

IN THE MATTER OF AN ARBITRATION

BETWEEN:

HEALTH EMPLOYERS ASSOCIATION OF BC

(the “Employer”)

AND:

COMMUNITY BARGAINING ASSOCIATION

(the “Association”)

ARBITRATOR: Christopher Sullivan

COUNSEL: Mark Slobin and  
Jennifer Lamont for  
the Employer

Andrea Davis and  
Colleen Fitzpatrick  
for the Association

DATE & PLACE OF HEARING: April 3, 2008  
Vancouver, BC

PUBLISHED: April 17, 2008

The parties agree I have jurisdiction as arbitrator to hear and determine the matters in dispute. This case arises out of the settlement agreement, hereinafter referred to as the “Settlement Agreement”, reached on January 26, 2008 (and effective February 15, 2008) between the Government of the Province of British Columbia (the “Government”), the Health Employers Association of British Columbia (“HEABC”) and the Community Bargaining Association (“CBA”), acting on behalf of members of the constituent unions under the Health Services and Support Community Subsector Collective Agreement (the “Community Collective Agreement”). The Settlement Agreement was reached following the decision of the Supreme Court of Canada striking down certain provisions of the *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2 (“Bill 29”).

The Settlement Agreement provides for a lump sum amount for payments to be made to Union members impacted by Bill 29. Section 5.4 sets out the governing language concerning these payments as well as the dispute resolution process as follows:

5.4 The parties agree on the following process for the identification and categorization of impacted individuals entitled to a payment from the one and one-half million dollar (\$1,500,000) lump-sum amount:

A. Step One:

- i. The Community Bargaining Association will engage in the following preliminary process:
  - a) the identification of impacted individuals;
  - b) the criteria and categories of impact; and
  - c) the value assigned to each category of impact.

By no later than March 31, 2008, the number of categories and the relative value of such categories will be established, so that the determination can be made as to the expenditure of the amount allocated under subsection e. (sic) of Section 5.1 above by calculating the number of impacted individuals in each category times the relative value of all categories divided by the amount allocated under subsection e. (sic) of Section 5.1 above.

- B. Step two:
- i. The joint governance committee with a neutral Chair will be established comprised of three (3) representatives appointed by the Community Bargaining Association and three (3) representatives appointed by HEABC. The parties agree that Chris Sullivan will be appointed as the neutral Chair of the joint governance Committee.
  - ii. The Committee will determine its own process.
  - iii. The Committee will review and confirm:
    - a) the identification of impacted individuals;
    - b) the categories of impact and criteria for inclusion in that category;
    - c) the application of the criteria to impacted individuals and/or the assignment of impacted individuals to categories of impact; and
    - d) the value assigned to each criteria in the category of impact.
  - iv. Disputes by previously impacted individuals will be limited to appropriate application of the criteria to individuals for placement within the categories established.
  - v. The application of the criteria to impacted individuals and/or the assignment of impacted individuals to categories of impact must be finalized, prior to any distribution of funds, in the event there are disputes over assignments.
  - vi. The Chair has jurisdiction only to resolve disputes regarding the allocations (including those as between purposes listed in A above and B above as referenced in Section 5.1 above) and development of criteria and assignment of individuals to categories, and there is no jurisdiction to render any decision, the effect of which would result in the lump sum of one and one-half million dollars (\$1,500,000) being exceeded. The Chair also has jurisdiction to determine that the

process set out in Step One and Step Two will not be conducted in a manner that is arbitrary, discriminatory, or in bad faith.

The present case involves preliminary issues regarding the determination of the criteria and categories of impact as per Section 5.4(B)(iii)(b) of the Settlement Agreement, as well as the eligibility of several categories of individuals to a claim on settlement funds pursuant to the Settlement Agreement, the Supreme Court of Canada decision in *Health Services and Support – Facilities Subsector Bargaining Association et al. v. British Columbia* [2007] S.C.J. No. 27 (the “Supreme Court of Canada Decision”), and arbitral law.

## **GENERAL BACKGROUND TO DISPUTE**

It has long been recognized by the Provincial Governments in power that the provision of healthcare services to the public was a hugely significant financial burden borne by the Province. For at least the last 15 years through the development of public policy directives and the conduct of inquiries and commissions, the Government sought to consider and redefine the structure and delivery of health care services in the Province. These considerations were dictated by Government's motivation to reduce healthcare spending and resulted in restructuring and reorganization of health care delivery over the years through the enactment of various pieces of legislation. By 2001 there was a financial crunch in the health sector and the newly elected Government took steps to reduce health care expenditures through various legislative acts (see generally the *Health Care Services Continuation Act* and the *Health Care Services Collective Agreements Act*).

