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File: 561-34-889

Citation: 2020 FPSLREB 11

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

ELIZABETH BERNARD

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Bernard v. Professional Institute of the Public Service of Canada

In the matter of a complaint made under section 190 of the *Federal Public Sector Labour Relations Act*

Before: David Orfald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

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

Decided on the basis of written submissions, filed January 18 and February 5, 2018, and July 25 and September 17, 2019.

REASONS FOR DECISION

I. Introduction

[1] Elizabeth Bernard ("the complainant") filed this complaint against her bargaining agent, the Professional Institute of the Public Service of Canada (PIPSC or "the respondent"), alleging that it committed an unfair labour practice by denying her the right to vote in a collective agreement ratification process.

[2] Ms. Bernard is an employee of the Canada Revenue Agency (CRA). Her position is included in the Audit, Financial and Scientific (AFS) bargaining unit there. PIPSC is the certified bargaining agent for that unit.

[3] While Ms. Bernard is in the AFS bargaining unit, she is what is commonly called a "Rand deductee" — an employee who pays dues to the bargaining agent but is not a member of it. Under PIPSC's by-laws, only its "Regular members" are entitled to take part in ratification votes.

[4] In December 2017, Ms. Bernard asked for a "voting key" to participate in a ratification vote on a tentative agreement reached between PIPSC and CRA for the AFS bargaining unit. PIPSC told her that to receive a voting key she would need to become a Regular member. It informed her as to how to change her status. She declined and filed this complaint.

[5] In its response to the complaint, PIPSC took the position that the complaint challenges an internal union matter, which does not engage the duty of fair representation (DFR). As such, it argued that the Federal Public Sector Labour Relations and Employment Board ("the Board") does not have jurisdiction over the complaint.

[6] In support of its position, PIPSC noted that this same issue was decided in *Sturkenboom v. Professional Institute of the Public Service of Canada*, 2012 PSLRB 81. The complainant in *Sturkenboom* was, like Ms. Bernard, a CRA employee in the AFS bargaining unit and a Rand deductee who was denied a voting key. The former Public Service Labour Relations Board (PSLRB) dismissed the complaint, finding that it was without jurisdiction to rule on an internal union matter and that the complaint was without merit.

[7] I find nothing in Ms. Bernard's arguments to convince me that I should depart from the PSLRB's finding in *Sturkenboom*. For that reason and those that follow, I dismiss her complaint for lack of jurisdiction.

[8] During the written submissions process, Ms. Bernard also raised issues with respect to identifying and notifying other persons who may be affected by this proceeding; those issues are also addressed in the reasons that follow.

II. Complaint before the Board

[9] Ms. Bernard filed this complaint on December 19, 2017, under s. 190(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). The complaint and accompanying documentation provided the following background information.

[10] On September 23, 2017, PIPSC and the CRA reached a tentative agreement for the renewal of the AFS collective agreement. On November 23, 2017, PIPSC announced that it would hold an electronic ratification vote of its members between December 6 and 20, 2017.

[11] On December 7, 2017, Ms. Bernard asked for a voting key to participate in the ratification vote. PIPSC told her that to receive one, she would need to become a Regular member, and it provided her with information on how to change her status. On December 13, 2017, she told PIPSC that she did not wish to become a Regular member but that she still believed that she should be allowed to vote. In the alternative, she asked how to appeal its decision. A PIPSC official replied the same day, repeating that only Regular members were entitled to vote and stating that she could appeal its decision to the Board, but also drawing her attention to the PSLRB's decision in *Sturkenboom*.

[12] Ms. Bernard proceeded to file this complaint. As corrective action, she asked the Board to "… order PIPSC to amend its policy on ratification votes to ensure that it complies with the Act."

[13] On January 18, 2018, PIPSC objected to the complaint on jurisdictional grounds. It took the position that ratification votes are an internal matter, governed solely by its by-laws. Under its by-laws, a Regular member is a person who belongs to a bargaining unit that PIPSC is certified to represent, who has made an application and has been

accepted as a member, and who has paid the requisite fee. By-law 10.3 provides that Regular members are entitled to participate in ratification votes on tentative agreements.

[14] In its response, PIPSC took the position in that it is well established that the Board does not have jurisdiction to intervene in internal union matters. It also argued that the Board lacks jurisdiction because the complainant failed to establish a *prima facie* violation of the *Act*. In other words, she provided no factual allegations that if proven true, would lead to a finding that the *Act* has been violated.

