Files: 161-2-808
150-2-44

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

DIANE KILBY ET AL.

Complainant and Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA AND DARYL BEAN

Respondents

RE: Complaint under section 23 alleging a violation of subsection 10(2); Application under subsection 43(2) alleging a violation of the prohibitions set out in subsection 40(3) of the Public Service Staff Relations Act

Before: P. Chodos, Vice-Chairperson

For the Complainant: Timothy Wilson, Student-at-law

For the Respondents: Derek Dagger, Counsel, Public Service Alliance of Canada

Heard at Ottawa, Ontario,
February 2 and 3, 1998.

The complaint under section 23 of the Act (Board file: 161-2-808) was filed on August 9, 1996. Immediately prior to the scheduled hearing of this matter, the complainants' representative advised that he also intended to seek an order decertifying the Public Service Alliance of Canada (PSAC) pursuant to subsection 43(2) of the Act. (It should be noted that the Board has directed that a file (no. 150-2-44) be opened in respect of the application under subsection 43(2)). From the outset the PSAC has taken the position that the Board was without jurisdiction to deal with the complaint (see for example a letter dated September 9, 1996 signed by Mr. Georges Nadeau, and subsequently a letter from Mr. Derek Dagger dated April 25, 1997). At the hearing, Mr. Dagger, representing the respondents, reiterated his objection to the Board's jurisdiction in respect of the complaint under section 23, and as well, in respect of the application under subsection 43(2) of the Act. Mr. Dagger contended that even if the allegations made by the complainants were accepted as being true, they disclose no basis for the Board accepting jurisdiction under these provisions.

The undersigned decided to hear evidence and argument in respect of the jurisdictional objections and to issue a decision addressing that issue, prior to, if necessary, hearing the case on the merits. In these jurisdictional proceedings the evidence consisted of the testimony of two of the complainants, Diane Kilby and Lynn Jones; the respondents chose not to call any evidence.

Diane Kilby had been employed by Human Resources and Development Canada (HRDC) and its predecessor, the Canada Employment and Immigration Commission since November 1972. She retired from the Public Service effective November 26, 1997. Prior to her retirement Ms. Kilby was in the PM bargaining unit and had been very active in the Public Service Alliance of Canada; she held several offices including National Vice-President, Canada Employment and Immigration Union (C.E.I.U.) in 1990; she was elected as alternate National Vice-President for women's issues for central Canada and, from 1993 was the National Vice-President for the headquarters region of C.E.I.U. until her retirement. Ms. Kilby has been responsible for representing the component on joint union-management consultation committee meetings at the regional and national levels. She was also Chairperson from 1993 to 1997 of the Human Rights/Race Relations Committee of C.E.I.U. which was charged with promoting equality rights within the union and in the workplace. In addition,

Ms. Kilby was the PSAC representative to the Canadian Labour Congress Committee on lesbian and gay issues.

Ms. Kilby testified that as a result of the series of complaints alleging harassment, discrimination and abuse of authority on the part of Mr. Cres Pascucci, the National President of the C.E.I.U., as well as other officers of this component of the PSAC, the Alliance Executive Committee established a three-person Independent/Impartial Review Committee which was mandated to do the following (Exhibit C-3):

- *Review all aspects of the November 1994 National Executive meeting, including the non-confidence motion and the reasons for its adoption.*

- *Review the five resolutions that contain allegations concerning violations of both the CEIU By-Laws and the PSAC Constitution.*

- *Review the events which transpired at the May 15, 1995 National Executive Meeting.*

- *Review any other matters which are brought to the attention of the Committee related to the inability of the CEIU National Executive to function in an effective and efficient manner.*

Following its review the Committee came to a number of conclusions, among them:

(page 4, Exhibit C-3)

- *Some women (and men) on the National Executive have indicated that they are physically as well as emotionally afraid of the President.*

- *A large majority of the National Executive say that the President fosters an environment where sexist and racist comments can be made. Examples were provided where racist and sexist remarks were not called to order during meetings and conference calls of NVPs.*

- *The President undermines the role of the NVPs for women's issues - i.e. by limiting their role, by supporting the removal of those positions and by voting against providing adequate resources to the NVPs for women.*

. . .

(page 6)

. . .

