

BRITISH COLUMBIA LABOUR RELATIONS BOARD

SIMPE 'Q' CARE INC.

(the "Employer")

-and-

HOSPITAL EMPLOYEES' UNION

(the "HEU")

-and-

CHRISTIAN LABOUR ASSOCIATION OF CANADA, LOCAL NO. 501

("CLAC")

PANEL: Jan O'Brien, Vice-Chair

APPEARANCES: Thomas F. Beasley, for the Employer
David Tarasoff, for the HEU
Timothy G. Charron, for CLAC

CASE NOS.: 54790, 54805, 54806 & 54838

DATES OF HEARING: May 17, 18 & 19 and June 14 and 15,
2006

DATE OF DECISION: July 24, 2006

DECISION OF THE BOARD

I. **NATURE OF THE APPLICATION**

1 The HEU applies under Section 18 of the *Labour Relations Code* (the "Code") to represent the Employer's employees at and from Windermere Care Centre ("Windermere") in Vancouver. The HEU further applies under Section 142 of the Code to represent the Employer's employees at and from Inglewood Care Centre ("Inglewood") in West Vancouver by varying them into the proposed Windermere bargaining unit. In the alternative, the HEU applies under Section 18 of the Code to represent the employees at Inglewood in a stand-alone bargaining unit.

2 The Employer and CLAC oppose the HEU's application for the Windermere bargaining unit and the HEU's application to vary the employees at Inglewood into the proposed Windermere bargaining unit. CLAC was granted standing on the Windermere application and the Section 142 application at Inglewood. Neither the Employer nor CLAC object to the HEU's application for a stand-alone bargaining unit at Inglewood. CLAC has no standing on the Section 18 application at Inglewood.

3 The Employer and CLAC assert that they have a collective agreement reached under a voluntary recognition arrangement that bars the HEU's application at Windermere. The HEU alleges that CLAC failed to carry out an adequate ratification of the collective agreement it reached with the Employer.

4 Finally, HEU applies under Sections 6 and 9 alleging that the Employer and CLAC committed unfair labour practices by joining together to interfere in the HEU's organizing drive at Windermere. The HEU alleges that the Employer held captive audience meetings and employees were threatened with job loss if they joined the HEU. The HEU also alleges under Section 31 of the Code that CLAC is an employer influenced or dominated organization at least in relation to its dealings with the Employer at Windermere.

5 A representation vote was taken at Windermere on May 4, 2006 and at Inglewood on May 8, 2006. The ballot boxes remain sealed pending resolution of the Employer's and CLAC's objections and the HEU's unfair labour practice complaint.

II. **BACKGROUND**

6 The Employer is a private service provider owned by three registered nurses – Gerry Clayford-Beckie, director of education and quality assurance, Janie Robinson, director of administration, and Margot Ware, director of human resources. While Clayford-Beckie and Robinson were working together at the Royal Ascot long-term care centre they developed a model of care for seniors they dubbed Simpe "Q".

7 As a result of the *Health Social Services Delivery Improvement Act*, SBC 2002, c.2, also known as Bill 29, health care employers were allowed to contract out services provided by their employees, many of whom were represented by the HEU. In 2003, the Employer was approached to put together a proposal to provide residential care aides, recreation activity aides, a social worker and a volunteer coordinator at Windermere.

8 The Employer was awarded the contract and began providing staff at Windermere on February 11, 2004. Windermere, a large, 15-storey building in central Vancouver, is home to 215 residents. It includes a 12-bed palliative care unit.

9 The Employer has about 150 employees at Windermere. The majority are residential care aides, 10 are recreation activity aides, one is a social worker and one is a hostess. In addition, there is a care manager, a care coordinator, a human resources manager, and an administrative assistant working at Windermere. Other contractors provide laundry, food and housekeeping services. Windermere continues to directly employ registered nurses and receptionists.

10 The Employer began hiring employees to work at Windermere in December 2003 and January 2004. The existing Windermere employees were given the first opportunity to apply for positions. Ultimately, about two-thirds of the employees hired were already working at Windermere and were members of the HEU. Once they started working for the Employer, they became non-union.

11 The Employer obtained its second contract at Inglewood in West Vancouver. There are 235 residents in three separate buildings. The Employer has about 150 to 160 resident care aides and three licensed practical nurses at Inglewood. Once again about two-thirds of the employees hired to work at Inglewood were drawn from the existing staff and were HEU members until they started working for the Employer. Inglewood directly employs activity staff and front desk staff who continue to be members of the HEU. Other contractors provide registered nurses, laundry, housekeeping, food and maintenance staff.

