

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

SIMPE 'Q' CARE INC.

(the "Employer")

-and-

HOSPITAL EMPLOYEES' UNION

("HEU")

-and-

CHRISTIAN LABOUR ASSOCIATION OF CANADA, LOCAL NO. 501

("CLAC")

PANEL: Brent Mullin, Chair  
Michael Fleming, Associate Chair  
Philip Topalian, Vice-Chair

APPEARANCES: Colin G.M. Gibson, for the Employer  
David Tarasoff, for HEU

CASE NO.: 55273

DATE OF DECISION: July 27, 2007

**DECISION OF THE BOARD**

I. NATURE OF APPLICATION

1           The Employer applies under Section 141 of the *Labour Relations Code* (the  
"Code") seeking leave and reconsideration of BCLRB No. B171/2006 (the "Original  
Decision") which found the Employer had breached Section 6(1) of the Code and that a  
single bargaining unit encompassing two work sites at which employees of the  
Employer work, was an appropriate bargaining unit.

II. BACKGROUND

2           The Employer is a private sector service provider in the contracted health care  
industry. The Employer entered into contracts with Windermere Care Centre in  
Vancouver ("Windermere") and Inglewood Care Centre in West Vancouver  
("Inglewood") to provide staff and services at both private, long-term care facilities.

3           The two facilities have different owners and the Employer negotiated a different  
commercial contract with each facility.

4           In mid-March 2006, the Employer contacted CLAC. In the third week of March,  
2006, HEU began an organizing campaign at Windermere.

5           The Employer met with CLAC representatives on April 11, 2006 and then met  
over the Easter long weekend, concluding a collective agreement covering four sites on  
April 17, 2006. The Employer and CLAC then arranged for co-ordinated employee  
meetings.

6           On April 18, 2006, the Employer posted a notice of what was characterized as a  
mandatory staff meeting to be held at Windermere on April 19, 2006. Four employee  
meetings occurred at Windermere on April 19, 2006 which were attended by all of the  
Employer's employees working at Windermere.

7           At those meetings, the Employer expressed its preference for CLAC and  
encouraged employees to vote in favour of the collective agreement which had just  
been negotiated with CLAC.

8           The Employer also posted notice of CLAC meetings with employees to be held  
on April 20, 2006. The Employer contacted employees not scheduled to work that day  
at Windermere to tell them about the meeting.

9           Both sets of meetings were conducted at Windermere and employees were paid  
to attend.

10 CLAC met with the employees at Windermere on April 20, 2006. After that  
meeting, a ratification vote was conducted.

11 On April 24<sup>th</sup> CLAC conducted a second meeting at Windermere with additional  
employees and allowed a further opportunity to vote.

12 The collective agreement was ratified at Windermere but was rejected at  
Inglewood.

13 The HEU applied for certification for a unit which encompassed both sites on  
April 25, 2006.

14 The Original Decision concluded the Employer knew about the HEU organizing  
drive and that the meetings conducted by the Employer were captive audience  
meetings.

15 The Original Decision found the Employer's actions went beyond the expression  
of views and the Employer had used its power in the workplace to require employees to  
attend the April 19, 2006 meetings.

16 The Original Decision found the message in the April 19, 2006 meeting was a  
mixture of persuasion and pressure and was a direction to do something, i.e., to vote for  
the CLAC collective agreement, and was thus not an expression of a view.

17 The Original Decision concluded that, under all the circumstances, a reasonable  
employee would feel a great deal of pressure to act in accordance with the Employer's  
wishes and that the vote would not reflect the true wishes of the employees: paras. 62  
and 65, Original Decision.

#### Bargaining Unit Appropriateness

18 The Employer opposed the proposed single bargaining unit which encompassed  
both Windermere and Inglewood. The Employer argued a bargaining unit at each site  
would be appropriate.

19 In applying the *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") criteria, the Original Decision concluded the employees at the two sites had the  
same duties and responsibilities and dealt with similar types of patient needs: para. 68.

20 The Original Decision found the Employer's physical and administrative structure  
did not clearly indicate a single bargaining unit would be inappropriate: para. 69.

21 The Original Decision concluded that, while the two facilities were geographically  
separate, that did not necessarily mean a single unit was inappropriate.

22 Finally, the Original Decision concluded that the lack of functional integration did  
not mean a single unit was inappropriate.

23 The Original Decision went on to note the terms of the CLAC collective  
agreement which covered both sites were the same.

24 The Original Decision concluded the concerns present in *Compass Group  
Canada (Health Services) Ltd.*, BCLRB No. B194/2004 (Upheld on Reconsideration in  
BCLRB No. B263/2005) ("*Compass*") were not present in this case: para. 75.

25 The Original Decision found that, as a result of all those considerations, the  
Employer had not rebutted the presumption against multiple bargaining units.

### III. POSITIONS OF THE PARTIES

#### Unfair Labour Practice

26 The Employer submits the April 19, 2006 meetings were not captive audience  
meetings because employees were free to come and go from the meetings and  
understood that the meeting was not mandatory.

27 The Employer says another equally reasonable conclusion to the one reached in  
the Original Decision was that employees attended the meetings simply because they  
knew the meetings were important and wished to hear the Employer's views.

28 The Employer argues it had a right to express a preference for CLAC and also  
that it favoured the collective agreement with CLAC. The Employer submits that  
proposition is consistent with long-standing Board policy.

29 The Employer submits that the April 19, 2006 meeting should be preferred over  
haphazard "hallway" meetings with individual or small groups of employees.

