Files: 461-HC-10
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Parliamentary Employment and Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA, HOUSE OF COMMONS SECURITY SERVICES EMPLOYEES ASSOCIATION AND COMMUNICATIONS, ENERGY AND PAPER WORKERS UNION OF CANADA

Complainants

and

ROBERT MARLEAU, MARY ANNE GRIFFITHS AND JACQUES SABOURIN

Respondents

RE: Complaints under section 13 of the Parliamentary Employment and Staff Relations Act

Before: Yvon Tarte, Chairperson

For the Complainants: Dougald Brown, counsel

For the Respondents: Jacques Emond, counsel

Heard at Ottawa,
November 14, 15, 1996 and April 1, 2, 1997

These three complaints are concerned with a survey questionnaire sent to all the employees of the House of Commons. The basic facts in all three complaints are identical and are not generally in dispute. The parties requested that the three complaints be heard together and that only one decision be issued to cover all matters in dispute. The three complainants are bargaining agents certified under the *Parliamentary Employment and Staff Relations Act* and will be hereinafter referred to by their respective acronyms: PSAC, HCSSEA and CEP. Senior officers from each complainant testified.

The respondents Robert Marleau, Mary Ann Griffiths and Jacques Sabourin are respectively Clerk of the House of Commons, Deputy Clerk of the House of Commons, Administration and Director General, Human Resources. Two of the respondents, Messrs. Marleau and Sabourin testified.

The complaints were filed under section 13 of the Parliamentary Employment and Staff Relations Act (the Act) which reads:

> *13. (1) The Board shall examine and inquire into any complaint made to it that an employer or an employee organization, or any person acting on behalf of an employer or employee organization, has failed*
>
> *(a) to observe any prohibition contained in section 6, 7 or 8;*
>
> *(b) to give effect to any provision of an arbitral award;*
>
> *(c) to give effect to a decision of an adjudicator with respect to a grievance; or*
>
> *(d) to comply with any regulation respecting grievances made by the Board pursuant to section 71.*
>
> *(2) Where under subsection (1) the Board determines that any person has failed to observe any prohibition, to give effect to any provision or decision or to comply with any regulation as described in that subsection, it may make an order, addressed to that person, directing the person to observe the prohibition, give effect to the provision or decision or comply with the regulation, as the case may be, or take such action as may be required in that behalf within such specified period as the Board may consider appropriate and,*

> *(a) where that person has acted or purported to act on behalf of an employer, it shall direct its order as well to the employer; and*
>
> *(b) where that person has acted or purported to act on behalf or an employee organization, it shall direct its order as well to the chief officer of that employee organization.*

More specifically the complaints deal with the prohibition contained in subsection 6(1) of the Act:

> *6. (1) No person who is employed in a managerial or confidential capacity, 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.*

The complainants seek a declaration that subsection 6(1) of the Act was violated, an order to cease and desist as well as certain other orders dealing with the questionnaire and its results.

The Facts

At the beginning of the previous Parliament, in late 1993, the government made it clear that the Public Service would come under more aggressive program review. The House of Commons decided to take the lead and move quickly.

In the spring of 1995, the House of Commons set up a Transition Team to come up with a blueprint for continued renewal. In June and October 1995 two documents dealing with the renewal process were prepared. Those documents are referred to as follows in a 19 February 1996 memorandum to all employees signed by Mr. Marleau (Exhibit E-1):

> *For some time now, we have been involved in an extensive renewal process. From the document entitled Blueprint for Renewal (June, 1995) and the Outlook on Program Priorities and Expenditures (October, 1995), a series of activities has been undertaken to move the House towards its goal of becoming more streamlined and effective with fewer people, at a lower cost, while continuing to provide or deliver a competent, professional service to Members within guidelines approved by Members.*

By the spring of 1996 several Steering Committees had been set up to deal with the various themes developed in the Outlook document. In addition a Culture Task Force was created. The Steering Committees and the Culture Task Force were to work in close cooperation with the Transition Team of which Mr. Marleau was the head. Mr. Marleau refused requests by the bargaining agents to participate in the activities of the Transition Team since he felt the renewal process had to be management driven.

The House of Commons advertised for volunteers for its Culture Task Force (Exhibit E-2):

> *The House of Commons is looking for 6 to 8 volunteers to become members of the newly created Culture Task Force. The House's Senior Management Team has set as an objective to become a more streamlined and effective organization, able to operate at a significantly reduced cost, with fewer employees, while continuing to provide Members and the public with the quality services they have come to expect. The House's corporate culture, its strength and weaknesses, will be a powerful force in moving the House towards the realization of its objectives.*
>
> *A culture which supports a learning organization and which recognizes teamwork, innovation, calculated risk-taking and experimentation is required to give the House the flexibility and adaptability it will need to respond to its future challenges. A skilled, knowledgeable and motivated work force, management values and the involvement and empowerment of employees are key elements to the House's renewal.*
>
> *The Culture Task Force will contribute to renewal by:*
>
> - *acting as a catalyst for change;*
> - *providing advice on removing barriers to the desired culture;*
> - *developing various culture related activities (breakfasts, forums, etc.);*
> - *evaluating new and existing programs (e.g., Employee Recognition Program; Employee Attitude Survey); and,*
> - *providing advice on how policies and initiatives will affect the culture and how the desired culture can in turn affect policies and initiatives.*

> *Participation in the culture Task Force, to the extent possible, will be representative of the House population with cross-sectional and multi-level representation. In addition, participants should be open to new ideas and change; be innovative; value people, learning and communication; and, be able to commit a minimum number of hours to Task Force activities.*
>
> *Interested candidates are invited to submit their names, the reasons why they are interested and what they think they can bring to the Culture Task Force before August 31, 1995 by e-mail, to Anne Bouffard or Marie-Andrée Lajoie, by memo to Room 1200 - 151 Sparks Street, or by fax at 995-5357.*

Mr. Marleau testified that although the Transition Team had no influence on the selection of Culture Task Force members, he gave it his "intellectual support". In the summer of 1995, prior to the advertising for volunteers, the Culture Task Force presented a briefing note (Exhibit U-10) to the Senior Management Team of which all three respondents are members. The purpose of this briefing note was to seek the support of the House of Commons for the work of the Culture Task Force. The services of Diane Salt, a communications expert and member of the Transition Team were made available to the Culture Task Force.

The response to the request for volunteers for the Culture Task Force was quite good. In order to carry out the mandate of the Culture Task Force, the volunteers regrouped themselves into several committees including a steering committee and an Organizational Pulse Committee (OPC).

At its first meeting in January or February 1996, the OPC discussed the possibility of an employee survey to canvass attitudes and solicit ideas for change. In mid-February 1996, the Culture Task Force met with John Luik a consultant who had been hired by the House of Commons as a process facilitator. The OPC raised the idea of a survey with Mr. Luik who in turn mentioned it to Mr. Marleau. With Mr. Marleau's conditional approval secured, Mr. Luik reported to the OPC on 27 February 1996 (Exhibit E-13):

> *I have spoken to Mr. Marleau about the survey and he is happy to have your group go ahead and design one and conduct it. He does ask that you do three things:*
>
> *1) Send him an E-Mail outlining what the Pulse group has in mind;*

> *2) let him look at the survey once it is prepared;*
>
> *3) work with me to insure that it is properly designed.*
>
> *I have his permission to spend some time with your group. Please let me know when you want to work. I will provide you with some sample employee surveys that we have used elsewhere.*

On April 26, 1996, the OPC submitted a draft Employee Opinion Survey to Mr. Marleau for his approval (Exhibit E-15). In its memorandum to Mr. Marleau, the OPC stated that in order to proceed with the survey project it required senior management support, approval of the proposed survey questions and funding. The OPC was asked to make a presentation of its project to the Senior Management Team. Following such a presentation on 15 May 1995, the Senior Management Team approved the survey project and recorded its decision to that effect as follows (Exhibit E-18):

> *<u>House of Commons Employee Opinion Survey</u>*
>
> *Yves Legault and Ted Buglas, members of the Organizational Pulse Committee of the Culture Club, presented the Committee's proposal to conduct an Employee Opinion Survey. The objectives of the survey would be:*
>
> - *to provide baseline data to measure the progress of renewal at the House;*
> - *to provide a foundation for a partnership between managers and employees to address key concerns with concrete and results-oriented action plans;*
> - *to provide managers with reliable upward communication mechanisms for action-planning within the House.*
>
> *It was agreed - That the proposal to proceed with the survey be approved and that employees be permitted to complete the survey during working hours. SMT identified June 6 and 7 as the target dates for completion of the form. It was also agreed - That funds would be provided to engage the services of an independent consultant to analyse the data and that the Clerk's frank be used to mail each completed form directly to the consulting firm. It was also agreed that the form would be printed in two colours.*
>
> *SMT members made a few comments on the contents of the questionnaire and it was suggested that the survey be reviewed by the consultant selected to analyse the results prior to distribution to employees. SMT also requested that it*

> *be briefed on the survey results before they are made available to employees. The DGHR proposed that the unions be advised of the survey at a joint committee meeting scheduled for the week.*
>
> *The SMT also conveyed its appreciation for the excellent report and presentation by the Organizational Pulse Committee.*