12 Windermere and Inglewood have different owners. The Employer negotiated two different contracts with the owners of Windermere and Inglewood. Different wage rates are paid to the employees of Windermere and Inglewood. None of the employees at Windermere and Inglewood transfer between the two care homes. There are separate care managers and human resource managers at Windermere and Inglewood. The work routines are different at the two facilities as a result of the different configurations of the buildings and a different mix of residents.

13 The duties and responsibilities of the resident care aides at the two facilities are the same. Both care homes have special care residents in a secure unit who suffer from dementia. Both have extended care residents and intermediate care residents. At both there are higher functioning residents. The Simpe 'Q' model of care is in place at both care homes.

14 At both Windermere and Inglewood, the employee shift schedule rotates every
six weeks. Windermere employees work three weeks of days and three weeks of
afternoons then three weeks of days and three weeks of nights. Inglewood employees
work straight days, straight afternoons or straight nights for six weeks. The employee
handbooks at the two facilities are the same except for the organizational charts and the
inclusion of a short description of the hospice at Windermere.

15 The Employer also has contracts at Waverly Assisted Living in Chilliwack
("Waverly") and Courtyard Terrace in Burnaby. The Employer has been awarded a
contract at Pine Grove Care Home in Kamloops ("Pine Grove") to begin providing
services there in August 2006.

16 At one of the fall 2005 conferences of the BC Retirement Community Association
("BCRCA"), the Employer learned that there were opportunities to expand into the
Fraser Health Authority ("FHA") and Interior Health Authority ("IHA"). At that time, the
Employer preferred to remain non-union. However, it later concluded that to be
successful in bidding in the IHA where smaller centres had a strong union presence it
would have to have a voluntary recognition agreement with a union. The Employer's
decision was influenced by the owner of Pine Grove who wanted the Employer to "be
part of CLAC". Under the heading of Pine Grove Care Centre – Kamloops, the minutes
from the owners' meeting of February 1, 2006 show that the owners intended to discuss
CLAC with their legal counsel.

17 In mid-February 2006, the Employer's legal counsel contacted CLAC and
obtained a template of a CLAC collective agreement. A CLAC representative also
phoned the Employer in February.

18 The HEU began an organizing campaign at Windermere during the third week of
March after it received some phone calls from Windermere employees on about March
17. The first meeting with employees was on March 21 and the next on March 28.

19 Clayford-Beckie and Robinson were each on two weeks holidays in March 2006.
Before Ware went on two weeks vacation the three owners met on April 6. A discussion
about CLAC was on the agenda. Robinson said the Employer had been gradually
moving in the direction of becoming a unionized company and by the April 6 meeting
determined that it was the way they had to go. Under the Employer's model of care
employees are required to multi-task. The Employer wanted to work with a union where
classifications were not as rigid and departmentalized as Clayford-Beckie had found in
her previous experience working with public sector unions. The Employer concluded
that CLAC was not as rigid about classifications and was flexible enough to incorporate
things that were important to the Employer.

20 The Employers first meeting with CLAC representatives took place on April 11,
2006 at the union's office in Surrey when Clayford-Beckie, Robinson and Robin
Wenner, the Employer's human resources consultant, met with Marcel Dionne, Don
Munday and Karen Tatum of CLAC. During the meeting, the Employer told CLAC that

HEU had been calling its employees since it obtained the contract at Windermere. The Employer and CLAC did not consider this activity to be an organizing drive.

21 CLAC's time was limited so the Employer and CLAC agreed to meet over the upcoming Easter weekend. Negotiations took place on April 14 (Good Friday), April 15 and April 17, 2006. At the end of each day, a draft collective agreement incorporating changes was produced. Tentative agreements for Windermere, Inglewood, Courtyard Terrace and Waverly were reached on April 17. After being reviewed by senior CLAC representatives, some minor amendments were made on April 18. The collective agreements at each site are the same with the exception of the recognition clause which names the specific site and the wage schedules.

22 The Employer and CLAC then coordinated their schedules to set up employee meetings on April 19 at Windermere which would then be followed by a CLAC ratification meeting on April 20.

23 The Employer arranged for notices to be posted on April 18, 2006 for employee meetings on April 19. The notice states: "**MANDATORY PAID STAFF MEETING Attendance is Important.** Please work a time into your schedule" (emphasis in the original). According to Clayford-Beckie, employees were not required to attend the meetings. She said the word mandatory was used to tell staff that they would be paid to attend. Robinson said mandatory staff meetings mean it is an important meeting and staff will be paid to attend. Employees who were not scheduled to work on April 19 were telephoned at home by the Employer's administrative staff and asked to attend the meeting. Any employees not scheduled to work that day were paid for two hours if they came into the meeting.