> 2. *Our findings indicate that the person mainly responsible for the dysfunctionality is the National President. We believe that he has misused his authority, that his process is undemocratic, that he has used the power of his position to gain support, that he has poisoned the relationships within the Component, and that, as a result, the Component cannot function. We believe that if he stays on the National Executive, his presence will cause further destabilization. We do not believe that he can bring about a positive working relationship among and with members of the National Executive for the following reasons . . .*

. . .

The Committee recommended, among other things, that *"the AEC (Alliance Executive Committee) asks its National Board of Directors to suspend the membership of the National President of C.E.I.U. for at least five years."*

Following receipt of the Review Committee's report, the Alliance Executive Committee submitted a resolution to the National Board of Directors proposing that "*Cres Pascucci's membership be suspended for a period of five (5) years for violations of the C.E.I.U. By-Laws and PSAC Constitution as well as harassment, intimidation, misuse of authority and abuse of power; ..."* (Exhibit C-5).

The National Board of Directors' authority to discipline an Alliance officer is founded in Section 25, Sub-Section (1) of the Public Service Alliance's Constitution; this provision reads as follows:

(Exhibit C-2)

> *The National Board of Directors shall have the authority, by resolution passed by a majority consisting of two-thirds (2/3) of those eligible to vote, to suspend or expel from membership any Alliance National Officer; any Component, Local, Area Council, or any of their officers or members, for contravening any provision of the Constitution of the Alliance or the By-Laws of any Component or the By-Laws of any Local or for causes as listed in Sub-Section (5)*

> *of this Section. An Officer or member suspended or expelled from membership shall be removed from an office held for a period not exceeding five years. Any person or persons suspended or expelled shall turn over to the Alliance all records, documents, funds or property that are held in trust for the Alliance, a Component, a Local or an Area Council.*

Apparently, the resolution was not passed by the Board of Directors. Accordingly, Mr. Pascucci continues to hold the office of National President of the Component. Ms. Kilby noted that the National Board of Directors is composed of eighteen (18) Component Presidents plus eight (8) Regional Vice-Presidents. Pursuant to the Alliance's constitution, the Triennial Convention is the supreme governing body; however, between conventions it is the National Board of Directors which effectively assumes that role; the Board of Directors delegates responsibility for the day-to-day operations of the PSAC to the National Executive Committee which, in 1995, consisted of the National President, Mr. Daryl Bean; the First Vice-President, Nycole Turmel; the Second Vice-President, Susan Giampietri; John Baglow as the Third Vice-President and Joane Hurens as the Regional Executive Vice-President for Quebec.

It was Ms. Kilby's contention that the process under which the proposed suspension of Mr. Pascucci was defeated is inherently discriminatory because the colleagues of the harasser, that is Mr. Pascucci, were sitting in judgment of him.

Ms. Kilby noted that subsequently the members of the Human Rights/Race Relations Committee submitted a harassment and discrimination complaint dated January 28, 1996, along with supporting documents, to Daryl Bean (Exhibit C-6). The complaint noted that the Race Relations Committee was responsible for organizing a human rights conference; it was alleged that during the course of their organizing efforts, Mr. Pascucci had sent a notice to 434 CEIC workplaces advising the membership to disregard information sent out by the Committee.

In response to the complaint Ms. Kilby received a letter under the signature of Mr. Bean dated February 19, 1996 which stated the following:

(Exhibit C-7)

> *I have reviewed the documentation submitted by the CEIU Human Rights/Race Relations Committee as well as other correspondence received from other CEIU members. In*

> *carrying out the review, I considered the definition of harassment as outlined in the PSAC Harassment Policy and Complaint Procedure adopted at the January 1993 NBoD Meeting. In addition, I requested another person (who will not be named) to review the complaint and provide me with an independent opinion simultaneously and without consultations with me.*
>
> *After thoroughly reviewing the complaint, we both independently reached the conclusion that there is no "prima facie" evidence of harassment. While we both agree that the matter should have been handled in a more professional manner, we cannot agree that harassment was involved.*
>
> *In my opinion, this is a continuation of an ongoing improper communications approach and a style of leadership which does not build unity amongst members. A professional approach designed to resolve the difficulties involved could have avoided these conflicts.*
>
> *Therefore, I must deny the harassment complaint, however, I sincerely hope that these difficulties will be handled in a professional and constructive way in the future.*

Ms. Kilby testified that in her view the failure of Mr. Bean to establish an independent investigation committee before denying the complaint was contrary to the PSAC Policy on Harassment, as well as Regulation 19, paragraph 9 of the Constitution, which provides for the establishment of a committee of three members of the National Board of Directors to investigate any charges.