By December of 2001, the Government effectively collapsed the then-existing 52 regional health boards and community health councils, into 5 newly created, geographically defined health authorities and one provincial health authority responsible

for certain specialized health care services. The mandate of the health authorities was and is to coordinate and manage the delivery of health services in the Province, as funded and directed by the Ministry of Health.

To provide further clout for the reduction of costs through the administration of the delivery of healthcare services through the health authorities, Bill 29 became law on January 28, 2002. Bill 29 effectively permitted Government, through the health authorities, to redesign and reorganize health care service delivery. The Bill gave the health authorities the right to reorganize and move functions and services within a worksite, to other worksites or to other health sector employers (see Section 4). The health authorities under Bill 29 were able to assign employees to work at other worksites or for other health sector employers (see Section 5). In order to achieve these objectives, Bill 29 removed any restrictions contained in health sector collective agreements on contracting out of non-clinical services and allowed the health authorities to contract out work, while simultaneously re-writing the bumping language provided for in health sector collective agreements and ending employment security rights. Simultaneously, program funding was being reduced in certain health care delivery areas.

The relevant impact of Bill 29 on Union members under the Community Health Collective Agreement was as follows:

**a) Reorganization of Health Care Service Delivery**

Section 4 of Bill 29 allowed the health authorities to reorganize and move functions and services within a worksite to other worksites or to other health sector employers. Section 5 allowed the health authorities to assign employees to work at other worksites or for other health sector employers.

**b) Contracting Out Provisions**

Article 13.16 of the Community Health Collective Agreement 2001 – 2004 provided that:

The Employer agrees not to contract out any work presently performed by employees covered by this Agreement which would result in the laying off of such employees. There will be no expansion of contracting in or out within the bargaining unit of the Union as a result of the reduction of FTEs.

Under Bill 29, Section 6(2), a collective agreement could not contain a provision that in any manner restricted, limited or regulated the right of a health sector employer to contract outside of the collective agreement for the provision of non-clinical services. The effect of this provision was to strike the contracting out protections contained within health sector collective agreements.

**c) Employment Security Provisions**

At the time that the regional health boards and community health councils were reorganizing the delivery of health care services in the Province, they also entered into extensive negotiations with the various health sector union bargaining associations through an industrial inquiry commission, guided by Commissioner Vince Ready. This commission led to the introduction of the Employment Security and Labour Adjustment Agreement ("ESLA"), and the creation of a bilateral agency, the Healthcare Labour Adjustment Agency ("HLAA") to administer it. ESLA and HLAA were designed to ameliorate the impact that any reorganization of health care service delivery would have on the employees of an affected bargaining unit or units.

The terms of this agreement were incorporated into health subsector collective agreements including the Community Collective Agreement. Pursuant to Article 13.8 of the Community Health Collective Agreement 2001 – 2004. That Article provided:

Displaced employees shall, following the expiration of their notice period under the Collective Agreement, retain employment security for a period of up to twelve (12) months during which time every effort will be made to place such employees into gainful employment (hereinafter called “*Employment Security*”). Displaced employees who refuse placement by the HLAA shall lose their HLAA registration and the employment security period will be terminated. This does not affect an employee’s recall rights under the Collective Agreements.

The Employer from which a displaced employee is displaced shall pay the wages and benefited of the displaced employee for the duration of the employment security period. The HLAA shall reimburse the Employer for any portion of the employment security period in excess of six (6) months.

Bill 29, Section 7, struck down the ESLA provisions of health sector collective agreements in their entirety, save and except those entitlements that existed prior to Bill 29, thereby eliminating any Union member’s access to employment security.

**d) Bumping and Layoff Provisions**

Article 13.5 of the Community Collective Agreement for the term 2001 – 2004 provided that:

It is agreed that in instances where a job is eliminated, either by automation or change in method of operation, employees affected shall have the right to transfer to a job in line with seniority provided such transfer does not effect a promotion and provided, further, the employee possesses the ability to perform the duties of the new job. Employees affected by such rearrangement of jobs shall similarly transfer to jobs in line with seniority and ability.

A transfer under this section shall not be deemed to effect a promotion unless it results in an increase in the pay rate of the transferring employee in excess of three percent (3%) of his/her existing pay rate.

The Unions will recommend to their membership that they facilitate and expedite the job selection, placement and bumping process in the context of downsizing and labour adjustment generally.

Under Bill 29, Section 9(d), a collective agreement could not contain bumping options other than the bumping options set out in the regulations.