30 The Employer argues the Original Decision erred in concluding there was  
anything improper in the Employer and CLAC negotiating a collective agreement  
quickly. The Employer says that it and CLAC had been communicating for months  
regarding a possible voluntary recognition agreement and the Employer decided to  
move ahead to that end once a contract with the Pine Grove facility had been entered  
into.

31 The Employer says that the finding that the April 19, 2006 meeting is a captive  
audience meeting is a finding of mixed law and fact and is therefore subject to challenge  
or reconsideration. To the extent to which it is a finding of fact, the conclusion  
constitutes a palpable and overriding error and should be overturned on that basis.

32 The Employer argues that, if the meeting was in fact a captive audience meeting,  
that is not, in and of itself, an unfair labour practice. Rather, it only establishes a higher  
level of scrutiny. Communication in such a meeting may constitute an unfair labour  
practice if it is found to be coercive or intimidating – neither of which was present here.

33 The Employer submits the Original Decision erred in relying on *347143 B.C. Ltd.*  
(*c.o.b. Westside Foods*), BCLRB No. B402/1996 (para. 59, Original Decision) which  
pre-dated the 2002 amendments to Sections 6(1) and 8 of the Code.

34 The Employer also says its comments in the employee meetings were the  
expression of its views, not a direction to the employees to vote for the collective  
agreement with CLAC.

35 Finally, the Employer argues the CLAC ratification votes did in fact reflect the  
true wishes of the employees. Employees were given proper notice of the meetings  
and the issues to be decided in those meetings, as well as sufficient information upon  
which to make an informed decision.

36 The Employer says the fact employees at one site ratified the agreement while  
those at another site did not, is indicative of the vote as being reflective of the true  
wishes of the employees.

37 The HEU submits the Original Decision's conclusion that the April 19, 2006  
meeting was a captive audience meeting is essentially a finding of fact and, as such,  
does not provide an appropriate basis to grant leave.

38 The HEU says that, in any event, the conclusion reached in the Original Decision  
on this point, was one which was consistent with the evidence and therefore no error is  
made out.

39 The HEU argues that the Employer is essentially challenging the finding of fact  
regarding the timing of the negotiations between the Employer and CLAC. In any event,  
there is no error in the conclusion the negotiations moved quickly and that the Employer  
knew about the HEU organizing activities.

40 The HEU submits the Original Decision did not conclude the April 19, 2006  
meeting was, in and of itself or *per se*, an unfair labour practice as asserted by the  
Employer. The HEU goes on to say there is no error in the conclusion employees were  
subjected to pressure in the context of the captive audience meetings. Such pressure is  
not permitted: *RMH Teleservices International Inc.*, BCLRB No. B188/2005 (Leave for  
Reconsideration of BCLRB No. B345/2003) ("*RMH*"), para. 66.

41 The HEU adds that the Employer urged the employees to vote for the CLAC  
agreement, which is a direction to act and not the expression of a view: *Excell Agent  
Services Canada Co.*, BCLRB No. B171/2003, 96 CLRBR (2d) 161 ("*Excell*"). Such  
"incitement", even if it is not itself coercive or intimidating, is interference with the  
selection of a trade union contrary to Section 6(1). The Employer's comments  
interfered with the ongoing HEU organizing campaign and were designed to do just that.

42 Finally, the HEU submits that the Employer's argument that the ratification votes  
are reflective of the true wishes of the employees ignores the fact a majority of  
employees at Windermere voted in favour of the CLAC agreement. The HEU says, if

the April 19, 2006 captive audience meeting had not occurred, perhaps many more employees would have voted against the agreement.

Bargaining Unit Appropriateness

43 The Employer submits the Original Decision erred in failing to properly consider the *IML* community of interest factors.

44 The Employer says the Original Decision failed to decide whether the three most important community of interest factors indicated if a single bargaining unit was appropriate.

45 Finally, the Employer argues the Original Decision erred in not properly applying the Board's decision in *Compass* and in distinguishing that decision from the facts in this case. In particular, the Employer relied on the comments of the panel in the original decision in *Compass* at paragraph 34 and 72 to 74. The Employer says:

The Employer, and other employers in the industry, have organized their contracts and labour relations affairs in reliance on the *Compass* principles. The Original Panel's decision to restrict *Compass* to very narrow facts, allowing for the certification of potentially company-wide bargaining units for health care contract service providers, reverses the Board's policy on this issue and sweeps away the labour relations model on which much of the industry has been based since *Compass*.

46 The Employer says Windermere and Inglewood have different owners; the Employer has a different commercial contract with each; the terms and conditions of employment are different under the terms of each contract.

47 The HEU says that the Employer objected to the larger, more inclusive bargaining unit proposed by the HEU and was therefore required to rebut the presumption against multiple bargaining units. In that exercise, the Employer was required to establish the proposed larger unit was not appropriate.

48 The HEU submits the Original Decision correctly noted that the absence of functional integration does not mean a combined bargaining unit is inappropriate. If that were the case, existing units could never be expanded through Section 142, which would be directly inconsistent with long-standing Board policy.

49 The HEU says the *Compass* decision was expressly restricted to the facts arising in that case. In any event, the facts in that case are clearly distinguishable from those arising in this case.

50 The HEU argues that the Board has in fact granted certifications in the contract service provider industry even where contracts are held by separate divisions or profit centres. That is consistent with the Board's approach in other contexts.

51 The HEU submits that, in *Compass*, the proposed bargaining unit encompassed a privately operated residence with a publicly operated location. In this case, the two facilities are both private seniors' facilities offering a similar range of care and services.