[15] The complainant provided her reply to PIPSC's position on February 5, 2018. She alleged that its by-laws violate s. 187 of the *Act*. She argued that the duty of fair representation should extend to its rules on ratifying collective agreements. She also alleged that the by-laws violate ss. 188(d) and (e) of the *Act*.

[16] The Board determined that it would hear the parties' jurisdictional arguments via written submissions, which were received from the respondent on July 25, 2019, and from the complainant on September 24, 2019.

[17] The complainant also asked for an order that PIPSC provide the Board with the names and home addresses of every Rand deductee in the bargaining unit. She argued that that was required for the Board to comply with s. 4 of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*"), which states that the Board must provide copies of initiating documents, such as this complaint, to "… any person who may be affected by the proceeding."

[18] Thus, there are two issues to be decided:

- Issue 1: Does the Board have jurisdiction to hear this complaint?
- Issue 2: Is the Board required under the *Regulations* to notify all Rand deductees in the relevant bargaining unit of this complaint?

III. Summary of the arguments

A. For the respondent

[19] PIPSC argued that the Board and its predecessors have consistently held that the duty of fair representation under s. 187 of the *Act* is not engaged when it comes to internal union matters, absent a specific legislative provision. That duty is concerned with representation as it relates to dealings between employees and their employer. It

does not extend to the internal workings of a bargaining agent. Among other cases, it referred me to *Bracciale v. Public Service Alliance of Canada (Union of Taxation Employees, Local 00048)*, 2000 PSSRB 88 at paras. 22 to 29; *St-James v. Canada Employment and Immigration Union Component (Public Service Alliance of Canada)*, PSSRB File No. 100-1 (19920331), [1992] C.P.S.S.R.B. No. 44 (QL); and *Kilby v. Public Service Alliance of Canada*, PSSRB File Nos. 161-02-808 and 150-02-44 (19980427), [1998] C.P.S.S.R.B. No. 28 (QL) at para. 33.

[20] Secondly, labour boards across Canada have consistently ruled that the ratification of a collective agreement is an internal union matter not covered by the duty of fair representation. In the absence of a legislative provision requiring bargaining agents to hold ratification votes on tentative agreements, the duty of fair representation is not engaged. Among other cases, PIPSC referred me to *Connolly (Re)* (1998), 107 di 120 at para. 107; *Pipe Line Contractors Association of Canada (Re)* (1984), 57 di 205; *Threlfall (Re)*, [2001] B.C.L.R.B.D. No. 37 (QL) at para. 58; and two decisions of the Canada Industrial Relations Board (CIRB): *Air Canada (Re)*, 2010 CIRB 539; and *Air Canada (Re)*, 2010 CIRB 540 at para. 49. They all stand for the proposition that labour boards do not have jurisdiction over a DFR complaint that alleges that a bargaining agent failed to comply with its internal by-laws or to hold ratification votes.

[21] Specifically, PIPSC argued that the PSLRB adopted that same principle not only in *Sturkenboom* but also in *Sahota v. Professional Institute of the Public Service of Canada*, 2012 PSLRB 114, which concerned a decision of PIPSC not to hold a ratification vote on a memorandum of understanding affecting a portion of a bargaining unit. The PSLRB concluded as follows:

…

> *[44] … No ratification was required under any bylaw or statutory provision. And, even had a ratification vote been required under the Institute's bylaws, a failure to hold one would still not necessarily have brought this matter under the scope of section 187 of the* Act*.*

…

[22] Although acknowledging that the Board is not bound by its predecessor's decisions in *Sturkenboom* or *Sahota*, PIPSC took the position that in a number of its decisions and those of its predecessors, the Board has emphasized the importance of consistency and predictability in its jurisprudence (see *Fehr v. Canada Revenue*

Agency, 2017 FPSLREB 17 at paras. 7, 72, and 73 (upheld in 2018 FCA 159 at para. 7); *Mackie v. Treasury Board (National Defence)*, 2003 PSSRB 103 at para. 27; and *Bazinet v. Treasury Board (Department of Public Works and Government Services)*, 2011 PSLRB 111 at paras. 24 and 25).

[23] As for the complainant's accusation that PIPSC's actions breached ss. 188(d) and (e) of the *Act*, it argued that its decision that Rand deductees cannot participate in ratification votes does not amount to discipline, a penalty, discrimination, intimidation, or coercion. Ms. Bernard was not in any way singled out by PIPSC; nor was its denial of a voting key for her in any way linked to her having exercised her rights under Parts 1 or 2 of the *Act*. She failed to provide any facts that would establish a *prima facie* breach of the *Act*.

