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Files: 561-02-176
and 561-34-177

Citation: 2008 PSLRB 13

Public Service
Labour Relations Act

Before the Public Service
Labour Relations Board

BETWEEN

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Complainant

and

TREASURY BOARD
and CANADA REVENUE AGENCY

Respondents

Indexed as
Professional Institute of the Public Service of Canada v. Treasury Board and Canada Revenue Agency

In the matter of complaints made under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Dan Butler, Board Member

For the Complainant: Martin Ranger, Professional Institute of the Public Service of Canada

For the Respondents: Karl Chemsi, counsel

Decided on the basis of written submissions
filed November 28 and December 13, 2007.

I. Complaints before the Board

[1] These reasons constitute an interim decision with respect to the two complaints described below.

[2] On September 17, 2007, the Professional Institute of the Public Service of Canada ("the complainant") filed complaints against the Treasury Board of Canada and the Canada Revenue Agency ("the respondents" or "the employers") under paragraphs 190(1)(*b*) and (*g*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 ("the *Act*"). Complaints filed under paragraph 190(1)(*b*) allege a failure to comply with the duty to bargain in good faith under section 106. Complaints filed under paragraph 190(1)(*g*) allege an unfair labour practice within the meaning of section 185. The complainant also alleged violations of the *Canadian Charter of Rights and Freedoms* ("the *Charter*").

[3] The complainant stated its allegations against the Treasury Board of Canada (PSLRB File No. 561-02-176) as follows:

> 1. *The Complainant Professional Institute of the Public Service of Canada ("the Union") is an employee organization as defined under section 2 (1) of the* Public Service Labour Relations Act (PSLRA) *and is the exclusive bargaining agent for all employees of the Employer described in certificates issued by the former Public Service Staff Relations Board for the following nation-wide bargaining units:*
>
>   *(a) Applied Science and Patent Examination (SP);*
>   *(b) Computer Systems (CS);*
>   *(c) Engineering Architecture and Land Survey (NR);*
>   *(d) Health and Social Services (SH); and*
>   *(e) Audit, Commerce and Purchasing (AV).*
>
> 2. *The Respondent Employer (the "Employer") is Her Majesty in right of Canada as represented by Treasury Board.*
>
> 3. *On June 18, 2007, Union Negotiator Jamie Dunn sent by facsimile and regular mail to Employer Negotiator Kevin Marchand a notice of its desire to bargain with a view to the renewal of the SP collective agreement, which expires on September 30, 2007. In this letter, Mr. Dunn requested contact information for all employees in the Union's SP bargaining unit. More specifically, Mr. Dunn requested that the Employer provide the Union with each employee's name, position title, telephone numbers and*

fax numbers at both work and home, as well as regular mail and email addresses at both work and home. Further, Mr. Dunn asked that the Employer provide this information by June 30, 2007 in both hard copy and electronic format.

4. *On June 28, 2007, the Union received a letter dated June 25, 2007 from Carl Trottier, Senior Director of Collective Bargaining for the Employer. This letter acknowledged receipt of the Union's notice to bargain for the SP group. The bargaining unit member contact information requested by the Union in its notice to bargain was not provided with this letter, nor was any reference made therein to the request for this information.*

5. *In early July 2007, Mr. Dunn spoke by telephone with Mr. Marchand and inquired as to the status of his request for contact information for the bargaining unit employees. Mr. Marchand stated that the Employer had received requests for this information from several bargaining agents. Mr. Marchand stated that the Employer considered this to be a policy issue and that it intended to issue one response to all bargaining agents on this specific issue.*

6. *To date, however, the Employer has provided no response.*

7. *This, notwithstanding that the Union made the same request:*

   (a) on June 21, 2007 for its CS bargaining unit, which is bargaining the renewal of its collective agreement expiring December 21, 2007;

   (b) on September 11, 2007 for employees in its NR bargaining unit, which is bargaining the renewal of its collective agreement expiring September 30, 2007;

   (c) on September 13, 2007 for employees in its SH bargaining unit, which is bargaining the renewal of its collective agreement expiring September 30, 2007; and

   (d) on August 30, 2007 for employees in its AV bargaining unit, which is bargaining the renewal of its collective agreement which expired June 21, 2007.

8. *The Union has a legal obligation under s. 187 of the* PSLRA *to represent its members in good faith and in a non-arbitrary manner. This obligation applies to representation of employees at the bargaining table, the*

filing and arbitration of grievances and complaints of employer violations of the PSLRA.

9. *In respect of bargaining, the Union must be able to communicate with employees in its bargaining units in respect of bargaining, including the following:*

   (a) the development of a proposal package for collective bargaining;

   (b) keeping employees informed regarding the progress of bargaining; and

   (c) advising employees of dates and times for strike or ratification votes.

10. *In respect of grievances, the Union has a legal obligation to provide representation in matters that do not fall directly within the four corners of the collective agreement. Pursuant to the Supreme Court of Canada decision in* Weber v. Ontario Hydro, *[1995] 2 S.C.R. 929, adjudicators have sole jurisdiction to deal with disputes that arise either inferentially or expressly from the collective agreement. And, pursuant to the Supreme Court of Canada decision in* Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.), *[2003] S.C.J. No. 42 and the provisions of s. 226(g) of the* PSLRA, *adjudicators have jurisdiction to adjudicate alleged violations of employment-related statutes.*

11. *In the event of a strike vote, the Union has a legal obligation under s. 184 of the* PSLRA *to conduct a secret ballot among all employees in the bargaining unit in a manner that ensures employees are given a reasonable opportunity to participate in the vote and to be informed of the results. There is a similar requirement under s. 183 of the* PSLRA *to conduct a secret ballot vote among all employees in the bargaining unit where the Minister responsible for the* PSLRA *is of the opinion that it is in the public interest that the employees in a bargaining unit be given the opportunity to accept or reject the employer's last offer.*

12. *The Union is under a legal obligation under ss. 119 to 134 of the* PSLRA *to negotiate agreements for the provision of essential services before it can take strike action.*

13. *Labour unions, including the Complainant Union, are democratic organizations which have played an active role in Canadian economic, social and political life for many years. This role requires that the Union be able to*

communicate with bargaining unit employees for purposes of providing information including, but not limited to, the following:

(a) the functions performed by the Union and the procedure for becoming a member of the Union;

(b) the procedures for running and voting for elected positions within the Union, including positions on Union bargaining committees;

(c) the results of Union elections and other information about the democratic life and activities of the Union; and

(d) facts and viewpoints concerning economic, political and social issues that are relevant to the Union and bargaining unit employees.

14. *In the light of all of the above, it is essential that the Union be provided with employee names, position titles, telephone numbers, and regular mail and email addresses at home and work in order to communicate with all employees in its bargaining units. This need is particularly acute in the case of the bargaining units listed in para. 1 above, as these are nation-wide units composed of employees working in hundreds of different locations across the country. Without this information, it is impossible for the Union to communicate with bargaining unit employees.*

15. *Consequently, the Employer's refusal to provide employee names, position titles, telephone numbers, and regular mail and email addresses constitutes:*

(a) a violation of the Employer's obligation under s. 106 of the PSLRA *to bargain with the Union in good faith and make every reasonable effort to enter into a collective agreement;*

(b) interference in the administration and representation of employees by the Union and discrimination against the Union, contrary to s. 186 of the PSLRA*;*

(c) a violation of the guarantee of freedom of association in s. 2 (d) of the Canadian Charter of Rights and Freedoms*; and*

(d) a violation of the guarantee of freedom of expression in section 2 (b) of the Canadian Charter of Rights and Freedoms.

[4] The statement of complaint against the Canada Revenue Agency (PSLRB File No. 561-34-177) recounted that the complainant requested the same contact information from that employer for employees in the Audit, Financial and Scientific (AFS) Group. The collective agreement in that relationship expired December 21, 2007. The complainant indicated that the respondent did not reply to the request. The remaining sections of the statement of complaint against the Canada Revenue Agency were identical to paragraphs 8 through 15 of the complainant's submission regarding the Treasury Board of Canada (reproduced above).

