

Case Name:

**British Columbia (Health Employers Assn.) v.  
Facilities Subsector Bargaining Assn.**

**IN THE MATTER OF applications pursuant to the Labour  
Relations Code, RSBC 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**

[2004] B.C.J. No. 885

2004 BCSC 603

28 B.C.L.R. (4th) 186

131 A.C.W.S. (3d) 241

Vancouver Registry No. L041054

British Columbia Supreme Court  
Vancouver, British Columbia

**Bauman J.**

Oral judgment: May 2, 2004.

(63 paras.)

*Civil procedure -- Contempt -- What constitutes -- Judgments and orders -- Disobedience of or non-compliance with -- Health law -- Public health -- Labour law -- Collective agreements -- Civil action -- Industrial disputes -- Strikes -- Remedies -- Contempt proceedings -- Labour relations boards -- Orders -- Enforcement -- Unfair labour practices -- By union -- Illegal strikes.*

Application by Health Employers Association for relief against Facilities Subsector. The Health Employers Association asked that the Facilities Sector be fined for disobeying an interim order of the British Columbia Labour Relations Board.

HELD: Application granted in part. The Facilities Subsector Bargaining Association was found guilty of contempt and the hearing was adjourned to allow the filing of materials as to the appropriate remedy.

**Counsel:**

N.T. Mitha and P.D. McLean, for the applicant.

P.H. Dickie and C.G. Buchanan, for the respondents.

**1 BAUMAN J.** (orally):-- By its motion, the Health Employers Association of British Columbia, which I will call the "HEABC", seeks this relief against the Hospital Employees Union, which I will call the "HEU": that it be fined for its contempt of court for wilfully disobeying the interim order of the British Columbia Labour Relations Board issued 30 April 2004, which provided, amongst other things, (that the respondents, that is, HEU and the Facilities Subsector Bargaining Association):

refrain from in any manner impeding or preventing or attempting to impede or prevent employees of HEABC members who are represented by the respondents from resuming their duties and work schedules of employment with HEABC members and which interim order was filed as an order of this court on April 30, 2004, or wilfully conspiring to disobey the order and counsel disobedience of the order by

- (a) on or about April 30, 2004 from 6:00 a.m. onward to the present conducting themselves or permitting, causing, directing, facilitating or organizing other persons to conduct themselves in contempt of this court and the order by continuing illegal strike activity at or near HEABC member premises; counselling, encouraging or exhorting members of the HEU not to resume their duties and work schedules of employment with HEABC members; counselling, encouraging or exhorting HEU members who have resumed their duties and work schedules to cease working, preventing and impeding HEU members from resuming their duties and regular work schedules of employment with HEABC members.

- 2** This application to find the HEU guilty of civil contempt of an order of this court is advanced in the context of intensely polarized relations between government and its public sector unions in this province.
- 3** That relationship is marked by much rhetoric, some of it dangerous, all of it unsettling, on both sides.
- 4** The friction between the two has been exacerbated by recent events in the healthcare field.
- 5** It began with a lawful strike by members of the HEU, which in turn led to the government's introduction and passage of Bill 37, the Health Sector (Facilities Subsector) Collective Agreement Act.
- 6** That Act essentially orders employees of employers who are members of the HEABC to resume their duties and work schedules of employment.
- 7** The Act also prohibits an officer or a representative of the HEU from impeding or preventing, or attempting to impede or prevent, employees from complying with the Act by returning to work.
- 8** Finally, the Act deems a collective agreement between the HEABC and the association of unions to be in force and it implements, subject to certain provisos, a wage reduction for employees.

**9** All this has led to the increasingly chaotic scenes and strident protests which we have witnessed in the last two days.

**10** Very early in the morning of 30 April 2004, the Labour Relations Board of this province made an interim order under the Labour Relations Code. That order was thereafter immediately filed in the registry of this court, making it, in effect, an order of this court.

**11** In respect of the HEU, the LRB made these orders:

1. The Board orders the unions, their officers, members, employees and agents to immediately refrain from declaring or authorizing a strike against the HEABC members.
2. The Board orders the employees of HEABC members who are represented by the unions to immediately resume their duties and work schedules of employment with the HEABC members.

...

