A Long and Winding Road:
Labour Litigation in the Wake of Bill 29

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I. Background

Section 6 of the *Health and Social Services Delivery Improvement Act*, SBC 2002, c. 2 ("Bill 29") provides that a collective agreement in the health sector must not contain a provision which restricts the ability of a health sector employer to contract out for non-clinical services. Health sector employers accepted this invitation and laid off hundreds of employees, most of whom were members of the Hospital Employees' Union (the "HEU"), and contracted with certain service providers to provide dietary, housekeeping, laundry and other support services in health sector facilities. For the most part, these service providers were Compass Group Canada (Health Services) Ltd. ("Compass"), Aramark Canada Facility Services Ltd. ("Aramark") and Sodexho MS Canada ("Sodexho").

HEU embarked upon a campaign to organize the employees of these service providers and met with considerable success. In the ensuing three year period, HEU filed many applications for certification with the Labour Relations Board (the "Board"). But meanwhile, these service providers entered into collective agreements with what is now the United Steelworkers of America, Local 1-3567 (the ""USWA") through voluntary recognition of the USWA by the Employers.

The Board was called upon to address a whole host of issues as a result of the clash between the Employers and the USWA on the one hand, and the HEU on the other. Most of the debate centered on two broad issues – bargaining unit appropriateness and voluntary recognition ratification.

This paper will summarize some of the key decisions and findings that emerged as a result of the debate and conflict that arose out of Bill 29 litigation. Many of the issues addressed by the Board are quite routinely addressed by labour relations practitioners in British Columbia, including amendments to a proposed bargaining unit description, orders respecting disclosure of documents and particulars, the *prima facie* case standard, primary versus alternative unit descriptions, and standing, both as an interested party and as an intervener. But some novel issues arose, and even some of the issues which were seemingly familiar had a decidedly unfamiliar air about them in the legal landscape as altered by Bill 29. It is hoped that the following discussion of the more novel issues will be instructive and of interest to the community.

II. Bargaining Unit Appropriateness

A. *General*

In retrospect, the protracted dispute(s) between the parties at the Board arising from the effort to organize and represent workers of service providers was in essence a long conversation about bargaining unit appropriateness. The application and interpretation of the Board's decision in *Island Medical Laboratories*, BCLRB No. B308/93, 19 CLRBR (2d) 161 ("*IML*") was the subject of much discussion.

The essential dispute was this: the Employers tended to argue that bargaining units in the private sector service provider industry must mirror the commercial contract under which the employees provide services. The Employers said that bargaining units which mirror the commercial contracts were the *only* appropriate units in the industry, the rationale for this argument being that each contract was a separate "profit centre".

HEU tended to pursue broader based bargaining units which in some cases included or spanned more than one commercial contract. HEU pointed to the *IML* presumption against multiple units and the Board's long standing preference for large, inclusive all-employee units.

B. *"Profit Centres" and Bargaining Unit Appropriateness in the Service Provider Industry*

The concept of the "profit centre" was central to Employer objections to HEU certification applications, and Compass' objections in particular. Compass vigorously asserted that bargaining units must share the same parameters as the commercial contracts, each of which was described as a separate "profit centre". Loosely defined, a "profit centre" is an endeavour that must stand or fall on its own and is financially independent of the employer's other enterprises.

The Compass position reached its apogee in *Compass Group Canada*, BCLRB No. B194/2004, 107 CLRBR (2d) 55 (upheld on reconsideration in B263/2005, 116 CLRBR (2d) 58).

It is interesting to note that this case resulted from a dispute that is quite unusual. The dynamic driving the dispute was different than in most certification cases. Generally, in order to secure a certification, it is an *applicant union* that must rebut the presumption against multiple bargaining units in response to an objection by an employer. The applicant union must establish that the unit sought is an appropriate unit with reference to the six *IML* factors.

But in BCLRB No. B194/2004, however, the *Employer* argued that a second unit was appropriate and therefore set out to rebut the presumption against multiple units. Since the Employer was in effect arguing in favour of a second unit, the Employer quite properly set out to rebut the presumption with reference to all six *IML* factors to show

that a second unit is an appropriate unit. Accordingly, the panel in BCLRB No. B194/2004 correctly considered the Employer's position with reference to all six factors.

