BCLRB No. B137/2013

BRITISH COLUMBIA LABOUR RELATIONS BOARD

SIMON FRASER UNIVERSITY

(the "Employer" or the "University")

-and-

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL UNION 3338

(the "Union" or "CUPE")

-and-

SIMON FRASER UNIVERSITY ADMINISTRATIVE AND PROFESSIONAL STAFF ASSOCIATION

("APSA")

PANEL:	James Carwana, Vice-Chair
APPEARANCES:	Patrick Gilligan-Hackett, for the Employer Matthew Yun, for the Union Bruce Laughton, Q.C., for APSA
CASE NOS.:	57505, 57729, 57730, 57731, 57733, 57790, 57791, 57792, 57793, 57794, 57795, 57796, 57798, 57799, 57800, 57991, 57992, 58195, 58199, 58321, 58322, 58324, 58329, 58330, 58332, 58333, 58334, 58576, 58578, 59555, 59558, 59794, 59797, 59802, 61238, 61239, 61522
DATES OF HEARING:	February 25-27, 2013
DATE OF DECISION:	June 28, 2013

DECISION OF THE BOARD

I. NATURE OF THE APPLICATIONS

1 Various applications have been made by the Union to the Board under Section 139 of the *Labour Relations Code* (the "Code"). These applications involve approximately 522 disputed positions. During the course of the case management process relating to these matters, I was advised the parties had been able to resolve many of the disputed positions, although over 200 remained in dispute. It was determined that adjudication of the Section 139 applications would first deal with the issue of the scope of the Union's bargaining unit. This included an examination of the history involved with the bargaining unit, the issue of abandonment, and a consideration of the breadth of the original certification. It was agreed that, after my decision was rendered, the parties would work on applying the principles and parameters set out in the decision to the disputed positions. Thus, the purpose of this decision is to provide certain findings at this time with a view to assisting the parties in the process of dealing with the positions in dispute.

II. BACKGROUND

2 The parties and their legal counsel are to be commended for the manner in which the hearing on the matters before me was conducted. The parties arrived at an Agreed Statement of Facts ("Agreed Statement of Facts" or "ASF") which reduced the hearing time that would otherwise have been necessary and allowed for the presentation of the case in a concise and coherent fashion. Some oral evidence was led on the issue of abandonment which again was dealt with in a focused manner by the parties.

3 Counsel for the parties reviewed the history of CUPE's certification. As noted in the Agreed Statement of Facts, "CUPE is the successor to the Association of University and College Employees" ("AUCE"), and in 1994 AUCE "merged with CUPE to become Local 3338". AUCE was certified by the Board as the bargaining agent for "*office, clerical and technical staff, including laboratory employees*" at the University in November 1974 (italics in ASF). The Agreed Statement of Facts states that "AUCE did not obtain an 'all employee' certification".

4 Shortly after certification, AUCE made an application in 1975 (the "1975 application") "under what was section 34 of the *Code* to '*have a number of positions* [approximately 170] *examined as to the appropriateness of their inclusion in our bargaining unit of office, clerical and technical workers including laboratory workers*'" (added text and italics in ASF). A review of the parties' submissions related to the 1975 application indicates the jobs involved with the 1975 application covered a wide spectrum. The result of this process is set out in the Agreed Statement of Facts:

> In January 1976, the Board issued letter reasons that listed employees included in, and excluded from, the bargaining unit. The Board excluded around two-thirds of the approximately 170 positions. It did not provide reasons regarding its determination of scope.
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> By letter to counsel for the University dated January 28, 1976, the Board provided the following brief reasons for its exclusion of individual employees from the bargaining unit: "*management*", "*management and/or out of unit description*", "*confidential*", "*out of unit description*" and "*Section 152A*".
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> AUCE asked [for] an explanation for the Board's decision, but the Board did not do so. (ASF, at paras. 21-23, emphasis in ASF)

5 There was a reconsideration application following this where "the parties reached agreement that approximately 20 of the included positions should be excluded, and the Board accordingly excluded those positions" (ASF, at para. 24).

6 The Agreed Statement of Facts indicates that APSA "has represented the University's administrative and professional staff since 1982". Also, documents were entered into evidence from 1980 and 1981 which refer to certain jobs as being part of the "administrative and professional" group.

7 After the date of APSA's inception in 1982, AUCE/CUPE filed one application to the Board which "related to exclusion of a position from CUPE's bargaining unit" prior to the current applications which are before me. That matter was dealt with by the Board in 1986. In a letter dated February 10, 1986 during the submission process relating to that 1986 application, AUCE indicated it would pursue a grievance whenever it believed non-bargaining unit members were "doing the work of the bargaining unit".

8 In the Agreed Statement of Facts, there is reference to only one grievance relating to inclusion/exclusion matters following the establishment of APSA in 1982 until 2002. The arbitration award in that case was rendered on November 20, 1986 and dealt with allegations "that the University could not take duties from a CUPE bargaining unit position and transfer those duties outside the bargaining unit" (ASF, at para. 30). With respect to the arbitration award rendered in that case, the Agreed Statement of Facts states as follows:

> Arbitrator Clive McKee found in *Simon Fraser University*, Unreported Award, November 20, 1986 (C. McKee) [*McKee Award*] that the University could transfer bargaining unit functions out of the CUPE bargaining unit to a management position because "*there is clearly no work jurisdiction clause*" in the Collective Agreement preventing the University from doing so (at 12).

