Date: 2001119
Docket: S016391
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Mr. Justice Lowry
November 19, 2001

BETWEEN:

JOHN STROHMAIER on His Own Behalf, And On Behalf of The AMBULANCE PARAMEDICS OF BRITISH COLUMBIA CUPE LOCAL 873

PLAINTIFFS

AND:

CANADIAN UNION OF PUBLIC EMPLOYEES

DEFENDANT

Counsel for the Plaintiffs:	F.G. Potts
Counsel for the Hospital Employees Union:	J.L. Quail C.T. Reardon
Counsel for the Defendant:	J.J.M. Arvay Q.C. M.D. Pollard

[1] **THE COURT:** The biennial convention of the Canadian Union of Public Employees ("CUPE") convenes in Vancouver this morning. Some 2000 delegates are expected to register. One Local, No. 873, makes application on short leave for an order in the nature of injunctive relief. The order sought would preclude the delegates of the Hospital Employees' Union

("HUE"), a provincial service division of CUPE, from voting at the convention unless the agreement that was negotiated by the National Executive Board of CUPE ("NEB"), by which the members of HEU became members of CUPE in 1994 (the "Agreement"), is first ratified by the other delegates attending. Local 873 contends that some of the terms of the Agreement are at odds with the provisions of the CUPE constitution such that the Agreement as a whole is void unless properly ratified. A substantial number of other locals indicate their support for the position Local 873 takes.

[2] Local 873 is a member of CUPE(BC), a provincial council of CUPE, the representatives of which participated in negotiating the Agreement with HEU. But Local 873 maintains that the Agreement was not widely published, that the provisions of the Agreement have only just recently become known to it and other locals, and that the procedures available to it to have the constitutionality of the Agreement addressed internally have since been exhausted. It is important to recognize at the outset that what in the main underlies this application is not any newly discovered dissatisfaction with the provisions of the Agreement that are impugned, but rather a dispute over the number of delegates HEU is entitled to send to the convention.

[3] CUPE is of course a large national labour organization. It was formed in 1963. HEU is a British Columbia union that was one of the founding members. HEU withdrew in 1970 and under the Agreement rejoined almost 25 years later. As part of the Agreement, a Letter of Understanding was given with respect to the delegates HEU could send to a convention. This is said to have been done because of an organizational anomaly, recognized at the time, that resulted in HEU being able to send a disproportionate number of delegates. One example given now is that, under the constitution, HEU which has perhaps 45,000 members can send 439 delegates while CUPE(BC) which has 65,000 members can only send 417 delegates.

[4] Since the Agreement was made, there have been three biennial conventions. None have been held in this province and, largely because of the cost, HEU has only sent 80 delegates. Given that the current convention was to be held in Vancouver, HEU sought to send more delegates (I am told about 200 or 10 percent of the total expected), and claimed the right to send 439. Its right was challenged by CUPE(BC), relying on the Letter of Understanding, and the matter was submitted to arbitration. The arbitration was heard at the end of October and the arbitrator's award was published in the first week of this month. He determined that HEU is now

entitled to the number of delegates for which the constitution provides.

[5] Local 873 then commenced this action for a declaration that the Agreement is void together with interim and permanent injunction relief. It contends that the interim relief it now seeks will in no way deny HEU any right it had to participate in CUPE's determination to enter into the Agreement, but will ensure that what, on its face, is an unconstitutional agreement will be given no further effect unless properly ratified if that were to be the will of the convention. The broad relief sought in the Notice of Motion has, in the course of the hearing, been narrowed to seeking a mandatory order that, as the first order of business, the chair arranged by appropriate means to have the convention vote on the ratification of the Agreement, and that the HEU delegates not be permitted to participate. Local 873 says that, if the relief sought is denied, it will suffer irreparable harm in that there are a number of significant decisions to be made at this convention including the election of national officers and spending priorities for the national organization.

[6] The considerations that govern applications of this kind are well established and are here largely a matter of common ground. They are three and they have been most recently

discussed by the Supreme Court of Canada in ***RJR MacDonald Inc. v. Canada (Attorney-General)*** (1994), 111 D.L.R. (4th) 385. To succeed Local 873 must first establish that there is a fair question to be tried. It is neither necessary nor desirable that there be a prolonged examination of the merits unless, as here, if granted the injunctive relief sought or denied would have the practical effect of putting an end to the action: ***RJR MacDonald*** pp. 403—405. Local 873 must then establish that if the relief sought is denied it will suffer irreparable harm, and finally that the balance of convenience favours its application being allowed.

[7] Local 873 says there are four provisions of the Agreement that are not permitted under the CUPE constitution, but in its writ and on the affidavits filed in support of this application and in applying for short leave, it identified only three. The first is that under the constitution, (Section 6) only members may vote as delegates at a convention while the Agreement (Clause 3) provides that HEU may assign one of its delegate votes to the Secretary Business Manager who may, but may not, be a member. The second is that under the constitution (Section 7) there are mandatory trusteeship provisions in favour of the NEB that under the Agreement (Clause 7) are not to be exercised with respect to the HEU

Service Division. The third (referenced only in the writ) is that under the constitution (Appendix C) a service division is subject to the powers of control and supervision provided by the constitution to the same degree as any other chartered body while the Agreement (Clause 2) preserves a greater measure of autonomy for HEU than the constitution allows.

