Labour Relations Board Update

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I. Introduction

In this paper, we endeavour to update the community on Labour Relations Board decisions of note made in the last couple of years, and particularly in the months following the 2006 CLE presentations on "Bill 29-Related Jurisprudence" and "Employer Communications and Campaigns During Union Organizing Drives." This paper will deal with expression rights under the *Code*, both as a defence to alleged unfair labour practices and in other contexts, including union freedom of expression. In addition, we will discuss bargaining unit appropriateness and partial decertification.

II. Freedom of Expression Under the Code (1) Unfair Labour Practices

A. Code Amendments

The Legislature amended the unfair labour practice provisions of the *Code* in 2002. The most notable amendments were to section 8, which is generally known as the "employer speech" provision, and to s. 6(1), which prohibits interference with the formation, selection or administration of a trade union.

Previously, s. 8 provided as follows:

> Nothing in this Code deprives a person of the freedom to communicate to an employee a statement of fact or opinion reasonably held with respect to the employer's business.

In 2002, s. 8 was amended to read as follows:

> 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.

A companion amendment was made to s. 6(1) of the *Code* so that it now makes express reference to s. 8:

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

B. The Decisions in RMH

It is generally accepted that the amendments to ss. 8 and 6(1) were intended to give employers more latitude to communicate with employees about unions and collective bargaining. But the Board initially took a very broad view indeed of employer speech, most notably in the decision in *RMH Teleservices International Inc.*, BCLRB No. B345/2003, 100 CLRBR (2d) 95. The amendments to s. 8 do not compel the result or conclusions drawn in the *RMH* case.

RMH was a telephone "call centre" located in Surrey. In response to organizing activity by the BCGEU, RMH embarked upon what the union described as an "anti-union campaign" (para. 5), a characterization that was accepted by the Board (para. 104).

RMH brought in managers from abroad to circulate throughout the call centre to answer employee enquiries and to give them gifts bearing anti-union messages, including Frisbees and sand pails filled with popcorn.

In addition, RMH set up five projectors in the call centre to present a slide show which included messages about the RMH RRSP matching program, complete with a depiction of a "money tree" and RMH financial statements. In addition, anti-union messages were continuously projected onto the wall of the call centre.

In the now rather notorious original decision in *RMH*, the Board found that essentially all of these actions and statements were permissible under the *Code*. The Board found as follows with respect to the slide shows:

> The projections can be fairly characterized as part of a campaign (an organized course of action) designed by the Employer to persuade employees not to join the Union. However, this does not necessarily mean that the messages projected or their method of their delivery is coercive or intimidating. The fact the Employer expressed its views as part of a campaign against the Union is a relevant feature of the context in which those views are assessed. However, in the absence of coercion or intimidation, views expressed as part of a campaign are protected by Section 8 and do not constitute interference for the purposes of Section 6(1). (para. 104).

But subsequently, a reconsideration panel showed a willingness to limit the kind of activities that the original panel in RMH was prepared to accept.

In RMH Teleservices Inc., BCLRB No. B188/2005 (Leave for Reconsideration of B345/2003), 114 CLRBR (2d) 128, the union argued that a full blown political style campaign of the type waged by RMH was not permitted under the Code and that the slide show and the gifts bearing anti-union messages amounted to "forced listening" and were not permissible or protected under s. 8.

On reconsideration, the Board noted that under the amended *Code* provisions, an employer may communicate with employees about unionization, but it may not do so in a manner that is coercive and intimidating. Coercion and intimidation means "compulsion for the purpose of influencing conduct" (see para. 46). On that basis, the reconsideration panel concluded that the slide shows amounted to "… improper pressure on employees and are thus are [sic] contrary to the restrictions on coercion and intimidation in both sections 8 and 9 of the Code" (para. 66). Similarly, the reconsideration panel concluded that although the gifts were of marginal value, the employer was "improperly intrusive and persistent" in its attempt to express a view in this way (para. 68).

In discussing the slide shows, the reconsideration panel (significantly) observed as follows:

> The slide shows were so prominent, persistent and impossible to miss that employees, while at work, would inevitably have been forced to view them or forced to consciously turn away from them. *This is the type of communication where otherwise permissible views become coercive or intimidating* (emphasis added) (para. 66)

The Board recognizes that the "medium is the message" and this is an important finding in an age when technology allows us to convey information in ever more vivid ways.

On the other hand, we think that the Board unfortunately failed to sufficiently curtail anti union "campaigns" by employers:

> … the test under the legislation is not whether the employer was engaging in an anti-union 'campaign' … Accordingly, if the campaign takes place in written form and the views expressed are not in themselves coercive or intimidating, the Board has in effect found that the fact that they could be characterized as an anti-union campaign by the employer would not be sufficient to render them coercive or intimidating … (para. 54)

With respect, the problem with this specific finding is that it does not take proper account of the fact that if a message is conveyed in the context of a political style campaign that might well make it coercive and intimidating, even though the substance of the message might be otherwise permissible. This finding about employer "campaigns" is in this sense inconsistent with the panel's other findings. The reconsideration panel did not accept that a political style campaign is one, large vehicle or medium for delivering a message and that even messages which might otherwise be permissible or even benign could become coercive if delivered in that way.

We think that although the reconsideration decision in *RMH* addresses some of the most disturbing aspects of the original decision, it does not address employer campaigning sufficiently to give comfort to those concerned about access to collective bargaining for unorganized workers.