A regular union-management consultation meeting took place on 22 May 1996. Although the OPC survey project was not on the agenda, the matter was raised at the meeting in keeping with the suggestion made by Mr. Sabourin at the May 15th SMT meeting (supra). The following is an extract of the minutes of that meeting (Exhibit U-1, Tab 2):

> *1. PRESENTATION FROM THE ORGANIZATIONAL PULSE COMMITTEE*
>
> *1.1 Members of the Organizational Pulse Committee, a sub-group of the Culture Task Force, made a presentation on an upcoming employee Opinion Survey to be done House-wide on June 6, 1996. Employee responses will be completely confidential. The survey will probe their opinions on a variety of work-related subjects divided in three themes: Employee's Attitude, Organizational Climate and Corporate Culture. There will be approximately 100 questions asked to employees and results will be given to all employees simultaneously in early September. The Senior Management Team has agreed to fund a contract with a specialized consulting firm which will tabulate the employees' responses.*
>
> - *CEP expressed strong concerns about "attitude surveys" and the way results are interpreted and used. They asked whether there were any question regarding unions. They felt that this survey was "dropped" on them and that was a way to sideline bargaining agents. Finally, they expressed concerns on who will pay for the consultant and questioned the fact that the questionnaire itself was not available at this meeting.*
>
> - *Management replied that the Organizational Pulse Committee was entirely employee-driven and that Management did not intervene in the content or process. Management confirmed that, with the Senior Management Team's approval, that they*

would share the draft questionnaire with unions before it is sent to employees.

- *PSAC generally agreed with CEP and further added that they should have been consulted and felt they were being left out of the process. They added that they appreciate the work that was put into the survey and do not want to take away any credit from members of this committee.*

- *PIPSC thanked the committee for the presentation and mentioned that they felt this was not a deliberate attempt to sideline unions, pointing out that, now, the Organizational Pulse Committee is aware of the existence of unions and that bargaining agents should be included in the loop. They further requested to see a copy of the questionnaire before it is sent to employees.*

- *SSEA said that they admired groups of employees who make efforts to change things and they encouraged their own members to sit on such committees. They also felt the need to see a draft of the questionnaire before it was sent out, just to be reassured. SSEA further warned all UMC participants that no editing should be done to the questionnaire. SSEA concluded by saying that this was a good job and that "it was a sign that things were changing around the Hill". Even this committee is a sign of positive change and everyone has to recognize that management cannot change overnight and that in the past three years, there has been significant improvement. SSEA urged for everyone's patience.*

- *Members of the Organizational Pulse Committee mentioned that half of the Culture Task Force is unionized and that there was no intent whatsoever to sideline unions. They reiterated their intent to inform bargaining agents and offered to provide information sessions to employees at the request of bargaining agents.*

- *CEP mentioned that the Communications Task Force sent a questionnaire to some 100 employees and one of the questions related to the employee's satisfaction on the quality of communications in union meetings. CEP finds this unacceptable and considers filing a formal complaint of union interference.*

- *Management agreed with CEP and pointed out that in no circumstances, was this questionnaire designed to interfere with union business. It was also noted that two union representatives on this UMC were members of the Communications Task Force and had not indicated any problems with this partial survey. Management recognized the mistake and offered its most sincere apologies. Management added that it would share with all representatives the results of this questionnaire.*

- *A member of the PIPSC Group executive added that he was on this particular task force and admitted that he had not read the questionnaire before it was sent out, but that the questionnaire was designed after thorough review of the literature and it was in no way intended to interfere with union business.*

Following this union-management meeting the Senior Management Team authorized the release of the survey questionnaire to the bargaining agents. On May 27 and 28, after having had an opportunity to review the survey questionnaire, all three complainants raised concerns with the House of Commons. In its letter to Mr. Sabourin (Exhibit U-1, Tab 5), CEP stated that the sending of the survey questionnaire to its members was totally inappropriate, that it clearly interfered with its rights of representation and demanded that the survey not be distributed to its members. The PSAC letter to Mr. Sabourin (Exhibit U-1, Tab 7) on May 28 offered the same arguments and added that the bargaining agent had serious concerns on questions "which relate to issues such as health and safety, hours of work and overtime and pay administration, presently covered under various collective agreements."

In view of these objections a meeting was called on June 3, 1996, to allow the complainants to meet with the OPC, Mr. Sabourin and Ms. Griffiths. According to Yves Legault a member of the OPC, the bargaining agents were more specific in expressing their concerns at the June 3rd meeting. Mr. Sabourin testified that the complainants continued to demand at that meeting that the survey not take place. In cross-examination Mr. Sabourin expressed the view that it would be improper for management to survey unionized employees on matters directly related to pay and that it would be "precarious" for management to touch upon work place benefits in such a survey.

Following the meeting the OPC prepared and forwarded a memorandum to all the meeting participants (Exhibit E-17):

> *Based on our meeting earlier this afternoon, our Committee has carefully reviewed each of the points raised and would like to inform you of our collective decision to proceed with our Employee Opinion Survey.*
>
> *Throughout this employee-driven project, we have worked hard to involve a wide variety of individuals in the development phase. For example, the very composition of our group reflects a variety of employment categories, areas of work and includes unionized and non-unionized employees.*
>
> *We recognize that formal consultations with both the respective bargaining units and the representatives from management could have provided us with valuable input on the survey contents. We acknowledge the concerns surrounding the union's mandate to represent its employees and it was never our intention to circumvent union participation in this project. However, we believe that the survey we have developed will provide useful data for all employees at the House of Commons and the organization as a whole.*
>
> *While we are proceeding as planned with the survey, we have made several changes which directly address some of the concerns raised by union representatives. Concerns were raised regarding the confidentiality of demographic variables. This issue has been dealt with by removing the question which asked respondents to identify their occupational groups. Further, the breakdown of departments has been expanded in order to ensure the anonymity of individual respondents.*
>
> *In addition, the preamble to the survey which stated "managers and employees will jointly set priorities, prepare action plans and implement the actions agreed upon following reception of data analysis", has been removed. By removing this statement we are allowing for broad flexibility in dealing with the results.*
>
> *While we are going ahead with the survey on June 6th, we see this as only the beginning of our project. The key issue of designing an action-planning strategy for dealing with the results of the survey has not yet been decided and remains to be discussed. Between now and the end of August, we are hoping to work with any interested party in developing parameters for data analysis, presentation of results to all*

> *House employees and a strategy for acting on the results. We will be actively seeking your advice on these matters later in June.*
>
> *We are confident that there remains ample opportunity for consultation and feedback on this project from management and union groups. We believe that everyone stands to gain from working together over the next few months to maximize the benefit of the survey for all employees of the House of Commons. We recognize that union representatives will make the decisions that are in the best interests of their membership.*
>
> *Thank you for your interest in the Employee Opinion Survey Project. If you have any further questions or concerns please do not hesitate to contact us at any time.*

Mr. Marleau testified that he never asked for the right to veto any particular questions in the survey since he wanted the OPC to make all the decisions and manage the process. Mr. Sabourin on the other hand expressed the view that Mr. Marleau had the authority to veto any question, series of questions or for that matter the whole project.

The survey questionnaire was distributed to all House of Commons employees on June 6, 1996. The results of the survey were made public on September 11, 1996.

The parties exchanged written submissions and replies in this case. What follows are the full texts of those arguments:

Arguments for the Complainants

> ***THE LEGISLATION***
>
> *The provision of the Parliamentary Employees Staff Relations Act applicable to these complaints is s.6(1):*
>
> *6(1) No person who is employed in a managerial or confidential capacity, 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.*
>
> *This provision is identical to provisions in the Canada Labour Code [s.94(1)(a)], the Public Service Staff Relations Act*

[s.8(1)] and to provisions in most provincial labour relations statutes.

ANALYSIS

Numerous decisions of Canadian Labour Boards have recognized that a Union's role as exclusive bargaining agent can be undermined when an employer attempts to communicate directly with employees on workplace issues. Even when employer communications are not made with an express intent to defeat the union, they can convey a subtle but effective message that employees' interests can be protected and advanced without a union. Numerous decisions of Canadian Labour Boards have recognized that an employer must scrupulously respect the fine line which separates appropriate from inappropriate employer communications. The approach taken by Labour Boards in these cases is usefully summarized in Saskatchewan Wheat Pool, [1996] C.L.R.B.D. No. 17, C.L.R.B. Decision No. 1167, at paragraph 31:

> *However, what these decisions make clear as well is that the labour relations context within which such communications take place, the content of the communications themselves, and the consequences, intended or not, that they have on the authority of the bargaining agent are all critical factors in determining whether an employer has crossed the thin dividing line between what is proper direct communication under the Code and what is not. The communication process in a unionized work environment is a dynamic one which has, through its various permutations and forms, the potential to influence not only the employer-employee rapport but that of the employee-bargaining agent as well.*

Section 6(1) of the Parliamentary Employees Staff Relations Act does not preclude the introduction of programs designed to foster and promote greater employee participation in the workplace. In CUPE, Broadcast Division and Canadian Broadcasting Corporation, 27 C.L.R.B.R. (2d) 110, C.L.R.B. Decision No. 1102, the CLRB recently dealt with a case involving the employer's introduction of an employee participation process called "Opportunities for Change". The comments of the CLRB in the CBC case apply with equal force to the present case:

> *Greater consultation and interaction between management and labour on workplace issues is not only desirable but, in the current social and economic milieu, becoming increasingly necessary. In order for*

labour and management to develop the constructive labour relations and collective bargaining practices which Parliament intended to support and foster by promulgating the Canada Labour Code, parties, such as the union and employer at CBC, faced with the demanding circumstances that presently exist, must adopt progressive and realistic industrial relations strategies -- strategies that both acknowledge the existing economic and competitive realities, as well as appreciate the necessary mutual interdependence of the union and employer in promoting and achieving the common well-being of both the employer's operation and the employees' working conditions to "ensure", in the words of Parliament, "a just share of the fruits of progress to all" (preamble of the Code).