24 At Windermere, four employee meetings with the Employer took place on April 19. The first was a short meeting at 1:20 p.m. with five senior care aides. Then two large meetings took place at 1:30 p.m. and 3 p.m. followed by a smaller meeting at 4 p.m. for employees that had been covering for those at the earlier meetings. All the employees in the building – about 80 to 85 employees -- attended the April 19 meetings.

25 At the senior care aide meeting, Clayford-Beckie went over what she planned to discuss at the larger group meetings so that later the senior care aides could clarify concerns or answer questions from staff. She wanted the senior care aides to answer questions in a way that was consistent with her message at the larger meetings. She asked the senior care aides to encourage employees to vote in favour of the collective agreement with CLAC. She told them that they should tell employees that the Employer would like their support.

26 At the 1:30 p.m. meeting, Clayford-Beckie announced that as a result of an opportunity to expand into the Interior, the Employer had decided to work with a union to represent its employees. She told them that the Employer was a private company providing care for other private companies. She contrasted the situation at Windermere which is owned by two individuals with large public hospitals which are owned by the

government. Clayford-Beckie's intention was to point out that large public sector unions may be suitable for large hospitals but not smaller private facilities. She said the Employer had negotiated a collective agreement with CLAC which had worked with other private companies in health care. Clayford-Beckie encouraged employees to vote in favour of the collective agreement. She told them CLAC would be good for the employees and good for the Employer.

27 Clayford-Beckie told the employees that CLAC would make a presentation to them on April 20. They would receive a copy of the collective agreement, would have an opportunity to go through it with CLAC representatives, and then they would have an opportunity to vote. Clayford-Beckie spoke for about 25 minutes at the 1:30 p.m. meeting. She testified that she said basically the same things at the meetings at 3 p.m. and 4 p.m. During all meetings, some employees came and went.

28 Robinson attended the last 20 to 25 minutes of the 1:30 p.m. meeting. She did not attend any other meetings at Windermere. Robinson told employees about the terms of the collective agreement with CLAC. She told them it was their choice but that the Employer would like their support for CLAC. She told employees that CLAC would be good for the Employer and the employees. Robinson also told the employees that big public sector unions like the HEU did not like private contractors like the Employer.

29 The Employer posted notices at Windermere advertising the CLAC meeting on April 20. The Employer had administrative staff phone employees not scheduled to work to let them know about the meetings. Employees were paid to attend the CLAC meeting. Clayford-Beckie agreed that if employees were paid to attend a meeting they would think that it was a mandatory meeting.

30 Clayford-Beckie and Robinson testified that they first learned of the HEU organizing drive on April 25 when the Board faxed a notice regarding the certification application to the Employer. However, the Employer knew that the HEU was targeting care homes in the private care industry. Shortly after it obtained its contract with Windermere, it became aware that the HEU was phoning employees. The Employer also knew that in April 2006 some employees had raised concerns with the Windermere care manger Rebecca Lalani about the HEU phoning them at home. Clayford-Beckie said it was possible that this happened before April 11, 2006.

31 Lalani has worked for the Employer in a management capacity as a nursing consultant at all of its sites since October 2004. In April 2006, while she was care manager at Windermere, some employees wanted to know who had been giving HEU representatives their phone numbers. The HEU representatives were calling to invite them out for coffee and to chat. Lalani was not certain of the specific date when this occurred but said it occurred over a period of a week or two prior to April 21, 2006.

32 During the last few weeks of April, around the time of the CLAC ratification vote and the HEU representation vote, a good number of staff also asked Lalani about rumours that if the HEU came to Windermere that the owners might close the place.

Lalani told them that she did not know what might happen as she had no control over the outcome. Lalani did not discuss the closure rumour with the Employer. Robinson testified that she heard about this rumour around the time that the CLAC ratification vote was taking place. She did nothing personally to dispel the rumour but the Employer did tell employees that the Windermere owners did not have a stake in what the Employer did and that was not necessarily what would happen.

33 Robinson was at Windermere when CLAC held its meeting to make sure the room set-up was right. She did not attend the CLAC meeting. Dionne, Munday and Tatum conducted the April 20 meeting in a staff lounge. They brought 40 collective agreements with them and asked the employees to leave copies in the lounge. They delivered another 50 to 60 more copies on April 21. Two employees, Nida Williams and Maya Kalyan, summonsed by HEU, testified that copies of the collective agreement were available on several floors of Windermere before the April 24 meeting.

34 The April 20 meeting lasted for four hours. Munday talked about the history of CLAC and Dionne spent about 1-1/2 hours going over the collective agreement terms and answering questions about wages, classifications, grievance procedures, benefits, and seniority. Employees wanted to know what was in the collective agreement for them and why should they vote yes. No one mentioned that the HEU was organizing.

