

# **A PRACTICAL GUIDE TO THE DUTY OF FAIR REPRESENTATION**

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## INTRODUCTION<sup>1</sup>

A complaint by an employee against her union that she has not been fairly represented is generally not the most complicated, vexing or difficult matter that a union representative or union-side labour lawyer will face. The facts are usually well known; most, if not all, of the pertinent documents are in the possession of the union; the union member will usually not be well-versed in either the practice or the procedure before labour relations boards; and the member is usually not represented.

Despite this, complaints that a union has violated its duty of fair representation to one of its members are some of the most difficult and potentially significant matters that a union representative or counsel will be required to deal with. Unfortunately, this significance and difficulty is likely to increase in the years ahead.

In this day and age unions have a far greater range of responsibility than they ever previously had. With the proliferation of *Weber*<sup>2</sup> type claims, union representatives are required to be knowledgeable or at least familiar with a vast array of common law torts (trespass, defamation, libel, etc.) as these matters are now frequently arbitrable under a collective agreement. The enforcement of individual statutory rights found in employment-related legislation (ie. *Employment Standards Act, 2000*,<sup>3</sup> *Human Rights Code*,<sup>4</sup> etc.) are also the responsibility of unions (at least in Ontario) as a result of changes to labour legislation and the interpretation of that legislation.<sup>5</sup>

As the reach of the union's duty expands, the effect of a union's decision will have far greater impact on individual rights. If a union decides not to proceed to arbitration with a grievance alleging a violation of, for instance, human rights legislation or a violation of an individual's privacy rights, the employee will likely be without any avenue or forum in which to pursue such claims.

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<sup>1</sup> The author would like to acknowledge and thank Rick MacDowell, former Chair of the Ontario Labour Relations Board, for his insight and advice in the preparation of this paper.

<sup>2</sup> *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929

<sup>3</sup> S.O. 2000, c. 41

<sup>4</sup> R.S.O. 1990, c. H.19, as amended.

<sup>5</sup> See for example the recent decision of the Supreme Court of Canada in *Parry Sound Social Services Administration Board v. OPSEU, Local 324*, [2003] 230 D.L.R. (4<sup>th</sup>) 257

Up until now, labour relations boards and the courts have given unions significant latitude in respect to decisions not to proceed to arbitration. As the reach of the unions' duty expands to cover rights formerly capable of being advanced by the individual, that latitude may well be curtailed putting increased pressure on unions to proceed to arbitration or at least making a decision that is more "right" than "wrong".

### **THE SOURCE OF THE UNION'S OBLIGATION**

A union's duty of fair representation had its genesis in a series of decisions of the United States Supreme Court in the 1940's. In one of the first reported decisions, members of a trade union sued their union as a result of the union negotiating terms and conditions that discriminated against Black employees. The Court struck down the offending provisions and held that as the union was the exclusive bargaining agent of the employees, there was a duty upon the union to exercise its authority fairly.<sup>6</sup>

In a later decision, the United States Supreme Court expanded on the nature of the union's duty. In *Vaca v. Sipes*, 386 U.S. 171 (1967) the Court stated at page 177:

Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

At page 190, the Court put the duty in terms familiar to many of today's labour relations practitioners:

A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith.

Following the reasoning in *Vaca, supra*, and other American decisions, as early as 1969 a Canadian court found there existed a common law duty of fair representation.<sup>7</sup> The existence of a common law duty was confirmed by the Supreme Court of Canada in 1984. The Court stated:

The exclusive power conferred on the union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.<sup>8</sup>

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<sup>6</sup> *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 65 S.Ct. 226 (1944)

<sup>7</sup> *Fisher v. Pemberton* (1969) 8 D.L.R. (3d) 521 (B.C.S.C.)

While there existed (and still exists) a common law obligation on unions to represent their members fairly, on the basis of the emerging jurisprudence governments began enacting specific provisions in the labour legislation detailing a union's obligations to its members. Accordingly, since February 15, 1971 in Ontario, and since 1977 in the federal sector, there has been a statutory duty on unions to fairly represent their members.

In Ontario, a union's duty of fair representation is codified in section 74 of the *Labour Relations Act, 1995* which provides:

74. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in 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, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case maybe.<sup>9</sup>

Prior to 1971 a complaint in Ontario that a union had failed to represent an employee would have to be brought before the courts and the complainant would have to rely on her common law rights. However, the few reported cases that exist indicate that most union members brought their complaints to the Ontario Labour Relations Board. Such complaints were routinely disallowed by the Board except in extreme circumstances (where there was significant evidence of collusion between the union and the employer) on the basis, *inter alia*, that there was no statutory authority for the granting of the relief sought. Accordingly, complaints to the various labour relations boards were for the most part ineffective in addressing any concerns.

Today, legislation similar to section 74 exists for employees in the federal sector and with respect to employees in all other provinces, except Prince Edward Island, Nova Scotia and New Brunswick.

