BRITISH COLUMBIA LABOUR RELATIONS BOARD

NANAIMO SENIORS VILLAGE PARTNERSHIP (NANAIMO SENIORS VILLAGE MULTI-LEVEL CARE FACILITY)

(the "Partnership")

-and-

WELL-BEING SENIORS SERVICES LTD.

("Well-Being")

(Collectively the "Respondents")

-and-

HOSPITAL EMPLOYEES' UNION

(the "Union")

PANEL:	Allison Matacheskie, Vice-Chair
APPEARANCES:	Delayne M. Sartison, for the Partnership David McDonald and Kathryn Ford, for Well-Being G. James Baugh and V.R. (Sam) Black, for the Union
CASE NOS.:	51999 and 52002
DATES OF HEARING:	September 2, 2004, January 4-6, 10, 11, 13, 14, 26 and 27, 2005
DATE OF DECISION:	August 24, 2005

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 The Union alleges that the Partnership breached Sections 5(1), 6(1), 6(3)(a), (b), (d), 9 and 32 of the *Labour Relations Code* (the "Code") when it terminated all of its care service employees while an application for certification was pending. The Employer's primary argument is that it contracted out its care service employees in keeping with its rights as a health sector employer under the *Health and Social Services Delivery Improvement Act,* RSBC 2002, c. 2 ("Bill 29") and therefore, its actions are not in violation of the Code.

2 The Partnership also argues that it is not the employer of the employees that are the subject of this application as it contracted out its care services to Well-Being long before the certification applications were filed. The Union argues that the Partnership is the true employer, but also filed another unfair labour practice complaint in the alternative naming Well-Being as the employer. The applications were heard together and are both dealt with in this decision.

II. FACTS

3 The Partnership presently owns and operates the Nanaimo Seniors Village Multi-Level Care Facility which is a licensed residential care facility in Nanaimo (the "Facility"). The Facility has 100 permanent publicly funded beds, 10 temporary publicly funded beds and 40 privately funded beds.

4 The Facility opened in 2001. From 2001 to January 2004, the Facility was under the operation of the Nanaimo Seniors Village Ventures Ltd. ("Ventures"), a company that existed under the umbrella of Retirement Concepts Senior Services Ltd. ("Retirement Concepts").

5 The Partnership came into existence in January 2004 through a corporate reorganization of companies under the umbrella of Retirement Concepts. The Partnership exists under a partnership agreement between Retirement Concepts and RC Holdings Ltd. ("RC Holdings"). Retirement Concepts owns 99.99% of the Partnership and RC Holdings owns 0.01% of the Partnership. Retirement Concepts also owns 100% of RC Holdings.

6 In January 2004, the Partnership replaced Ventures as the owner and operator of the Facility. In this decision, I will use the term Partnership even if the facts predated the transfer of operation from Ventures to the Partnership.

7 Mary McDougall is the current President and Chief Operating Officer of Retirement Concepts. Dr. Azeem Jamal is the current Chief Executive Officer of Retirement Concepts. McDougall is also the President and Chief Operating Officer of the Partnership.

8 When the Facility first opened in 2001, the Partnership entered into a voluntary recognition agreement with BCGEU to be the bargaining agent for the Resident Care Aides ("RCAs") and Activity Aides ("AAs").

9 The Partnership is expressly designated as a public sector health employer under the *Public Sector Employers Act,* RSBC 1996, c. 384 ("*PSEA*") and the *Health Care Employers Regulation,* BC Reg. 427/94 ("*Regulation*") to the *PSEA.* By virtue of Section 6 of the *PSEA,* any employer designated in the *Regulation* must become and remain a member of the Health Employers' Association of British Columbia ("HEABC"). The Partnership is a member of the HEABC as was its predecessor, Ventures. Therefore, when the care service staff were certified to BCGEU, the Facilities Subsector Collective Agreement ("Master Agreement") applied.

10 The Registered Nurses ("RNs") and Licensed Practical Nurses ("LPNs") employed at the Facility were not unionized. The terms and conditions of their employment were covered by an agreement between the Partnership and the individual nurses called the "Professional Nurses Partnership Agreement" (the "Nurses Agreement"). It had a term from April 1, 2001 to March 31, 2004.

11 On January 28, 2002, the government of British Columbia enacted Bill 29 which voided provisions of existing collective agreements and, among other things, enabled a health sector employer to contract with outside service providers to perform services previously performed by certain unionized employees.

12 In June 2003, the Partnership began to consider contracting out the care services at the Facility because they understood that the total wage cost when a contracted service provider was used was approximately $22 per hour as compared to the approximately $33 per hour under the Master Agreement currently in place at the Facility.

13 Retirement Concepts initiated an expression of interest process in July 2003 for contracting out the non-clinical services at three of the Retirement Concepts' facilities: Renfrew Care Centre, Beacon Hill Villa and the Facility.

14 In July 2003, McDougall held a meeting with the employees at the Facility and told them the Partnership was seeking proposals to contract out the care services. McDougall told them they had heard the cost of contracting out was $22 per hour and they wanted to see if it was true and whether they could provide a level of service at that cost that could be accepted in the Facility. McDougall told them she would be in a better position to let them know what was happening at the end of August 2003.

15 By August 2003, three companies were short listed as potential contractors for the Facility. They were Caresource, Bayshore and Tendertouch.

16 McDougall then had another meeting with the employees. She advised them that the Partnership was still not in a position to make a decision relating to contracting out. At this meeting, employees asked what they could do, and McDougall told them they could talk with BCGEU and have the Union meet with them.

17 Diane O'Brien was the BCGEU shop steward at the Facility and she contacted BCGEU. There were numerous meetings between BCGEU and the Partnership from August to October 2003. McDougall was insistent that the cost savings had to be in the range of $10 per hour for any proposal to be considered as an alternative to contracting out. BCGEU never put forth a proposal that was competitive with the outside contractors. The BCGEU representative advised O'Brien that the Union would not put forth a proposal for a $10 wage cut for all the employees.

18 The RCAs and AAs applied for decertification and effective November 14, 2003, they were decertified from the BCGEU.

19 After the decertification, McDougall met with some employees and told them the Partnership would allow them time to put in a proposal. McDougall testified that the decertification was not something that the Partnership had not anticipated and that this event threw a "curveball" into the exploratory contracting out process that was occurring.

20 McDougall suggested the RCAs and AAs elect four representatives to put together a proposal on behalf of the larger group. A group of four was chosen and it included O'Brien and another RCA named Howard Van Impe. McDougall and Carol Crow, Director of Human Resources for the Partnership, then began discussing options with the employees' representatives. To ensure the employees knew the parameters of what would be acceptable to the Partnership, McDougall told them "I am putting $22 in an envelope and you need to decide how to allocate it over wages and benefits". Crow then put together five different options to show the different ways that their wages and benefits could be cut from $33 per hour to $22 per hour. McDougall made it clear to the employees that she would not proceed with the outside companies pending the employees putting forward an acceptable proposal.

21 For over a month, the employees' representatives worked on their proposal. In December 2003, Van Impe made a presentation to McDougall and Crow of the package prepared by the committee. The cost to the Partnership was slightly higher than the $22 and so he made a formal written proposal which he went through with them line by line. He felt that he had to sell the proposal to the Partnership because it was a little higher than the parameters initially set out by McDougall. The last written point in his proposal was "the greatest concession made by the RCAs was the decertification from the union". He felt that was important because it showed the employees' integrity and trust in what they were doing. Van Impe testified that the comment back from

McDougall was that she was "proud of them and it set a precedent as there had not been a lot of decertifications".

