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File: 561-02-47829

Citation: 2024 FPSLREB 62

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

TANYA BOAM, CYNTHIA OSTERTAG, DENEENE CURRY, NARMIN HASSAM-CLARK, LISA FLEURY, AND MELISSA WOOD

Complainants

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Boam v. Public Service Alliance of Canada

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

Before: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainants: Tanya Boam

For the Respondent: Sandra Gaballa, Public Service Alliance of Canada

Decided on the basis of written submissions, filed August 31, October 4, and November 1 and 8, 2023, and January 12 and 18, 2024.

REASONS FOR DECISION

I. Overview

[1] Six civilian members ("CMs") of the Royal Canadian Mounted Police (RCMP) have filed a complaint alleging that their bargaining agent, the Public Service Alliance of Canada (PSAC), has violated its duty of fair representation. The essence of their complaint is that PSAC has failed to communicate properly with them and other CMs whom it represents.

[2] As I will set out in this decision, the subject matter of this complaint falls outside the jurisdiction of the Federal Public Sector Labour Relations and Employment Board ("the Board"). The Board's jurisdiction over the duty of fair representation has two preconditions: the subject of the representation must (1) fall under the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), and (2) involve a complainant's individual relationship with their employer or the collective relationship between an employer and the bargaining unit as a whole. Most of the lack of communication was about issues that fall outside the *Act* or that are governed exclusively by other provisions in the *Act*. Even the one area of communication that fell within the *Act* (the fact of representation) fails the second precondition as it was not about an individual dispute between the complainants and their employer or about PSAC's communication to the bargaining unit as a whole in the context of collective bargaining.

[3] I have dismissed the complaint as a result.

II. Procedure followed to decide the complaint

[4] The Board (which in this decision also refers to any of the current Board's predecessors) is empowered to decide a complaint on the basis of written submissions because of its power to decide "… any matter before it without holding an oral hearing" in accordance with s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) and *Walcott v. Public Service Alliance of Canada*, 2024 FCA 68.

[5] On July 13, 2023, Tanya Boam filed this complaint on her own behalf and on behalf of five other CMs: Cynthia Ostertag, Deneene Curry, Narmin Hassam-Clark, Lisa Fleury, and Melissa Wood (collectively, "the complainants"). PSAC responded to the

complaint on August 31, 2023, and asked that it be dismissed on two preliminary grounds: that the Board does not have the jurisdiction to hear it, and that it is untimely. The complainants filed a reply on October 4, 2023. The Board then asked PSAC to file a rebuttal, which it did on November 1, 2023. The complainants filed another response to that rebuttal on November 8, 2023.

[6] A different member of the Board decided that PSAC's preliminary objection over the Board's jurisdiction would be addressed first and by way of further written submissions. The complainants filed their further submissions on January 12, 2024, and PSAC responded on January 18, 2024.

[7] After reading those new submissions, I share the opinion of my colleague that the issue of the Board's jurisdiction can be addressed in writing. The Board has often decided duty-of-fair-representation complaints in writing when the initial issue involves the Board's jurisdiction; see *Messer v. Public Service Alliance of Canada*, 2024 FPSLREB 6, and the other cases cited at paragraph 4 of that decision. Additionally, there are no facts about the issue of whether the Board has the jurisdiction to hear this complaint that require an oral hearing or the cross-examination of witnesses to resolve. Instead, I have assumed the complainants' concerns to be factually true and have assessed whether the Board has the jurisdiction to hear a complaint based on such concerns.

III. Factual context to the complaint

[8] This complaint has its origins in something referred to in the RCMP as the "Category of Employee" issue. By way of background, there are three categories of workers in the RCMP: regular members (RMs), CMs, and public service employees (PSEs). RMs are members of the RCMP who are appointed under the *Royal Canadian Mounted Police Act* (R.S.C., 1985, c. R-10; "*RCMP Act*") to a rank in the RCMP plus special constables; see the *Royal Canadian Mounted Police Regulations, 2014* (SOR/2014-281; "*RCMP Regulations 2014*"), s. 1. RMs perform the duties normally associated with police officers. CMs are members of the RCMP who are appointed to a level (instead of a rank) under the *RCMP Act*; see *RCMP Regulations 2014*, s. 1. PSEs are employees appointed under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13). Both CMs and PSEs perform a wide range of duties that support the work of the RCMP.

[9] The distinction between CMs and PSEs has been a matter of concern for decades. In *Rebuilding the Trust: Task Force on Governance and Cultural Change in the RCMP* (2007), the authors noted at page 34 that "… it is difficult to discern why a CM position exists when the duties and responsibilities are indistinguishable from those of a PSE", and that "[o]ver the past 20 years or so there have been several attempts to clarify and regularize the current situation beginning with a Categories of Employees study which began in 1995." They recommended that the RCMP determine whether it had a continuing need for two categories of civilian workers.