C. Employer Speech After RMH

In *SimpeQ Care Inc.*, BCLRB No. 171/2006, 126 CLRBR (2d) 135, the Board found that the Employer violated s. 6(1) when it made certain statements at "captive audience meetings," including statements made to "induce actions in others" (i.e., statements which are not "views" and are not protected by s. 8). This case is under reconsideration, and an issue of interest to the reconsideration panel is the effect of arguably coercive statements when employees have an opportunity to consider and assess these statements and to seek out other points of view.

D. What Relationships are Governed by the Unfair Labour Practice Provisions?

The Board recently had occasion to consider the ambit of the protections afforded by the unfair labour practices provisions of the *Code*. In *Bestlink Transport Services Inc*., BCLRB No. B266/2006, the Board concluded that ss. 5(1)(b), 5(1)(d) and 9 applied to the conduct of Bestlink in relation to owner-operators (independent contractors) because:

> These provisions regulate the conduct of a 'person' toward another 'person.' I infer from the use of these words, combined with the non-exhaustive definition of the word 'person,' that the Legislature intended those provisions apply to actors who do not fit neatly within the definition of 'employer,' 'employee,' 'trade union,' 'employers organization,' or 'council of trade unions.' (para. 60)

However, the Board held that s. 6(3)(a) could not be invoked by the owner-operators regarding Bestlink's conduct, because even though it might apply to a manager and her employer, it could not apply to a company in its dealings with independent contractors (see paras. 109, 110).

It might be noted here that in the past, the Board held that the unfair labour practices provisions serve to protect "managers." In *Hung's Holding Co*., BCLRB No. B129/93, the Board said this:

> The Employer argued that Norgaard was not protected by Section 6(3)(a) or Section 6(3)(b) because he was a member of management and not an employee under the Code. The Employer's position in regard to Section 6(3)(a) is not supported by the jurisprudence. In *Kamloops News Inc.*, BCLRB No. 302/84 (reconsideration of BCLRB No. 285/83), a similar argument was considered by the Board regarding the Section 3(3)(a) of the former Labour Code. The wording of Section 3(3)(a) is virtually identical to that of Section 6(3)(a). The Board ruled that Section 3(3)(a) provided a protection to persons who might not be included in the definition of 'employee' under the Code. Therefore, even if I were to accept the Employer's argument that Norgaard was not an employee he nevertheless falls within the protection afforded by Section 6(3)(a). However, I do not accept the Employer's argument that Norgaard is a member of management (p. 6)

In *Michael Nolin*, BCLRB No. B55/2007 (leave for reconsideration of B123/2006), a reconsideration panel applied Code provisions to communications made by a Saskatchewan lawyer to a group of Wal-Mart employees in BC. The reconsideration panel held that while the lawyer could invoke s. 8, his statements in this case were coercive and intimidating and not within the parameters of that provision, and were indeed in one instance "outrageous and inflammatory."

E. Unfair Labour Practices After Certification

1. During Collective Bargaining

In *Seli Canada Inc*., BCLRB No. B36/2007, the Board held that a statement by an employer during an organizing campaign to the effect that the business may close could well be threatening and coercive in that context but might not be an unfair labour practice if made post-certification during collective bargaining (see para. 60). In a collective bargaining dispute, a key consideration is the extent to which the employer discloses financial information to the union so as to support a statement about possible closure. The Board also affirms that a deliberate lie is not a genuinely held view and is not protected by s. 8 of the *Code*. In addition, in *Seli*, the Board found on the facts that the wage structure in the employer's "final offer" under s. 78 did not contravene the *Human Rights Code* by discriminating on the basis of place of origin, but it is at least implicit in the decision that s. 78 cannot be used to compel employees to vote on unlawful bargaining demands. And finally, the Board affirmed that a vote under s. 78 cannot proceed unless the "final offer" is first presented to the union. An employer cannot "sweeten" the final offer tabled in collective bargaining and attempt to present the sweetened deal directly to employees.

2. During a Decertification Campaign

In *PR Foods Ltd*., BCLRB No. B41/2007, Certain Employees filed a decertification application. There was no evidence the Employer was involved in the campaign to decertify the grocery store in any way (para. 36). However, "… the only employees conducting the decertification campaign were Stark and Pattenden. It is not disputed that all employees knew that Stark is the daughter of the Employer and Pattenden is the wife of the excluded Store Manager" (see para. 34). In these circumstances, the Board dismissed the decertification application. Stark and Pattenden did not intentionally use their familial connections to intimidate employees, but s. 9 posits an objective test, not a subjective one. Given those close familial connections, a reasonable employee would have felt coerced into signing a revocation and the application was dismissed.

F. Remedies

It has been suggested that a lack of effective remedies is a factor that likely contributes to the incidence of unfair labour practices and impairs access to collective bargaining. This is perhaps most apparent in the Board's ongoing reluctance to utilize remedial certification as a remedy.

1. Background

In *Beechwood Construction Ltd.*, [1977] 2 Can LRBR 218, the Board expressed concern that the remedies fashioned by the Board apparently have little impact on the incidence of unfair labour practices. Consequently, in *Beechwood*, the Board signalled that it would resort to remedial certification more readily to deprive employers of the very thing that their unlawful conduct sought to achieve - to remain non-union.

