IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***HEU v. BCLRB et al.,***
2005 BCSC 1369

Date: 20050930
Docket: L051210
Registry: Vancouver

In the matter of the ***Judicial Review Procedure Act***,
R.S.B.C. 1996, c. 241 (as amended);
And in the matter of the ***Labour Relations Code***,
R.S.B.C. 1996, c. 244 (as amended);
And in the matter of decisions of the Labour Relations Board
dated April 22, 2003 and April 15, 2004

Between:

Hospital Employees' Union

Petitioner

And

**British Columbia Labour Relations Board; and
Larry Hipperson, Ken Arnold, Michael Gunther
Aidan Wind, Philip Hayes**

Respondents

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

Counsel for the Petitioner:	D.W. Tarasoff
Counsel for the Respondent: Labour Relations Board:	E. Miller
Counsel for the Respondents: Harry Hipperson, Ken Arnold, Michael Gunther, Aidan Wind, Philip Hayes:	R.B.E. Hallsor
Date and Place of Hearing:	September 14, 2005 Vancouver, B.C.

[1] These proceedings are pursuant to the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241. The petitioner seeks to quash a decision of the Labour Relations Board of British Columbia (the "Board"), which declared that the petitioner contravened Part 5 of the ***Labour Relations Code***, R.S.B.C. 1996, c. 244 (the "***Code***"), by striking and picketing at health care facilities. The declaration was given on the application of the personal respondents, who applied for a declaration as a prerequisite to a claim for an action in damages.

[2] There are three bases for the petition:

(1) The decision of the Board to grant standing to the personal respondents was patently unreasonable and, hence, so, too, was the decision to grant the relief sought by them even if there was some basis upon which the Board could have concluded that some of the petitioner's conduct was contrary to Part 5 of the ***Code.***

(2) The Board dismissed the petitioner's argument that the impugned activity was political speech and expression protected by the ***Canadian Charter of Rights and Freedoms,*** Part I of the ***Constitution Act 1982***, being Schedule B to the ***Canada Act 1982*** (U.K.) 1982, c. 11.and that the ***Code*** and ***Health Sector (Facilities Subsector) Collective Agreement Act***, S.B.C. 2004, c. 19 (the "***Act***") are inconsistent with the ***Charter*** to the extent that their provisions purport to restrain, restrict, or prohibit such conduct. Further, the Board did so on the basis of Board precedent and policy without regard

to the circumstances at hand and thus unlawfully and unreasonably fettered its judgment. The Board thereby erred in law or committed a reviewable jurisdictional error, or both.

(3) The Board declared that the petitioner engaged in picketing activity contrary to Part 5 in the absence of any evidence that the petitioner engaged in picketing activity and therefore exceeded its jurisdiction and violated the rules of natural justice.

Facts

[3] In April, 2004, the petitioner engaged in lawful strike action against health care employers in British Columbia. This was a controlled strike. That is, the Board designated certain services to be essential and those services were maintained. However, many services were interrupted.

[4] On April 29, 2004, the Government of British Columbia enacted the ***Health Sector (Facilities Subsector) Collective Agreement Act.*** The ***Act*** imposed a collective agreement and required that the petitioner end the strike and that the employees to return to work.

[5] The work stoppage continued. On April 29, 2004, health care employers applied to the Board under Part 5 of the ***Code***. They alleged that the union had violated the ***Code*** and the ***Act*** by continuing to strike and to picket. The union challenged the applicability of Part 5 of the ***Code*** to what they were doing. It argued

that the petitioner was engaged in a political protest which was protected by the ***Charter***.

[6] On April 30, 2004, the Board issued an interim order. That order directed the union to refrain from declaring or authorizing a strike; it ordered union members to refrain from participating in or continuing a strike and to resume their duties; and it ordered the union refrain from impeding or preventing its members from resuming their duties. The interim order was filed in this Court. The work stoppage continued until May 3, 2004, when union members returned to work.