[5] The complainant requested the same corrective action in both complaints:

> *The Union requests that the Board:*
>
> *1. Issue a declaration that the Employer, by refusing to provide to the Union the names, position titles, telephone numbers and home and email addresses for all employees in the bargaining unit, has:*
>
> *(a) failed to bargain collectively in good faith and make every reasonable effort to enter into a collective agreement, contrary to s. 106 of the* PSLRA*; and*
>
> *(b) interfered with the administration of an employee organization and the representation of employees by an employee organization and discriminated against an employee organization, thereby violating s. 186 of the* PSLRA*;*
>
> *(c) violated the guarantee of freedom of association in s. 2 (d) of the* Canadian Charter of Rights and Freedoms*; and*
>
> *(d) violated the guarantee of freedom of expression in s. 2 (b) of the* Canadian Charter of Rights and Freedoms.
>
> *2. Order that the Employer:*
>
> *(a) cease and desist from violating the* PSLRA *and the* Canadian Charter of Rights and Freedoms*; and*
>
> *(b) provide forthwith the information requested by the Union and continue to provide updates to the Union on a quarterly basis.*

> 3. *Order that the Employer compensate and otherwise make whole the Union for all losses and expenses incurred as a result of its violations of the* PSLRA, *including the cost of this proceeding.*
>
> 4. *Order that the Employer provide copies of the Board's findings and orders with respect to this matter to all of its current and newly hired employees for a three year period following the date of the Board's decision in this matter.*
>
> 5. *Order that the Employer post a notice in all of its work locations informing employees of their rights under the* PSLRA, *for a three year period following the date of the Board's decision in this matter.*
>
> 6. *In the alternative to the remedies requested above, consent to prosecute the Employer pursuant to subsection 202 (3) of the* PSLRA.
>
> 7. *Such further and other relief as may be appropriate in the circumstances.*

[6] Counsel for the respondents replied to both complaints on October 2, 2007, as follows:

> . . .
>
> *The respondents have concerns with regards to employee privacy, as well as, other very serious practical concerns. We have sought an opinion from the Office of the Privacy Commissioner of Canada with regards to the privacy concerns.*
>
> *The respondents recognize the bargaining agent's statutory obligations and are interested in pursuing discussions with them on this matter. It is hoped that a mutually agreeable resolution can be reached, which could later be put before the Board for endorsement as a "Board Order".*
>
> *The respondents are therefore, requesting to proceed by way of mediation with the assistance of a Board appointed mediator. The respondents are willing to engage in discussions with the bargaining agent in order to reach an agreement that would be ratified by the Board and they feel that mediation would be the ideal method of resolution for the issues at hand.*
>
> *If no resolution can be reached through mediation, the respondents respectfully reserve their right to make further representations at a later date.*

. . .

[7] By letters dated October 5 and 16, 2007, the complainant informed the Public Service Labour Relations Board ("the Board") that it would not participate in mediation.

[8] The Chairperson of the Board subsequently decided that the complaints would be dealt with by way of written submissions. A registry officer from the Board wrote to the parties on November 13, 2007, informing them of that decision and setting dates for filing written arguments and rebuttals. The letter requested particularly that the parties provide ". . . their respective positions on the applicability . . ." of two decisions: *Public Service Alliance of Canada and Treasury Board, Harder and Public Service Commission, Hubbard*, PSSRB File Nos. 161-02-791 and 169-02-584 (19960426), and *Griffiths v. Nova Scotia (Education)*, 2007 NSSC 178.

[9] The Chairperson has appointed me as a panel of the Board to decide the complaints based on the written submissions received by the Board.

II. Written submissions

[10] The complete written arguments and rebuttals submitted by the parties are on file with the Board. The sections below reproduce substantial excerpts from those submissions. The selected excerpts, in my view, reflect the core arguments made by the parties and the case law upon which their arguments are based.

A. For the complainant

[11] The complainant filed its written arguments on November 28, 2007:

. . .

> *Bargaining agents have a legal obligation under S. 187 of the PSLRA to represent its* [*sic*] *members in good faith and in a non-arbitrary manner. This obligation applies to representation of employees at the bargaining table, the filing and adjudication of grievances and complaints of employer violations of the PSLRA.*
>
> *In order for a bargaining agent to meet its legal obligation under S. 187 of the PSLRA, the Complainant needs to be able to communicate easily with employees in its bargaining units with respect to bargaining and related matters and with respect to representational matters. This legal obligation requires that the bargaining agent be able at all times to communicate with its members. . . .*

In order to do so, a bargaining agent must upon request, receive up-to-date information concerning employee names, position titles, telephone numbers, and regular mail and e-mail addresses at home and work.

. . .

In the first case [referred to the parties by the Board], *the employer was refusing to provide the names of employees who would be affected by a workforce adjustment situation. The employer's argument to refuse disclosure was that it could not release the names of the affected employees because of the Privacy Act. The Board rejected this argument and determined that the bargaining agent was entitled to the requested information.*

As for the second decision . . . . The government responded by saying that releasing such lists would constitute an unreasonable invasion of personal information and as such, it refused the request . . . the tribunal ordered the release of the requested information.

Both cited decisions support the Complainant's position that it is entitled to the requested information without any qualification. It is information available to the employer; it is information which is necessary for the Complainant to meet its duty of fair representation under the PSLRA. The Complainant submits that both respondents . . . cannot refuse to release the requested information by hiding behind privacy concerns. These arguments have been rejected by various courts and tribunals.

. . .

In the case cited as Millcroft Inn Ltd [2000] O.L.R.D. No. 2581, the Ontario Labour Relations Board . . . determined that:

> *[35] "(…) I find that the union's capacity to represent the employees for whom it has bargaining rights is impeded or detrimentally affected by the employer's refusal to provide the names, addresses and telephone numbers of those employees. The employer's refusal to give the union the names, addresses and telephone numbers amounts to interference in the union's capacity to represent them."*

In the above referenced case, the employer was justifying its refusal to provide the information based on a concern for privacy of the employees. On this issue, the Board determined:

> *[36] "That consideration may be of general value, but it is not sufficient to trump the union's interest in*

> *being able to represent its bargaining constituency effectively."*

A similar finding by the Ontario Labour Relations Board was reached in the decisions cited as Ottawa-Carleton District School Board [2001] O.L.R.D. No. 4575 . . . .

Other provincial labour boards have also made similar rulings. In the decision CAW-Canada Local 114 v. Sun's Enterprises (Vancouver) Ltd., British Columbia Labour Relations Board, September 18, 2004, Vice-Chair Mullaly determined that in order to fulfill its statutory duty of fair representation, a union must be able to communicate with its members and if an employer does not have a sound business purpose for refusing to provide a union with the information needed to communicate with those employees, the employer interferes with the representation of those employees . . . .

> *"In my view, an employer does not violate the privacy of its employees if it provides to those employees' certified bargaining agent information that enables the Bargaining agent to contact the employees to fulfill its statutory obligations to those employees."*

The same findings were also reached under the jurisdiction of the Canada Labour Code in General Teamsters, Local Union No. 362 v. Monarch Transport Inc. and Dempsey Freight Systems Ltd., Canada Industrial Relations Board, October 20, 2003.

The employer was also of the opinion in the above-cited case . . . that under the federal Personal Information Protection and Electronic Document Act (PIPEDA), it could not release the requested information. Vice-Chair Pineau determined that there are two basic principles which have governed the disclosure of employee information.

> *"The first is that the union interest in obtaining requested information is related to a legitimate labour relations interest and second, the employer's refusal to give the information to the union amounts to interference with the union's capacity to represent employees of the bargaining unit."*

It is the Complainant's contention that the applicable jurisprudence is crystal clear: bargaining agents are entitled to the personal information concerning their members which an employer has in its possession, and as such, we are requesting an order of the Board to that affect.