In any event, in B194/2004, HEU applied to vary a unit of employees working under a commercial contract between Compass and a particular client at a particular site to include another group of employees working under another commercial contract between Compass and a different client at a different site. Compass opposed the variance, and argued that there must be two separate bargaining units for each of these separate commercial contracts. Compass therefore sought to rebut the IML presumption against multiple bargaining units. The HEU application was dismissed on the basis that the unit sought by HEU was not appropriate because it sought to combine employees working under different circumstances.

But the same panel of the Board later allowed an application by HEU for a unit of employees working under two separate commercial contracts, since the proposed unit included employees working under two contracts between Compass and the same client at the same sites; see *Compass Group Canada*, BCLRB No. B200/2005, 115 CLRBR (2d) 303 (upheld on reconsideration B263/2005, 116 CLRBR (2d) 58 and on judicial review 2006 BCSC 618).

C. *Appropriateness Lessons Learned from B194/2004 and B200/2005*

A couple of points arising from these decisions may be of interest to the labour relations community.

First, in keeping with the approached more or less consistently applied in cases from *ICBC* to *IML*, the Board demonstrated a measure of sensitivity to specific circumstances in assessing appropriateness and rejected absolutes such as "bargaining units must mirror commercial contracts/profit centres in all cases". The Board rejected a unit combining commercial contracts in one case but accepted such a unit in another because of different circumstances. It is this sensitivity to circumstances which makes the concept of "appropriateness" flexible and elastic so as to foster access to collective bargaining for workers.

Second, it is worth noting that this is in keeping with a number of Board decisions in which unions are certified for bargaining units including more than one "profit centre". In other words, *context* is all important, and a finding that a contract or business is a "separate profit centre" does not automatically result in a separate bargaining unit which mirrors the profit centre.

D. *Other "Profit Centre" Cases*

Although the following cases were not decided in the wake of Bill 29, a quick survey of Board decisions involving profit centres is useful in understanding the cases discussed above.

1. In *Southland Canada Inc.*, BCLRB No. B484/98, the union sought to vary its certification at a 7-11 Store in Surrey to include another 7-11 Store in Surrey and one in Vancouver. The employer opposed the variance, largely for the following reasons:

> There are different managers and different workforces at the two stores. There is no functional integration between them and they are treated very functionally as two very separate operations, *with each responsible for its own profit and loss* (emphasis added)(paragraph 5)

The Board allowed the variance sought by the union. Although the Board found that the employer's structure was "fairly centralized and connected via the field consultants and the marketing managers" (paragraph 14), the Board does not dismiss the claim that each store is responsible for its own profit and loss. That is the hallmark of a "separate profit centre". In other words, the Board varied on profit centre to include two others.

2. The decision in *Starbucks Corp*., BCLRB No. B231/97 is of interest. The union applied to vary a unit of eight Lower Mainland stores to include a store in Westbank. Starbucks opposed the variance, in part on the basis that the stores were separate business units. The Board accepted this assertion, but also looked at how the separate business units operated in the overall corporate environment:

> The physical and administrative structure of the Employer lends itself to both a centralized and decentralized structure. The stores are viewed as separate business units with a District assuming overall responsibility for a number of stores (paragraph 18)

In the result, the Board allowed the variance. The interesting point for present purposes is that separate business units when viewed in overall context were included in one unit.

3. In *Starbucks Corp*., BCLRB No. B323/96, another variance case, the Board again allowed a variance over employer protestations that each store is a "separate business unit". It is very important to note that in this *Starbucks* case, the union *agreed* that the stores were separate business units, so there was no dispute about that point. The Board allowed the variance to include these separate business units. This again illustrates the point that "separate business units" by no means necessarily results in "multiple bargaining units". The context must be examined. See paragraphs 8, 15, 20, 31, 32 and 39.