In the prevailing circumstances at the CBC, it is understandable why the employer sought to establish a process that would facilitate the kind of broad-based employee involvement it hoped to achieve. However, in a union environment, the employer cannot institute an employee participation program - such as OFC was - which focuses on areas that are directly the concern of the union in the collective agreement, or on the bargaining table, without involving the union itself in the establishment and conduct of the process. To be successful, any consultative program to be implemented by the employer in a unionized workplace must involve the union in a meaningful way. To ensure that the consultative process established does not offend the provisions of the Code, the employer must ensure that its implementation does not serve to subvert, circumvent or replace the union in its legitimate role as exclusive bargaining agent, or, in the words of s. 94, otherwise interfere with the administration of the trade union or its representation of the employees.

By the same token, the union should not be in a position to derail the consultative process simply by refusing to participate. Where progressive labour relations projects are instituted or attempts made to do so, current labour relations realities dictate that the Board cannot look at the employer's conduct in the abstract. In the circumstances of the present case, had the union been consulted and serious provision made for its participation in the process by the employer, the Board may well have taken another view of the matter: Canada Post Corporation, supra.

> *The union cannot enlist the assistance of the Code to derail an otherwise genuine attempt by the employer, made within the confines of the Code, to implement effective industrial labour relations strategies designed to involve the union and its members in addressing required workplace changes in order to meet economic and industrial relations realities and to ensure the overall common well-being of the employer, the trade union and, most importantly, the employees.*
>
> *If the employer makes a genuine and reasonable effort to involve the union in a consultative process - that meets the requirements discussed earlier herein - and the union refuses to participate, the Board may well decline, in the appropriate circumstances, to exercise its discretion to grant a remedy pursuant to s. 99 [am.S.C. 1991, c. 39, s. 3(1), (2)], even if the subsequent conduct of the employer - strictly speaking - constitutes a breach of s. 94.* ***(emphasis added)***

In the result, the CLRB found that the development and implementation of the "Opportunities for Change" consultation process by the CBC, without the inclusion of the union, violated s. 94(1)(a) of the Canada Labour Code.

Failure to Consult the Bargaining Agents

In this case, the complainants were excluded from any role in the development and implementation of the various employee participation processes that were spawned by the "renewal initiative" at the House of Commons. Nowhere in the mandate or activities of the Culture Task Force was there any recognition that the Unions representing half the total employee population at the House of Commons were an integral and legitimate part of the workplace culture. It is a telling comment on the labour relations environment at the House of Commons that the Senior Management Team, which included the three Respondents, endorsed and approved a mandate for the Culture Task Force ***(Exhibit U-10)*** *in which the CTF was described as "the primary catalyst and conscience for the organization" and which omitted any reference whatsoever to Unions or to the fact that the House of Commons is a unionized workplace. This despite the fact that the mandate of the Culture Task Force was to foster a culture that included "employee involvement in decision making" and "open and honest communication".*

Despite the existence of a formal procedure for union/management consultation meetings, the unions were not told about the Employee Opinion Survey until May 22, 1996. By the time that the unions were told about the

survey, the project had achieved such momentum that it was a fait accompli. Mr. Sabourin acknowledged as much in his testimony when he stated that management felt compelled to proceed with the survey in the face of the union objections because to do otherwise would lead to cynicism and lack of trust on the part of the OPC. Because they were consulted so late in the process, the unions were placed in a situation where raising legitimate objections was viewed as obstructionist. This was clearly the attitude of Ms. Griffiths, who stated that she could not see what "all the fuss was about".

The consultation with the unions on May 22nd was an afterthought. Although consultation on the survey was the first item of business, it was not included on the agenda prepared by Mr. Sabourin's office and consequently the bargaining agents were taken by surprise.

The unions were not given the same information about the survey as Mr. Marleau had received in the "briefing note" that the Senior Management Team received. Unlike management, the unions were not told that the survey was regarded as an integral part of management's renewal initiative. The unions were told nothing of the communications strategy that had been drawn up by a member of the transition team, Dianne Salt, and presented for approval to the Senior Management Team. Nor were the unions told that one of the target audiences identified in Ms. Salt's communications strategy was "unionized staff and their representatives" ***(Exhibit E-15)****.*

Nor were the union representatives at the union/management consultation meeting on May 22nd even provided with the survey questionnaire. When they requested an opportunity to review the survey questionnaire, they were told that it could only be released with Senior Management Team approval.

Labour Relations Context

Much was made at the hearing about the fact that the complainants would not, as a result of the Public Sector Compensation Act, S.C. 1991, c. 30, as amended by S.C. 1993 c. 13, be in a position to commence collective bargaining until early 1998. However, the freeze on bargaining did not confer a license on management at the House to communicate with employees on workplace issues over the heads of the unions. In a labour relations context where collective bargaining has been frozen for six years, bargaining agents are more, not less, vulnerable to being undermined by the employer's communications with

employees. The raison d'être of a bargaining agent is to bargain collectively. In a labour relations environment where that function has been statutorily, albeit temporarily, removed, even subtle messages from an employer may well lead employees to question whether the union has a real and meaningful role in representing them on workplace issues.

The Respondents were well aware that the statutory freeze and workforce reductions might make employees question whether unions are desirable. At a meeting on June 27, Mr. Marleau bluntly told bargaining representatives that the renewal process would have a negative impact on the unions. According to the Minister, Mr. Marleau stated:

> *Managers were told back in 1994 that their mothers were dead and that things would not be the same anymore. This paradigm shift has had an impact also on unions: they lose co-workers and union dues.* ***(Exhibit E-4)***

In the same meeting, Mr. Marleau also warned the bargaining unit representatives about "inflexible union representation".

Content of the Survey and Surrounding Communications

A few days before the survey questionnaire was to be distributed, a flyer was distributed to all employees ***(Exhibit U-1, Tab 12)****. The flyer stated that the survey would be "100% employee-driven" and that the survey was "supported by senior management". The flyer stated:*

> *Based on the results, solutions and improvements can be jointly formulated between both employees <u>and</u> management.*

There was no indication in the flyer that the bargaining agents representing half the employees at the House of Commons would have any role in implementing solutions or improvements identified by the survey.

The flyer also described the upcoming survey as the "first ever House-wide employee opinion survey - a chance for all employees at all levels to provide input on a number of organizational issues, including communications, job satisfaction, learning opportunities and much more". Whether intended or not, the flyer distributed prior to the survey conveyed the message that the bargaining agents were irrelevant in conveying and representing the interests of employees on workplace issues.

The same message was conveyed in the descriptive information provided to employees on June 6th, along with the survey questionnaire. The introduction to the survey questionnaire included the following:

> *ABOUT EMPLOYEE SURVEYS...*
>
> - *Employee surveys are conducted on a regular basis by many public and private organizations. They are often started as an integral part of organizational renewal initiatives.*
>
> - *Many organizations use feedback from employee surveys to adjust corporate strategies and to solve specific problems in the work environment.*
>
> - *Successful surveys depend on the honesty of employees in identifying best practices and problem areas in the organization, as well as the willingness of employees to work with organizational leaders to fix the problems identified by the survey results.*

Again, by omitting any mention of unions, the implicit message was that the unions had no role in either identifying problems in the work environment or in remedying the problems.

It is not necessary that all unionized employees would take this message from the communications surrounding the survey. The Alberta Labour Relations Board has pointed out in a recent case that communications with employees inevitably send out several messages:

> *...the process of talking to employees directly, whether through meetings or surveys, worked to undermine the Union's authority with its members. It inevitably sent out several messages. `Your Union is not representing what you really want'- `We don't believe your Union is honestly reporting on the wishes of its members' or `Your Union cannot help you in your difficult lay-off period ahead, so you should act on your own behalf.' Obviously, not all Union members would draw the same message from the employer's conduct. However, just having to deal with the variety of employee reactions to these surveys, threats of layoffs and so on, on top of its direct negotiations could only have made representing employees more difficult.*

> *United Nurses of Alberta v. Alberta Healthcare Association, [1995] 95 CLLC 143,711 (Alta. Labour Relations Board)*

The survey questionnaire itself contained questions in a number of areas that are properly the subject of collective bargaining between the complainants and the House of Commons. One section of the questionnaire dealt with compensation and benefits. Employees were asked to rate their agreement or disagreement with a number of statements:

> *62. Overall, I think I am paid fairly compared with:*
>
> *a. Other HOC employees who hold similar jobs.*
>
> *b. People in public sector organizations who hold similar jobs.*
>
> *c. People in private sector organizations who hold similar jobs.*
>
> *63. Overall, I am satisfied with my pay.*
>
> *64. Overall, I am satisfied with my employee benefits.*