> Since the *McKee Award*, there have been seven rounds of collective bargaining between the University and CUPE at which CUPE has tabled proposals which include a "work of the bargaining unit" clause. A bargaining unit work clause has never been included in the Collective Agreement. (ASF, at paras. 30-31, emphasis in ASF)

9 From time to time inquiries have been made by AUCE/CUPE about positions posted in APSA. As noted in the Agreed Statement of Facts:

> ...For example, on May 7, 1993, John Bannister, CUPE's Business Agent, asked the University for a full job description of a position in the Office of the Registrar to determine whether the position is "properly part of the administrative professional employee group of jobs". CUPE filed no grievance regarding that position. (ASF, at para. 44)

10 A policy grievance regarding the disputed positions before me was first filed on October 15, 2002 (the "Policy Grievance"). As indicated in the Agreed Statement of Facts, the positions in dispute increased during the time period which followed:

> Between 2002 and early 2008, CUPE added numerous additional positions to the Policy Grievance such that by 2008, the list was for approximately 522 positions ("Disputed Positions"). It routinely grieved any posted position outside of its bargaining unit. Typically, any position posted outside of CUPE's certified bargaining unit was classified by the University as an APSA position or, more rarely, as an excluded position from any union or association. (ASF, at para. 48)

11 The filing of the Policy Grievance followed an award rendered by Arbitrator John Kinzie: *Simon Fraser University and Canadian Union of Public Employees, Local 3388*, Ministry No. A-212/02, [2002] B.C.C.A.A.A. No. 288 (the "Kinzie Decision"). The Kinzie Decision was issued pursuant to a process established under Appendix G of the Collective Agreement which made provision for an "umpire" and for written recommendations to be made to resolve the differences referred to the umpire. This is described in the Agreed Statement of Facts as follows:

> During bargaining for the 1997-1999 Collective Agreement, the parties negotiated the inclusion of Appendix G (now Appendix F) in the Collective Agreement. Appendix G was a Letter of Agreement establishing a process to review 22 specifically listed positions to determine whether they fell within the scope of the bargaining unit as certified by the Board ("Kinzie Process").
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> * * *
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> The University and CUPE followed the Kinzie Process for the 22 listed positions. Agreement was reached for 11 of the positions

> and the other 11 were referred to John Kinzie for mediation. Mediation was unsuccessful and the parties arbitrated the matter before Arbitrator Kinzie between November 29, 1999 and February 8, 2001. Arbitrator Kinzie released his decision on August 29, 2002 ("Kinzie Decision"). The University unsuccessfully sought review the Kinzie Decision pursuant to section 99 of the *Code* (*Simon Fraser University*, BCLRB No. B128/2003, leave for reconsideration dismissed, BCLRB No. 257/2003). (ASF, at paras. 34 and 36)

12 There is disagreement between the parties "about whether the Kinzie Process leading to the ultimate decision by Arbitrator Kinzie, was without prejudice and precedent" (ASF, at para. 35). The without prejudice and precedent question as it relates to the current proceedings was addressed by the Board in *Simon Fraser University*, BCLRB No. B79/2012 ("B79/2012"). As stated in the Agreed Statement of Facts:

> The Board concluded (*ibid.* at para. 49), "*As a result and for the reasons set out above, I find that the parties did not mutually intend 'written recommendations' arising from a 'fair hearing' under Appendix G to be 'without prejudice or precedent' to the current proceedings before the Board*". (ASF, at para. 35, emphasis in ASF)

13 In 2003, while the Employer was seeking review and reconsideration of the Kinzie Decision, APSA filed an application "for certification of a bargaining unit of the 660 members it had at that time" (ASF, at para. 9). As a result primarily "of the Board's concerns about potential industrial instability arising from the certification of another bargaining unit", the application by APSA "was ultimately unsuccessful" (ASF, at para. 9; see *Simon Fraser University*, BCLRB No. B274/2003 ("B274/2003")).

14 The Agreed Statement of Facts further describes aspects of the APSA certification application as follows:

> While APSA's certification application was unsuccessful, the Board did find that APSA "*has demonstrated that persons in the proposed unit share a community of interest based on the first four/IML/factors identified above" (APSA Certification Decision* at para. 24). The Board also held that, "*Despite the existence of a potential community of interest...the outcome of this application does not turn on the first four/IML/factors alone" (ibid.* at para. 26). In its decision, the Board described the members of APSA as follows (*APSA Certification Decision* at para. 11):
>
> > *Persons in the proposed [APSA] unit work at all three campuses. They are present throughout virtually all of the University's operations, and generally work in the middle reaches of the administration. Some supervise employees in other*

> *bargaining units in addition to performing other administrative tasks. The typical member of the APSA group is highly educated (the proposed unit includes a technical group), works independently and exercises decision-making authority. For these reasons APSA has identified itself as a group of "professionals" in counter-distinction to persons in other bargaining units. Gary Hall is the President of APSA. Hall characterized the APSA group as consisting of all the "white-collar" workers not included in other certified bargaining units or the Faculty Association. Hall testified that members of APSA would likely find working under the terms of the CUPE collective agreement to be too restrictive and would reject the external control exerted by CUPE.*

> The Board further observed in the *APSA Certification Decision* that (at para. 12) "[t]*he CUPE bargaining unit includes about 850 employees. CUPE has not attempted to organize the APSA group albeit it claims that up to 200 members of the APSA group are in its unit. CUPE would not refuse to organize the APSA group provided it were approached to do so*". (ASF, at paras. 10-11, emphasis in original)

15 As previously indicated, the Union had filed a policy grievance about the disputed positions it was claiming. The Policy Grievance eventually came to be heard by Arbitrator Emily Burke. The Employer raised the question of an arbitrator's jurisdiction to deal with the matters involved and whether the issues related to the Policy Grievance should be determined by the Board rather than an arbitrator. The Employer's position was that the matters raised should be heard by the Board, and the Union's position was that the matters were within the purview of an arbitrator.

