

LETTER DECISION  
BCLRB No. B62/95

August 27, 2001

To Interested Parties:

Re: British Columbia Institute of Technology ("BCIT") -and- Canadian  
Union of Public Employees, Local Union 3643  
("CUPE") -and- Marriott Corporation of Canada  
Ltd. ("Marriott") -and- British Columbia  

---

Government Employees' Union (the "BCGEU") -  
and- British Columbia Institute of Technology Staff  
Society ("BCITSS")

(Part 5 - Case: 21650)

1 This is an application by the British Columbia Institute of Technology for an Order  
restricting picketing. BCIT has contracted out the provision of most of its janitorial services to  
Marriott Corporation of Canada Ltd. CUPE is on strike against Marriott and is picketing the  
campus of BCIT where the CUPE employees work.

2 The BCGEU and BCITSS (the "Intervening Unions") were granted party status as the  
commencement of the hearing. The BCIT Student Association applied for and was denied  
standing.

3 Despite the extensive and able arguments made by CUPE and the Intervening Unions to  
the contrary, I find that the matter before me does not raise any new issues of law. This matter is  
expedited, and I issue these reasons as shortly after the conclusion of the hearing as possible.  
Consequently, these reasons will not outline the facts nor the positions of the parties except as  
they are relevant to the analysis and decision which follow.

4 The issues raised in the case are as follows:

1. Is BCIT a neutral third party entitled to apply for relief from picketing under Section 65(6)?
2. Is the Board able to restrict picketing, without prohibiting the picketing by CUPE?

3. If any restriction on picketing would amount to a prohibition, what order, if any, should the Board make to regulate the picketing?
4. Is BCIT an ally of Marriott by reason of its decision to have its managers perform work which, but for the strike against Marriott, would have been performed by Marriott employees?
5. If BCIT is not an ally, is it performing struck work which is "used" by Marriott, contrary to Section 68 of the Code? Should BCIT be denied relief under Section 65(6) for this reason?

1. **Is BCIT subject to common site picketing and entitled to relief under the Code?**

5 CUPE asks me to interpret the definition of "common site picketing" in light of the overall framework of the Code which is to insulate *innocent* third parties from the impact of picketing. CUPE argues that BCIT is not an innocent third party as it has contracted out to Marriott services which are essential to its continued operation and the function it fulfils. CUPE says the case before me is quite different from those circumstances where construction projects are being carried out at work locations where other work is being performed. The work performed by Marriott at BCIT is not removed from the central operations of BCIT. The janitors employed by Marriott perform a function which is part of the normal operations of BCIT.

6 CUPE refers to the Board's decision in *The Vancouver Opera Association*, BCLRB Letter Decision No. L13/81, in support of its argument that BCIT and Marriott are functionally inter-dependent. CUPE identifies the two as co-adventurers working towards a common goal, and argues that without the operations of BCIT, Marriott could perform no work at that location. In addition, CUPE argues that the cleaning is functionally integrated because both BCGEU employees of BCIT, and CUPE employees of Marriott, perform janitorial functions, some side by side in the same buildings at the BCIT campus.

7 CUPE argues that as BCIT made a decision to contract out services essential to its operation it cannot be insulated from the foreseeable consequences of this contracting out. In conclusion, CUPE says if I grant the relief sought here this will result in a windfall to employers who contract out and that any relief to BCIT will tip the scales towards Marriott. The intervening Unions adopt this argument.

8 The Board's decision in *Sovereign General Insurance Company and Jim Dent Construction*, BCLRB No. B451/94 (Leave for Reconsideration of BCLRB No. B275/94), is determinative of this issue. Chair Lanyon, Associate Chair Hall, Vice-Chair Mullin, and two Members took the opportunity in this reconsideration decision "to set out the general

interpretative and policy framework which will govern the Board's adjudication of future common site picketing applications under Section 65(6) of the Code" (p. 14).

