slow on the residential side and layoffs would have to take place if the residential installers and/or service technicians were not employed on the commercial side. The residential installers and/or service technicians transferred to the commercial side are generally assigned to work on the smaller commercial jobs. However, when such crossovers do occur, the transferred installer or service technician continues to work under his collective agreement and not the collective agreement of the side to which he has been transferred.

I now turn to the three employees located in the interior and how they go about performing their duties. Lemke and Heinze, as commercial installers, report to Tkachuk. They are two of the 21 installers reporting to him. Saunders, the service technician, reports to Bourgon. He is treated as a residential service technician based on the fact that between 60% and 70% of his work is done on residential alarm systems. He is one of the 11 residential service technicians reporting to Bourgon.

All three employees drive company vans and spend virtually all of their time on the road and in customers' premises installing and servicing alarm systems. They obtain their parts and other supplies from the Burnaby office and store them in their trucks or a small warehouse the Employer maintains in Kelowna.

The three employees are dispatched to their work in much the same way as the Burnaby installers and service technicians are, with some variation reflecting their small

numbers and the geographical area they have to cover. Heinze and Lemke are assigned their work either by Tkachuk or the commercial installation coordinator in Burnaby. However, unlike the Lower Mainland installers, they are permitted to schedule when they will perform their work. This allows them to batch jobs in particular cities and towns so that they can carry them out in the most efficient manner possible. Like the Lower Mainland service technicians, Saunders is also assigned his work by the Regional Dispatch Centre in Ontario. Again, because of the area he has to cover, the optimizer will schedule Saunders into particular cities on specific days, so for example, all pending service jobs in Penticton will be scheduled for Tuesdays and Vernon jobs a different day. He would also do small commercial service jobs required to be done in the area that particular day.

The three interior employees seldom attend at the Burnaby offices. They will do so for training purposes and for some social activities. They do not attend the monthly tool-box meetings, but Lemke testified that they are sent copies of the minutes of those meetings which they review and provide input on if they think necessary. In her evidence, Bozanin questioned whether tool-box meeting minutes were regularly sent to the interior employees. She suggested that some may have been sent on a sporadic basis.

The three interior employees have never been asked or directed to perform work in the Lower Mainland. However, from time to time, in special circumstances, Lower Mainland based employees have been asked to go outside the traditional area covered by the Burnaby office, i.e., Squamish to Hope, to perform work, for example, in Whistler and in the interior. One current example is Lower Mainland employees going to the interior to assist in converting the Employer's alarm systems in light of the move to 10-digit dialing in the area covered by the 250 area code. Volunteers have been sought and the Union shop stewards have been informed when this has occurred. It appears that the Employer has been successful in obtaining volunteers from the installers group, but not as successful from the residential service technicians working in the Lower Mainland.

It appears that it was when one of those shop stewards was in Kelowna in August, 2007 working on a job that he became aware of the three interior employees. That shop steward was Paul Szigety, a commercial installer covered by the Branch 80 collective agreement. He reported what he had learned to Flynn and Flynn filed the grievance that gave rise to this proceeding on September 20, 2007. In that letter he advised the Employer that:

> "The Union is grieving the fact that three (3) new employees, in Kelowna, BC being directed by and paid by Branch 80 Burnaby have not had dues submitted. The Union contends the Employer has breached Article 1.01 (a) and (b)."

IV

I now turn to address the issues that arise for determination in this proceeding.

The Union holds two certifications in respect of employees working "at and from" the Employer's Burnaby offices. One encompasses its commercial installers and service technicians. This bargaining unit is described as Branch 80. The second covers its residential installers and service technicians. This bargaining unit is known as Branch 79. The Union's grievance has been filed, and I have been appointed, under the Branch 80 collective agreement.

The Union maintains that the three interior employees, Lemke, Heinze and Saunders, perform work within the Branch 80 bargaining unit, and that therefore, they must become and remain members of the Union. The Employer does not dispute that the work performed by Lemke and Heinze is very similar to the work performed by the commercial installers and service technicians working in the Lower Mainland. However, it contends that all three interior employees do not perform that work "at and from" its Burnaby offices and accordingly, they cannot be treated as being in the Branch 80 bargaining unit. It says that the interior employees constitute a new group which can only be placed in a bargaining unit by the Board after it has been satisfied that the Union has established majority support amongst them.