16 In an award dated December 19, 2007, Arbitrator Burke dealt with the jurisdictional question: *Simon Fraser University and Canadian Union of Public Employees, Local 3338* (CUPE Exclusions Grievance), Ministry No. A-169/07, [2007] B.C.C.A.A.A No. 241 (the "Burke Award"). Arbitrator Burke noted that the Employer's arguments in connection with abandonment and the principles in *Automatic Electric (Canada) Limited*, BCLRB No. 26/76, [1976] 2 Canadian LRBR 97 ("*Automatic Electric*") were "an integral part of the Board's jurisprudence" and stated:

> ...any dispute about whether the Union has abandoned its representation rights does not involve contract issues. (See *Insurance Corporation of British Columbia v. Office and Professional Employees' International Union, Local 378* (2000), 86 LAC (4th) 66.) Further, the Employer points out the principles in *Automatic Electric* are applicable and require a union who wishes to expand the scope of its bargaining authority to first organize the

> employees. That argument raises issues that are an integral part of the Board's jurisprudence. (Burke Award, at para. 17)

17 In the analysis portion of the Burke Award, Arbitrator Burke noted:

> In *ICBC, supra*, [the case referenced in the Employer's argument there] the arbitrator declined jurisdiction because he found the "real substance" of the dispute included whether the union abandoned its right to represent the employees in question. The Employer in this case makes the same argument about the many disputed positions which it alleges existed outside the Union bargaining unit for decades. (Burke Award, at para. 28)

18 Arbitrator Burke went on to find for the Employer on the preliminary objection and stated as follows:

> ...I do not find the substance of the dispute lies in the details of a collective agreement provision, but primarily is a matter for the Board to decide. As in *ICBC*, the concentration of issues under the statute comprises the substance of the dispute to such an extent that it is a dispute over the law and policy of the Code, rather than the collective agreement. As argued by the Employer, the primary issues raised by policy grievance, the scope of the certification and whether the Union must organize the incumbents in the disputed positions, are both matters which should be heard by the Board. Indeed, it is not disputed that the Board has inferentially dealt with this issue in the past, as set out in the context referred to above. Further, a significant aspect to the Employer's argument is that the disputed positions existed outside the Union bargaining unit for decades. This issue potentially engages the Board's jurisprudence in *Automatic Electric, supra*, as to whether ultimately the Union is required to organize the employees in the disputed positions. (Burke Award, at para. 29)

19 Following the decision by Arbitrator Burke, the Union filed applications relating to the positions in dispute which are now before the Board.

20 As previously noted, in B79/2012 the Board addressed the use to be made of the Kinzie Decision in these proceedings. The Board found that the Kinzie Decision "ought to be admitted for the limited purpose(s)" which were identified there by the Board. The Board said:

> In reviewing the Union's submissions, I am satisfied the Union primarily intends to rely on the Kinzie Decision for the legal principles and analysis contained therein. To the extent that the Union refers to using it as a "part of the history and facts," I do not understand this to mean the Union intends to rely on the facts in the Kinzie Decision as evidence in this proceeding. ...

> ...Even if I find that the Union may rely on the Kinzie Decision, I am not automatically bound by the legal principles and analysis it contains. Arbitral decisions may involve different considerations, different facts and different agreed-to legal tests from that which is before the Board. It is significant that a person's inclusion or exclusion from a bargaining unit is an issue within the exclusive jurisdiction of the Board. While parties may argue the persuasiveness of a particular arbitral decision, I am bound by the principles expressed and implied in the Code with respect to that issue and not those which are developed in a private resolution of certain positions not before me.
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> * * *
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> ...I am not persuaded that it would be inefficient to admit the Kinzie Decision as arbitral authority at this point in the proceeding. Similarly, the Board's probative concerns relating to the Union's reliance on old testimony and the duties of disputed positions are not at issue given that the Union does not intend to rely on the Kinzie Decision for that evidence. The Board's fairness concerns also do not arise as the current application is that of the Union, a full party to the proceedings leading to the Kinzie Decision. APSA also does not need to lead evidence in response to the Union's reliance on the Kinzie Decision as, again, it will not be relied upon as evidence. I find further that there may be fairness concerns if the Union is prevented from relying on certain jurisprudence, especially where a similar vetting has not been done of the other parties' authorities.
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> * * *
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> As a result, I find the Kinzie Decision ought to be admitted in these proceedings for the limited purpose(s) I have identified. Appendix G does not prevent the Union from relying on the Kinzie Decision as arbitral authority in the current proceeding. While the relevancy of the Kinzie Decision may be limited, I do not find there are significant efficiency and fairness concerns so as to persuade me not to permit the Union to rely on it. (B79/2012, at paras. 39, 40, 52 and 54)

III. POSITIONS OF THE PARTIES

21 As identified by Arbitrator Burke in her referral of these matters to the Board, the issues raised by these matters include the concept of abandonment and the application of the principles in *Automatic Electric*. Arbitrator Burke noted that the existence of the disputed positions "outside the Union bargaining unit for decades" was "a significant aspect" to the Employer's argument and was an important consideration in her decision to refer the matter to the Board (Burke Award, at para. 29). Moreover, the abandonment issue, including the application of the principles in *Automatic Electric*, was

the first matter dealt with in both the submission of the Employer and APSA. In all the circumstances, I will deal with the abandonment issue first.

22 The Employer relies on the law as set out in *British Columbia Hydro & Power Authority*, BCLRB No. B60/97, 35 C.L.R.B.R. (2d) 33 ("*BC Hydro*"). In *BC Hydro*, the Board found that the union there (the "OPEIU") had permitted the employer to hire employees outside of the collective agreement. The Board found that the failure of the union to claim the individuals were within the scope of its bargaining unit was a tacit agreement that the individuals fell "outside the scope of its bargaining unit" and amounted "to an abandonment by the OPEIU of its claim to represent these individuals" (*BC Hydro*, at para. 37).

23 The Employer says CUPE has been aware that "the vast majority of the Disputed Positions have both existed and been part of APSA for decades". The Employer further says the Union has not taken issue with the vast majority of the disputed positions being outside of the Union's bargaining unit. While there were some minor skirmishes of a limited nature, the Employer submits CUPE's conduct reflects "that, fundamentally, it accepted at least a significant majority of the University's decisions" about exclusions from the CUPE bargaining unit.