But as observed by the Board yet again, this time in 1996, unfair labour practices were not in decline and remedial certification would therefore be used in a more "liberal" way; see *Cardinal Transportation B.C. Inc.*, BCLRB No. B344/96 (Leave for Reconsideration of B463/94 and B232/94), 34 CLRBR (2d) 1 at para. 328. But the panel in *Cardinal Transportation* also added the following qualification:

> … we do not see the effect of this policy resulting in an immediate and significant increase in the issuance of remedial certifications. The Board can monitor the labour relations effect of the potentially increased use of this remedy both in terms of a particular collective bargaining relationship (its success or failure), and in regard to its general deterrence (the rate of unfair labour practices generally and the kind of unfair labour practices specifically - discharge, discipline, threats of closure, etc.) (para. 329)

This amounts to a plea to the business community to "self regulate" in light of "potential" remedial action by the Board. This sort of plea is no doubt effective for conscientious employers who are inclined to adhere to the *Code* in any event, but would do little to dissuade those who are prepared to contravene the *Code* to defeat a certification drive.

And indeed, this attempt at urging effective self regulation on the employer community has in our view been unsuccessful. And yet, the Board continues to deal with remedial certifications very gingerly indeed.

2. Remedial Certification Today

Nonetheless, it must be pointed out that the remedy has life in it yet. The Board issued a remedial certification in *Trevor J. Lowe Holdings Ltd*., BCLRB No. B212/2005, 115 CLRBR (2d) 113. The employer committed a number of unfair labour practices when it disciplined union organizers, implemented a profit sharing program and increased employee wages to defeat the union. The analysis resulting in the remedy was based upon *Cardinal Transportation*. While this indication of Board activism is encouraging, it is apparent that the *Cardinal* policy of trusting in employer self regulation does not work and should be discarded.

In Trevor J. Lowe Holdings, BCLRB No. B50/2006 (Leave for reconsideration of B212/2005), 122 CLRBR (2d) 155, a reconsideration panel set out at least some of the factors upon which the original panel (or any original panel, presumably) can properly grant a remedial certification:

> … the employer committed a serious unfair labour practice in coercing union organizers by way of a threat to their employment security (paragraph 151); the effect of the contravention was to cast a continuing chill on the organizers' efforts which lasted up to the date of the vote (paragraph 152); a majority of employees had signed cards and therefore the union had a core group of support sufficient for collective bargaining (paragraph 153); the result of the first vote was 17-17 (paragraph 153); and 'but for that contravention, the union would have obtained a majority support at the first vote' (paragraph 154). In circumstances where the Board finds a union would have obtained majority support for certification but for the unfair labour practice committed by the employer, remedial certification is clearly an appropriate remedy (paragraph 6)

In a very recent decision, *Better Buy Market Ltd*., BCLRB No. B84/2007, the Board ordered a remedial certification in circumstances where a manager coerced and intimidated employees by making several statements linking unionization with outright closure of the business, layoffs or a reduction in hours to part-time status. Again, the Board applied the criteria outlined in *Cardinal Transportation*.

3. Scope of a Remedial Order

Another recent decision of interest on the topic of remedies is the decision in *Michael Nolin*, BCLRB No. B55/2007 (leave for reconsideration of B123/2006). In that case, the Board concluded that a Saskatchewan lawyer violated the *Code* by making statements to Wal-Mart employees in BC which were coercive and intimidating, and in one instance "outrageous and inflammatory." Such statements are not protected by s. 8. By way of remedy, the Board ordered Wal-Mart to provide the names and addresses of all employees to a third party mail service provider so that the Board's decision could be sent to them, even though there was no finding that Wal-Mart violated the *Code*. The reconsideration panel upheld this remedial order. Section 133 says that if "any person" has violated the *Code*, the Board may order "a person" to do any number of things, but properly interpreted, the terms "any person" and "a person" in s. 133 are not necessarily the same "person." In other words, "a person" other than the *Code* violator might be ordered to do something so that an effective remedy is crafted. Also, the requirement that there must be a rational connection between the breach and the remedy does not require "precise numerical equivalency" between the employees affected by the breach and the employees affected by the remedy. We submit that the Board sensibly approached the question of remedy in this case.

III. Freedom of Expression Under the Code (2)…For Trade Unions, Too

While much of the discussion in this paper has focused on employer reliance on s. 8 to establish a right, or at least defence, to communication with employees about unionization, unions have increasingly found or tried to find creative uses for this provision.

While s. 8 is sometimes referred to as employer speech provision, it applies to all persons, including unions and their members. So, the broad and liberal interpretation of the protection afforded to employers ought to result in the same level of protection for unions. Unfortunately, to date this has not necessarily turned out to be the case, in our view.

One of the first attempts by a union to rely on s. 8 was by the BC Teachers Federation (the "BCTF"). The BCTF sought to communicate to parents the concerns held by teachers about the

school system (see *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation*, 2005 BCCA 393). David McDonald discusses the BC Court of Appeal decision in considerable detail. However, we noted that in the arbitration proceeding before Donald Munroe, QC, the BCTF not only argued the Employer's policy violated the *Charter* but that s. 8 of the *Code* provided the teachers with the right to communicate with parents.

Arbitrator Munroe rejected the argument advanced by the BCTF. His reasons demonstrate a considerable unease with a literal application of the broad wording of s. 8 (the same literal interpretation that the Board provides in instances of employer speech). Arbitrator Munroe reasoned, at para. 59:

> Examined literally, the language of Section 8 is extremely broad. The one qualifying phrase ('provided that the person does not use coercion or intimidation'), coupled with Section 8's placement in the statute and in context of the provisions immediately surrounding it, suggests that the provision's predominate aim is to create an atmosphere of free speech (absent coercion or intimidation) during that stage of the labour-management relationship commonly called the organizing period - i.e., where the statute is operating in relation to the acquisition or termination of bargaining rights. But while that may be the major purpose of Section 8, its breadth of language does not permit its application to be limited to the so-called organizing period. However, whether one is looking at Section 8 in relation to the organizing period, or in context of a later phase of the labour-management relationship, it cannot be given literal or unqualified application …

The interpretation and application of section 8 does not appear to have been appealed by the BCTF or, if it was, it did not find its way into the Court of Appeal's decision.