Employee compensation and benefits are clearly at the core of a union's representational role. To solicit the views of bargaining unit members about the adequacy of their compensation and benefits directly conveyed an unmistakable message that the bargaining agents were irrelevant. As stated by the Canada Labour Relations Board in a recent decision:

> *...the effect of this section is to grant a bargaining agent a form, so to speak, of institutional protection with regard to the fulfilling of all its obligations under the Code, notably that of negotiating a new collective agreement for its members. It is no secret that the upcoming round of negotiations between SWP and GSU will deal, of necessity, with the issue of the salary grading plan. Any direct communication from the employer to the employees on a matter of such concern to both of them has the potential, if not the actual effect, of tilting the bargaining balance in favor of the employer. This is something clearly contrary to the scheme of the Code relative to the collective bargaining process. One of the reasons for the restrictions put by the Code on this form of communication is that of maintaining a pre-bargaining balance between the parties so that the*

> *employer cannot use its greater ease of access to employees to gain a competitive advantage at the bargaining table. Again, regardless of whether such was the employer's intention, the fact that it did take place in these circumstances supports the Board's finding that such a conduct is contrary to the Code provision here at issue.*
>
> *Saskatchewan Wheat Pool [1996] C.L.R.B.D. No. 17, C.L.R.B. Decision No. 1167, at paragraph 37.*

Other parts of the survey also dealt with areas of legitimate concern to the bargaining units. The Parliamentary Employment and Staff Relations Act is permissive about the matters that can form part of a collective agreement. "Collective Agreement" is broadly defined in the Act as an agreement "...containing provisions respecting terms and conditions of employment and related matters".

The survey questionnaire dealt with numerous matters that were legitimately the concern of the bargaining agents. Despite the fact that the complainants' collective agreements included provisions dealing with training and career development leave, the survey solicited employee views on training issues. Employees were asked to rate their agreement to the following statements:

> *The HOC has done a good job of providing the training I've needed to do my job well.*
>
> *The HOC does a good job of providing career development opportunities.*
>
> *The HOC's policies and programs help employees balance work and family responsibilities.*

The survey also probed employee views on other areas which, although not the exclusive preserve of the bargaining agents, are areas in which the unions would reasonably be expected to have an important role in articulating their members' views and concerns. For example, employee opinions were solicited on whether the amount of overtime worked was reasonable (question 5); introduction of new technology (question 3); flexible work arrangements (question 8); workplace harassment (question 10); performance appraisals (questions 26 to 31); promotion (questions 69 and 89).

The clear message conveyed by the survey and the promotional flyer that preceded it was that the unions were

not relevant in articulating the views of their members and did not have a role to play in bringing about necessary changes across the spectrum of workplace issues.

The Respondents' Role in the Survey

Throughout the hearing, the Respondents stressed that the opinion survey was not conceived or prepared by management. However, Yves Legault, the Co-Chair of the OPC, admitted in cross-examination that the Employee Opinion Survey would not have proceeded without the approval and support of the Senior Management Team, which included Mr. Marleau, Mr. Sabourin and Ms. Griffiths.

Mr. Sabourin, in cross-examination, conceded that House of Commons management would not send a survey directly to bargaining unit members regarding their pay and benefits. Mr. Sabourin also admitted that he continued to support the survey even after he became aware that the unions had strenuous objections to questions concerning compensation and benefits. In cross-examination, he was asked the following questions:

Q. *After the May 22nd union/management consultation meeting, you became aware that the unions had major difficulties with the survey?*

A. *Yes.*

Q. *You were aware that the unions saw this survey as undermining their authority to represent their members?*

A. *Yes, I was aware of that view.*

Q. *But nevertheless, management continued support for a survey which included questions which you agreed you would not send out directly?*

A. *Yes.*

Mr. Sabourin's explanation for proceeding with the survey in the face of the unions' objections was that there would have been a "lack of trust" and "cynicism" if the survey had not proceeded. Even when it became apparent that the unions had not been properly consulted in the survey project and that parts of the survey were inappropriate, the senior management of the House of Commons determined that legitimate concerns of the unions should be sacrificed so that the OPC not become cynical about management.

It is clear from the evidence which emerged during the hearing that the Senior Management Team, which included the Respondents, considered the Employee Opinion Survey to be an integral part of the renewal initiative, an initiative which the bargaining agents did not endorse and which they considered in many respects to be contrary to the interests of their members. It became something of a mantra during the hearing for the survey to be described as "employee-driven". However, when the complete submission to the Senior Management Team ***(Exhibit E-18)*** *was eventually disclosed, it became clear that the portrayal of the survey as an "employee-driven exercise" was a key part of the communications strategy devised by Dianne Salt of the Transition Team. Notwithstanding the efforts to put this "spin" on the survey, it is abundantly clear that the senior management of the House of Commons, including the Respondents, was involved in approving and supporting the survey from inception to completion.*

Both Mr. Marleau and Mr. Sabourin testified that in their view, the Clerk had the prerogative to veto questions in the survey which he considered to be inappropriate. The failure on the part of the Respondents was the failure to recognize that certain questions in the survey, particularly those dealing with compensation and benefits, were equally inappropriate given the union's legitimate role. Had the complainants been consulted and involved in the survey project at an early stage, it is altogether likely that any problems would have been worked out through meaningful consultation.

However, by the time the bargaining agents were informed of the survey, it had become part of an elaborate strategy which the Respondents had endorsed and which they were unwilling to delay or derail for fear of engendering a "loss of trust" on the part of the OPC. The survey and the communications surrounding it completely ignored the legitimate role played by the complainants not only in the "culture" of the House, but as the exclusive bargaining agent of more than half the employees of the House on terms and conditions of employment and related matters. In an already strained labour relations atmosphere, and in an environment where a six-year freeze on collective bargaining would already lead some employees to question the value of union representation, the survey was an invitation to employees to regard the bargaining agents as irrelevant to the identification and solution of workplace issues. By continuing to give their approval and financial support to a survey which conveyed this message, the Respondents breached s.6(1) of the ***Act****.*

Arguments for the Respondents

POSITION OF THE HOUSE OF COMMONS

It is respectfully submitted that the House of Commons ("the employer") has not interfered with the representation of employees by the Unions and therefore is not in violation of subsection 6(1) of the Parliamentary Employees Staff Relations Act.

The employer submits that the creation of the Survey was not a management initiative and, therefore, it had no obligation to consult with the Unions prior to the distribution of the Survey.

In the alternative, if this Board is to find that the Survey was a management initiative, the employer submits that there was no obligation on management to consult with the Unions. The employer, through the Survey, was merely communicating with its employees and was in no way undermining the existence of the Unions nor interfering with the Unions' right to represent their members.

The Unions have alleged that the Survey is an unlawful communication with unionized employees of the House of Commons, however, they have also alleged that extensive consultation with them during the creation of the Survey would make the communication lawful. Therefore, in the further alternative, if this Board finds that there was a duty to consult with the Unions in order to legitimize the communications, the employer submits that this duty was discharged through the meeting of May 22, 1996 and June 3, 1996.

The employer submits that the Survey was not a prohibited form of communication given that:

1. *The employer has not offended the general principles of communication;*

2. *The parties have a long standing collective bargaining relationship;*

3. *The communications were not made in the context of collective bargaining nor were the parties engaged in collective bargaining at the time of the communications; and*

4. *There was meaningful consultation between the parties.*

LEGAL ARGUMENT

Subsection 6(1) of the Parliamentary Employment Staff Relations Act provides as follows:

> *"No person who is employed in a managerial or confidential capacity, 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"*

General communications

It is submitted that direct communications with employees is not per se unlawful.

The Canada Labour Relations Board has provided a list of principles governing direct employer communications with employees in Brown and S.I.U. (Sedpex Inc.) (1988), (Board files 565-320, 745-2722, 745-2752), at page 17.

> *"Generally speaking the following principles apply to employer communications:*
>
> - *an employer may reply to what he perceives as propaganda, but he may not use promises of reward, intimidation, threats or other means of coercion to interfere with, undermine or derogate the union;*
> - *he may not threaten unpleasant consequences if something is done or not done by a union;*
> - *an employer may not malign or demean a union;*
> - *he may not make inappropriate selling pitches to employees over the head of the union;*
> - *the employer is not in the clear if he does not provide misleading information calculated to damage, or having the effect of damaging, the bargaining agent in the eyes of the people in the unit.*

In short, if an employer speaks the truth, and does so moderately and rationally, exercising appropriate recognition of the legitimacy and role of the bargaining agent, the communication will probably be judged to be within the realm of permissibility. Where the communication does not distort the truth or mislead, sets out a reasonably fair and accurate summary of the situation, does not denigrate the union or have the purpose and effect of undermining its efforts to represent its people, it can be considered to be outside the prohibition of section 184(1)(a)."

In the Ontario Labour Relations Board decision of A.N. Shaw Restoration Ltd. and O.P.C.M., Local 172, [1978] May O.L.R.B Rep. 393, at page 398, the Board examined the rules in Brown in the context of the collective bargaining process. The Board noted that during collective bargaining, any communications by an employer to its employees must be closely scrutinized for encroachments upon the union's right to bargain on behalf of its members.

