BCLRB No. B349/2004

BRITISH COLUMBIA LABOUR RELATIONS BOARD

SODEXHO MS CANADA LIMITED, ARAMARK CANADA FACILITIES LTD., and COMPASS GROUP CANADA (HEALTH SERVICES) LTD./GROUPE COMPASS CANADA (SERVICES DE SANTE) LTEE.

("Sodexho", "Aramark", and "Compass", together the "Employers")

-and-

HOSPITAL EMPLOYEES UNION and BC GOVERNMENT AND SERVICE EMPLOYEES UNION

(the "HEU", and the "BCGEU", together the "Unions")

PANEL:	Sharon Kearney, Vice-Chair Jan O'Brien, Vice-Chair Ken Saunders, Vice-Chair Mark Leffler, Member Gail Martin, Member
APPEARANCES:	Kate Bayne and Andrea Zwack, for Sodexho Kim G. Thorne and Muriel Henry, for Aramark David Duncan Chesman and Brian Dartnell, for Compass Chris Buchanan and David Tarasoff, for the HEU Keith Oleksiuk, for the BCGEU

CASE NOS.: 50741, 50967, 50972, 51000, 51052, 51053, 51094, 51160, 51231, 51248, 51304, 51333, 51545, 51554, 51591, 51602, 51628, 51648, 51660, 51661, 51664, 51686, 51687, 51715, 51786, 51791, 51856, 51857, and 51972

DATE OF HEARING: October 5, 2004

DATE OF DECISION: November 10, 2004

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Unions filed a number of applications seeking to be certified to represent employees of Sodexho, Aramark, and Compass at various locations in B.C.

2 The Employers are private contract service providers who, as a result of the *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c.2 ("Bill 29"), obtained contracts with the provincial Health Authorities to provide housekeeping, laundry, food and other non-clinical support services in public health care facilities. Before Bill 29, HEU and BCGEU members directly employed by the Health Authorities provided these services. The Unions oppose Bill 29 and the contracting out it permits, and they have launched a court challenge to the legislation.

3 The Employers have a common preliminary objection to the certification applications filed by the Unions - they allege that the HEU and the BCGEU are not appropriate bargaining agents for their employees as a result of the Unions' goal of having the Bill 29 contracts held by the Employers reversed.[1]

4 In the interest of adjudicative efficiency, this panel was constituted to deal solely with this objection. The parties filed written submissions and presented oral argument on the issue.

---

[1] The Employers have raised their inappropriate bargaining agent objection in relation to more than 50 outstanding HEU and BCGEU certification applications. We have not listed all of the case numbers of the files involved because the parties understand that the Employers' objections relate to all the certification applications made in respect to the contracts made possible by Bill 29.

II. BACKGROUND

5 Bill 29 was enacted on January 29, 2002. The legislation nullified certain collective agreement provisions which had prevented the Health Authorities from contracting out non-clinical support services provided by employees represented by the HEU and the BCGEU. After the enactment of Bill 29, the Health Authorities laid off several hundred of these employees and contracted out the work. Sodexho, Aramark and Compass all succeeded in obtaining contracts for this work with various Health Authorities.

6 Soon after the passage of Bill 29, the HEU and the BCGEU jointly launched a court challenge to the constitutionality of Bill 29, seeking a declaration that Bill 29 was of no force and effect. The challenge has thus far been unsuccessful: see *Health Services and Support – Facilities Subsector Bargaining Association et al. v. British Columbia,* 2004 BCCA 377, affirming 2003 BCSC 1379. The Unions are now seeking leave to appeal from the Supreme Court of Canada.

7 The Unions' goal in the court challenge is to have the Bill 29 contracts held by the Employers reversed and to have the laid-off employees retroactively restored to their former jobs with the Health Authorities. The Unions say that they also want to have the employees currently working under the Bill 29 contracts integrated into the public health system as employees of the Health Authorities. The HEU has publicly stated its goal is to reverse the effects of Bill 29, regardless of the outcome of the constitutional challenge.

III. POSITIONS OF PARTIES

8 The Employers argue that the Unions' goal of bringing about the termination of their contracts with the Health Authorities (the "Bill 29 contracts") renders them unable to fulfill their duties under the Code and inappropriate bargaining agents for the employees employed under these contracts.