Despite this initial failure, unions have continued to attempt to have the protection afforded to employers to apply to trade unions as well.

Last year saw two successful instances of s. 8 being utilized by unions. Both involved members communicating to the public about a dispute with their employer in contravention of an employer policy prohibiting such communication.

The first case is an arbitration award by Dalton Larson, Overwaitea Food Group and UFCW 1518, 149 LAC (4th) 281, upheld on review, BCLRB No. B193/2006. In that case, the grocery store employees wore buttons stating "SOS" and "Save Our Save-On Jobs." The employer was converting a number of "Save-On Foods" stores to "Pricesmart" stores, and in the process implementing a collective agreement that did not provide terms as favourable for employees. The union grieved the conversions but also started a publicity campaign to put pressure on the employer to stop and reverse the conversions. The employer prohibited the wearing of the buttons on its property. Arbitrator Larson upheld the right of the employees to wear the buttons while working. While the union did not argue s. 8 before the arbitrator, on appeal the Board found that the wearing of the buttons was analogous to "an activity that is specifically protected in s. 8 of the Code - the right of every person to express his or her views provide the person does not use intimidation or coercion."

The second case is an arbitration award by Robert Diebolt, QC, Westfair Foods Ltd and UFCW 1518, 155 LAC (4th) 77, upheld on review, BCLRB No. B244/2006 and on reconsideration, BCLRB No. B1/2007. In this case, the Union was in a legal strike position but had not commenced a strike. Employees were leafleting on company property while off-shift. The leaflets urged shoppers to shop elsewhere pending the formation of a new collective agreement. The Employer instructed the employees to stop leafleting and threatened to discipline the employees if they refused to stop distributing the leaflets. The arbitrator found that s. 8 provided the employees

with the right to communicate in the manner that they did. The arbitrator's decision was upheld on appeal and on reconsideration. On appeal the employer sought to argue that the urging a consumer boycott was not an expression of a view. The employer was foreclosed from making this argument because it had not made the argument before the arbitrator.

While these two cases demonstrate some potential avenues for unions to explore, the Board may be changing its approach to s. 8 as a result of the unwelcome outcomes of unions seeking the same freedom of expression as employers enjoy.

For example, late last year the Board issued a decision involving the right of unions and their members to communicate political messages during a labour dispute (Canadian Forest Products et al, BCLRB No. B312/2006 (currently under appeal)). This decision provides some insight as to some possible future development as to how the Board will interpret 8 not just for unions but also for employers.

The case arises from the 2004 strike by the Facilities Bargaining Association (the "FBA"). The FBA was in a legal strike position and commenced a lawful strike against the employer, the Health Employers Association of BC. Almost immediately, the government intervened and legislated the workers back to work, in legislation known as Bill 37. Despite the legislation and a Board order to return to work, the FBA remained on strike. Ultimately, the FBA was found to have been in contempt of a court order requiring it to end its unlawful strike.

While the unlawful strike was underway, various political rallies were held that decried Bill 37. One such protest occurred in Prince George outside of a pulp mill owned by Canadian Forest Products. The protest resulted in the unionized workers at the pulp mill not attending work, which led to a shut down of the pulp mill. Canadian Forest Products proceeded with an application asserting that the Hospital Employees' Union (the "HEU") and two named individuals had unlawfully picketed in contravention of the *Code*, although it did not seek a declaration that its employees had committed an unlawful strike.

After a lengthy hearing, the Board issued its decision in late 2006. In that decision, the Board accepted that during a labour dispute, unions and their members can make political statements, even on placards, as long as it did not have a "signal effect," which essentially means that as long it did not have the same result as a picket line. (This is an important decision on picketing and political protest, however that is a topic for another day.)

But what is important for this paper is that the HEU argued that it and its members were acting within their rights provided by s. 8, standing alone or in combination with s. 64 of the *Code*. The HEU argued that this was a full defence to the complaint.

The Board rejected this defence on three independent grounds. First, the Board held that the Legislature must not have intended s. 8 to apply to the picketing provisions, but the Board does not provide any basis for this interpretation in the actual words used in s. 8. Second, the Board held that the "signal effect" is not a "view" and therefore not protected by s. 8. Third, the Board held that the "signal effect" is coercive.

It is the second and third grounds which are the more interesting grounds for the labour relations community. In the second ground, the Board is adopting a narrower interpretation of "view" than previously applied. Under this approach, not all expressive communication falls within the definition of a view, even when the communication is not coercive. The Board states that:

> The expression of a 'view,' to the extent that it seeks to obtain support from the listener, does so by attempting to persuade the listener on the merits of a cause. Political protest messages are an example: their essence is 'support us if you agree with our message.' The purpose of Section 8 is to ensure the freedom to engage in that type of discourse, for the benefit of both the speaker, who can persuade others to follow a certain course of action, and the listener, who can decide upon a course of action with the benefit of all views on the matter. 'Signal effect' picketing, on the other hand, says: 'Do not cross this because it is an official picket line.' It appeals to the whole host of concerns former Chair Weiler identified in the quote relied upon by the Supreme Court of Canada in *K-Mart*: union discipline, potential job loss, social ostracism, and moral opprobrium for violating the picket line ethic of reciprocal solidarity. Indeed, 'signal effect' picketing is successful as a tool of workers' collective power *because* it relies on such factors to achieve a broad and unanimous response, rather than the varied and less effective response that occurs when individuals take action in accordance with their own individual 'views' of the situation. I conclude that 'signal effect' picketing is not merely the expression of a 'view' within the meaning of Section 8.