24 The Employer states that "APSA's existence and its representation, at any given time, of hundreds of the University's employees did not escape CUPE's notice". Furthermore, "CUPE's long-time failure to assert its right to represent the employees in the Disputed Positions constitutes a sustained, wholesale abandonment of whatever representational rights it may have had".

25 The submission of APSA regarding abandonment is to the same effect as the Employer's submission. APSA relies upon the decision in *BC Hydro* and argues that the *BC Hydro* case and the present case are remarkably similar. The union in *BC Hydro* had been certified decades earlier "to represent a broadly described bargaining unit and that bargaining unit description had been incorporated into the parties' collective agreement". From the job postings, the union in *BC Hydro* was aware that the positions in issue were not being included in its bargaining unit. As previously noted, the Board in *BC Hydro* found the union was "deemed to have tacitly agreed that the individuals fall outside the scope of its bargaining unit" (at para. 37). In the present case, APSA argues:

> A large majority of the positions in dispute have been in existence for many years and have been part of the APSA bargaining unit. CUPE has had every opportunity to dispute those positions and in the absence of such a dispute must be taken to have abandoned any claim that its certification covers those positions.

26 APSA further says that CUPE's abandonment affects the scope of the bargaining unit. In effect, APSA argues that the historical reality amends the scope of the bargaining unit and that:

> ...CUPE is not entitled to a declaration under s. 139 that individuals which it has never historically represented fall within the scope of its bargaining unit.

27 Like the Employer, APSA argues that the action CUPE ought to be taking is to "organize these employees and seek a variance to its unit if it wishes to represent them in collective bargaining".

28 In its written submission, CUPE denies that it abandoned its claim to represent the disputed positions. CUPE says that the Appendix G process which culminated in the Kinzie Decision reflects the fact there was a dispute between the parties as to inclusions and exclusions and further says this was accepted by the Board in its review decision of the Kinzie Decision (*Simon Fraser University*, BCLRB No. B128/2003 "B128/2003")). In the time period following the Kinzie Decision, the Union says:

> Since the Kinzie Decision and the reconsideration application in B128/2003, the Union successfully opposed APSA's certification in B274/2003.
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> As noted in the University's response, the Union continued to file grievances ("indiscriminately" in the University's words at para. 46) on every vacant position posted outside CUPE's bargaining unit.
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> The Union attempted to grieve the exclusions, but in 2007 the University successfully applied for a dismissal of the grievance for want of jurisdiction [Burke Award]. In 2008, the Union filed the s. 139 matters herein with the Board.
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> The current matter herein concerns those positions disputed since 2002, not from before. The Union throughout the last decade has attempted to pursue and assert its rights.

29 In the Union's oral submissions, it relied upon Appendix G as evidence that the Union tried to bargain a solution with the Employer about their differences regarding inclusions and exclusions.

IV. ANALYSIS AND DECISION

a) Abandonment – the Law and Board Policy

30 I begin my analysis with a review of the decision in *BC Hydro*. This case sets out the law with respect to abandonment and was referred to by both the Employer and APSA.

31 The facts in *BC Hydro* are very similar to those in the present case. The union's certification was from 1962 and referred to employees "in any phase of office, clerical, technical, administrative or related work and including all field men employed by the employer". The collective agreement between the parties also contained a scope provision making the agreement applicable to employees described in the certification.

32 The union in *BC Hydro* filed its application under Section 139 in November 1995 and later re-filed its application on February 2, 1996. The determination sought by the union there involved approximately 650 employees that were unrepresented by the OPEIU who it said were covered by the scope of its certification. Similar to the present case, the employer in *BC Hydro* had posted the job vacancies and they were advertised on bulletin boards. Furthermore, inquiries had been made by the OPEIU from time to time about certain postings, indicating an awareness of such matters.

33 The Board in *BC Hydro* considered whether the OPEIU was entitled to a declaration that the employees involved were within its bargaining unit, or whether the OPEIU was required to sign up the individuals it had never historically represented prior to seeking to represent them. In dealing with this issue, the Board commented on the effect of the past practice of the parties and the concept of abandonment. The Board in *BC Hydro* stated as follows:

> If the Employer improperly designates a position as falling outside the OPEIU unit, the OPEIU may either apply to the Labour Relations Board for a determination that the position falls within its unit, or may grieve the Employer's failure to abide by the scope clause in its collective agreement. If the OPEIU is aware of the nature of the work performed by an individual or a group of individuals, and does not claim that the individuals fall within the scope of its bargaining unit, the OPEIU is deemed to have tacitly agreed that the individuals fall outside the scope of its bargaining unit. This tacit agreement amounts to an abandonment by the OPEIU of its claim to represent these individuals. Such a tacit agreement diminishes the scope of the OPEIU's bargaining unit: *Canwest Steel*, IRC No. C32/89; *Cradley Enterprises Limited*, BCLRB Letter Decision No. B62/94; *Pacific Brewers Distributors Limited*, BCLRB No. L84/80; and *Pacific Coach Lines Limited*, BCLRB No. L180/82.
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> * * *
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> The scope clause in this collective agreement contains a broad unit description. It includes employees "in any phase of office, clerical, technical, administrative or related work and including all field men...etc." While this unit description has been included in successive collective agreements since certification, it is not free from ambiguity. The past practice of the parties respecting the interpretation of the clause is relevant in order to ascertain the parties' intention respecting its scope. This is a clause which has