[10] In 2013, Parliament passed the *Enhancing Royal Canadian Mounted Police Accountability Act* (S.C. 2013, c. 18). Section 86 of that Act provides that Treasury Board may deem CMs to be PSEs on a date published in the *Canada Gazette*. The RCMP more commonly refers to this as "deeming". Treasury Board initially announced that the deeming date for CMs to become PSEs would be April 26, 2018 (*Canada Gazette*, Part I, Vol. 151, No. 6, p. 672), then extended it to May 21, 2020 (*Canada Gazette*, Part I, Vol. 152, No. 14, p. 1134), and then finally revoked that deeming date and never replaced it (*Canada Gazette*, Part I, Vol. 154, No. 18, p. 869).

[11] Before the Category of Employee project was shelved, the RCMP spent years working towards it. One thing the RCMP did was to divide CMs into different occupational groups and subgroups and then match those groups and subgroups to existing public service occupational groups as much as possible. The pay for CMs was also matched to existing public service occupational groups (although other terms and conditions of employment remained different). The Board described this process in *Public Service Alliance of Canada v. Treasury Board*, 2020 FPSLREB 105.

[12] One difference between being a CM and a PSE used to be that CMs could not engage in collective bargaining. On January 16, 2015, the Supreme Court of Canada struck down the prohibition on members of the RCMP engaging in collective bargaining; see *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1. That decision impacted both RMs and CMs. Eventually, Parliament amended the *Act* to include RCMP members within its ambit.

[13] On November 30, 2017, after those amendments to the *Act* came into force, PSAC filed 14 applications with the Board, asking for CMs in certain RCMP occupational subgroups to be included in 1 of 4 bargaining units represented by PSAC

for the corresponding or matching occupational subgroup for PSEs. Those applications were put on hold pending the deeming of CMs into PSEs (which would make the application moot). As deeming was slowed and then eventually shelved, the Board had to deal with those applications. On November 26, 2020, the Board granted 5 orders in essence declaring that CMs occupying positions in the relevant occupational subgroups are included in the bargaining unit represented by PSAC contained within the matching group or subgroup. Those decisions bear the citations 2020 FPSLREB 105 through 109, inclusively. In short, CMs in occupational groups that matched the PSE occupational groups already represented by PSAC were rolled into those PSAC bargaining units.

IV. Nature of the complaint

[14] The complaint is about the quality of communication by PSAC to CMs it represented after PSAC became their certified bargaining agent on November 26, 2020. The complainants specifically complain about the following:

- PSAC did not communicate directly with CMs after November 26, 2020, to inform them that they were represented by PSAC and to provide them with an orientation package or invite them to become members of PSAC, despite PSAC having been provided with personal contact information by the employer;
- PSAC's internal handbook requires local or branch officers to ensure that each worker in their local/branch is asked to sign a union card and receives information about the union in a timely way, and this was not done;
- PSAC has a union orientation kit for new members that was never provided to CMs;
- the information provided on the website of the relevant component of PSAC (the Union of Safety and Justice Employees (USJE)) is unhelpful because CMs had not been notified of their representation or where to find information;
- during the strike conducted by PSAC in 2023, there continued to be a lack of communication and clarity about the status of CMs and the expectations about whether they should participate in the strike; and
- PSAC's strike vote commenced on February 22, 2023, yet CMs were not sent a voting package for that strike until sometime in March 2023, which reduced the amount of time available to cast their votes. The complainants also allege that there were difficulties logging on to PSAC's website at that time.

[15] The complainants submit that this treatment is discriminatory compared to their PSE counterparts. While the complaint does not say so explicitly, I have inferred

that the complainants state that new PSEs have received orientation packages and other communication from PSAC.

[16] PSAC denies that it acted in a manner that was discriminatory or inappropriate, and it provided a list of communications sent to the complainants and other CMs from 2018 through 2023 as well as information about what was posted on the USJE's website about CMs.

[17] At this stage, I am not deciding whether the complainants have proven their allegations. I am ruling only whether the Board has the jurisdiction to hear these allegations.

V. The complaint falls outside the Board's jurisdiction

A. The scope of the duty of fair representation

[18] This complaint alleges that PSAC violated s. 187 of the *Act*, which codifies a bargaining agent's duty of fair representation to the employees in the bargaining unit that it is certified to represent. Section 187 states explicitly that it governs a bargaining agent's "… representation of any employee in the bargaining unit."

[19] This means that a complaint alleging a breach of PSAC's duty of fair representation must be about its representation of employees vis-à-vis their employer. As the Board stated recently in *Messer*, at para. 9, "… the duty of fair representation applies only when the subject of the representation (1) falls under the *Act*, and (2) involves a dispute with the employer."

[20] PSAC argues that this complaint fails both requirements: it falls outside the scope of s. 187 of the *Act* because it does not relate to representation about the collective agreement or issues arising under the *Act*, and it is also about internal union matters and not the relationship between the complainants and the employer.