22 The Partnership accepted the employees' proposal. A meeting was then scheduled for all the RCAs and AAs on December 22, 2003 to communicate the new terms and conditions of their employment.

23 The Partnership then looked at the situation and focused on the fact that the reason they had wanted to contract out was to get away from the Master Agreement using the legislation available. In her evidence, McDougall explained:

> ...keeping that objective in mind, we couldn't keep the employee group with Partnership because we are a health sector employer. So we wrapped Well-Being around the employees.

24 One of the other corporate entities under the Retirement Concepts umbrella is Well-Being. An arrangement was put into place with Well-Being. Well-Being is a company that is 100% owned by Retirement Concepts and McDougall is the sole operating authority. Well-Being does not have an office or any overhead expenses. There was no negotiation process between the Partnership and Well-Being.

25 The RCAs and AAs were given letters of employment to sign that were on Well-Being's letterhead signed by McDougall. The letters set out the same terms and conditions that the Partnership and the RCAs and AAs had just agreed to. Some employees noticed the name of Well-Being on the letter. McDougall told Sue Ball, the Administrator of the Facility, to tell them it was just a payroll change. Ball complied with these instructions. The employees did not receive letters of termination or records of employment from the Partnership.

26 The next step in the process was the creation of a new employee handbook. The four employee representatives put one together by taking information and documents from existing policies and procedures. They then took it to Crow for her approval.

27 A document called a Contract Service Providers Agreement was signed by the Partnership and Well-Being. It stated the contract was for a five-year term.

28 The Nurses Agreement between the Partnership and the RNs and LPNs expired on March 31, 2004. Before it expired, the Partnership met with the nurses to advise them that the Nurses Agreement would not be renewed and they would structure the employment relationship the way they had with the RCAs and AAs. The nurses were told they would receive employment letters and an employee handbook which would govern the terms and conditions of their employment. At the end of May 2004, employment letters were issued to the nursing employees on Well-Being's letterhead. Most of the nurses refused to sign the letters. The nurses did not receive termination notices or records of employment from the Partnership and they remained working at the Facility.

29 The reduced labour costs from the wage reductions agreed to by the RCAs and AA's would save the Partnership approximately $400,000 per year.

30 On June 22, 2004, the Union filed an application for certification of the LPNs naming the Partnership as the employer. At the certification hearing on June 30, 2004, Well-Being attended and asserted that it was the employer of the LPNs. The Union maintained that the Partnership was the true employer but also filed an alternative application naming Well-Being as the employer. The Respondents also asserted that the only appropriate bargaining unit was one which included all of the care service employees.

31 According to McDougall, the certification application triggered a risk assessment by the Partnership. The Partnership wanted to ensure that the cost objectives of avoiding the Master Agreement could be continued. In particular, the Partnership was concerned that if there ever was a decision from the Board that the Partnership was the true employer of the employees, they would automatically qualify for the Master Agreement. So, the Partnership decided they had to clarify the situation by transferring its "contract" with Well-Being to another organization with which the Partnership had an arms-length relationship.

32 On June 29, 2004, a memorandum was issued to the LPNs on Well-Being's letterhead. The memo stated that "a union is not necessary" and "it is not appropriate for just the LPNs to unionize". The memo continued, "If the LPNs vote to join the Union ..., you will become a small group in a very large union ... [that] makes political decisions. We believe those political decisions may not necessarily reflect the best interests of employees ...". It ended with "Your colleagues ... recently decided against union representation due to uncertainty around the Facilities Subsector Collective Agreement".

33 Van Impe was approached by other RCAs or AAs about unionizing and he contacted the Union on July 12, 2004.

34 On July 14, 2004, Ball and Crow met with the RCAs and AAs and announced that the Partnership intended to change the service contractor from Well-Being to another contractor. O'Brien, Van Impe and the other employees were shocked. O'Brien and Van Impe felt they had been lied to as they had understood if they agreed to the cut in wages and benefits their jobs would not be contracted out. Also, they had been specifically told that Well-Being was just a payroll change. They were devastated at the news of their positions being contracted out.

35 One employee, Eric Evans, testified that he knew he had been contracted out since January and Van Impe testified that he would have known he was contracted out if he had taken the time to seriously consider his employment letter on Well-Being's letterhead. However, I accept the evidence of O'Brien and Van Impe that most employees at the meeting were shocked by the Partnership saying their jobs had been contracted out.

36 There was a separate meeting with the LPNs immediately following the meeting with the RCAs and AAs. The LPNs were advised that it was unclear what would happen to the LPNs given the outstanding application for certification, but the Partnership believed that all care staff, including the LPNs, should be covered by the new contract.

37 On July 16, 2004, the Partnership filed a Section 32(1) application with the Board. In the application, it maintained that it is not the employer of the care staff at the Facility and therefore the Section 32 application was really unnecessary. However, out of an abundance of caution, it brought the application to seek permission to terminate its existing care services contract with Well-Being as it pertained to the LPNs and re-tender that contract to another service provider. It did not seek permission to change the contractor with respect to the RCAs and AAs as the certification application did not include them. In its application, the Partnership set out the reason the change of contractors was necessary:

> The proposed change is necessary to ensure effective and continued implementation of the Partnership's long-held business plan to contract out care services to achieve cost savings and efficiencies. Further, it is necessary to make the change within the freeze period because the Partnership was not aware of the risk associated with its current contract arrangement until it received the HEU's initial certification application. Until the Partnership received the HEU's application, it thought that the identity of the employer of care staff and the nature of its contractual relationship with Well-Being were understood and would be respected.

38 The Partnership then met with the contract service care providers who had been short-listed back in the summer of 2003. The Partnership entered into extensive discussions with Bayshore with the intention that it would enter into a contract for care services effective September 9, 2004. The date of September 9, 2004 was chosen because it fell on a payroll date and was within the statutory 10-month time-bar following the BCGEU decertification.

39 On July 27, 2004, McDougall sent an email to Bayshore on behalf of the Partnership advising that they had been selected as the new care service provider for the Facility.

40 On July 28, 2004, McDougall accepted a letter addressed to Well-Being from the Partnership, signed by Jamal, which confirmed that the contract was terminated effective September 9, 2004 and that both the Partnership and Well-Being had agreed to waive the contractual requirement for 60 days written notice for the termination of the contract.

41 On that day, there was another meeting with the RCAs and AAs to tell them their employment was being terminated and Bayshore would be the new contractor. Prior to this meeting, McDougall, Crow and Ball met with O'Brien, Van Impe and the other members from the group of employees' representatives. At this meeting, McDougall

apologized for not clearly telling them they had been contracted out and asked what reaction they could expect from the employees at the meeting. Van Impe was very upset and started yelling. Another employee representative started to cry. O'Brien suggested a break in the meeting. They reconvened and shortly thereafter, went together into the larger meeting of all the RCAs and AAs. At the meeting, McDougall told all the employees their employment was terminated and the new contractor would be Bayshore. There was a flurry of questions from the employees primarily asking what would happen to them. McDougall assured them that, as much as possible, there would be no changes. She advised that the Partnership would make every effort to stress the importance of continuity of care and that the Partnership would be encouraging the new contractor to continue the care with the same employees in similar roles, with similar responsibility and similar terms of remunerations.

42 The next day, July 29, 2004, the Union served the Partnership and Well-Being with new applications for certification which were for the LPNs, RCAs and AAs. There was a primary certification application for the Partnership and an alternative application naming Well-Being as the employer. The Board received the applications on July 30, 2004.

43 On July 30, 2004, the Union applied to withdraw its applications for certification filed on June 22, 2004 which sought a bargaining unit of only the LPNs at the Facility. On August 3, 2004, the employer applied to withdraw its Section 32 application and the Union did not object to its withdrawal. The applications to withdraw were granted by the Board.