> "been shaped by a later agreement by the parties about the precise scope of the unit": *Automatic Electric (Canada) Limited, supra,* at p. 100.
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> In the alternative, if the scope clause in the collective agreement is not ambiguous, then the OPEIU, by permitting this Employer to hire employees outside the collective agreement, has agreed to amend the scope of the bargaining unit (see cases referred to above). The OPEIU has abandoned a claim to represent these employees under the terms of its collective agreement and effectively altered the scope of the bargaining unit. In order to represent these employees the OPEIU must organize them, and make an application to the Board to represent them or seek voluntary recognition.
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> Once lost, bargaining rights may only be recovered by variance, either as a result of organizing or by voluntary representation. Both avenues require the applicant union to establish its representation among the employees sought to be brought into its unit. **To hold otherwise would be to allow a union to expand the scope of its unit by sweeping in previously unrepresented employees without reference to their wishes. This is fundamentally inconsistent with the Code: *Olivetti Canada Ltd.*, BCLRB No. 113/74, [1975] 1 Can LRBR 60, and *Automatic Electric (Canada) Limited, supra.*** (*BC Hydro*, at paras. 37, 42, 43 and 46, emphasis added)

34 The decision in *BC Hydro* was subsequently referred to by the Board in *Workers' Compensation Board of British Columbia*, BCLRB No. B364/2001 ("*WCB*"). There the Board discussed the concept of abandonment and a union's acquiescence to the exclusion of a position through conduct:

> **An agreement to diminish the scope of the unit or abandon representational rights may be found in the collective agreement or another document. It may also be expressed or implied through the conduct of the parties. Likewise a union's acquiescence to the exclusion of a position may be inferred from the conduct of the parties.** ... (*WCB*, at para. 86, emphasis added)

35 After referencing paragraph 37 of *BC Hydro* (quoted at paragraph 33 above), the Board in *WCB* noted the importance of the parties' conduct in determining a union's representational rights:

> Thus, there are several important factors to consider when determining if the parties agreed or if a union has acquiesced to the exclusion of a position. **First it is not only the parties' words but**

> **also their conduct that is at issue. The fact the parties treat a position as excluded may determine whether the Union agreed or acquiesced to an exclusion. Second, the conduct necessary to effectively assert representational rights lies in a claim either by way of grievance or an application to the Labour Relations Board.** That claim must be advanced and prosecuted in a reasonable period of time once the union is both aware of the nature of the work and that the employer excluded the position. An employer's interests may be considered in this equation in so far as it may have relied on the state of affairs to order its business and negotiate terms of employment with excluded persons.
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> **The importance of these factors flows directly from the rationale underpinning the Board's policy in *Automatic Electric*.** That rationale is premised on the recognition that individuals develop a distinct community of interest when they work outside the collective bargaining regime for a period of time. To avoid this consequence it is necessary that a claim to represent excluded persons be prosecuted in a reasonable time following the employer's initiative. Moreover, the claim must be founded in a grievance or a Labour Relations Board application. The parties may choose to complain to one another, discuss the merits of their respective positions and even "agree to disagree". **However, if a union waits for too long then at some point, enough time will have passed that the individuals excluded will have developed a separate community of interest, thus triggering the policy concerns articulated in *Automatic Electric*.** Accordingly, the Union's acquiescence to the exclusion of a position may be inferred from its failure to advance a claim to include it in the unit. (*WCB*, at paras. 87-88, emphasis added)

36 In *City of Vancouver*, BCLRB No. B247/2003, 95 C.L.R.B.R. (2d) 52 ("*City of Vancouver*"), the Board considered the law and policy set out in *WCB*. The *City of Vancouver* case was an application under Section 139 where the union sought to include 39 positions into its bargaining unit. The Board relied on the decision in *WCB* in holding that a union must bring such an application within a reasonable period of time and "that period of time is measured in months, not years" (at para. 54). The time frames involved in *City of Vancouver* between the creation of the disputed positions and the time the union there brought its application was different for the various positions involved. However, where the union had not filed a claim to a position for almost one and a half years from the date the position was posted, the Board held that the union had acquiesced in the exclusion of the position.

37 In terms of the actions required to claim a disputed position, it is not enough for a union to assert "the right to determine the status of excluded positions" (*WCB*, at para. 90). As indicated in the excerpt from *WCB* above, "the conduct necessary to effectively assert representational rights lies in a claim either by way of grievance or an application to the Labour Relations Board" (*WCB*, at para. 87). Thus, in order to "advance an

effective claim", a union is required to "act on its intention in a timely manner" by filing an application to the Board or a grievance (*WCB*, at para. 90). The Board further explained this in *City of Vancouver* as follows:

> The fact that parties may agree to disagree or complain one to another about inclusions or exclusions is insufficient to establish a claim under the Code. In *WCB*, the Board rejected the union's argument that it may effectively advance a claim by merely communicating to the employer its intention to exercise its legal rights regarding the status of excluded positions. While the Board encourages parties to resolve their own disputes, the Board will not permit such a process to become interminable. If such exchanges of divergent views between the parties continues for too long, then, as the Board pointed out in *WCB*, "...at some point, enough time will have passed that the individuals excluded will have developed a separate community of interest, thus triggering the policy concerns articulated in *Automatic Electric* [*Automatic Electric (Canada) Ltd.*, BCLRB No. 26/76, [1976] 2 Can LRBR 97]": para. 88. Once a reasonable period of time has passed during which a failure to resolve disputes has manifested itself, a union is obliged to bring on an application if it hopes to preserve its rights. Further, nothing prevents a union from filing an application with the Board and then agreeing with the employer to hold the application in abeyance while discussions take place to resolve the issues. (at para. 43)

38 The conduct of the parties is an important factor even where, as in the case before me, the collective agreement has a scope clause which refers to the initial certification. In *BC Hydro*, the Board noted that such scope clauses may not be free from ambiguity and "[t]he past practice of the parties respecting the interpretation of the clause is relevant in order to ascertain the parties' intention respecting its scope" (at para. 42). The Board further held that, even if there was no ambiguity, the parties' conduct in *BC Hydro* had "effectively altered the scope of the bargaining unit" referenced in the collective agreement since the union had permitted the hiring of "employees outside the collective agreement" (at para. 43). Likewise, in *WCB* the Board noted that the scope clause in the collective agreement there, which referenced the certification, would not dictate "the status of an individual regardless of the circumstances surrounding their previous exclusion" (at para. 97), and their exclusion raised "the policy concerns articulated in *Automatic Electric*" (*WCB*, at para. 99).

b) Abandonment – Application of the facts to the Law and Board Policy

39 The evidence at the hearing before me established that many of the disputed positions have been of long standing and have been in existence outside the CUPE bargaining unit for many years. The evidence included an analysis of the history involved with such positions and established a number of specific points including:

- All jobs with the same title have similar job content. The practice at the University was to use consistent job titles for similar work. Human Resources would review job descriptions to make sure that the content was relevant to the title, although there might be some slight variations to deal with the specific department.