#### IV. SUPPLEMENTARY SUBMISSIONS

52 The panel requested and received from the parties further submissions in respect to the following questions:

1. In *Convergys Customer Management Canada Inc.*, BCLRB No. B62/2003, the Board said the 2002 amendments "reflect the confidence that a reasonable employee can make inquiries and assess (the employer's) views... (para. 118). In the present case, did the employees have a reasonable opportunity to make inquiries and assess the Employer's views before voting?
2. If not, would this fact, in the circumstances of this case, render the expression of views intimidating or coercive or in breach of Section 6(1) of the Code?
3. Section 6(1) states that it is applicable, "except as otherwise provided in Section 8". What is the impact (if any) of the timing of the meetings and vote with respect to whether the April 19 meetings were coercive or intimidating, or in breach of Section 6(1) of the Code? If the timing is relevant, does it render the April 19 meetings coercive or intimidating, or otherwise in breach of Section 6(1) of the Code?
4. In the circumstances of this case, did the Employer breach Section 6(1) by arranging the meeting between CLAC and the employees, and in its conduct relating to the meetings (i.e., arranging the meetings at the worksite, on work time, and paying the employees to attend)?

#### V. ANALYSIS

53 The requirements to obtain leave for reconsideration are set out in *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), (1994), 20 CLRBR (2d) 44, 93 CLLC ¶16,043 ("*Brinco*"). The application for reconsideration must establish a good, arguable case that the original decision should be overturned, based on one of the established grounds for reconsideration.

##### Unfair Labour Practice

54 The unfair labour practice issues in the present matter engage the Section 2(a) "rights and obligations of employees, employers and trade unions" in the voluntary recognition and organizing context of this case. The issues require us to apply the significant amendments to the Code in 2002 to these circumstances.

55 Expression rights have been broadened under the amended Section 8 of the Code: *Convergys Customer Management Canada Inc.*, BCLRB No. B62/2003, paras.

95-118 (“*Convergys*”). But equally, those rights must not be exercised in a manner which is coercive or intimidating: Sections 8 and 9 of the Code: *Ibid*.

56 The expression of views under the Code may interfere with union organizing (Sections 6(1) and 8), but it must not intimidate or coerce (Sections 8 and 9).

57 Expression rights include the right to hear or receive views: *RMH*, para. 39. Under the Code, employees have the right to hear or receive views about unionization. This supports their ability to make an informed choice.

58 Employees also have the right under the Code not to be subjected to coercion or intimidation from others expressing their views. This supports the employees’ right to make a free choice in respect to unionization.

59 The employees’ rights to an informed and free choice are supported by Section 2(a) of the Code. It requires the Board to exercise its duties under the Code in a manner that “recognizes the rights and obligations of employees”, as well as unions and employers.

60 The legislative intent in the most recent amendments to the Code was to broaden expression rights, while narrowing the legislative restrictions: *RMH*, para. 36.

61 This was captured and well explained in the original decision in *Convergys*, paras. 104-118. The explanation there is worthy of careful review. It notes the expanded scope of permissible expression (para. 104), in which expression rights are not to “be scrutinized against a standard of reasonableness” (para. 104), “undue influence” is not prohibited (paras. 105-110), and thus views “may reflect a person’s bias and be uninformed or unreasonable” (para. 112).

62 However, that expression of views must not be coercive or intimidating (paras. 114-116). The nature and impact of the expression of views will be measured contextually (paras. 114-115).

63 By way of summary, the explanation in *Convergys* concludes:

Taken as the whole, the Legislature's amendments to Sections 2, 6(1) and 8 reflect important judgments about the ability of employees to make free choices about union representation, despite attempts to influence their decision-making through the expression of views that are not coercive or intimidating. The amendments reflect the confidence that a reasonable employee can make inquiries and assess these views, knowing that most often, their employer will view their participation in a union and collective bargaining as contrary to the employer's self-interest. Hence, the expression of non-coercive or non-intimidating views based on the preference to resist certification are *prima facie* protected by Section 8 and do not constitute interference for the purposes of Section 6(1). This reasoning equally applies if views are expressed in what might be characterized a campaign to

influence employees' decision-making about union representation. In the absence of a deliberate lie, it is not the Board's role to police the accuracy or reasonableness of views expressed in accordance with Section 8. (para. 118)

64 Our task in the present matter is to give effect to the legislative intention in the above noted Code provisions, within the overall context of the Code: *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27.

65 Turning to the facts in this case, we find that the Employer has not raised a good, arguable case that the employee meetings held at Windermere on April 20 and 24, 2006 were not captive audience meetings. Accordingly, leave is denied on this issue. Among other facts, the Employer's notice to the employees regarding these meetings stated in capitalized, bold, and underlined print that the meetings were "mandatory paid" staff meetings. The Employer also contacted the employees telling them to attend, all the employees attended, they were paid for their attendance, and a principal of the Employer acknowledged that the employees would have seen these as mandatory meetings: Original Decision, paras. 23-29. In short, the meetings clearly were captive audience meetings.

66 As explained in *Convergys*, in the 2002 amendments to the Code the Legislature broadened expression rights in a manner which would not limit them in terms of undue influence or subtle pressure:

Another indicator of the Legislature's intent lies in the absence of the words "undue influence" in Section 8. The Board's observations in *Cardinal* regarding the impact of the 1987 amendments to the Code provide a good starting point for this aspect of the analysis:

In 1987 the *Labour Code* was replaced by the *Industrial Relations Act (Industrial Relations Reform Act, 1987, S.B.C. 1987, c. 212)*. The *Industrial Relations Act* continued with Section 3(3)(g) (statement of fact or opinion reasonably held with respect to the employer's business) and also enacted the following new provision:

2(3) Nothing in the Act deprives a person of his freedom to express his views provided he does not use undue influence, intimidation, coercion or threats.