44 On August 4, 2004, a letter was sent to all the employees on Well-Being's letterhead advising that the contract with Well-Being would be terminated effective September 9, 2004 and their employment would end on that date. The letter also advised that Bayshore would be in contact with them to discuss any employment terms it proposed to extend to the current care team.

45 On August 4, 2004, memoranda were given to the LPNs, RCAs and AAs concerning the August 9, 2004 representation vote. They confirmed that Well-Being's contract has been cancelled in favour of a contract with Bayshore and then set out that the cancellation of Well-Being's contract may prevent the Union from having successful certification applications. It then says that even if the Union is successful, the employees may be required to bargain a new collective agreement. The memoranda then makes comments similar to the June 29, 2004 memo saying that a union is not necessary and that, if they join the union, instead of being a group of 100 employees with a strong voice to management, they will become 100 out of 43,000 employees in a union that makes political decisions that may not reflect the best interests of the employees.

46 Later that day, O'Brien received a phone call from a representative of the Union asking why she had not contacted the Union when they were all terminated. O'Brien told the Union representative they were not terminated, it was just a change in the contractor. O'Brien then phoned Ball and asked, "Am I fired?". Ball said she was not

fired. Then O'Brien said she had better put something up on the sign-in board at the Facility as the Union had told her everyone was fired.

47 The next day, August 5, 2004, Ball put up a notice, on the sign in board that said:

> Your letters are NOT lay-off notices. Nothing has changed from what [McDougall] told you last week. Well-Being (as of Sept 9) will NO LONGER be the contracted service provider at [the Facility]. That is all the letters are for. NO ONE has been laid-off.

48 On August 6, 2004, the Board dismissed the certification applications on the basis that the Union was time-barred from bringing forward an application for certification that included the RCAs and AAs until the expiry of the 10-month period imposed by Section 33(1) of the Code. The representation votes that were scheduled to occur on August 9, 2004 were cancelled: *Nanaimo Seniors Village Partnership (Nanaimo Seniors Village Multi-Level Care Facility)*, BCLRB No. B253/2004 (upheld on reconsideration in BCLRB No. B56/2005).

49 On August 6, 2004, Ball gave a memorandum to all the care employees on Well-Being's letterhead signed by her. It advised all the employees that the representation vote had been cancelled by the Board because of the time-bar. The memorandum went on to state that she was writing to clarify some information and misinformation. One of the clarifications was set out as follows:

> The letters issued on August 4, 2004 are notices of termination of your employment with Well-Being. A new contractor has been selected. We are doing everything we can to ensure continuity of care at the Facility. This means we believe that the same employees should remain caring for the same residents in the same roles. While we are taking these positions that decision is ultimately up to the new contractor. We are confident that the new contractor will see the wisdom of our position, but we cannot make any assurances on what is going to happen in the future. Those decisions are to be made by the new contractor.

50 The unfair labour practice complaints that are the subject of this decision were filed on August 6, 2004.

51 On August 10, 2004, a memorandum was distributed advising that Bayshore was the new contracted care service provider effective September 9, 2004.

52 On August 18, 2004, a memorandum on Well-Being's letterhead was distributed advising that Caresource would be the new contracted care service provider because they were unable to reach a satisfactory agreement with Bayshore.

53 The Partnership and Caresource entered into a contract effective September 9, 2004. All but nine of the care service employees were rehired by Caresource and continued to work at the Facility.

III. SUBMISSIONS OF THE PARTIES:

SUBMISSION ON THE UNFAIR LABOUR PRATICE COMPLAINTS

54 The Respondents submit that the only issue I need to address is the following:

> Is it contrary to the Code for a health sector facility to structure its service delivery in a manner that responds to financial constraints and in accordance with its rights under Bill 29?

55 The Respondents submit that the answer to that question is "no" and accordingly, the complaints should be dismissed.

56 The Respondents say that the decision to re-tender the Well-Being's contract to another contractor was done in order to ensure that the financial gains achieved through the initial contracting out to Well-Being could be maintained. The Respondents acknowledge that the decision to contract out, and to re-tender the contract in 2004, was done in order to remove the potential of having the Master Agreement apply to the Facility. The Respondents argue that the LPNs' applications confirmed the concerns that the close relationship between the Partnership and Well-Being caused confusion and needed to be clarified. They say there was no urgency earlier because there was the 10-month time-bar on certification to all the care employees. The Respondents therefore submit that their actions are in compliance with its rights under Bill 29 and are not a violation of the unfair labour practice provisions of the Code.

57 The Respondents also argue that they have not violated the unfair labour practice provisions of the Code because the giving of termination of employment notices to employees of Well-Being on August 4, 2004 was not the first notice that their employment was going to be terminated. The Respondents had informed the employees on July 14, 2004, prior to the certification application for the larger group being filed, and at a point when it says there was no organizing campaign occurring.

58 The Respondents submit that the Board has confirmed that where a decision to terminate employees is made and disseminated prior to the certification campaign commencing and the applications for certification being filed, the Union cannot rely on the individual notices of termination as evidence of an unfair labour practice: *KFCC/PepsiCo Holdings Ltd.,* BCLRB No. B342/97 ("*KFCC*"); *Chapters Inc.,* BCLRB No. B283/99 ("*Chapters*").

59 The Respondents also submit that they cannot be found to have committed any unfair labour practices because they had no knowledge of an organizing drive. More specifically, they argued that there was no organizing drive for the larger group prior to July 14, 2004 which is the date the decision to terminate all care service employees was communicated. The Respondents say an adverse inference should be drawn against the Union concerning its failure to present any evidence of an organizing drive.

60 The Respondents also submit that a key point that underlies this whole case is at all relevant times there was a statutory time-bar which prohibited the Union from applying to represent the care employees. McDougall testified that she was aware of the time-bar and that the Partnership acted in accordance with the provisions of Section 33(10). The Respondents also argue that the application of the time-bar was not a mere theoretical possibility either as the Board dismissed the applications for certification as a result of the time-bar on August 6, 2004.

61 The Respondents further submit that, not only did their actions not constitute a violation of Section 6 or 9 of the Code, but that the decision to terminate the contract with Well-Being and the resulting termination letters for the employees were reasonably necessary for the conduct of the Partnership's business and were not motivated by any anti-union animus. The Partnership saves approximately $400,000 a year in relation to the care aides alone. While these savings had been achieved as of January 2004, the Partnership needed to re-tender this contract in order to ensure that these savings continued, particularly when the Partnership became concerned that Well-Being might not be seen as an independent entity.

62 The Respondents submit that the concern was not with the Union's certification, but rather that a certification would bring with it the Master Agreement and its terms and conditions of employment. By terminating the contract with Well-Being and re-tendering it to a third party contractor outside of the "Retirement Concepts" groups of companies, the business objective of avoiding the Master Agreement would be achieved. The Respondents submit that this objective of avoiding the Master Agreement does not translate to a desire to avoid unionization generally, or representation by the Union specifically.

63 The Respondents submit that financial considerations play the most important role in operating a business. Labour costs are key financial considerations. The Board has recently commented upon the intersection between the employer's right to operate in financially viable ways and the Code's unfair labour practice provisions. In *Campbell Goodell Traynor Consultants Limited,* BCLRB No. B288/2003 (Leave for Reconsideration of BCLRB No. B232/2003) ("*Campbell*") at para. 11:

> Labour costs are an integral, and often a large, part of the costs of a business. They have been recognized as such by the Board as least as far back as *Federated Co-operatives Limited,* BCLRB No. 85/79, [1980] 1 Can LRBR 372. The importance and legitimacy of considering labour costs has also been recognized as recently as the Board's decision in *Schenker Distribution,* BCLRB No. B236/2003. It is not an unfair labour practice complaint to consider the cost of labour in making business decisions.