- The witness for the University analyzed the dates of creation for the types of positions on Schedule A to the Agreed Statement of Facts (being the list of disputed positions). This evidence demonstrated that, in each of the four groups which were analyzed, the types of positions involved were created in 1990 or before and continued through the intervening period. The groups were: Systems Consultant type positions; Administrative Assistant type positions; Coordinator type positions; and Analyst type positions.

- The 1990 date was based on the date a "new HR/Payroll system was implemented", and for some positions the evidence established that they existed earlier than 1990. This was demonstrated by tracing back the position numbers for various positions. The evidence showed the same position number was carried forward for jobs which Human Resources determined to be substantially the same, even though the name may have changed. Thus, the Financial Analyst position was traced back to 1981 through its position number, and the Information Technology Professional III position was shown to have originated in February 1982 with the same position number. Similarly, the Information Technology Professional II position and the Information Technology Professional IV position were traced back to 1989 when they were known as "Systems Consultant" type positions.

40 The evidence at the hearing established that over the years a large number of the disputed positions were placed outside the AUCE/CUPE bargaining unit and into the APSA group by the Employer. The Agreed Statement of Facts indicates that "[s]ince the time of the original collective agreement between AUCE and the University, AUCE/CUPE has had access to information about job vacancies at the University" (ASF, at para. 39). Information about job vacancies has been posted on publicly accessible bulletin boards by Human Resources staff employed by the University, including "information about the employee group into which the University has classified the relevant position" and a position summary (ASF, at para. 42). Furthermore, there is evidence that copies of job postings were sent to the Union office.

41 The Union does not deny being aware of such information and, as indicated in the Agreed Statement of Facts, "AUCE/CUPE has from time-to-time made inquiries regarding positions posted in APSA" (ASF, at para. 44). Where the Union had a question about whether a position was properly in APSA, the Union would raise that matter with the University. Again, as indicated in the Agreed Statement of Facts:

> For example, on May 7, 1993, John Bannister, CUPE's Business Agent, asked the University for a full job description of a position in

> the Office of the Registrar to determine whether the position is "properly part of the administrative professional employee group of jobs". CUPE filed no grievance regarding that position. (ASF, at para. 44)

42 I find that for many years the Union was aware of a large number of the disputed positions being posted in APSA together with information such as the nature of the work involved with such positions.

43 I turn next to consider whether the Union effectively asserted representational rights to the positions in dispute.

44 In terms of applications to the Board regarding exclusions, the Union filed only one such application from May 1979 until filing the applications which are before me. That application was filed in 1986, and alleged that the Employer had eliminated the position of Student Services Assistant from the bargaining unit and replaced it with the position of Departmental Assistant outside the unit. However, that application was subsequently withdrawn. Additionally, there was one grievance arbitration which took place during this time period where the Union alleged that "the University could not take duties from a CUPE bargaining unit position and transfer those duties outside the bargaining unit" (ASF, at para. 30). That arbitration also occurred in 1986. The case involved the transfer of duties outside the bargaining unit from the position of the Admissions Assistant, which was in the bargaining unit. Arbitrator Clive McKee held "that the University could transfer bargaining unit functions out of the CUPE bargaining unit to a management position because '*there is clearly no work jurisdiction clause*' in the Collective Agreement preventing the University from doing so" (ASF, at para. 30, emphasis in ASF).

45 The Union filed the Policy Grievance in 2002 "regarding a total of 52 positions it alleged had been improperly excluded from its bargaining unit" (ASF, at para. 45). In its submissions, the Union relied on the agreement reflected in Appendix G to the Collective Agreement, dated November 17, 1997, as demonstrating the action it took to challenge exclusions to the bargaining unit.

46 For the purpose of this analysis, I will assume, without deciding, that the Appendix G date, which is earlier than the Policy Grievance, is the appropriate date to use in considering this matter. Using this date, there is a period of approximately 18 years from May 1979 to November 1997 with only the withdrawn application to the Board dealing with the Student Services Assistant position and the McKee arbitration dealing with transfer of duties involving the Admissions Assistant position. For approximately 11 years, from the 1986 Board application and the 1986 McKee arbitration to the November 1997 Appendix G date, the evidence does not demonstrate any further application or grievance by CUPE to assert representational rights.

47 As previously noted, the evidence established that a large number of the types of positions in dispute have been of long standing and in existence for many years, with some identified as going back to the early 1980s. This time period included many years where no grievance or arbitration was filed by AUCE/CUPE to assert representational rights.

48 The decisions in *WCB* and *City of Vancouver* establish that a union must take steps to assert representational rights within a reasonable time. A reasonable time is measured in months not years. In order to assert such rights, **"the claim must be founded in a grievance or a Labour Relations Board application"** (*WCB*, at para. 88, emphasis added). The failure of a union to take such steps results in a loss of any such representational rights.

49 Applying these principles here, I find that there has been a loss of representational rights through the Union's abandonment. The reasoning in *BC Hydro* is applicable to the facts before me. As counsel for APSA stated, "[a] large majority of the positions in dispute have been in existence for many years" and have been part of APSA. For many years, the Union took no steps to effectively assert any representational rights by filing grievances or Board applications. I find CUPE abandoned its claim to represent the individuals in such positions and is "deemed to have tacitly agreed" that such positions fall outside the scope of its bargaining unit (*BC Hydro*, at para. 37). Like the situation in *BC Hydro*, this has "effectively altered the scope of the bargaining unit" and if CUPE wishes to represent such individuals it must organize them (*BC Hydro*, at para. 43).