> *"The existence of this well-established principle of exclusivity of bargaining right means that employers must be circumspect when communicating with employees represented by a bargaining agent,* ***especially when these communications occur during the course of negotiations****. The need for circumspection on the part of employers, however, does not mean that all communications between employer and employees are prohibited. ... Where communications occur between employer and employees during negotiations, the Board must draw a line dividing legitimate freedom of expression from illegal encroachments upon the union's exclusive right to bargain on behalf of the employees. The line is not an easy one to find, and can only be discovered by asking whether such communications in reality represent an attempt to bargain directly with the employees. If employer communications can be characterized in this manner, they must be regarded as unduly influencing employees and, therefore, falling outside the protection provided to freedom of expression in section 56." (emphasis added)*

In Rubbermaid Canada Inc. And United Automobile Workers, Local 252 (1985), 21 L.A.C. (3d) 168, the employer instituted a series of monthly lunch meetings at which employees invited to attend with senior officers of the company. Employees attended on a voluntary basis. There was no official union representation. At the meetings the senior officers reported on the company's progress and on various matters. Employees were given an opportunity to ask questions, provide suggestions, express their own views and generally discuss the progress of the company. Matters that might be the subject-matter of a grievance, or which touched on negotiations were not dealt with at these meetings. The Board concluded that such communications by the employer with its employees was not prohibited, and stated at page 170:

> *"There is no doubt that the union is the exclusive bargaining agent, and is the representative of the employees, being entitled to speak on their behalf in*

> *negotiations and in the administration of the collective agreement.*
>
> *. . .*
>
> *Although the union is the exclusive bargaining agent of the employees, management is not thereby prevented from communicating directly with employees in respect of the conduct of its operations* ***or from seeking their comments or suggestions about the enterprise generally****. There might be circumstances in which labour relations atmosphere was such that communications of this sort might in fact constitute an attempt to undermine the union, or to influence collective bargaining. . . In the instant case, however, the evidence does not reveal such an attempt on the part of the company. In particular,* ***there is no evidence of any attempt to bargain or to influence bargaining****, nor was there any attempt to handle grievances directly with employees."*

It is submitted that in distributing the Survey there was no promise of reward, intimidation, threat or other means of coercion used to interfere with, undermine or derogate the Unions, there was no threat of unpleasant consequences if something was or was not done by the Unions; the Unions were not maligned or demeaned; and there was no inappropriate selling pitches used in distributing the Survey to employees. Further, it is submitted that the Survey did not communicate any information to employees, but instead sought information from these employees on a voluntary and anonymous basis.

It is submitted that the Survey merely attempted to seek employee comments or suggestions about the atmosphere at the House of Commons generally. It is submitted that the employer did not attempt to bargain directly with its employees or to influence bargaining and therefore did not communicate with its employees in a prohibited manner.

Mature bargaining relationship

In evaluating whether a particular example of employer speech is prohibited by the governing statute, labour boards will consider the context in which the speech is offered. In Pride of Alberta, a Limited Partnership of Burns Foods (1985) Ltd. [1996] Alta. L.R.B.R. 143, the Alberta Labour Relations Board relied on a passage from Professor Adams' text, Canadian Labour Law, at paragraph 12 (quicklaw vesion (sic)*) as authority for the conclusion that direct communications by an employer where there is a long standing collective bargaining relationship should have less*

constraints than where the parties are new to collective bargaining.

> *" ...where an organizing campaign is underway or where the collective bargaining relationship is a new one, Boards will scrutinize employer speech more critically. The following passage from Adams text, Canadian Labour Law is illustrative of the approach:*
>
> > *An analysis of the cases tends to reveal that a more strict standard of communications is applied to employers during an organizing campaign than where a collective bargaining relationship is in place. Speech, where no trade union is in place, requires a more delicate appreciation of employee sensitivity. In the context of collective bargaining however, a Board is more likely to construe the information conveyed as justified and of a type employees ought to receive."*

In Canada Cement Lafarge Ltd. v. United Cement. Lime and Gypsum Workers' International Union, Local 368 [1980] O.L.R.B. 1583, the Board considered the impact of employer statements threatening months of plant closure and reduced employment in the future if employees did not accept a final offer. In view of the long standing collective bargaining relationship and the prevailing market conditions in the context of the employer's statement as a whole, the Ontario Board ruled that the "average" bargaining unit employee would understand the threat of closure as a "statement of bargaining reality" and the "mature" employee would be able to make up his or her own mind as to whether the prediction of future layoffs was accurate or not.

It is submitted that the employer and its Unions have long standing collective bargaining relationships. The bargaining unit of the CEP was first certified in March 1987; the bargaining unit of the SSEA was first certified in 1987; and the bargaining unit of the PSAC was first certified in May 1987. It is therefore submitted that given the longstanding collective bargaining relationship between the employer and its Unions, any direct communications by the employer should be subject to looser constraints than if the parties were new to collective bargaining.

Communications made in the context of collective bargaining

It is submitted that a survey that is not anonymous and that refers directly to collective bargaining issues or issues that

are the subject of ongoing negotiations between the employer and the union would be a prohibited form of communication.

In The United Nurses of Alberta and the Alberta Healthcare Association [1995] Alta. L.R.B.R. 373, questionnaires where conducted at four hospitals: one hospital sought opinions on whether employees would accept a 5% wage rollback, and if so, how to structure the rollback; another hospital held a staff meeting and individually polled employees, with responses identified by employee name; the third hospital held a staff meeting and solicited responses to a questionnaire, on a voluntary basis; and at the fourth hospital management held an employee meeting and directly sought wage concessions from the union local. In each situation layoffs were presented to employees as the inevitable result of any refusal to make wage concessions. The Alberta Labour Relations Board found at pages 23-24 (quicklaw version):

> *"In three of the cases at hand, the employer is seeking, by means of a poll or survey, to get an expression of employee support for a change in collective agreement terms. Why do the employers want that expression of employee wishes? The obvious answer is that they hoped it would put pressure on the Union to accept rollbacks as suggested by the government and sought by the employers...."*

In finding that there had been a violation of the governing labour relations statute, the Board relied on the fact that "there was no pretence of anonymity" in the surveys and the fact that "the questions bluntly referred to the prospect of layoffs". The Board added, at page 26 (quicklaw version) that if the surveys had been conducted in a different manner, they may not have violated the Labour Relations Act.

> *"Had this been a "give us your suggestion" type of questionnaire not dealing directly with matters then the subject of negotiations we might not even have found interference. However, its reference to layoff and wage and benefits reductions put it into the arena of topics clearly being dealt with by the Union in negotiations."*

In Staff Nurses Association of Alberta and University Hospitals Board [1995] Alta. L.R.B.R. 346 the employer commenced a process to redesign its patient care model. The unions were communicated with on issues that impacted upon the collective agreement and the unions permitted its members to participate in the project provided they did not address collective bargaining issues. When the employer did not address issues arising from the design project during renegotiation of the collective agreement, the union

complained that the employer was interfering with its representation of employees by direct discussion of design project issues with employees. In dismissing the union's complaint the Board held at pages 12-13 (quicklaw version):

> *"In this case, the [employer] has not made any proposals to change the collective agreement. It has just entered into a three year collective agreement with the [union] which it verbally and in writing repeatedly said it intended to uphold. This is consistent with the [employer's] contention that the implementation phase will occur over three years. There is no evidence to support the [union's] claim that recommendations coming from the Design Project are indeed the [employer's] proposals for change to the collective agreement. As a result, there was nothing for the parties to negotiate yet. Likely there will be future proposals to be negotiated but, the complaint is premature at this stage."*
>
> . . .
>
> *When the Design Project reaches the stage where it may impinge upon contractual terms and conditions, we agree the [employer] should consult with the [union] not the employees.*
>
> *The evidence does not satisfy us that the [employer] was participating or interfering with the representation of employees by a trade union. It was not attempting to negotiate with employees individually or collectively for changes to the collective agreement, thereby bypassing the [union]."*

The Board in Civic Service Union No. 52 and Edmonton Public Library [1995] Atla. L.R.B.R. 476 adopted the reasoning of the Board in Staff Nurses Association and concluded at pages 12, 14 (quicklaw version) that the Library's direct solicitation of its employees for support of a funding plan for the library's expansion did not amount to interference by the employer of the union's representation of its members.

> *"[W]e find the Library has not interfered with the representation of employees by the Union. The Library has not sought changes to the collective agreement, nor attempted to bargain in any fashion with the employees. The Library sought no changes to the employees' terms and conditions of employment.*
>
> . . .

> *. . . the Employer here was not trying to amend the collective agreement or alter the terms and conditions of employment. The Employer was not attempting to increase deductions from its employees' pay cheques or otherwise reduce their wages. Rather, the employees' contributions remained unaltered and were to remain so whether their Employer's efforts were successful or not. At best, from the Union's standpoint, as in Staff Nurses Assoc. of Alberta v. University Hospitals Board, this application is premature.*
>
> *. . .*
>
> *While the Library could have reduced tensions by approaching the Union before sending the Memo, the fact it chose not to, in the circumstances, is not a violation of the Code."*

In CUPE, Broadcast Division and Canadian Broadcasting Corporation 27 C.L.R.B.R. (2d) 110, the CBC's decision to implement direct consultation by the employer with employee members of the union in order to receive employee input into the corporation's upcoming restructuring was found to interfere with the representation of employees by their union. The Canada Labour Relations Board noted at pages 117, 119 that the subject matter being dealt with through consultation was the same as the issues that were the subject of ongoing collective bargaining or were otherwise enshrined in the collective agreement between the parties.