[24] The respondent made no arguments with respect to the complainant's request that the Board order it to produce the names and home addresses of its Rand deductees so that the Board could notify them as other persons who may be affected by this proceeding.

B. For the complainant

[25] The complainant noted that since her complaint was filed in December of 2017, PIPSC held another ratification vote for her bargaining unit, in July 2019, in which she was once again excluded from voting.

[26] She argued that s. 187 applies to all matters related to the representation of employees in a bargaining unit, not just representation when it comes to grievances. While acknowledging that the *Act* does not require a bargaining agent to hold a ratification vote, she argued that when one decides to, it must carry out the vote in a way that complies with the *Act*, including ss. 187 and 188. She argued this is similar to the duty of fair representation when it comes to grievances. The *Act* does not require that every grievance be put forward, but it does require that a union's decision-making process about a grievance be free of arbitrariness, discrimination, and bad faith.

[27] The complainant argued that any cases about ratification votes decided under the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*") are inapplicable under the *Act* because the DFR provision in the *Code* is narrower than the one in the *Act*.

[28] The provision under the *Code*, s. 37, reads as follows:

> ***Duty of fair representation***
>
> ***37*** *A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith* ***in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.***
>
> [Emphasis added]

[29] The provision in the *Act*, s. 187, reads as follows:

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

[30] The complainant's argument is that the broader wording of s. 187 of the *Act* makes it clear that Parliament intended it to apply to all matters related to the representation of employees in a bargaining unit, while the provision in the *Code* is focused on representation with respect to rights under the collective agreement (i.e., grievances).

[31] She argued that PIPSC's by-laws are arbitrary, discriminatory, and constructed in bad faith and therefore that they violate s. 187. As such, the Board should take jurisdiction over her complaint.

[32] For the proposition that PIPSC's by-law is arbitrary, Ms. Bernard argued that all employees are subject to the collective agreement, but only some are allowed to vote. PIPSC provided no labour-relations purpose for excluding non-members from voting on the agreement. The Board should examine PIPSC's decision-making process using the same criteria for assessing the duty of fair representation in a grievance context. Citing *Lamolinaire v. Communications, Energy and Paperworkers Union of Canada*, 2009 CIRB 463, the issues would include whether PIPSC conducted a perfunctory or cursory inquiry or a thorough one and whether it gathered sufficient information to arrive at a sound decision. This duty extends to all non-members in the bargaining unit (see *McRaeJackson v. CAW-Canada*, 2004 CIRB 290).

[33] She noted that the Ontario Labour Relations Board (OLRB) took jurisdiction over a question of an employer bargaining agency's voting structure in *Sarnia Construction Assn. v. Operating Engineers Employer Bargaining Agency*, 2004 CanLII 27271 (ON LRB). She argued that if a labour board could take jurisdiction over how an employer bargaining agency ratifies a collective agreement, then a labour board should also take jurisdiction over how a union's ratification process works.

[34] With respect to the discrimination allegation, Ms. Bernard noted that some employees do not join their unions as a matter of religion or conscience. Among several cases cited, see as examples *A.R.R. v. Saskatchewan Government and General Employees' Union*, 2011 CanLII 8557 (SK LRB); and *La Roy v. Alberta Teachers' Association*, 2015 CanLII 8699 (AB LRB). In the complainant's bargaining unit, such an employee would engage clause 26.04 of the PIPSC-CRA collective agreement, which allows him or her to make a charitable donation equal to the union dues. However, such an employee is not considered a Regular member and would not be entitled to vote in a ratification process.

[35] According to the complainant, this demonstrates that PIPSC's by-laws discriminate on the basis of religion, which is a prohibited ground. Discrimination does not require intent — one need consider only the effect of a practice; see, for example, *Reeves v. Deputy Head (Department of National Defence)*, 2019 FPSLREB 61 at para. 179; and *Edwards v. Treasury Board (Canada Border Services Agency)*, 2019 FPSLREB 62 at para. 36. Thus, the issue is not whether PIPSC intended to discriminate on the basis of religion. The impact is that some employees are excluded from voting because of their religion.

