

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

LIFESTYLE RETIREMENT COMMUNITIES LTD. (formerly  
INTERNATIONAL CARE CORPORATION)

(the "Employer")

-and-

BRITISH COLUMBIA GOVERNMENT AND SERVICE  
EMPLOYEES' UNION

(the "Union")

PANEL: Keith Oleksiuk, Chair  
John B. Hall, Associate Chair (Adjudication)  
V. A. Pylypchuk, Vice-Chair

COUNSEL: Colin Gibson, for the Employer  
Ken Curry, for the Union

CASE NO.: 33566

DATE OF HEARING: September 23, 1997

DATE OF DECISION: December 22, 1997

## DECISION OF THE BOARD

### I. NATURE OF APPLICATION

1           The Employer applies under Section 141 of the *Labour Relations Code* for leave  
and reconsideration of the Board's decision in BCLRB No. B163/97. The original panel  
granted the Union's application for certification. The Employer asserts the original  
decision was inconsistent with the principles expressed or implied in the Code because  
employees will fall both within and outside the bargaining unit.

### II. FACTS

2           The facts are detailed in the original decision. Set out below are the crucial  
findings for the purpose of this leave application.

3           The Employer operates three geographically separate facilities in Victoria. The  
Parkwood and Parkwood Care are located across the street from each other, and they  
are approximately three kilometres from the Kensington. The Union applied for a  
bargaining unit at the Kensington.

4           The classifications of employees at the Kensington and the Parkwood are  
essentially the same. The Parkwood Care does not have all of the same classifications  
as the other two facilities, but has a few additional ones including nurses and personal  
care assistants. Terms and conditions of employment are the same at all three sites.

5           There are three categories of employees at the sites: full-time employees work  
at least 152 hours per month on a regularly scheduled basis; part-time employees work  
less than 152 hours per month on a regularly scheduled basis; and casual employees  
work on an on-call basis.

6           Management of the three facilities is centralized. Each facility has a separate  
budget and there is separate time keeping for employees at each facility.

7           Two full-time employees, Betty Wade and Ann Walmsley, regularly work at both  
the Kensington and the Parkwood. Walmsley works two evenings per week at the  
Kensington and two other evenings per week at the Parkwood. Wade works as a night  
house person at the Kensington and the Parkwood.

8           Ray Rosauero, a full-time cook's assistant at the Kensington, has worked on a  
casual basis at the Parkwood and the Parkwood Care, and more recently has worked  
between the Kensington and, on a casual basis, at the Parkwood Care.

9           Among part-time employees, Fred Weber works at all three facilities as the  
building services assistant. He works Saturdays, Sundays and statutory holidays,  
rotating between the three facilities. Mark Baim, the part-time cook/baker, works at the

Parkwood Care on Sundays, Mondays and statutory holidays, and he is permitted to work three of the remaining five days per week as an on-call cook at any of the three facilities. He has worked substantial hours between the Kensington and the Parkwood Care, as well as some hours at the Parkwood. Mandy Yu, a part-time busperson, works at the Parkwood on Saturdays, Sundays and statutory holidays. She has also worked a number of hours at the Kensington as a busperson. Dianne Schiffner has worked part-time as a housekeeper/laundry employee at the Parkwood Care on Saturdays and Sundays and has worked as a laundry assistant at the Kensington on Mondays.

10           Among casual employees, three (Hornock, Dolf, and Canillo) have each worked more than one week at another facility besides the Kensington and one (Canillo) has worked substantial hours at both the Kensington and the Parkwood. Employee Orr also worked to some not insubstantial extent at both the Kensington and the Parkwood.

### III. DECISION OF THE ORIGINAL PANEL

11           The Employer took the position before the original panel that there was a consistent managerial policy of functional integration between the three facilities. It argued that the certification application cut across classification lines resulting in certain employees being both inside and outside the bargaining unit. In every other respect, the Employer said the other factors in *Island Medical Laboratories Ltd.*, BCLRB No. B308/93 (Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), (1993), 19 CLRBR (2d) 161 ("*IML*"), pointed to a single appropriate bargaining unit encompassing all three facilities. The Employer highlighted a number of concerns regarding the administration of a collective agreement and the viability of collective bargaining if the proposed bargaining unit was certified.

12           The original panel identified the two fundamental principles of the Code that impact on appropriateness determinations: access to collective bargaining and industrial stability. The panel outlined the test for determining appropriateness as being whether a rational, defensible line can be drawn around the proposed unit. The underlying labour relations question is whether the proposed bargaining unit will produce viable collective bargaining and collective agreement administration.