[21] On that second point, the Board distinguishes between the representation of members in issues involving their employer (which is subject to the duty of fair representation) and what it has called "internal union matters" (which are not subject to the duty of fair representation). For example:

1) In *Bracciale v. Public Service Alliance of Canada (Union of Taxation Employees, Local 00048)*, 2000 PSSRB 88 at para. 29, the Board dismissed a complaint

about a union local posting minutes of a meeting that the complainants said were false and harassing because of this:

…

> *… the complainants are disputing the Local 00048's Executive Council's day-to-day operations of the Local 00048 as well as other internal union matters. Their dispute relates directly to their relationship with their bargaining agent, not with their employer. In other words, their dispute concerns exclusively their membership in the bargaining agent, not their employment with the employer.*

…

2) In *Sturkenboom v. Professional Institute of the Public Service of Canada*, 2012 PSLRB 81 at para. 31, the Board ruled that it had no jurisdiction to hear a complaint that an employee was not permitted to vote on whether to ratify a collective agreement without being a member because this issue "… is an internal union matter in which the Board does not intervene." Similarly, in *Sahota v. The Professional Institute of the Public Service of Canada*, 2012 PSLRB 114 at para. 46, the Board ruled that it had no jurisdiction to hear a complaint against a union for having reached an agreement with the employer on amending a collective agreement without holding a ratification vote because "… the complainants' allegations and the nature of their complaint deal exclusively with internal union matters and that they fall outside the scope of the respondents' statutory duty of fair representation." Finally, in *Bernard v. Professional Institute of the Public Service of Canada*, 2020 FPSLREB 11 at para. 60 (upheld in 2020 FCA 211; "*Bernard #2*"), the Board dismissed a complaint about a ratification vote because such votes are an "internal union matter".

3) In *Hancock v. Professional Institute of the Public Service of Canada*, 2023 FPSLREB 51 at paras. 84 to 88, and *Serediuk v. Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)*, 2023 FPSLREB 71 at paras. 25 to 34, the Board rejected complaints about disputes between union stewards or the eligibility to serve as a steward as such disputes are internal union matters or concern internal union affairs.

[22] The complainants argue that failing to provide them with information or an orientation kit contravenes the PSAC local/branch officers' handbook and PSAC's "Steward Kit Union Orientation for New Members". These are precisely the sort of claims that fall within the category of internal union matters and outside the Board's jurisdiction. The Board has never enforced the terms of a union's constitution and has consistently treated a union's constitution and bylaws as internal union matters that fall outside the Board's jurisdiction, as in *Serediuk*. The Board has also denied jurisdiction over disputes about a union's travel-expense policy (see *Tucci v. Hindle*, [1997] C.P.S.S.R.B. No. 146). An allegation that a bargaining agent has failed to follow

its internal policies falls outside the scope of the Board's jurisdiction to enforce the duty of fair representation.

B. Communication and the duty of fair representation

[23] However, the complainants are not only complaining about a breach of PSAC's policies. Their complaint is more broadly about an alleged failure by PSAC to communicate effectively with CMs, not just that this failure constituted a breach of PSAC's policies.

[24] Neither party cited any Board decision dealing with communication issues as the basis of a duty-of-fair-representation complaint. Recently, in *Fortin v. Public Service Alliance of Canada*, 2022 FPSLREB 67, and *Payne v. Public Service Alliance of Canada*, 2023 FPSLREB 58, the Board dismissed duty-of-fair-representation complaints that were based in part on a bargaining agent's alleged lack of communication about why it was not challenging the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police*. In both cases, the Board dismissed the complaint because it concluded that the lack of communication was not arbitrary, discriminatory, or in bad faith. However, this implies that — without stating so explicitly — a bargaining agent's communication with the employees it represents can fall within its statutory duty of fair representation.

[25] Other labour boards have also treated a lack of communication as possibly falling within the statutory duty of fair representation, depending on the context. For example, the Canada Industrial Relations Board (CIRB) has stated that "[l]ack of communication per se does not constitute a violation of the [*Canada Labour*] *Code*, except where it prejudices the complainant …"; see *McRaeJackson v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, 2004 CIRB 290 at para. 40. The CIRB has explained this more recently in *Fortin v. Syndicat des employées et employés professionnels(les) et de bureau, section locale 434, SEPB-CTC-FTQ*, 2016 CIRB 810 at para. 44, as follows:

> *[44] While lack of communication between the union and the complainant does not in itself constitute a violation of the* Code*, this does not mean that the Board does not consider communication an element that can give rise to a section 37* [duty of fair representation] *violation.…*

[26] The Ontario Labour Relations Board (OLRB) has allowed duty-of-fair-representation complaints when a union has not communicated at all with its members during the negotiation of a collective agreement, stating, "It is difficult to conceive how the duty of fair representation can be discharged when the bargaining agent in an industrial setting fails entirely to meet with the employees prior to or any time during the bargaining process"; see *Employees of Manor Cleaners Ltd. v. Textile Processors, Service Trade, Health Care, Professional and Technical Employees International Union, Local 351*, 1983 CanLII 875 (ON LRB) at para. 9. When discussing that case and others along the same lines, the OLRB has also stated that some sort of consultation is imperative when a union is negotiating a new collective agreement but that it will not delve into the manner of that consultation or require consultation when the employees have nothing meaningful to offer; see *Blasdell v. United Food and Commercial Workers International Union, Local 1000A*, 2003 CanLII 47149 (ON LRB) at paras. 99 to 101. The OLRB has also allowed a duty-of-fair-representation complaint when a union failed to properly inform a grievor about the state of her grievance, to punish her for having supported a rival union; see *Unifor v. Unite Here, Local 75*, 2021 CanLII 20862 (ON LRB) at para. 105.