35 If an employee wanted to vote they went to an adjoining room where CLAC had set up a cardboard voting booth. Tatum asked the employees to sign in and gave them a ballot. After they marked the ballot behind the cardboard screen, they were asked to fold the ballot and place it in a manila envelope. Sixty-three employees voted. At the end of the day, CLAC sealed the envelope with tape and had two employees sign their names across the seal.

36 About three employees asked CLAC what the rush was to vote on April 20. At the end of the meeting, CLAC decided that it should hold another meeting and allow further voting on April 24 to ensure that a representative group of employees participated in the ratification process. CLAC provided another notice for the April 24 meeting which was posted by the Employer. Once again, the Employer's administrative staff phoned employees who were not scheduled to work to let them know about the April 24 meeting.

37 On April 24, about 10 employees with specific questions about the collective agreement showed up. The CLAC representatives met with them one-on-one. In front of some employees, CLAC opened the envelope with the ballots in it. The cardboard voting booth was in a corner of the staff lounge where the meeting was taking place. After signing in, employees received a ballot. After marking it, they folded it and placed it in the envelope. Williams and Kalyan attended the April 24 meeting. They were both concerned about placing their ballots in the open envelope and later phoned the Board to complain.

38 Following the meeting, the CLAC representatives asked the employees still there to witness the vote count. Another 21 employees voted on April 24. The ratification of the collective agreement was approved by a 45 to 38 margin at Windermere. At Inglewood, the employees rejected the collective agreement with CLAC.

39 The HEU became aware that CLAC was involved in a voluntary recognition agreement with the Employer on April 19. The pace of the HEU organizing drive picked up after that with the HEU getting a lot more membership cards signed between April 20 and 25.

40 After the HEU applied for certification on April 25, Robinson sent out a memo to the Windermere employees stating the following:

I have been informed that the employees voted in favour of the Collective Agreement entered into between SimpeQ Care Inc. and CLAC.

Today I received a notice from the BC Labour Relations Board that the HEU has applied for Certification to represent the employees at Windermere Care Centre.

SimpeQ Care Inc. takes the position that HEU is precluded from making that application due to the Collective Agreement with CLAC.

Robinson said it was important that the employees understand that the Employer was taking a stand because it had a ratified collective agreement with CLAC.

41 On May 2, Robinson sent another memo to the Windermere employees telling them that the changes to their terms and conditions of employment provided under the collective agreement with CLAC would not be implemented until the Board made a decision about the HEU's application for certification. If the Board dismisses the HEU application for certification then the Employer would implement the changes retroactive to April 24, 2006 (the date of ratification). Robinson said the memo came about because employees were asking about when the benefit package provided in the CLAC agreement would be implemented and there was confusion because of the HEU certification vote. Dionne testified that he asked the Employer to put the benefit package on hold when he learned of the HEU's certification application. CLAC felt it would "not make sense" to implement the benefit package when there was some legal uncertainty about whether employees would actually get to enjoy the fruits of it. CLAC was also concerned that by implementing the collective agreement it would run afoul of the freeze provisions of Section 32 of the Code.

42 Susan Fisher, the HEU's director of organizing and bargaining, testified that the HEU's view is that the delivery of long-term care is best provided through a public system. The HEU preferred the system in place prior to the passage of Bill 29 which provided a master collective agreement for all unionized employees in long-term care.

The HEU is fighting to make the public consider other alternatives to a for-profit system in long-term care. The HEU would prefer that a different balance between for-profit and public health care. The HEU believes the pendulum has swung too far toward the for-profit model. Fisher added that the HEU has many collective agreements with private health care providers.

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III. POSITIONS OF THE PARTIES

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The Employer submits that there is a valid collective agreement in place with CLAC. The Employer contends that the facts do not bear out the HEU's allegations that it acted with undue haste to reach a collective agreement with CLAC. The Employer asserts that the April 19 meetings were not captive audience meetings because employees could come and go from the meetings.

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CLAC submits that voluntary recognition is part of the collective bargaining scheme under the Code. The fact that the Employer prefers CLAC does not amount to an unfair labour practice. Employees are entitled to know when they vote on a voluntary recognition agreement all the information about the options. In this case, CLAC does not take the position that the employees would be better off if the Employer was unable to bid on contracts in health care. CLAC questions whether there was an active HEU organizing drive underway prior to April 19 since more cards were signed after that point.