The effect of this new provision was discussed in *Focus Building Service Ltd.*, IRC No. C90/87. The Industrial Relations Council decided that there was no longer a requirement that an

employer remain "strictly neutral" during the course of a union organizing drive or prior to a representation vote. However, this increased ability to communicate with employees during the organizational period was confined by the words "...provided he does not use undue influence, intimidation, coercion or threats". Undue influence was defined as follows:

In my opinion, undue influence is a species of intimidation. It may be distinguished from the more direct form of equally coercive pressure by a certain subtlety of application. Its effectiveness is perhaps enhanced by this characteristic. The Legislators have clearly stated that the use of such a weapon by an employer has no place in the industrial relations arena. (p. 17)

It must be remembered that the concept of "undue influence" was imported into the Board's policy long before its express inclusion in the 1987 amendments:

...Employer conduct which has a significant impact on the employee's freedom to make up his or her own mind about collective bargaining is the kind of conduct which will run afoul of s. 3. In making that judgment, we must always be conscious of the fact of employee dependence on the employer, especially for job security, and the opportunity this gives the employer for undue influence on that choice. ... (Forano, *supra*, p. 18) (paras. 132-134)

The Union argues that the concept of undue influence continues to regulate the expression of views under Section 8. Its submission is based on the observation advanced in *Cardinal*, that the concept of undue influence predates its express inclusion in the 1987 amendments. The Union argues that the concept survives, despite the fact that the current language of Section 8 contains no express reference to it.

One problem with this submission is that it does not square with the legislative history behind Section 8. The reference to

undue influence in *Forano Limited, supra* was made outside the context of a specific legislative provision defining a right of expression. Since *Forano Limited, supra*, the Legislature has chosen to speak to this matter. In 1987 the Legislature explicitly marked the scope of permissible employer communication with the concept of undue influence. Hence, the fact the Legislature chose not to include a reference to undue influence in the most recent amendment cannot be easily overlooked. In light of this history, had the Legislature intended that the Board apply this concept to limit the expression of views under Section 8, it would have said so.

The Union's submission also overlooks the longstanding distinction between coercion, intimidation and undue influence. In *Cardinal*, the Board identified a common element between the three concepts, namely: "any effort by an employer to invoke *some form* of force, threat, undue pressure or compulsion for the purpose of controlling or influencing an employee's freedom of association. This is what we mean by coercion in this decision" (para. 196; emphasis added).

These propositions continue to apply regardless of the amendments. However, coercion, intimidation and undue influence are still different concepts as a matter of degree. As the Council concluded in *Focus Building Service Ltd.*, IRC No. C97/87, ("*Focus*") undue influence is a species of intimidation characterized by the subtlety of its application.

For all these reasons, we conclude that by choosing not to proscribe undue influence under Section 8, the Legislature has signalled that the Board should focus the application of coercion and intimidation to the use of more direct forms of pressure: *North Shore Association for the Mentally Handicapped*, BCLRB No. B474/99, at para. 52. (*Convergys*, paras. 105-110)

67 The test to be applied to the expression in this case is that set out above in *Convergys*. Within that test, it is not a breach of the Code for an employer to invite a union to organize its employees. It is also not a breach of the Code for an employer to express its preference for one union over another. However, in a captive audience meeting, an employer would be best advised to express its view in a reasoned and reasonable manner, as was done here.

68 Within this legal framework (the Code as amended in 2002), while the Employer's comments in the Windermere meetings may have been "a mixture of persuasion and pressure" (Original Decision, para. 61), their content was within the lawful expression rights in Section 8 of the Code and short of the "more direct forms of pressure" constituting unlawful coercion or intimidation (*Convergys*, para. 110).

69 Along with the prohibitions on coercion and intimidation, there is a further way in which comments can fall outside the protection of expression rights in Section 8 of the Code. As set out in *Excell*, there is a distinction between the expression of a view and a

direction to others to act. In paragraph 57, the Original Decision cites the test from *Excell* as follows: “[a]ctions taken to influence an outcome by inciting others to act are not the same as views expressed’ (*Excell*, para. 49).” (emphasis added)

70           However, in our view, it cannot be found that the Employer’s comments in the present case were “inciting” or provoking the employees into supporting the CLAC collective agreement. Certainly it was the Employer’s expressed view that it was in its interest, and in its view, the employees’ interest, to support the CLAC collective agreement: Original Decision, paras. 25-26. The way that would be done would be by the employees voting for the CLAC collective agreement. But to then say that takes the Employer’s comments beyond the bounds of the expression of a view to a direction to act is, with all due respect, more of a semantical than a meaningful distinction. It puts form over substance. In general that should not be the approach taken in labour relations matters, including, we find, in the specific circumstances of this case. The Employer’s comments were not provocative or “inciting” in nature. They were an expression of a view and an attempt to persuade, which is lawful under the Code. In our view, in terms of the amended expression rights in the Code, the comments fall within the lawful bounds of Section 8 expression rights. They do not constitute an incitement to others to act outside of the bounds of lawful Section 8 expression rights.