The bumping regulations were altered with the passage of the *Health Sector Labour Adjustment Regulation*, B.C. Reg. 39/2002. The regulation provided that employees with more than five years' seniority could only bump employees with less than five years' seniority and only if they were capable and qualified of performing the work. Employees with less than five years' seniority could only bump the most junior employee whose hours of work were comparable to their own and only if the employee is qualified and capable of performing the work. "Comparable" was defined as hours of work that differ from no more than 20% of the regularly scheduled hours of work and a wage rate that differs by no more than 5%. The regulation further provided that an employee exercising a bumping right had to advise the employer no more than 48 hours from receiving a seniority list of under five year employees of their intention to bump at the same worksite. A bumping employee was required to advise the employer within seven days of receiving the seniority list of their intention to bump to a different worksite.

## **UNION CHALLENGE OF BILL 29**

The CBA, along with the Facilities Support and Services Bargaining Union and the Nurses Bargaining Association, joined together to advance a challenge of the constitutionality of Bill 29 in 2002, seeking a declaration that Bill 29 was of no force and effect. The various associations challenged Bill 29 on the basis of four sections of the *Charter*:

- (a) Section 15 – equality rights;
- (b) Section 2(d) – freedom of association;
- (c) Section 7 – right to liberty and security of the person; and
- (d) Section 2(b) – freedom of expression

Section 15 of the *Charter* says that every individual has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. In addition to these grounds, the courts had said that analogous grounds of discrimination may apply. The section 15 claim under the *Charter* alleged that Bill 29 had the effect of discriminating against women and the occupational status of support workers in health.

In reliance on section 2(d) of the *Charter*, the associations asserted that Bill 29 effectively deunionized the health sectors. The associations argued that the Bill affected freedom of association because it interfered with individuals' ability to form, belong to and maintain an association. Further, it was argued that it was a breach of freedom of association if union members were precluded from doing collectively that which individuals could do lawfully; that is, that the legislation prevented unionized members from negotiating terms that non-union individual employees are free to negotiate. Further, it was argued that Bill 29 was such a substantial interference with the collective agreements negotiated by the various health sector associations, that it was contrary to the right to freedom of association.

In reliance on section 7 of the *Charter*, the associations further argued that Bill 29 prevented individuals from participating in determining fundamental conditions of employment and, thus, limited individuals' right to liberty and security of the person.

In reliance on section 2(b) of the *Charter*, the associations argued that Bill 29 deprived workers of freedom of expression by nullifying collective agreement language that required employers to communicate and consult on workplace organization.

The challenge was unsuccessful at both the British Columbia Supreme Court and Court of Appeal levels: see *Health Services and Support – Facilities Subsector*

*Bargaining Association et al. v. British Columbia*, 2004 BCCA 377, affirming 2003 BCSC 1379. While not all of the original constitutional arguments were pursued to the Supreme Court of Canada in 2007 that Court ruled that certain provisions of Bill 29 were valid, but others were not.

In summary, the Court upheld the Government's right to reorganize service delivery (Section 4), to compel multi-worksites assignments, and to eliminate the Employment Security and HLAA provisions (Sections 7 and 8). The Court ruled that Sections 6(2) and 6(4) (contracting out) and 9 (layoff and bumping rights) of Bill 29 were unconstitutional. It was in regard to the Supreme Court of Canada's decision on these latter matters that led to the Settlement Agreement and the hearing of these preliminary issues.

## **CRITERIA AND CATEGORIES**

The constituent unions of the CBA have gathered extensive information from members affected by Bill 29 and have reviewed and considered claims against the Settlement Agreement settlement funds. The CBA, as represented by the Joint Governance Committee, and HEABC have spent considerable time negotiating the appropriate criteria and categories for entitlement to a claim under the provisions of the Settlement Agreement.

The parties have reached a tentative agreement on those criteria and categories and seek a preliminary ruling on same, subject to a ruling by the Arbitrator with respect to the entitlement of certain other categories of individuals. The parties' tentative agreement is marked as Appendix A to this Award.

## **PRELIMINARY RULINGS**

There are a number of groups of individuals that have claimed entitlement through the grievance process to a share of the settlement funds referenced in the Settlement

Agreement. The parties seek preliminary rulings on that entitlement in light of the decision of the Supreme Court of Canada in these matters. My rulings are as follows:

### **1. Reorganization**

Many individuals have filed grievances asserting that their rights and entitlements under the Community Collective Agreement were breached as a result of Bill 29 authorizing the reorganization of their workplaces. While some reorganization arose as a direct result of Bill 29, much of the reorganization of the health sector was not a direct result of this legislation, although it occurred in the “shadow” of Bill 29.

