

BRITISH COLUMBIA LABOUR RELATIONS BOARD

UNIVERSITY OF BRITISH COLUMBIA

(the "Employer")

-and-

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 116
(U.B.C. EMPLOYEES)

(the "Union")

PANEL:	Catherine R. McCreary, Vice-Chair
APPEARANCES:	William Clements, for the Union Michael H. Korbin, for the Employer
CASE NO.:	53468
DATE OF DECISION:	April 27, 2006

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 The Union applies under Section 99 of the *Labour Relations Code* for review of an arbitration award dated May 27, 2005 (Ministry No. A-120/05) (the "Award") rendered by David C. McPhillips (the Arbitrator"). The grievance concerned whether the Union was entitled to receive copies of the documentation relating to a job posting without first having to file a grievance and having an arbitrator order disclosure. The Employer refused claiming that the Union had no right to that information under the collective agreement and that disclosure of private information of the applicants was precluded by the provisions of *Freedom of Information and Protection of Privacy Act* [RSBC 1996], Chapter 165 ("FOIPPA"). The grievance was dismissed.

2 Shortly after the Arbitrator issued the Award, the Court of Appeal dealt with the issue of disclosure of documents and the impact of FOIPPA when it arose in an award by Arbitrator Judy Korbin. In *British Columbia Public School Employer' Assn. v. British Columbia Teachers' Federation*, [2005] B.C.J. No. 1791 (QL), 2005 BCCA 411 ("*Chilliwack School Board*"), the Court declined jurisdiction under Section 100 of the Code.

3 The Court of Appeal has issued another decision on the interpretation of FOIPPA. In *Canadian Office and Professional Employees' Union, Local 378 v. Coast Mountain Bus Co.*, [2005] B.C.J. No. 2655 (QL), 2005 BCCA 604 ("*Coast Mountain*"), the Court accepted the agreement of the parties that it had jurisdiction to review the award under Section 100 of the Code.

4 I sought further submissions from the parties on the jurisdictional aspect of the application. I find that I can make a determination in this matter without a formal hearing.

II. THE AWARD

5 The Award arose as a result of a policy grievance filed by the Union seeking disclosure of documents with regard to filling of positions under the collective agreement. The Union seeks documents relating to the job posting and the qualifications of applicants. The Union's position is that these documents must be provided in order for it to fulfill its role as the exclusive bargaining agent. The Employer objects on two grounds. It says that under the collective agreement and the Code, the Union does not have a right to these documents. It further submits that the production of such information is precluded by the FOIPPA.

6 The Arbitrator concluded that there was no express provision in the collective agreement that mandated the Employer to disclose the documents to the Union. He held that to accede to the Union's request would require him to amend or modify the

collective agreement and “in effect, embark on a process of interest arbitration.” He found that such a course of action would be improper as it is outside the jurisdiction of a rights arbitrator.

7 The Arbitrator found that FOIPPA allows for disclosure if it is mandated by “an enactment.” He reviewed the provisions of the Code to determine whether such disclosure was mandated. He found that there is nothing explicit in the Code which provides for the type of disclosure sought by the Union. He commented that while the Code allows for the pre-hearing production of documents to be ordered by an arbitrator, there is necessarily a requirement that a grievance be filed and an arbitrator appointed. He recognized that documents ordered produced by an arbitrator would fall within the exception in FOIPPA but noted that there must first be at least a grievance filed to commence proceedings. The Arbitrator found that there is no general right of discovery expressly or implicitly contained in the Code prior to a hearing, “let alone during the grievance process or before a grievance is even filed.” (at 18)

8 The Arbitrator pointed out that an order concerning the disclosure of documents is a discretionary matter and that to accede to the Union’s request would be an abandonment of that discretion. He said that the more appropriate action would be to seek an order for disclosure in a specific case which can then be evaluated taking into account the circumstances and the labour relations context of the case. One such condition that may be attached is a requirement of confidentiality so as to protect privacy rights. An arbitrator can make an order that balances the right to privacy with the right to a fair hearing. That balance may be different in each case.