[27] This means that it is insufficient for me to simply say that this complaint is about communication and therefore that it falls either within or outside the scope of the duty of fair representation. I must go further and assess whether the subject matter of the communication meets the two requirements to fall within the scope of the duty of fair representation — namely, whether the communication is about something that (1) falls under the *Act*, and (2) involves the complainants' relationship with the employer. I am using the word "relationship" instead of the word "dispute" used in *Messer* because it more clearly includes the collective bargaining component of the duty of fair representation (although I note that the definition of a "dispute" under the *Act* includes a difference arising out of collective bargaining, so that it is not wrong to require a "dispute" with the employer, only confusing).

[28] This is also the essence of the OLRB's approach: communication with employees in the bargaining unit can be part of the duty of fair representation when the communication is about a subject matter that is an issue that falls under the labour relations statute and involves some issue with the employer, such as collective bargaining or a grievance.

[29] This means that I have to turn to the specifics of the alleged lack of communication in this complaint.

C. Specific lack of communication alleged in this case

[30] In their complaint and submissions, the complainants have identified four aspects of this lack of communication: (1) information about membership in PSAC, (2) provided a ballot for the strike vote late, (3) a lack of communication about PSAC's expectations for whether the complainants should participate in the strike (and the consequences if they did not), and (4) failing to inform CMs that they are represented by PSAC and the consequences of that representation. I will deal with these four aspects in turn and consider whether any of them meet the two preconditions for the duty of fair representation — namely, whether the subject about which the complainants say there was a lack of communication (1) falls under the *Act*, and (2) involves their relationship with the employer.

[31] I want to emphasize again that PSAC denies that there was a complete lack of communication to the complainants specifically and CMs more generally. However, at this stage, I am not resolving whether the communication was adequate. I am considering only whether the Board has the jurisdiction to hear this complaint. This decision should not be taken as finding that PSAC failed to communicate, or that it communicated inadequately, with CMs.

1. Communication about membership rights in an employee organization falls outside the scope of the duty of fair representation

[32] The complainants state that they were not given information "… in regards to joining the union including an application to become a member of the union …" (submissions dated October 4, 2023). A lack of communication about membership in PSAC falls outside the scope of the duty of fair representation.

[33] The Board has limited jurisdiction over disputes about membership in an employee organization in s. 188 of the *Act*. As PSAC pointed out in its submissions, the complainants have not based their complaint on s. 188 of the *Act*. Additionally, the complainants have not alleged any facts that could trigger the preconditions for a complaint under s. 188. Paragraph 188(b) requires that the employee organization has denied membership to an employee; the complainants do not allege that they were denied membership. Paragraph 188(d) requires that the employee has been harmed by

reason of having exercised a right under Parts 1, 2, or 2.1 of the *Act*; the complainants do not allege that they exercised any such rights. Finally, s. 188(e) requires that the employee has testified in a proceeding, made an application or filed a complaint, or exercised any right under Parts 1, 2, or 2.1 of the *Act*; the complainants do not allege that they have testified, made an application or filed a complaint, or exercised any right under those Parts of the *Act*.

[34] Issues surrounding a person's membership with a bargaining agent fall outside the scope of the *Act*, except for these limited purposes.

[35] Additionally, membership in a bargaining agent does not involve the relationship between an employee and their employer; it is a purely private relationship between them and their bargaining agent. See, for example, *Bracciale, Unionized Members of Hanmer Bus Lines Reina Connors v. Canadian Union of Public Employees*, 2000 CanLII 12256 (ON LRB) at para. 31, and MacNeil, *Trade Union Law in Canada* (looseleaf), at chapter 8:8 ("A decision to admit an applicant to membership does not involve an employer's decision").

[36] Therefore, the Board has no jurisdiction over a complaint about a bargaining agent's communication about its membership rules as such a complaint fails both preconditions for the existence of the duty of fair representation.

2. Communication about a strike vote falls outside the scope of the duty of fair representation

[37] The complaint about the conduct of a strike vote falls outside the statutory duty of fair representation.

[38] Strike votes are regulated by s. 184 of the *Act*, which requires that an employee organization hold a vote by secret ballot of all employees in the bargaining unit before declaring or authorizing a strike. Subsection 184(1) specifically requires that "… the employees are given a reasonable opportunity to participate in the vote …". Subsection 184(2) goes on to provide a mechanism for an employee to complain about irregularities in a strike vote, and s. 184(3) provides that the Board may summarily dismiss such an application if the outcome of the vote would not have been different even if the alleged irregularities occurred.

[39] Section 184 of the *Act* is a complete code governing complaints about the opportunity to participate in a strike vote or other irregularities in the vote. As the Board put it in *Sturkenboom*, at para. 27, "The legislator, in regulating certain votes but remaining silent on others, has, in effect, spoken." The essence of the complaint about the strike vote is that the complainants were not given a reasonable opportunity to participate in the strike vote because they were provided with their ballot late. Any complaint about that issue must be addressed under s. 184(2) of the *Act*.