> *"[A]n employer's direct communications with its employees, while collective bargaining is in progress, that undermines or discredits the union in the eyes of the employees effectively contravenes both sections of the Code."*
>
> *. . .*
>
> *"Considering the fact that the employer and the union were involved in collective bargaining, and that major issues discussed with employees in the OFC process related to items that were either on the bargaining table or contained in the collective agreement, we conclude that the employer's conduct could only undermine the union in the eyes of its members and have an adverse effect on both the administration of the trade union and its representation as the exclusive bargaining agent of unionized employees. The employer's conduct therefore constituted a clear breach of both ss. 94(1)(a) and 50 of the Code."*

It is submitted that unlike the surveys in Alberta Health Care Association, the Survey in question at the House of Commons asked for suggestions from employees, did not deal with matters that were the subject of negotiations and was completely anonymous and voluntary.

It is submitted that as in Staff Nurses Association and Edmonton Public Library, there has been no evidence advanced at this hearing to suggest that the Employer does not intend to uphold the collective agreements governing its bargaining units, there is no evidence that the recommendations coming from the Employee Opinion Survey are proposals for changes to the collective agreement, the Survey is not at a stage where it may impinge on the terms and conditions of employment of the unionized employees at the House of Commons, nor has the employer sought changes to the collective agreements.

It is further submitted that unlike Edmonton Public Library, the OPC did approach the Unions prior to distributing the Survey and even changed portions of the Survey in response to the Unions' concerns.

It is submitted that unlike the situation in Canadian Broadcasting Corporation, there was no collective bargaining in progress at the House of Commons, therefore distribution of the Survey throughout the House of Commons could not have undermined the Union in the eyes of its members nor could it have had an adverse effect on the ability of the Unions to represent their employees.

Meaningful Consultation

It is submitted that any obligation with regard to meaningful consultation is not fulfilled if a party does no more than disseminate information. Consultation must include listening to suggestions, responding to questions and providing answers to why a party is or is not adopting suggestions.

In Treasury Board and Public Service Alliance of Canada, [1985] CPSSRB No. 158, the reasoning of Sidney Terminal Case (Board file 169-2-49) was adopted at page 14 (quicklaw version) with regard to the meaning of consultation.

> *"Mr. Jolliffe held ... that the parties intended consultation to mean that, in advance of the shift change there is a responsibility on the employer to explain fully and attempt to justify the reasons for the proposed changes. In other words, the employer would be in violation of the article if it took such a decision without considering the views of the Alliance. It does not follow,*

however, that the employer's failure to convince the union representatives of the need for the shift change constitutes a violation of the article. Indeed consultation need not result in agreement between the parties."

It is submitted that the OPC met with the bargaining agents on two occasions, May 22, 1996 and June 3, 1996. At both of these meetings the OPC explained the purpose of the Survey and answered questions with regard to the Survey. It is further submitted that the OPC, following the June 3, 1996 meeting, amended the Survey, in response to specific concerns raised by the bargaining agents.

It is therefore submitted that the OPC engaged in meaningful consultation with the bargaining agents prior to distributing the Survey throughout the House of Commons. It is submitted that the decision of the OPC to proceed with the Survey after it received requests from the bargaining agents not to proceed does not change the fact that meaningful consultation had taken place.

RELIEF REQUESTED

It is respectfully submitted, based on the foregoing, that this Board dismiss the complaints filed.

It is submitted that no person employed in a managerial or confidential capacity participated in or interfered with the formation or administration of an employee organization or the representation of employees by such an organization.

It is further submitted that no person acting on behalf of the employer participated in or interfered with the formation or administration of an employee organization or the representation of employees by such an organization.

Finally, it is submitted that the employer did not in fact or in law, as evidenced above, interfere with the formation or administration of an employee organization or the representation of employees by such an organization.

Reply of the complainants

In its written submissions, the employer has repeatedly suggested that senior management did not have any input into the creation of the survey, the survey questions and that management was not involved with the decision to proceed with the survey.

The facts do not support this suggestion:

- *one of the co-chairs of the OPC, Nathalie Hannah, was a managerial employee;*

- *the Clerk of the House, Mr. Marleau, informed the OPC that work on the survey could proceed on condition that he review the final draft survey prior to distribution. Mr. Marleau had the prerogative to veto questions in the survey which he considered to be inappropriate;*

- *Dianne Salt, a managerial employee, was in charge of developing a communications / marketing strategy for the implementation of the survey;*

- *The Project Workplan prepared by the OPC required that Mr. Marleau be given an opportunity to provide feedback and final approval of the survey;*

- *in designing the survey, the OPC consulted with the chairs of three management task forces;*

- *once the draft survey and draft communications strategy was completed, Mr. Marleau was asked to approve the survey questions, approve funds for consultant fees and to commit to senior management support;*

- *at Mr. Marleau's request, the OPC asked the Senior Management Team for approval to proceed with the survey and for funding to hire consultants. Both approvals were given;*

- *the bargaining agents were not given a copy of the survey until approval had been obtained from the Senior Management Team; and*

- *completed questionnaires were mailed free of postage in House of Commons envelopes endorsed with the Clerk's frank.*

- *Yves Legault, co-chair of the OPC, testified that the survey would not have proceeded without the support and approval of senior management.*

Contrary to the assertions made at paragraphs 22 and 47 of the employer's submissions, at the June 3, 1996 meeting, the unions expressed specific objections to the portion of the survey dealing with pay and benefits.

Contrary to the assertions made at paragraph 75 of the employer's submissions, with respect to pay and benefits, the survey did not ask for "suggestions", but instead bluntly asked whether the employees were "satisfied with pay and employee benefits".

Response to Employer's Legal Submissions

At paragraph 69, the employer makes the following critical admission:

> *It is submitted that a survey that is not anonymous and that refers directly to collective bargaining issues or issues that are the subject of negotiations between the employer and the union would be a prohibited form of communication.*

The employer has suggested that because the survey was anonymous, does not refer directly to collective bargaining issues, and was not undertaken during negotiations, the employer has not engaged in a prohibited form of communication.

Anonymity

The fact that a survey is anonymous is not relevant to the issue of whether the survey undermines a union's exclusive right to represent its members.

As indicated in the Alberta Healthcare Association decision referred to by the employer, a poll or survey of employees concerning issues relating to pay might well "put pressure on the union to accept [less in salary]." The fact that a survey is anonymous does not reduce the ability of an employer to effectively use the survey to later pressure a bargaining agent to accept less, nor does it reduce the effect of the implied suggestion that the union is not necessary to protect employee interests.

Bargaining Issues

As set out at pages 19 to 21 of the complainants' written submissions, the survey contained numerous questions in areas that are properly the subject of collective bargaining between the complainants and the House of Commons, such as pay and benefits.

Negotiations

The Shaw Restoration case referred to by the employer does not suggest that the limitations on employer communication with employees applies only during the

course of negotiations. The quote referred to by the employer at paragraph 62 of its submissions is general in nature, but makes specific reference to communications in the course of negotiations (which was the situation being analyzed by the Board in that case):

> *The existence of this well-established principle of exclusivity of bargaining rights means that employers must be circumspect when communicating with employees represented by a bargaining agent, especially when these communications occur during the course of negotiations.*

In the Rubbermaid Canada case referred to by the employer at paragraph 63 of its submissions, the arbitrator notes that employer communications will be prohibited when they "undermine the union or ...influence collective bargaining". In the Rubbermaid Canada case, the arbitrator noted that the employer communications with employees did not involve labour relations matters (p. 170).

Clearly, the union's role as exclusive bargaining agent can be undermined when an employer attempts to communicate directly with employees on workplace issues, whether or not the communication is made during negotiations with the union.

Conclusion

In summary, the employer has admitted that, subject to timing and anonymity issues, an employee survey that refers directly to collective bargaining issues is a prohibited form of employer communication. As outlined above, the fact that a survey is anonymous, or is circulated outside of negotiations, does not affect the fact that such a survey will inevitably serve to undermine the role of the bargaining agent. As such, the Employee Opinion Survey, authorized and paid for by management, was a prohibited form of communication.

Reply of the respondents

By way of reply the Respondent reiterates and relies upon its previous submissions.

The Respondent reiterates that in this Complaint the Complainants have not alleged that there was a failure to consult under a Collective Agreement, but rather they have alleged that the Respondent participated or interfered in the formation or administration of an employee organization. The Complainants in their submissions allege that the

Respondent did not engage in meaningful consultation. The Respondent reiterates that in fact meaningful consultation did take place.

The Complainants allege, at page 3 of their submissions, that they were not invited to participate in the Culture Task Force. However, it is submitted that Ms. Paquette testified that Anne Bouffard, at the meetings in July 1995, asked for union involvement in the Task Force. It is further submitted that the Culture Task Force was open to all employees of the House of Commons and nothing prevented the Unions from becoming involved in group.