71           Lastly, before concluding on the unfair labour practice point, we do not find it necessary to deal with the Employer’s argument regarding the determination in the Original Decision that the Employer “moved quickly in April 2006 to conclude a collective agreement” with CLAC: Original Decision, para. 52. That conclusion was largely used to support a finding that the Employer knew about the HEU organizing drive at that time. To the extent that it could be argued to be a factor in respect to the unfair labour practice assertions, we find in the circumstances that it would not be a significant or a compelling one. Since the amendments to the Code in 1993, the Code has contemplated, and even encouraged, less adversarial and more cooperative approaches to labour relations, including collective bargaining. There should be no predisposition that collective agreements should take months and months, or even years, to negotiate and should be encyclopaedic in detail and length.

72           To this point in our analysis, applying the law set out above, including the higher level of scrutiny which captive audience meetings require, we would not find an unfair labour practice. The Employer’s comments at the Windermere meetings fall within the lawful expression of views within the Code’s Section 8 expression rights. This determination is consistent with the legislative intent of broadened expression rights in Sections 8 and 6(1) of the Code.

73           However, there are further concerns in the circumstances. One of them is the timing of the meetings. For convenience, we repeat a critical passage from *Convergys*:

Taken as the whole, the Legislature’s amendments to Sections 2, 6(1) and 8 reflect important judgments about the ability of employees to make free choices about union representation, despite attempts to influence their decision-making through the

expression of views that are not coercive or intimidating. The amendments reflect the confidence that a reasonable employee can make inquiries and assess these views, knowing that most often, their employer will view their participation in a union and collective bargaining as contrary to the employer's self-interest. Hence, the expression of non-coercive or non-intimidating views based on the preference to resist certification are *prima facie* protected by Section 8 and do not constitute interference for the purposes of Section 6(1). This reasoning equally applies if views are expressed in what might be characterized a campaign to influence employees' decision-making about union representation. In the absence of a deliberate lie, it is not the Board's role to police the accuracy or reasonableness of views expressed in accordance with Section 8. (para. 118) (emphasis added)

As can be seen in this passage, an important part of the approach in the amended Code is that "a reasonable employee can make inquiries and assess these [i.e., in this case the Employer's] views". That approach is an integral part of the amendments in 2002 which, along with the Sections 8/6(1) amendments, added as a duty of the Board the obligation to recognize "the rights and obligations of employees, employers and trade unions" under the Code: Section 2(a). Of particular note here, is the express reference to the employees and their rights and obligations, along with those of the unions and employers who are most often the formal parties in a matter before the Board.

74 It is thus now a duty of the Board to consider the rights and obligations of the employees involved in any matter before the Board. In turn, the obligation to recognize the employees' rights requires that those rights be respected. The rights to be recognized and respected include the opportunity for a reasonable employee to "make inquiries and assess...views" expressed under Section 8 of the Code: *Ibid.*

75 Looked at from an employee perspective, the timing of the meetings in this case present a concern regarding whether the employees would have been able to make inquiries and assess the views being expressed to them by the Employer regarding whether to support the CLAC collective agreement or not. Notices for the Employer's meetings with the employees at Windermere were posted on April 18, 2006: Original Decision, para. 23. The meetings themselves, there were four of them, were held the next day, April 19: *Ibid.*, para. 24. The subsequent meeting with CLAC was held the very next day after that, April 20: *Ibid.*, para. 34. Notice for that meeting had been provided that same day, April 20: *Ibid.*, para. 29. Employees voted at the conclusion of the meeting: *Ibid.*, para. 35.

76 Notably, "[a]bout three employees asked CLAC what the rush was to vote on April 20": Original Decision, para. 36. As a result, CLAC held another meeting on April 24. A smaller group of employees attended that meeting and voted at the end of it: *Ibid.*, para. 37. The ballots were counted at the conclusion of that meeting on April 24: Original Decision, para. 38.

77 In summary, the employees were given notice on April 18 of a mandatory meeting to be held the next day, April 19. They were required to attend that meeting. They were then given the opportunity to attend the CLAC meeting the following day, April 20, after which they were given the opportunity to vote. When several of the employees questioned CLAC as to "the rush" (Original Decision, para. 36), a further meeting and opportunity to vote was held on April 24. A small number of employees took up that opportunity (10: Original Decision, para. 37), versus the large number of employees who attended the April 20 meeting and voted then (63 employees: Original Decision, para. 35).

78 Looked at from the perspective of the rights of the employees, we find they were not given a proper opportunity to make inquiries and assess the views of the Employer and CLAC which were being presented to them. That concern is most strongly raised in the April 19-20 sequence. The very need for the April 24 meeting speaks to the concern.

79 We find that the April 20 CLAC meeting did not provide an opportunity for the employees to make inquiries and assess the views that had been put forward by the Employer on April 19 and then CLAC on April 20. There was simply no reasonable opportunity to do so in the circumstances, given the timing of the meetings. Without that opportunity, the context becomes coercive. As such, it is a breach of Section 9 of the Code. We uphold the outcome in the Original Decision on that basis.

80 A further concern in the circumstances is that the CLAC meetings were arranged by or with the Employer, were held at the worksite, with attendance being paid for by the Employer. Those meetings were not organized for the purpose of the Employer expressing its view. All of that activity by the Employer is arguably conduct and thus not protected expression under Section 8 of the Code. As such, it would be subject to the Board's longstanding approach to interference under Section 6(1) of the Code: see, for instance, *South Surrey Hotel Ltd. (Best Western Pacific Inn)*, BCLRB No. B25/94, at p. 13.

81 We requested submissions from the parties on this concern: see question 4 of the panel's supplementary questions, set out in paragraph 52 above. Unfortunately, we received limited submission on this point.