. . .

[*Sic* throughout]

B. <u>For the respondents</u>

[12] The respondent also filed written arguments on November 28, 2007:

. . .

General

The respondents deny having been engaged in any violation of the PSLRA. *The respondents understand the bargaining agent's statutory obligations and do not dispute the principles outlined in the jurisprudence with respect to disclosure of personal information to unions for their legitimate purposes as a bargaining agent. The respondents, however, . . . have concerns with regards to employee privacy, as well as other serious practical concerns. Specifically, the respondents do not necessarily have in their possession all the information requested by the union and the respondents cannot ensure the accuracy of the information that they do possess.*

The Case Law Principles

. . . [The two cases identified in the Board's letter], *as well as the many cases cited within them, illustrate that the privacy legislation that exists in various jurisdictions, does indeed allow for disclosure of personal information to unions for their legitimate purposes as a bargaining agent.*

The respondents understand this principle outlined in the jurisprudence and is willing to abide by the case law. However, there is a significant difference in our case . . . .

In the first case cited . . . , the Board ordered the employer to provide the requested information, however, it is important to note that in this particular case, there was never a dispute as to whether or not the employer had the information in its possession . . . the employer's witness . . . [stated] *"that there was no administrative problem in giving this information to the complainant and that it was the Privacy Act which was the principal and overriding issue."*

In the second case, . . . the union had requested a list of persons in possession of certificates of qualification and certificates of apprenticeship in the construction and electrical trade in Nova Scotia from the Nova Scotia Department of Education. The Department of Education, in this case, was the certifying body for these various certificates and therefore, had this information in its possession.

The respondents understand and do not argue the principles outlined in these two cases. However, in the present matter, the respondents do not necessarily have in their possession all the information requested by the union and there cannot be any guarantee of the accuracy of the information that they do possess. As the respondents have never had to use this information to date, there has not been a need to verify whether or not it is complete for all employees nor to ensure that what is possessed is accurate. It is also important to note that certain information requested by the complainant in this case, such as home email addresses, has never been collected by the respondents.

There are other decisions related to disclosure of personal information to a bargaining agent that also support the previous two cases in indicating that this type of personal information should be disclosed to the bargaining agent for their legitimate purposes. These cases also demonstrate that the information in question is in the employer's possession. The following jurisprudence demonstrates the importance of the bargaining agent being on equal footing with the employer by providing the bargaining agent with the information that is has in its possession.

In Millcroft Inn Ltd., *[2002] OLRB Rep. July/August 665, the decision states that: "A consequence of the union possessing exclusive bargaining status on behalf of the employees is that the union is placed in an equal bargaining position with the employer in its collective bargaining relationship. To the extent that the employer has information which is of value to the union in its capacity to represent the employees (such as their names, addresses and telephone numbers), the union too should have that information." This decision acknowledges once again that the information being discussed is within the employer's possession.*

. . . Co-Fo Concrete Forming Construction Limited *[1987] OLRB Rep. September 1213, at 1222-2, . . . illustrates that the lack of information being requested is an important factor to consider when examining cases of disclosure.*

Office of the Privacy Commissioner of Canada

In addition to the case law and as per my letter dated October 2, 2007, an opinion was sought from the Office of the Privacy Commissioner of Canada (OPC) with regards to privacy concerns surrounding the disclosure of information to a bargaining agent . . . .

. . . the OPC raised very serious concerns with regards to the availability and the accuracy of the information being requested by the bargaining agent. The OPC also addresses the case law that is in favour of disclosure and supports the

argument that there is a significant difference in that the employer may not possess all the information requested and that the accuracy of the information that it does possess is questionable.

Finally, the OPC did not see how the disclosure of the information being requested in this case could be considered a consistent use under the Privacy Act, *as the accuracy of the information being requested is in question. . . .*

Conclusion

The respondents deny having violated s. 190(1)(b) nor s. 190(1)(g) of the PSLRA. Generally there is a willingness by the respondents to provide the requested information that they currently have in their possession, in accordance with the jurisprudence on this issue.

The respondents agree to abide by the principle of placing the bargaining agent on equal footing with the employer. It is respectfully submitted, however, that any order from the Board should not have the effect of forcing the respondents to collect personal information solely for the purposes of providing it to the bargaining agent.

As previously mentioned the distinguishable feature between the present case and the existing jurisprudence is the fact that the respondents do not have all the personal information requested by the complainant. The respondents may have some of the information requested but they cannot ensure the accuracy of what they currently possess.

Should the Board order the disclosure of the information in possession of the respondents, it is submitted that the order should provide that the complainant may use this information solely for the legitimate purposes of the bargaining agent in accordance with the PSLRA. *Furthermore, although not bound by the* Privacy Act, *the complainant should provide the Board with assurances that it will manage the personal information disclosed in conformity with the principles of fair information practices embodied in the* Privacy Act *and the* Privacy Regulations. . . .

. . . the respondents have not been afforded the opportunity to provide evidence through witnesses and are unaware of the complainant's arguments with regards to the violation of the Charter. . . . the respondents would like to reserve the right to address the complainant's allegations that the complainant had violated the Charter. . . .

> *. . . should the Board find in favour of the complainant, the respondents respectfully request that the Board hold a hearing or appoint a mediator in relation to any remedy the Board may be considering.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

C. <u>Complainant's rebuttal</u>

[13] The complainant submitted written rebuttal arguments on December 13, 2007:

> . . .
>
> *It is clear from the Respondent's submissions that both the Treasury Board and the Canada Revenue Agency agree that the Professional Institute is entitled to the personal information of its members in order to carry out its statutory obligations. The issue according to the Respondent's submissions is not whether a bargaining agent is entitled to the information but rather how to obtain the information.*
>
> *Although this may very well be a practical concern to the Respondent, it should not be accepted by the Board as a valid reason in denying our legal right to this information. The Respondents have known, since the enactment of the Public Service Labour Relations Act in 2005, that all federal Public Service bargaining agents would be making requests to obtain the personal information as* [*sic*] *its members, yet no process was put in place to do so?*
>
> *It is respectfully submitted that the Respondent has the resources and necessary manpower to update the personal information databank of its employees. The case law cited in both the Professional Institute and the Respondent's submissions is abundantly clear that we are entitled to the personal information of our members and no employer can be permitted to hide behind process concerns.*
>
> *The Respondent has raised concerns that if the Board orders the disclosure of information, that the order should provide that the Professional Institute use this information solely for the legitimate purpose of the bargaining agent in accordance with the PSLRA. . . . The Professional Institute will and always has utilized information from the Respondent in conformity with its rights and obligations under the PSLRA and will continue to do this.*

> *In terms of our submissions concerning charter violation, we respectfully submit that the Supreme Court of Canada ruling in Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia, 2007, SCC 27 stands for authority that the right to bargain is protected by the Charter. We respectfully submit that by not providing us with the personal information of our members, the Respondent is violating the Charter protection of freedom of association and freedom of expression.*
>
> . . .
>
> [*Sic* throughout]

D. <u>Respondents' rebuttal</u>

[14] Counsel for the respondents also submitted written rebuttal arguments on December 13, 2007:

> . . .
>
> *In the complainant's submission certain issues were not addressed concerning their complaint. The complainant's submission was based solely on the following section of the* Public Service Labour Relations Act *(*PSLRA*): s.190(1)(g) Unfair labour practice within the meaning of section 185.*
>
> *Therefore, the respondents submit that all other allegations and remedies initially outlined in the complaint that were not addressed in their submission are without foundation. In particular, this would include the:*
>
> - *The* PSLRA*: s. 190(1)(b) Failure to comply with section 106 (duty to bargain in good faith)*
> - *The* Canadian Charter of Rights and Freedoms*: s. 2(d) freedom of association and s. 2(b) freedom of expression*
> - *The complainant's requested remedy in regards to reimbursement of expenses*
> - *The complainant's alternative remedy concerning a "consent to prosecute" pursuant to subsection 202(3) of the* PSLRA*. I would also point out in this regard that section 202(3) is not applicable in this instance as it relates to the prosecution of an employee organization.*
>
> *. . . The respondents do agree that the jurisprudence supports the disclosure of personal information for the legitimate purposes of the complainant but qualifies this by stating that these decisions concern information within the*

> *possession of the respective employer. . . . there is a willingness by the respondents to provide the requested information that they currently have in their possession. . . .*
>
> *The respondents submit that the complainant has not demonstrated in its submission that the* PSLRA *has been violated. The respondents maintain that it has* [*sic*] *not violated s. 190 of the* PSLRA *as alleged in the complaint or at all and the respondents respectfully request that the complaints be dismissed.*
>
> . . .