[40] The Quebec Tribunal Administratif du Travail came to a similar conclusion in *Pelletier v. Travailleurs et travailleuses unis de l'alimentation et du commerce, Section locale 501*, 2020 QCTAT 24 at paras. 20 to 22, where it dismissed a complaint against a strike vote as falling outside the duty of fair representation and, instead, concluded that a strike vote was a matter of internal union management in the absence of some express statutory provision to the contrary.

[41] I also note that this complaint was filed well after the strike was concluded. I agree with the OLRB in *Marriott Management Services*, [1994] OLRB Rep. July 957, in which it stated that a labour board should not inquire into a strike vote well after the strike is underway and, in this case, completed because doing so is a purely academic exercise. I further note that the Board has already ruled that any irregularities in the strike vote would not have affected the result in light of the overwhelming support for the strike by the bargaining unit employees who cast a ballot, in *Paterson v. Public Service Alliance of Canada*, 2023 FPSLREB 44. Even if the subject-matter of the complaint fell within the Board's jurisdiction, I would have dismissed it for those reasons.

[42] The opportunity to participate in strike votes is regulated by s. 184 of the *Act*, not by the duty of fair representation in s. 187.

3. Communicating strike information falls outside the scope of the duty of fair representation

[43] The complainants allege that CMs (including themselves) were not informed properly about PSAC's expectations for whether the complainants should participate in the strike until a website posting dated April 24, 2023, which was in the middle of the strike. The complaint is specifically about whether the complainants were entitled to

strike pay and whether they will be subject to discipline by PSAC if they crossed a picket line during the strike.

[44] There is nothing in the *Act* about strike pay and nothing in the *Act* outside s. 188 about internal union discipline; further, s. 188 of the *Act* does not provide any special rules about discipline flowing from actions during a strike; see *Birch v. Union of Taxation Employees, Local 70030*, 2008 ONCA 809 at paras. 64 to 66. The consequences for a member of a bargaining agent who does not participate in a strike fall to be determined under s. 188 of the *Act* or the civil court system and not under s. 187.

4. Communicating the fact of representation to individuals or subsets of a bargaining unit falls outside the duty of fair representation

[45] The complainants state that PSAC failed to communicate with them after the November 26, 2020, Board decision to inform them that they were being represented by PSAC.

[46] The complainants point out that the Board's November 26, 2020, orders included provisions dealing with the requirement that the employer provide CMs' personal contact information to PSAC. Orders requiring an employer to provide personal contact information to a bargaining agent are commonplace in this jurisdiction after the Supreme Court of Canada's decision in *Bernard v. Canada (Attorney General)*, 2014 SCC 13 ("*Bernard #1*") which upheld a similar Board order.

[47] If a bargaining agent has a right to receive personal contact information because such information is necessary to communicate with the employees it represents in order to perform its duty of fair representation, then I understand the complainants to be asking me to draw the conclusion that communication about the fact of such representation must be a necessary part of the duty of fair representation.

[48] Therefore, it is instructive to return to *Bernard #1* to examine the basis of such an order and the extent to which such an order is linked to a bargaining agent's duty of fair representation.

[49] In the case that became *Bernard #1*, the Board initially granted an interim order that the employer provide personal contact information in *Professional Institute of the Public Service of Canada v. Treasury Board*, 2008 PSLRB 13, requiring the parties to

negotiate the details of how such information would be provided. One issue for the Board (along with, eventually, the Supreme Court of Canada) was why a bargaining agent required such information. The Board wrote the following on that issue:

> …
>
> *31 I believe that* ***section 187 of the*** **Act** ***provides context for the concerns expressed in the complaints rather than their real foundation.*** *The same could also be said about other provisions of the* Act *cited by the complainant in its original filing though not subsequently argued in its written submissions:* ***section 184*** *(conduct of a strike vote),* ***section 183*** *(conduct of a final-offer vote) and sections 119 to 134 (essential services).* ***Those provisions arguably help the complainant establish why it has a legitimate need for employee contact information from the employer.*** *The complainant must nevertheless demonstrate the grounds for its complaints under one or more of the legislative provisions specifically cross-referenced by section 185. If the real foundation for its unfair labour practice argument is not in section 187, what is the operative provision?*
>
> …
>
> *62 I believe that the main issue of proof* [that personal contact information is required] *is brought into its most acute focus by the bargaining agent's obligations arising under section 184 of the* Act *….*
>
> …
>
> *65 Leaving aside for the moment the issue of whether home contact information is essential, I am convinced that the thrust of the decision in* Ottawa-Carleton District School Board *must apply to these complaints.* ***Given the obligation placed on a bargaining agent by section 184 of the*** **Act** *to give all employees in the bargaining unit "… a reasonable opportunity to participate in [a strike] vote and be informed of the results,"* ***a failure by the employers to supply the complainant with the employee contact information necessary for that purpose*** *would constitute interference in the representation of employees by the complainant within the meaning of paragraph 186(1)*(a) *and thus an unfair labour practice for purposes of section 185 and paragraph 190(1)*(g)*.*
>
> …
>
> *68* ***I believe that the same finding applies with respect to section 183 of the*** **Act** *that provides for the possibility of a directed vote on an employer's final offer ….*
>
> *69 As in the case of a strike vote under section 184 of the* Act*, the constituency for purposes of a final-offer vote under section 183 is comprised of "all of the employees in the bargaining unit," not just those employees who are members of the bargaining agent certified to represent the bargaining unit. For the conduct of a*