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The HEU argues that even if the collective agreement with CLAC is valid, the HEU's application for certification should be granted under the policy set out in *Crest Motor Hotel Ltd.*, BCLRB No. 189/1987, (1987), 17 CLRBR (NS) 223 as it is applying for a larger, encompassing bargaining unit. The HEU further argues that there is no collective agreement "in full force and effect" because the Employer and CLAC have not implemented the terms of the collective agreement. The HEU argues in the further alternative that if the collective agreement is in force, it was not duly ratified.

IV. ANALYSIS AND DECISION

1. Unfair labour practices

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The central issue in this case is whether the collective agreement reached by the Employer and CLAC is a bar to the HEU application for certification at Windermere. I begin by considering whether the Employer and CLAC committed unfair labour practices that would make the collective agreement invalid.

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The relevant sections of the Code are:

Unfair labour practices

6. (1) Except as otherwise provided in section 8, an employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

Right to communicate

8. Subject to the regulations, a person has the freedom to express his or her views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion.

Coercion and intimidation prohibited

9. A person must not use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become or to refrain from becoming or to continue or cease to be a member of a trade union.

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Voluntary recognition is a legitimate route for a trade union to follow to obtain the legal right to represent employees in a bargaining unit. However, when a collective agreement reached under a voluntary recognition arrangement is held up as a bar to a certification application, the Board will scrutinize the agreement to ensure that the uncertified union is actually representative of the employees that it claims to represent: *Delta Hospital*, BCLRB No. 76/77 (1978) 1 Can LRBR 356. One way for a union to show that it is actually representative of the employees is to ask employees to ratify the collective agreement. However, an employer may breach to Section 6(1) if it influences its employees to vote in favour of the union it has selected and against another union involved in an organizing drive. As set out in *Province of British Columbia (Ministry of Health)*, BCLRB No. B263/2002, such a determination “involves a consideration of the facts of each case, including the circumstances in which a voluntary recognition agreement was signed, the reasons for signing it and the effect that it is likely to have had on the employees’ right to select the bargaining agent of their choice” (para. 60).

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In this case, a number of different events were taking place within the same timeframe. The Employer held a series of employee meetings on April 19, 2006. CLAC began to have the collective agreement ratified on the following day, April 20, 2006, and concluded the ratification process on April 24, 2006. The HEU was conducting an organizing drive and employees were actively signing membership cards in the period April 19 to 24, 2006.

51 I start by determining if the Employer knew that the HEU was trying to unionize its employees at Windermere when it entered into the voluntary recognition agreement with CLAC. The Employer acknowledges that it was aware that the HEU was phoning its employees after it obtained the contract at Windermere in 2004. There is also evidence that the Employer knew that the HEU was phoning employees in April 2006 when the Employer decided to negotiate a collective agreement with CLAC. The HEU began signing up employees at Windermere on March 21. Lalani, the Windermere care manager, told the Employer some time in the week or two before April 21 that some employees complained that the HEU was phoning them at home. Although Clayford-Beckie was not certain, she stated it was possible that Lalani told the Employer about the HEU phoning before the April 11 meeting with CLAC. At the April 11 meeting, the Employer told CLAC that the HEU was phoning its employees.

52 The timing of the Employer's decision to go ahead with the voluntary recognition agreement with CLAC is also relevant. After a number of months of mulling over whether to enter a voluntary recognition agreement with CLAC, the Employer moved quickly in April 2006 to conclude a collective agreement. The initial concern leading to the Employer's decision to voluntarily recognize CLAC arose in the context of the Pine Grove contract in the IHA. Although the Pine Grove contract does not start until August 2006, the Employer decided to put in place collective agreements at its other sites in April. It met over a four-day period on a holiday weekend.

53 Then at the April 19 meeting, with employees, the Employer made a direct reference to the unsuitability of the HEU.

54 When I consider that the Employer knew in April 2006 that HEU was phoning its employees, the timing of the collective agreement negotiations, and the Employer's reference to the HEU at its employee meetings, I find that the Employer was aware that the HEU was actively seeking to represent its employees at Windermere when it decided to reach a collective agreement with CLAC in mid-April 2006.

55 I turn now to deciding whether the Employer held "captive audience" meetings with the Windermere employees on April 19. In *Cardinal Transportation B.C. Incorporated*, BCLRB No. B344/96 (Reconsideration of BCLRB Nos. B463/94 and B232/95), 34 CLRBR (2d) 1, the Board commented as follows about captive audience meetings:

Employers in the normal course of their business are free to express their views to employees from the date of hire; they can and do on a continual basis issue written material to employees and post all such material in the workplace. They may, as a matter of management prerogative, devote as much supervisory time and resources to workplace communications as they desire. These communications can and do include one-to-one meetings between supervisors and employees, small group meetings and meetings of the entire company.