[36] As for bad faith, Ms. Bernard argued that PIPSC and other bargaining agents have expelled some individuals from membership and therefore have excluded them from participating in ratification votes (see *Lampron v. Professional Institute of the Public Service of Canada*, 2011 PSLRB 29; *Johnson v. Professional Institute of the Public Service of Canada*, 2011 PSLRB 85 ("*Johnson 1*"); *Johnson v. Professional Institute of the Public Service of Canada*, 2011 PSLRB 86 ("*Johnson 2*"); and *Hunter v. Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN*, 2017 FPSLREB 4). The complainant argued that those members were expelled to advance the bargaining agent's interests and to punish employees who exercise their rights under the *Act* to join the employee organization of their choice. Once expelled,

they are then denied the right to participate in ratification votes, which is hostile and represents bad faith, according to Ms. Bernard.

[37] The complainant argued that the CIRB has taken a different approach, ruling that trade unions may not punish employees for exercising their fundamental freedoms (see *Teamsters, Local Union 847 v. Canadian Merchant Service Guild*, 2011 CIRB 605 (upheld in 2012 FCA 210)).

[38] The complainant also disputed the notion that the Board has no jurisdiction over internal union affairs. As evidence, she cited *Veillette v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 58 ("*Veillette 1*"); and *Veillette v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 64 ("*Veillette 2*"). In both cases, the PSLRB reviewed complaints about internal union discipline, despite the bargaining agent's arguments about the PSLRB's jurisdiction over "internal affairs". In the latter case, the PSLRB found that it could review a by-law or policy if the by-law or policy violated the *Act*, and it reached the same conclusion in *Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 103 at para. 62.

[39] Ms. Bernard argued that it is well within the Board's jurisdiction to ensure that the process that PIPSC uses to conclude a collective agreement complies with the duty of fair representation and the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6). For example, she asked, if PIPSC decided to hold a ratification vote open only to male employees in a bargaining unit, would the Board not intervene? And, if PIPSC decided to consult only with employees in Saskatchewan to determine its national bargaining strategy, would the Board decline jurisdiction on a complaint from employees in Nova Scotia?

[40] If the Board declines jurisdiction, the matter does not disappear, argued Ms. Bernard. It would then have to be decided by the Canadian Human Rights Tribunal or the Federal Court, which would subvert the statutory scheme set up by Parliament that the Board determine all public-sector labour-relations matters (see *St. Anne Nackawic Pulp & Paper v. CPU*, [1986] 1 SCR 704 at para. 16).

IV. Reasons

A. Issue 1: Does the Board have jurisdiction to hear this complaint?

[41] The complainant has been excluded from participating in a ratification vote of a collective agreement for her bargaining unit because the bargaining agent's by-laws permit only its "Regular members" to vote. She alleged that those by-laws violate s. 187 of the *Act*.

[42] The Board will consider questions of whether a bargaining agent has acted in a manner consistent with its obligations under the *Act*. With the exclusive right to represent the employees of a bargaining unit comes a corresponding obligation on its part to refrain from acting in a manner that is arbitrary or discriminatory or that is in bad faith, as set out in s. 187 of the *Act*.

[43] To address this issue, I will discuss the Board's jurisdiction on ratification votes, the applicability of the duty of fair representation to such votes and the complainant's allegations of bad faith and discrimination.

1. Board's jurisdiction on Ratification votes

[44] The first question that must be addressed is whether the complainant has established that the decision to exclude her from participating in a ratification vote on the basis of membership attracts the duty of fair representation.

[45] The Board's jurisprudence clearly establishes that ratification votes are internal union matters and not covered by the duty of fair representation.

[46] Ms. Bernard argued that there is "no merit" to the suggestion that I should follow the PSLRB's decision in *Sturkenboom* and that the Board is obligated to make its decision based on the facts and arguments before it. She added the following: "The facts and arguments I have presented are different from Mr. Sturkenboom's."

[47] I agree that I am not bound by the Board's predecessor's decision and that I must consider the complainant's facts and arguments.

[48] However, the essential facts provided in Ms. Bernard's complaint are identical to those of Mr. Sturkenboom. Both were CRA employees, both were in the AFS bargaining unit, and both had declined to become Regular members of PIPSC "… for reasons that are not in the public record …", as the complainant put it in her arguments. Therefore,

both were denied access to a voting key in a ratification vote after having been given the chance to change their status.

[49] Ms. Bernard provided no information to suggest that she personally had facts unique to those in *Sturkenboom*. In both of its written submissions, the respondent argued that Ms. Bernard did not provide a *prima facie* case of a violation of her rights. She was given the opportunity to respond to both submissions.