In support of its position, the Employer refers me to *Abitibi Paper Company Ltd.* (1979), 21 L.A.C. (2d) 393 (Burkett). In that case, the collective agreement provided that the employer recognized the union as the exclusive bargaining agent

> ". . . for employees of the Sault Ste. Marie Division engaged in office work while employed in the mill and woods offices located at Sault Ste. Marie and for camp and depot personnel . . . ."

The employer decided to move the functions of a particular clerical job from its Sault Ste. Marie offices to its White River offices some 200 miles away. The incumbent in the position at Sault Ste. Marie bumped into another job at that location and a new employee was hired into the position at White River. The union sought a declaration that the White River employee and the work of the position still remained in its bargaining unit.

In dismissing the grievance, the majority referred to the Ontario Labour Relations Board's practice in granting certifications. It specifically referred to the Ontario Board's decision in *Inglis Ltd.* [1977] O.L.R.B. Rep. 128 (March) and its comments at paragraph 20 that:

> "The scope of a trade union's recognition [in other than voluntary recognition situations] is initially set by the Ontario Labour Relations Board certificate. The Board practice is to certify an applicant trade union, which evidences sufficient membership support, for all employees of the employer within a named municipality. The municipal boundary has been the rough and pragmatic response of the Board to the conflict generated by the desirability for continuity of bargaining rights on the one hand [*i.e.*, when a plant relocates] and the requirement for freedom of

> choice on the other. The fine-tuning is left to the parties. Whereas the certificate establishes the initial scope of the union jurisdiction the parties are free to negotiate an expanded recognition [subject to the statutory protections afforded those covered by a voluntary recognition]. It is the parties themselves who are best equipped to make the necessary trade-offs between management rights, union rights and employee rights. It is they who are best equipped to make their own bargain and to thereby set the parameters of their own relationship."
>
> (at 399-400)

The majority then concluded that:

> "The union is recognized as the exclusive bargaining agent for 'employees of the Sault Ste. Marie Division engaged in office work while employed in the mill and woods offices located at Sault Ste. Marie.' There is nothing before us as would cause the board to conclude that the parties intended to cover other than certain employees 'located at Sault Ste. Marie.' Having regard to the practice of the Ontario Labour Relations Board to circumscribe the bargaining rights which it confers by reference to a municipal boundary (indeed art. 1.01 of the instant collective agreement makes reference to the bargaining unit approved by the Ontario Labour Relations Board), and to the approach taken by arbitrators in dealing with the issue, the parties should have used clear and unequivocal language if they wished to extend the union's bargaining rights to cover employees of the Sault Ste. Marie division regardless of their physical location. The parties, however, described the bargaining unit in terms of those employed in the mill and woods offices 'located at Sault Ste. Marie' and in the result the board must conclude that it was their intent to restrict the union's bargaining rights to Sault Ste. Marie. The board finds that the parties did not intend to cover employees of the company located outside Sault Ste. Marie and that accordingly, the scope of the union's bargaining rights do not extend to White River."
>
> (at 402-403)

The approach adopted in *Abitibi Paper Company Ltd., supra*, was followed in Alberta in *Brandt Tractor Ltd.* (2005), 146 L.A.C. (4th) 154 (A.V.M. Beattie, Q.C.). In that case, the union was recognized in the collective agreement:

> ". . . as the sole bargaining agent for employees employed in the Service and Parts Department at 10630 – 176th Street, Edmonton;

> 9101 – 116th Street, Grande Prairie; and #5 – 360 MacKenzie Blvd., Fort McMurray in the Province of Alberta . . . ."

The union's grievance claimed that resident mechanics working in a number of locations outside of Edmonton were still within the bargaining unit because they were effectively managed and controlled from the Edmonton location.

The majority of the arbitration board quoted extensively from the decision in *Abitibi Paper Company Ltd., supra*, and another Ontario decision to the same effect, *Wilfred Laurier University* (2001), 66 C.L.A.S. 3 (Devlin). It noted the union's argument that:

> ". . . 'the source of effective management and control' and not the site of employment, should be the critical factor."
>
> (at 176)

It concluded that that argument could not succeed in the face of "the clearly established arbitral jurisprudence" (at 176).