Inevitably, however, one of the responses of an employer who wants to discourage the unionization of its business is to suddenly increase its communications with its employees; and one particular kind of communication by an employer, which often takes place during a union organizing drive and that has received special attention by all Canadian labour boards, is the "captive audience" meeting. It has some or all of the following characteristics: it is held on company property during working hours, with no deduction in pay; attendance is compulsory, or if the employer states that it is voluntary, all employees feel compelled to attend because not to attend would be to clearly identify oneself as a supporter of the union; and senior management is in attendance. There is typically a discussion about: current wages and working conditions; company performance, and industry or sector performance; the position of competitors (and the wages which they pay); the changes which may take place in a business once a stranger (union) inserts itself into the relationships between employee and employer; the implicit knowledge of management of the union's organizing drive; and in some cases express or implied threats of layoffs, closures, alterations of wages and working conditions. (paras. 204 – 205)

56 In my view, many of the characteristics of captive audience meetings were present at the April 19 meetings. Employees were phoned at home and asked to attend meetings that were labelled mandatory. They were paid to attend the meetings which took place at the worksite during working hours. I do not find Clayford-Beckie's testimony that employees understood the meetings to be voluntary to be compelling. The fact that every employee in the Windermere facility on April 19 attended the meetings indicates that employees understood the word mandatory to mean that attendance was compulsory.

57 With the amendments in 2002 of Sections 6(1) and 8 of the Code, the expression rights of employers were broadened to allow them to comment more freely to employees during a unionization drive. In *Excell Agent Services Canada Co.*, BCLRB No. B171/2003, 96 CLRBR (2d) 161 ("*Excell*"), the Board found that speech acts of an employer may amount to interference under Section 6(1) of the Code if they are not an expression of a "view". The Board distinguishes between the expression of one's own views and the use of communication to induce action in others. Thus, "[a]ctions taken to influence an outcome by inciting others to act are not the same as views expressed" (*Excell*, para. 49). For the following reasons, I find that is the situation that arises here.

58 In further considering the impact of the amendments to Sections 6(1) and 8 of the Code, the Board noted in *RMH Teleservices International Inc.*, BCLRB No. B188/2005, (Leave for Reconsideration of BCLRB No. B345/2003), 114 CLRBR (2d) 128 ("*RMH*"), that there is nothing to suggest that the Legislature intended to undermine an employee's right to freely choose whether or not to be represented by a union as set out in Section 4 of the Code. In the context of this case, the right being exercised by

employees is the right to freely choose between two different bargaining agents. Since concern about free choice is high in the context of captive audience meetings, the Board continues to closely scrutinize captive audience meetings where employers use them to express views on unionization. The Board explained the rationale for the continued scrutiny of captive audience meetings in the following passage from *RMH*:

...we conclude that the concept of "forced listening" comes closer to capturing the essence of what can make an otherwise acceptable employer expression of views during an organizing drive coercive or intimidating. Section 8 does not guarantee an audience. The right of expression under Section 8 does not entail a right to compel others to listen to those views. A reasonable employee who has no choice but to listen to an employer's views regarding unionization may feel coerced or intimidated by the very fact that they have no choice but to hear their employer's views. Whereas they can turn away from a union organizer or a co-worker and decline to listen to them on the topic of unionization, an employee is far less able to turn away from their employer. By virtue of their authority in the workplace, employers can compel their employees to listen to them. Compelled or forced listening raises serious concerns regarding employee free choice on the issue of unionization. (para. 58)

59 In assessing whether an Employer's conduct amounts to interference contrary to Section 6(1), the Board examines all the circumstances – the context, timing, and audience. The Board also takes into account the nature of the employer's relationship with its employees. As the Board stated in *347143 B.C. Ltd. (c.o.b. Westside Foods)*, BCLRB No. B402/1996: "Employees are economically dependent upon their employers and may be readily swayed by employer conduct, even where subtle, which indicates support for a union" (para. 69).

60 The Employer's conduct went beyond simply expressing its views regarding the collective agreement with CLAC. First, the Employer took action by using its power in the workplace to require employees to attend meetings where the Employer representatives expressed their preference for unionization with CLAC. With these actions, the Employer was seeking to give one union – CLAC – an advantage over another union – the HEU.

61 Next, at the April 19 meetings, the Employer sought the support of the Windermere employees for the CLAC collective agreement. Both Employer representatives told the employees that CLAC would be good for the Employer and good for the employees. The Employer was overt about its support for CLAC and more subtle about its opposition to the HEU. Nonetheless, the Employer indicated the unsuitability of the HEU by contrasting CLAC to large public sector unions working at the hospital across the street and by stating that the HEU did not like private contractors such as the Employer. I find that the message being conveyed by the Employer was a mixture of persuasion and pressure. As the Employer's message was a direction to do

something, i.e., vote for the collective agreement with CLAC to thwart the HEU's organizing drive, I find it is not an expression of a view.