[8] The fourth provision of the Agreement that is said to be unconstitutional was first raised during the hearing. Under the constitution (Section 14), the basis of the dues payable to CUPE by local and provincial unions is prescribed while under the Agreement (Appendix B) there is provision for the dues to be paid by HEU on a different basis. I am told that HEU and one other large local of CUPE, Local 1000, pay dues that are not determined on the same basis as other locals and that there are historical reasons why this has occurred. There is, in any event, no suggestion that this comes as a surprise to anyone. The affidavit material is silent on the point.

[9] CUPE and HEU point out that the Agreement contains a severability clause (Clause 13) which they say manifests the parties' desire to enter into the Agreement even if parts of it were at some time to be determined to be invalid. Both say that all of the impugned provisions are severable, although it

is accepted that the fourth may be problematic. I do not understand the question of severability to be addressed by Local 873 in the course of its submissions on this application.

[10] CUPE and HEU say further that the first of the impugned provisions can of itself be of no real consequence in the context of this application. It involves only one possible delegate vote. They say that the second and third provisions may be said to be no more than a contractual exercise of discretion that the constitution affords the NEB. They say they cannot be expected to address the fourth impugned provision in any substantive way, given that it was first raised at the hearing.

[11] This court has given consideration to the burden of establishing that there is a fair question to be tried that is borne by an applicant who seeks an interim mandatory injunction. Some of the authority was reviewed in ***Williams v. International Assn of Machinists and Aerospace Workers, Airline Lodge No. 2324*** [1992] B.C.J. No. 3068. There it was said at paragraph 10, that a mandatory injunction will only be granted where there is a fair question to be tried and the applicant has a case which is unusually sharp and clearly right.

[12] I consider the burden borne by Local 873 here to be very heavy indeed. It does not seek to merely preserve rights until the case can be tried; it seeks a mandatory injunction that carries with it the potential for upwards of 45,000 members of HEU having no voice at the convention and perhaps even the expulsion of all of the HEU members based on the contention that some provisions of the Agreement are not constitutional, but with no determination to that effect having been made in the action it has commenced.

[13] I am not satisfied that the local can be said to be right to the degree required for the mandatory injunction that is sought. There is no doubt an issue to be tried, but the case that has been put on this application does not persuade me that the result is so clear that an order should be made now that will effectively put an end to the action. In addition to what CUPE and HEU say in response to the application, I consider there may well be questions as to whether Local 873 can ultimately succeed in its contention that an agreement that has been acted upon for so long, and which was made by a national board, properly elected to conduct the business of CUPE, is now not valid.

[14] This renders discussion of the second two considerations largely unnecessary but I address them briefly.

[15] I accept that Local 873 is able to say that it may suffer irreparable harm in the sense that it could not be compensated in damages, but that should not be overstated. It appears to me that at worst the non-HEU delegates at the convention may suffer some dilution of their voting strength. If ultimately the Agreement is held to be of no force or effect, decisions taken at this and perhaps three earlier conventions based on votes where the participation of the HEU members could be shown to be determinative may, to the extent possible, have to be undone. However, no attempt is made in the affidavit evidence to identify what issues are particularly contentious now and why it is thought the HEU delegates, being only 10 percent of the total delegates expected to register, can actually be expected to make the difference on any particular vote.

[16] I do not accept that the balance of convenience favours the mandatory injunction that is sought. Apart from a court order, the only reason that the convention would have to ratify the Agreement is because it is unconstitutional. An amendment of the constitution requires a two-thirds majority vote. It is, in my view, difficult to see how in the absence of a finding that the Agreement is unconstitutional the ratification could be sought or what vote might actually be

required. At very least, the underlying premise of the exercise would have to be that the Agreement is invalid, although no determination to that effect would have been made. The ramifications, legal and otherwise, of other than a convincing vote in favour of the Agreement are difficult to comprehend. Local 873 says that is not the court's concern. I disagree. I consider that when asked to exercise its discretion to grant a mandatory injunction, the court must have a clear understanding of the consequences for the litigants. Here they are anything but clear.

[17] I am concerned that Local 873 has waited until now to commence this action and until the eve of the convention to apply for the interim relief it seeks. I am not at all satisfied that the local can find any justification by claiming to have been unaware of the provisions of the Agreement so that its challenge to the validity of four of them could not be initiated earlier. I do not accept that the local can be heard to say that, although as a member of CUPE(BC) it was represented in the negotiations with HEU, it knew nothing of the impugned provisions which it now raises. If it knew not what had been agreed it can only have been because it chose not to inquire. The delay militates against the exercise of discretion in favour of a mandatory injunction

because CUPE and HEU have not been afforded an opportunity to respond that is commensurate with the gravity of what could be the consequences of the order that is sought.

[18] But even putting those considerations to one side, the cost of a CUPE convention runs in the order of $10 million. The disruption to this convention, and the potential for the HEU members to be disenfranchised, all in the absence of a determination that the Agreement has been acted upon for more than six years is not valid, far outweigh the inconvenience Local 873, and those that support it, may suffer if the relief sought is denied and the Agreement is ultimately determined to be invalid.

[19] I consider my discretion is to be exercised against granting the relief sought and the application will accordingly be dismissed with costs.