The obvious question that arises after reading this passage is this: is it not the case that much of the employer communication that the Board has found to be lawful share the same effect as the so-called "signal effect" (something we could call the "employer speech effect")? It would appear that anti-union employer communication frequently does not attempt to persuade by the merits of a cause, but rather, seeks to rely on other considerations or pressure on employees not to support a union. In fact, the Board has found that s. 8 does not prohibit an employer from putting "undue pressure" on employees not to join a union see Convergys Customer Mgt. Canada Inc., BCLRB No. B62/2003, 90 CLRBR (2d) 238. Thus, it would appear that the Board has created two standards for what constitutes a view, one for employers and one for unions. It will be interesting to see if and how the Board resolves this conflict.

The third ground is also of interest as the communication that the Board found to be coercive was a handful of individuals standing peacefully by the roadside with a person stating that they expected unionized workers to honour the picket line (although it was not clear that the unionized employees heard the statement). Other than that, the individuals were wearing placards that had anti-government messages such as "Bill 37 No!" The Board found that not all aspects of the signal effect were coercive but that some elements of it were. But, the Board does not identify what elements are coercive and why. There did not appear to be any threats or anything that could be construed as anything more than the "undue pressure" which has previously been found to be lawful. The pressure placed on employees by employer effect speech would seem to be greater than any signal effect in the *Canadian Forest Products* case. Once again, it will be interesting to see if and how the Board resolves this conflict.

So, presently, the attempt by unions to have the same right as employers under s. 8 as had mixed success and has resulted in seemingly inconsistent decisions by the Board.

IV. Bargaining Unit Appropriateness

A. … in the Contract Service Provider Sector in British Columbia

In 2006, CLE featured a review of the key decisions and findings of the Board that emerged from litigation involving the *Health and Social Services Delivery Improvement Act*, SBC 2002, c. 2 ("Bill 29"). In this section of the paper, we will identify subsequent developments in the Board's analysis of bargaining unit appropriateness in that context.

1. Background

It is useful to review the background to the disputes in this sector as described in the previous CLE papers. Section 6 of Bill 29 provides that a collective agreement in the health sector must not contain a provision which restricts the ability of a health sector employer to contract out for non-clinical services. Health sector employers invoked this provision and laid off hundreds of employees, most of whom were members of the Hospital Employees' Union (the "HEU"), and contracted with certain service providers to provide dietary, housekeeping, laundry and other support services in health sector facilities.

HEU embarked upon a campaign to organize the employees of these service providers and met with considerable success. In the ensuing three year period, HEU filed many applications for certification with the Board. But meanwhile, these service providers entered into collective agreements with what is now the United Steelworkers of America, Local 1-3567 (the "USWA") through voluntary recognition of the USWA by the employers.

The Board was called upon to address a whole host of issues as a result of the clash between the Employers and the USWA on the one hand, and the HEU on the other. Most of the debate centered on two broad issues - bargaining unit appropriateness and voluntary recognition ratification. The application and interpretation of the Board's decision in *Island Medical Laboratories*, BCLRB No. B308/93, 19 CLRBR (2d) 161 ("IML") was the subject of much discussion.

Essentially, the dispute(s) amounted to this: the employers tended to argue that bargaining units in the private sector service provider industry must mirror the commercial contract under which the employees provide services. The employers asserted that bargaining units must share the same parameters as the commercial contracts, each of which was described as a separate "profit centre." Loosely defined, a "profit centre" is an endeavour that must stand or fall on its own and is financially independent of the employer's other enterprises. HEU tended to pursue broader based bargaining units which in some cases included or spanned more than one commercial contract. HEU pointed to the IML presumption against multiple units and the Board's long standing preference for large, inclusive all-employee units.

2. Recent Developments in the Compass Line of Cases

The employer's position reached its apogee in *Compass Group Canada*, BCLRB No. B194/2004, 107 CLRBR (2d) 55 (upheld on reconsideration in B263/2005, 116 CLRBR (2d) 58). In that case, HEU applied to vary a unit of employees working under a commercial contract between Compass and a particular client at a particular site to include another group of employees working under another commercial contract between Compass and a different client at a different site. Compass opposed the variance, and argued that there must be two separate bargaining units for each of these separate commercial contracts. Compass therefore sought to rebut the IML presumption against multiple bargaining units. The HEU application was dismissed on the basis that the unit sought by HEU was not appropriate because it sought to combine employees working under different circumstances.

But the same panel of the Board later allowed an application by HEU for a unit of employees working under two separate commercial contracts, since the proposed unit included employees working under two contracts between Compass and the same client at the same sites (see *Compass Group Canada*, BCLRB No. B200/2005, 115 CLRBR (2d) 303 (upheld on reconsideration B263/2005, 116 CLRBR (2d) 58 and on judicial review 2006 BCSC 618, 130

CLRBR (2d) 47)). The Employer's appeal of the judgment of the Supreme Court was dismissed (see *Compass Group Canada (Health Services) Ltd. v. Hospital Employees' Union*, 2007 BCCA 237 (April 26, 2007)).

A different panel of the Board found that a proposed bargaining unit very much like the one at issue in B200/2005 was appropriate for collective bargaining in *Compass Group Canada (Health Services) Ltd*., BCLRB No. B6/2006.