[7] The Board did not make a determination about the constitutional and other issues between the parties. Health care employers and the unions, including the petitioner, put these proceedings behind them.

[8] The personal respondents allege they were scheduled to undergo medical procedures between April 30 and May 3, 2004. They say the procedures were cancelled because of what they allege were breaches of the ***Code*** by the petitioner.

[9] The personal respondents wish to bring an action for damages against the petitioner. A pre-condition to any such action is a determination by the Board that there has been a contravention of Part 5. That is the effect of s. 137(4) of the ***Code***:

> A court of competent jurisdiction may award damages for injury or losses suffered as a consequence of conduct contravening Part 5 if the board has first determined that there has been a contravention of Part 5.

The respondents therefore made an application to the Board under that section, seeking such a declaration.

[10] The matter first came before the Board in 2004. A panel of the Board published the first decision on October 19, 2004 (BCLRB No. B315/2004). The panel noted that while the Board's order was not complied with, that itself is not a breach of Part 5. It also stated that in the absence of their claim for damages, the personal respondents would not have a basis for being granted standing. But for that claim, they would be no different from other members of the public who are inconvenienced by a labour dispute.

[11] The panel said it required "particulars." Pursuant to Rule 2(2) of the Labour Relations Board Rules, the Board required particulars of the alleged striking or picketing activities at a specific location and particulars of the damages alleged to have been suffered.

[12] The personal respondents provided materials on November 5, 2004. These particulars put forward the nature of the procedure for each respondent and how it was cancelled or postponed as a result of the job action.

[13] The Board then received further submissions. On February 15, 2005, the same panel published the next decision (BCLRB No. V46/2005). The union continued to vigorously oppose the making of any declaration. It argued there was no "causal link" established between the withdrawal of services and the harm alleged. It argued that because of the disruption in health care arising from the lawful action before April 30, 2004, it was doubtful the procedures would have

occurred in any event. The union argued the respondents therefore had no standing. The petitioner disputed that the harm alleged would necessarily have been avoided if the procedures had gone ahead. It maintained the objections it made at first and also raised other objections.

[14] The panel noted at paras. 4-6 the particulars that had been received from the applicants:

> The Applicants' particulars can be summarized as follows: each of the five Applicants were scheduled to undergo a medical procedure or operation at a specified hospital in BC on April 30, 2004. The scheduled procedures were: a cortisone injection to alleviate the symptoms of a shoulder injury; a renogram to diagnose a potential recurrence of cancer; a circumcision to treat a 'chronic health condition'; surgery to repair a torn knee ligament; and heart valve replacement surgery. Each of the Applicants were advised by their doctors or surgeons on April 28 or 29, 2004 that if the HEU members remained off the job on April 30, their respective procedures or operations would not take place as scheduled on April 30. The HEU members did not return to work on April 30, 2004, and none of the Applicants' procedures or operations took place that day. All were re-scheduled for a later date.
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> The Applicants' particulars make it clear that the delay in receipt of treatment caused them frustration, anxiety and emotional upset. In addition, in some cases the delay is alleged to have prolonged physical discomfort from the untreated condition. In some cases the delay in treatment or need to re-schedule is also alleged to have caused economic loss due to an inability to work in the interim between April 30 and the re-scheduled procedure, or the need to take additional time off work for the re-scheduled procedure.
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> Although not expressly stated, it is also clear from the particulars that the Applicants' procedures or operations were not in the nature of emergency medical treatments. Rather, the procedures were either diagnostic in nature or required to treat chronic conditions. All the procedures were re-scheduled and either have been or will be performed at a later date, ranging from a few weeks after April 30 to a year later.

[15] The panel decided that under s. 139, it had a discretion to exercise as to whether to answer the question raised. The Board considered that the parties to the dispute itself (health care employers and health care unions) were satisfied not to litigate the matter and rather to "move on". In these circumstances, the Board considered that a strong argument not to instigate litigation about whether the conduct was unlawful. "But," the panel said, "The fact the respondent wishes to pursue a claim for damages gives life to the issue."