> *final-offer vote to be fair and legitimate, it is imperative that the bargaining agent be able to communicate with all eligible voters to present its perspective on the subject matter of the vote as well as any other relevant information. If the bargaining agent cannot access all voters, the employer, quite able for its part to communicate with all employees in their places of work, would enjoy an advantage entirely inconsistent with the underlying objective of the* Act *to support effective labour-management relations and ensure the fair operation of the collective bargaining process. To access final offer voters, should the appropriate minister of the Crown exercise his or her discretion under subsection 183(1), the bargaining agent requires contact details for all employees in the bargaining unit. Further, in anticipation of the possibility of such a vote,* ***the bargaining agent should be able to communicate to employees in the unit information about developments during collective bargaining so that all eligible voters in a potential final-offer vote enjoy a common accumulated information base.*** *It matters not whether a final-offer vote actually occurs — and no such vote has yet been conducted under the authority of the* Act *— but that it could occur and that its occurrence lies entirely outside of the control of the bargaining agent.*
>
> …
>
> [Emphasis added]

[50] After some judicial steps that are unimportant for the purposes of this decision, the case returned to the Board (2011 PSLRB 34) to address the terms on which an employer must disclose personal contact information to a bargaining agent. The Board again returned to the reasons why a bargaining agent requires personal contact information. The Board focussed particularly on strike votes and final-offer votes in s. 183 and 184 of the *Act*, but also commented as follows at paragraph 164:

> *[164] … The Board has concluded that a bargaining agent has a right to contact all employees directly — relying on employees going to a website or talking to a steward does not meet that obligation. As noted in* Co Fo Concrete Forming Construction Ltd, *[1987] OLRB Rep. October 1213, (cited in* Millcroft Inn, *at paragraph 13),* ***if a bargaining agent is to fulfill its duty of fair representation, it must be able to communicate directly with each employee that it represents.***
>
> [Emphasis added]

[51] Ultimately, that decision reached the Supreme Court of Canada. That Court summarized the basis of the Board's decision as follows:

> …

> *[7] … The Board decided that "in principle", the employer's failure to provide the union "with at least some of the employee contact information that it requested" was an unfair labour practice because it interfered with the representation of employees by the union within the meaning of s. 186(1)*(a) *of the* Public Service Labour Relations Act. ***It pointed particularly to the union's responsibilities in connection with the conduct of a strike vote (s. 184) and a final-offer vote (s. 183) as "legitimate representational purposes" that justified the disclosure of the kind of personal information sought by the union****.…*
>
> *…*
>
> *[15] Ms. Bernard's position was that disclosure of her home telephone number and address breached her privacy rights and her right not to associate with the union. The Board addressed all of the privacy concerns raised by Ms. Bernard and the Commissioner. It concluded that work contact information was insufficient to allow a bargaining agent to meet its obligations to represent all employees in the bargaining unit. In its view, "a bargaining agent has a right to contact all employees directly — relying on employees going to a website or talking to a steward does not meet that obligation": 2011 PSLRB 34 (CanLII), at para. 164.*
>
> *…*
>
> *[22]* ***The nature of the union's representational duties is an important part of the context for the Board's decision. The union must represent all bargaining unit employees fairly and in good faith****. The* Public Service Labour Relations Act *imposes a number of specific duties on a union with respect to employees in the bargaining unit. These include a duty to provide all employees in the bargaining unit with a reasonable opportunity to participate in* ***strike votes*** *and to be notified of the results of such votes (s. 184). According to the Board, similar obligations apply to the conduct of* ***final-offer votes under s. 183 of the*** **Act**.
>
> *…*
>
> *[24] The Board found that the employer's refusal to disclose employee home contact information constituted an unfair labour practice because it interfered with the union's representation of employees. Two rationales fueled this conclusion. The first is that* ***the union needs*** **effective** ***means of contacting employees in order to discharge its representational duties****. This was explained in* Millcroft, *where the Ontario Labour Relations Board extensively reviewed a union's duties and concluded that the union "must be able to communicate effortlessly with the employees" and "should have [their contact information] without the need to pass through the obstacles suggested by the employer" in order to discharge those representational duties: para. 33.*
>
> *…*
>
> [Emphasis added]

[52] It is possible to read *Bernard #1* narrowly and conclude that the basis for the order that an employer provide personal contact information to a bargaining agent derives from ss. 183 and 184 of the *Act* — namely, the bargaining agent's obligations to provide all employees it represents (not just its members) an opportunity to cast a ballot in a strike vote or a Minister-ordered final-offer vote.