4. In *WMI Waste Management*, BCLRB No. B53/93, the union applied to represent employees at the employer's Delta site and the employees at the Abbotsford site in one unit. The employer argued that the unit was inappropriate because it included

these two locations. The Board described some of the evidence that was called as follows:

> WMI Waste Management of Canada Inc. operates a solid waste disposal business. It has operations in Alberta, but the only two operations in British Columbia are at Delta and Abbotsford. The Delta operation, referred to by the Employer as Waste Management of Greater Vancouver, provides services to customers from a boundary drawn at the Langley border west to Vancouver. The Abbotsford operation, referred to as Waste Management of the Fraser Valley, provides service to customers east of the Langley border extending to Chilliwack and Abbotsford. Each of the two operations is set up as a separate profit centre, but not as a separate company. The only legal entity is WMI Waste Management of Canada Inc.(page 1)

In this case, the Board allowed the application. The Board rejected the employer's claim of complete separation between the two locations, but also found that "each location has a fair degree of autonomy"(page 3).

5. In *Coastal Ford Sales*, BCLRB No. B393/95, the CAW applied for a unit of employees at Coastal Ford on Main Street in Vancouver. The Machinists already represented a unit of employees of Coastal Ford in Burnaby. The Board noted that "…Main Street is considered a separate profit centre for internal accounting purposes" (paragraph 14). The CAW, which sought certification for a second unit for the same employer, argued in support of a second unit partly with reference to the Main Street location as a profit centre (see paragraph 28).

The Board dismissed the CAW's application. The analysis of the second *IML* factor was as follows:

> It is undisputed that the physical and administrative structure is largely integrated business-wide across both locations…Although there is a certain degree of autonomy in supervision at both locations at the bargaining unit level, overall integration of reporting structures and administrative functions is significant. Finally, I am satisfied that treating Main Street as a separate profit centre is for internal accounting purposes and is not helpful in this inquiry. Whether this be a first or second certification application, this factor is at best neutral from the Union's perspective. Beyond that it supports a single unit concept (paragraph 35).

In *Coastal Ford*, then, there was a "separate profit centre" aspect of the employers structure but that was largely "neutralized" by the overall structural context such that a bargaining unit which mirrored the "separate profit centre" was *not* appropriate. The Board suggests, in fact, that the second *IML* factor might in those circumstances tend toward a broader unit and not be merely neutral.

Coastal Ford was upheld on reconsideration in BCLRB No. B431/95.

6. In *Corps of Commissionaires*, BCLRB No. B66/2002, the union applied to vary its bargaining unit of commissionaires in Kelowna to include guards and matrons at

RCMP detachments in Williams Lake and Alexis Creek. The Board noted that "…employees work under contract at a third party site"(paragraph 93).

The employer objected in part on the basis that "…the two groups are entirely distinct groups of employees, working for what is in reality two separate business units"(paragraph 77).

The Board addressed the "separate business units" objection as follows:

> The Employer argues that there are, in essence, two separate business units within the Employer's structure. The Union objects to the Employer advancing that characterization of its organization as it was not a position advanced in its particulars, nor did it offer any witness to substantiate that view. It complains of a lack of opportunity to cross-examine to test that assertion. Given that challenge to the propriety of the Employer advancing that argument at that late stage, I give the assertion of "separate business units" little weight. I also observe that no evidence was led, as there has often been in other cases, to establish that the different sites and programs were different profit centres.
>
> Although I do not give weight to that separate business argument, I do make this observation on its implications. To follow the logic of the Employers argument to its ultimate point, each contract would have a separate business unit. Under that logic, given the large number of contracts the Employer has with many clients, each contract with its separate business unit would justify a separate bargaining unit. To accept that argument would potentially lead to a patchwork quilt of certifications. A single framework for collective bargaining is obviously preferred over such a hotchpotch of multiple units (paragraphs 98, 99).

This analysis is entirely in keeping with the *IML* presumption against multiple units and the Board's long standing preference for large, inclusive all-employee units.

7. *Cadillac Fairview*, BCLRB No. B245/94, was a case in which the Board declined to vary one "profit centre" to include another, as in BCLRB No. B194/2004. It is submitted, however, that *Cadillac Fairview* is probably wrong for these reasons and should not be relied upon.