9 The Arbitrator also reviewed two Board cases where an employer was ordered to disclose to the union material that was otherwise protected by privacy legislation. In *The Governor and Company of Adventurers of England Trading into Hudson’s Bay aka Hudson’s Bay Company and in French Compagnie de la Baie D’Hudson*, BCLRB No. B226/2004 the Board ordered the employer to provide to the union the names, addresses and wage rates of members of the bargaining unit. Similarly in *P. Sun’s Enterprises (Vancouver) Ltd. (Hotel Grand Pacific)*, BCLRB No. B301/2003, where the Board ordered the employer to provide the union with a list of employee contact information, the Board held that the employer was required to provide information to the bargaining agent that allows it to fulfill its statutory obligation to those employees.

10 With respect to those Board decisions, the Arbitrator held:

There are two observations to be made with respect to these decisions. First, these are all labour relations board decisions which do not deal in any way with the particular issue which is presently before this Arbitration Board. Second, the information sought in those cases was very benign and involved the name, address, and telephone number of employees and, in one case, their wage rates and benefits. This is not the type of highly personal information contained in job applications, résumés and interviews which is the subject of the present application.

(at p. 21)

11 The Arbitrator held that there was no denial of the Union's rights under FOIPPA due to the opportunity to obtain the requested information through the arbitration process. He held that within the arbitral context, there was no denial of the Union's right to be free from employer interference under Section 6 of the Code nor was the Union prevented from complying with its duty of fair representation found in Section 12 of the Code. He directed the Union to the Board if it wished to argue an unfair labour practice more broadly. He summarized his decision as follows:

In summary, with respect to the *Labour Relations Code*, authority rests with an arbitration board only after it has been granted jurisdiction in a particular case. With regard to the Collective Agreement, there is no provision therein upon which this Arbitration Board could rely as a basis to issue the blanket order requested by the Union.

Finally, this Board does acknowledge the legitimacy of the Union's desire for expediency and efficiency in its handling of promotion and appointment matters. However, the appropriate solution is for the parties to negotiate, with the requirements of *FOIPPA* in mind, more expedited procedures to deal with the difficulties which have been identified. (at p. 22)

III. JURISDICTION

12 This application was first filed almost one year ago. Shortly thereafter, the Court of Appeal released its decision in *Chilliwack School Board*. I asked the parties to comment. Before I could issue a decision, the Court of Appeal issued its decision in *Coast Mountain*. In that case, the Court of Appeal accepted jurisdiction over a dispute regarding the applicability of FOIPPA. I asked the parties for further comment, particularly on the jurisdiction of the Board to review the Award.

13 In *Vancouver Hospital & Health Sciences Centre v. British Columbia Nurses' Union*, [2005] B.C.J. No. 1392 (QL), 2005 BCCA 343 the test was set out to determine whether the Board or the Court of Appeal has jurisdiction in a particular matter. The Court held:

I would summarize what I understand to be the correct analytical approach to the application of ss.99 and 100, based on a purposive interpretation of those sections, and the jurisprudence which has previously addressed the problem:

1. identify the real basis of the award;
2. Determine whether the basis of the award is a matter of general law;
3. If the basis of the award is a matter of general law, determine whether it raises a question or questions concerning the

principles of labour relations, whether expressed in the ***Labour Relations Code*** or another statute.

If the answer to the third question is affirmative, then review of the award lies within the jurisdiction of the Labour Relations Board. If it is negative, review lies within the jurisdiction of this Court. (paras. 49 - 50)

14 In *Chilliwack School Board* the matter under review was an arbitrator's award that applied the provisions of FOIPPA to the collective agreement provisions. The Court of Appeal determined that the proper jurisdiction for review was with the Board.

15 The Court held:

While the arbitrator considered certain provisions of FOIPPA which might be characterized as "general law" in that they affect all employees, whether unionized or not, that consideration did not form the real substance of the award which, in my view, is "whether, having regard to the provisions of FOIPPA, the Labour Relations Code and the Collective Agreement, the refusal by the Employer to produce the requested documents constituted a breach of Article A.16 of the Collective Agreement." Central to that question are several principles expressed or implied in the Code. They include the Code's system of exclusive bargaining authority and duties of a statutory bargaining agent; the binding effect of a collective agreement under the Code and the duties of the parties to implement it; the bargaining agent's duty of fair representation under the Code; the mandatory inclusion under the Code of a method of resolution of disputes without stoppage of work; and the public policy and purpose of the Code to facilitate expeditious, inexpensive resolution of disputes by the parties themselves. The real substance of the award may involve questions of the general law but it cannot, in my view, be described as "a matter or issue of the general law not included in section 99(1)." From that, it follows that section 100 does not apply. (at para.45)

16 A similar in-depth analysis was not done in the *Coast Mountain* case. The Court accepted the agreement of the parties that it had jurisdiction. While it considered *Chilliwack School Board*, it was distinguished on the basis that in that case, it was a policy grievance under consideration.