4. The Board orders the unions, their members, officers, employees and agents to immediately refrain from in any manner impeding or preventing or attempting to impede or prevent employees of HEABC members who are represented by the unions from resuming their duties and work schedules of employment with HEABC members.

**12** That is, in brief compass, the political and social context to this contempt application.

**13** While I am alive to that context, that context, from the perspective of the judiciary, as represented by this court, is not what this case is about.

**14** From the perspective of a court of law, this case is not about politics, economics, social or other ills; it is about the rule of law.

**15** That is the rule which, in a free and democratic society, is the foundation for the social contract between all members of our community.

**16** Adherence to the rule of law is what buffers an ordered society from anarchy.

**17** This court spoke to this in an early labour case, *Canadian Transport v. Alsbury* (1952), 6 W.W.R. (NS) 473. The language is a bit dated, but it nevertheless is apposite:

Over the centuries our laws have been built up to give the greatest protection to all classes of our society, and only through the medium of the freedom and independence of the courts are these privileges protected. Once our laws are flouted and orders of our courts treated with contempt, the whole fabric of our freedom is destroyed. We can then only revert to conditions of the Dark Ages when the only law recognized was that of might. One law broken and the breach thereof ignored is but an invitation to ignore further laws, and this, if continued, can only result in the breakdown of the freedom under the law which we so greatly prize.

18 More recently, in *United Nurses of Alberta v. Alberta* (1992), 89 D.L.R. (4th) 609, Justice McLachlin (as she then was) said this of contempt of court:

Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court.

19 Unlike many legal concepts the rule of law is simple.

20 It is written in plain English and it does not admit of lawyerly loopholes.

21 It has a number of aspects, but the aspect with which I am concerned holds, quite simply, that the law in our society is supreme - no one - no politician - no government - no judge - no union - no citizen is above the law.

22 We are all subject to the law. We do not get to pick and choose the laws which we will observe and obey.

23 Each of us must accept the rule of all laws, even if we have to hold our noses in complying with some of them.

24 Let me turn to the affidavit evidence filed by the applicant.

25 It includes affidavits from many management employees in numerous health authorities and major hospitals throughout this province.

26 Many of the affidavits echo a similar theme: Health institutions surrounded by so-called protest lines made up of HEU members organized and directed by alleged agents and officers of the union.

27 There is overwhelming evidence to the effect that the hospitals identified enjoy only staffing at essential service levels, if indeed that. The inference is irresistible that the protest lines are inhibiting and impeding workers from crossing and reporting for work.

28 The evidence raises a number of legal issues, including the issue of whether the individuals directing the protest lines are agents of the HEU such that their acts are the acts of the HEU.

29 A potentially difficult issue arises as to whether the protest lines and the conduct of the HEU represent legitimate political protest or a thinly and poorly disguised strike.

30 In the end, I do not have to address these issues at this time. I wish, rather, to concentrate on sections 6(c) and (e) of the Health Sectors Collective Agreement Act, and these subsections read:

6           Immediately after this Act comes into force and despite the Labour Relations Code

- (c) Every employee must resume his or her duties and work schedules of employment with the employer; and
- (e) An officer or representative of a trade union must not in any manner impede or prevent or attempt to impede or prevent any person to whom paragraphs (a) to (c) apply from complying with those paragraphs.

31 These sections, in turn, have formed the basis for paragraphs 3 and 4 of the Labour Relations Board's order which I earlier quoted.

32 In this context, I have before me the evidence of Scott McCann, an associate lawyer in the office of the applicant's counsel.

33 He attaches as Exhibit A an extract from the HEU's website printed at about 10:40 a.m. on 30 April 2004 when all parties agree the fact of the filing of this order in this court was known and indeed had taken place. Extracts from Exhibit A, quoting:

Day 6, HEU members stand their ground as thousands more join protest lines. As thousands of CUPE members begin setting up pickets at public institutions across the province, HEU is telling its members to maintain and respect protest lines at hospitals and long-term care facilities.

34 Again from Exhibit A:

It's the start of Day 6 of protest actions by healthcare workers. There are reports that as many as 15,000 CUPE members will be off the job today in support of HEU members. The HEU's instructions to its members are that protest lines will continue to be maintained and respected by union members and that essential services will continue to be provided.

As thousands of CUPE members begin setting up pickets at public institutions across the province, HEU is telling its members to maintain and respect protest lines at hospitals and long-term care facilities.