3. Other Recent Developments in Health Care

The Board has further refined its approach to appropriateness in this area. In *SimpeQ Care Inc.*, BCLRB No. 171/2006, 126 CLRBR (2d) 135, the Board allowed an application for a bargaining unit consisting of employees of the employer at two separate sites, even though the employees worked under two contracts for two different clients. Essentially, the Board found that the two contracts or enterprises were not as distinct or as separate as the two enterprises in *Compass*, BCLRB No. B194/2004 and thus, a bargaining unit combining employees was an appropriate unit.

In *Good Samaritan Society*, BCLRB No. B12/2007, 131 CLRBR (2d) 117, the Board rejected the employer's contention that it is a "contract service provider" and noted, at para. 26, that in decisions subsequent to BCLRB No. B194/2004, the Board concluded that units which combine separate contracts (and hence the employees working under them) are appropriate bargaining units, including *SerVantage Services Corp*., BCLRB No. B109/2006 (upheld on reconsideration in B140/2006).

4. Contract Service Providers in other Sectors

In *Corps of Commissionaires (Victoria, the Islands and Yukon)*, BCLRB No. B161/2006, the Board allowed an application by CUPE to represent Jail Commissionaires, even though the many employees of the Employer were already represented by the PSAC. In other words, the Board concluded that CUPE rebutted the presumption against IML multiple units and certified a second bargaining unit for this Employer. This finding was, it seems, based largely on the fact that employees of the Corps are certified on a contract by contract basis, and a certain amount of "proliferation" is to be expected. We should add that although this second unit was found to be appropriate by the Board, it does not follow that the inclusion of these employees in a broader, more inclusive unit would be inappropriate.

B. … in the Traditionally Difficult to Organize Sectors in British Columbia

In *IML*, the panel cited *Woodward Stores (Vancouver) Ltd.*, BCLRB 129/74, [1975] 1 Can LRBR 114, and affirmed that in "traditionally difficult to organize" ("TDO") sectors of the economy with low union densities, the Board will "relax" the community of interest factors so as to facilitate access to collective bargaining. The application of the "TDO" concept was contentious in the recent *Wal-Mart* line of cases.

1. Vancouver Film School

A useful point of departure for a discussion of the *Wal-Mart* cases is the decision in *Vancouver Film School*, BCLRB No. B291/2003 (Leave for Reconsideration of B387/2002), 99 CLRBR (2d) 61. In many ways, this case foreshadows the *Wal-Mart* analysis and findings.

In *Vancouver Film School*, the panel rejected the employer's argument that the *IML* "building blocks" approach should be abandoned on the basis that it results in "initial bargaining structures" which create industrial instability. This bodes well for an appropriateness analysis which accounts for access to collective bargaining at least to the degree contemplated by IML. And given the reconsideration panel's affirmation of *IML*, the decision should most certainly not be read as signalling a return to the approach in *Whistler Mountain Ski Corp*., IRC No. C83/90 that was denounced by the IML panel; see pages 171, 174, 175. In other words, an applicant union need not show a "unique" community of interest within a proposed unit to secure an initial less than all employee certification. An initial unit may indeed be a scaled down version of an all employee unit, as IML tells us on page 171. The variation in skills and interests may be as great within a proposed less-than-all-employee unit as the variation is outside of the proposed unit; see *IML*, page 174. An applicant union must simply demonstrate a community of interest within a proposed unit sufficient distinct to allow for a rational, defensible boundary around the proposed unit. This allows for employee access to bargaining and successful organizing in keeping with *IML*.

On the other hand, the *Vancouver Film School* panel also intimates that the Board will more carefully scrutinize applications to ensure the *IML* standard is met in obtaining an initial certification for a first "building block" (see para. 22). But we are concerned at the faint echo of *Whistler* in the reconsideration panel's discussion of the first *IML* factor at para. 29 of the decision:

> The original decision thus found the skills, interests, duties and working conditions of the employees in the alternative unit were similar to both the other employees in the proposed unit and to the employees outside the unit. It concluded that this 'both discourages and encourages' a finding that the employees in the unit had a 'distinct community of interest': *ibid*. The original decision was correct that the issue was whether the employees had a distinct community of interest, but was incorrect in assessing the legal ramifications of its factual findings in that regard. Given that the employees in the proposed unit share similar skills, etc., with those outside it, that weighs against the conclusion that they have a distinct community of interest, even though they share similar skills, etc., with each other. Therefore, this factor should not have been neutral; it should have weighed against a finding of appropriateness.

In our view, this is not in keeping with the principle affirmed in *IML* that an initial building block may indeed be a scaled down version of an all employee unit (at 171) and that the variation in skills and interests may be as great within a proposed less-than-all-employee unit as the variation is outside of the proposed unit (at 174).

But in relation to applications for initial, less-than-all-employee units, the Vancouver Film School panel also addresses the TDO concept and strongly reiterates that the Board will relax the community of interest analysis only in such circumstances. The Board stresses that it will not accept a TDO argument in the absence of compelling evidence (see paras. 17 and 18).

Vancouver Film School affirms IML and the principle that access to collective bargaining is a key component in the appropriateness analysis. But to the extent that it signals a tougher approach to appropriateness in relation to initial applications for certification, and in that vein seems to lapse into something of the discredited Whistler analysis, and moreover, takes a "hard line" on the TDO concept, it is not encouraging for access to collective bargaining and effective organizing.
And that brings us to the Board's decisions in Wal-Mart.