9 At page 10 of the *Sovereign* decision the Board outlines a two-stage analysis to approach applications under Section 65(6). The Board notes that the current Section 65(6) contains an express direction that "the Board shall restrict the picketing in such a manner that it affects only the operation of the [primary employer]". The Board notes "this language does not engage any of the discretionary factors which were previously adopted by the Board in cases such as *Vancouver Symphony Society*, [BCLRB No. L15/81], (e.g. functional inter-relationship or lack of 'neutrality')". The Board continues:

Past Board decisions considered functional integration on the basis that it might affect the "neutrality" of a secondary employer. Another rationale is that the degree of integration may be so significant that what would otherwise be considered a "common site" (absent the functional integration) has become analogous to a single, primary site. However, we emphasize that consideration of this factor only arises at the second stage of analysis, if restricting picketing at the first stage would result in a prohibition. (p. 12)

I take these passages in *Sovereign General Insurance Company, supra*, to mean that although BCIT has entered into a contract with Marriott for Marriott to provide functions which are part of the normal operation of BCIT, although there is a functional integration between the work performed by BCIT employees and that performed by Marriott employees, and Marriott and BCIT are, in effect, co-adventurers with a common goal, BCIT is nonetheless an employer carrying on an operation, employment or business entitled to relief under Section 65 unless they are found to be an ally at the first stage of this inquiry. Consequently, I do not find CUPE's argument persuasive on this issue.

2. **Can I restrict the picketing at BCIT without prohibiting picketing?**

10 At this initial stage of inquiry, primary emphasis is placed on the protection of BCIT. The obligation upon BCIT at this stage is to specifically propose the "minimum restrictions necessary for its protection" (see p. 10, *Sovereign General Insurance Company, supra*). BCIT provided little, if any, evidentiary basis for its position that in order to protect its operations I must leave all gates unpicketed except Gates C, C and I.

11 CUPE argues that restricting picketing to these entrances is tantamount to a prohibition. CUPE argues that Marriott suppliers, Marriott employees, and persons who benefit from Marriott services at BCIT use all eight entrances to the campus and that limiting the pickets in

any respect amounts to a prohibition on effective picketing by CUPE. CUPE distinguishes this from those cases involving construction gates where construction employees and contractors normally enter through one gate. CUPE argues that it must direct its picket towards the public generally, suppliers of material to Marriott and the BCIT community at large. CUPE argues there is no effective way it can prevent individual suppliers from entering BCIT through non-picketed gates, as there is no reporting gates or checkpoints possible. In any event, some suppliers are providing goods for both BCIT and Marriott at the same time. CUPE argues that the presence of security guards result in the effective prohibition of its picketing as these guards are directing individuals seeking entrance to the BCIT campus to non-picketed gates. The intervening Unions adopt this argument and add that any restrictions on picketing render their collective agreement clauses permitting employees to respect picket lines ineffective.

12 I do not accept CUPE's argument that, for all practical purposes, it will not be able to attempt to persuade suppliers and those persons doing business with Marriott from entering BCIT unless it is able to picket all eight gates. The CUPE picketers will still be able to effectively persuade persons not to do business with Marriott. Several of the gates at BCIT are used normally by staff and employees and persons doing business with BCIT. If individuals are required to change their pattern of coming to the campus and are required to seek out a non-picketed entrance to BCIT, this will serve to bring to these persons' attention the grievances of Marriott employees. In addition, several of these gates are on busy thoroughfares, visible to passing motorists and the public. I am satisfied that I can protect BCIT from the effects of the labour dispute without effectively, or for all practical purposes, prohibiting the picketing.

13 I now turn to the issue of the restrictions on picketing proposed by BCIT. BCIT proposes that CUPE pickets be permitted at three locations. I am not satisfied that the three locations proposed by BCIT constitute the minimum restrictions on picketing necessary to protect BCIT. BCIT argues that it requires more than one access to the campus in order to avoid a terrible pedestrian and traffic problem at its periphery. I think it likely, on the basis of the meagre evidence I heard on this point, that BCIT's operations would be protected if at least three entrances were available for access by students, faculty, staff and those servicing the construction site.