64 The Respondents argue that the reconsideration panel in that case noted that this reasoning was consistent with Section 2 purposes of the Code. The panel stated "[i]n order to produce a suitable return on investment, businesses must be productive, competitive, and ultimately profitable". (*Campbell* at para. 13)

65 The Respondents also rely on the Supreme Court of Canada decision in *Société de la Place des Arts de Montréal*, 2004 SCC 2 for the proposition that companies have the right to determine if they were going to remain in a certain line of business.

66 The Respondents submit that Section 5(1) does not apply in this case as it is designed to preserve the integrity of proceedings before the Board. The general reference to "the exercise of rights conferred by or under the Code" is not meant to encompass all rights generally under the Code. Rather, this phrase is to be read in conjunction with the other rights guaranteed in this section that apply to the various ways in which a person might approach the Board to exercise his or her rights: *Gibraltar Mines Ltd.,* IRC No. C275/88 (Reconsideration of C203/88).

67 The Respondents argue that this is also not a situation where Section 32 applies because a valid application for certification was not in existence at the time that the termination notices were issued. At the time the termination notices were issued, there was a time-bar in place that prevented the application from being made.

68 Further, the Respondents argue that where an employer's actions are formulated, decided and communicated to employees prior to union involvement, the fact that they are not actually implemented until after the certification application is filed does not necessarily bring them under the protection of Section 32.

69 Concerning the June 29, 2004 and August 4, 2004 memoranda, the Respondents submit that they were not coercive or intimidating. They say that they provide employees with the employer's position on unionization, and such communication is protected under Section 8 of the Code. The Board has made it clear that the expressing, by an employer, of non-coercive and non-intimidating views, based on a preference to resist certification are protected by Section 8 of the Code and do not constitute an unfair labour practice: *Convergys Customer Management Canada Inc.,* BCLRB No. B111/2003 (Leave for Reconsideration of BCLRB No. B62/2003) ("*Convergys*").

70 Turning to the Union's submissions, the Union argues that Bill 29 does not override or trump the unfair labour practice provisions in the Code. The Union argues that, despite Bill 29, it remains an unfair labour practice to contract out employees to avoid being certified.

71 The Union argues the Partnership had knowledge of the organizing drive as a result of the LPNs' certification application. The Union points to the fact that it was only after the LPNs' certification application was filed that the Partnership took steps to extricate itself from the arrangement with Well-Being.

72 The Union also notes that the LPNs are included in the subsequent certification application filed on July 30, 2004. The Union argues that the Partnership had notice of the LPN organizing drive by June 22, 2004 (the date of that application for certification) and that, effectively, the same organizing drive continued through July with the LPNs remaining part of the subsequent application filed on July 30, 2004.

73 The Union alleges that the Respondents breached Sections 6(3)(a) and (b) of the Code. The Union argues that there is a pattern or history of anti-union animus of the Partnership dating back to 2001, including the Partnership having a role in the decertification of BCGEU. The Union says the Partnership made a hasty decision to terminate the contract for care services with Well-Being and the fact that the decision was made so quickly indicates the employer was motivated by anti-union animus.

74 The Union also submits that the only reason for contracting out the care staff at that time was to prevent the Union's certification applications from being successful and avoid the possibility of a true employer declaration against the Partnership by the Board. The Union submits this is evidence of anti-union animus as the only way the Master Agreement would apply is if the Partnership's employees became unionized.

75 The Union argues that the Respondents' explanations for their actions do not amount to proper cause or changes that are reasonably necessary for the proper conduct of their businesses. The Union argues that there is no evidence that the Partnership is in financial hardship justifying its contracting out. The Union submits that the mere fact that an employer can run an operation at a lower cost without a union is not sufficient justification for mass termination of its employees: *Common Ground Publishing Corp.,* BCLRB No. B1/2003, at para. 61.

76 The Union also alleges that the termination notices constituted coercion or intimidation used to compel or induce employees not to become members of a trade union contrary to Sections 6(3)(d) and 9 of the Code. The Union submits it is important to keep in mind that the termination notices were issued on, or shortly after August 4, 2004, and the representation vote was scheduled for August 9, 2004. The certification applications were not dismissed until August 6, 2004.

77 The Union submits that the Respondents violated Section 5(1) by issuing notices of termination to all care staff on August 4, 2004 and terminating their employment on September 9, 2004. The Union argues that the only reason for contracting out the care staff at the Facility was to prevent the Union's certification applications from being successful and avoid the possibility of a true employer declaration against the Partnership by the Board. The goal of the Respondents to avoid the Master Agreement could only be achieved if the Union's certification applications were unsuccessful.

78 The Union also argues that the Respondents have violated Section 32 as the employees were terminated during a statutory freeze. The Partnership's explanation that it needed to re-tender and bring in a different contractor to avoid the Master Agreement is not proper cause for the termination of the employees. The Union argues that if the risk of employees becoming unionized was considered to be a sufficient reason for suspending the protection of Section 32, the protection offered by that provision would be hollow.

79 Concerning the memoranda, the Union submits that they are not protected by Section 8 as the Board distinguishes between the expression of one's view and the use of communication to coerce others: *Excell Agent Services Canada Co.,* BCLRB No.

B171/2003. The Union says the memo dated June 29, 2004 urges employees to consider what is best for the Facility and the rest of the memo explains that remaining non-union is what is best for the Facility. Therefore, the clear message is that the employees should vote against the Union's certification. The Union says Section 8 also does not protect the memorandum dated July 14, 2004. It says it is intimidating and coercive since it refers to the employer's plan to replace the current care provider, Well-Being with another contract care provider and suggests that the care staff will be terminated.

80 The Union argues that the duty outlined in Section 2(b) of the Code must be read in harmony with the other duties imposed in Section 2: *Interwrap Inc.,* BCLRB No. B305/2003. The Union argues that the duty set out in Section 2(b) does not trump the rights of employees to organize. The Union submits that the Partnership has failed to provide documentary financial evidence supporting its claim that being a party to the Master Agreement would undermine its ability to employ workers in an economically viable business.

81 In summary, the Union argues that the Partnership, or alternatively Well-Being, violated Sections 5(1), 6(1), 6(3)(a), (b), (d), 9 and 32 of the Code.

SUBMISSIONS OF THE PARTIES ON THE TRUE EMPLOYER ISSUE

82 The Union argues that Section 6(3) of Bill 29 does not apply because the Partnership was not a health sector employer at the time of the initial certification application. It argues the definition of health sector refers specifically to members of HEABC whose members are unionized. Since the Partnership did not have any unionized employees at that time, it is not a health sector employer.

83 In the alternative, and if the Board finds that the Partnership is a health sector employer, the Union submits that the true employer test set out in Section 6(3) does not apply because one of the two pre-conditions set out for its application has not been met. The true employer test set out in Section 6(3) only applies if the following two conditions are met: a) services are provided under a contract between a health sector employer and an employer that is not a health sector employer; and b) there has already been a finding by the Board that the employee is an employee of the employer that is not a health sector employer.

84 The Union argues the onus is on Well-Being to first prove that it is the employer of the employees. The test set out in Section 6(3) could only apply after Well-Being has established it is the employer of the employees.

85 The Union argues since Section 6(3) of Bill 29 does not apply, the traditional true employer test developed in the Board's jurisprudence is the test that must be applied.