13           The original panel went on to say that post-*IML* cases have consistently pointed to functional integration as the most important community of interest factor where the Board has denied an initial application for certification. The question which the original panel posed for itself was: "at what point does functional integration of employees between geographic locations produced non-viable collective bargaining or collective agreement administration?" (para. 31).

14           The original panel was cognisant of the principle in *IML* that functional integration, as it relates to employee interchange or job duty integration between locations, must be on a day-to-day basis reflecting a consistent managerial policy, and not simply amount to holiday relief or the replacement of sick employees. It discounted the example of transfers of employees from one facility to another as being an example of functional

integration on a day-to-day basis within the meaning of *IML*. For the same reason, the panel discounted the employment of casuals on an on-call basis at the various facilities.

15 The original panel then posed the question of whether the fact that a few employees may be both inside and outside the bargaining unit was sufficient to conclude that collective bargaining and collective agreement administration would not be viable. It referred to *A.S. King Logging Ltd.*, BCLRB No. 14/79, [1979] 1 Can LRBR 551, where the Board determined a bargaining unit to be inappropriate as an individual employee would otherwise have been within and outside of the bargaining unit on a number of occasions in the course of a single day. The original panel also referred to *Cariboo Memorial Hospital*, BCLRB No. 47/74, [1974] 1 Can LRBR 418 (relied on in *A.S. King Logging Ltd.*), where the Board held that once the unit is defined, then the union either represents the employee or it does not. It is totally at odds with the scheme of the Code to divide an employee amongst two or more unions which represent different units within the same employer.

16 In weighing the fact that an employee's work relationship might be governed in part by a collective agreement and in part by an individual contract of employment, the original panel determined that this does not take into account the importance of access to collective bargaining on an initial application for certification. It distinguished *Cariboo Memorial Hospital* and *A.S. King Logging* on the basis that in those cases an individual employee would be within and without the bargaining unit in the course of a single day. The panel then reviewed the facts in the case, noting that some seven out of 47 employees could be considered to be functionally integrated at more than one work place within the Employer's operation. The panel concluded that this was a limited extent of functional integration and considered whether it should preclude the viability of collective bargaining or collective agreement administration.

17 The original panel then went on to deal with a number of concerns raised by the Employer going to the issue of viable collective bargaining or collective agreement administration. It determined that picketing would not be a problem because it would be limited to the Kensington if the proposed bargaining unit were determined to be appropriate. The original panel further determined there is no prohibition in *IML* from cutting across classification lines where the classifications exist at more than one geographic location. The original panel noted that the Board regularly cuts across a classification line to grant an application for certification at one location. The original panel determined that the scope of the bargaining unit was easily determined as being at the Kensington. On some of the other issues, the original panel declined to give a definitive opinion. With respect of the issue of seniority and employee status, it said that would be a matter to work out at collective bargaining. Similarly, the original panel concluded that, with regard to the matters of discipline and a disciplinary record, the parties could work out a satisfactory procedure at collective bargaining; if not, it would be a matter to be addressed by an arbitration board. Thus, the panel concluded that none of the issues raised by the Employer posed an impediment to viable collective bargaining or collective agreement administration.

18 The original panel distinguished *Arcus Community Resources Ltd.*, BCLRB No. B419/95, by saying that the functional integration in that case between members of the proposed unit and a third location involved all of the care giving employees of the proposed bargaining unit. The original panel determined that to be extensive functional integration when compared to the facts of this case, which it termed to be a limited functional integration.

#### IV. ARGUMENT

19 The Employer argues that the decision of the original panel is fundamentally inconsistent with the Board's long-standing policy against certifying bargaining units in which employees are both in and out of the unit simultaneously. Further, the Employer says that the original decision results in the creation of a bargaining unit around which a rational, defensible line cannot be drawn contrary to the principles expressed or implied in the Code. Finally, the decision is contrary to the Board's requirement that the bargaining unit must ensure the viability of collective bargaining and collective agreement administration.

20 The Employer argues that the original panel recognized the problem in certifying the proposed bargaining unit, but dismissed the problem on the basis of *de minimis* and on the basis that on any given day employees worked only in one of the facilities. The Employer acknowledges that *Richmond Elevator Maintenance Ltd.*, BCLRB No. B119/97, held that there may be some exceptions if the extent of crossover is such that collective bargaining and collective agreement administration could be viable. The kind of exception is probably best illustrated by *North Shore Disability Resource Centre Association*, BCLRB No. B284/95 (Leave for Reconsideration denied: BCLRB No. B405/95). In that case, employees effectively worked separate jobs in locations that were being treated as separate employers.