The Complainants allege, at page 4 of their submissions, that Mr. Lytle was assigned to the steering committee of the Culture Task Force. It is submitted that Mr. Lytle was not assigned but chose voluntarily to sit on the steering committee. Mr. Lytle stated, in cross examination, that members of the Culture Task Force were asked to list the sub-groups they wished to be involved in. Mr. Lytle became a member of the steering committee because he listed it as one of the sub-groups he was interested in joining.

The Complainants allege, at page 7 of their submissions, that "a number of managers at the House were consulted about the survey". Mr. Legault testified that the OPC approached members of SMT prior to the May 15, 1996 SMT presentation. It is submitted that SMT members were approached in order to ensure that the OPC had the support of these members with regard to their funding request.

The Complainants state, at page 7 of their submissions, that the agenda for the May 22, 1996 UMC meeting "made no mention of the proposed survey". While this is correct, Mr. Morin stated in cross examination, that it is not unusual for the agenda to be deviated from at UMC meetings.

The Complainants allege, at page 9 of their submissions, that "[a]t the June 3rd meeting, the unions expressed specific objections to the portion of the survey dealing with pay and benefits". It is submitted that there was no evidence provided at the hearing to support this statement. It is further submitted that Mr. Batho, Mr. Lytle and Mr. Morin all admitted in cross examination that the Unions raised no specific objections at the June 3, 1996 meeting other than concerns with the preamble and the question relating to occupational groups.

The Complainants have relied on the following quotation from Saskatchewan Wheat Pool, *[1996] C.L.R.D. No. 17 Decision No. 1167, at pages 11 and 12 of their submissions,*

as authority for the fact that employers must respect the fine line which separates appropriate from inappropriate employer communications.

> *"However, what these decisions make clear as well is that the labour relations context within which such communications take place, the content of the communications themselves, and the consequences, intended or not, that they have on the authority of the bargaining agent are all critical factors in determining whether an employer has crossed the thin dividing line between what is proper direct communication under the Code and what is not. The communication process in a unionized work environment is a dynamic one which has, through its various permutations and forms, the potential to influence not only the employer-employee rapport but that of the employee-bargaining agent as well."*

It is not disputed that the Saskatchewan Wheat Pool *decision correctly sets out the test to be applied to determine the appropriateness of an employer's actions. It is submitted that application of this test to the instant case results in the conclusion that the communications that occurred were not prohibited by law. The context within which communications take place, their content and their consequences are stated as critical factors in determining the appropriateness of the communications.*

With regard to the context within which the communications occurred, it is submitted that there was no ongoing collective bargaining at the time of the Survey, no notices to bargain had been served by any bargaining agents at the House and the earliest any notice to bargain could be served was early 1998. With regard to the content of the communications, it is submitted that the content of the Survey does not refer directly to any collective agreement issue nor to an issue that related to any ongoing bargaining or negotiations between the employer and the bargaining agents. The communications were simply an anonymous and voluntary request for information. With regard to the consequences of the communications, it is submitted that no evidence was presented by the Unions detailing any harmful or potentially harmful consequences of collecting information through the Survey.

It is submitted that the Board in Saskatchewan Wheat Pool *found that there had been improper communications as a result of the fact that the communications related not only to matters that had been the subject of intensive negotiations but were also the core of the special negotiation process set up to resolve collective bargaining and also the fact that the*

communications took place immediately following the union executive's negative recommendation of the proposal to its bargaining unit. It is submitted that the circumstances in Saskatchewan Wheat Pool *are completely different from the circumstances of the instant case.*

The Complainants allege, at page 12 of their submissions, that the comments of the CLRB in CUPE and Canadian Broadcasting Corporation *, 27 C.L.R.B.R. (2d) 110 apply with equal force to the instant case. We do not agree. Our comments relate to the following extract from the* Canadian Broadcasting Corporation *case, relied upon by the Complainants.*

> *"However, in a union environment, the employer cannot institute an employee participation program - such as the OFC was - which focuses on areas that are directly the concern of the union in the collective agreement, or on the bargaining table, without involving the union itself in the establishment and conduct of the process. To be successful, any consultative program to be implemented by the employer in a unionized workplace must involve the union in a meaningful way." (emphasis added)*

It is submitted that the Survey does not focus on areas that are "directly the concern" of the Unions in the Collective Agreements or on the bargaining table. It is further submitted that the Survey simply provided an opportunity for employees to provide their opinions on general issues at the House of Commons. Mr. Batho, in his testimony attempted to relate questions from the Survey to provisions from his Collective Agreement, but was unsuccessful in providing much detail with the exception of the fact that a few questions in the Survey deal with the same or similar subjects to the Collective Agreement, but relate to entirely different issues within those subjects. For example, technological change is dealt with in both the Survey and the Collective Agreement. In the Survey the question concerning technological change (Question 3) relates to whether the House of Commons is properly applying new technology to employee work. In the Collective Agreement (Union Exhibit 2, article 10), however, the clause on technological change relates to the amount of notice of change to be provided, the contents of the notice of change, consultation with the union regarding retraining or reassignment relating to technological change and the provision retraining by the employer.

The extract of the Canadian Broadcasting Corporation *case relied upon by the Complainants also provides that "If the employer makes a genuine and reasonable effort to involve*

the union in a consultative process . . . and the union refuses to participate, the Board may decline . . . to exercise its discretion to grant a remedy. . . It is submitted that there was consultation with the Unions, both at the UMC meeting on May 22, 1996 and at the meeting set up to discuss the Survey on June 3, 1996. Apart from the two suggestions that were incorporated into the Survey the Unions did not provide any specific objections to the Survey and simply requested that the Survey be stopped. The fact that the Complainants are now relying on objections that they never discussed during consultation, in effect, amounts to a failure to participate in the consultation process.

The Complainants allege, at page 15 of their submissions, that they were not informed of the Survey prior to the May 22, 1996 UMC meeting. It is submitted that the Unions were invited to meetings in July 1995, wherein they were told of the Culture Task Force and given a poster that indicated that a Survey would possibly be undertaken by the Task Force. Ms. Paquette testified that each of the union representatives present at the meetings were given copies of the posters. It is further submitted that Mr. Lytle, Vice-president of the CEP, testified that he was a member of the steering committee of the Culture Task Force, the committee that oversaw all activities of the Task Force committees, including the OPC.

The Complainants allege, at page 15 of their submissions, that the consultation that took place between the OPC and the Unions occurred so late in the process that it placed the Unions in a situation where raising legitimate objections was viewed as obstructionist. It is submitted that no such evidence was presented at the hearing and that at no time did any party infer that legitimate objections would be labelled as obstructionist. It is further submitted that, as provided in Mr. Morin's testimony, the Unions did make legitimate objections concerning the preamble and the question on occupational groups, and that the OPC did respond to these objections by removing these areas from the Survey.

The Complainants allege, at page 16 of their submissions, that a freeze on bargaining make the bargaining agents more vulnerable to being undermined by the employer's communications with employees. It is submitted, however, that the Complainants did not present any evidence to support this statement, nor did it provide any comments with regard to the freeze on collective bargaining.

The Complainants allege, at page 17 of their submissions, that the existence of the statutory freeze and the workforce reductions might contribute to employees questioning the

desirability of the Unions. It is submitted that the Survey did not refer to either of these topics. It is further submitted that the Complainants did not provide any evidence at the hearing that related these topics to the Survey.

The Complainants state, at page 18 of their submissions, that the fact that there is no mention of the Unions in the introduction to the Survey sends the message to employees that they have no role in the workplace. It is submitted that during consultation on June 3, 1996, the Unions made specific reference to this section of the Survey and requested that a portion of it be removed. It is submitted that no other objections were raised at the meeting nor were any objections raise at the hearing concerning this section.

The Complainants rely on United Nurses of Alberta v. Alberta Healthcare Association, *[1995] 95 CLLC 143,11, at pages 18 and 19 of their submissions, as authority for the fact that communications with employees inevitably sends out several messages. However, the Board in* Alberta Healthcare Association *was faced with a very different situation to that of the instant case. In* Alberta Healthcare Association *employees were asked to choose, usually not voluntarily and not anonymously, between layoffs and a percentage decrease in pay. This is not the same as the instant case where no direct negotiations were occurring and where an anonymous and voluntary Survey requested attitudinal information from employees on various subject matters. It is submitted that the possibility of a wrong message being sent out to employees is greatly reduced where the communication occurs in an environment such as the one that existed in the instant case.*

The Complainants rely on a further quote from Saskatchewan Wheat Pool, *at page 20 of their submissions, as authority for the fact that soliciting views from employees about their compensation and benefits sends a message that the Unions are irrelevant. The* Saskatchewan Wheat Pool *case provides that a reason to restrict communication is to prevent employers from gaining a competitive advantage at the bargaining table. It is submitted that Mr. Legault testified that the information collected from employees was presented to SMT and the Unions at the same time. It is submitted that both the SMT and the Unions were provided with identical information at this meeting. The fact that the Complainants chose not to attend this meeting cannot be relied upon to justify the employer gaining a competitive advantage.*

The Complainants in their submissions state, at page 24, "[h]ad the complainants been consulted and involved in the survey project at an earlier stage, it is altogether likely that any problems would have been worked out through

meaningful consultation". It is submitted that this Complaint does not deal with the failure to consult. It is further submitted that it is easy to make such a statement after the fact, however, there was no evidence introduced by the Complainants that would indicate that this would have been the result. It is submitted that there was never any indication from the Complainants' evidence that the Unions would have gone along with the Survey.