2. Developments in the Wal-Mart Line of Cases

In *Wal-Mart Canada Corp*., BCLRB No. B190/2005, 115 CLRBR (2d) 63, the Board found that a bargaining unit including both the Tire Lube Express employees and automotive department employees ("Division 6") at some seven stores in BC was appropriate for collective bargaining. The Board found that there was a minimal amount of functional integration between the Division 6 group and another division but that this was not sufficient to defeat the application. Also, the panel found that the collective bargaining would not be undermined even though the proposed unit cut across the sales associate and department manager classification lines *in each store* (i.e., sales associates and department managers were found inside and outside the proposed unit). The panel said that the general admonition against certifying a unit which cuts across a classification line at a single site should not be applied without examining the facts (see para. 186). Out of an abundance of caution, the panel went on to concluded that in any event, the department store sector (as opposed to the broader retail sector generally), in which Wal-Mart operates, is TDO and noted that the principle that the Board will not cut across a classification line at a single site is significantly relaxed in the TDO context. The Board granted the application for the seven stores and ordered the representation vote to be counted.[1]

In *Wal-Mart Canada Corp*., BCLRB No. B301/2005 (Leave for Reconsideration of B190/2005 and Certification dated September 7, 2005), 117 CLRBR (2d) 127, a reconsideration panel concluded that the original panel gave rather short shrift to the general principle that a proposed bargaining unit which cuts across a classification line(s) at a single site is not appropriate. But the reconsideration panel notes that the principle is "not an absolute rule" (para. 49) and says that:

> … While the original panel recognized the restriction against cutting across classification lines in a single integrated site would not generally occur, it concludes the facts were appropriate to find an exception to the general proposition (para. 53)

The reconsideration panel nonetheless remitted this issue back to the original panel, a decision which is hard to understand in light of the statements set out above. The decision is even more difficult to understand because the reconsideration panel makes no effort to address the original panel's conclusion in the alternative that Wal-Mart operates in the TDO department store sector and the general rule against cutting across a classification line(s) is therefore significantly relaxed. The decision of the reconsideration panel thus gives rise to concerns about appropriateness and access to collective bargaining. First, based on the approach of the reconsideration panel, it appears that an original finding that a proposed unit is appropriate is surprisingly fragile on reconsideration. Second, the reconsideration panel muses that it may be time to test the continuing relevance of the TDO doctrine in the retail sector, even though the original panel concluded that the department store sector, and not retail generally, was at issue. This was a harbinger of things to come.

But in the end, the original panel again reviewed the circumstances in light of the general (but not absolute) rule against cutting across classification lines at a single site and reached the same conclusion as in B190/2005 (see Wal-Mart Canada Corp., BCLRB No. B5/2006 (published January 10, 2006)).

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1 Following the publication of B190/2005, the representation vote was conducted, and only Division 6 employees at the Cranbrook store voted for certification. A certification therefore issued for Division 6 employees at Wal-Mart in Cranbrook on September 7, 2005.

However, Wal-Mart sought reconsideration of B5/2006 and was successful (see BCLRB No. B153/2006). In that case, Chair Mullin concluded that the TDO concept was not applicable in the circumstances, but even if it was, it would not justify the manner in which the original panel permitted the unit boundaries to cut across classification lines. With respect, this conclusion on these facts robs the TDO concept of its remaining vitality and it now has little capacity, if any, to actually foster access to collective bargaining. The Chair also alluded to the Board's refusal to recognize new "crafts" and reluctance to create "new technical units." This decision was upheld on judicial review (see *UFCW Local 1518 v. BC Labour Relations Board & Wal-Mart Canada*, 2007 BCSC 546 (May 2007)).

Much of Chair Mullin's thinking on these issues is outlined in *Vancouver Film School*.

In a subsequent decision, the Board found that stand-alone units of Division 6 employees in the Surrey West store and the Guildford store were appropriate (see *Wal-Mart Canada Corp.*, BCLRB No. B51/2006). The union argued that the facts in the Surrey and Guildford cases were same as the facts in B190/2005 and B5/2006 and the same result i.e. the one that was favourable to the union should follow. The panel accepted this argument. The union was successful in the representation vote at the Surrey West store and was therefore certified as bargaining agent for Tire & Lube and automotive employees at that location.

However, in BCLRB No. B186/2006 (leave for reconsideration of B51/2006), a reconsideration panel reasoned that if the facts in the Surrey and Guildford cases were indeed the same as in B190/2005 and B5/2006, then the Surrey certification must be cancelled, because B5/2006 was overturned on reconsideration in B153/2006 and the same legal outcome must follow on the same facts.

There are no unionized Wal-Mart employees in BC.

C. … in the Context of Decertification

Appropriateness principles are also applied in the context of attempts at partial decertification of bargaining units, as is discussed below.

D. … in General

1. Back to Basics - The First IML Community of Interest Factor

The Board's recent decision in *Good Samaritan Society*, BCLRB No. B12/2007, 131 CLRBR (2d) 117 clarifies what we think is an often misunderstood and misapplied passage in *IML*, wherein the first community of interest factor is described as being of "limited conceptual guidance" (at 181). Some parties have cited this passage so as to minimize the importance or weight that should be ascribed to the first *IML* community of interest factor, "similarity in skills, interests, duties and working conditions." But in fact, the *IML* panel did not say that the first factor was less important than the others. The *IML* panel explained that:

> During the 1940s, 1950s and 1960s, with unionization being primarily in the private sector, historical divisions took place which reflected a more traditional view of community of interest, *i.e.* the separation of white-collar from blue-collar workers. This distinction was often based on gender, skills or sometimes an unstated division based upon class. A plant would be separated from office; indeed, if the office was organized it may often have been to an entirely different union. However, in the late sixties, seventies and eighties, with the growth of public sector unions and the policy of a single, all-employee bargaining unit, these distinctions were no longer