21 The Employer says that in this case the Union is asking the Board to depart from *A.S. King Logging Ltd.*, *supra*, and as such it has a "heavy onus" of proving that collective bargaining and collective agreement administration will continue to be viable despite employees being in and out of the bargaining unit. The Employer says the exchange of employees was not concocted for improper purposes and has been a long-standing practice. The positions straddle more than one facility.

22 The Employer argues further that the original panel's distinction (which turned on the fact that on any given day the employees are only at one facility) has no merit. One employee works a rotating shift at all facilities continuously, and two others work shifts at two facilities on a regularly scheduled basis. The Employer says it does not make any labour relations sense to create a unit for employees who have one foot in the bargaining unit and one out. In *Cariboo Memorial Hospital*, *supra*, the Board said it would not create units where certain employees would be split between two certified bargaining agents. The same principle holds here and the Board should not be creating units where an employee's job is governed in part by a collective bargaining

relationship and in part by the common law relationship. That principle was established in *A.S. King Logging* where former Vice-Chair Rod Germaine stated:

... There is no valid reason for distinguishing between the situation in which an employee's work relationship might be governed by two collective agreements and the situation in which an employee's work relationship might be governed in part by a collective agreement and in part by an individual contract of employment. It would be an equally "unwise labour policy" for the Board to permit either of those situations. (p. 554)

23 More recently, the Board said in *Ely Publications Ltd.*, BCLRB No. B401/94:

... While a bargaining unit may be defined by reference to the work performed by employees, the structuring of units around job functions alone may lead to impractical situations in a labour relations setting: *Cariboo Memorial Hospital et al, supra* and *A.S. King Logging Ltd., supra.*, p. 552. The Board will not certify a unit in which an employee may be both in or out depending upon the duties performed at any given time. ... (pp. 18-19)

24 The Employer goes on to raise a number of examples which it says would be problematic and which would render the collective bargaining and collective agreement administration non-viable in such a situation. These include the administration of discipline and discharge; keeping track of an employee's disciplinary record and knowing what could or could not be applied under which regime; implementing discipline or termination for a non-culpable manner such as absenteeism or substance abuse; the calculation and payment of overtime for employees who worked at both locations; the Union's obligations to represent an employee with regard to all these matters; the administration of wages and benefits; problems of picketing; and the problem of expanding the unit through a variance.

25 The Employer says that the original panel's solution of having the parties work out some of these matters at collective bargaining is untenable because they cannot be taken to impasse and there is no way to compel a solution. The Employer says as a result that a rational, defensible boundary cannot be drawn around the proposed bargaining unit. The original panel's decision should therefore be reversed and the certification cancelled.

26 The Union argues that the original panel's decision was consistent with the principles expressed or implied in the Code. It says that all the cases where bargaining units have been held to be inappropriate are situations where there is a continuum of work amongst various locations. The example here of Weber approaches that kind of continuum, but not the other employees that the Employer is relying upon. The issue becomes whether the minimal example of one individual working at all three locations is sufficient to deprive 47 employees access to collective bargaining. The Union argues that the original panel was in a much better position to make an assessment of these

facts and came to the correct conclusion. All the cases suggest that the issue is fact-driven and must be determined on the circumstances of each individual case.

27 The Union distinguishes *Ely Publications Ltd., supra*, on the basis that the crossover there was at the same geographic location. The Union also distinguishes *Arcus Community Resources Ltd., supra*, on the basis that the crossover occurred each working day for a large number of people and at a separate geographic location.

28 The Union says that there is no problem in this case because if employees go to work at the Kensington they are part of the bargaining unit that day. If the employees go to work at the Parkwood they are not part of the bargaining unit for that day. It is not the same problem as described in the previous decisions where employees are in and out of the bargaining unit all on the same day.

29 The Union says that the key is whether the bargaining unit continues to be viable. Is it any less viable with increased interchange? The Union argues that where the matter is *de minimis*, the ability to fix it at negotiation is greatly enhanced; where the interchange increases, the problem and the obstacles to fixing it at collective bargaining increase. It is a question of degree and the assessment must be made by the original panel hearing the application.

30 The Union argues that the application of discipline would not be a problem and that the Employer would have the right to use a record of the employees when they work off-site because that would be related to their work on-site. Further, the Union says even if the parties were not able to work out their problems in collective bargaining that would not make the unit any less viable in these particular circumstances with the limited interchange that occurs.