Ms. Kilby maintained that there were other instances where complaints of harassment and discrimination were not properly addressed in accordance with the Constitution and Regulations of the Alliance. She referred to a complaint filed by a Ms. Zelda Lucas who had filed a harassment and discrimination complaint against a Mr. Alan MacKinnon who was at the time National Vice-President for the Nova Scotia region; this complaint was filed with Mr. Pascucci however he did not pursue this matter as required by Regulation 19. Ms. Kilby also referred to certain incidents involving a fellow complainant, Ms. Lynn Jones; these incidents were the subject of testimony from Ms. Jones and are described in greater detail below.

Ms. Kilby also referred to other incidents involving Mr. Pascucci as well as other members of the C.E.I.U. National Executive, which are set out in Exhibit C-4, Ms. Kilby's submission to the Independent Review Committee. In addition, Ms. Kilby

outlined how Mr. Pascucci had interfered with her work as Chair of the Human Rights Committee and in particular had hampered her ability to represent a grievor in respect of an issue concerning racism and discrimination in the workplace. In the course of representing this grievor, she was advised by the Department that she was no longer considered the union representative; when she replied that the question of representation is an internal union business, she was advised that Mr. Pascucci had told the Department that she was no longer on the committee in question. As a result, the Department stopped sending her correspondence; this resulted in delays in dealing with the grievance, which was ultimately upheld.

Ms. Kilby identified Exhibit C-8, a letter from Mr. Scott Serson dated May 28, 1995 which acceded to a request from Mr. Pascucci to provide for partially paid leave for Union officers, including the complainants. Ms. Kilby maintained that this demonstrates that there is employer involvement in the matters in dispute.

In cross-examination Ms. Kilby identified Exhibit R-1, a document entitled "PSAC POLICY 27" concerning human rights. Ms. Kilby acknowledged that these policies are created either by a vote of the membership at the Triennial Convention or by a vote of the National Board of Directors. She also identified Exhibit R-2 entitled "CANADA EMPLOYMENT AND IMMIGRATION UNION, GOALS, PRINCIPLES AND VALUES"; this document was adopted at a C.E.I.U. convention. Ms. Kilby agreed that these two documents speak of PSAC's commitment to human rights and to actively fighting discrimination. She observed that while the policies are important, the practices are equally important; she agreed that the policies are being respected in part. In re-examination Ms. Kilby stated that while the Public Service Alliance has taken positive steps with respect to minority issues, there is discrimination within the PSAC itself.

Ms. Lynn Jones also testified on behalf of the complainants. Ms. Jones lives in Halifax and has been employed with the Public Service since 1979. She is currently an Employment Equity Consultant, and is pursuing a project known as the Black and Aboriginal Development Initiative. Ms. Jones has been an active union member for a number of years and has held several positions both at the local, regional and national levels of the PSAC; she had been on the Regional Women's Committee; she has also

held positions on the Anti-racism Committee and at the national level was part of the National Equal Opportunites Committee.

Ms. Jones testified as to the make-up of the Equal Opportunities Committee; she noted that originally the Committee was composed of representatives from each of the 18 PSAC Components. However, the Committee did not choose representatives who were from minorities; that is, the Committee had originally been composed mainly of white, able bodied women, without representation from persons who are aboriginal, of colour, or with disabilities. The Board of Directors had refused to make changes to the composition of the Committee to reflect a greater diversity. Currently, the Alliance Executive Committee selects the representatives of eight unelected equity seats, reflecting minority groups.

Ms. Jones also indicated that she is a PSAC representative on the Canadian Labour Congress, as a General Vice-President. She noted that the CLC established a task force consisting of members of visible minority groups, including herself. The Task Force issued a report (Exhibit C-9) entitled "Challenging Racism: Going beyond Recommendations". Both the Public Service Alliance of Canada and the Halifax Regional Women's Committee of the PSAC submitted briefs to the Task Force: the latter brief spoke of problems of racism within the PSAC and steps which should be taken to alleviate discrimination. According to Ms. Jones, the briefs recognize that there is systemic discrimination within the Alliance.

Ms. Jones also noted that she had attended a C.E.I.U. Women's Conference in 1993 in Ottawa. There was only one other person of colour at the conference of approximately 100 people: she had raised the issue of having equity seats in the future and met with success in this demand. She then brought a similar resolution to the National PSAC Conference; she noted that currently there is a provision for equity seats for the PSAC Women's Conference.