The variance application in that case was refused in circumstances where *both* parties argued that the test on a variance of this type is whether the proposed enlarged unit is "more appropriate" that the stand alone unit(s); see pages 3 and 4. That is not the test on a variance of this kind, and never has been the test. If the proposed variance brings "an" appropriate unit into existence, then it must be granted.

Second, note too that in *Cadillac Fairview* "…the Union called no evidence in support of its proposed alteration to this Employer's existing single site bargaining structure" (page 4).

Third, given the circumstances in *Cadillac Fairview*, it is very difficult to square it with the decisions discussed above and the *IML* building blocks approach.

E. *Conclusion re Profit Centres and Appropriateness*

To sum up, the case law demonstrates that a finding that a commercial contract is a "separate profit centre" by no means results automatically in a finding that a separate bargaining unit is necessary. The Board reviews the overall context in which the business or contract operates and has in many cases included employees working in the business or under the contract in a broader unit with other employees. This kind of analysis is essential so as to preserve and adhere to the principles in *IML* and to avoid a "hotchpotch" of units. To approach the question of "separate profit centres" without regard to overall context, and to simply equate "separate profit centre" with "separate bargaining unit" is not the correct approach.

In B200/2005, and later in BCLRB No. B6/2006, wherein HEU was certified to represent employees in a very similar unit, the Board showed it was sensitive to context and circumstances and would not automatically draw the lines of a bargaining unit in accordance with a "profit centre". BCLRB No. B194/2004 should not be read as endorsing such an approach.

As a final point regarding the profit centre argument, it is worth noting that BC labour legislation has in the past provided for *multi-employer* units. Health sector labour relations legislation provides for province wide multi-employer bargaining units. Clearly, if separate employers can be in one unit for collective bargaining, the concept of appropriateness and the collective bargaining process are surely flexible and creative enough to accommodate separate profit centres in one bargaining unit in most cases.

F. *Proliferation of Units and Industrial Instability-Evidentiary Considerations*

The decision in *Sodexho MS Canada Ltd*., BCLRB No. B23/2004 (upheld on reconsideration in B67/2004) raises some interesting points about two key *IML* concepts, proliferation and industrial instability. This was a case where the IWA (as it then was) applied for a unit of employees at a particular worksite. Sodexho supported the application but the BCGEU and HEU argued that the unit was inappropriate because it was contrary to the *IML* presumption against multiple bargaining units and resulted in an unacceptable proliferation of bargaining units. Neither the IWA nor Sodexho called any evidence. Rather, they pointed to a so-called "pattern" of stand alone bargaining units in the service provider industry and argued that HEU and BCGEU did not call evidence showing the pattern would cause instability.

The Board dismissed the application. The onus was on those wishing to rebut the presumption against multiple units to call evidence establishing the additional unit would not cause instability – it was not enough to point to a lack of evidence of instability. In other words, the HEU and the BCGEU were not required to call evidence showing instability – Sodexho and the IWA were obliged to call evidence showing stability.

Sodexho is interesting too on the issue of reliance on a pattern of certifications. The Board confirmed that patterns are of little utility where the previous certifications were uncontested.

G. *The* IML *"Building Blocks" Approach*

Another appropriateness decision of arising out of Bill 29 litigation is *Aramark Canada Facility Services Ltd.*, BCLRB No. B243/2004. In this case, the Board affirmed the building blocks approach to certification as described in *IML* and endorsed this approach to certification and organizing within a large commercial contract that includes many sites in a large geographic area. Aramark's objection that the only appropriate bargaining unit was one including all sites under the commercial contract was therefore dismissed.

Incidentally, the IWA had occasion to apply for a unit including all of the sites under that commercial contract but the application was dismissed. In *Aramark Canada Facility Services Ltd.*, BCLRB No. B4/2005, the Board found that an application for certification under Section 18(4) by a voluntarily recognized trade union must be supported by membership evidence which conforms with Section 3 of the *Labour Relations Regulations*.

H. *Bargaining* Agent *Appropriateness*

Generally, the Board does not consider the appropriateness of the bargaining agent, only the appropriateness of the bargaining unit sought by the applicant union. That is as it should be.