9 Specifically, the Employers say that the Unions cannot bargain in a manner consistent with the Code since achieving collective agreements with them would undermine the Unions' goal of having their business relationships with the Health Authorities terminated. Thus, the Employers assert that the Unions are incapable of bargaining in good faith as mandated by Section 11 of the Code.

10 The Employers also say that by seeking to terminate the contract under which their employees are employed, the Unions are in a conflict of interest which would make it impossible for them to properly represent their employees and to fulfill their duty of fair representation under Section 12 of the Code. The Employers also argue that the Unions should have advised their employees of the Unions' goal of terminating the contracts under which they are employed before they were asked to sign membership cards.

11 Lastly, the Employers say that the Board would not be fulfilling its duty under Section 2(b) of the Code if the Unions were granted certifications for their employees, since the Unions are pursuing a course of action aimed at causing the Employers to lose the business in which their employees are employed. The Employers argue that granting the HEU's or the BCGEU's certification applications would be inconsistent with the employment of employees in economically viable businesses because it would both threaten their employment and reduce the Employers' economic viability.

12 In short, the Employers query how a trade union that seeks the failure of their businesses can be certified as the exclusive bargaining agent of employees employed by these businesses.

13 The Unions argue that the Employers' objections do not fall within the very narrow grounds under which the Board will examine the appropriateness of a bargaining agent and they assert that the Employers' arguments are based on purely hypothetical concerns. The Unions say that if their legal challenge results in the termination of the Employers' contracts with the Health Authorities, they will diligently represent any member who is displaced and in the meantime, they intend to vigorously bargain on behalf of the employees to obtain fair collective agreements with the Employers. The Unions say that, in the past, they have been able to balance such conflicting interests.

IV. ANALYSIS AND DECISION

14 The issue before us is as follows:

- Does the Unions' goal of bringing about the termination of the Bill 29 contracts, by way of their constitutional challenge or otherwise, make them inappropriate bargaining agents for the Sodexho, Compass and Aramark employees who are employed under these contracts?

15 We begin our consideration of this issue by noting the exceptional nature of the Employers' objection. Provided a union is properly constituted, the Board does not scrutinize whether a particular union is an appropriate bargaining agent for the employees. Rather, the Board leaves that decision to the employees to make. Consequently, it is very rare for employers to object to the appropriateness of the proposed bargaining agent. As set out in *Compass Group Canada (Health Services) Ltd./Groupe Compass Canada (Services de Sante) Ltee*, BCLRB No. B328/2003, the Board seldom delves into the identity of a bargaining agent unless it is necessary to ensure that the unit is appropriate for collective bargaining:

> In the rare case, limitations on employee autonomy have been seen as necessary to advance industrial stability in settings where there has been a perceived need to impose such measures given a history of conflict. Those occasions have been few. They have arisen more commonly in a council of trade unions setting or where there has been a history of jurisdictional disputes between

> craft unions that may justify the grant of exclusive jurisdiction to a particular union or to a moratorium on changes in representation: *Proflex*; *C.E.P.*; and *BC Rail Ltd.*, BCLRB No. B311/2002 (Reconsideration of BCLRB No. B272/2003). Neither of those scenarios is at play in this case. (para. 85)

16 Both the HEU and the BCGEU are well-established trade unions. However, the Employers argue that this is one of the exceptional cases where the Board's intervention is justified. The Employers do not argue that either the HEU or the BCGEU are, generally speaking, unsuitable to represent employees. Rather they say that the Unions' goal of bringing about the termination of the Bill 29 contracts by way of the constitutional challenge or otherwise, renders them unable to fulfill their duties under the Code. The Employers say that in these circumstances, the Unions are inappropriate bargaining agents for the employees employed under the Bill 29 contracts.

17 The Employers have raised serious concerns about the potential viability of a collective bargaining relationship if the Unions are certified. The Employers submit that there are many steps the Unions can take to try to achieve their goal of reversing the Bill 29 contracts even if their constitutional challenge is unsuccessful. The Employers urge us to draw a number of inferences in this respect. For example, the Employers argue that the Unions may take unreasonable positions in bargaining to try to prevent the attainment of a collective agreement on terms which will allow the Employers' to continue in business; they may seek to engage in work stoppages which will undermine the Employers' ability to perform under its contracts; they may raise complaints and concerns about the Employers' performance of their contracts to the Health Authorities, the government or the public; and lastly, they may lobby the government to repeal Bill 29.