Ms. Jones also referred to a teleconference meeting of C.E.I.U. in which Mr. George, the Regional Vice-President, stated: *"What am I, a nigger from the Atlantic"*. She stated that no one had raised an objection to this comment; when she called a point of privilege noting that the comment was blatantly racist, Mr. George was told only that he should not do it again; although Ms. Jones stated that this was not a

satisfactory response, the meeting continued. At the next C.E.I.U. National Executive Meeting on March 26, 1991, Ms. Jones spoke about this incident and proposed several resolutions addressing the question of racism (Exhibit C-10): none of the recommendations were adopted.

Ms. Jones also described certain events which occurred during a C.E.I.U. Atlantic Conference held in Halifax on May 25 and 26, 1995. Ms. Jones had proposed that a Mr. Carvery, one of the leaders of a protest concerning Africville, a community in the Halifax area, be invited to address the Conference. At the same meeting a no-confidence motion, directed at Mr. Pascucci, was also on the agenda. When Mr. Carvery was asked to speak, there was an objection from a Ms. Pat Phee, an African-Canadian woman, that the question of non-confidence should be dealt with instead. Ms. Jones, who was chairing that part of the program, overruled the objection. Subsequently, a Ms. Rachel Henry, who is also an African-Canadian woman and a member of the Anti-racism Committee of the C.E.I.U., wrote to Mr. Pascucci on June 7, 1995 (Exhibit C-12) accusing Ms. Jones of violating several provisions of the By-Laws of the C.E.I.U. In response to this complaint, Mr. Pascucci took steps to establish a committee to investigate her actions, without proper authority. Ms. Jones observed that Mr. Pascucci's actions were racially motivated; she noted that this incident was part of the allegations against Mr. Pascucci which were examined by the Review Committee (ref. Exhibit C-3).

Ms. Jones also noted that when Ms. Zelda Lucas had raised with Mr. Pascucci a complaint concerning Mr. Alan MacKinnon, a Vice-President of the C.E.I.U., Mr. MacKinnon was asked for his response concerning Ms. Lucas' allegations; upon receipt of his response, Mr. Pascucci decided that there was no need for an investigation committee. Ms. Jones contrasted this with her own experience, when an investigation committee was immediately set up by Mr. Pascucci.

Ms. Jones referred to the circumstances surrounding the selection of participants in the Race Relations Committee. Originally the members were chosen by Mr. Pascucci, until the Human Rights Conferences were held; at the first conference the participants voted unanimously to elect their own members to the Human Rights Committee; this was duly passed by the C.E.I.U. National Executive; however, when the C.E.I.U. convention was held, Mr. Pascucci decided that he would continue to select

who would be on the Human Rights Committee. This decision was challenged at the National Executive Committee, which rescinded the selection and provided for elections. Ms. Jones also observed that the work of the Human Rights Committee was hampered because of difficulties in having the National Executive address the minutes of their meetings in a timely fashion. Ms. Jones also testified that she had refused to endorse the collective agreement between the C.E.I.U. and its staff in 1996, as the agreement did not contain an equity plan, notwithstanding that at the prior convention an equity plan had been approved.

In cross-examination Ms. Jones identified Exhibit R-3, the C.E.I.U. By-Laws, Regulations and Policies booklet dated December 10, 1997. She also identified Exhibit R-4, a Public Service Alliance document entitled "POLICY PAPERS AND RESOLUTIONS OF RECORD, 1995".

Argument

The complainants' representative filed written submissions as well as making oral arguments. The following are extracts from his written argument as well as a summary of his oral submissions.

Summary Statement on Jurisdiction

> *The Public Service Staff Relations Board has consistently interpreted its role in administering the Public Service Staff Relations Act as excluding any power to intervene in the internal affairs of an employee organization.*
>
> *In its interpretation, the duty of fair representation extends only to the relation between the employee and the employer (typically in the context of grievances). It has not been interpreted as extending to the relations of members among themselves. In Hibbard vs. PSAC (PSSRB File No. 161-2-136, May 21, 1976), the Board stated:*
>
> > *This Board has no such authority under Section 8(2)(c)(i). Its concern is restricted to the rights of employees. The rights of members are matters between a member and the employee organization and are governed by the constitution and by-laws of that organization. The complaints of Mr. Hibbard against Officers of the organization are an internal matter of PSAC, for which there may be a remedy in another forum. (at 11 QL)*