[53] However, the Supreme Court of Canada also referred repeatedly to *Millcroft Inn Ltd. and CAW-Canada, Local 448* (2000), 63 C.L.R.B.R. (2d) 181 ("*Millcroft Inn*"), in support of its conclusion. In *Millcroft Inn*, the OLRB ordered an employer to provide personal contact information to a union. The OLRB did not base its decision on strike votes or final-offer votes; it based its decision on the union's duty of fair representation, stating:

> …
>
> *22 There is much Board jurisprudence on the extent of a union's obligations under this section. A union must diligently pursue the interests of the members of the bargaining unit it represents. To the extent a union has statutory duties under the Act, such as those in section 74, it possesses corresponding statutory rights which enable it to fulfil those duties. A union must act fairly, genuinely and competently towards the employees it represents:* C.M.S.G. v. Gagnon*, [1984] 1 S.C.R. 509 (S.C.C.), at 527.* ***What are the kinds of circumstances in which a union can reasonably be expected to represent its bargaining unit members? A union must be able to pursue grievances on behalf of the employees.*** *It must be able to investigate those grievances and to act promptly to achieve their resolution. It must be able to communicate with employees to ensure that the collective agreement it has concluded is being properly administered by the employer concerned. It needs to be vigilant. It is responsible for the enforcement of the employees' rights under the collective agreement. If a union is not vigilant, it may face a claim of estoppel if it allows rights it or the employees possess to fall into disuse and to be overridden or ignored by the employer:* Owen Sound (City) Commissioners of Police v. Police Assn. (Owen Sound) *(1984), 14 L.A.C. (3d) 46 (Ont. Arb.);* Agassiz Division Assn., M.T.S. v. Agassiz School Division No. 13 *(September 17, 1997), Graham Arb. (Man. Arb.).*
>
> *23 The Board will take account of the history of a union's dealings with the employees when assessing whether the union has met its duty of fair representation to them:* Brinovec v. S.M.W., Local 575*, [1986] O.L.R.B. Rep. 585 (Ont. L.R.B.);* Bernard v. Scarborough General Hospital*, [1977] O.L.R.B. Rep. 770 (Ont. L.R.B.). A union should take reasonable steps, such as communicating with the employee concerned, to hear what the employee has to say before acting in some manner against that employee's interests:* Ritrovato

> v. I.U.O.E., Local 793, *[1986] O.L.R.B. Rep. 1401 (Ont. L.R.B.);* Plummer v. O.P.C.M., Local 172, *[1983] O.L.R.B. Rep. 1920 (Ont. L.R.B.). A failure to communicate with the employee concerned in such circumstances may be deemed to be arbitrary, and hence in violation of the union's duty of fair representation under section 74. A union has an obligation to try to settle grievances early in the process:* Syme v. G.A.U., Local 28B, *[1983] O.L.R.B. Rep. 775 (Ont. L.R.B.). To do so it might have to communicate with one or more of the employees in the bargaining unit. In order to assess the merits of a grievance, a union representative may need to speak to several employees in the bargaining unit. He or she may need to trace, contact and interview witnesses. The representative may need to explore with the employees the implications of pursuing a particular grievance. This could involve talking to other employees in the bargaining unit besides the grievor. A union's obligations under section 74 involve the proper investigation of employee concerns. One employee's grievance may affect the rights of other employees. A union representative may need to speak to other employees to assess the impact. A union is obliged to communicate with an employee concerning his or her grievance:* Glykis v. Hotel & Restaurant Employees' Union, Local 75, *[1984] O.L.R.B. Rep. 1406 (Ont. L.R.B.). A union should keep the employee apprised of developments in the pursuit of his or her grievance. A failure to advise an employee that the union has decided not to pursue his or her grievance may constitute a violation of section 74:* Ritrovato, *above.*
>
> …
>
> *26 What is apparent from the examples of the union's obligations to the employees in its bargaining unit, even during those times when it is not involved in the negotiation of a collective agreement, is that the union has a duty to represent the employees fairly and in a manner which is not arbitrary or discriminatory. What is also apparent is that if the union is to fulfil that duty, it must be able to communicate directly with each employee it represents.*
>
> …
>
> [Emphasis added]

[54] Like the Supreme Court of Canada did in *Bernard #1*, I have found the OLRB's decision in *Millcroft Inn* instructive. If an employer is required to provide a bargaining agent with the personal contact information of employees in a bargaining unit because such information is necessary for the bargaining agent to fulfil its duty of fair representation by communicating with the employees it represents, then communication falls within the duty of fair representation.

[55] However, I have already stated that conclusion. Communication can be a component of the statutory duty of fair representation. The real issue is communication about **what** and to **whom**.

[56] What is noteworthy about *Millcroft Inn* at this stage is the OLRB's summary of the purposes or subject matter of this communication. The OLRB stated that communication with bargaining unit employees is necessary for a union to properly pursue and assess grievances. As I have set out earlier, the OLRB has also stated that communication can be necessary for the purposes of collective bargaining as well.

[57] I am not aware of any decision suggesting that a bargaining agent's duty of fair representation requires it to proactively communicate its existence to an employee. Neither party has provided any decision addressing that issue.

[58] Therefore, I am left to resolve this issue by returning to the first principles set out earlier: the duty of fair representation applies only to issues covered by the *Act* and with respect to the relationship between an employee and their employer. The existence of a bargaining agent — or, to put that another way, the scope of a bargaining unit — certainly falls within the ambit of the *Act*. Therefore, the issue is whether it meets the second criterion.