17 After a review of the submissions and the two recent Court of Appeal cases, I have determined that the jurisdiction for review of this award lies with the Board. The question to be answered is with regard to the interpretation of the collective agreement and the applicability of the provisions of the Code. It is only after the collective agreement is interpreted by the arbitrator and the principles of the Code applied, that the application and implication of the FOIPPA must be considered. Accordingly the "real substance of the dispute" is the interpretation of the collective agreement and the

rights and obligations of the parties that arise under the Code. As the Court of Appeal found in *Chilliwack School Board*, this places jurisdiction with the Board.

IV. SECTION 99 APPLICATION - POSITIONS OF THE PARTIES

18 The Union accepts the Arbitrator's conclusion that there is no express provision of the Collective Agreement that gives it the right to the information sought. However, the Union claims that the Arbitrator erred in finding that until an arbitration proceeding had commenced, the Code does not authorise disclosure of potentially relevant information sought by the Union to carry out its functions under the Code. The Union appeals under Section 99 of the Code, because it allows the Board to set aside an arbitration award when the decision is inconsistent with the principles expressed or implied in the Code. It submits that:

- the discretionary power of arbitrators to order a disclosure of documents does not conflict with a pre-existing right under the Code to disclosure of documents relevant to an issue between the parties.
- recognising that the Code authorises disclosure of information related to a legitimate labour relations interest furthers the objects of the Code and is consistent with the privacy protections in FOIPPA.
- The disclosure of *prima facie* relevant documents is authorised, even prior to a grievance being filed, and is consistent with past Labour Relations Board case law.

19 In a nutshell, the Union argues that, despite having no language in the collective agreement entitling it to pre-grievance disclosure of documents used by the Employer in a posting process to fill positions, the Union is nevertheless entitled to this information in order to fulfill its obligations as bargaining agent. Due to this prerogative of the Union and due to the Employer's agreement to the job competition process in the collective agreement, FOIPPA is not an impediment to the disclosure. An arbitrator has jurisdiction to order that the Employer disclose the information on the basis that the information is being sought to assure compliance with those sections of the collective agreement relating to job posting and competitions.

20 The Employer argues that this application is not properly brought under Section 99 of the Code. The basis for this rests with the authority of an arbitrator to provide the Union with the remedy it seeks. An arbitrator's jurisdiction is limited to providing resolution of disputes arising under the collective agreement. This collective agreement contains no language authorising disclosure of information. The Union's claims to entitlement are completely based on the provisions of the Code. Hence, the Employer argues, the Union should bring its claim to the Board for resolution, not to an arbitrator. The Employer's argument is bolstered by the findings of the Arbitrator who held that if the Union wished to argue its allegation of interference in its ability to represent employees, it should make a complaint to the Board under the provisions of the Code.

V. ANALYSIS AND DECISION

21 While both *Chilliwack School Board and Coast Mountain* lead to the conclusion that the FOIPPA is not a bar to the disclosure of information between an employer and a union where the union is carrying out its duties as bargaining agent, a distinguishing factor in this case is the lack of foundation in the collective agreement for the disclosure of the information sought. In the collective agreements in the cases under consideration by the Court of Appeal, the employer had agreed that the union was entitled to the information sought. The Arbitrator noted the complete absence of such a provision in this agreement and suggested that it be the subject of collective bargaining.

22 Thus, the real question for me to consider is whether the Arbitrator was in error when he refused to find that the Employer has an obligation to disclose the information which arises from the Code. The Union argues that the Arbitrator should have found that the Employer must produce such records when requested by the Union without the requirement that the Union file a grievance in advance.