86 In the further alternative, the Union argues if the Board finds that Section 6(3) of Bill 29 applies, the interpretation argued by the Respondents is so narrow it is impossible for a health sector employer to be found to be the true employer under

Section 6(3). The Union argues it is a new test and not a bar. If the legislators had intended Section 6(3) to be impossible to meet it would have chosen wording that mirrors Sections 6(5) and 6(6) of Bill 29:

> 6. (5) A collective agreement does not bind, and section 35 of the Code does not apply to, a person who contracts with a health sector employer.
>
> 6. (6) A health sector employer must not be treated under section 38 of the Code as one employer with any other health sector employer or a contractor.

87 The Union submits that the true employer test traditionally used by the Board is set out in *Columbia Hydro Constructors,* BCLRB No. B36/94, (1994), 22 CLRBR (2d). It says the only significant modification brought about by Section 6(3) is the fact that the Board will no longer be permitted to apply the true employer test in the health sector in a completely flexible way. In the absence of a finding that the health sector employer intended the employees to be fully integrated with the operations of the health sector employer and working under its direct supervision and control, the Board will not be able to declare the health sector employer to be the true employer.

88 The Union submits that it does not have the onus of proving or disproving the Partnership's intentions. The intention to create a direct-employment relationship is an objective one to be gleamed from all of the circumstances of the case: *Mustang Engineering and Construction Ltd.,* IRC No. C128/90.

89 The Union submits that the use of the word "fully" before the term "integrated" does not change the question which forms part of the ordinary true employer test set out by the Board in *Columbia Hydro Constructors, supra.* The question remains into which organization or undertaking are the employees integrated?

90 The Union also submits that, given the overlap between the corporate structures of the Partnership and Well-Being, it is impossible to prove that the employees of the Partnership have no connection to Well-Being.

91 The Union asserts that because of the overlap in corporate structures of the Partnership and Well-Being, the Respondents have posed an impossible test in stating that the Partnership cannot be found to assert direct control over the employees unless the Partnership controls every aspect of the employees work and pay without input from Well-Being. The Union submits that the test set out in *Columbia Hydro Constructors, supra* provides guidance. That test required that the Board consider which party exercises direction and control over the employees performing the work. The Union argues that Well-Being and the Partnership do not have an arms-length relationship and this is an important factor to consider in a true employer analysis: *OCL Industrial Materials Ltd., et. al, BCLRB* No. B284/96.

92 The Union argues that the Board should look beyond the paper arrangements to examine the true relationship which exists in practice from a labour relations

perspective: *Bosa Construction* Inc. *et al.*, BLCRB No. B264/99, *The Kelowna Daily Courier, a Division of Thomson Newspapers Corporation*, BCLRB No B233/93, and *Semiahmoo Management Ltd.*, BCLRB No. B12/98.

93 The Union says the Board is also required to consider the motivation of the contractor in applying the true employer test. In *Graham Construction and Engineering (1985) Ltd., et. al, BCLRB* No. C140/92 at p. 6, the Board noted, "...it is necessary to assess carefully whether the arrangement is for bona fide business reasons which operate within the frame work of an arms length commercial arrangement". The Board held that anti-union animus expressed or inferred would bear on the assessment of the factors in the true employer test and evidence of such would cause the Board to look behind the commercial relationship set out in the agreement between the parties.

94 The Respondents argue that Section 6(3) clearly applies to the circumstances of the contract in place between the Partnership and Well-Being at the time of the Union's certification application. The Respondents submit that the Partnership is a health sector employer as it is a member of the HEABC and inclusion in the health section is entirely dependent upon HEABC membership: *Cheshire Homes Society of British Columbia (King Edward House, Lloyd/Graham House, Bodie/Dunbar House),* BCLRB No. B323/2001. The Respondents also argue at a minimum on a *prima facie* basis the employees at the Facility are working under a service contract with Well-Being. Well-Being is the nominal employer and this satisfies the elements necessary to trigger the Section 6(3) test.

95 The Respondents argue that Section 6(3) substantially modifies the true employer test. Unlike the ordinary test, Section 6(3) prevents a true employer declaration absent a finding that the health sector employer intended the contractor's employees to be "fully integrated" with the operations of the health sector employer and under its "direct supervision and control".

96 The Respondents submit that first, an adjudicator must now be satisfied that the health sector employer "intended" to have contractor employees fully integrated with its operations and under its direct supervision and control. It is not enough to prove *indicia* of full integration and direct supervision or control or to merely demonstrate an intention to create an employment relationship. Rather, the Union must prove the Partnership's subjective and active intention to create conditions in which the individuals nominally employed by the contractor are actually fully integrated within and directly supervised by the Partnership. While intention to create a direct employment relationship one of the seven *York Condominium* criteria, proof of the alleged true employer's intention with respect to full integration and direct supervision is now a pre-condition to a true employer finding in the health sector.

97 Second, the Respondents say Section 6(3) adds the modifying term "fully" to the level of integration required to establish the health sector employer is a true employer. The Respondents submit that "full" integration will be proved only if the Board accepts that there was no separation at all between Well-Being's care employees and the Partnership and that Well-Being's care employees have no connection to Well-Being.

98 Third, Section 6(3) now requires that the health sector employer be involved in direct supervision and control of contractor employees to substantiate a finding that it is the true employer. It is not enough to prove *indicia* of control other than day-to-day supervision. It must be both supervision and control and intended.

99 The Respondents submit that Section 6(3) test will not be satisfied unless the Union proves that the Partnership intended that Well-Being would have essentially no role in the working lives of the employees. In other words, the Union must prove that Well-Being was a corporate artifice inserted between the Partnership and a group of employees, and that the Partnership always intended Well-Being to be devoid of employer's attributes while the Partnership itself continued to directly supervise and fully integrate the employees within the Partnership business. A health sector employer who genuinely intends to receive services from the employees of another employer under a contract cannot be held the true employer of the contractor's employees in accordance with the Section 6(3) test.

100 The Respondents submit that the evidentiary threshold required to demonstrate an alleged true employer's intention that the contractor employees be fully integrated within its business and under its direct supervision is very high. It is not enough to point to the acknowledged flaws in the arrangement between the Partnership and Well-Being. The Union must prove that those flaws existed because the Partnership never really intended anything other than the continued direct employment of the care staff, albeit through a different corporate vehicle.

101 In summary, therefore, the Respondents submit that Section 6(3) true employer test is not met and the Partnership cannot be held to be the employer of Well-Being staff at the time of the Union's certification application.

IV. ANALYSIS AND DECISION

102 The two issues argued by the parties are the true employer issue and the unfair labour practice complaints. The Respondents submit that determining the identity of the true employer of the employees at the Facility is necessary if, and only if, I first find that an unfair labour practice was committed which is serious enough in nature to attract a remedial certification. However, I find that it is necessary to decide the true employer issue in order to properly consider the unfair labour practice complaints.

103 I therefore turn first to the issue of who is the true employer.

104 I find the test applicable to the true employer question in this case is that set out in section 6(3) of Bill 29:

> (3) The labour relations board or an arbitrator appointed under the Code or under a collective agreement must not declare a person who

> (a) provides services under a contract between a health sector employer and an employer that is not a health sector employer, and
>
> (b) is an employee of the employer that is not a health sector employer
>
> to be an employee of the health sector employer unless the health sector employer intended the employee to be fully integrated with the operations of the health sector employer and working under its direct supervision and control.

105 I do not accept the Union's argument that the test does not apply. As soon as the Partnership is unionized (if not before), it becomes a health sector employer for the purposes of Section 6(3) of Bill 29.