III. Reasons

[15] The complaints before the Board were filed under paragraphs 190(1)(*b*) and (*g*) of the *Act*. By citing those provisions, the complainant has characterized the failure by both respondents to provide requested employee contact information as a violation of the duty to bargain in good faith and an unfair labour practice. The complainant has also alleged that the failure represented a violation of the fundamental rights of freedom of association and freedom of expression guaranteed under sections 2 (*d*) and (*b*) respectively of the *Charter*.

[16] The reasons for decision that follow turn first to the alleged contraventions of the *Act*. Findings on that element of the complaint will determine whether it is necessary to proceed to consider the *Charter* issues raised by the complainant.

A. Alleged violations of the *Act*

[17] Paragraphs 190(1)(*b*) and (*g*) of the *Act* read as follows:

> ***190.*** *(1) The Board must examine and inquire into any complaint made to it that*
>
> . . .
>
> (b) *the employer or a bargaining agent has failed to comply with section 106 (duty to bargain in good faith);*
>
> . . .
>
> (g) *the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*

[18] Has the complainant met its onus to establish on a balance of probabilities the grounds for a complaint under either paragraph 190(1)(*b*) or (*g*) of the Act, or both?

1. Duty to bargain in good faith

[19] The subject matter of a complaint submitted under paragraph 109(1)(*b*) of the *Act* is an alleged breach of section 106, the statutory provision that imposes on the parties a duty to bargain in good faith:

> ***106.*** *After the notice to bargain collectively is given, the bargaining agent and the employer must, without delay, and in any case within 20 days after the notice is given unless the parties otherwise agree,*
>
> *(*a*) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith; and*
>
> *(*b*) make every reasonable effort to enter into a collective agreement*

[20] The complainant submits that the employer is legally obliged to provide to the bargaining agent certain information about employees in the bargaining unit necessary for performing the range of representation roles required of it under the *Act*, including collective bargaining. Absent from the complainant's submission, however, is a clearly articulated argument that there is a specific legal obligation to that effect under the duty to bargain in good faith under section 106. The complainant alleged a breach of section 106 in its original complaints but did not elaborate in its subsequent submissions how the employer's refusal to supply employee contact information constituted a violation of the duty to bargain in good faith in the specific circumstances of the complaints. In that light, the employer has argued that the complainant's failure to advance such an argument leaves the complaints unfounded as far as paragraph 190(1)(*b*) is concerned.

[21] There is no contest that the complainant's request for information and the response (or non-response) by the employers to that request occurred in the context of preparations for collective bargaining. That said, did the fact that the complainant made its requests for information in conjunction with collective bargaining necessarily impose on the employers a good-faith bargaining requirement under section 106 of the *Act* to supply the requested information? Did the employer's failure to provide the

requested information as of the time that the complaints were filed constitute on its own a breach of a duty owed to the bargaining agent under that section?

[22] It is troubling that the complainant chose not to perfect its arguments regarding the application of section 106 of the *Act* to the facts of the case. The complainant did refer in its submissions to the linkage between access to employee contact information and the ability to communicate with employees during collective bargaining but did so invoking section 187, not section 106:

. . .

> *In order for a bargaining agent to meet its legal obligation under S. 187 of the PSLRA, the Complainant needs to be able to communicate easily with employees in its bargaining units with respect to bargaining and related matters and with respect to representational matters. This legal obligation requires that the bargaining agent be able at all times to communicate with its members . . . .*

. . .

[23] In the original complaint, the complainant referred specifically to the bargaining agent's responsibility to communicate with employees in ". . . the development of a proposal package . . ." to keep employees ". . . informed regarding the progress of bargaining . . ." and to advise employees ". . . of dates and times for strike or ratification votes . . . ." In its subsequent submissions, however, the complainant did not follow through to argue that the employers' refusal to provide the information it requested did affect, or would affect, its capacity to communicate with employees for those purposes or otherwise interfered with its ability to negotiate at the bargaining table. The complainant, in short, did not establish a sufficient basis in its submissions to allow the Board to determine that the employers' actions impaired, or would have impaired, the bargaining agent's ability to carry out its responsibilities in collective bargaining to the extent of constituting a violation of the duty to bargain in good faith owed by the respondents to the complainant.

[24] While there may be a sound argument that the duty to bargain in good faith under section 106 of the *Act* includes an obligation on an employer to supply certain types of information about employees in the bargaining unit for purposes of collective bargaining, I am not prepared to rule to that effect in the absence of more specific submissions from the complainant on the point. The principle at issue is obviously

very important and potentially has broad application. The onus was on the complainant to prove the basis for its complaint under paragraph 190(1)(*b*). In my view, it has not discharged that burden.

[25] For that reason, I concur with the employer's submission that the complaints are unfounded under paragraph 190(1)(*b*) of the *Act*.

2. <u>Unfair labour practice</u>

[26] The subject matter of a complaint submitted under paragraph 190(1)(*g*) of the *Act* is an unfair labour practice within the meaning of section 185:

> ***185.*** *In this Division, "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*

[27] The only cross-referenced provision of the *Act* that the complainant explicitly mentioned in its written submissions was section 187 which reads as follows:

> ***187.*** *No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.*

[28] As outlined in paragraph 19 above, the complainant has argued that the *Act* imposes broad representation responsibilities on the bargaining agent on behalf of all employees in the bargaining unit. The bargaining agent cannot accomplish those legal responsibilities when the employers deny it access to necessary employee information in their possession. The complainant specifically identified section 187 of the *Act* as the source of those legal obligations. To that extent, the complainant's submissions appear to paint the failure of the employers to provide employee contact information as an unfair labour practice within the meaning of section 185, viewed with section 187 in mind. The complainant does not clearly say so in its submissions, but the fact that it filed its complaints under paragraph 190(1)(*g*) of the *Act* and then drew the Board's attention primarily to section 187 in its arguments supports the inference.

[29] The way the complainant has invoked section 187 of the *Act* in its submissions is unusual, if not unprecedented. To the best of my knowledge, past Board decisions interpreting section 187 (and those interpreting a similar provision under the previous

legislation) have uniformly involved allegations made against a bargaining agent, not by a bargaining agent against an employer. The typical case under section 187 arises when an employee has alleged that representational decisions or actions taken by a bargaining agent were arbitrary or discriminatory or exhibited bad faith. To be sure, the section has been referred to as the "duty of fair representation" provision of the *Act* — a duty owed by bargaining agents to employees.

[30] The logic that the complainant has apparently asked the Board to accept is that the existence of a positive duty owed by a bargaining agent to employees under section 187 of the *Act* also creates a legal duty on an employer's part to furnish necessary employee contact information. I find that logic novel and not without appeal but at the same time dissonant with the purpose of the provision. Using a section of the *Act* designed to permit third-party review of a bargaining agent's representation activities to establish a legal onus binding the employer to certain obligations seems to me to stretch the lawmakers' intent rather too far.

[31] I believe that section 187 of the *Act* provides context for the concerns expressed in the complaints rather than their real foundation. The same could also be said about other provisions of the *Act* cited by the complainant in its original filing though not subsequently argued in its written submissions: section 184 (conduct of a strike vote), section 183 (conduct of a final-offer vote) and sections 119 to 134 (essential services). Those provisions arguably help the complainant establish why it has a legitimate need for employee contact information from the employer. The complainant must nevertheless demonstrate the grounds for its complaints under one or more of the legislative provisions specifically cross-referenced by section 185. If the real foundation for its unfair labour practice argument is not in section 187, what is the operative provision?