There are two notable situations. Firstly, there are claims arising from individuals who were aggrieved by Sections 4 and 5 of Bill 29 when service delivery was reorganized through the transfer of functions or services within a worksite, or to another worksite within the region or to another health sector employer, and/or through the assignment of an employee within or to any worksite of an employer or another health sector employer.

Secondly, there are claims that do not fall under either Sections 4 or 5 of Bill 29, but are reorganizations arising for other purposes not related to Bill 29. In fact, Bill 29 only authorized, and the Supreme Court of Canada upheld, Government’s right to reorganize under Sections 4 and 5. Thus, any reorganizations not falling squarely within the description of Sections 4 and 5, were not the product of Bill 29.

Reorganizations that fall under Sections 4 and 5 were upheld by the Supreme Court of Canada and, thus, those individuals claiming entitlement as a result, have no entitlement.

Those individuals that claim entitlement to settlement proceeds arising from a non-Bill 29 reorganization have no entitlement to any settlement proceeds arising therefrom.

This is not to say that some of those individuals affected by either Bill 29 reorganizations or non-Bill 29 reorganizations may have claims arising from altered layoff and bumping rights under Section 9 of Bill 29.

## **2. Closures/Reductions in Funding**

Directly related to the reorganization claimants are those individuals that suffered job loss and related damages as a result of closures and/or reductions in funding that they assert arose under the auspices of Bill 29. Since 2001 Government has reduced and cut funding to the delivery of health care services in the Province. Those decisions are entirely within the rights of Government to make. And those decisions did lead to the closure or reduction of certain programs (i.e., CHW1 funding), facilities, and, in some cases, of entire companies (i.e., Paramed Health Services) which no longer wished to continue providing health care services in the Province. Funding cuts and company decisions to close their businesses were not sanctioned by Bill 29 per se, but, rather, were economic decisions arising in the context of Government cutbacks. While these decisions may appear related to Bill 29, there is nothing in that piece of legislation that compels closures or reduction in funding, and thus, Bill 29 is not “responsible” for those losses. Individuals claiming entitlement to settlement proceeds in these types of circumstances have no entitlement pursuant to the decision of the Supreme Court of Canada, nor under the Settlement Agreement.

## **3. Retendering of Contracts**

Similar to the situation arising with closures and/or reductions in funding are those situations where service providers were either unsuccessful in a retendering of a contract or service providers opted not to participate in a retendering of a contract. Quite

obviously these actions would result in job loss or, in certain situations, invoke bumps. Again, these decisions were not imposed as a result of Bill 29, but are, rather, business decisions made by companies in the context of reorganization and cutbacks in health care delivery in the Province and are not proper claims pursuant to the decision of the Supreme Court of Canada, nor the Settlement Agreement.

Again, bumping rights may have been affected in some retendering situations and may lead to claims arising from altered layoff and bumping rights under Section 9 of Bill 29.

#### **4. Elimination of Access to ESLA/HLAA**

As discussed above, the Supreme Court of Canada allowed Sections 7 and 8 of Bill 29, which effectively eliminated ESLA and HLAA provisions from the Community Collective Agreement. Individuals claiming entitlement to settlement proceeds under these provisions have no claim as a result of the decision of the Supreme Court of Canada.

#### **5. Wage Rollbacks Arising from Negotiated Agreements**

In April of 2004, Bill 37 (*Health Sector (Facilities Subsector) Collective Agreement Act*, S.B.C. 2003, C. 93) ended a three-day-old strike of some 43,000 health support employees and imposed significant wage roll backs of 15% to union members in the Facilities subsector. A different tact was taken by the CBA with respect to threatened legislated rollbacks and a wage rollback of 4.06% was negotiated with Government. That agreement was a response to clear and concerted threats by Government to do in the Community Subsector what it had done in the Facilities Subsector. Many union members view these negotiated rollbacks as part and parcel of Bill 29, but they are not, in fact, in any way related. Individuals claiming entitlement to settlement proceeds in these circumstances have no entitlement.

## **6. Article 15.4 (Scheduling Grievances)**

A number of Community Health Workers assert that, as a result of Bill 29, their hours of work were not assigned in accordance with the Collective Agreement, either in breach of seniority provisions or by providing hours to casuals before regulars.