106 I also do not accept the Union's argument that Section 6(3)(b) of Bill 29 mandates that there must first be a finding by the Board that the employee is an employee of the employer that is not a health sector employer. I agree with the Respondents' position that all that required is that the employer that is not the health sector employer be the nominal employer of the employee.

107 Under Section 6(3) of Bill 29, I must not declare the Partnership to be the true employer unless I find that the Partnership intended the employees to be fully integrated with its operations and working under its direct supervision and control. I find this test is met on the facts in this case.

108 McDougall clearly explained how she decided, on behalf of the Partnership, to "wrap" Well-Being around the employees to insulate the Partnership from the possibility of having the Master Agreement apply to the employees at the Facility. I find the Partnership remained in charge of the day-to-day supervision and control of the employees at the Facility. There was no change in the role filled by Ball after the alleged contracting out to Well-Being. Ball remained an employee of the Partnership and in charge of the day-to-day supervision and control of the employees. She had no relationship with Well-Being. There was no management presence of Well-Being at all at the Facility. Any actions taken by McDougall were seen by the employees as actions of the Partnership. She did not introduce herself as the operating authority of Well-Being. In fact, she ensured the employees did not know about any involvement of Well-Being by telling them that the new name on their letters of employment, or pay stubs, was only a payroll change.

109 Well-Being and the Partnership are both owned by Retirement Concepts. The only person who had any operating authority for Well-Being is also a key figure in the management of the Partnership and Retirement Concepts. There is no arms-length relationship whatsoever.

110 There was no request for proposals process involving Well-Being as there had been with other companies in the summer of 2003. There were no negotiations leading

up to the service contract. The arrangement using Well-Being was simply something the Partnership decided to put into place at the Facility.

111 Well-Being does not have an office or any overhead expenses. The only person who plays a role in it is McDougall. It only applied for a business number in July 2004, long after Well-Being is allegedly the employer of all the care service employees at the Facility. Prior to that, when paying the employees at the Facility, it used Retirement Concepts' business number for statutory deductions.

112 Well-Being also did not prepare any internal or working documents related to employment of the employees of the Facility. These were still prepared by Retirement Concepts as they had been before the alleged contracting out to Well-Being. For example, the extended health benefits are still processed through Retirement Concepts. There is a Payroll Change Notice Form for a care service employee at the Facility confirming that her wage has increased by 75 cents having worked 1827 hours on Retirement Concepts' letterhead and lists Well-Being as a department. There are also two reference letters, one dated April 1, 2004 and the other dated July 30, 2004, which confirm the employment of a care service employee at the Facility and their current salary. The reference letters are on Retirement Concepts' letterhead signed by Karen Close, an employee of Retirement Concepts. There is no mention of Well-Being in the reference letters.

113 The Partnership did not terminate the employment relationship it had with its current workforce. The employees were not given termination letters or records of employment. Well-Being did not go through a hiring process with any of the employees. They were not even verbally told that they were fired by the Partnership but immediately rehired by Well-Being. When the employees attended the meeting on July 14, 2004, most were shocked and had no idea they had been contracted out.

114 The memoranda posted in the workplace by Ball, after she received the phone call from O'Brien asking if the employees had been fired clearly show the lack of distinction or difference between the Partnership and Well-Being. Ball, who is the administrator of the Facility paid by the Partnership, told the employees on a memorandum on Well-Being's letterhead that the letters they received on Well-Being's letterhead signed by McDougall are not lay-off notices and that the only change is going to be a different contractor. Then, two days later, Ball told them on Well-Being's letterhead, that the letters are termination letters but "they" are doing everything they can to ensure continuity of care at the facility meaning the same people in the same jobs.

115 The evidence in this case points overwhelmingly to the Partnership remaining in the same position with respect to the care service employees after the alleged contracting out to Well-Being as it was before. There were no changes of any substance.

116 Well-Being had no interest or self-direction separate and apart from the Partnership. Well-Being agreed to waive the 60-day notice of termination provision in

its contract for the express purpose of enabling the Partnership to make arrangements with another contractor before the 10-month time-bar arising from the BCGEU decertification would expire. At the same time that McDougall received this letter on behalf of Well-Being, she was sending emails on behalf of the Partnership soliciting new contractors for the Facility.

117 To support their argument that Well-Being was the true employer, the Respondents primarily relied upon matters of form rather than substance such as the fact that there was a document called a service contract between Well-Being and the Partnership, there were letters of employment that went to each employee with Well-Being named on the letterhead and there was a Well-Being employee handbook. However, I find that none of these documents establish that Well-Being was anything more than an empty corporate vessel used by the Partnership.

118 Concerning the letters of employment, when any employees noticed the different name on the letter, McDougall told Ball to tell them it was only a change in the payroll company.

119 Concerning the employee handbook, the employees who participated in creating the handbook thought it was a Retirement Concepts employee handbook. Also, Crow assisted the employees in creating the handbook and had the final approval on the contents. She has no role within Well-Being and did not even know who the directors of Well-Being were. There is no evidence that McDougall, the only individual who had any role in Well-Being, had any involvement in the creation of the employee handbook.

120 Concerning the service contract, it was not finalized until February 20, 2004. However, the letters of employment with Well-Being were dated for January 2004. As well, the provisions of the service contract were not complied with. The service contract was in place for over eight months and yet there is no attempt to hire a manager ever. It is insufficient for the Partnership and Well-Being to merely say, after the fact, that they always intended that Well-Being would hire a manager to run the day-to-day operation of the Facility.

121 I do not agree with the Respondents that it is necessary to prove that the Partnership had the subjective intention to fully integrate the employees into its operation. The Board's earlier jurisprudence has dealt with the issue of how to prove intention of a party to a dispute. I find it applies equally to the intention required under Section 6(3) of Bill 29. Intention must be determined objectively not subjectively and has to be gleaned from all the circumstances of the case: *Mustang Engineering and Construction Ltd., supra.*

122 I also do not find it necessary to determine who bears the onus of proving the intention required by Section 6(3) of Bill 29 as in this case the evidence overwhelmingly supports the finding that the Partnership intended to fully integrate care service employees with its operations and intended to have them working under its direct supervision and control.

123 I do not accept the Respondents' argument that in order to be "fully integrated" in the Partnership's operations within the meaning of Section 6(3) of Bill 29, there must be no separation between the employees and the Partnership and that Well-Being must have no connection to the employees. If there were not even a nominal connection between Well-Being and the employees, the Section 6(3) analysis would not even be triggered. It is contemplated by the legislature as a precondition to the true employer analysis that there be a nominal connection between Well-Being and the employees.

124 In summary, I find that Well-Being is not a separate and distinct entity from the Partnership. The totality of the evidence overwhelmingly supports the finding that the Partnership remained the true employer of the employees at the Facility and the wrapping of Well-Being around the employees did not result in the Partnership contracting out its care staff. The Partnership continued direct employment of the care services staff albeit though a different corporate vehicle.

125 I now turn to a consideration of whether the action taken by the Partnership of terminating all the care service employees at the Facility in order to avoid the Master Agreement amounted to unfair labour practices.

126 The Respondents argue that it is not contrary to the Code for a health sector employer to structure its service delivery in a manner that responds to financial constraints and in accordance with its rights under Bill 29. In other words, it is not contrary to the Code for a health sector employer to contract out its employees to avoid the Master Agreement. The Union argues that Bill 29 does not override the unfair labour practice provisions in the Code.