35 As well, as paragraph 4 of Mr. McCann's affidavit, he deposes:

At approximately 2:15 p.m., I telephoned the HEU bargaining hotline which is reached through phone number 604-739-1515. I have listened to this message and recorded a copy of it. Below is a transcription of the message based on my review of the recording.

36 I will not quote the entire extract, but let me quote these extracts from the recording:

HEU is telling its members to maintain and respect protest lines at hospitals and long-term care homes. Essential service levels are being maintained at all facilities.

37 The tenor of these statements is repeated in the evidence filed by the HEU. Paragraphs 3 to 6 of the affidavit of Margaret Blamey read:

3 Early in the morning of April 29, 2004 the Health Sector Facilities Subsector  
Collective Agreement Act Bill 37 was passed by the provincial legislature.

4 The union strike then ended and the union immediately began to encourage  
its members to engage in a political protest against Bill 37 and the actions of  
the provincial government.

5 One of the primary ways the union has communicated with its members in  
recent months has been through bargaining bulletins. Bargaining bulletins  
are widely distributed to HEU members, local executives and shop stewards.  
They are available on the union's website. They are E-mailed to  
approximately 1500 people. They are distributed to HEU staff, including  
staff at regional offices, and they are hand delivered to individual members.

6 On April 29, 2004 the union issued a bargaining bulletin which makes it  
clear that the union will henceforth be engaged in a political protest.  
Attached as Exhibit A is a true copy of the bargaining bulletin dated April  
29, 2004.

38 And that in turn reads, in part:

HEU's provincial executive met this morning one hour after Royal assent was  
given to Bill 37, the B.C. Liberal's legislative attack on healthcare workers. The  
Executive is now asking members to put up protest lines and respect them until  
further notice.

39 This bulletin is dated 29 April 2004, but clearly the sentiments and directions contained in it  
continue in place since the filing of the LRB's order in this court, and HEU did not suggest otherwise in  
argument.

40 I will only refer to one other affidavit at this time. It is the affidavit of John Bavanda at tab 13 of  
the chambers brief.

41 Mr. Bavanda is a human resources consultant with the Interior Health Authority at Kelowna. He  
deposes at paragraphs 3 to 7:

3 Today, April 30, 2004 at approximately 11:05 a.m. I met with Mr. Dennis  
Nogue, provincial representative for the HEU. I know Mr. Nogue personally  
and he has previously informed me of his position as provincial  
representative with the HEU. I have dealt with him on HEU matters for the  
past eight months.

4 This meeting took place in the administration office of Cottonwoods Care  
Centre, an extended care home operated by the IHA. Also present for the  
meeting was Ms. Lennie Wilson, an HEU steward. I know Ms. Wilson

7

personally and know of her position with the HEU.

5 Both Mr. Nogue and Ms. Wilson confirmed that they were aware of the order which had been issued by the Labour Relations Board.

6 I asked Mr. Nogue to confirm that the HEU would restore full service levels immediately in compliance with the order. Mr. Nogue said that the HEU would be maintaining essential service levels only. With respect to employees crossing the line and coming into work he stated the HEU would be applying peer pressure to keep them out on the line.

7 Mr. Nogue also told me that if any employees crossed the line, he would instruct an essential employee to leave Cottonwoods. This meant that if an HEU member returned to work, an HEU member employee already at work at Cottonwoods as an essential services worker would be removed from the facility. I took this to be a threat. Mr. Nogue confirmed that only essential service levels were going to be maintained by the HEU. I told him that I did not agree and that the IHA had the right to discipline HEU members who failed to report to work.

42 It is obvious that the protest lines around the province are intended by the HEU (and Mr. Nogue's conduct can clearly be brought home to the union, see *Brink's Canada Ltd. v. Teamsters Local Union No. 213* [1984] B.C.J. No. 190) - as I say, it is clear that the protest lines around the province are intended by HEU, in the terms of the order, "to impede or prevent or attempt to impede or prevent employees of HEABC" who are represented by HEU, "from resuming their duties and work schedules of employment with HEABC members."