50 In arriving at these conclusions, I agree with the statements by the Board in *WCB* and the analysis from *Automatic Electric* referred to in *WCB*:

> From the point of certification forward, the scope of the unit may be determined by agreement of the parties. The Board's recognition of these arrangements flows from a desire to promote the parties' private ordering of their collective bargaining relationship. This preference is rooted in the purposes of the Code which, among other things, promote the practice and procedure of collective bargaining.
>
> **The Board's recognition of the parties' agreements to adjust the scope of the unit is equally based on the practical consequences of the parties' conduct. Where those consequences give rise to a serious question about whether excluded individuals support the union, the Board requires that the union demonstrate that a majority support an application to include them.** In *Automatic Electric*, the Board described those practical consequences in the following terms:
>
> > 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 particulate in union affairs, and 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 interest from the remaining employees who are included in the heart of the bargaining unit.** ...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?
>
> 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 underway, 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...** (p.100; emphasis added) (*WCB*, at paras. 81-82, further emphasis added)

51 As in *Automatic Electric*, there is a "real-life momentum" to the fact that many of the disputed positions in the case before me have been excluded for many years. The "real-life employment environment" is one where the members of APSA have "developed an identity and culture in counter-distinction to persons outside the APSA group", which was described by the Board in its decision dealing with the application for certification by APSA:

> APSA has demonstrated that persons in the proposed unit share a community of interest based on the first four *IML* factors identified above. Assuming they are employees, persons in the proposed unit work under a common framework of employment conditions, share common interests and in many cases perform similar duties. These conclusions largely flow as a natural consequence of the fact that the APSA group has negotiated with

> SFU for some twenty years regarding terms of employment. Given this history it is not surprising that APSA has developed an identity and culture in counter-distinction to persons outside the APSA group. (B274/2003, at para. 24)

52 In my view, it would be contrary to the law and policy of the Board to ignore the "real-life employment environment" which exists surrounding APSA, and the practice which has developed regarding the exclusions from the CUPE bargaining unit (*WCB*, at para. 82, quoting *Automatic Electric*).

53 It is also important to recognize "the practical consequences of the parties' conduct" (*WCB*, at para. 82). Where "those consequences give rise to a serious question about whether excluded individuals support the union, the Board requires that the union demonstrate that a majority support an application to include them" (*WCB*, at para. 82). Like the situation in *WCB* and *Automatic Electric*, I find that a large majority of disputed positions have operated outside of CUPE for a long time, that there is a serious question about whether the excluded individuals support the Union, and that they should not be suddenly swept into the CUPE bargaining unit and "under the collective agreement by a Board decision, irrespective of whether the union has any significant support" among those employees (*WCB*, at para. 82).

54 While the Union argued that employee wishes should not be determinative in cases dealing with exclusions and inclusions, in the circumstances before me I find employee wishes to be a significant factor. As the Board stated in *BC Hydro*, it is "fundamentally inconsistent with the Code" to sweep into a bargaining unit "previously unrepresented employees without reference to their wishes", when their positions have been outside the bargaining unit for a lengthy period of time (at para. 46). For the vast majority of positions here, that period of time has been many years, not months.

55 This finding is, as previously noted, to the same effect as the Board's determination in *Automatic Electric*. There the bargaining unit description was wide enough to include sales staff. However, the practice which had developed was not to include sales staff as part of the bargaining unit and the collective agreement had not been applied to the sales staff. In *Automatic Electric*, the Board found that "[t]his practice was accepted by the trade-union for more than ten years" (at p. 98). The Board held that the sales staff should not be swept into the bargaining unit without taking into account the wishes of those employees and stated:

> 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 a later agreement by the parties about the precise scope of the unit. (*Automatic Electric*, at p. 100)

56 In terms of the Kinzie Decision and the issue of "abandonment", I note the concept of "abandonment" is not mentioned in the Kinzie Decision. Likewise, there is no discussion of *BC Hydro* or *WCB* (both determined before the Kinzie Decision), or *City of Vancouver* (decided after the Kinzie Decision). Thus, in my view, abandonment was not an issue considered in the same manner as here, nor was it an issue determined in the Kinzie Decision.

57 My other observations regarding the Kinzie Decision in terms of the relationship to my findings about abandonment and *Automatic Electric* are as follows:

- The positions in dispute before me began as a Policy Grievance. They came to the Board because of a determination by Arbitrator Burke that "whether the Union abandoned its right to represent the employees in question" was primarily "a matter for the Board to decide" rather than an arbitrator (Burke Award, at para. 28). Furthermore, because this matter potentially engaged "the Board's jurisprudence in *Automatic Electric, supra*, as to whether ultimately the Union is required to organize the employees in the disputed positions", Arbitrator Burke held that the matter "should properly be deferred to the Labour Relations Board" (Burke Award, at para. 32). The conclusion by Arbitrator Burke that the matters here are for the Board to decide is not in question and underlies the current applications. Thus, it is for the Board, rather than an arbitrator such as Arbitrator Kinzie, to decide the abandonment issue and the application of the principles in *Automatic Electric* as noted above.

- An examination of the specific wording of Appendix G, which governed the Kinzie process, indicates that the issue for Arbitrator Kinzie under Appendix G was "the scope of the bargaining unit **as certified by the Labour Relations Board**" (emphasis added). As previously mentioned, unlike Arbitrator Kinzie, the focus of my earlier analysis has been the conduct of the parties **over time** resulting in abandonment, and the resulting need to organize the employees in the disputed positions as set out in *Automatic Electric*.