In St-James vs. CEIU and Cres Pascucci (PSSRB File No. 100-1, March 31, 1992), the Board further affirmed:

> *It has been widely recognized that at least in the absence of specific provisions to that effect in its enabling statute, a labour relations board does not have supervisory authority to regulate the internal matters of a bargaining agent. (at 11-12 QL)*

In this same decision, the Board goes on to cite the text Canadian Labour Law (1985) which lists those matters with which labour relations boards have been unwilling to interfere. It is to be noted that discrimination does not figure in that list.

The test for intervention as stated in St-James is the following:

> *…unless and until the actions of the bargaining agent affect the employment relationship, the Board clearly has no role to play. (at 13 QL)*

It would appear that even discrimination would not be sufficient to warrant the Board's intervention. As stated in Martel vs. PSAC (PSSRB File Nos. 161-2-669 to 671, October 27, 1993):

> *It may very well be that Mr. Martel was treated in a discriminatory, biased, wrongful, capricious and arbitrary manner by Mr. Flinn, the UTE and the PSAC, but the Board has no jurisdiction to interfere in the internal affairs of the bargaining agent. Case law recognizes that the Public Service Staff Relations Board has no power to control and govern the internal affairs of the union in the absence of any specific legal provision giving it jurisdiction to decide such matters. (at 73, 74 QL)*

There would, however, appear to be limits to the deference of the Board concerning internal union business. In Jacques vs. PSAC (PSSRB File No. 161-2-731, April 20, 1995) the Board stated in the context of the duty of fair representation as set forth in s. 10(2) of the Public Service Staff Relations Act:

> *Nor may decisions be motivated by inappropriate discrimination based on factors such as race, gender, or political or religious beliefs. Finally, decisions of the employee organization may not seek to harm or assail a member, failing which they will be deemed to have been made in bad faith. (at 49-50 QL)*

This of course raises the question as to what is appropriate as opposed to inappropriate discrimination. As we will see in the next decision to be surveyed, this expression will be modified to more correctly read "inappropriate distinctions".

In Begley vs. PSAC (PSSRB File No. 161-2-759, July 4, 1995), the theme of harm to members was again raised.

> *The decisions of a union in matters of fair representation must not be based on inappropriate distinctions relating to race, sex, political beliefs, or religion, or any other prohibited ground of discrimination. Finally, such decisions must not be made arbitrarily or in bad faith, that is they must not seek to harm or hamper any employee in the bargaining unit. (at 32 QL)*

Finally, in Tucci vs. Hindle (PSSRB File No. 161-2-840, December 29, 1997), the Board stated in the context of the scope of the duty of fair representation:

> *I agree with the complainant that the Board can look at **these kinds of decisions** by a bargaining agent, where they in effect constitute a denial of representation which is arbitrary, discriminatory, or in bad faith. However, such conclusions are very serious and cannot be arrived at lightly. (at 37-38 QL)*

The Complainants, in urging the Board to take jurisdiction in this case, wish to reiterate the following points:

- *they are before the Board in a dual capacity: they were at once members and employees as they were having part of their union leave paid for by the Government*
- *they were involved in representation*
- *they exhausted all internal avenues of redress*
- *they inquired about complaining to the Canadian Human Rights Commission but were advised verbally that the Commission would not accept a group complaint*
- *the Complainants submit that the Board's decision in Yarrow vs. Treasury Board* (Agriculture and Agri-Food Canada) *(PSSRB File No. 166-2-25034, February 5, 1996) stands for the proposition that the complaint-based system of the Canadian Human Rights Commission does not represent a "remedy"*

- *the Board has the authority and has in the past considered decisions based on representation*

- *decisions by PSAC harmed and hampered the Complainants and should not be immune to review by the Board*

- *the Public Service Staff Relations Act provides specific legislative authority for a review of discrimination on the part of an employee organization or bargaining agent*

Mr. Wilson also noted that subsection 10(2) of the Act was promulgated in June 1993; accordingly, the case law prior to 1993, which deals with the common law duty of fair representation, is less relevant. Mr. Wilson also submitted that this provision does allow the Board to delve into the internal affairs of the union where it has adversely discriminated against its members. He argued that there is evidence in this case of systemic discrimination on the part of the Public Service Alliance of Canada, which requires the Board's intervention.