18 In short, the Employers say that the Unions seek the failure of the businesses which provide employment to the employees they seek to represent and they contend that the Unions will attempt to show failure in every phase of the employment relationship day in and day out.

19 Based on the Employers' arguments, there are four possible ways in which the Unions' goal of terminating the Bill 29 contracts can be achieved:

1. through the Bill 29 constitutional challenge;
2. by persuading the provincial government to revoke Bill 29;
3. by persuading the Health Authorities to use their own employees to provide the services provided by the Employers; and
4. by causing the Employers' businesses to fail.

20 Although there is some overlap among these, we turn first to the Unions' constitutional challenge to Bill 29. The Employers are careful to note that they do not view the constitutional challenge alone as the basis for their objection. They recognize

the right of the Unions to bring a constitutional challenge and state that they are prepared, "at least in theory", to concede that the bringing of such a challenge is not necessarily inconsistent with the Unions' duties under the Code. In our view, this is a proper concession.

21 Under Bill 29, the provincial government acted unilaterally to void certain terms in the Facilities Sub-sector collective agreement. If the HEU and the BCGEU achieve the remedy sought through the constitutional challenge, the effect would be to restore job security and contracting out limitations to the Facilities Sub-sector collective agreement. However, it is not at all clear what the "on the ground" effect of a successful constitutional challenge to Bill 29 would be. In any event, assuming the constitutional challenge represents a threat to the continued or future existence of the Bill 29 contracts, we do not find that this potential threat is sufficient, in and of itself, to render the BCGEU or the HEU inappropriate bargaining agents for the employees employed by the Employers under these contracts. Nor do we find that it was necessary for the BCGEU or the HEU to have obtained the "informed consent" of the employees before continuing to pursue the challenge or before seeking their support for certification.

22 We turn now to the Employers' arguments based on Section 12 of the Code. The Unions assert the Employers do not have standing to make a Section 12 argument on behalf of their employees. The Employers say they are not formally invoking Section 12, but rather are raising the concern that there is a fundamental conflict of interest between the Unions and their employees. The Employers say that the Unions cannot represent the interests of their employees while seeking to reverse the contracts that the employees depend upon for employment.

23 In our view, it makes no difference which bargaining agent represents the employees while the Unions' constitutional challenge is underway or indeed, while the Unions may be lobbying either the provincial government or the Health Authorities. Presumably the constitutional challenge and any lobbying efforts by the Unions will continue no matter which trade union represents the Employers' employees. If the employees are represented by a union which is not involved in the constitutional challenge, that is not going to have any effect on the ultimate disposition of the Unions' constitutional challenge or on the ultimate outcome of any lobbying efforts by the Unions. In short, certification will not be the proximate cause of the employees' loss of employment if this occurs.

24 Arguably, if the employees are represented by either the HEU or the BCGEU, they may actually be in a position to influence the conduct of the Unions in respect of the constitutional challenge. The employees would certainly be in a better position to leverage support from the Unions to mitigate the effects of a successful constitutional challenge on their employment.

25 With respect to the possibility that the Unions may encourage the Health Authorities to use their own employees to provide the services at issue or may lobby the provincial government to revoke Bill 29, the reality is that the Board has no jurisdiction

to deal with a number of the concerns raised by the Employers. These include the prospect of the Unions raising complaints and concerns about the Employers' performance of their contracts to the Health Authorities, the government or the public or lobbying the government to repeal Bill 29. Raising complaints or concerns about an employer with government bodies or the public, and lobbying for the repeal of legislation are not violations of the Code.