In explaining its decision, the majority stated that:

> "In the present case there is the same similarity in job duties between the field mechanics and resident mechanics as there was in the *Wilfrid Laurier University* case but, as Arbitrator Devlin stated, that is not the determining factor; rather it is the geographical scope of the bargaining unit. It is perhaps significant to note that the resident mechanics spend even less time (5%) at the Edmonton branch than did the new Co-op Coordinator (15%) in the *Wilfrid Laurier University* case. Furthermore, Arbitrator Devlin rejected, as we reject, the argument that the source of control should be the primary consideration; rather it is where the work is performed.
>
> In the present case there can be little doubt that the work is performed where the resident mechanics reside and conduct their duties rather than at or out of the Edmonton branch which is the source of control. It is to be noted that the inclusion of a specific address in Edmonton in the Recognition article makes no difference in the present case compared to the geographic description of 'Edmonton' in the new Certificate of the ALRB, but the geographic scope is greatly reduced from the previous collective agreement which was the Province of Alberta.

> Accordingly we find that the geographical scope of the bargaining unit is established in clear terms and the resident mechanics are outside that scope."
>
> (at 182)

The Employer also relies on the Industrial Relations Council's decision in *Wismer & Rawlings Electric Ltd.*, IRC No. C85/92. That case involved, *inter alia*, an application by the International Brotherhood of Electrical Workers, Local 2203 to vary its certification which covered employees "at and from" the employer's Prince George location to include employees at the employer's MacKenzie branch. The union contended that the MacKenzie branch involved a relocation of part of the Prince George branch's business and that therefore it was not necessary for it to demonstrate majority support amongst the MacKenzie employees. In this regard, it was relying on the Board's decision in *Inglis Ltd*,. BCLRB No. 125/86.

The Council did not agree with the union's submissions. It stated that:

> "In this case, we are completely satisfied on the evidence as well as the applicable law and policy that the circumstances require a representation vote to be held on the IBEW's application to vary its bargaining certificate to include the employees at the Employer's MacKenzie branch. The IBEW's certification is for employees (except office and sales staff) 'at and from' the Prince George location, engaged in the manufacture, construction, installation, maintenance, rebuilding and repair of electric motors and equipment. In no way can we interpret the MacKenzie branch as a 'relocation' of any part of the Prince George branch's business or a 'transfer' of any part of the Prince George branch's business to Mackenzie (sic). The employees and/or the business at the MacKenzie branch are not under the scope of the IBEW's certification at the Prince George branch. Rather, the MacKenzie branch is an expansion of the Employer's business with a new group of employees attempting to succeed in a market area where, some five years ago, the Prince George branch failed to succeed. There is no policy rationale for waiving the representation vote requirement to protect the collective bargaining rights of IBEW members in the Prince George branch: the MacKenzie branch is not usurping the business operations of the Prince George branch or the work of the Prince George employees as, for example, in *Westar Timber Ltd.*"
>
> (at 11-12)

For its part, the Union refers me to the Board's decision in *Interior Diesel and Equipment Ltd., supra*. The International Union of Operating Engineers Local 115 was

certified for a bargaining unit of Interior Diesel's employees involving employees working "at and from" specified locations in Prince George, Williams Lake, Kamloops, Penticton and MacKenzie. It subsequently became a successor to another company for which the same union also had a certification encompassing all employees in the Province except certain excluded groups. The predecessor had branches in Kamloops and Kelowna. At the same time, Interior Diesel opened a new shop in Lumby.

The union advanced two arguments in support of its claim that the employees at the Kelowna shop should be included in its certification. The predecessor's Kamloops employees had already been melded into Interior Diesel's Kamloops operations. It asserted that Interior Diesel was a successor and that therefore by operation of then Section 53 of the Labour Code, Interior Diesel was bound by the predecessor's certification and collective agreement. In the alternative, it argued that:

> ". . . the new Kelowna shop, and a new shop at Lumby, were mere 'satellites' of the Kamloops shop and should come under the 'at and from' portion of the Kamloops certificate."
>
> (at 565)

Interior Diesel had one "resident mechanic" in Lumby. That individual had formerly worked for the employer at a different location which was not included in the union's certification. In Lumby, he worked from his house and he maintained a small stock of parts there. He was paid an hourly rate and was responsible for the Lumby operations. Interior Diesel argued that Lumby was an independent location not included within the union's certification. The union maintained it was a "satellite" of the Kamloops branch.