82 We are also concerned about the impact a determination or further comments here could have on the legitimate and beneficial practice of voluntary recognition in the province (in respect to Sections 2(a), (c), (d), (e) and (h) of the Code, for instance). This is particularly the case for contexts where there has not been coercive or intimidating expression or conduct in breach of Sections 8 or 9 of the Code.

83 As a result, we make no further comments on this point.

84 We add, nonetheless, that one of our goals in the above analysis is to provide some clear guidance in respect to both the broadened expression rights in the Code, consistent with the legislative intent in the 2002 amendments to Sections 8 and 6(1) of

the Code, and the remaining unfair labour practice provisions in the Code. As set out above, it is clear that the legislature intended to broaden expression rights in the Sections 8 and 6(1) amendments. We have given effect to those broadened expression rights in allowing the meetings on April 19 and the Employer's expression in them.

85           However, a concomitant intent of the legislature in the 2002 amendments was to not improperly inhibit employee free choice. As a result, employer expression remained subject to coercion and intimidation. In our view, we have given effect in the above determinations to these latter protections as well, not allowing employee free choice to be inhibited by the lack of the opportunity to make inquiries and assess the views that were being proffered to the employees in the April 19th and 20th meetings.

86           A critical concern which has helped shape our determinations in this regard is respect for the employees. In our view, that properly reflects the Section 2(a) amendment to the Code, which requires the Board to recognize the rights and obligations of employees, as well as the more traditional focus on the usual parties before the Board, unions and employers. As well, in our view, it is consistent with the mischief identified in *Hansard* in respect to these amendments and the subsequent legislative intent in the amendments themselves.

87           There is a common sense basis to this approach which provides a non-technical, non-legalistic basis for understanding the Board's decisions in this area. For instance, in *RMH* the Board did not allow the dimming of the lights in the workplace in order for the employer in that case to run anti-union slide shows on the walls throughout the workday. Plainly put, that approach by the employer was disrespectful of the employees and their right to a non-coercive work environment in which to exercise their right of free choice.

88           Similarly, in the present case, pressing the employees into back-to-back meetings without the opportunity to have the proper time to make inquiries, assess the views they were hearing, and come to their own, considered conclusions in respect to the choice facing them is again simply not properly respectful of them and their rights.

89           Thus, a good start for any party wishing to exercise its expression rights under the Code, but also not fall afoul of the restrictions in the Code, is to consider the nature of their potential conduct in respect to the employees. Does it treat the employees respectfully, including allowing them the proper opportunity to make inquiries, review what they have heard, and make up their minds in regard to what is being put before them?

#### Bargaining Unit Appropriateness

90           We begin by noting that the Employer opposed the larger single bargaining unit proposed by the HEU and instead argued that two separate bargaining units were to be preferred.

91 We find no error in the Original Decision's approach that the Employer was  
required to rebut the presumption against proliferation and to establish that the  
proposed larger unit was not appropriate.

92 The Original Decision clearly considered the first *IML* factor concluding the  
employees at both sites performed similar duties for patients with similar needs. We  
find no error in the conclusions reached in the Original Decision on this point.

93 We find no error in the Original Decision's conclusion that a lack of functional  
integration was not supportive of a conclusion the larger unit was inappropriate. Such a  
conclusion would clearly be inconsistent with the Board's long-standing building block  
approach under Section 142 of the Code. In such cases there is not likely to be  
functional integration otherwise an initial, smaller unit could not have been certified in  
the first place.

94 We do not find reviewable error in the Original Decision's approach and  
conclusions in respect to the other *IML* factors.

95 The Employer's primary argument is that the Original Decision erred in  
distinguishing the earlier *Compass* decision. In that regard, the Employer places  
considerable reliance on paragraphs 72 to 74 of the decision of the original panel in the  
*Compass* decision, BCLRB No. B194/2004 (the "*Compass* Original Decision").

96 The difficulty with that position is that it does not note the Board's comments on  
reconsideration in respect to the determination in the *Compass* Original Decision. The  
reconsideration panel concluded:

...while it was open to the panel [in the *Compass* Original Decision]  
to reach its conclusions, they should be seen as being limited to the  
specific facts of the case before the panel, including the corporate  
histories. As well, we agree with the original panel's comment that  
the concerns giving rise to the original panel's conclusions in this  
case may not be present in future cases. (BCLRB No. B263/2005  
"*Compass* Reconsideration Decision, para. 24)

97 The *Compass* Reconsideration Decision also specifically noted in respect to the  
private sector, contracted health care service providers, that "the fact two groups of  
employees are distinct with even divergent interests, will not necessarily lead to a  
conclusion they cannot be included together in a single unit": *ibid.*, para. 22.

98 The original panel in *Compass* in fact reached that conclusion in a further,  
companion *Compass* decision, BCLRB No. B200/2005, upheld on reconsideration in  
BCLRB No. B263/2005, upheld on judicial review: *Compass Group Canada (Health  
Services Ltd. (c.o.b. Crothall Services Canada and/or Morrison Healthcare Food  
Services and/or Morrison Management Specialists) v. Hospital Employees' Union*,  
[2006] B.C.J. No. 883, 2006 BCSC 618; appeal dismissed: 2007 BCCA 237. That  
conclusion was reached in the face of an employer argument in that case very similar to  
that mounted here: BCLRB No. B263/2005, para. 29. A similar conclusion was upheld

in *Compass Group Canada (Health Services) Ltd.*, BCLRB No. B71/2006 (Leave for Reconsideration of BCLRB No. B6/2006).