> observed in the public sector. Indeed, today in British Columbia, an all-employee bargaining unit will include within one collective agreement widely different skills and terms and conditions of employment. In the public service, a master collective agreement combined with subsidiary component agreements will include groups as diverse as prison guards, conservation officers, senior financial officers, and social workers. Within the health care industry, there are difference professional groups with their own self governing bodies (some national in scope and some established by statute), all included in the same bargaining unit. Traditional boundaries have been deliberately erased in favour of large bargaining units, which have proved viable in collective bargaining terms. So although similarities in skills, interests duties and working conditions remain at a common sense level a factor in community of interest, it may be of less help in drawing a rational and defensible line; its inherent flexibility may prove useful but provide only limited conceptual guidance (at 180-81)

Thus, the Board's statement in *IML* that the first factor is of "limited conceptual guidance" does not mean that this factor is not terribly important or is less important than the other factors. What this means is that in the past, if a proposed bargaining unit included many diverse employee groups that diversity would militate against the application. White collar workers were separated from blue collar workers, men were separated from women, production employees were separate from office workers, and so on. But today, the Board is much more inclined to encourage large, diverse, inclusive units. So it is no longer the case that *dissimilar* skills and interests militate against a proposed unit to the degree it did in the past. But where a unit is comprised of employees with very *similar* skills and interests and working conditions, that is a strong factor in favour of the proposed unit, and this factor is as influential and as of the same degree of conceptual guidance as any of the *IML* factors.

In *Good Samaritan*, the panel held as follows:

> In *IML*, *supra*, the Board does state that the inherent flexibility of the first factor may provide only 'limited conceptual guidance,' however, when the passage is read in context, I take the Board to merely be making the point that dissimilar skills and interests no longer provide as much help as they once did in drawing a rational and defensible line around a less than all-employee unit (para. 12)

The panel then reviewed the passage from *IML* that is quoted above and concluded as follows:

> In my view, this passage does not stand for the proposition that similarities in skills, interests, duties and working conditions are of limited conceptual guidance when the issue is whether an all-employee unit is appropriate. To the extent that the Board decisions cited by the employer support such a proposition, I am not persuaded by the reasoning in them (para. 13)

2. Farewell and Adieu to Multi-Employer Units?

In *Canadian Union of Public Employees*, BCLRB No. B18/2006, a number of employers included in a single multi-employer bargaining unit withdrew their support for that bargaining structure and applied to the Board under Section 142 to dismantle it. The application was allowed. The Board said that the *IML* community of interest factors are of "limited assistance" in assessing the appropriateness of a multi-employer units, but that in any event, the application does not result in proliferation of units with the same employer so the presumption against multiple units is not offended. This decision was upheld on reconsideration in BCLRB No. B114/2006 and is now the subject of a petition for judicial review filed by the union.

V. Partial Decertification

In this area, the Board continues to adhere to the law and policy developed in *White Spot Ltd*., BCLRB No. B16/2001, 65 CLRBR (2d) 161 (leave for reconsideration of B440/99, 55 CLRBR (2d) 184) and *Baptist Housing Society*, BCLRB No. B442/98, 48 CLRBR (2d) 1 (leave for reconsideration dismissed, B176/99).

In Certain Employees of the Gulf and Fraser Fishermen's Credit Union, BCLRB No. B308/2006, 130 CLRBR (2d) 124, employees at the South Burnaby branch sought partial decertification of a unit comprised of six locations. The employer also operated six non-union locations. The Board applied the law and policy set out in White Spot and dismissed the application. Two aspects of the decision are of particular interest. First, the Board concluded that although employees regularly moved from branch to branch, partial decertification would have only a minimal impact on the employees in the remaining unit, presumably because employees would still have an opportunity to post into positions in the five remaining union locations and the six non-union locations. Second, the Board concluded that decertification of the entire unit was possible in practical terms and therefore dismissed the application.

The Board applied the *Baptist Housing* test in *Certain Employees of the British Columbia Cancer Agency (Genome Sciences Centre)*, BCLRB No. B113/2005 wherein employees in one of several research departments of the Cancer Agency, which is itself integrated with the Provincial Health Services Authority, sought partial decertification. The Board dismissed the application on the basis of appropriateness considerations:

> Applying the IML factors to this case, I find that the 'group' proposing to leave would not constitute an appropriate unit. All of the employees in the bargaining unit, and not just the secretaries and clerks, have similar skills, interests duties and working conditions as other bargaining unit members. The GSC and the rest of the BCCA are under the same administrative structure which is engineered by the PHSA. There is not physical separation of the Certain Employees from the rest of the bargaining unit and, in particular, from the rest of the research centres of the BCCA. The fact that there is little, if any, functional integration between Certain Employees and other members of the bargaining unit is not determination [sic] given my other findings. Most significantly, this application cuts across classification lines with no meaningful geographic separation (para. 60)

VI. Conclusion

The law and policy of the *Code* has continued to evolve in response to changes to the legislation and changes in the way that services are provided to British Columbians. Given the level of economic activity in BC, we can expect the next 12 to 24 months to present new challenges, particularly for unions seeking to organize in an era of expanded employer speech and perhaps greater privatization of services, and for employers seeking to remain viable in a competitive, heated economic environment. These are the kind of conditions which produce new problems to solve, and Board jurisprudence will no doubt continue to evolve.