26 Speaking out in the legal, public, and political arenas is one of the recognized roles of trade unions. Apart from their role as collective bargaining agents under the Code, trade unions enjoy separate lives in the broader community as social and political institutions. This reality is reflected in the definition of trade unions under Section 1. Section 1 only requires that a trade union or, for that matter, an employer's organization have "...as *one of its purposes* the regulation in British Columbia of relations between employers and employees through collective bargaining..." (emphasis added). In *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, the Supreme Court of Canada acknowledges:

> ...the dynamic and evolving role of the trade union in Canadian society. In addition to permitting the collective expression of employee interests, trade unions contribute to political debate. At the level of national policy, unions advocate on behalf of disadvantaged groups and present views on fair industrial policy. These functions, when viewed globally, affect all levels of society and constitute "an important subsystem in a democratic market-economy system"... (para. 38)

27 As social and political institutions, unions have an important right to speak out and take positions on political issues and may pursue legal and political goals, not just collective bargaining goals. In *Retail, Wholesale and Department Store Union, Local 558*, [2002] 1 S.C.R. 156, the Supreme Court of Canada commented:

> Free expression is particularly critical in the labour context. As Cory J. observed for the Court in *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, "[f]or employees, freedom of expression becomes not only an important but an essential component of labour relations" (para. 25). The values associated with free expression relate directly to one's work. A person's employment, and the conditions of their workplace, inform one's identity, emotional health, and sense of self-worth: *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *KMart*, *supra*.

> Personal issues at stake in labour disputes often go beyond the obvious issues of work availability and wages. Working conditions, like the duration and location of work, parental leave, health benefits, severance and retirement schemes, may impact on the personal lives of workers even outside their working hours. Expression on these issues contributes to self-understanding, as well as to the ability to influence one's working and non-working life. Moreover, the imbalance between the employer's economic power and the relative vulnerability of the individual worker informs virtually all aspects of the employment relationship: see *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 92, per Iacobucci J. Free expression in the labour context thus plays a significant role in redressing or alleviating this imbalance. It is through free expression that employees are able to define and articulate their common interests and, in the event of a labour [page 174] dispute, elicit the support of the general public in the furtherance of their cause: *KMart*, *supra*. As Cory J. noted in *KMart*, *supra*, at para. 46: "it is often the weight of public opinion which will determine the outcome of the dispute".
>
> Free expression in the labour context benefits not only individual workers and unions, but also society as a whole. In *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, the reasons of both La Forest and Wilson JJ. acknowledged the importance of the role played by unions in societal debate (see also *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70, and *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94). As part of the free flow of ideas which is an integral part of any democracy, the free flow of expression by unions and their members in a labour dispute brings the debate on labour conditions into the public realm. (paras. 33 -35)

28 The idea that free expression is central to labour relations and that parties to collective agreements may freely express their views on labour relations and other matters is also a Code principle reflected in Sections 2, 8 and 64. Section 8, in particular, recognizes the right of a person to express their views "...on any matter..." absent coercion or intimidation.

29 Consequently, it is necessary to differentiate between a union's political motives and its obligations under the Code. In the practical world of labour relations parties may say things that are inconsistent with their Code obligations. However, there is a difference between what parties may say and what they ultimately do. For this reason we find that the Unions may pursue their goal of reversing the Bill 29 contracts by, for example, lobbying the government to repeal Bill 29, without being considered "inappropriate bargaining agents" for employees of the Employers. While the Board must exercise its powers under the Code in a way that, among other things, fosters the

employment of workers in economically viable businesses (Section 2(b)), we do not interpret this provision as requiring the Board to "screen" unions to ensure that the views they express and the positions they advocate are advantageous to the employers whose employees they represent, or are congruent with the employers' political views or economic interests. The fact that the Unions might lobby government to repeal Bill 29, and the Employers in turn might lobby the government to retain the legislation, does not lead to a conclusion that certifying either the HEU or the BCGEU to represent the Employers' employees is inconsistent with Section 2(b) of the Code.

30 Accordingly, we dismiss the objection that the BCGEU and the HEU are inappropriate bargaining agents, based on the fact that they have participated in the constitutional challenge to Bill 29, or may urge the Health Authorities to use their own employees or may lobby the provincial government to revoke Bill 29.

31 We now consider the Employers' position that the Unions will attempt to cause the failure of their businesses to further the goal of reversing the Bill 29 contracts. There are several difficulties with this position. First, the Employers have not alleged the Unions have actually breached the Code by, for example, bargaining in bad faith. Rather they ask the Board to assume that the Unions *will* breach the Code in pursuit of its goal and they ask us to draw a number of inferences that we find are not sustainable on the evidence before us. The fact that the Unions have, as a goal, the reversal of the Bill 29 contracts does not automatically lead to an inference that they will sabotage the collective bargaining relationship in order to make the Employers' businesses fail.