[16] The Board then considered whether the respondent had standing. The Board concluded that the test for standing is whether an applicant's interest will be affected in a direct and legally material manner. The Board held that the applicants satisfied this test: seeking the declaration is a legal prerequisite to pursuing the claim.

[17] The panel said this about the particulars at para. 35:

> …I note that no particulars whatsoever have been provided with respect to the actions of the HEU in relation to these Applicants. In my view the Applicants should have provided particulars of the HEU's job action at the particular hospitals in question, for example, and how the job action affected the decisions of the Applicants' doctors or surgeons to cancel their procedures and re-schedule them.
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> Nonetheless, I find the Applicants' failure to provide particulars of the HEU's job action is not, in itself, fatal to their application. The essential facts that the HEU withdrew services to essential service levels and put up 'protest lines' is not in dispute: it is the legal characterization of this conduct which is in issue.

[18] The panel then addressed the argument that the refusal to return to work was protected by the ***Charter*** and therefore not unlawful:

> The Board has recently dealt with the question of whether there is a constitutionally required 'political protest' exception to the Code's ban on 'mid-contract' strikes (i.e., striking during the term of a collective agreement). In *HEABC*, BCLRB No. B395/2004 (Leave for Reconsideration of BCLRB No. B64/2004 and BCLRB No. B92/2004), a majority of the Reconsideration Panel held that the Code bans all forms of mid-contract strikes, including 'political protest' strikes, and that this complete ban is constitutionally valid and not overbroad. The majority consisted of Chair Mullin and Registrar Brown.
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> In *obiter*, Chair Mullin suggested that an exception for political strikes may be constitutionally permissible in certain circumstances, but held that he was bound by judicial authority to the contrary from the British Columbia Supreme Court, and thus he agreed with Registrar Brown in the result. Therefore, the legal result in *HEABC* is that there is no exception for mid-contract 'political protest' strikes under the Code. They remain impermissible unless and until a court decides otherwise.
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> Although the Board has decided that there is no constitutional exception to mid-contract strike, the Chair has also alluded to the possibility that an exception may be required in certain circumstances. This, he said, would be for a court to decide. I do not know whether a court would decide that the HEU's conduct in this case was constitutionally permissible.

[19] The Board granted the declaration that the HEU's conduct, in continuing to strike and picket at health care facilities between April 30 and May 3, 2004 contravened Part 5 of the ***Code***. The panel went on at para. 9:

> I make no comment as to the ability of the HEU to raise any constitutional/jurisdictional arguments concerning the impugned conduct as 'political protest' in front of a court before any damages for a contravention of Part 5 are awarded.

[20] The petitioner applied for reconsideration pursuant to s. 141 of the ***Code***. The reconsideration panel made its decision on April 7. The union sought leave to reconsider on six grounds:

1. the original panel erred in declaring that the HEU engaged in picketing contrary to Part 5 in the period April 30 to May 3, 2004 in the absence of any evidence or particulars whatsoever upon which to base a finding that picketing occurred;

2. the original panel erred in deciding that the Applicants would be affected in a direct and legally material way by the outcome of the proceeding and therefore had standing to pursue a Part 5 declaration in the absence of particulars demonstrating that the alleged harm suffered by the Applicants was caused by the impugned conduct;

3. the original panel erred in granting relief (a Part 5 declaration to allow a suit for damages against HEU) that is not rationally connected to the breach of the Code;

4. the original panel erred in deciding that there is a live controversy and that the matter was not moot in the absence of particulars demonstrating that the Applicants have at least a good, arguable case for damages;

5. the original panel erred in failing to dismiss the application as amounting to an abuse of process on the basis of the express finding that "… the CTF [Canadian Taxpayers Federation] was the impetus for this application and … the Applicants would not have otherwise brought it but for the involvement of the CTF"; and

6. the original panel erred in concluding that the impugned conduct was contrary to Part 5 of the Code and therefore unlawful strike and picketing activity and not *Charter* protected political speech, expression and protest.