[50] Ms. Bernard's core arguments were identical to that in *Sturkenboom*. She alleged that PIPSC's by-laws violate s. 187 because they restrict voting rights to those who are Regular members. Section 187 of the *Act* reads as follows:

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

[51] In *Sturkenboom*, the PSLRB concluded it had no jurisdiction over the internal union issue of whether the right to vote on a tentative agreement should be extended to Rand deductees, stating as follows (at paragraph 31):

> …
>
> ***31*** *The procedure for conducting ratification votes, including granting or not granting a right to vote to non-members of the union, is governed by the PIPSC, not by the* Act. *Consequently, it is an internal union matter in which the Board does not intervene. It has been stated consistently in the case law, as in* White *or in* Bracciale et al.*, that the Board has no jurisdiction in internal union matters, except if specifically mentioned in the* Act.
>
> …

[52] In reaching that conclusion, the PSLRB found it significant that the *Act* specifically provides that all employees in a bargaining unit are entitled to vote in the following certain prescribed circumstances: certification votes (s. 65), de-certification votes (s. 95), employer final-offer votes (s. 183), and strike votes (s. 184). The PSLRB concluded that the *Act*'s silence on normal ratification votes renders them purely internal union matters. It stated, "The legislator, in regulating certain votes but remaining silent on others, has, in effect, spoken," (at paragraph 27).

[53] Also in *Sturkenboom*, the PSLRB made a number of findings that the decision to restrict voting to Regular members did not constitute an unfair labour practice. It stated as follows in particular:

> …
>
> ***20*** *… I cannot find that the union's policy and the communication of that policy by the respondents could in any way be considered as intimidation or coercion. I also find that the actions complained of were in no way meant to "compel" the complainant to join the union. He was invited to do so and advised that if he wished to vote, joining would be necessary, but advising a person that they must join an organization if they wish to benefit from certain privileges is not conduct which rises to the level of "compelling" someone to join. The* Act *does not guarantee that employees who decide not to join the union will be granted the same rights and privileges that can come with union membership.*
>
> …
>
> ***32*** *The complainant alleged the respondents violated the duty of fair representation found in section 187 of the* Act*. In such a complaint, the complainant must prove that the respondents acted in a manner that was arbitrary, discriminatory or in bad faith. The complainant argued that the union's policy was arbitrary, discriminatory and in bad faith in that it "favour(s) the PIPSC's own members". There is, however, no evidence that the respondents acted in a discriminatory manner towards him as there is no evidence to prove that the policy was not uniformly applied or that it took into account considerations that it ought not to have. Furthermore, that policy is based on long-standing and legislatively accepted principles, and its content cannot be construed as violating section 187 of the* Act*.*
>
> …

[54] Also in *Sturkenboom*, the PSLRB reviewed the history of the Rand formula and how it came to be adopted in the post-war era as a way of resolving the "closed shop" or "union shop" issue that was the centre of many labour disputes at the time. Following a difficult strike situation, in *Ford Motor Co. of Canada v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America (U.A.W.-C.I.O.)*, [1946] O.L.A.A. No. 1 (QL), Justice Rand came up with the solution that all employees in a bargaining unit would pay dues but would not be obligated to belong to the union. This struck a balance between the opposing interests that had led to the strike. The solution survived and has become a feature of many unionized workplaces across the country, including the federal government. The PSLRB then concluded as follows:

…

> ***30*** *When a union is certified as a bargaining agent, it obtains the exclusive right and the responsibility to negotiate the working conditions for the employees included in the bargaining unit. As part of the bargaining process, the union can consult the employees, informally or formally through votes, on the bargaining proposals, the bargaining priorities or the acceptance of a tentative agreement with the employer. However, it does not have to. If the union decides to formally consult the employees with a vote, it runs that process and might decide, as it did in this case, to limit the right to vote to its members and to deny it to employees who chose to not become members. That does not constitute an unfair labour practice.*

…

[55] Ms. Bernard provided no convincing argument as to why I should reach a different conclusion, and I agree with the PSLRB's conclusion in *Sturkenboom*.