But in very rare cases, some characteristic or feature of the applicant union might result in an objection that the applicant is an inappropriate bargaining agent.

In two Bill 29 cases, the Board considered the identity of the bargaining agent in the context of an application for certification.

In *Compass Group Canada*, BCLRB No. B328/2003, HEU asserted that the USWA (then the IWA) was not an appropriate bargaining agent because the addition of another bargaining agent in the health sector would disturb the highly regulated and carefully structured labour relations regime established under the *Health Authorities Act*. In other words, the HEU argued that the IWA (as it then was) was not an appropriate bargaining agent because it was not one of the established health sector unions. This argument was rejected by the Board.

In another case, *Sodexho MS Canada*, BCLRB No. B349/2004, 109 CLRBR (2d) 54, the Employers argued that the HEU and the BCGEU were not appropriate bargaining agents for their employees by reason of HEU and BCGEU opposition to Bill 29 and their attempt to strike it down in the Courts. The issue was framed by the panel 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? (paragraph 14)

The Employers also argued that the unions were obliged to inform employees about the challenge to Bill 29 before they signed membership cards.

In an interesting decision, the Board affirmed that in Canada, it is recognized that unions play a social and political role in society and are not confined to bargaining for better wages and benefits and must therefore be allowed to address the issues of the day. The Board noted the importance of freedom of expression in the labour context. Moreover, the Board does not go behind membership cards and enquire as to why employees signed a card to determine if employees made a reasonable and informed decision.

III. Voluntary Recognition

The validity of collective agreements reached through voluntary recognition of the USWA by the Employers was a frequent subject of debate. For the most part, the issue turned on whether or not the ratification process employed by the USWA was such that it could claim to be truly representative of the employees. The ratification procedure was assessed on the basis of the standard prescribed in *Marriott Management Services*, BCLRB No. B239/94 (reconsideration denied in B331/94); see, for example, *Compass Group Canada*, BCLRB No. B100/2005, 113 CLRBR (2d) 161.

In *Aramark Canada Facility Services*, BCLRB No. B173/2004, 107 CLRBR (2d) 25, the Board found that the alleged collective agreement was not valid because employees were not afforded an opportunity to ratify the collective agreement. Rather, the process was such that they were merely accepting certain terms and conditions of employment in order to secure an interview to obtain a job. This decision was upheld on reconsideration in BCLRB No. B214/2004, 107 CLRBR (2d) 41.

IV. Strikes and Picketing

A dispute between health sector employers and HEU implicated the Bill 29 contractors in some interesting ways.

First, the HEU argued that the employees of the contractors must be subject to essential services designations in the health sector dispute, because the essential services orders permits health sector employers to utilize contractors to obtain only essential services during a dispute. The unions argued that permitting the health sector employers to utilize 100% of the staff of the contractors during a strike was inconsistent with essential services law and policy. The Board rejected this argument in *Health Employers Association of BC*, BCLRB No. B99/2004, 104 CLRBR (2d) 235.

Having made that conclusion, the Board entertained applications by the contractors for relief from common site picketing. They argued that they were simply third parties who

were not involved in the dispute and picketing should be restricted so as to leave them unaffected by it. The unions advanced a number of arguments in the common site proceedings, including the proposition that picketing could not be restricted short of a prohibition. See *Compass Group Canada*, BCLRB No. B302/2005 (leave for reconsideration of B139/2004), 117 CLRBR (2d) 154.

It is respectfully submitted that the decision to allow a struck health sector employer to utilize a full range of services without limitation from a contractor during a dispute amounts to a serious error by the Board that is very much at odds with essential services law and policy and results in an unwarranted limitation on the right of the union to effective and meaningful strike and picketing activity.

V. Conclusion

While labour litigation in the wake of Bill 29 afforded practitioners and the Board an opportunity to revisit some labour relations fundamentals and consider familiar issues in a significantly altered legal landscape, we must not lose sight of the fact that in the end, the real issue was the right of workers to join unions of their choice and to have that choice recognized and respected in a prompt and unequivocal manner.