14 I understand some entrances are used much more heavily than other entrances. CUPE advises that it does not seek to picket those gates which are principally used by students seeking access to BCIT nor does it wish in any way to impede the construction project. The Employer's evidence is that students most heavily use a gate identified by the parties as Gate H. The Union has no objection to this gate remaining free of pickets. Gate E is another gate used principally by students. Gate E is also a gate identified by John Watson, the president of BCIT, as the most heavily used entrance, along with Gates B and F. Although the picketing by CUPE at the most busy entrances will result in some inconvenience to those persons entering the BCIT campus, there is no evidence that picketing at these busy entrances will adversely impact upon the

operations of BCIT as long as other entrances are left unpicketed. The Union has no desire to picket at Gate G. I am permitting Gate I to remain unpicketed so as to enable free access to persons seeking entry to BCIT from the east side of the campus. I am assured by the Union that it will take all steps necessary so as its picketing does not impede the construction project.

15 As I have determined that I can restrict picketing without prohibiting picketing for all practical purposes, I need not move to the second stage to determine what, if any, regulation would be appropriate in all the circumstances.

3. **Is BCIT an ally of Marriott because of its decision to utilize BCIT managers to perform the cleaning previously performed by Marriott?**

16 CUPE argues that BCIT has altered the terms of its contract with Marriott, and has provided relief to Marriott through these amendments. BCIT has advised Marriott that its five supervisors should be assigned to clean the washrooms and two labs at BCIT during the next ten days. It is the intention of BCIT to deploy its own managers to perform the other work which normally would be performed by Marriott employees. CUPE argues that the effect of BCIT managers performing the cleaning function will result in Marriott receiving some benefit, at least during the ten day period before BCIT has effectively terminated its contract with Marriott.

17 An "ally" is defined in Section 65 as a person who assists the employer in resisting a lawful strike. BCIT is not assisting Marriott in resisting a lawful strike. BCIT and Marriott have a contract which requires Marriott to provide cleaning services. If Marriott is not able to provide these cleaning services BCIT is permitted to cancel the contract upon giving ten days' notice.

18 On February 3, 1995 John Watson, the president of BCIT, wrote to Marriott putting it on notice that "should picketing occur and you are unable to maintain services properly, we intend to serve you with notice of our intent to cancel the custodial contract".

19 On February 16, 1995 Watson advised Marriott that it was in breach of its contract to provide custodial services. Marriott was put on notice that if the breach is not corrected within ten days, the contract for custodial services would terminate in accordance with the contract. The effect of BCIT managers cleaning the premises of BCIT does not result in a change in the contractual relationship between BCIT and Marriott, nor does it result in a change which has the effect of assisting Marriott in resisting the strike. There is nothing in the evidence before me that suggests that the effect of the cleaning by BCIT managers will extend the contractual relationship between Marriott and BCIT.

20 CUPE argues that if BCIT managers did not perform the cleaning services that BCIT would breach its contract with Marriott and would enter into a contract with another janitorial firm to provide janitorial services within the ten day period. CUPE argues that BCIT has

relieved the pressure upon Marriott to negotiate a collective agreement forthwith with CUPE by extending to it a ten day grace period. CUPE refers to the Board decision in *Southland Canada Inc.*, BCLRB No. B188/93, where a third party who had altered its contract with a struck employer was relieved from an ally declaration because it had made every effort to make alternative arrangements and was unable to.

21 I find that BCIT has not altered its contractual arrangements with Marriott in order to assist the struck employer. In fact, it is bringing its relationship with Marriott to an end. I find that BCIT is not an ally of Marriott.

4. **Should BCIT be denied relief because it is performing struck work?**

22 The final issue is whether BCIT is a party to a violation of Section 68 by Marriott. CUPE argues that BCIT is supplying its managers for Marriott's use to do cleaning which would otherwise be performed by Marriott's bargaining unit employees. CUPE relies on the reconsideration decision of the Board in *TNL Construction Ltd.*, BCLRB No. B460/94 (Reconsideration of BCLRB No. B455/94). TNL and MacMillan Bloedel had a contract under which TNL undertook a construction project at MacMillan Bloedel to upgrade the pulp mill. Under the terms of this contract MacMillan Bloedel performed first aid, fire protection and other safety related work necessary for the construction performed by TNL. When MacMillan Bloedel was struck by the Communications, Energy and Paperworkers' Union of Canada, Local Unions Nos. 592 and 686, MacMillan Bloedel was unable to continue to perform this work. The reconsideration panel held that if TNL performed this first aid, fire protection and other safety related work necessary for the completion of its projects, TNL would be performing struck work which would result in TNL's services being used by the struck employer, contrary to the replacement work provisions of the Code.