[56] I will address the complainant's arguments related to *Sarnia Construction Assn.*, in which the OLRB did take jurisdiction over an issue of the voting structure used to carry out the employer ratification of a collective agreement in a dispute that arose between two parties: an employer bargaining agency, and one of the employer members of that agency. At issue was a provision in the Ontario *Labour Relations Act, 1995* (S.O. 1995, c. 1, Sched. A; "the *OLRA*") that imposed a duty of fair representation upon the employer bargaining agency. Although the OLRB's decision to take jurisdiction would appear to be a different conclusion than in the jurisprudence concerning union ratification votes, in fact, the OLRB's analysis of the law at issue was that "[b]oth the statutory power and the real life activity of employer bargaining agencies and employee bargaining agencies are entirely different," (at paragraph 67). The duty of fair representation imposed on the employer bargaining agency was tied directly to a ratification process spelled out in s. 156 of the *OLRA*. The employer bargaining agency lacked any organizational structure or responsibility for administering the collective agreement in that case. It existed primarily to facilitate bargaining and ratification across a group of employers. For that reason, the OLRB took jurisdiction over the complaint, not because it read ratification votes into the term "representation".

[57] Significantly, having taken jurisdiction, the OLRB did not find that the voting structure was arbitrary or discriminatory to any particular group of employers, concluding that "[a] structure will be arbitrary or discriminatory to a particular group

only where the voting structure is so disproportionate to the labour relations stake of a certain group that it bears no reasonable relationship to the interest that group has in bargaining," (at paragraph 158).

[58] In conclusion, in my reading, *Sarnia Construction Assn.* does not stand for the proposition that labour boards should take jurisdiction over the issue of ratification votes being conducted by unions.

[59] Similarly, although the complainant correctly pointed out that the duty of fair representation extends to non-members, none of the cases she cited, including *Lamolinaire* and *McRaeJackson*, established that this duty extends to matters that do not engage representation vis-à-vis an employer.

[60] While I appreciate the complainant's careful reading of the differences between s. 37 of the *Code* and s. 187 of the *Act*, the underlying question raised by this complaint is the same as the one that has arisen in similar cases under the *Code*: Are ratification votes an internal union matter, and if so, is there any valid legislative ground for the Board to intervene? I have found none.

2. Duty of Fair Representation in Ratification Votes

[61] Even if I had been persuaded by the complainant's argument that the duty of fair representation extends to how the bargaining agent conducts its votes, the question before me would be: Has the complainant established that the decision to exclude her from participating in the ratification vote, on the basis of membership, was arbitrary, discriminatory, or in bad faith?

[62] It must be recognized that as a starting point, Parliament has provided for collective bargaining in the federal public sector. In the preamble of the *Act*, Parliament recognized the important place of collective bargaining in effective labour-management relations and the role of bargaining agents to "… represent the interests of employees in collective bargaining and participate in the resolution of workplace issues and rights disputes …" The collective bargaining process begins with an employee organization seeking certification as a bargaining agent. To be successful, the Board must be satisfied that it has the support of a majority of employees in that bargaining unit. From the inception of the collective bargaining relationship, a democratic process is at play.

[63] To participate in the life and affairs of the bargaining agent, its by-laws set out that an employee must choose to participate and must take steps to become one of its members. This is consistent with the balance Justice Rand struck in *Ford Motor Co. of Canada*. The Supreme Court of Canada also recently recognized this approach as follows in *Bernard v. Canada (Attorney General)*, 2014 SCC 13 at para. 21:

> *[21] …* [the bargaining agent] *has the* exclusive *right to bargain on behalf of* all *employees in a given bargaining unit, including Rand employees. The union is the exclusive agent for those employees with respect to their rights under the collective agreement.* ***While an employee is undoubtedly free not to join the union and to decide to become a Rand employee,*** *he or she may not opt out of the exclusive bargaining relationship, nor the representational duties that a union owes to employees.*
>
> [Emphasis added]

[64] If an employee chooses to participate in the life of the bargaining agent by becoming a member, PIPSC's by-laws provide that the member may then participate in the selection of the representatives. By extension, through its elected representatives, members participate in determining the mandate for collective bargaining. Thus, when PIPSC comes to the bargaining table, it does so with a mandate that has the support of its membership. Following negotiations, there may be a tentative agreement. Except in certain situations not applicable in this case, PIPSC is not required by the *Act* to hold a ratification vote. It may choose whether to bring the proposal back for a vote. If a ratification vote is held, the complainant's view is that as she is affected by the collective agreement, she should be allowed to participate in the ratification process. However, the bargaining agent has determined that only its members may vote on a proposal; that is, only those may vote who have demonstrated their desire to participate in the collective bargaining process by becoming members.