127 The provisions of Bill 29 that are relevant to this application are as follows:

> 6. (1) In this section:
>
> "non-clinical services" means services other than medical, diagnostic or therapeutic services provided by a designated health services professional to a person who is currently admitted to a bed in an inpatient unit in an acute care hospital, and includes any other services designated by regulation.
>
> 6. (2) A collective agreement between HEABC and a trade union representing employees in the health sector must not contain a provision that in any manner restricts, limits or regulates the right of a health sector employer to contract outside of the collective agreement for the provision of non-clinical services.
>
> 6. (4) A provision in a collective agreement requiring an employer to consult with a trade union prior to contracting outside of the collective agreement for the provision of non-clinical services is void.

128 The unfair labour practice provisions of the Code that are relevant to this application are as follows:

> 6. (1) Except as otherwise provided in section 8, an employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.
>
> (3) An employer or a person acting on behalf of an employer must not
>
> (a) discharge, suspend, transfer, lay off or otherwise discipline an employee, refuse to employ or to continue to employ a person or discriminate against a person in regard to employment or a condition of employment because the person
>
> (i) is or proposes to become or seeks to induce another person to become a member or officer of a trade union, or
>
> (ii) participates in the promotion, formation or administration of a trade union,
>
> (b) discharge, suspend, transfer, lay off or otherwise discipline an employee except for proper cause when a trade union is in the process of conducting a certification campaign for employees of that employer,
>
> (d) seek by intimidation, by dismissal, by threat of dismissal or by any other kind of threat, or by the imposition of a penalty, or by a promise, or by a wage increase, or by altering any other terms or conditions of employment, to compel or to induce an employee to refrain from becoming or continuing to be a member or officer or representative of a trade union.
>
> 9. A person must not use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become or to refrain from becoming or to continue or cease to be a member of a trade union.
>
> 32. (1) If an application for certification is pending, a trade union or person affected by the application must not declare or engage in a strike, an employer must not declare a lockout, and an employer must not increase or decrease rates of pay or alter a term or condition of employment of the employees affected by the application, without the board's written permission.
>
> (2) This section must not be construed as affecting the right of an employer to suspend, transfer, lay off, discharge or otherwise discipline an employee for proper cause.

129 The relevant provisions of Bill 29 void collective agreement provisions which would otherwise preclude a healthcare employer from contracting out for the provision of non-clinical services. As in the present case, the decision to subcontract typically results in considerable labour cost savings for the health care employer.

130 Given that Bill 29 allows health care employees to avoid the Master Agreement by contracting out, the argument is that it should not be considered an unfair labour practice to contract out employees in order to avoid the Master Agreement, even if the contracting out occurs during an organizing drive.

131 The unfair labour practice provisions of the Code are intended to protect the freedom of employees to choose to become members of a trade union and participate in its lawful activities. Protection of that freedom is expressly set out as a principle of the Code in s. 4(1), and has been authoritatively described by former Chair Weiler as "the fundamental premise of the whole statute": *Forano Limited*, [1974] 1 Can LRBR 13 at p. 17. Unfair labour practice provisions (along with certification and duty to bargain in good faith provisions) are "one of the three essential components of all legislation modeled on the *Wagner Act* (including all labour legislation in Canada)": *Cardinal Transportation B.C. Incorporated*, BCLRB No. B344/96 (Reconsideration of BCLRB No. B463/94 and BCLRB No. B232/95) at para. 186.

132 Absent an argument based on Bill 29, it would be a clear unfair labour practice for an employer to terminate its employees and contract out their work during an organizing drive, in order to avoid certification. It would be hard to think of a clearer example of a practice from which the unfair labour practice provisions of the Code are designed to protect employees. In the present case, the respondents argue that they did not terminate the employees and contract out their work to avoid certification but rather to avoid the application of the Master Agreement which the certification would inevitably bring. Accordingly, the termination and contracting out should not be seen as unfair labour practices, because they were not motivated by "anti-union animus".

133 For the following reasons, I cannot accept these arguments. Bill 29 permits employers to avoid the Master Agreement in some circumstances (that is, where they would otherwise be restricted by collective agreement provisions from contracting out of the Master Agreement). However, Bill 29 does not state that employers may commit what would otherwise be an unfair labour practice in order to avoid the Master Agreement. Given the fundamental nature of the protections provided by the unfair labour practice provisions, and the fundamental nature of the Code principle that employees are free to choose whether to certify, I decline to read into Bill 29 an implicit overruling of this principle and these provisions. The Legislature is presumed to know the existing state of the law. Had the Legislature intended Bill 29 to overrule the "fundamental premise" of the Code and the unfair labour practice provisions, it would have used express language to do so.

134 Therefore, I find that it is not a defence to the allegations of unfair labour practices for the Partnership to simply say that it contracted out in keeping with its rights under Bill 29. The Partnerships' actions must still withstand the scrutiny of the unfair labour practice provisions of the Code.

135 I also reject the argument that, because the respondents were motivated by a desire to avoid the Master Agreement rather than simply a desire to thwart the employees' decision to certify, their actions should not be considered an unfair labour

practice. I accept the Union's argument that I cannot separate these two concepts in this case. The only way in which the Partnership would be governed by the Master Agreement is if the employees were unionized while the Partnership is their employer. Therefore, when the Partnership terminated its care service employees to prevent the Master Agreement from applying at the Facility, it was really terminating its employees to ensure that it would not be certified. The only conclusion I can draw from the facts in this case is that the employees were terminated because they sought to unionize. This constitutes anti-union animus on the part of the Partnership.

136 The fact that virtually the same group of employees subsequently became unionized when they were employed by a different employer, Caresource, does not nullify the fact that the Partnership terminated all the care service employees because they sought to unionize when they were employed by the Partnership. It is irrelevant that the Partnership is prepared to enter into a service contract with a contractor that has unionized employees.

137 Next, turning to the question of whether the terminations occurred during an organization campaign or while a certification application is pending. The Respondents submit that there is no evidence of any organizing campaign going on prior to July 14 or July 28, 2004.

138 There is minimal evidence of any organizing campaign predating the Partnership's announcement of its decision to end the contract with Well-Being. The only evidence is the evidence of Van Impe being approached by care aides about contacting the Union which resulted in Van Impe contacting the Union on July 12, 2004, and the evidence of another employee at the Facility that "everyone" was talking about unionizing.

139 However, I accept the Union's argument that there was, in effect, one expanding organizing drive with respect to the LPNs, RCAs and AAs at the Facility which began long before July 14, 2004. The LPNs remained a consistent part of the Union's certification applications. The continued effort of the Union to represent the LPNs establishes a continuum from the first certification application for them alone filed on June 22, 2004 to the second application to represent all the care service employees, including the LPNs, filed on July 30, 2004. At all material times, the Union was trying to organize the LPNs. The only material change is that they expanded their campaign to later include the RCAs and AAs as well. I find it would be artificial for me to find that there was one organizing campaign that ended presumably upon the withdrawal of the certification application for the LPNs alone on July 30, 2004, and a separate and distinct organizing campaign that resulted in the certification application for the RCAs, AAs, and LPNs filed on the same day. Therefore, I find that, in this case, there was a continuous campaign to organize the LPNs at the Facility.

140 I also find that the Partnership anticipated that there would be an application for certification for all care service employees. In its objections to the LPN certification, the Partnership argued that the appropriate bargaining unit should encompass all care service employees. After being advised of the LPN application, the Partnership acted

quickly. It gave notice of termination for all employees on August 4, 2004 effective September 9, 2004 even though it had not finalized the arrangements with a contractor. At the time of the terminations, the Partnership told the employees the new contractor would be Bayshore. However, it ultimately ended up being Caresource. The Partnership was very clear in its evidence that it had to act fast because it needed to have a third party contractor in place before the statutory time-bar expired. I find on the totality of the evidence, that the Partnership anticipated that there would be an expanded application which included the RCAs and AAs and therefore acted as quickly as it could to end any possible employment relationship it had with the care service employees.

