

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: **HEABC v. Facilities Subsector
Bargaining Assoc.,
2004 BCSC 762**

Date: 20040611
Docket: L041054
Registry: Vancouver

**IN THE MATTER OF APPLICATIONS PURSUANT TO
THE LABOUR RELATIONS CODE, R.S.B.C. 1996, c. 244**

Between:

**Health Employers Association of British Columbia
on behalf of its members**

Applicant

And

**Facilities Subsector Bargaining Association
and Hospital Employees' Union**

Respondents

Before: The Honourable Mr. Justice Bauman

Reasons for Judgment

Counsel for the Applicant

N. T. Mitha and
P. D. McLean

Counsel for the Respondents

P. H. Dickie and
C. G. Buchanan

Date and Place of Trial/Hearing:

2 and 17 May 2004
Vancouver, B.C.

[1] On 2 May 2004, I found the Hospital Employees' Union guilty of civil contempt of an order of the British Columbia Labour Relations Board filed in this court.

[2] The order arose out of Bill 37, the **Health Sector (Facilities Subsector) Collective Agreement Act**.

[3] That **Act** essentially ordered employees of employers who are members of the HEABC to resume their duties and work schedules of employment.

[4] The order was effective in the early hours of 30 April 2004 and the HEU did not get its employees back to work until early on 3 May 2004.

[5] These are relatively approximate timing parameters.

[6] It is important to note that on motion of the HEABC, this was a finding of civil, not criminal contempt.

[7] In essence, my finding confirms that the HEU and its members were engaged in an illegal strike involving hospital and health care facilities around the province during the noted period.

[8] The impacts of the HEU's actions are summarized in the affidavit of David Woodward, Deputy Minister of Strategic

Initiatives and Corporate Services for the Ministry of Health Services.

[9] Between 30 April and 3 May 2004, 5,896 surgical procedures were cancelled; between the same dates, 19,064 diagnostic procedures, including MRIs, ultrasounds and laboratory tests were cancelled.

[10] Mr. Woodward at paragraph 13 of his affidavit deposes:

Based on this approximation, a conservative estimate of the costs incurred by the Health Authorities as a result of the HEU job action plus the cost of catching up all of the cancelled surgeries and procedures to as a result of the actions of the HEU on April 30 through May 3, 2004 would be approximately \$6,424,000.

[11] Mr. Dickie, counsel for the HEU, takes issue with this estimate and he submits that it overlooks an almost equal amount which was "saved" in wages and benefits otherwise payable to workers affected by the job action.

[12] In the end, it is not necessary to measure the damage to the people of this province in dollars and cents. What is clear is that the loss represented by the pain, suffering, stress, anxiety and just plain inconvenience to the public, wrought by these activities, is incalculable.

[13] It now falls to the court to impose a fit punishment on the HEU for its contempt.

[14] In his text *The Law of Contempt in Canada* (Toronto: Carswell, 1997) Jeffrey Miller distinguishes between criminal and civil contempt in the matter of punishment:

As between criminal and civil contempts, the general principle is that criminal contempts are to be answered with penal sanctions, while sanctions for civil contempts should protect the rights as between private litigants and thus generally should be "coercive" (as opposed to punitive). Kellock J. characterized the distinction this way in *Poje v. British Columbia (Attorney General)*:

In case of a breach of a purely civil nature, the requirements of the situation from the standpoint of enforcement of the rights of the opposite party constitute the criterion upon which the court acts. But a punitive sentence is called for where the act of violation has passed beyond the realm of the purely civil.²

[Footnote omitted]

[15] This theme was echoed in the leading British Columbia case *International Forest Products Ltd. v. Kern*, 2000 BCCA 500. I quote Justice Esson at ¶17:

That, in my view, sums up the error which requires this appeal to be allowed. The trial judge gave no practical effect to the consideration that these appellants were not found to have committed conduct which threatened the proper administration of justice. The distinction between civil and criminal contempt is set out in the passage from the reasons of Wood J. in the *Everywoman's* case (*supra*, para.

10) and was summed up in these words by McEachern C.J.B.C. giving judgment for the court upholding that decision: **Everywoman's Health Centre Soc. (1988) v. Bridges (1990), 54 B.C.L.R. 273.** At p.293, the Chief Justice said:

A civil contempt is one where the dispute is entirely between private parties which does not threaten the proper administration of justice. A criminal contempt is one where, because of the nature of the conduct in question, the issues transcend the interests of the parties, and the public has an interest in ensuring the proper administration of justice.

[16] While the matter before me is one of civil contempt, I do not overlook the very public nature of the HEU's defiance of the order and the fact that the damage engendered thereby, far from being confined to the parties, has extended to the public at large.

[17] As to sentencing considerations in a matter of civil contempt, a useful summary is offered by Chief Justice Green in **Health Care Corp. of St. John's v. Newfoundland and Labrador Assn. of Public and Private Employees**, [2001] N.J. No. 17 (QL) (S.C.).