3. <u>Interference</u>

[32] Returning to the original filing, the complainant asked the Board to issue a declaration that the employers' refusal to provide contact information to the bargaining agent ". . . interfered with the administration of an employee organization and the representation of employees by an employee organization and discriminated against an employee organization, thereby violating s. 186 of the *PSLRA."* The relevant provisions within section 186 read as follows:

. . .

> ***186.*** *(1) Neither the employer nor a person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall*
>
> *(*a*) participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization; or*
>
> *(*b*) discriminate against an employee organization.*

. . .

[33] Curiously, the complainant's subsequent written submissions do not refer further to section 186 of the *Act*. As with the allegation of bad faith bargaining under paragraph 190(1)(*b*), the complainant does not follow through specifically on its charge that the employers interfered with the complainant's work or discriminated against it within the meaning of subsection 186(1). The absence of a perfected argument on the application of the statutory provision is, once more, very troubling.

[34] Although the complainant's failure to follow through explicitly with its original allegation offers the same justification for dismissing the complaints under paragraph 190(1)(*g*) of the *Act* as applied earlier with respect to paragraph 190(1)(*b*), several considerations have led me in a different direction. First, I believe that I am entitled to find that the complainant has implicitly placed an argument before the Board under subsection 186(1) by virtue of the preponderance of the case law that it cited, even though it did not explicitly mention subsection 186(1) in its written pleadings or phrase the arguments using its precise terms. More particularly, by urging the application of case law that has specifically examined the extent to which an employer's refusal to provide employee information to a bargaining agent comprises interference in the representation of employees by a union, the complainant has laid grounds for a case under paragraph 186(1)(*a*) — though not under paragraph 186(1)(*b*).

[35] Second, while the respondents in their rebuttal took the position that the complaints were unfounded under paragraph 190(1)(*b*) of the *Act* due to the absence of submissions, they did not advance the same argument to challenge the foundation for the complaints under paragraph 190(1)(*g*). Instead, they accepted — tacitly or otherwise — that the complainant's submissions did argue an unfair labour practice and that the merits of that argument are before the Board.

[36] Third, and most crucially, the respondents' own position on a bargaining agent's right to information has convinced me that no good interest would be served by dismissing the complaints for want of a more explicitly articulated argument by the complainant under subsection 186(1) of the *Act*.

[37] The respondents do not accept that their failure to supply employee information substantiates the complaints under either paragraph 190(1)*(b)* or (*g*) of the *Act*. They have left little doubt, however, in both of their submissions to the Board, that they understand and accept that the complainant should receive employee contact information:

> . . .
>
> *. . . The respondents understand the bargaining agent's statutory obligations and do not dispute the principles outlined in the jurisprudence with respect to disclosure of personal information to unions for their legitimate purposes as a bargaining agent . . . .*
>
> . . .
>
> *. . . . The . . . jurisprudence demonstrates the importance of the bargaining agent being on equal footing with the employer by providing the bargaining agent with the information that is* [*sic*] *has in its possession . . . .*
>
> . . .
>
> *. . . . Generally there is a willingness by the respondents to provide the requested information that they currently have in their possession, in accordance with the jurisprudence on this issue . . . .*
>
> *The respondents agree to abide by the principle of placing the bargaining agent on equal footing with the employer.*
>
> . . .
>
> *. . . The respondents do agree that the jurisprudence supports the disclosure of personal information for the legitimate purposes of the complainant . . . there is a willingness by the respondents to provide the requested information that they currently have in their possession. . . .*
>
> . . .

[38] The primary issue for the employer is not the principle that the complainant seeks to establish through its complaints (i.e., that the employer is obliged to provide

certain information about employees to their bargaining agent) but rather the nature of some of the information requested and the modalities of providing information to the bargaining agent. The respondents raise concerns arising from the *Privacy Act,* R.S.C. 1985, c. P-21, about issues relating to the practical capacity of the employers to furnish all the information requested in an accurate and timely manner and about questions relating to the bargaining agent's stewardship of the information to be provided.

[39] All of the above suggests to me that the dispute underlying the complaints is much less about the existence of a legal principle under the *Act* than about the implementation of that principle. The Board has been asked nonetheless to rule that the principle does exist under the *Act.* In a certain sense, this is the very unusual situation where a principle, largely agreed to by the parties, finds itself in search of an appropriate legal foundation in the *Act*. The employer effectively accepts the basic precept argued by the bargaining agent, with qualifications, but cannot agree that it has violated the *Act* in the sense alleged, given the form of the complaints. The complainant, for its part, asserts that there are compelling grounds throughout the *Act* to justify its objective but seeks that objective through specific complaints whose form necessarily shapes and perhaps constrains the Board's analysis of the situation. The Board, for its part, must be appropriately cautious and determine that a legal principle applies only if it can found that principle in a section of the *Act* opened to analysis by the nature of the specific complaints before it.

[40] The way forward, in my view, is to return to paragraph 186(1)(*a*) of the *Act*. Through an examination of the merits of the complaints under that provision, the Board can assess whether paragraph 186(1)(*a*) provides a foundation for the basic principle that the parties apparently accept. If it does, then the Board may be in a position, through its determination with respect to the complaints, to endorse the principle that the *Act* imposes an obligation on the employer to disclose employee information to the bargaining agent. The analysis would then turn to the remedy issues and concerns raised in the parties' submissions. If the Board is unable to find that there is a founded complaint under paragraph 186(1)(*a*), it must move on to the *Charter* issues raised by the complainant.

[41] Paragraph 186(1)(*a*) of the *Act* prohibits the employer from " . . . participat[ing] in or interfer[ing] with the formation or administration of an employee organization or

the representation of employees by an employee organization . . . .” The situation addressed by the complaints does not pertain to employer involvement or interference in the “formation of an employee organization” and probably relates to involvement or interference in the “administration” of an employee organization only in the most general of senses. What is more directly at issue instead is the impact of the employers’ actions or inaction on the “representation” of employees by the complainant. In the context of the complaints before the Board, therefore, did the employer’s failure to provide necessary employee contact information interfere with the complainant’s representation of employees and thus comprise a breach of paragraph 186(1)(*a*)?

[42] The case law discussed in the submissions, in my view, supports a finding in the affirmative.

[43] In *Public Service Alliance of Canada and Treasury Board, Harder and Public Service Commission, Hubbard*, brought to the attention of the parties by Board staff, the bargaining agent filed a complaint under section 23 of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (“the former Act”) , alleging that a representative of the employer violated the prohibitions contained in, among others, subsection 8(1):

> ***8.*** *(1) No person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall participate in or interfere with the formation or administration of an employee organization or the representation of employees by such an organization.*

[44] Subsection 8(1) of the former *Act* is broadly analogous to paragraph 186(1)(*a*) of the *Act*.

[45] The complainant bargaining agent in that case had sought the names and addresses of all persons who were likely to face layoff under a downsizing program initiated at that time by the federal government. The complainant argued that the employer had an obligation to provide the requested information and that when the employer failed to do so, it ran afoul of the prohibition expressed in subsection 8(1) of the former *Act*. The respondent replied that “. . . nothing under section 8 or any other section of the *PSSRA* . . . imposes upon the respondents an obligation to provide the names and addresses of affected employees.” As in the current complaints, the respondent then proceeded to identify issues arising under the *Privacy Act* that in its

view prevented an employer from furnishing the requested information to the bargaining agent without qualification.

[46] The primary focus of the reasons for decision in *Public Service Alliance of Canada and Treasury Board, Harder and Public Service Commission, Hubbard,* was the privacy issues raised by the respondent. The Public Service Staff Relations Board ("the former Board") found that those privacy issues ". . . cannot impede the proper flow of information which the complainant requires for the proper execution of its responsibilities under the *PSSRA* . . . ." As to the existence of an underlying obligation to provide information, the former Board found simply and conclusively in the affirmative at page 7:

. . .