141 The Partnership also asserted in evidence and argument that had any of the applications for certification only named Well-Being as the employer, without the accompanying assertion that the true employer was the Partnership, the Partnership would not have considered changing the arrangement with Well-Being. The concern was only that the Partnership was named. This further supports my conclusion that the Partnership terminated its relationship with the care service employees as a direct reaction to the certification applications naming it as their employer.

142 Further, I do not accept the evidence of McDougall that the Partnership had decided earlier in June that it had to end the relationship with Well-Being and engage a third party contractor. McDougall first stated this late in her cross-examination and it was inconsistent with her evidence in direct examination. In direct examination, she was very clear that the LPNs' application triggered the risk assessment that led the Partnership to decide it had to end the arrangement with Well-Being as it posed a risk for the Partnership to be found to be the true employer of the employees at the Facility. Her evidence in cross-examination that the decision had been made before the application for certification of the LPNs, and the LPN certification application only confirmed the Partnerships concerns, is also inconsistent with the submissions filed on behalf of the Partnership in this case and in the Partnership's earlier Section 32 application which were filed as exhibits in this case.

143 Also, the Partnership admitted that the LPNs' certification application played a part in its decision. I have found that the arrangement with Well-Being was not a contracting out and that the Partnership remained the true employer. Thus, at a minimum, in this case, there is an admission by the Partnership that the termination of all the care service employees were motivated in part by the certification application for the LPNs.

144 The Partnership also argued that the ending of the arrangement with Well-Being was not an unfair labour practice because it fell under the protection of Section 6(4)(b) of the Code as a change reasonably necessary for the proper conduct of its business. The Partnership did not lead any particulars or provide any financial evidence to establish it was necessary for the business. It saves approximately $400,000 in labour costs per year by contracting out and argues that in order to be financially viable, it must be productive, competitive and ultimately profitable. However, there is no evidence before me that the Partnership is having difficulty making any profits and therefore, I

cannot find that it is reasonably necessary for the conduct of the Partnership's business that it terminate its employees while a certification application is pending in order to make $400,000 more in profits than it did before.

145 I have also taken into account the fact that Bill 29 is legislation aimed, in part, at alleviating cost concerns in healthcare arising from the provision of non-clinical services. I have also considered the Partnership's arguments that Section 2(b) of the Code requires me to foster the employment of workers in economically viable businesses and that in order to produce a suitable return on investment, businesses must be productive, competitive and ultimately profitable: (*Campbell* at para 13.) However, on the facts in this case, the Partnership's ability to save costs by contracting out does not override the Code's protection of an employee's freedom to choose to be a member of a trade union.

146 Turning to the specific sections of the Code, I find that the Partnership has not violated Section 5(1) as it is only meant to protect the integrity of the Board processes. There are no allegations in this case that anyone has been terminated, or otherwise threatened because they were participating in a Board proceeding.

147 I find the Partnership breached Section 32 of the Code with respect to the LPNs. I do not accept the Respondents argument that the statutory freeze does not apply as the certification applications were dismissed as untimely due to the 10-month time-bar. At the time that the decision was made and communicated to the care service staff, there was a certification application pending for the LPNs and this is all that is required for the protection in Section 32 to come into effect. The fact that the first certification application filed for the LPNs was withdrawn and the other certification filed for the LPNs, RCAs and AAs was later dismissed by the Board is irrelevant. The statutory freeze mandated by Section 32 is not retroactively dissolved because a certification application is not ultimately successful.

148 I also do not accept the argument that the employees were terminated before the certification application filed on June 30, 2004 and therefore, before the statutory freeze was in effect. There was a statutory freeze in effect from the time the first application was filed on June 22, 2004 until it was withdrawn on July 30, 2004 and on the same day, the second certification application was filed thereby creating either a continuous statutory freeze or two back-to-back statutory freeze periods.

149 The reason given for contracting out was to continue to save the labour costs and avoid the Master Agreement applying. As stated above, the only manner in which the Partnership could ensure that the Master Agreement did not apply was to ensure that it was not certified. This is not a proper cause to terminate employees during a statutory freeze period. The Partnership has breached Section 32 of the Code.

150 I also find the Partnership has breached Section 6(3)(a) when it terminated the care service employees because they sought to become members of the Union. The Partnership has also breached Section 6(3)(b) because it terminated the employees without proper cause when the Union was in the process of conducting a certification campaign for its employees.

151 The Partnership has also breached Section 6(1) as it is clearly interference with the selection of a trade union for the Partnership to terminate all its care service employees to ensure that it was not certified.

152 The Partnership has also breached Sections 6(3)(d) and 9 of the Code. The Board uses an objective test to assess the employer's conduct against the standard of a reasonable employee: *Excell Agent Services Canada Co.*, BCLRB No. B172/2003. The employees were advised a few days prior to the date the representation vote was scheduled that they were terminated. The memoranda given to the employees clearly set out that the Partnership is opposed to being unionized. With the exception of the confirmation of the terminations, the comments in the memoranda of June 29, 2004 and August 4, 2004 concerning the Union and the certification are not a violation of Sections 6(1), 6(3)(d) and 9 as they were not coercive or intimidating. The expressing of noncoercive and non-intimidating views, based on a preference to resist certification is protected by Section 8 of the Code and do not constitute an unfair labour practice: *Convergys.* However, the communication of the terminations during the organization campaign while a certification application is pending is a breach of Sections 6(3)(d) and 9 as it is a threat of job loss on the eve of a certification representation vote.

153 An employee could reasonably have come to the conclusion that if they voted against certification, the Partnership might rescind the terminations. The fact that the Partnership, at that point in time, appeared to be on a set course of action to end the employment relationship with the care service employees so they could not ever be certified with the Partnership as their employer, does not remove the terminations from the definition of a threat. The employer's subjective intentions are not relevant when determining if the employer's actions amounted to a threat in the eyes of a reasonable employee.

154 In summary, I find the Partnership to be the true employer and to have breached Sections 6(1), 6(3)(a), 6(3)(b), 6(3)(d), 9 and 32 of the Code. Accordingly, I dismiss the complaints against Well-Being as they were filed in the alternative.

155 At the outset of the hearing, the Respondents brought an objection to the Union leading evidence of additional allegations of anti-union animus that were particularized in the Union's will-say statements but were not included in the complaints filed with the Board. The Union acknowledged that this evidence was not being tendered to support additional unfair labour practice complaints. Rather, the Union submitted that this additional evidence was relevant to contradicting the Respondents' position that the decision to contract out care was motivated by financial reasons, and not anti-union animus. In light of my finding that the Partnership's actions were motivated by anti-union animus in seeking to avoid certification, it is not necessary to determine if the additional evidence is admissible.

V. REMEDY

156 The legal issues arising from the enactment of Bill 29 and the issuance of Decision No. B253/2004 are complex and raise concerns as to an appropriate remedial response. Possible remedies range from a bare declaration of a breach to an order for remedial compensation with full compensation.

157 Given the wide range of potential remedies, the unusual circumstances of this case, and the ongoing nature of the relationship between the parties, I believe it is appropriate for the parties to be given an opportunity to reach an agreement on a remedy. To that end, the parties are directed to meet with a mediator of the Board in an effort to resolve the issue of remedy.

158 In the event that the issue of remedy cannot be resolved, I remain seized. However, I strongly urge the parties to reach a compromise with each other rather than rely on the Board to impose a remedy upon them.

LABOUR RELATIONS BOARD

ALLISON MATACHESKIE
VICE-CHAIR