- With respect to the Board's review of the Kinzie Decision in BCLRB No. B128/2003, the Board found there were "unique circumstances" in the case, where "the parties [had] agreed" to have Arbitrator Kinzie determine the specific matters before him "in accordance with Appendix G of the collective agreement" (B128/2003, at para. 26). Based on those particular circumstances, the Board exercised "deference to the Arbitrator's decision" (B128/2003, at para. 26).

- In the hearing before me, APSA noted that it had not been a full party before Arbitrator Kinzie and there had been no opportunity for APSA to present evidence before Arbitrator Kinzie. In such circumstances, it could not be said that *res judicata* based on the Kinzie Decision is applicable here (see *Angle v. Canada (Minister of National Revenue – M.N.R.)*, [1975] 2 S.C.R. 248). Along this line, in B79/2012 the Board stated that in this proceeding APSA would "not

need to lead evidence in response to the Union's reliance on the Kinzie Decision as, again, it will not be relied upon as evidence".

- As previously indicated, the Board's decision in B79/2012 dealt with the use to be made of the Kinzie Decision in these proceedings. The Board found that the Kinzie Decision "ought to be admitted in these proceedings for the limited purpose(s)" identified in B79/2012, and that the Union was not prevented "from relying on the Kinzie Decision as arbitral authority in the current proceeding". The Board further noted the Kinzie Decision did not automatically bind the Board to the "legal principles and analysis it contains" and stated:

> Arbitral decisions may involve different considerations, different facts and different agreed-to legal tests from that which is before the Board. It is significant that a person's inclusion or exclusion from a bargaining unit is an issue within the exclusive jurisdiction of the Board. While parties may argue the persuasiveness of a particular arbitral decision, I am bound by the principles expressed and implied in the Code with respect to that issue and not those which are developed in a private resolution of certain positions not before me. (B79/2012, at para. 40)

58 In *BC Hydro* the Board noted that its decision regarding abandonment had "significantly reduced the number of positions which the OPEIU may claim as falling within the scope of its bargaining unit" (at para. 61). Likewise, my decision here significantly reduces the number of positions CUPE "may claim as falling within the scope of its bargaining unit".

59 Although my finding that abandonment applies will affect a large number of the positions in dispute, it does not mean that all the disputed positions are necessarily caught by this finding. The Employer's submission refers to abandonment applying to the "vast majority" of disputed positions, and the submission of APSA refers to "[a] large majority of the positions in dispute" in terms of the abandonment issue. Thus, the possibility may exist of a small number of positions that are truly of a new type, which may have been the subject of a grievance or application to the Board within a reasonable time after their creation (for example, by the Union's Policy Grievance).

60 The Board in *BC Hydro*, having determined that abandonment applied to significantly reduce the number of positions at issue, held that "[t]he OPEIU must now assess precisely the scope of any claim it wishes to pursue in light of my decision and advise the Board, and the parties, of any claim it wishes to advance" (at para. 61). Further, the union in *BC Hydro* was to "particularize the positions it claims fall within the scope of its bargaining unit, as amended by agreement (both express and tacit), which it acted in a timely fashion to bring within the scope of its bargaining unit" (at para. 60).

61 In terms of dealing with this matter moving forward, my order will be similar to the order in *BC Hydro*. In that respect, CUPE "must now assess precisely the scope of any

claim it wishes to pursue in light of my decision and advise the Board, and the parties, of any claim it wishes to advance". Further, for those claims it wishes to advance, and keeping in mind my finding regarding abandonment, CUPE "must particularize the positions it claims fall within the scope of its bargaining unit, as amended by agreement (both express and tacit), which it acted in a timely fashion to bring within the scope of its bargaining unit". This is to be part of the process previously described of the parties applying this decision to the list of disputed positions.

62 When examining the abandonment issue, I proceeded on the assumption that the breadth of the bargaining unit description in the initial certification was broad enough to encompass the disputed positions. With respect to determining the breadth of the initial certification, I will comment only briefly at this time.

63 In the Union's initial written submission relating to this hearing, the Union argued that the wording in the original certification ought to be interpreted to mean all "white-collar" workers in "non-teaching" positions. This was based on a statement in the Kinzie Decision; however, during the reply portion of its oral argument the Union acknowledged that the statement in the Kinzie Decision could not be used to ground a finding that the original certification was for such an all inclusive unit. This concession was appropriate, and it is my view, based on a review of all the evidence and the arguments of the parties, that the scope of the original certification was not intended to include all "white-collar" employees in "non-teaching" positions. Furthermore, as previously discussed, it is clear from all the evidence, including the growth of the APSA group, that the parties did not treat the bargaining unit as encompassing all these employees in the years that followed.

64 At this point, I do not intend to make additional findings about other items raised in argument which may not be necessary to move the process forward to the next step. As noted earlier, after this decision the parties are to "work together to apply the Board's decision to the list of disputed positions" (ASF, at para. 81). This will involve assessing what, if any, positions remain in dispute through the process previously described, as well as any specific items to be adjudicated in respect of such positions.

V. CONCLUSION

65 For the reasons given, I find that the Union has abandoned its claim for representational rights regarding a large number of the positions in dispute. This decision significantly reduces the number of positions CUPE "may claim as falling within the scope of its bargaining unit". I find the decision in *BC Hydro* to be applicable to the present case and, in terms of dealing with this matter moving forward, my order will be similar to the order in *BC Hydro*. In that respect, CUPE "must now assess precisely the scope of any claim it wishes to pursue in light of my decision and advise the Board, and the parties, of any claim it wishes to advance" (*BC Hydro*, at para 61). Further, for those claims it wishes to advance, and keeping in mind my finding regarding abandonment, CUPE "must particularize the positions it claims fall within the scope of

its bargaining unit, as amended by agreement (both express and tacit), which it acted in a timely fashion [through grievance or Board application] to bring within the scope of its bargaining unit" (*BC Hydro*, at para. 60). This is to be part of the process previously described of the parties applying this decision to the list of disputed positions.

LABOUR RELATIONS BOARD

JAMES CARWANA
VICE-CHAIR