[21] In BCLRB No. B91/2005, the reconsideration panel dismissed five of the grounds, numbers 1, 3, 4, 5, and 6, because they did not disclose a "good arguable case" and said nothing further about them. It addressed the second ground holding that it did not disclose a good arguable case either. The Board said:

> We disagree with the HEU's characterization of the Original Decision. The original panel considered the particulars provided by the Complainants and concluded they were sufficient for the purpose of determining standing.
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> The original panel outlined the Complainant's particulars regarding the causal link between the alleged damages and the impugned HEU

conduct in paragraphs 4-5 of the Original Decision. The original panel said, in part:

> Each of the Applicants were advised by their doctors or surgeons on April 28 or 29, 2004 that if the HEU members remained off the job on April 30, their respective procedures or operations would not take place as scheduled on April 30. The HEU members did not return to work on April 30, 2004, and none of the Applicants' procedures or operations took place that day. (para. 4)

The original panel also set out and applied the proper test for standing, and reached its conclusion as to standing in paragraph 32. In so doing the panel implicitly concluded that the particulars were sufficient to demonstrate that the Complainants will be affected by the outcome of their application in a direct and legally material way. We agree with that conclusion.

Standard of Review

[22] Before considering the petitioner's grounds, I will address the standard of review. This is not a matter of contention in these proceedings. The applicable standard with respect to issues of natural justice is "whether, in all the circumstances, the tribunal acted fairly": ***Administrative Tribunal Act***, S.B.C. 2004, c. 45, s. 58(2)(b). The decision to grant standing is reviewable on a standard of patent unreasonableness. The court must find the Board's decision to be "not in accordance with reason" or "clearly irrational": ***McCaffery v. Labour Relations Board of B.C.***, 2005 BCSC 611 at paras. 27-30 and ***Budgell v. British Columbia (Labour Relations Board)***, 2005 BCSC 487 at paras. 20-21/

Grounds for Review

[23] The first basis for review is essentially the same argument that the petitioner made to the review panel: that the respondents did not have standing to pursue a

Part 5 declaration because they would not be affected in a direct and legally material way by the outcome of the proceedings. The Board considered the particulars supplied by the respondents. The Board ruled that the respondents have a direct and legally material interest in the outcome of the declaration because it is they who are making the claim for damages. Moreover, the Board required that the claim have some apparent merit.

[24] The petitioner, however, argues the Board must go further and require the respondents to prove causation: that the harm they suffered was caused by the union's breach of Part 5 and not by some other factor. I do not accept that proposition. The Board's decision to grant standing to the respondents was not patently unreasonable. With respect, it was in my view correct.

[25] If the petitioner's position prevailed, the Board would be required in this case to conduct a hearing into the cause of the harm suffered by the individual respondents. This could involve medical evidence and conflicting expert opinion. If the Board decided in favour of the respondents, the matter would proceed to an action for damages where the same questions of causation could arise. In an action for damages, other parties could be added such as health care facilities or physicians. In the circumstances, any decision of the Board would not bind the parties to the litigation.

[26] Here, the Board was satisfied from the particulars that the petitioners were putting forward a claim for damages that had some basis in fact. That was sufficient.

[27] The petitioner argues that cases where persons have sought standing on judicial review are instructive by analogy. With respect, I do not agree these cases are analogous. The respondents in this case are not seeking to review a decision involving health care employees and health care unions. They are not seeking to insinuate themselves into these disputes. Rather, they maintain they have suffered damages as a result of the petitioner's conduct which they allege was unlawful. They seek to bring an action in court. They are seeking a declaration from the Board because that is the requirement of the ***Code***.

[28] I turn to the second ground: the Board's decision to decline to decide the ***Charter*** issue.