With respect to the application under subsection 43(2) of the Act, Mr. Wilson observed that this provision historically has meant that an employer organizations could not discriminate against certain groups, for example, as between part-time and full-time employees. Thus in *Montreuil* (Board file 161-2-135) the Board held that the Canadian Union of Postal Workers had a duty to fairly represent casual employees and could not discriminate against this group. Mr. Wilson submitted that subsection 43(2) provides a broad general prohibition against discrimination. The clear implication from these provisions is that discrimination is an extremely serious matter for which there should be a remedy. The applicants' representative contended that there is evidence here of discrimination within the Public Service Alliance of Canada which is both overt and systemic, for example, Ms. Jones' testimony concerning the teleconferencing meeting where the term "nigger" was used; notwithstanding her objections, nothing was done. He noted that the perpetrator in that instance was a National Vice-President of the C.E.I.U. There was another incident involving Mr. Alan MacKinnon who was also a National Vice-President; in both instances neither Mr. Pascucci, the President of the Component nor Mr. Bean, the National President, responded to the complaints. Mr Wilson also submitted that the failure of the Board of Directors to pass the suspension resolution is consistent with the contention that there is systemic discrimination within the Public Service Alliance of Canada.

Counsel for the respondent submitted that subsection 40(3) has a narrow purpose; had the legislators intended to allow a small group of members to decertify a union, they would have used very specific wording to that effect. He noted that unions are like many other organizations; they are fighting the scourge of bigotry, as demonstrated by Exhibits R-1 to R-4; however, notwithstanding the best of intentions, there is bound to be some examples of prejudice and bigotry within an organization the size of the Public Service Alliance; the Union should not be held to a standard of perfection. The Public Service Alliance of Canada is determined to fight racism and prejudice, but this is a matter respecting internal union affairs, and therefore beyond the jurisdiction of the Board, either under subsection 10(2) or subsection 43(2). Counsel contended that the *Public Service Staff Relations Act* does not confer on the complainants the power to conduct a "scorched earth policy" because there may be some racism within the ranks of the union. The appropriate remedy for the complainants is not before this Board but before the Human Rights Commission.

Decision

The complainants have made applications pursuant to both subsections 10(2) and 43(2) of the Act. These provisions provide as follows:

> *10. (2) No employee organization, or officer or representative of an employee organization, that is the bargaining agent for a bargaining unit shall act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employee in the unit.*

> *43. (2) Where the Board, on application to it by the employer or any employee, determines that a bargaining agent would not, if it were an employee organization applying for certification, be certified by the Board by reason of a prohibition contained in section 40, the Board shall revoke the certification of the bargaining agent.*

Subsection 40(3) of the Act is also relevant:

> *40. (3) The Board shall not certify as bargaining agent for a bargaining unit any employee organization that discriminates against any employee because of sex, race, national origin, colour or religion.*

With respect to the complaint under subsection 10(2), it is readily apparent that the Board has no jurisdiction to deal with this dispute under that provision. The complainants' representative acknowledged that there is at best a tenuous link between the complaints and the complainants' relationship with the employer. In fact, it is crystal clear that the complaint concerns exclusively the complainants' relationship with the bargaining agent and its officers; it has nothing to do with the employee organization's representation on behalf of the complainants vis-à-vis the employer.

As Mr. Wilson has candidly noted in his written argument, the Board has consistently held that its jurisdiction under section 10 does not extend to the regulation or oversight of the internal affairs of employee organization. See for example the decision in *Tucci and Hindle,* (*supra*, dated December 29, 1997) where the Board very recently reaffirmed this conclusion. The Board's view of the ambit of the unfair representation provision is in fact no different than that of labour relations boards in other jurisdictions in Canada where such provisions are found. Thus, in his text *Canadian Labour Law* (2nd ed.), Canada Law Book, (1993) former Mr. Justice George Adams makes the following observation:

(paragraph 13.210)

> *Labour relations boards have made it clear that the statutory duty of fair representation does not apply to regulate the internal workings of trade unions. The duty applies only to a trade union in the representation of its members in terms of their relations vis-à-vis their employer. Accordingly, labour relations boards have been unwilling to interfere with: the conduct of ratification votes, the suspension of an employee from membership in the trade union, the exclusion of non-members from votes on contract matters during collective bargaining, an allegedly unfair appeal procedure provided by a trade union with respect to decisions whether to pursue grievances, allegations concerning a trade union's constitutional procedures with respect to elections, the right of a trade union member to run for the office of area steward, the method in which delegates are selected for the purpose of participating in a union convention and the fact that the trade union may have departed from its internal by-laws, the alleged improper removal of the complainant from a trade union office and membership when it was clear that the complainant was not an employee in the bargaining unit, the hiring-hall methods*