31 The Employer in rebuttal says the Union must take the operation as it finds it. The Union's argument amounts to saying that the Employer could have structured things differently.

## V. ANALYSIS AND DECISION

32 The principles governing determinations of bargaining unit appropriateness are well established. The policy articulated by the Board in *IML, supra*, continues to serve as the foundation for such inquiries. However, as expressly recognized in *Richmond Elevator Maintenance Ltd., supra*, functional integration has generally emerged as the most important factor.

33 The *Richmond Elevator* decision serves as a useful starting point for our analysis. The panel referred to *A.S. King Logging Ltd., supra*, and identified the underlying concern as "...the ability to achieve a viable collective bargaining regime in situations where individuals have some of their work for a particular employer covered by the terms of a collective agreement, and other work for that same employer covered by another collective agreement or by an individual contract of employment" (para. 15). The panel summarized its view of the authorities as follows:

The cumulative message that can be drawn from these cases is that the Board must be able to satisfy itself that the potential difficulties of having an employee included or excluded from a bargaining unit when some work done by that employee for the employer takes place inside of the collective bargaining relationship, and some work outside of the collective bargaining relationship can be addressed in a way that allows a viable collective bargaining relationship. Generally, it is the extent of the employee interchange or cross-over that is critical in determining whether collective bargaining is viable. ... (para. 16)

34 A similar question was posed in this case by the original panel: at what point does functional integration of employees between geographic locations produce non-viable collective bargaining or collective agreement administration? (para. 31). Not all levels of functional integration will necessarily result in a proposed unit being inappropriate for collective bargaining. We confirm that in assessing the viability of collective bargaining, the Board examines, among other things, the *nature or type* of any overlap in duties between employees within a proposed unit and those who would be excluded, as well as the *extent* of any such overlap.

35 The Employer here has a *bona fide* and long-standing practice of employees working at two or more of its facilities:

- two full-time employees (Wade and Walmsley) regularly work at more than one facility, including the Kensington (para. 15).
- another full-time employee at the Kensington (Rosauro), has worked on a casual basis at the other facilities, but more recently has worked mostly at the Kensington and, on a casual basis, at Parkwood Care (para. 15).
- one part-time employee (Weber) works at all three facilities on a rotating basis (para. 16).
- another part-time employee, Schiffner, regularly works at Parkwood Care and the Kensington (para. 16).
- two other part-time employees (Baim and Yu) have worked at two or more of the facilities, including the Kensington; one of them (Yu) worked "substantial hours" at the Kensington and Parkwood Care, as well as some hours at Parkwood (para. 16).
- three casual employees (Hornock, Dolf and Canillo) worked more than one week at a facility besides Kensington; another (Orr) worked "to some not insubstantial extent" at both the Kensington and Parkwood (para. 17).

36 The original panel concluded that the exchange of casual employees "who provide relief coverage, or are employed for special events or when extra work needs to be done" failed to demonstrate "functional integration on a day to day basis within the

policy set out in *IML*" (para. 32). Even with their exclusion, the original panel concluded that at least four and as many as seven full-time and part-time employees regularly work at the Kensington and another facility (para. 40). Unlike *North Shore Disability Centre Association*, these employees have not been hired individually at each location. There is "... functional integration of employees in several departments -- employee interchange, shared duties etc. ... on a day-to-day basis, reflecting a consistent managerial policy": *IML*, supra, at page 182.

37 The original panel expressed concern about the fact that these employees would be working for the employer both in and out of the bargaining unit. In so doing, the original panel recognized that the nature and extent of functional integration in these circumstances poses potentially serious problems for both collective bargaining and on-going collective agreement administration (see paras. 41-47). Those problems became the primary focus of, and were more fully explored by, the parties in the Section 141 submissions and in their oral submissions. This further exploration in considering the functional integration problems addressed in the original hearing in the context of (*IML*), also considered the additional issue of potential problems arising from the scope of permissible collective bargaining under the Code.

38 A trade union is certified to represent *employees* and not merely the *work* which they perform. For example, jurisdiction over work (e.g. assignments between job classifications, contracting out and so on) is properly the subject of collective bargaining. In contrast, while the scope of representational rights may be discussed, the issue cannot be taken to impasse in the event the parties disagree. See *Vancouver Symphony Society*, IRC No. C3/93, (1993), 17 CLRBR (2d) 161, and *Northwood Pulp and Timber Limited*, BCLRB No. B271/94, (1994), 23 CLRBR (2d) 298. This inability to take to impasse matters beyond the representational rights granted in a certification stands as a potential obstacle to complete resolution where some employees work both in and out of the bargaining unit. If the parties cannot reach agreement in collective bargaining on issues that flow from this dual existence, then the inability to achieve finality under the Code is problematic to viable collective bargaining.