[29] The original panel noted that the Board had held in a previous case, ***Health Employers Association of British Columbia***, (December 17, 2004), BCLRB No. B395/2004, that "...the *Code* bans all forms of mid-contract strikes, including 'political protest' strikes, and that this complete ban is constitutionally valid and not overbroad". The panel went on to say that such "political protest" strikes remain impermissible until a court decides otherwise. That may be a reference to the fact that the Board's decision in ***Health Employers Association of British Columbia*** is itself the subject of a judicial review application in this court which has not yet been heard.

[30] The petitioner argues that this amounts to a wrongful fettering of judgment or declining of jurisdiction because no consideration was given to the facts and circumstances of the particular case.

[31] The petitioner relies on *Donald J.M. Brown and John M. Evans*, *Judicial Review of Administration Action in Canada, looseleaf (Toronto: Canvasback Publishing, 2004)* at paras. 12:4410 and 12:4421*:*

> An allegation that a tribunal has 'fettered its judgment' is similar to a charge of 'prejudgment', in that the complaint is that the decision-maker has decided the matter without regard to the particular circumstances. In particular, an agency may not fetter the exercise of its statutory discretion or its duty to interpret and apply the provisions of its enabling statute, by mechanically applying a rule that it had previously formulated, other than where it is properly enacted pursuant to a statutory power to make subordinate legislation.
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> ...
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> A decision-maker will fetter his or her discretion by *automatically* following policies, rules, guidelines, or precedent, notwithstanding that their existence is proper. In other words, although courts have often acknowledged that policies and guidelines may be desirable as tolls of effective and fair administration, and that their creation may be implicit in the statutory grant of discretionary decision-making authority, decision-makers cannot *confine* their exercise of their discretion by refusing to consider other factors that are legally relevant.
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> ...
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> On the other hand, the Law Reports are replete with cases in which decisions were set aside because the agency failed to make an independent judgment and instead merely applied a policy or guideline without considering the specific circumstances of the particular case. (emphasis in original, footnotes omitted)

[32] I agree with the petitioner that the Board is not permitted to apply precedent or policy without regard to the facts and circumstances in each particular case. Here, however, the Board had addressed a ***Charter*** challenge to the definition of strike in an earlier case, ***Health Employers Association of British Columbia***. It has made an interpretation that even withdrawals of service which could be characterized as political protests aimed at government are captured by the

definition of "strike". The panel was simply basing its decision on a legal interpretation of the ***Code*** which has not been overruled by judicial authority. It is noteworthy that the petitioner did not outline circumstances to the Board which it argued distinguished this case from the circumstances in ***Health Employers Association of British Columbia***. The petitioner simply argued that the job action was ***Charter*** protected political speech, expression and protest.

[33] I turn to the third ground: that there is no basis for finding that picketing occurred. The petitioner points to the fact that the order of the Board of April 30 did not enjoin picketing. The applicants provided no particulars of impugned conduct which would warrant a finding of picketing. Therefore, there is no evidentiary basis for a finding there was picketing.

[34] In the first decision of the original panel, the panel said (at para. 40) there was "no dispute that HEU members remained off the job, while maintaining essential services, and participated in what the HEU characterizes as protest lines outside a number of HEABC member sites throughout British Columbia between April 30, 2005 and May 3, 2004".

[35] In the original panel's second decision, at para. 36, it noted that despite the respondent's failure to provide particulars, the "essential facts that the HEU withdrew services to essential service levels and put up 'protest lines' is not in dispute: it is the legal characterization of this conduct which is in dispute".

[36] The union does not take issue with these conclusions. It does not say there was no evidence of "protest lines". That being the case, I conclude that the Board

was entitled to find, in light of its conclusion that the protest constituted a strike, that the protest line constituted picketing within the meaning of the ***Code***.

[37] For these reasons the petition is dismissed. The respondents other than the Labour Relations Board are entitled to costs at Scale 3.

"Mr. Justice Kelleher"