> *The Board concludes that, in failing to provide the requested information to the complainant,* [the employer's representative] *is interfering in the representation of employees by the complainant contrary to subsection 8(1) of the* PSSRA.

. . .

[47] In *Millcroft Inn Ltd.*, [2000] O.L.R.D. No. 2581 (QL), cited by the complainant, the Ontario Labour Relations Board (O.L.R.B.) determined a very similar issue in the following context:

. . .

> ***2*** *The issue in the unfair labour practice complaint is whether, by refusing to provide the applicant ('the union') with the names, addresses and telephone numbers of the employees in the bargaining unit represented by the union, the responding employer ('the employer'/'the company') has violated section 70, which reads:*
>
> > *70. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not*

> *use coercion, intimidation, threats, promises or undue influence.*
>
> . . .

[48] The O.L.R.B. summarized the positions argued by the parties as follows:

> . . .
>
> ***8*** *The union contends that it needs the names, addresses and telephone numbers of the employees if it is to fulfil its statutory duties under the Act to represent the employees fairly and properly. It suggests that the employer's refusal to provide that information has the effect of interfering with the union's capacity to represent the employees. That, it argues, is a violation of section 70 of the Act.*
>
> ***9*** *The employer takes the view that it is not interfering with the union's representation of the employees. At worst, it suggests, it is simply not aiding the union in its representation of the employees. The employer's counsel argues that the union has avenues available to obtain the information it seeks by asking employees to tell the union themselves, either as a result of a bulletin board request or as a result of the stewards speaking to each of the employees.*
>
> ***10*** *The employer's counsel contends that the obligation to provide the information sought by the union may arise if the parties have negotiated a provision to that effect in their collective agreement, but, in the absence of such a provision, there can be no general obligation to provide the information, particularly in the circumstances of this case when, in counsel's submission, the union can reasonably obtain the information by communicating with their members through its bulletin board or the stewards.*
>
> . . .

[49] In its decision, the O.L.R.B. extensively reviewed the range of responsibilities that a union certified to represent employees must discharge under various sections of the governing provincial statute. The O.L.R.B. also examined the union responsibilities that have emerged more generally from the case law, particularly in the line of decisions originating with the Supreme Court of Canada's determination in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.

[50] Many elements in the O.L.R.B.'s findings are germane to the complaints currently under consideration, but I find the following excerpts most instructive:

. . .

24 *. . . The Board has said on several occasions that a refusal by an employer to provide the names, addresses and telephone numbers of employees during the negotiation of a collective agreement may constitute an unfair labour practice. But this case does not arise in that context. The union wishes to assert its entitlement to the information generally, not restricted to the context of collective bargaining. . . .*

. . .

26 *What is apparent from the examples of the union's obligations to the employees in its bargaining unit, even during those times when it is not involved in the negotiation of a collective agreement, is that the union has a duty to represent the employees fairly and in a manner which is not arbitrary or discriminatory. What is also apparent is that if the union is to fulfil that duty, it must be able to communicate directly with each employee it represents.*

. . .

31 *A consequence of the union possessing exclusive bargaining status on behalf of the employees is that the union is placed in an equal bargaining position with the employer in its collective bargaining relationship. To the extent that the employer has information which is of value to the union in its capacity to represent the employees (such as their names, addresses and telephone numbers), the union too should have that information. The employees' privacy rights are compromised (no doubt legitimately) by the employer having details of their names, addresses and telephone numbers. The union's acquisition of that information would be no greater compromise, nor any less legitimate.*

. . .

33 *The establishment of a collective bargaining relationship between a union and an employer entails a change in the employment relationship between the employer and its workers. The change is from an individual to an* [*sic*] *collective basis of the relationship - the union becomes the agent for the employees and, as such, it is entitled to speak on their behalf as if they were together negotiating as a group. The individual employees may not make their own individual bargains or deals with the employer. To that end, the union is entitled to take full instructions from them and to represent them. For the union to do so, it must be able to communicate effortlessly with the*

> *employees. . . . The union needs the information and it should have it without the need to pass through the obstacles suggested by the employer.*
>
> . . .
>
> ***35*** *Taking all of the above into account, I find that the union's capacity to represent the employees for whom it has bargaining rights is impeded or detrimentally affected by the employer's refusal to provide the names, addresses and telephone numbers of those employees. The employer's refusal to give the union the names, addresses and telephone numbers of the employees amounts to interference in the union's capacity to represent them.*
>
> . . .

[51] The O.L.R.B. extended its findings in *Millcroft Inn Ltd* one year later in *Ottawa-Carleton District School Board*, 2001 CanLII 11073 (O.L.R.B.), also cited by the complainant. In the latter decision, the O.L.R.B. found further justification for compelling an employer to supply employee contact information to the union in the latter's statutory obligation, for example, to conduct strike and ratification votes:

> . . .
>
> *13 Under the Act, for the reasons articulated in* The Millcroft Inn Limited*, an employer is obliged to provide the information the union seeks in this case. The failure to do so interferes with the union's capacity to represent its members effectively and it constitutes an unfair labour practice. A number of union obligations were described in* The Millcroft Inn Limited*. There are certain others, which were not mentioned there. For example, under the Act strike votes and ratification votes are mandatory. One wonders how a union can properly conduct such votes, preparing an accurate list of voters and telling them of the vote arrangements if it cannot communicate with the employees outside the workplace. It should not have to go to the employer in order to be able to fulfil these statutory obligations to employees. Section 79(9) of the Act specifically contemplates a union conducting such votes by mail. A union can undertake this obligation only if it has the information the union seeks in this case. . . .*
>
> . . .

[52] The Canada Industrial Relations Board (C.I.R.B.) has followed suit. In *General Teamsters, Local Union No. 362 v. Monarch Transport Inc. and Dempsey Freight*

Systems Ltd., [2003] C.I.R.B. No. 249, the complainant union alleged that the respondent employer's failure to provide requested employee information was an unfair labour practice within the meaning of subsection 97(1) contained in Part I of the *Canada Labour Code*. The C.I.R.B. surveyed the emerging case law, including a further precedent from the O.L.R.B.:

. . .

> *[20] The Ontario Board recently issued a third decision, in* The Alcohol and Gaming Commission of Ontario, *[2002] OLRB Rep. January/February 1, where it reiterates the precepts in* Co-Fo Concrete Forming Construction Limited, supra, *and in* The Millcroft Inn Limited, supra. *The Board concluded that the employer had advanced no legitimate business purpose for withholding the information sought by the union and thus had violated the Act. . . .*
>
> > *9. The union must be able to communicate quickly and easily with the employees is represents. In order to do so effectively it requires their names and addresses. This kind of information is particularly necessary when the union represents members of a bargaining unit who are dispersed across the province. It is not sufficient for the union to have access to work telephone numbers and notice boards. The union may need to communicate more thoroughly or privately than is possible at the workplace. The union is the representative of the employees and has significant obligations towards them which may only be met if it can communicate. (see* Millcroft Inn supra *paragraphs 20 to 29). By refusing to provide the requested information, the Commission has interfered with the union's representation of employees in the bargaining unit.*

. . .

[53] Turning to the circumstances of the case before it, the C.I.RB. ruled as follows:

. . .