[18] There, these ten principles are set out:

1. The inherent jurisdiction of the court, as a superior court, allows for the imposition of a wide range of penalties for civil and criminal contempt;

2. Deterrence, both general and specific, but especially general deterrence, as well as denunciation, are the most important factors to be considered in the imposition of penalties for civil, as well as criminal, contempt;
3. The impact that the contemptuous act has had on the general public, particularly in relation to health and safety matters, is a relevant consideration in determining the level of penalty;
4. It is the defiance of the court order, and not the illegality of any actions which led to the granting of the court order in the first place, which must be the focus of the contempt penalty;
5. Imprisonment is normally not an appropriate penalty for a civil contempt where there is no evidence of active public defiance (such as public declarations of contempt; obstructive picketing; and violence) and no repeated unrepentant acts of contempt;
6. Where a fine is to be imposed, the level of the fine may appropriately be graduated to reflect the degree of seriousness of the failure to comply with the court order;
7. Where the defiance of the order is related to continuance of an unlawful strike resulting in failure to report for work when normally scheduled to do so, the number of times when the contemnor was presented with a clear and visible opportunity to demonstrate his or her intention to comply with the order and does not avail of that opportunity can be used as a rough measure of the degree of defiance;
8. Because the symbolism of continuance of collective defiance in the face of the court order is often significant in encouraging continuance of the contempt by others, and conversely, the symbolism of individuals acting, in the face of group pressure, to comply with the law is also often significant in encouraging others to do likewise, those

with a special visible position of leadership within the group, such as shop stewards or union officers who are also members of the unlawfully striking bargaining unit may be regarded as committing a more serious contempt if they refuse to comply with the order, and thereby may appropriately receive a greater penalty;

9. In setting the overall level of penalty, the court may take account of the level of penalty imposed in similar cases in the past and may adjust the penalty upwards or downwards, depending on the court's assessment as to whether previous levels of penalty have had an effective general deterrent effect;
10. In ordering payment of a fine, the court may permit, by imposition of appropriate conditions, the contemnor to satisfy the fine in alternative ways, such as payment to a charity or the provision of free services to the persons harmed by the continuance of the contemptuous behaviour.

[19] Counsel have provided me with most of the labour/contempt cases decided in this province. These include the historical precedents like *Poje v. AGBC*, [1953] 2 D.L.R. 785 (S.C.C.) and the series of cases involving the United Fishermen & Allied Workers Union decided in the late 1960s.

[20] They also include:

- ▶ ***Adams Laboratories Ltd. v. Retail, Wholesale & Department Store Union, Local 580***, [1980] B.C.J. No. 776 (QL) (C.A.), (1980), 23 B.C.L.R. 74;
- ▶ ***J.C. Kerkhoff & Sons Construction Ltd. v. United Brotherhood of Carpenters & Joiners of America, Local 452***, [1984] B.C.J. No. 580 (QL) (S.C.);

- ▶ *Brink's Canada Ltd. v. Teamsters Local Union No. 213*, [1984] B.C.J. No. 190 (QL) (S.C.); *Brink's Canada Ltd. v. I.B.T. Local Union No. 213*, [1986] B.C.J. No. 991 (QL) (C.A.);
- ▶ *J.C. Kerkoff & Sons Construction Ltd. v. United Brotherhood of Carpenters & Joiners of America, Local 452*, [1984] B.C.J. No. 1196 (QL) (S.C.);
- ▶ *Entex Door Systems Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 1928*, [1985] B.C.J. No. 534 (QL) (S.C.);
- ▶ *Verigin Construction (1983) Ltd. v. B.C. and Yukon Building Trades Council*, [1986] B.C.J. No. 2458 (QL) (S.C.); (1988), 30 B.C.L.R. (2d) 31 (C.A.); and
- ▶ *Rogers Cable T.V. - British Columbia v. International Brotherhood of Electrical Workers, Local 213*, [1987] B.C.J. No. 50 (QL) (S.C.); [1987] B.C.J. No. 957 (QL) (S.C.).

[21] All of these cases, I believe, are examples of criminal contempt.

[22] The fines imposed are of course driven by the particular facts before the various courts. But I note that they resulted in fines ranging from \$1,000 to \$85,000 in the *Brink's* decision.

[23] None of the cases concerned a situation like that before me.

[24] And it should also be noted that the decisions are all from the 1980s and they are therefore somewhat dated (and the amounts therein affected by inflation since then).

[25] I have enjoyed more assistance from a number of recent cases in Alberta, Saskatchewan and Newfoundland, which all involved illegal strikes by health care workers and their unions.

