LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION DECISION

UNITE HERE LOCAL 40

UNION

HOSPITALITY INDUSTRIAL RELATIONS
on behalf of
SHERATON VANCOUVER AIRPORT HOTEL
(RICHMOND INN HOTEL LTD.)

EMPLOYER

(Re: Application to Suspend Disclosure Order)

Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Michael J. Prokosh
Representing the Employer:	Jason Koshman
Dates of Application and Submissions:	December 11, 12, 14 and 17, 2015
Date of Decision:	December 29, 2015

[1] Arbitrators have express authority to determine prehearing matters and issue prehearing orders under the current British Columbia *Labour Relations Code*.[1] This makes explicit what was previously an implicit authority. In 1983, the Labour Relations Board decided:

> In British Columbia, arbitration boards are able to order production of documents prior to a hearing in certain circumstances.
>
> This does not mean that there is a general right to "discovery of documents" as there is under the British Columbia Supreme Court Rules. Far from being a matter of right, the power to order production of documents prior to the hearing is a discretionary matter to be exercised by the arbitration board. In many less complicated arbitration cases, it will not be necessary or appropriate to order pre-hearing production of documents. Documents can be produced as witnesses give their evidence without unnecessary delay or unfairness to either side.
>
> However, the present case involves complex evidence and documents which, upon production, will need considerable time for study and instruction. Where delay is likely if prehearing production is not ordered, it is appropriate for an arbitration board to make such an order.
>
> An order for production of documents must not be used in order to allow what is colloquially known as a "fishing trip" …. Nor should pre-hearing production of documents be considered a matter of right. Also, as we stated at the outset of this decision, a pre-condition for the production of any document at a hearing will involve considerations of relevance, admissibility and other possible objections to particular documents. The documents must be described with particularity in order that these issues may be canvassed, and the other party knows what documents to produce.[2]

[2] The question of disclosure of documents by legal entities or persons other than parties to a collective agreement before rather than at an arbitration hearing has been considered by arbitrators[3] and courts.[4] In the circumstances of this arbitration, a similar question has been referred to the Labour Relations Board.[5]

[3] In 2004, Arbitrator McPhillips described the arbitral consensus on what a party will usually be ordered to disclose as follows:

> It must be emphasized that the test in these situations is not whether it can be proved the documents are definitely relevant but rather whether they are "potentially" relevant and, in that regard, questions of relevance are generally viewed liberally: *Pacific Press Ltd.*, (1982) 7 L.A.C. (3d) 316 (Somjen); *Mount St. Joseph Hospital*, 19 L.A.C. (3d) 107 (Thompson); *Government of British Columbia*, *supra*; *B.C. Transit*, *supra*; *School District No. 65 (Cowichan)*, 54

---

[1] *Labour Relations Code*, s. 92(1)(c)

[2] See *Pacific Press Ltd.* [1983] B.C.L.R.B.D. No. 1

[3] E.g., *Nova Pole International Inc.* [2001] B.C.C.A.A.A. No. 337 (Blasina);

[4] E.g., *Halifax Shipyard Ltd. v. Marine, Office and Technical Employees Union, Local 28* [1996] N.S.J. No. 552, appeal dismissed as reported in *Halifax Shipyard* [1997] N.S.L.A.A. No. 11 (MacPherson), ¶ 10

[5] *Hospitality Industrial Relations* [2015] B.C.C.A.A.A. No. 110 (Dorsey)

> L.A.C. (4th) 378 (Dorsey); *British Columbia Children's Hospital*, September 5, 1990 (Greyell); *Toronto District School Board*, 109 L.A.C. (4th) 20 (Shime).[6]

[4] In its 1983 decision, the Board cited arbitrators who rejected adopting the Supreme Court of British Columbia Rules of Court for grievance arbitration practice.

[5] More recently, after a July 2010 change in the Rules of Court,[7] the Board chose to adopt a disclose principle for its administrative practice limiting prehearing disclosure to “all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact.” The panel concluded:

> In my view the Principle requires parties to focus on the fundamental issues in their case, and to focus on obtaining and disclosing those documents which are necessary for litigation. The parties should use the pleadings to guide their document disclosure requests. It goes without saying that all documents referred to in the pleadings should be disclosed, including all reliance documents, which I understand the parties in this matter have agreed to exchange. [8]

[6] There are no pleadings or right to disclosure in grievance arbitration unless they are in the collective agreement. The issue before the Board in 2010 was Board practice and the exercise of its authority under section 126(1) of the *Labour Relations Code*, not arbitration practice. The Board’s practice principle is not a *Code* mandated principle. There was no Board discussion on whether the issues and barriers to access to justice that prompted reform of the Rules of Court and the change in Board practice exist in grievance arbitration where prehearing disclosure is discretionary.

[7] Nonetheless, in 2012, one arbitrator decided the Board’s change in its administrative practice decrees a similar change in grievance arbitration practice.