43 As to the remainder of the evidence filed by the applicants, I accept it and believe it. I exclude from the evidence the paragraphs agreed to be deleted by the applicants on the record from the respondents' list of objections. I also exclude as hearsay tab 15, page 3, paragraphs 12 and 13. I dismiss the respondents' other evidentiary objections.

44 As to the elements of civil contempt, I am, on the evidence, satisfied beyond any reasonable doubt that:

- (i) the HEU has had proper notice of the LRB order and its filing in this court;
- (ii) the terms of the order are clear. The respondents' contention that the prohibition as to striking was ambiguous was not at all compelling.
- (iii) at least this term of the order has been breached by the HEU, and here I am referring to paragraph 4 of the order:

The Board orders the unions, their members, officers, employees and agents to immediately refrain from in any manner impeding or preventing or attempting to impede or prevent employees of HEABC members who are represented by the unions from resuming their duties and work schedules of employment with HEABC members.

45 And, of course, I stress the concepts "impede or prevent or attempting to impede or prevent" employees from going back to work.

46 I am satisfied beyond a reasonable doubt that the order has been breached in the terms of the notice of motion - and here I refer back to the notice of motion:

... by counselling, encouraging or exhorting members of the HEU not to resume their duties and work schedules of employment with HEABC members; counselling, encouraging or exhorting HEU members who have resumed their duties and work schedules to cease working; and preventing and impeding HEU members from resuming their duties and regular work schedules of employment with HEABC members.

47 Finally, I am satisfied beyond a reasonable doubt that in doing these things, the HEU had the requisite mens rea in committing the offence of civil contempt.

48 I find the contempt of the HEU as described proven beyond a reasonable doubt.

49 As to remedy, I will hear the parties, but I would like to adjourn the remedy phase to later this week. I expect full submissions on the remedy phase. I expect senior officers of the HEU to be here for that proceeding. Indeed, I am surprised that they were not here today.

50 As to the future conduct of the HEU and its members, pending the remedy phase, let me direct these words:

51 There are a number of tools available to the court in dealing with instances of contempt of its orders. These include fines - potentially very onerous fines - and jail for individuals.

52 As tools to be used in resolving what is essentially a political/social/economic controversy, they are pretty blunt, and they may not be very effectual.

53 So let me call on your better instincts as responsible citizens - as responsible trade unionists.

54 Obey the law - in this case, the interim order of the LRB filed in this court.

55 Obey it - not because the elected government has passed the Health Sectors Collective Agreement Act upon which the order is based, not simply because the Labour Relations Board - one of the most credible institutions of its kind in North America - directs you to, not because this court by the filing of the LRB order has further directed it; obey the directions in the order because it is the law - for better or worse - whether right or wrong - whether fair or thought to be unfair.

56 Obey the law - do not sacrifice a basic tenet of our social structure - the rule of law not men - in momentary anger, for fleeting tactical advantage or because of the perceived economic disadvantage of the moment.

57 Now, as I say, I will hear you on the remedy phase, but I have expressed my preference.

(SHORT ADJOURNMENT TAKEN) (SUBMISSIONS)

58 THE COURT: Well, I hear what Mr. Mitha is saying, but it seems to me that the deterrence, to the extent there can be any, as a result of my ruling is the fact that the court has made a finding of contempt,

and, of course, whether the HEU purges itself of the contempt by complying with the order is, of course, an important aspect of sentencing. So that is the potential deterrence that is hanging over the head of the union, if you like.

**59** I remain of the view that a break between the finding I have made today and the penalty phase, the remedy phase, should be had. I think it should be sooner than later, and I am going to say Tuesday morning in this court. And I am particularly interested in the background of the HEU and financial information, i.e. reasonable estimates of the cost to the HEABC and the economic wherewithal of the union, to the extent you can provide me with that information in admissible format on the remedy phase.

**60** MR. MITHA: I take it we have leave to file further materials on those matters?

**61** THE COURT: Yes. Well, it is a remedy phase, and subject to the normal process of exchange with your friend, and any prejudice to them from the point of view of short notice, we will have to deal with that as it arises.

**62** So at this point, I am adjourning to Tuesday at 10:00 a.m. in this courthouse.

**63** Thank you for being very cooperative in making yourselves available, and thank you for your very helpful submissions today.

BAUMAN J.

cp/i/qw/qlrds/qlsnv/qlbrl

drs/e/qlmxk/qlstv