> *[24] . . . the union's capacity to represent all of its members fairly in employment matters and the whole process of collective bargaining would be frustrated if such information were denied. . . .*
>
> *[25] This Board agrees with the Ontario Board's findings in* The Millcroft Inn Limited, supra, *that the union's basic rights to establish and maintain a collective bargaining relationship*

> *are a product of legislation and are independent of employer consent . . . . They exist as a means of ensuring that the union is able to meet its statutory obligations of representing employees. These rights are distinct from substantive rights secured through the bargaining relationship and to which the union is entitled only by way of the employer's agreement . . . . While the parties may be encouraged to agree on a disclosure clause in the collective agreement, its absence is not a bar to obtaining such information through a simple request.*
>
> *[26] During the collective bargaining process, the union has the need to communicate with employees in order to formulate a bargaining position, to confer with them during the course of bargaining, to participate in a ratification or strike vote, as well as to obtain their endorsement of positions taken during bargaining. To be able to communicate expeditiously and effectively with employees, the union needs up-to-date information about the employees it represents.*
>
> *[27] Outside of the bargaining process, the union requires such information, for example, to explore with employees the merits of pursuing a grievance, to conduct an investigation, or to contact and interview witnesses, to inquire into employee concerns, all of which are part of the union's duty of fair representation. To adequately fulfil that duty, the union must have the means of communicating directly with each employee it represents.*
>
> *[28] It is the Board's finding that the employer's refusal to provide the names, addresses and home telephone numbers of employees in the bargaining unit constitutes interference in the union's capacity to represent them. . . .*

[54] In *P. Sun's Enterprises (Vancouver) Ltd. (Hotel Grand Pacific) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (C.A.W.-Canada), Local 114*, [2003] B.C.L.R.B.D. No. B301 (QL), the British Columbia Labour Relations Board (B.C.L.R.B.) endorsed the line of Ontario decisions on union access to employer-held information about employees in the bargaining unit:

. . .

> ***23*** *I agree with the reasoning of the Ontario Board in* Millcroft *and conclude that (i) to fulfill its statutory obligations a union has to be able to communicate with the employees it represents and (ii) if an employer does not have a sound business purpose for refusing to provide a union with the information needed to communicate with those employees, the employer interferes with the union's representation of those employees.*

. . .

[55] In that case, the B.C.L.R.B. considered whether the employer breached the provincial labour code when it did not accede to the union's request for ". . . a list of the names, home addresses and home telephone numbers of employees in the bargaining unit. . . . " Finding in the complainant's favour, the Vice-Chairperson of the B.C.L.R.B. wrote:

. . .

> ***32*** *I find (i) that Section 6(1) of the Code prohibits employers from interfering with the representation of employees by trade unions and (ii) that if an employer, without a sound business reason, refuses to provide a trade union with information the union needs to fulfill its statutory obligations to the employees it represents, the employer interferes with the representation of those employees. . . .*

. . .

[56] Some of the foregoing decisions include references to other precedents that canvass the nexus between the representation obligations of bargaining agents, their legitimate business interests in securing information from employers about employees covered by the collective agreement or about their terms of employment, the employers' obligations under statute and the privacy concerns that employers frequently articulate. Issues of the latter type were the principal subject of *Griffiths*, also referred to the parties by Board staff.

[57] I find no principled reason in the case law summarized above that would suggest why the Board, in the current complaints, should depart from the direction taken by labour tribunals in other major jurisdictions or, indeed, from the findings of the former Board in *Public Service Alliance of Canada and Treasury Board, Harder and Public Service Commission, Hubbard*. Paragraph 186(1)(*a*) of the *Act* prohibits the employer from interfering in the representation of employees by a bargaining agent. The accumulated case law finds that, as a general proposition, an employers' failure to provide employee contact information to a bargaining agent does constitute the type of interference in a bargaining agent's representation of employees that this type of statutory provision is intended to prevent. That interference comprises an unfair labour practice.

[58] Proof that a bargaining agent has submitted a request for information, that the requested information can be tied to legitimate representational purposes under the statute and that the employer has refused the request is normally sufficient to found a complaint. There is no clearly accepted requirement to prove the actual impact of the employer's refusal on the bargaining agent's capacity to represent employees or, for example, to establish that the employer's refusal is animated by an anti-union animus. Privacy concerns may play a role in shaping the determination to be made but even on that dimension most decisions have found that the bargaining agent's right to information will overcome normal privacy considerations.

[59] In these complaints, the fact that the bargaining agent requested information and that the employers failed to provide that information are undisputed. In my view, the main outstanding issue of "proof" is whether the information requested by the bargaining agent in its complaints ("the names, position titles, telephone numbers and home and email addresses for all employees in the bargaining unit") can be tied to legitimate representational purposes under the statute.

[60] On that point, the complainant alluded to its obligations under the *Act* to represent employees in collective bargaining, to file and adjudicate grievances and to prosecute complaints as the principal purposes for which it required employee information. The original complaints also cited responsibilities arising from section 184 (conduct of a strike vote), section 183 (conduct of a final-offer vote) and sections 119 to 134 (essential services). The bargaining agent's responsibilities, in the complainant's submission, require communication "at all times" with employees, including "RAND members" (i.e., employees in the bargaining unit who choose not to acquire formal membership with the bargaining agent as an employee organization). Information allowing it to contact employees is essential to communication efforts. That necessary information is in the employers' hands.

[61] Exactly what employee information is required, and when, for each of the representational purposes cited by the complainant may be subject to argument. For purposes of my interim ruling at this stage, however, I need not examine each purpose in detail nor be precise about the exact type of contact information required for a given activity. The latter element becomes, in my view, an appropriate part of a discussion about redress.

[62] I believe that the main issue of proof is brought into its most acute focus by the bargaining agent's obligations arising under section 184 of the *Act*, as referenced by the complainant in its original filings. Section 184 reads as follows:

> ***184.*** *(1) In order to obtain approval to declare or authorize a strike, an employee organization must hold a vote by secret ballot among all of the employees in the bargaining unit conducted in a manner that ensures that the employees are given a reasonable opportunity to participate in the vote and be informed of the results.*
>
> *(2) An employee who is a member of a bargaining unit for which a vote referred to in subsection (1) was held and who alleges that there were irregularities in the conduct of the vote may, no later than 10 days after the day the results of the vote are announced, make an application to the Board to have the vote declared invalid.*
>
> *(3) The Board may summarily dismiss the application if it is satisfied that, even if the alleged irregularities did occur, the outcome of the vote would not have been different.*
>
> *(4) If the Board declares the vote invalid, it may order that a new vote be held in accordance with the conditions it specifies in the order.*

[63] Section 184 of the *Act* is clear in its requirement that the bargaining agent must ensure that all employees in the bargaining unit, not just those who have subscribed as members of the bargaining agent, ". . . are given a reasonable opportunity to participate in the [strike] vote and be informed of the results." The language of the statute is mandatory. The bargaining agent can only comply with what the *Act* requires it to do if it has the ability to identify and communicate with all employees in the bargaining unit. It is public knowledge, long understood in the jurisdiction, that the information traditionally available to bargaining agents is most often insufficient for that purpose. Bargaining agents are generally able to develop on their own the necessary contact information for those employees who have become members and who have volunteered personal contact details, but the information about "RAND members," sometimes a significant percentage of the bargaining unit population, normally lies outside the direct ability of the bargaining agent to gather — hence, in this case, the complainant's request to the employers.

[64] *Ottawa-Carleton District School Board* recognized the dilemma: ". . . under the Act strike votes . . . are mandatory. One wonders how a union can properly conduct

such votes, preparing an accurate list of voters and telling them of the vote arrangements if it cannot communicate with the employees outside the workplace." That decision found not only that the employer must supply the employee contact information sought by the complainant but also that it was appropriate as part of that obligation that the employer provide home addresses and telephone numbers for employees to the union, the one specific type of information that the employer argued that it could not furnish given privacy issues. That conclusion was reached in the context of the union's requirement to conduct a strike vote (or a ratification vote) apparently because of concerns for the integrity of the mandatory vote were it conducted in the employer's workplaces using workplace contact addresses or telephone numbers.

[65] Leaving aside for the moment the issue of whether home contact information is essential, I am convinced that the thrust of the decision in *Ottawa-Carleton District School Board* must apply to these complaints. Given the obligation placed on a bargaining agent by section 184 of the *Act* to give all employees in the bargaining unit ". . . a reasonable opportunity to participate in [a strike] vote and be informed of the results," a failure by the employers to supply the complainant with the employee contact information necessary for that purpose would constitute interference in the representation of employees by the complainant within the meaning of paragraph 186(1)(*a*) and thus an unfair labour practice for purposes of section 185 and paragraph 190(1)(*g*).