> The LRB decided that it should use the statutory authority that it has that permits it to determine its own practice and procedure to align itself with the weight of reforms being adopted by the courts with the goal of providing accessible, affordable, fair and expeditious proceedings. The new rule requires parties to focus on obtaining and disclosing only documents that are necessary for litigation. The test of potential relevance is too broad and does not give due regard to proportionality or the weight of the evidence. It often required parties to compile documents at a considerable expenditure of time and expense that would not contribute significantly to the resolution of the issue. The new test is designed to address those issues. Most importantly for our purposes, the LRB

---

[6] *Overwaitea Food Group* [2004] B.C.C.A.A.A. No. 162, (McPhillips), ¶ 14
[7] *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 7-1(i)
[8] *University of British Columbia* [2010] B.C.L.R.B.D. No. 138, ¶ 21

> said that it expected that arbitration boards would also use the new test, which I accept would be appropriate in this case. [9]

[8] More recently, another arbitrator concluded: "The test to be applied in determining if a document should be disclosed is no longer whether the document is relevant or potentially relevant. Rather, that test was replaced by the British Columbia Labour Relations Board in the *University of British Columbia* case."[10]

[9] As I have[11], some arbitrators have approached the Board's decision more cautiously.[12] A Board change in its administrative practice framed by its rules, practice guidelines, case management strategy, application forms, timelines and fees for services does not automatically dictate how all arbitrators must exercise their discretion in disputes under all or specific collective agreements negotiated under the *Labour Relations Code*. Similarly, a change in practice by the Canada Industrial Relations Board would not dictate practice across Canada by arbitrators appointed under collective agreements negotiated under the *Canada Labour Code*.

[10] This approach is rooted in an assumption there continues to be Board deference to arbitral expertise, autonomy and consensus as stated by a Board panel in 2013.

> However, it is contemplated within the autonomy of the arbitral system in Part 8 of the Code, and the Board's limited review under Section 99, that issues which arise in labour arbitration may produce differing arbitral approaches and diverging lines of arbitral authority. The Board does not intervene in diverging lines of arbitral authority unless they are inconsistent with Code principles or interfere with the proper functioning of the arbitral system of dispute resolution: *Pirelli Cable & Systems Inc.*, BCLRB No. B57/2003 (Leave for Reconsideration of BCLRB No. B256/2002) at paragraph 18.[13]

[11] There might emerge, but there is not now, a consensus among arbitrators that following the new Supreme Court of British Columbia Rule and the new principle adopted by the, which they found necessary for their pleadings and trial based processes, is either an appropriate approach for exercise of arbitral discretion in some or all grievance arbitrations under sub-sections 92(1)(a) and (c) of the *Labour Relations*

---

[9] *Health Employers Association of British Columbia* [2012] B.C.C.A.A.A. No. 1 (Larson), ¶ 31
[10] *Teck Highland Valley Copper* [2015] B.C.C.A.A.A. No. 112 (Bell), Appendix A Preliminary Award, Part 3 "The Grievors' Notes"
[11] *National Energy Equipment Inc.* [2012] B.C.C.A.A.A. No. 95 (Dorsey), ¶ 23
[12] E.g. *Brewers' Distributor Ltd.* [2011] B.C.C.A.A.A. No. 13 (Keras)
[13] *Sunshine Poultry Processors Ltd.* [2013] B.C.L.R.B.D. No. 88, ¶ 14;

Code. – "An arbitration board may … (a) determine its own procedure … (c) determine prehearing matters and issue prehearing orders."

[12] For this reason, in my November 27, 2015 decision on the union's application for an order for prehearing disclosure of documents, I deliberately phrased the employer's objection in terms that encompassed both the prevailing arbitral test and the Board's more limited prehearing disclosure principle with a footnote reference to the Board's 2010 decision.

> The employer has not addressed the disclosure request in terms of it being an "avalanche" or "ambush." The employer has not addressed each of the numerated groupings of documents. It says these documents collectively are not relevant or, if available to the union, could not be used to prove or disprove a material fact.
>
> Instead, the employer focuses on the process context within which the union's application for an order for pre-hearing disclosure is made and applies for summary dismissal of the union's application.[14]

[13] In that decision, I also deliberately made a determination on the document disclosure to be ordered in terms that encompass both the prevailing arbitral test and the Board's more limited prehearing disclosure principle: "I determine these documents and this information are properly within the scope of documents and information commonly ordered to be disclosed before an adjudication or arbitration under a collective agreement and the *Labour Relations Code*."[15]

[14] The documents I ordered the employer to disclose are:

> **Employee Information:**
>
> Current and complete seniority lists and employee rosters, identifying for each employee the following information:
>
> 1. full name,
> 2. a unique employee ID#,
> 3. hire date,
> 4. classification,
> 5. classification seniority date,
> 6. rate of pay,
> 7. total hours worked during the twelve months ending 6/30/2015,
> 8. total hours compensated during the twelve months ending 6/30/2015 (including Paid Time Off, vacation days, sick days, etc.)