[26] These cases include:

- ▶ **United Nurses of Alberta v. Attorney-General of Alberta** (1990), 66 D.L.R. (4th) 385 (Alta. C.A.); (1992), 89 D.L.R. (4th) 609, [1992] 1 S.C.R. 901; [1992] A.J. No. 979 (QL) (C.A.);
- ▶ **Saskatchewan Health-Care Assn. v. S.U.N.** (1999), 177 D.L.R. (4th) 235 (Sask. Q.B.);
- ▶ **Continuing Care Employers' Bargaining Assn. v. A.U.P.E.**, (26 May 2000), Edmonton No. 0003-09786 (Alta. Q.B.); [2002] 9 W.W.R. 601 (Alta. C.A.); and
- ▶ **Health Care Corp. of St. John's v. Newfoundland and Labrador Assn. of Public and Private Employees**, [2001] N.J. No. 17 (QL) (S.C.).

[27] Once again, each case depends on its own facts, but I note the imposition of these fines.

[28] In **United Nurses of Alberta**, for a case of criminal contempt involving "flagrant open defiance, publicly avowed," of a court order prohibiting a strike, the union received fines of \$250,000 and \$150,000 in respect of two counts of contempt.

[29] In **Saskatchewan Union of Nurses**, legislation ordering the striking health care workers was passed. Like the case here,

an order of the court was made but the union and its members defied the order for about seven days.

[30] It was a case of criminal contempt. The union was fined \$50,000 and \$10,000 per day for a total fine of \$120,000.

[31] In ***Alberta Union of Provincial Employees***, the illegal strike in the health care field lasted two days. It was a case of a deliberate, premeditated, publicity-seeking flaunting of the court order.

[32] It was a case of civil contempt.

[33] The trial judge imposed a fine of \$400,000 on the union. On appeal, the Alberta Court of Appeal reduced the fine to \$200,000, finding that the Chambers Judge erred by effectively treating the matter as one of criminal, not civil contempt.

[34] The court noted that since 1980 the range of fines imposed in respect of a single instance of contempt by a union, either civil or criminal, is between \$500 and \$250,000.

[35] In the case at bar, the Union suggests that the applicable range of fine is between \$10,000 and \$50,000.

[36] With respect, these more current and relevant cases suggest a much higher range.

[37] The HEU has approximately 43,000 members. Those employees in the facilities subsector represent 28,100 full time equivalents.

[38] According to financial information filed by the Union, it has net assets, including cash, capital assets and strike funds of almost \$16 million. Included in this total is a cash reserve in the amount of \$1.5 million apparently reserved for the so-called "Fight Back Campaign/Political Action Fund".

[39] I have already discussed the nature of the HEU's contempt and the impacts of it.

[40] I note further here that there was evidence before me on the liability hearing indicating not only very open defiance of the order but, as well, instances of intimidation of workers by representatives of the Union.

[41] In mitigation of penalty, I note that the HEU did endeavour to maintain essential service levels during the so-called protest.

[42] As well, and again in mitigation, I note that the Union directed its members back to work shortly after my order on Sunday, 2 May 2004, at 4:00 p.m.

[43] Finally, Mr. Chris Allnutt, the secretary/business manager of the HEU, has filed an affidavit on 3 May 2004 in which he deposes: "On behalf of the HEU I offer a full apology for any and all disrespect the HEU has shown to this Court."

[44] I thank Mr. Allnutt for that apology.

[45] In setting a fine in this matter, I clearly cannot seek to completely undo in a money penalty the damage done by the union's actions. Nor is a fine which is so punitive as to be purely vengeful, appropriate. I must choose an amount which is significant, so that it serves the principles of deterrence and denunciation, but which is also restrained, so that the justice of it will be accepted by all.

[46] Taking into account the penalty considerations which I have outlined, stressing the need for deterrence and denunciation and bearing in mind the impacts of the contempt, and the size and the wherewithal of the Union, I impose a fine on the HEU for its contempt in the amount of \$150,000.

[47] That fine is suspended for a period of 30 days. Within that period, the HEU may purge its contempt (and the fine will

stand cancelled) by paying the total sum of \$150,000 in equal increments of \$25,000 to the following hospital foundations in British Columbia:

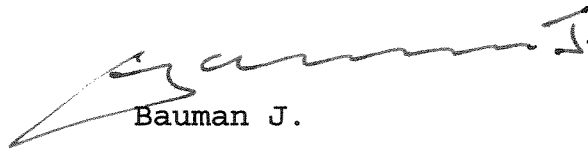
- ▶ Kelowna General Hospital Foundation;
- ▶ Royal Victoria Hospital Foundation;
- ▶ Spirit of the North Healthcare Foundation;
- ▶ St. Paul's Hospital Foundation;
- ▶ Surrey Memorial Hospital Foundation; and
- ▶ VGH & UBC Hospital Foundation.

[48] I believe that these foundations represent a number of the affected hospitals in various regions throughout the province. The list also includes foundations at facilities which serve the entire province.

[49] I hope that the Union will take the opportunity to purge its contempt in this manner.

[50] In this way, some good will come of this unfortunate

interlude in the provision of health care services in this province.

A handwritten signature in black ink, appearing to read "Bauman J.", is written above the printed name.

Bauman J.