23 The Arbitrator noted that the Code has specific provisions that have been interpreted to grant arbitrators jurisdiction to order the pre-hearing production of documents. See: *Pacific Press Limited*, BCLRB No. 109/83. He distinguished the line of cases like *Hudson's Bay* that mandate employers to provide information to unions so that they can carry out their responsibilities as bargaining agent. The basis for distinguishing this line of cases is that the LRB cases did not deal with the issue before the arbitration board and the information is not as sensitive (names, addresses and pay rates) as the employment information sought here. While unstated by the arbitrator, neither of the Board cases hold that an employer commits unlawful interference with the administration of a trade union by failing to provide information to the Union that may be relevant to administration of a particular collective agreement provision.

24 Section 99 provides that the Board may set aside an award of an arbitrator if it is inconsistent with the principles expressed or implied in the Code. Sections 82 and 89 constrain an arbitrator's jurisdiction such that an arbitrator does not have jurisdiction to apply the Code if the basis of the decision is not arising from some provision of the collective agreement. Section 82 provides:

82. (1) It is the purpose of this Part to constitute methods and procedures for determining grievances and resolving disputes *under the provisions of a collective agreement* without resort to stoppages of work.

(2) An arbitration board, to further the purpose expressed in subsection (1), must have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it *under the terms of the collective agreement*, and *must apply principles consistent with the industrial relations policy of this Code*, and is not bound by a strict legal interpretation of the issue in dispute.

25 Section 89 provides:

For the purposes set out in section 82, an arbitration board has the authority necessary to provide a final and conclusive settlement of a *dispute arising under a collective agreement*, and without limitation, may

- (g) interpret *and apply* any Act intended to regulate the employment relationship of the persons bound by a collective agreement, even though the Act's provisions conflict with the terms of the collective agreement, and
- (h) encourage settlement of the dispute and, with the agreement of the parties, the arbitration board may use mediation, conciliation or other procedures *at any time during the arbitral proceedings* to encourage settlement.

26 In this case, no violation of the collective agreement has been alleged. Thus, there is no *dispute* arising under a collective agreement over which an arbitrator can exercise jurisdiction.

27 The Union argues that there is a basis in the collective agreement for the providing of the information sought by the Union. Based on the provision regarding job postings in the collective agreement, the Union claims a right, due to the provisions of the Code, to have access to certain information with regard to how the Employer administers that section of the collective agreement. Thus, the Arbitrator is being asked to rule on the Union's rights under the job posting provisions of the Agreement in the absence of a live dispute concerning a single posting.

28 The Arbitrator held that granting the Union this right allows them to achieve by a grievance what they could have bargained into the collective agreement, but did not.

29 I find that in the absence of a dispute arising under the collective agreement, the Arbitrator does not have jurisdiction to order disclosure of the information sought by the Union by virtue of Code provisions.

30 Even if the Arbitrator had jurisdiction to apply the Code in the absence of a live dispute, the Arbitrator must consider what the Board would do in these circumstances. The Union bases its claim to disclosure on Sections 6(1), 2(e) and 12 of the Code. In *Hudson's Bay*, the Board ordered disclosure of personal information of employees so the union could carry out its duties to represent those employees in bargaining. Similarly in *P. Sun's Enterprises, supra*, the Board ordered disclosure of personal information to enable the union to carry out its statutory duties.

31 The Arbitrator distinguished those cases on the basis of the type of information disclosed. There, as here, there was no provision in the collective agreement mandating disclosure of employee personal information. Here, there is a provision, to which the Employer has agreed, that sets out a process with regard to job posting. It is information collected under that provision to which the Union seeks access

32 In this case, the Union did not show the arbitrator that the Employer's refusal to provide the information interfered with *the administration of the Union*. There is no doubt that the Union would be able to do a better job more efficiently if it had earlier access to the information sought. However, as noted by the Arbitrator, it is not without access to the information. It must file a grievance and appoint an arbitrator first. This contrasts to the Board cases where no other method was available for the union to obtain the necessary information.

33 The Board is continually urging parties to promote the cooperative resolution of workplace issues, to respond and adapt to changes in the economy, to foster the development of work related skills and to promote workplace productivity. Allowing the Union access to this information would work to advance these goals. However, I agree with the Arbitrator's concern that to accede to the Union's request would require him to modify the Collective Agreement. That modification should come about as a result of negotiation and cannot be imposed by an arbitrator.

VI. CONCLUSION

34 The Union's application is dismissed.

LABOUR RELATIONS BOARD

"CATHERINE R. McCREARY"

CATHERINE R. McCREARY
VICE-CHAIR