23 While acknowledging that notice was not provided to Marriott, CUPE argues that the fact that BCIT would be performing struck work contrary to the replacement worker provisions of the Code, should result in BCIT being denied relief under Section 65(6).

24 BCIT argues that Marriott is not using the services of BCIT management personnel as Marriott has no control over the BCIT personnel. BCIT says that instead of its managers performing this cleaning work, it could simply hire another company to do the work.

25 I have no application before me under Section 68 or Section 6(3)(e) of the Code. Any such application would have to be served upon Marriott. Consequently, I make no finding as to whether Marriott is in breach of Section 68(1) by using the services of BCIT managers to perform work of employees within the Marriott bargaining unit. The question before me is whether the fact that BCIT managers are performing this struck work should deprive BCIT of a remedy.

26 The term "use" in Section 68 was discussed in Board decision *V.I. Care Management Limited (Sunnyside Manor)*, BCLRB No. B112/93. The Board said the Code:

...refers to, and thus defines, an engager as an employer or a person acting on behalf of an employer. It prohibits that engager from using the services of a person in contravention of Section 68, which implies for the benefit of the employer in resisting a strike or pursuing a lockout. The engager in terms of the section is, therefore, the employer or a person acting on behalf of the employer, and the use of the services must be for the purposes or benefit of the employer. (pp. 12-13)

As there is some doubt whether the performance of work by BCIT managers is for the benefit of Marriott in resisting the strike, I do not conclude the performance of this work should deprive BCIT of the relief sought. Again, I make no determination as to whether Marriott has engaged in a violation of the Code.

27 The gates which are free from pickets are for entrance and exit by BCIT employees and faculty, persons working at the construction site at BCIT, and BCIT students. These entrances are not left unpicketed for the purpose of permitting the unrestricted entrance to the BCIT premises of persons supplying services, equipment or material to Marriott or for doing business with Marriott. BCIT has indicated its willingness to make some effort to attempt to direct persons who are suppliers of Marriott or doing business with Marriott, to use gates which are being picketing by the CUPE employees. The Panel requests that BCIT meet with CUPE in to discuss and attempt to agree upon some system whereby BCIT can take what steps it can to ensure that its gates which are free from picketing are not used by parties doing business with Marriott. If requested, the Board will assist in these discussions and, if appropriate, put a condition upon the Board's attached Order.

The details of the Board's Order restricting picketing are attached.

LABOUR RELATIONS BOARD

KATE YOUNG  
VICE-CHAIR

Interested Parties:

British Columbia Institute  
of Technology  
3700 Willingdon Avenue  
Burnaby, B.C. V5G 3H2  
ATTENTION: Tomi Eeckhout

Russell & DuMoulin  
Barristers & Solicitors  
2100 - 1075 West Georgia Street  
Vancouver, B.C. V6E 3G2  
ATTENTION: Kevin O'Neill (Counsel for BCIT)

Canadian Union of Public Employees,  
Local Union 3643  
#500 - 4940 Canada Way  
Burnaby, B.C. V5G 4T3  
ATTENTION: Robin Jones

McGrady, Askew & Fiorillo  
Barristers & Solicitors  
500 - 2696 Granville Street  
Vancouver, B.C. V6H 3H4  
ATTENTION: Carolyn Askew (Counsel for CUPE)

Marriott Corporation of Canada Ltd.  
#306 - 3631 No. 3 Road  
Richmond, B.C. V6X 2B9  
ATTENTION: David Sinclair

B.C. Government and Service  
Employees' Union  
4925 Canada Way  
Burnaby, B.C. V5G 1M1  
ATTENTION: Ken Curry (Counsel for BCGEU)

British Columbia Institute of  
Technology Staff Society  
3700 Willingdon Avenue  
Burnaby, B.C. V5G 3H2  
ATTENTION: John Steeves (Counsel for BCITSS)