39 One potential problem arising from functional integration is the negotiation of provisions dealing with hours of work, overtime and seniority -- i.e. given the fact that some employees will work both within and outside the bargaining unit.

40 Another serious area of difficulty is discipline and discharge where the Employer might rely on employee conduct at both the Union and a non-union facility. A series of questions immediately arises, including some recognized by the original panel: Would there be recourse to the grievance and arbitration procedure if an employee was disciplined while working at the non-union facility? If a culminating incident occurred at the Union facility, could the Employer rely on conduct at the non-union facility (where there was no ability to grieve earlier discipline when it was imposed)? What jurisdiction would an arbitrator have to deal with matters which did not occur during the employment relationship governed by the collective agreement?

41 The original panel, while vexed by these potential problems, determined that they could be resolved at collective bargaining and if not, by an arbitration board. We agree that a solution might be reached by agreement. However, it is also necessary to consider what will happen if there is no such agreement. That issue was not addressed in the original decision. Thus, the concern about potential problems of having no Code means of resolution in such situations was included in assessing the potential viability of collective bargaining. Nor was consideration given by the original panel to how the parties might address the impact of external legislation (such as the *Employment Standards Act*) where the overall relationship of several employees would be subject to both a collective agreement and an individual contract of employment.

42 These questions merely highlight the potential difficulties for collective bargaining of permitting employees to be governed in part by a collective agreement and in part by a common law contract of employment. Subject of course to the positions taken by the parties, important matters affecting the employment relationship could not be finalized in negotiations; nor would the parties be able to resort to economic sanctions as a means of breaking the impasse. In this case, the nature and extent of functional integration as described by the original panel, when combined with the potential difficulty of reaching final resolution, creates a level of concern about the viability of collective bargaining, including on-going collective agreement administration, so as to render the proposed bargaining unit inappropriate.

43 In reaching this conclusion, we also accept that none of the other three *IML* factors which arise on an initial application for certification point strongly or at all to the appropriateness of a separate unit. There is unquestionably a similarity in skills, interests, duties and working conditions between the Employer's three facilities (paras. 8-10 of the original decision); the Employer's administrative structure is centralized and relatively common as between the facilities (paras. 11-12); and, while separate, the facilities are geographically proximate, with Parkwood and Parkwood Care being located across the street from one another (para. 14).

44 Moreover, we do not accept the Union's argument that *A.S. King Logging* can be distinguished on the basis that employees there were both within and outside the bargaining unit during a single day. On the other hand, we have difficulty accepting the Employer's *de minimis* argument based on *A.S. King Logging* (i.e. the suggestion that only one employee working between two or more locations will preclude the Board certifying one of those locations by itself). Since the degree of functional integration here exceeds any notion of *de minimis* so we expressly leave this issue undecided. While the option was not suggested in this case, it may be more consistent with Board policy in appropriate cases to exclude persons who "straddle" a bargaining unit (see Section 22(1) of the Code), rather than to dismiss a certification application altogether. In other cases, it may be more appropriate to sweep in the entire person. None of this needs to be decided in this case.

VI. CONCLUSION

45 In summary, we have concluded that the original panel correctly identified the issue presented by the Union's certification application -- namely, whether the level of functional integration precluded viable collective bargaining and collective agreement administration. Like the original panel, we have found that the centralized nature of the Employer's operations and its long-standing practice of employee interchange constitute functional integration as described in *IML*. Certifying the proposed unit would thus give rise to a number of potential problems. This was also acknowledged by the original panel.

46 It is with the benefit of a fuller exploration of the potential problems identified in the original decision, against the limits imposed on collective bargaining by the law and policy under the Code, which were not considered in the original decision, that we are driven to a different conclusion. While these problems could be left for the parties to resolve in negotiations, we recognize that failing agreement by the parties, there are no mechanisms under the Code through which the problems could be resolved. Given that this case was already at the margin, we have concluded that when this policy concern is factored in as a further consideration, the proposed bargaining unit is inappropriate.

47 We therefore set aside the original panel's determination that the unit is appropriate for collective bargaining and cancel the Union's certification.

LABOUR RELATIONS BOARD

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