[65] A parallel can be drawn between the bargaining agent's requirements in this matter, as set out in its by-laws, and the requirements to vote in a federal election, as set out in s. 3 of the *Canada Elections Act* (S.C. 2000, c.9). All the people who reside in this country will be affected by the laws enacted by Parliament. However, it is not enough to merely live in this country to be allowed to vote; one must be a citizen. Anyone living in this country that is not a citizen but wishes to vote must take the necessary steps to become a citizen.

[66] The bargaining agent's decision to limit voting rights to its members is not arbitrary; in fact, it is rationally connected to its ability to carry out its bargaining agent role in the collective bargaining process.

3. Allegations of Discrimination and Bad Faith

[67] I will now turn to the complainant's arguments with respect to discrimination and bad faith. In doing so, I note that these arguments were not addressed in *Sturkenboom*.

[68] The complainant argued that PIPSC's by-laws discriminate on the basis of religion. Some employees in a bargaining unit do not join PIPSC because of religion, and the collective agreement provides that they can direct an amount of money equivalent to the dues to a charity of their choice. As a result, they are not Regular members under PIPSC's by-laws and cannot participate in a ratification vote. Therefore, the by-laws amount to discrimination, she argued.

[69] The problem with this line of argument is that Ms. Bernard provided no information to indicate that her religion was a factor in her decision not to become a member of the respondent. In fact, in her arguments, she distinguished herself as someone who chose not to join for other reasons.

[70] In short, she provided no *prima facie* information to suggest that she was subjected to discrimination.

[71] Similarly, she argued that PIPSC's by-laws represent a violation of s. 188 but provided no *prima facie* information to suggest that her personal rights were engaged by s. 188. That section of the *Act* reads in part as follows:

> ***Unfair labour practices — employee organizations***
>
> ***188*** *No employee organization and no officer or representative of an employee organization or other person acting on behalf of an employee organization shall*
>
> …
>
> ***(d)*** *expel or suspend an employee from membership in the employee organization, or take disciplinary action against, or impose any form of penalty on, an employee by reason of that employee having exercised any right under this Part or Part 2 or 2.1 or having refused to perform an act that is contrary to this Part or Division 1 of Part 2.1; or*

> ***(e)*** *discriminate against a person with respect to membership in an employee organization, or intimidate or coerce a person or impose a financial or other penalty on a person, because that person has*
>
> > ***(i)*** *testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part or Part 2 or 2.1,*
> >
> > ***(ii)*** *made an application or filed a complaint under this Part or Division 1 of Part 2.1 or presented a grievance under Part 2 or Division 2 of Part 2.1, or*
> >
> > ***(iii)*** *exercised any right under this Part or Part 2 or 2.1.*

[72] The prohibitions outlined in s. 188 must be linked to a person who has exercised a right under Parts 1 or 2 of the *Act*; in other words, he or she filed a complaint or a grievance.

[73] The complainant made no explicit link as to how PIPSC's actions violated s. 188. In her arguments, she referred to cases in which PIPSC had expelled an individual from membership (see her citations of *Lampron*, *Johnson 1*, *Johnson 2*, *Veillette 1*, *Veillette 2*, and *Bremsak*). She stated that those expulsions were made in bad faith and suggested that since expelled members are not entitled to vote, there is evidence that PIPSC's by-laws provide for differential representation of a member for reasons of bad faith.

[74] However, the PSLRB dismissed the complaints in *Lampron*, *Johnson 1*, and *Johnson 2* on the basis of timeliness, and Ms. Bernard's viewpoint that those expulsions were made in bad faith is merely an opinion, not a finding.

[75] With respect to the complaints in *Veillette 1*, *Veillette 2*, and *Bremsak*, I note that they were filed in relation to the provisions of s. 188 and that all were founded. This undermines the complainant's argument that the Board takes a different approach than does the CIRB. However, s. 188 is distinct and separate from s. 187. In any case, the complainants' memberships in those cases were reinstated.

[76] The weakness in her argument is made fatal by the fact that her complaint provides no *prima facie* evidence that she herself was expelled, suspended, discriminated against, intimidated, or coerced for making an application or a complaint under any part of the *Act*.

[77] Lacking any *prima facie* evidence related to either the religion argument or the suggestion that PIPSC is in violation of s. 188, I can conclude only that Ms. Bernard is

making hypothetical arguments on behalf of unnamed others. Following the Federal Court of Appeal's conclusions in *Bernard v. Close*, 2017 FCA 52 at para. 9 and *Bernard v. Canada (Professional Institute of the Public Service)*, 2019 FCA 236 at para. 15, I find no basis for the complainant to advance this aspect of her complaint on behalf of other persons.