[66] A review of the Board's records indicates that the complainant has specified the conciliation route as the dispute resolution procedure to be used in the event of a dispute in collective bargaining for two of the six bargaining units for which the current complaints are filed: the Computer Systems (CS) bargaining unit with Treasury Board as the employer and the Audit, Financial and Scientific (AFS) Group with the Canada Revenue Agency as the employer. In its relationship with both respondents, therefore, the possibility of a strike vote under section 184 of the *Act* is real for the complainant and not just a hypothetical proposition.

[67] To that extent at minimum, I find in principle that the respondents' failure to provide the complainant with at least some of the employee contact information that it requested does comprise interference in the representation of employees by the

complainant within the meaning of paragraph 186(1)(*a*) of the *Act* viewed against the obligation established by section 184.

[68] I believe that the same finding applies with respect to section 183 of the *Act* that provides for the possibility of a directed vote on an employer's final offer:

> ***183.*** *(1) If the Minister is of the opinion that it is in the public interest that the employees in a bargaining unit be given the opportunity to accept or reject the offer of the employer last received by the bargaining agent in respect of all matters remaining in dispute between the parties, the Minister may*
>
> *(*a*) on any terms and conditions that the Minister considers appropriate, direct that a vote to accept or reject the offer be held by secret ballot as soon as possible among all of the employees in the bargaining unit; and*
>
> *(*b*) designate the Board, or any other person or body, to be in charge of conducting that vote.*
>
> . . .

[69] As in the case of a strike vote under section 184 of the *Act*, the constituency for purposes of a final-offer vote under section 183 is comprised of "all of the employees in the bargaining unit," not just those employees who are members of the bargaining agent certified to represent the bargaining unit. For the conduct of a final-offer vote to be fair and legitimate, it is imperative that the bargaining agent be able to communicate with all eligible voters to present its perspective on the subject matter of the vote as well as any other relevant information. If the bargaining agent cannot access all voters, the employer, quite able for its part to communicate with all employees in their places of work, would enjoy an advantage entirely inconsistent with the underlying objective of the *Act* to support effective labour-management relations and ensure the fair operation of the collective bargaining process. To access final offer voters, should the appropriate minister of the Crown exercise his or her discretion under subsection 183(1), the bargaining agent requires contact details for all employees in the bargaining unit. Further, in anticipation of the possibility of such a vote, the bargaining agent should be able to communicate to employees in the unit information about developments <u>during</u> collective bargaining so that all eligible voters in a potential final-offer vote enjoy a common accumulated information base. It matters not whether a final-offer vote actually occurs — and no such vote has yet been

conducted under the authority of the *Act* — but that it could occur and that its occurrence lies entirely outside of the control of the bargaining agent.

[70] Once more, therefore, I find in principle that the respondents' failure to provide the complainant with at least some of the employee contact information that it requested does comprise interference in the representation of employees by the complainant within the meaning of paragraph 186(1)(*a*) of the *Act* viewed against the obligation established by section 183.

[71] It is probable that the same finding would result from a further analysis of the complainant's responsibilities under one or more provisions of the *Act* beyond sections 183 and 184, most particularly those sections related to phases in the collective bargaining process prior to the conduct of a final-offer vote or strike vote. The case law reviewed above certainly points strongly in that direction. For purposes of this interim determination of these complaints, however, I do not believe that I need to proceed to that further analysis. Having established a valid representational obligation under the *Act* — in sections 183 and 184 — for which the failure of the employer to provide employee contact information comprises interference in the representation of employees, there are sufficient grounds, in my opinion, to grant the complaints in principle. I leave the possibility of a more expansive extension of the interim finding to future determinations of other complaints on the subject, should they eventuate.

3. ***Charter*** **violations**

[72] By finding in principle in favour of the complainant under paragraph 186(1)(*a*) of the *Act*, I find that the Board does not need to consider the complainant's further allegations that the employers have violated the fundamental rights of freedom of association and freedom of expression guaranteed under sections 2 (*d*) and (*b*), respectively, of the *Charter*.

[73] Had it been necessary to consider the *Charter*-based allegations made by the complainant, I feel compelled to observe that its written submissions do not offer any satisfactory basis for the analysis required when *Charter* issues come before a tribunal. The complainant's November 28, 2007, submissions are entirely devoid of any mention of the *Charter*. In its December 13, 2007, rebuttal the complainant states only the following:

. . .

> *In terms of our submissions concerning charter violation* [*sic*]*, we respectfully submit that the Supreme Court of Canada ruling in Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia, 2007, SCC 27 stands for authority that the right to bargain is protected by the Charter. We respectfully submit that by not providing us with the personal information of our members, the Respondent is violating the Charter protection of freedom of association and freedom of expression.*

. . .

[74] The complainant's statement is an allegation, not an analysis or argument. The employer's rebuttal submission that the absence of arguments from the complainant about the application of the cited sections of the *Charter* leaves the complaints unfounded in that regard was certainly appropriate.

4. Corrective action

[75] At the conclusion of their November 18, 2007, submissions the respondents stated the following:

> *. . . should the Board find in favour of the complainant, the respondents respectfully request that the Board hold a hearing or appoint a mediator in relation to any remedy the Board may be considering.*

[76] I have made a finding in principle that the respondents' failure to provide employee contact information to the complainant comprises interference in the representation of employees by the complainant, thereby establishing grounds to grant the complaints. I believe that it is appropriate to issue that finding in the form of an interim decision and prudent to accede to the employer's request that the Board convene a hearing to consider further submissions on the remedy issues and concerns raised by the parties in their respective submissions.

[77] Without necessarily limiting the scope of the remedy hearing, I am particularly concerned to receive in greater detail the views of the parties on the following elements and issues: In practical terms, exactly what employee contact information do the employers possess or could they possess among the types of information sought by the complainant? How is that information maintained to ensure its accuracy and timeliness? What precise types of information are necessary with respect to the

complainant's representational obligations, and which among those types of information should be provided by the respondents? When should the respondents supply information to the complainant? What are the recurring requirements, if any, to update that information? Are there approaches under which the employers can meet their obligation to provide information in a fashion that reasonably addresses possible concerns arising under the *Privacy Act*? What, more specifically, are those concerns? Should any conditions be placed on the complainant's use of the information by the complainant once the employers have provided it?

[78] I am confident that I do not currently have a sound basis to address such questions. So as to be able to move beyond the finding in principle in this interim decision to a final determination of the complaints, further arguments — and possibly evidence — are required.

[79] That said, it is my strong conviction that the details of the required corrective action in a case of this type are optimally determined by agreement of the parties rather than by decision of the Board. From the outset, the respondents offered to engage in discussions with the complainant to that end. The complainant refused the possibility of mediation for reasons that are unclear to me. I believe that it is vital that discussions now occur between the parties, with or without the assistance of a mediator.

[80] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

IV. Order

[81] The Board declares in principle that the respondents interfered in the representation of employees by the complainant within the meaning of paragraph 186(1)(*a*) of the *Act* by failing to provide necessary employee contact information to the complainant. Such interference constitutes an unfair labour practice.

[82] The Board directs the parties to begin consultations within 30 days of the date of this decision with a view to determining whether they can reach a voluntary agreement regarding the employee contact information that the respondents will provide to the complainant. The Board's mediation services are available to assist the parties.

[83] Should the consultations undertaken by the parties not result in a full agreement on the issues in dispute within 90 days of the date of this decision, the Board will determine the remaining issues based on submissions at an oral hearing. The Board directs the director, Registry Operations and Policy, to consult immediately with the parties for purposes of establishing contingency dates for such a hearing, should it be required.

February 21, 2008.

Dan Butler,
Board Member