32 The Unions have denied that they will breach the Code in order to pursue their goal. The HEU is already certified to represent some of the employees of both Sodexho and Compass. Neither of these Employers rely on any assertion that, thus far, the HEU has failed to live up to its obligations under the Code. In these circumstances, we are not prepared to assume that the Unions will disregard their obligations under the Code. Specifically, we are not prepared to assume that the Unions will bargain in bad faith, engage in illegal work stoppages, or fail in their duty of fair representation.

33 The Unions' submissions make it clear that they intend to pursue their goal in ways which do not violate the Code. Consequently, we conclude that the Employers' concerns are anticipatory in nature. In the absence of evidence to support an inference that the Unions will act contrary to the Code to make the Employers' businesses fail, it is not reasonable to assume that they will do so. The Employers are not prejudiced by this conclusion. The Board is alive to the potential for unfair labour practices in the Bill 29 context and is in a position to respond if and when facts supporting a Code contravention crystallize. Until then, we are not prepared to assume that the Unions will violate the Code in order to pursue their goals.

34 The Employers argue that the Unions were obliged to inform employees about their Bill 29 challenge and goals before asking employees to sign union membership cards. The Unions say they did inform employees. It is not necessary to hold a hearing

to resolve this dispute. Even if we accept the Employers' factual assertion for the purposes of this decision, we conclude for the following reasons that the Employers' position is not well-founded.

35 The answer to the Employers' submissions on this point, largely rests on the general proposition that absent allegations of unfair labour practices (i.e. unlawful interference, coercion or intimidation) or a misrepresentation that renders a membership card equivocal, the Board does not examine the merits of employees' decisions to join a union. All the Code requires is that the membership card include a statement acknowledging that the employee has chosen the trade union to represent them in collective bargaining. Applying this test we are not persuaded that the failure to advise employees of the Bill 29 challenge or the potential impact of the remedies sought on the Employers' contracts renders the Unions' membership cards equivocal.

36 Moreover, we note that recent amendments to Section 8 of the Code considerably broaden the information that may be communicated to employees about union representation. Employers are now entitled to express their views on unionization. As a result, the Employers are free to express their views to their employees about representation by the HEU and the BCGEU. These views need not be reasonable or accurate as long as they are not deliberate lies. In our view, the same standard applies to trade unions. The Unions are not required to tell employees of any of the potential negative consequences of joining a union (including their goal of reversing the Bill 29 contracts) as long as they do not engage in misrepresentation.

37 The Board has long recognized that employees are in a position to seek out information and ask questions when they are being asked to sign a union membership card. Whether employees choose to sign membership cards without making enquiries is not a matter that calls for Board intervention. The Board does not go behind employees' decisions about joining a union to determine if they have made reasonable and informed choices. In the absence of unfair labour practices or misrepresentation, the merits of the employees' decisions to sign membership cards are not evaluated. Once a union is certified, employees have many opportunities to regulate the activities of their bargaining agent including decertifying after 10 months have passed.

38 With respect to the interests of the employees – as distinct from the interest of the Employers – the Unions' goal of wanting to bring an end to the Bill 29 contracts raises a serious concern about their continued security of employment. The Unions, however, have clearly stated that they recognize their obligation to do their utmost to act as the employees' exclusive bargaining agent under the Code and to live up to all of the requirements that entails. The Unions additionally recognize that if the Bill 29 contracts are terminated they have an obligation to act diligently to ameliorate the displacement of any of the employees. Unions frequently are required to balance competing interests. The potential that the Unions may be faced with competing and conflicting interests in representing the employees of the Employers is not, in our view, sufficient reason to assume that the HEU and the BCGEU will violate the Code.

V. CONCLUSION

39 For all of the above reasons, the Employers' objection that the HEU and the BCGEU are inappropriate bargaining agents is dismissed.

LABOUR RELATIONS BOARD

SHARON KEARNEY
VICE-CHAIR

JAN O'BRIEN
VICE-CHAIR

KEN SAUNDERS
VICE-CHAIR

MARK LEFFLER
MEMBER

GAIL MARTIN
MEMBER