[78] In summary, I find no reason to reach a different conclusion than the PSLRB did in *Sturkenboom*. I also find no basis to take jurisdiction over her complaint based on her arguments involving religion, or bad faith related to s. 188. In neither case has she provided any *prima facie* evidence that she has personally experienced discrimination, coercion, or bad-faith treatment from the respondent.

[79] Accordingly, the complaint is dismissed.

B. Issue 2: Is the Board required under the *Regulations* to notify all Rand deductees in the relevant bargaining unit of this complaint?

[80] In her submissions, Ms. Bernard asked the Board to order PIPSC to produce (only to the Board) a list of the names and addresses of those CRA employees in the AFS bargaining unit who are not Regular members of PIPSC. She argued that it is required so that the Board may discharge its duty under s. 4 of the *Regulations*, which states as follows:

> ***4*** *On receipt of an initiating document or, in the case of an initiating document sent by fax, on receipt of the original of the document and the copy, the Board must provide copies to the other party and to any person who may be affected by the proceeding.*

[81] In essence, Ms. Bernard argued that every other Rand deductee is a person who may be affected by the proceeding and that the Board should forward to each of them a copy of her complaint so that they can decide whether to apply to the Board for intervenor status.

[82] In addition, Ms. Bernard challenged naming her employer as another person who may be affected, in accordance with s. 4 of the *Regulations*. She also suggested that this was evidence that the Board had concluded that her complaint was more than an internal union matter.

[83] The Board named the CRA as a person that may be affected when it received the complaint. Naming the employer as a person that may be affected does not mean that it is granted intervenor status. It is provided with the initiating document and any subsequent correspondence. If it wished to intervene, it would still have to make an application, which would be determined by the Board.

[84] The Board would not determine on intake whether a DFR complaint concerns an internal union matter, and it did not do so in this case. That determination is made only after hearing the submissions of the complainant and the respondent.

[85] Naming the employer as a person that may be affected in DFR complaints reflects the fact that sometimes, an employer's interests could be engaged (for example, in a grievance context). It is consistent with the preamble to the *Act*, which speaks to fostering mutual respect and harmonious relations between employers and bargaining agents.

[86] I see no error or prejudice in Ms. Bernard's employer having been named as a person that may be affected, in accordance with s. 4 of the *Regulations*.

[87] With respect to other Rand deductees, having concluded that the Board is without jurisdiction to rule on Ms. Bernard's complaint, the question of notifying other affected persons is now rendered moot. However, I will also consider the request on its merits.

[88] Ms. Bernard's request would have involved the Board sending notice of her complaint to the entire population of Rand deductees in the AFS bargaining unit. This could well have involved several hundred individuals, if not more than a thousand. They all would have then been copied on all subsequent correspondence between the parties and the Board.

[89] Moreover, were Rand deductees in the AFS bargaining unit declared persons who may be affected, logic would suggest that such affected status would also apply to Rand deductees in other PIPSC bargaining units or even those in the bargaining units of other bargaining agents with rules similar to those of PIPSC.

[90] Similarly, were the Board to adopt such a broad interpretation of what it means to be an affected person, then any grievance on a particular collective agreement article (for example, the proper interpretation of an article on the distribution of

overtime) could extend to every employee covered by that article (e.g., any employee that works overtime).

[91] This cannot be what s. 4 of the *Regulations* requires. Giving such a broad interpretation to affected parties would work against the principle in the preamble to the *Act* that states that "… the Government of Canada is committed to fair, credible **and efficient resolution** of matters arising in respect of terms and conditions of employment …" (emphasis added). A narrower interpretation does not in any way prevent another person within the bargaining unit from initiating a complaint. In managing its procedure, the Board remains alert to ensuring the efficient resolution of matters and the wise use of resources. On this point, I note that the *Regulations* also provide at s. 13 that the Board may consolidate proceedings to ensure their expeditious resolution.

[92] To give effect to Ms. Bernard's proposed interpretation of s. 4 would not only run counter to the purpose of the *Act* as set out in the preamble, it would also not be a wise use of judicial resources. The Board is not required to provide notice to other employees in a bargaining unit when a complaint is brought against the bargaining agent.

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

(The Order appears on the next page)

V. Order

[94] The complaint is dismissed.

February 11, 2020.

David Orfald,
A panel of the Federal Public Sector
Labour Relations and Employment Board