The Complainants state, at pages 3 and 5 of their submissions, that the Respondent did not call either Ms. Bouffard or Ms. Salt to testify at the hearing. The Respondent submits that it was simply responding to the Unions' Complaints. Therefor, in order to deal with the issues and not the tangents, the Respondent did not call Ms. Bouffard or Ms. Salt, as evidence presented by other witnesses dealt with their involvement in the circumstances surrounding the Survey.

Based upon all of the evidence before this Board, it is our submission that the Survey and the communications surrounding it did not interfere with the formation or administration of the Unions in their representation of employees at the House of Commons.

It is therefore submitted that this application should be dismissed.

Reasons for decision

In June 1986 Parliament decided that some employees of the House of Commons and Senate could participate in collective bargaining. To that end, the *Parliamentary Employment and Staff Relations Act* was passed. The three complainants in these cases were certified as bargaining agents under the Act in 1987.

The collective bargaining process envisaged by the statute creates a bilateral regime under which the employer must deal with certified bargaining agents for the establishment of certain terms and conditions of employment. Such conditions of work are not negotiated between the employer and individual employees. Therefore in this context, one of the conditions sine qua non for collective bargaining to succeed is the primordial rule that the employer must bargain only with a union and must not interfere with the representation by a bargaining agent of its unionized employees.

To this end the *Parliamentary Employment and Staff Relations Act* allows for the certification of bargaining agents so that collective bargaining can take place within the parameters set out in the Act. The certification of a bargaining agent gives rise to certain rights and obligations contained principally in sections 5, 6, 7, 8 and 28 of the *Parliamentary Employment and Staff Relations Act*. Section 28 clearly states that upon certification, a bargaining agent has the exclusive right to bargain collectively for the employees in the bargaining unit for which it is certified.

It should be noted that the *Parliamentary Employment and Staff Relations Act* does not contain an employer free speech clause as do the *Alberta Labour Code* and the *Ontario Labour Relations Act*. Free speech clauses invariably stipulate that an employer does not violate the prohibition against interfering with the representation of unionized employees by reason only that the employer expresses its views so long as it does not use coercion, intimidation, threats, promises or undue influence.

In the *United Nurses of Alberta* case, referred to by the respondents, the Alberta Labour Relations Board engaged in a useful discussion of the question of employer communications with unionized employees and how those communications may interfere with a bargaining agent's right to represent its members (respondents' submissions, Tab 7, pages 20 and 21):

> *The cases dealing with interference tend to deal with the line between interference and free speech. This involves a balance. As the Ontario Board said:*
>
> > *While an employer is entitled to communicate directly with his employees notwithstanding the certification of a trade union, this right must be exercised judiciously and cannot be used to undermine the trade union's bargaining role.*
> >
> > *United Steelworkers of America v. Radio Shack [1979] C.L.L.C. para. 16,003 (Ont. L.R.B.)*
>
> *The Ontario Board elaborated on this theme in:*
>
> > *Operative Plasterers' and Cement Masons' International Association Local 172 v. A.N. Shaw Restoration Ltd. et al [1978] CLRBR 214 at 219.*
> >
> > *The existence of this well-established principle of exclusivity of bargaining rights means that employers must be circumspect when communicating with*

> *employees represented by a bargaining agent, especially when these communications occur during the course of negotiations. The need for circumspection on the part of employers, however, does not mean that all communications between employer and employees are prohibited. Section 56 of the Act, prohibiting employer interference with the formation, selection or administration of a trade union or the representation of employees by a trade union, expressly provides that this very general prohibition does not "deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence". Where communications occur between employer and employees during negotiations, the Board must draw a line dividing legitimate freedom of expression from illegal encroachments upon the union's exclusive right to bargain on behalf of the employees. The line is not an easy one to find, and can only be discovered by asking whether such communications in reality represent an attempt to bargain directly with the employees. If employer communications can be characterized in this manner, they must be regarded as unduly influencing employees and, therefore, falling outside the protection provided to freedom of expression in section 56. Once outside this protected area, such communications can be characterized as a violation of section 59 of the Act, and also a violation of the duty to bargain in good faith if they serve to undermine the viability of the bargaining agent.*
>
> *Several cases emphasize the heightened sensitivity needed if employers communicate directly with employees during bargaining. See for example, Union of Calgary Co-op Employees v. Calgary Co-op Association [1993] Alta. L.R.B.R. 335 at 358.*

Another and more useful discussion of the principles surrounding this issue is found in *Re Saskatchewan Wheat Pool*, a Canada Labour Relations Board decision referred to by the complainants in their written submissions (Tab 1, pages 12 and 13). The *Canada Labour Code*, like the *Parliamentary Employment and Staff Relations Act* does not contain a "free speech" clause:

> *[para29] This Board had many occasions recently to comment on the significance and extent of this prohibition as it relates to direct communications from the employer to the employees represented by a union. See: Aéroports de Montréal (1995), 97 di 116 (CLRB no. 1115); Canadian*

Broadcasting Corporation (1994), 96 di 122; 27 CLRBR (2d) 110; and 95 CLLC 220-028 (CLRB no. 1102); Canadian National Railway Company Limited and AMF Technotransport Inc. (1994), 94 di 11 (CLRB no. 1058). Similarly, provincial boards have issued words of caution with regard to communication matters between the employer and its unionized employees. See: Irving Oil Limited, August 4, 1995 (NBLRB) and Canada Safeway Limited et al., [1995] 3rd Quarter Sask. Labour Rep. 170.

[para30] What all of these decisions point to is, first, that this section does not mean that the employer should not engage, under any circumstances, in approaching employees directly on matters of employment interest. As indicated in Canadian Broadcasting Corporation, supra, workplace realities and trends being what they are, namely with respect to employee involvement and empowerment, greater consultation and interaction between management and labour on work-place issues is desirable and proper. Section 94(1)(a) is not meant to restrict this type of communications. But there is a requirement that, when instituting such a consultative or communication process, the employer ensure that "its implementation does not serve to subvert, circumvent or replace the union in its legitimate role as exclusive bargaining agent" (Canadian Broadcasting Corporation, supra, pages 134; 122; and 143,273).

[para31] However, what these decisions make clear as well is that the labour relations context within which such communications take place, the content of the communications themselves, and the consequences, intended or not, that they have on the authority of the bargaining agent are all critical factors in determining whether an employer has crossed the thin dividing line between what is proper direct communication under the Code and what is not. The communication process in a unionized work environment is a dynamic one which has, through its various permutations and forms, the potential to influence not only the employer-employee rapport but that of the employee-bargaining agent as well.

[para32] The limitations put on the communication process by section 94(1)(a) are to be understood within the context that a certified bargaining agent remains vested with the exclusive authority to fully represent the interests of its members and carry out all of its obligations under the Code. It relates ultimately to the centrality of the institution of collective bargaining within the broad scheme of the Code, and the attendant need to maintain the integrity of the collective bargaining process by protecting the parties to it.

In the present case the Board must determine whether the respondents who are all employed in a managerial capacity interfered with the representation of unionized members by the complainants. Two main questions must be answered. First does the June 6th survey constitute improper communication with unionized employees so as to interfere with their representation? Second, if the answer to the first question is in the affirmative, are the respondents responsible for the survey?

The basis for sound labour relations in any unionized workplace is communication. Sadly, these cases have shown that in 1996 communications between the parties were dismal. Inadequate interaction and lack of trust on both sides appear to be at the root of this unfortunate situation. With respect to the June 6th survey no meaningful consultation took place from which it could be said that the complainants were given a reasonable opportunity to participate in the process. Had such consultation taken place at an appropriate time and in a reasonable manner these disputes would likely not have arisen. Although each side to collective bargaining has rights and responsibilities, both management and union must show flexibility in the exercise of those rights to ensure harmony in the workplace.

The survey questionnaire covers several topics which are or can be the subject matter of collective bargaining between the parties. It is not crucial to this type of complaint that the communication with unionized employees take place during collective bargaining. Nor is evidence of intention to interfere necessary. At the crux of this matter is whether the survey interfered with the complainants' ability to represent their members.

Having considered all the evidence adduced as well as the submissions of the parties, I am satisfied that in a limited and subtle way it did. The survey questionnaire in dealing with pay and benefit issues, whether intentionally or not, raised questions as to the usefulness and necessity of the bargaining agents and hindered their ability to represent their members. The interference, although real was not, when placed in the context of this case, overly significant.

The evidence adduced clearly shows that the June 6th survey could not and would not have taken place without the support, both moral and financial, of the

senior management team of which Ms. Griffiths and Mr. Sabourin were members and Mr. Marleau was the head.

Clearly the survey questionnaire was adopted and promoted by the House of Commons management as a worthwhile initiative. The imprimatur given to this project by the SMT made it a management initiative. Even though the OPC was given a fair amount of freedom in the execution of the project the fact remains that survey could not have taken place without the approval and sanction of the respondents.

Given what precedes, I must therefore conclude that the respondents have breached subsection 6(1) of the *Parliamentary Employment and Staff Relations Act* and I make a declaration to that effect. In light of the nature of the breach and in the hope that the parties can get on with mending their somewhat strained relationship, the Board makes no other order.

Yvon Tarte
Chairperson

Ottawa, July 30, 1997