62 The Employer's comments were made in the context of a captive audience meeting where the employees had little choice but to listen to the Employer's views. The Employer timed the captive audience meetings to set the stage the day before CLAC's ratification meeting. A reasonable employee would feel a great deal of pressure to act in accordance with the Employer's wishes. A reasonable employee considering the Employer's statements could feel compelled to support CLAC and to not support the HEU. I find that the Employer was advancing its own interests to the detriment of the employees' right to freely choose between CLAC and the HEU. In these circumstances, I find the Employer was using communications to pressure employees to act in favour of CLAC and against the HEU.

63 In all of the circumstances, I find that the Employer interfered in the selection of a trade union contrary to Section 6(1) of the Code by pressuring its employees to support the CLAC collective agreement. I am not persuaded that the employees' true wishes were expressed in the CLAC ratification vote at Windermere. Accordingly, I find that the collective agreement between the Employer and CLAC is not in force at Windermere.

64 I turn now to a consideration of whether CLAC was acting on behalf of the Employer when it entered into the voluntary recognition agreement and thus violated Section 6(1) of the Code. CLAC learned on April 11 that the HEU was phoning the Employer's employees and then worked with the Employer to quickly negotiate a collective agreement. However, at the ratification meeting, CLAC's focus was on telling the employees what was in the collective agreement for them. There was no mention of the HEU. In these circumstances, I do not find that CLAC was acting on behalf of the Employer to interfere in the HEU organizing drive. Nor do I find that the HEU has presented evidence that would lead to a conclusion that CLAC was employer dominated or influenced at the Windermere site.

65 As I am satisfied that the employees' true wishes were not expressed in the ratification vote at Windermere as a result of the Employer's breach of Section 6(1) of the Code, it is not necessary for me to consider any of the HEU's other arguments with respect to the validity of the CLAC collective agreement with the Employer.

66 The HEU also complains that the Employer and CLAC acted in a manner that was coercive and intimidating. The HEU points to a rumour that the Windermere owners would close the facility if the HEU was certified. There is no evidence linking the source of this rumour to the Employer or CLAC. Although the Employer was aware of the rumour, the evidence clearly indicates that the rumour arose among the employees. This evidence falls short of establishing that the Employer and CLAC acted in a coercive and intimidating manner.

2. Appropriateness of combined bargaining unit

67 The final issue to be determined is the appropriateness of varying the Inglewood bargaining unit into the Windermere bargaining unit. (For the purposes of this decision, I will assume that the representation vote at Windermere favours unionization by the HEU.) The Board's seminal decision on bargaining unit appropriateness is *Island Medical Laboratories Ltd.*, BCLRB No. B308/93 (Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), 19 CLRBR (2d) 161, ("*IML*"). In considering whether a bargaining unit is appropriate for collective bargaining, the Board looks at four community of interest factors: similarity of skills and working conditions; the employer's physical and administrative structure; geography; and functional integration. When the application is for a second bargaining unit, as is the case here, the Board also considers the history of collective bargaining with the Employer and in the industry.

68 The vast majority of the employees at the two worksites are residential care aides who have the same overall duties and responsibilities. As these employees deal with residents experiencing a similar range of care needs, similar working conditions exist at the two facilities. There are some differences. For instance, Windermere has a hospice and Inglewood does not. Inglewood has licensed practical nurses while Windermere has recreational aides, a social worker and a hostess. But these differences are not so significant as to justify two different bargaining units. The similarity of skills and working conditions favours a single bargaining unit.

69 The Employer's physical and administrative structure has aspects of both a decentralized and centralized structure. While there are different care managers and human resources manager at each site, the same care co-ordinator, nursing consultant and human resources consultant have responsibility for both sites as do the three directors. The Employer administers the same model of care at the two sites. The physical and administrative structure does not clearly indicate that a single bargaining unit would be inappropriate.

70 With respect to geography, the two facilities are in separate buildings but are not a great distance apart. While geographic separation may indicate a different community of interest, physical separation does not necessarily mean that the two sites should be in separate bargaining units.

71 There is no functional integration between the two sites. However, once again a lack of functional integration does not mean that a combined unit is inappropriate.