[59] To determine that, I come back to the situations in which the duty of fair representation has included a duty to communicate: grievances and collective bargaining. None of the complainants had grievances, and the complaint does not give any indication that the complainants had individual disputes with their employer that could have been grieved.

[60] The complainants were in a bargaining unit while PSAC was collectively bargaining — at least, for most of the time. However, the duty to communicate for the purposes of collective bargaining is owed to the bargaining unit as a whole and not to any individual employee in it. I am not aware of any decision stating or even suggesting that any individual employee has a right to be consulted about collective bargaining.

[61] I draw this conclusion in part in light of CIRB decisions applying s. 39 of the *Canada Labour Code* (R.S.C., 1985, c. L-2). That provision sets out the rules for revoking the certification of a bargaining agent — something commonly referred to as

decertification. Subsection 39(2) in particular states that the CIRB may not issue a decertification order while no collective agreement is in force unless it is satisfied that the bargaining agent has failed to make a reasonable effort to enter into a collective agreement. The CIRB has concluded that to meet that requirement a bargaining agent must have consulted with and kept members of the bargaining unit informed about the progress of negotiations; see *Tessier v. Thunder Airlines Limited*, 2023 CIRB 1063. However, that obligation is owed to the bargaining unit as a whole. In fact, the CIRB has gone so far as to state that a bargaining agent is not required to consult or communicate in any way with employees who are not also members of the bargaining agent or may be hostile to it, stating this in *Allen v. U.S.W.A.*, [1979] 2 Can. L.R.B.R. 72:

> …
>
> *25 Collective bargaining is a delicate exercise for trade unions. Union officials are elected persons accountable to their constituency. Employers are not so publically* [*sic*] *accountable and can act in a less open fashion. But the give and take of collective bargaining requires the formulation of tactics and strategy by both parties. Each has an interest in keeping its tactics and strategy from the other. What the applicant proposes is that employees who have not evidenced support for the union, and in fact may be hostile to it, be consulted on and receive communication on matters which if disclosed could be adverse to the union's objects and those of its members. Such a proposition ignores the environment in which a union functions and places a burden on a union which hampers its ability to act as the collective bargaining partner contemplated in the Code.*
>
> *26 It is one thing to say the Code requires a union to act fairly, as it does in section 136.1. It is quite another to say it must act foolishly, as the proposition advanced by the applicant would require it.…*
>
> *27 That it restricted (as is assumed but not agreed to in this case) its consultation and communication to union members is not a derogation of its duty.…*
>
> …
>
> *29 The obligation to establish consultation and communication that we perceive as part of section 138(2) is an obligation that requires unions to include those who support it in its representation on their behalf. It is not an obligation to preach to the unconverted or take into its confidence those who feel no loyalty to it, although it must not discriminate against them in bargaining.*
>
> …

[62] While the connection between s. 39 of the *Canada Labour Code* and the duty of fair representation is imperfect, I agree with the CIRB that it would be foolish to expect or require a bargaining agent to consult or discuss its bargaining strategy with non-members.

[63] I am also concerned about a rule requiring communication with each individual employee in a bargaining unit for two other reasons, one practical, and one principled.

[64] The practical reason is the size of bargaining units in the federal public administration. The complainants state that they are part of the Program and Administrative Services (PA) Group represented by PSAC. The PA Group has just over 100 000 employees in it; see *Paterson*, at para. 5. It would be unrealistic and impractical for the duty of fair representation to require the Board to ensure that a bargaining agent properly communicated with each of 100 000 employees.

[65] The principled reason is that a bargaining agent engages in **collective** bargaining. A bargaining agent is an agent on behalf of a bargaining unit as a whole. Its broad representational responsibility for collective bargaining is owed to the bargaining unit as a collective entity. Unions are not service companies with customers to support; they are organizations committed to the collective welfare of their members. The duty of fair representation becomes atomized in the way suggested by this complaint only when there is a grievance or specific dispute between an employee and their employer. Even that responsibility has a collective component: grievances are usually about individual circumstances, but a union pursues them to protect the integrity of the agreement it has bargained on behalf of the collective. I appreciate that the complaint is sometimes framed as being about PSAC's communications with CMs as a group and not about its communication with these six complainants. Nevertheless, when assessing the duty of fair representation, the collective character of a union is important to keep in mind.

[66] For these reasons, I have concluded that the complaint falls outside the jurisdiction of the Board. The complaint does not meet both preconditions to trigger the duty of fair representation. Even to the extent that the alleged lack of communication was about issues falling under the *Act* (as is the case with the fact of representation), the duty of fair representation covers a lack of communication only in two circumstances: when the lack of communication was in relation to a concrete

dispute between an employee and their employer, or when the lack of communication was to the bargaining unit as a whole in the context of collective bargaining or other collective issues governed by the *Act*. This complaint does not fall into those categories; therefore, the Board has no jurisdiction to hear it.

[67] In light of that conclusion, I do not need to address whether the complaint is untimely.

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

(The Order appears on the next page)

VI. Order

[69] The complaint is dismissed.

May 13, 2024.

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board