The Board framed the question before it this way:

> " 'At and from' could be interpreted as 'reporting to' or it could be interpreted as working at the Employer's premises in the named town or being sent out on a temporary basis to work on machinery which is not brought into the shop. The question is whether Mr. Bourne at Lumby would fit into the first interpretation."
>
> (at 568)

The Board concluded that Bourne did fit within the first interpretation. It stated that:

> "It appears to this Board that, in the first place, the Lumby operator is not suitable to be considered a separate branch or unit. (If it were a single employee unit, it would not be certified over the objection of the employer, see *Hemlock Valley*, 29/79, [1979]

> 2 Can LRBR 229 at 273.) And, although the evidence is not as complete as we might have preferred, what evidence there is indicates that Mr. Bourne is not a manager, but an employee, and takes whatever 'manager to employee' direction comes his way from Kamloops or perhaps even Kelowna. In either event, he should be considered at present as 'at and from' Kamloops or Kelowna and therefore within the new amended unit. It is not necessary to add Lumby to the certificate.
>
> (at 569-570)

Canpar Industries, supra, is, in my view, an example of the second interpretation of "at and from" where employees leave the principal site to perform bargaining unit work on a periodic, but temporary basis.

I have considered the *Abitibi Paper Company Ltd., supra*, line of cases in Ontario and the decision in *Brandt Tractor Ltd., supra*, in Alberta, and, in my view, they are distinguishable from the circumstances before me. First of all, they are concerned with an "at" certification. That certification does not capture employees working "from" the certified location. Secondly, it appears that it is the Ontario Board's practice in certifying a trade union in respect of a unit of employees to capture all employees working for the employer in a specific area, i.e., a municipality where the employer's operations are. In light of these two elements, it is not surprizing, in my view, that arbitrators focus on geography when interpreting the scope of a bargaining unit rather than on the reach of management's direction and control from the certified location.

I have also considered the *Wismer & Rawlings Electric Ltd.* and *Inglis Ltd., supra*, line of cases and I am of the view that they are also distinguishable from the circumstances before me. In both those cases, the employer had established a new and independent branch of its operations, in MacKenzie in the case of Wismer & Rawlings Electric Ltd. and in Surrey in the case of Inglis Ltd. In *Wismer & Rawlings Electric Ltd., supra*, the Board found that to grant a variance of the certification would result in an expansion of the union's bargaining rights, but in *Inglis Ltd., supra*, the Board granted the variance because it concluded that the Surrey branch was not really new work but a relocation of work previously handled by a certified location.

In the case before me, the Employer has not established a new branch of its operations in the interior of the Province. Instead, it is servicing its customers in the interior from its Burnaby offices. It is managing its interior employees through the same managers in Burnaby that are managing the employees working for the Employer in the Lower Mainland. The interior employees obtain their parts from the Burnaby offices, just as the Lower Mainland employees do. They all submit their time sheets to Burnaby and they attend training sessions there as well. The only real difference between the Lower Mainland employees and those in the interior is the geographic areas in which they perform their work, although Lower Mainland installers and service technicians do

go into the interior from time to time to assist when the workload becomes too much for the three interior employees.

In my view, the circumstances of this case more closely parallel the facts before the Board in *Interior Diesel, supra*. In that case, the employer was found not to have created a new and separate branch in Lumby, but instead to have expanded into that area with employees working "from" one of its certified locations. In reaching that conclusion, the Board was persuaded by the fact that the employee in Lumby reported to, and took direction from, the Kamloops branch or perhaps the Kelowna branch, both of which were certified. Accordingly, it concluded that the employee was captured by the union's existing certification.

I am of the view that the use of the word "from" in the phrase "at and from" does serve to capture employees working in a geographically distinct area from the "at" location if they are managed, i.e., directed and controlled, by the employer from the certified location. In my view, *Interior Diesel, supra*, confirms that this approach is consistent with the law and policy of the Labour Relations Code. I am satisfied on the evidence before me that Lemke, Heinze and Saunders are managed from the Employer's Burnaby offices and that, accordingly, all three are employees working "from" those offices.