Article 15.4, “Scheduling of Hours”, deals specifically with the scheduling of Community Health Workers under the Collective Agreement. It provides as follows:

### *(a) Regular Employees*

- (1) (i) Regular employees shall be scheduled hours within their classification based on seniority, subject to the employee’s ability to meet specific client needs and geographic location.
- (ii) When assigning hours, regular employees shall be given priority over casual employees in accordance with the process described in Article 15.4 (a).

There are no provisions under Bill 29 which prohibited or limited appropriate assignment of hours to Community Health Workers. At the time that many of these scheduling changes arose, the effects of Bill 29 were being felt across the health sectors. While it is understandable that such changes and the ensuing grievances, again occurring in the “shadow” of Bill 29, were attributed to that piece of legislation, they are simply alleged breaches of the Collective Agreement and are not properly a part of implementation of the Settlement Agreement under Bill 29.

## **7. No Losses**

There is no question that many individuals were affected by Bill 29 and that it led to uneasiness and uncertainty among union members concerned about whether their employment would continue. For anyone this is a stressful situation.

There are a number of situations where union members were laid off and immediately rehired with no losses or where they were able to bump into another position with no loss in pay. As well, there are a number of members who grieved anticipated affects, i.e., a loss in hours, which never actually occurred. Though disconcerting, these are situations that could have arisen under the terms of the Collective Agreement in place at the time. Bumping, layoff and the uncertainty of changes in the workplace are labour relations realities, even absent legislation such as Bill 29. Unless those situations arose as a result of Bill 29, that is, as a result of contracting out (not reorganization, cutbacks or the like) and led to a loss in employment compensation, that is, a job loss, wage loss, benefit loss, or pension loss, as determined in the Section 5.4A Settlement Agreement, members are not entitled to compensation.

## **8. Mitigation**

At law, where members suffered a loss of employment compensation arising from Bill 29 contracting out or bumping, they also had a legal duty to mitigate their losses. That means that a member is not entitled to recover compensation for any loss that could have been or was avoided through their actions, i.e., obtaining other work. This is similar to the situation where members were affected by Bill 29, but suffered no loss as defined under the Settlement Agreement. Where members did experience loss in employment compensation arising from layoff due to contracting out (again, not reorganization, cutbacks or the like) or bumping and where they mitigated their losses fully or partially, they are only entitled to claim for those amounts not fully mitigated.

I shall retain jurisdiction to resolve any dispute that may arise out of the implementation of this decision.

It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 17<sup>th</sup> day of April, 2008.



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Christopher Sullivan

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## Part 1 – Identifying Impacted Individuals and Determining Categories of Impact

The Community Bargaining Association will identify a class of Impacted Individuals who were/are members of the CBA and employed by a Community Subsector Employer in 2002 or after, and who were either:

- a) laid off due to contracting out; or
- b) displaced and accessed the more limited bumping options under the Regulation to Bill 29 than the Collective Agreement,

AND, as a result, experienced a loss in employment compensation.

A loss in employment compensation is defined as a monetary loss falling under one or more of the following Categories:

1. job loss
2. wage loss
3. benefit loss (the specific type of benefits to be determined) and
4. pension loss (the specific types of pension loss to be determined).

The identification of the class of Impacted Individuals, their Categories of Loss and the value of their claims will be completed by June 15, 2008.

## Part 2 – Calculating the Amount of Payment for Each Impacted Individual:

Eligible Impacted Individuals' claims will be drawn from the \$1,500,000 lump sum amount (the "Fund"). The fund will also be used to pay for the fees and expenses of the neutral Chair and any other applicable expenses (the specific type of expenses to be determined) (together the "Fund Expenses").

The CBA will determine the preliminary amount of each Impact Individual's claim under each of the Categories and calculate a total claim for each Impacted Individual. If the total claims for all Impacted Individuals plus the Fund Expenses exceed the amount of the Fund under this preliminary process, payments from the Fund to each Impacted Individual will be re-calculated on a proportionate basis to the total payments to all Impacted Individuals to ensure that the Fund amount is not exceeded.

Payments to Impacted Individuals will be subject to any applicable statutory or mandatory deductions. Without limiting the generality of the foregoing, such deductions

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include any applicable income tax, employment insurance contributions, CPP contributions, pension contributions, and union dues.

Part 3 – The CBA must issue a communications update which would contain the following excerpt:

The preliminary process as determined by the CBA in initial meetings with the health sector employers/government for the distribution of funds is as follows:

*[the excerpt will then include the above sections on Identifying Impacted Individuals and Calculating the Amount of Payment for Each Impacted Individual and the following time frame for expected payment]*

Impacted Individuals may expect to receive payment by no later than December 31, 2008.