99 It is, therefore, not correct to say that the Board's *Compass* decisions displaced the *IML* presumption against multiple bargaining units in the health care contract industry. As well, we note that the structure of the contracts in the industry was established before the Board's *Compass* decisions, and not *vice versa*, as submitted by the Employer.

100 We are thus not prepared to overturn the Original Decision's bargaining unit appropriateness determination on the basis of the arguments before us to date.

101 That being said, we need to add the following. The presumption against multiple bargaining units in *IML* is a rebuttable presumption. The rebuttable nature of the presumption can be placed in the following policy framework.

102 The purpose of the Board's appropriateness approach and decisions is to establish a structure which will contribute to the success of the parties and the fulfillment of the interests under the Code. In that regard, the parties are more broadly defined than in the past in the amended Section 2(a) of the Code. It refers expressly to not merely the rights and obligations of employers and unions, the traditionally predominant parties in *Wagner Act* labour relations, but also the employees. We have in fact found that focus on the employees to be helpful in understanding the expression and unfair labour practice portion of this case: see paras. 73-74, 78-79, and 86-89 in the above analysis.

103 The interests in the Code also include the public interest in terms of the impact of the Board's decisions on all the concerns noted in Section 2 of the Code, including the express public interests noted in Sections 2(f) and (g).

104 The purpose of the Board's determinations is thus to contribute to the success of the parties, as more broadly defined, and the furtherance of all the interests expressly noted in Section 2 of the Code, including the public interest. It is not to merely set up an adversarial forum in which the traditional parties can battle out their respective concerns, come what may. There is more at play than that and a greater responsibility to be exercised by the Board in establishing the structure for collective bargaining under the Code.

105 The Board captured this broader approach in a different context in a case before it dealing with the potential re-opening of a mine in British Columbia. Under the more traditional approach to labour relations initially being followed by the parties, the re-opening of the mine was in serious doubt. When the matter came before the Board, however, the Board found that the current Code required it to look at the situation more searchingly and broadly. In doing so, the Board found that the Code provided a basis to ensure the mine re-opened and thereby provided critical jobs for the employees, the local community, and the province.

106 In supporting this approach on reconsideration, the Board commented as follows:

The re-opening of the mine as a viable business would be in the interests of local workers who need the jobs the mine would provide, the union who will represent those employees, the Employer, and the local community which will benefit from the employment and the economic multiplier effect of it re-opening. Section 2 directs the Board to consider all these interests in interpreting and applying the provisions of the Code.

Labour relations under the Code is intended to further, balance, and contribute to the success of these interests. In the Code, collective bargaining is recognized as an important societal institution which should be a vehicle for success, not failure. Labour relations under the Code needs to be a system which drives and achieves successful outcomes. (*Taseko Mining Ltd.*, BCLRB No. B299/2004 (Leave for Reconsideration of BCLRB No. B218/2004), paras. 12-13).

107 The Board also applied this broader, success-oriented approach in assisting with the resolution of the traditionally difficult, and at times even dysfunctional, collective bargaining between Construction Labour Relations Association and the Bargaining Council of British Columbia Building Trades Unions: see BCLRB No. B322/2004 and subsequent decisions.

108 The Board has as well tried to engage the community in respect to the positive, problem solving focus of the Code, consistent with this focus on producing success, not just acrimony and disruption: *Children's and Women's Health Care Centre of British Columbia and BC Cancer Agency*, BCLRB No. B393/2004 (Leave for Reconsideration of BCLRB No. B415/2003).

109 Thus, in the present matter, the certification structure which was established was intended to further the collective bargaining success of the parties and protect the further, broader interests noted in the Section 2 framework of the Code.

110 The Board will want to see that the structures it establishes do in fact contribute to these matters. That includes successful collective bargaining which furthers the interests of the three Section 2(a) parties (i.e., including the employees' concerns regarding job security as well as for wage and benefits, etc.) and the furthering of the provision of critical, patient services in the public interest (see Sections 2(f) and (g) of the Code; see also *Health Employers' Association of British Columbia (Fraser Health Authority and Burnaby Hospital)*, BCLRB No. B334/2002 (Leave for Reconsideration of BCLRB No. B228/2002), 87 CLRBR (2d) 70).

111 As a result, the Board's law in this area of certification of health care contract service providers may still be developing. The certification in this case, for instance, encompasses separate, commercial contracts the Employer has with two, separate owners. If that is a certification structure which has inhibited successful collective bargaining and the furthering of the other Code interests such as we have noted, that should be brought to the Board's attention.

VI. CONCLUSION

112 In conclusion, we dismiss the application for reconsideration.

LABOUR RELATIONS BOARD

***"BRENT MULLIN"***

BRENT MULLIN  
CHAIR

***"PHILIP TOPALIAN"***

PHILIP TOPALIAN  
VICE-CHAIR

**CONCURRING REASONS**

113 I agree with the ultimate conclusions reached by my colleagues in upholding the  
Original Decision. However, I would reach that conclusion on a slightly different  
analytical basis, which is set out below.

114 As was noted by the Board in *RMH Teleservices International Inc.*, BCLRB No.  
B188/2005 (Leave for Reconsideration of BCLRB No. B345/2003) ("*RMH*"), two  
fundamental rights in the Code come into play in cases such as this one, i.e., the right of  
employees to choose whether they wish to be represented by a union and an  
employer's right of expression: para. 22.

115 As was also noted in *RMH*, the amended Code expands employers' right of  
expression to include the expression of views regarding unionization.