---

[14] *Hospitality Industrial Relations* [2015] B.C.C.A.A.A. No. 110 (Dorsey), ¶ 83 – 84 (see also ¶ 74)

[15] *Hospitality Industrial Relations* [2015] B.C.C.A.A.A. No. 110 (Dorsey), ¶ 95

Performance Data

- Percent occupancy, by month, for the years 2009-2015
- Average Daily Rate, by month, for the years 2009-2015
- RevPAR (revenue per available rooms), by month, for the years 2009-2015
- The number of rooms for the years 2009-2015

Income Statements

- Income Statements, Balance Sheets and Cash Flow Statements, for each year during the period 2009-2015

Standards

- The most current Sheraton Brand Standards Manual

Meeting Business

- Annual average meeting revenues per square foot for 2010 – 2014 and year-to-date 2015

[15] I ordered the employer to make prehearing disclosure to the union on the following terms:

1. Conditions that address reasonable employer concerns about confidentiality of sensitive business information and provide protection for the employer;
2. A reasonable time by which employer disclosure can be made;
3. The person responsible for any extraordinary costs associated with compiling and delivering the documents and information is to be determined at the conclusion of the proceeding; and
4. Any other terms or conditions on which the union and employer agree or are determined on further submissions.

[16] I requested the union draft and discuss with the employer an order including these terms and waited receipt of a draft approved by the employer or submissions on any disputed aspect of a draft order.

[17] Union counsel drafted an order delivered to employer counsel on December 3, 2015. The draft proposes disclosure by a date and includes a term that reflects the common implied undertaking that documents disclosed to a party for a proceeding will not be used by that party outside the proceeding without the permission of the disclosing party or the authority granting the order.

[18] The employer made no response to the terms of the order. It concedes some of the documents are “arguably relevant” and intends to disclose these documents to the union no later than Friday, January 8, 2016.

[19] The employer seeks relief from immediate disclosure of other documents until there is a determination they are relevant or potentially relevant “based on the scope of the contract language at issue.” These documents are:

Performance Data

- Percent occupancy, by month, for the years 2009-2015
- Average Daily Rate, by month, for the years 2009-2015
- RevPAR (revenue per available rooms), by month, for the years 2009-2015
- The number of rooms for the years 2009-2015

Income Statements

- Income Statements, Balance Sheets and Cash Flow Statements, for each year during the period 2009-2015

Meeting Business

- Annual average meeting revenues per square foot for 2010 – 2014 and year-to-date 2015

[20] The employer applies for a suspension of the November 27th order.

> The Employer is neither challenging your authority to issue an order for production of documents nor asking that you vacate the order. Rather, the Employer is simply seeking an abeyance with respect to the timing of the order's implementation given the unique and unusual set of circumstances concerning LOU #9 and the reality that there has been no finding of relevance or potential relevance with respect to the documents of my client – 8 years of commercially sensitive financial information.
>
> Once this issue is resolved, and after that occurs, the Employer will suggest appropriate conditions in the form of a draft order that will be delivered to Mr. Prokosh.[16]

[21] This disclosure issue arises under a multi-employer collective agreement in which employers are broadly grouped by property status in tier subsets and represented by a voluntary employers' organization. By joining Hospitality Industrial Relations employers voluntarily choose to be part of multi-employer collective bargaining. Members may resign the employers' organization and thereby choose certification or enterprise-based collective bargaining. There is no corresponding choice in the union

[16] Employer Submission, December 17, 2015

or the employees of an employer to have an employer engage in multi-employer or certification-based collective bargaining.

[22] Within this context, LOU #9 permits the union and Hospitality Industrial Relations to address change at a specific property without having to engage with all employers at all properties in the multi-employer collective bargaining structure.

[23] The union's broad claim under LOU #9 is that there has been both change at a "particular property within the industry" and change within the industry that requires review of classifications and wage rates at a specific hotel property. The longitudinal business data the union seeks from this employer extends throughout the period of time during which the union asserts the change occurred – from the Best Western brand before the 2010 Olympics to the current higher scale Sheraton brand with a new conference centre.

[24] By any test, the contested documents and information in the possession and control of the employer that the union seeks are relevant and could, if available to the union, be used by it to prove or disprove a material fact. This was the determination I made on November 27th in the context of the change-based provisions and process in LOU #9 and the question referred to mediation and adjudication.

[25] The employer's application to suspend the disclosure order for some of the documents is denied.

[26] The employer is ordered to disclose in electronic format all of the "Performance Date", "Income Statements" and "Meeting Business" documents to counsel for the union no later than 5:00 p.m. on Friday, January 15, 2016.

[27] The union shall use the documents only for the purposes of this process under Lou #9. Counsel for the union shall limit disclosure of these documents to no more than three union representatives providing instructions to counsel. Union counsel will give the names of these individuals to employer counsel on or before Monday, January 18, 2016.

[28] I further direct that no later than 5:00 p.m. on Friday, January 29, 2016, the union shall deliver to both counsel for the employer and me:

1. A comprehensive statement of the nature and extent of change on which the union relies for the relief it seeks on this referral under LOU #9;
2. A complete statement of particulars of all and any wage increase for each employee classification the union claims is appropriate under LOU #9; and
3. A summary of the rationale for each classification wage increase.

[29] The terms of this order and case management direction may be amended by agreement between the union and employer without referral to me.

DECEMBER 29, 2015, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

James E. Dorsey