I have considered the decision in *Canadian General Electric Co. Ltd.* (1950), 2 L.A.C. 573 (Laskin) which was relied upon by the Employer. In my view, it is distinguishable from the facts of this case because the Board's description of the Branch 80 bargaining unit is clear and straightforward. This is so because the Board has expressed itself through *Interior Diesel, supra*, as to the kinds of circumstances that are captured through the use of the word "from" in its bargaining unit descriptions.

The Employer next argues that the Union and Lemke in particular are estopped from pursuing this grievance at this time because Lemke has been performing installation and service work on the Employer's national accounts in the interior since 2002 and they had not grieved that he should be included in the Branch 80 certification and collective agreement until September, 2007.

I am not persuaded that a case for estoppel has been made out in this case.

First of all, in order for an estoppel to be found, there must have been an unequivocal representation by the party against whom the estoppel is being claimed that it will not in the future rely on its strict legal rights. In this case, the representation that is being asserted is based on the Union's failure to launch a similar grievance to the one that is before me back in 2002 when Lemke was hired. The Employer and the Union did not discuss the matter back then. However, Flynn did discuss it with Lemke and he told Lemke that the Union would not seek to have him brought under the Branch 80 collective agreement because of his area representative responsibilities which included both managerial and sales responsibilities. In my view, not grieving in 2002 for those reasons does not constitute a representation that the Union would not grieve if an employee was

engaged in the interior to perform exclusively installation and/or service technician work. With this as a plausible rationale for the Union's failure to grieve in 2002, I am of the view that the Employer has not made out its case of the Union having made an unequivocal representation that it would not seek to have the Employer's interior employees included in the Branch 80 collective agreement. Any representation flowing out of the failure to grieve in 2002 was equivocal at best.

Secondly, even if the Employer could have proved that the Union had made such a representation, there is no evidence that the Employer has changed its position or acted to its detriment as a result of it such that it would be inequitable or unfair to allow the Union to revert to its strict legal rights.

Thus, I have concluded that the Union is not estopped from claiming in this grievance that the three interior employees are working "at and from" the Employer's Burnaby offices and therefore should be covered by the Branch 80 collective agreement.

The Branch 80 collective agreement covers commercial installers and service technicians. Lemke and Heinze are both predominantly involved in that kind of work as opposed to residential installation and service work. Therefore, I am of the view that they should be covered by the Branch 80 collective agreement and that its terms and conditions should be applied to them, including Article 1.01 (b).

However, I am of the further view that Saunders should not be included under the Branch 80 collective agreement. The bulk of his work involves residential service technician work. Residential service technicians are included in the Branch 79 certification and are covered by the Branch 79 collective agreement. The Union submits that his 30% to 40% commercial service work is sufficient to bring him within the Branch 80 collective agreement and it relies on the *Orenda Ltd.* (1972), 1 L.A.C. (2d) 72 (Lysyk) line of cases to support that submission.

In my view, the *Orenda* principles are not applicable to a case like this one where the issue is which of two existing bargaining units should an employee be placed in. Here the focus of Saunders' work is clearly residential not commercial. The Employer has a practice of residential installers and service technicians doing commercial work from time to time, but while they are doing so continuing to be governed by the Branch 79 collective agreement. I am of the view that Saunders should not be included in the Branch 80 collective agreement. If he is to be covered by a collective agreement, that agreement would more appropriately be the Branch 79 collective agreement.

In conclusion, the Union's grievance succeeds in respect of Lemke and Heinze. They are in the Branch 80 bargaining unit, and accordingly, its terms and conditions of employment should apply to them including Article 1.01 (b). I refer the application of that provision to them back to the parties, but I retain jurisdiction to complete my Award in respect of this matter if they are not able to resolve it themselves.

The Union's grievance in respect of Saunders, though, is dismissed. As a residential service technician, he does not fit within the scope of the Branch 80 bargaining unit, and accordingly, its terms and conditions of employment do not apply to him.

I retain jurisdiction to deal with any difficulties the parties may have in implementing this Award.

Dated this 30th day of October, 2008.

JOHN KINZIE
ARBITRATOR