72 Turning to the last two factors, I note that a key principle in *IML* is a presumption against multiple bargaining units. The issue at this stage is whether a second bargaining unit would create industrial instability. The Board looks to past conduct in collective bargaining as a predictor of future conduct in collective bargaining. The Employer has no collective bargaining history with the HEU. During the negotiations conducted with CLAC under the voluntary recognition arrangement, the Employer negotiated for four

sites at the same time. The result was a different collective agreement for each site. However, the terms of the collective agreements for Windermere and Inglewood are the same except for the recognition clause, the wage schedule, and the provision of long-term disability benefits along with a wage re-opener at Windermere.

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With respect to the industry, the Employer relies on Board decisions involving service contract providers in the health care industry which recognize that there is a pattern of the bargaining unit structure mirroring the commercial contract. As result, it is not uncommon for there to be multiple bargaining units. In *Compass Group Canada (Health Services) Ltd.*, BCLRB No. B194/2004 (Upheld on Reconsideration BCLRB No. B263/2005) ("*Compass*"), the Board noted that:

... [an] argument in favour of a stand-alone unit collides with the *IML* presumption again[st] multiple bargaining units. On the other hand a variance that combines two separate service contracts is inconsistent with the existing pattern of certifications at least in this particular sub-sector of the contract service industry.

The pattern of contract/location specific certifications in the industry meets the clients purported needs of ensuring their contracted services are not interrupted by labour relations issues at unrelated sites. The privately operated senior[s] residence at Renfrew and the publicly operated VCHA locations are a good example of two such unrelated sites. With separate certifications and separate bargaining units a strike affecting one of these service provider clients of Compass would not affect the other. While bargaining unit appropriateness is not determined by the wishes of the employer or its clients, what appears to be the traditional pattern of certification is a relevant consideration. (paras. 73-74)

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In *Compass*, the employer was organized into two separate divisions: one was operating at a privately-owned seniors' facility and the other at publicly-owned Vancouver Coastal Health Authority locations. The Board concluded that a single bargaining unit would "compel Compass to bargain contrary to its business structure". The Board further found that it would be necessary to create a single collective agreement for two groups of employees who do not have a community of interest and that the diversity between the two Compass divisions would likely give rise to a greater potential for industrial stability. In these circumstances, the Board found that the employer had rebutted the presumption in favour of an all-employee bargaining unit. The Board added:

While I have concluded the variance application is inappropriate in the specific circumstances of this case because it seeks to combine two separate business operations, I make no findings or conclusions with respect to the appropriateness of a variance application for this employer generally or within the sub-sector of the contract service industry as a whole. For instance, the

same concerns giving rise to the conclusion in this case that a variance is inappropriate may not be present with respect to a variance or a consolidate of service contracts within one of Compass' divisions or with respect to another contract service provider that structures its business operations differently. (para. 79)

75 I find that the concerns that led to the conclusion that the variance application was inappropriate for Compass are not present in this case. There is no evidence that the Employer will be required to change its business operations to accommodate a single bargaining unit. The Employer has a centralized business structure with separate on-site managers for Windermere and Inglewood. The Employer has separate service contracts at each site but provides the same type of services under its own model of care. While the two facilities are separately owned, they are both private, seniors' facilities offering a similar range of care to residents. The employees share the same skills and working conditions. The type of differences that exist between the two sites, for instance, the level of funds available for wages and benefits, are the sort of issues that could be addressed in collective bargaining. Overall, the evidence does not lead to a conclusion that a single bargaining unit will undermine efficient and stable collective bargaining. In these circumstances, I find that that the *Compass* decision is distinguishable on the facts and that the Employer has not rebutted the presumption against multiple bargaining units. I find that the application for the varied bargaining unit is appropriate for collective bargaining.

76 If the Windermere representation vote favours the certification of the HEU as the bargaining agent then the Inglewood representation vote taken under Section 142 of the Code will be counted. If the Inglewood employees vote in favour of representation by the HEU then the Inglewood bargaining unit will be varied into the Windermere bargaining unit. If the Windermere representation vote rejects the certification of the HEU then the Inglewood representation vote will be processed under Section 18 of the Code.

V. CONCLUSION

77 The Employer breached Section 6(1) of the Code by interfering in its employees' choice of bargaining agent at the Windermere site. Accordingly, I declare that the collective agreement with CLAC is not in force at Windermere.

78 The Employer is to refrain from further violations of the Code. The Employer is to post this decision in the staff lounge at the Windermere site for a period of one month from the date of publication of this decision.

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The HEU's representation vote at Windermere is to be counted. Depending on the results of that vote, the Inglewood representation vote will be processed either under Section 142 of the Code or, in the alternative, under Section 18 of the Code.

LABOUR RELATIONS BOARD

"JAN O'BRIEN"

JAN O'BRIEN
VICE-CHAIR