116 One of the purposes of the 2002 amendments to Sections 6(1) and 8 of the Code  
was to further informed and free choice by employees: *RMH*, para. 59. That is  
underscored by the amendments to Section 2(a) directing the Board to have proper  
regard to the rights and interests of employees as well as unions and employers.

117 Coercion and intimidation are clearly antithetical to informed and free choice and  
hence the proscriptions in Section 8 (and other Code provisions).

118 The concept of coercion has been typically characterized by the Board as  
involving the use of force, threats, undue pressure or compulsion: see, for example,  
*Cardinal Transportation B.C. Incorporated and Ed Klassen Pontiac Buick GMC (1994)*  
*Ltd.*, BCLRB No. B344/96 (Reconsideration of BCLRB Nos. B463/94 and B232/95),  
(1997), 34 CLRBR (2d) 1.

119 In *R. v. Therien*, (1958), 16 D.L.R. (2d) 646 (B.C.C.A.) Davie J.A. stated that  
"...Section 6, in my opinion, is intended to assure that employees may freely choose  
between joining and not joining by protecting them from pressure by union or employer  
or in the case of inter-union rivalry, from pressure by competing unions" (p. 661).

120 Davie J.A. went on to say that an attempt to persuade by rational argument is  
permissible but an attempt to compel by any form of pressure is not (p. 661).

121 Under the Code, in determining if the expression of views is coercive or  
intimidating, the Board considers both the entire context and cumulative effect:  
*Convergys Customer Management Canada Inc.*, BCLRB No. B62/2003; *RMH*, para. 50.

122 In my view, the question to be answered in this case is whether a reasonable  
employee would have felt undue pressure, i.e., pressure that would have undermined  
the exercise of their choice in all the circumstances.

123 As was noted by the Board in *RMH*, while there is a right of expression, listeners  
also have a right not to listen if that is their wish: para. 40. As was also noted in *RMH*,  
the workplace has characteristics that distinguishes it from other social relations, i.e.,  
there is a power imbalance arising from the employer's authority to direct the workforce  
(para. 52).

124 Expression in the workplace occurs in that context.

125 The decision whether to unionize is an important one for employees to make. As  
indicated earlier, informed and free choice on such an important matter should be free  
from undue pressure.

126 I agree with the reasoning and conclusion provided in my colleagues' analysis  
that the four meetings held at Windermere were captive audience meetings.

127 While such meetings are not *per se* coercive, they will be closely scrutinized for  
the reasons articulated in *RMH*.

128 In my view, an employer's authority in the work place means even non-coercive  
employer expression regarding unionization will have an impact or influence on  
employees. Under the amended Code influence of that nature is permissible.

129 In this case, the views expressed by the Employer in the captive audience  
meetings essentially related to an expression of preference for CLAC and the CLAC  
collective agreement and a rationale or explanation for that preference.

130 I agree with my colleagues that the expression of those views were not  
provocative, inciting or threatening. I also agree that the expression cannot be properly  
characterized as a call to action. I find the expression was largely intended to  
persuade. However, I find that the fact the views were expressed in the context of a  
captive audience meeting means a reasonable employee would have also felt pressure  
to accept those views.

131 I note the original panel's findings in this regard, which I accept, that the  
expression of views in this case constituted a mixture of pressure and persuasion.

132 In my view, the pressure created by the expression of views in the captive  
audience meetings in this case required that employees be provided a reasonable  
opportunity to make inquiries and to be able to properly assess the Employer's views.  
That opportunity is an important element of free and informed choice.

133 As it was, the CLAC meetings occurred the very next day following the captive  
audience meetings conducted by the Employer and there was no real chance for  
employees to make inquiries and assess the Employer's views. In my mind, denying  
employees that opportunity would reasonably constitute additional pressure to that  
already existing through the captive audience meetings.

134 The overall timing of events would have created additional pressure as well.  
More specifically, notice of the captive audience meetings was posted April 18, 2006.  
The four meetings occurred the next day. Notice of the CLAC meetings was posted that  
same day, i.e., April 19, and those meetings occurred the very next day with a vote at  
the conclusion of the CLAC meeting.

135 Of further concern is the fact the CLAC meetings were arranged by or with the  
Employer, held at the worksite with attendance paid for by the Employer.

136 Those considerations are part of the context and relevant to determining whether  
a reasonable employee would have felt undue pressure in the exercise of their Code  
rights, i.e., choice.

137 I find that when the context and cumulative effect is considered, I would uphold  
the outcome in the Original Decision and agree with my colleagues that the Employer  
breached Section 9 of the Code.

138 In my view, with the 2002 amendments, an employer may choose a variety of  
methods by which to communicate its views regarding unionization to employees. As  
was noted in *RMH*, communication in written form is likely to be the least problematic.  
Of the available mechanisms, a captive audience meeting will attract the most scrutiny  
and, as a practical matter given the considerations of context and cumulative effect, an  
employer choosing that method and participating in the exercise of employee choice in  
other ways, may risk a finding that the expression of views which is not, in and of itself  
coercive, becomes coercive or intimidating when all the circumstances are considered.  
That is particularly so where employees are denied a reasonable opportunity to assess  
an employer's views expressed in such a meeting and to make inquiries.

139 Finally, I agree and adopt my colleagues' analysis and conclusions regarding the  
issue of the appropriateness of the bargaining unit.

LABOUR RELATIONS BOARD

**"MICHAEL FLEMING"**

MICHAEL FLEMING  
ASSOCIATE CHAIR