> *chosen by a trade union to select back-up workers to receive work after the dispatch of all available union members and the alleged failure of a trade union to provide an adequate pension plan.*

The complainants' representative suggests that this Board should take jurisdiction in respect of the union's internal affairs where issues of discrimination and human rights violations are concerned. Clearly however, that would be entirely beyond the scope of subsection 10(2), and would fly in the face of substantial and long established jurisprudence. Accordingly, I must find that the Board is without jurisdiction under that provision to address the concerns raised by the complainants.

With respect to the application under subsection 43(2), I would first make the observation that in this case the "employee organization" and the "bargaining agent" (the terms used in this provision) is not the C.E.I.U. but rather the Public Service Alliance itself. The complainants have in fact recognized this distinction in naming the PSAC, and its President, Daryl Bean, as the respondents, as opposed to the Component or its President Cres Pascucci. However, the evidence demonstrates that their complaints are very largely directed at the leadership of the C.E.I.U. and in particular Mr. Pascucci. Indeed, the only evidence that relates specifically to any acts or omissions on the part of the Public Service Alliance of Canada *per se* is the letter from Mr. Bean to Ms. Kilby dated February 19, 1996 i.e. Exhibit C-7, and the decision of the National Board of Directors not to suspend Mr. Pascucci from membership, notwithstanding the recommendation of the Alliance's National Executive Committee. With respect to Exhibit C-7, it should be noted that Mr. Bean merely stated in his letter that:

. . .

> *After thoroughly reviewing the complaint, we both independently reached the conclusion that there is no "prima facie" evidence of harassment. While we both agree that the matter should have been handled in a more professional manner, we cannot agree that harassment was involved.*

. . .

While Ms. Kilby was undoubtedly disappointed and dissatisfied with this conclusion, there is nothing to suggest that the complaint was not considered in a full and fair

manner, or that the disposition of this matter by Mr. Bean was tainted in any way by discrimination or any other elements of bad faith.

As for the Board of Directors' decision not to suspend Mr. Pascucci, in my view it would be unfair to paint the Public Service Alliance of Canada with the broad brush of systemic discrimination on the basis of that decision. It would be an entirely unwarranted conclusion to find that the vote against the suspension of Mr. Pascucci was an endorsement of discriminatory practices. There can be a myriad of reasons why the Board of Directors voted as they did; there is simply no evidence to suggest that bigotry, racism, sexism or any other improper consideration was behind their decision not to suspend Mr. Pascucci.

The complainants' own evidence strongly suggests that the Alliance is very cognizant of the need to promote equality and fairness, and an atmosphere free of discrimination within its own ranks. Without the cooperation and support of at least some of the persons in positions of authority within the Alliance, it is doubtful that there would be a National Equal Opportunity Committee, or a Human Rights Conference, or a Race Relations Committee, to say nothing of the Public Service Alliance Constitution itself which states, *inter alia*:

(Exhibit C-2)

Section 5

MEMBERSHIP RIGHTS

Every member in good standing is entitled:

(a) to be represented by the union;

(b) to be free from any act or omission on the part of the Union, or other members, that would discriminate against the member on the basis of age, sex, colour, national or ethnic origin, race, religion, marital status, criminal record, physical or mental handicap, sexual orientation, language, political belief, or employer;

(c) to be free from harassment by another member, both within the union and in the work place, on the basis of any of the grounds mentioned in paragraph (b);

. . .

It is true that from time to time policies and practices can widely diverge; however it would be grossly unfair to condemn the Public Service Alliance of Canada for the inappropriate actions of a handful of individuals, and to thereby deprive thousands of employees of the benefits of union representation. I do not believe that subsection 43 (2) was intended for such a purpose.

In its 30-year history, the Board has not been called upon to interpret and apply subsection 43(2) of the Act. However, the Board has on occasion addressed allegations of discrimination in the context of collective bargaining issues. Perhaps the most notable of these decisions is *Le Syndicat des controleurs aériens du Québec*, Board file no. 143-2-164 in which the following observation is found:

> (at p. 143)
>
> . . .
>
> *The accusation that CATCA is practicing discrimination against the majority of its Quebec members is of a different order. It is apparently based on the applicant's perception of CATCA's overall position on the language question as manifested in its refusal to sign the French version of the collective agreement, its provision of services to francophone members, its attitude towards the designation of bilingual positions and thebilingualism bonus. In developing his submission on the charge of discrimination, counsel for the applicant even went so far as to accuse CATCA of racism. The seriousness of these charges places a heavy burden of proof on the applicant.*
>
> *We have already indicated that "where a judicial determination is to be made the definition of discrimination must be capable of being tested by objective evidence." A quasi-judicial board cannot acquiesce in the extravagance or imprecision of language that characterizes much of contemporary journalism and that may be fair game in the play of politics. The question before this Board is whether certain employees - the francophone members of the AI occupational group working in the Quebec Administrative Region - have suffered discrimination as a result of the attitudes and actions of their bargaining agent. In specific and concrete terms, have these employees been treated differently, and to their disadvantage, because of their identity as Quebec francophone air traffic controllers?*
>
> *The fact that particular majority decisions or policies are not to the liking of the minorities who oppose them is not,*

> *in itself, indicative of discrimination. The legitimacy of a majority decision in a democratic society is not contingent on its rightness, but on the legitimacy of the procedures for arriving at that decision, provided that the decision is not incompatible with the fundamental rights and shared values of that society. As we have noted above (p. 57ff.), the procedures must include the opportunity for minority views and interests to be articulated and the possibility for majority policies to be modified. One can understand the subjective feelings of persons who are in the minority position on issues that move them deeply. It is not unusual, in human terms, to attribute the failure to realize one's expectations, even in the short run, to factors such as harassment and discrimination. In judicial terms, however, attributions of this kind must be based on evidence that is objective and verifiable. Apart from the arguable case of CTACA's policy on the signing of the French version of the collective agreement - a policy that has now been changed - the objective evidence does not, in our opinion, support the allegations of discrimination. This conclusion applies a fortiori to allegations of "racism" which, unfortunately, are made with such facility and frequency in our present political context. The emotional energy generated by such allegations is not a substitute for the obligation to prove them.*
>
> . . .

There has been jurisprudence in other jurisdictions concerning provisions similar to subsection 43(2). In the early 1960's the Ontario Labour Relations Board issued several decisions refusing to certify locals of the Christian Labour Association on the grounds that the Association was in contravention of then section 10 of the Ontario Labour Relations Act; section 10 provided that "*the Board shall not certify a trade union ... if it discriminates against any person because of its race, creed, colour, nationality, ancestry or place of origin.*" In *Regina v. Ontario Labour Relations Board, Ex parte Trenton Construction Workers Association, Local 52*, (1963) 39 D.L.R. (2d) 593 the Ontario High Court overturned one of these decisions, the Court having concluded that:

> (at p.609)
>
> . . .
>
> *neither the constitution nor the declared practices and principles of the union bring it within the prohibitions of the relevant statutes. It is not to be overlooked that the statutes do not prohibit discrimination but only discrimination on*

> *certain stated grounds. All trade unions discriminate against members who will not subscribe to certain doctrines or beliefs of trade unionism. In the broad sense these could be called creeds but they are not creeds as I construe the meaning of the word "creed" in the statutes. As I have emphasized, what is prohibited is certification of a trade union that "discriminates against any person because of his creed". This is a restrictive clause and must be interpreted accordingly.*
>
> . . .

In light of the above-noted jurisprudence it would appear that the ambit of provisions such as subsection 43(2) is limited. The very nature of the sanction provided in subsection 43(2), that is, the revocation of certification, underlines that this provision is not intended as a means of redressing acts of discrimination manifested by particular individuals. To interpret subsection 43(2) in such a fashion, is to create a very blunt instrument when in fact a finely honed scalpel is called for, again keeping in mind that in this instance the end result of decertification under subsection 43(2) would be to deprive over a 100,000 employees of union representation, without any input from these members. Such a blunt instrument should be used with considerable caution, and in my view is entirely inappropriate and without foundation given the facts of this case.

Accordingly, the complaint and application for revocation of certification are dismissed for want of jurisdiction.

P. Chodos,
Vice-Chairperson.

OTTAWA, April 27, 1998.