While the common law duty of fair representation still exists, the Supreme Court of Canada has held that where there is a statutory duty, the common law duty of fair representation "is neither

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<sup>8</sup> *Gagnon v. Canadian Merchant Service Guild et al*, [1984] 9 DLR (4<sup>th</sup>) 641 at 654

<sup>9</sup> S.O. 1995, c. 1

necessary nor appropriate”<sup>10</sup> and the relevant labour board will have jurisdiction to consider the complaint. Furthermore, in *Gendron*, the Supreme Court of Canada held that where there is a statutory duty, the relevant labour relations board is the only body with the jurisdiction to adjudicate duty of fair representation complaints.

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<sup>10</sup> *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 4 W.W.R. 385

Notwithstanding the Court's decision in *Gendron*, some employees have attempted to litigate their disputes with unions before the courts even where a statutory regime exists. While there is certainly debate as to whether or not a court maintains jurisdiction over specific matters (i.e. negligence), the Saskatchewan Court of Appeal at least has held that one must apply the "*Weber*" test and that it is the characterization of the dispute that determines the appropriate forum.<sup>11</sup> The Court held that if the essential nature of the dispute arises from the interpretation, application, administration or violation of the collective agreement then the proper forum is the labour board.<sup>12</sup> The Court left undecided the issue of when a court may have jurisdiction despite the existence of a statutory duty.

While there is some debate about this, it is likely safe to say that for those employees who cannot look to a statutory duty of fair representation, their recourse lies with the courts.

In addition, for those employees who are covered by a statutory regime, it is unlikely that there will be many situations where a court would take the jurisdiction to consider a claim by an employee against her or his trade union if the cause of action relates to a matter arising from her or his employment. The appropriate forum will almost always be the specific labour relations board.

## **THE NATURE OF THE OBLIGATION**

Given that the courts have determined that labour boards are the appropriate forum for duty of fair representation complaints (at least in Ontario and in the federal sector), the courts have also left it up to labour boards to determine the content or the scope of that duty.

## **GRIEVANCES**

As the exclusive bargaining agent, it is only the trade union that may file grievances under its collective agreement with the employer. Unless expressly provided for in its constitution, a trade union is not obliged to take every grievance to arbitration nor is it obliged to file a grievance every time an employee so requests. It is undisputed that the union has the discretion whether or

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<sup>11</sup> *Hemmings v. University of Saskatchewan*, (2002) SKCA 96; unreported decision of the Court of Appeal for Saskatchewan.

<sup>12</sup> *Hemmings, ibid* , paragraph 20.

not to file a grievance, whether to proceed to arbitration with a grievance, and has the authority to settle grievances. That is part of the function of being the certified bargaining agent.

However, these decisions and the discretion exercised by the union must be done in a manner that is not “arbitrary, discriminatory or in bad faith”. The issue in any given case is whether the union’s behaviour runs afoul of the statutory duty of fair representation.

In *Gagnon v. Canadian Merchant Service Guild et al.*<sup>13</sup> the Supreme Court of Canada summarized the union’s obligation as follows:

1. The exclusive power conferred on the union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of the consequence for the employee on the one hand and the legitimate interest of the union on the other.
4. The union’s decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and confidence, without serious or major negligence, and without hostility towards the employee.<sup>14</sup>

The first thing to note, of course, is that the union’s duty is to all employees in the bargaining unit, whether or not the employee is a member of the union or supports the union. Secondly, and as noted above, the union is entitled to abandon, withdraw or settle grievances in its discretion. The Ontario Labour Relation Board has confirmed this on several occasions.<sup>15</sup>

In *Mirza Alam* the Board defined the elements of the duty of fair representation as follows:

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<sup>13</sup> *Supra*, at footnote 9

<sup>14</sup> *Supra*, at footnote 9, page 654

<sup>15</sup> *Minaker and The Elementary Teachers’ Federation of Ontario* [OLRB File No. 0500-02-U; unreported Decision dated March 20, 2003]; *Mirza Alam*, [1994] OLRB Rep. June 6 to 7; and *Catherine Syme*, [1983] OLRB Rep. May 775.



- (a) “*arbitrary*” – that is flagrant, capricious or grossly negligent;
- (b) “*discriminatory*” – that is, based on invidious distinction without labour relations rationale; or
- (c) “*in bad faith*” – that is, activated by ill-will, malice, hostility or dishonesty.<sup>16</sup>

The duty requires a union to carefully consider all relevant factors (and not consider any irrelevant factors) in reaching its decision. The union is entitled to consider factors such as the costs in proceeding to arbitration, the effects on other members of the bargaining unit, and, of course, the chances of success at arbitration. Other factors that the union should consider include the impact of the grievance on the individual: a grievance alleging unjust discharge requires a more thorough consideration than a grievance regarding, for instance, the use of a union bulletin board. In the former case the union’s conduct and the decision not to proceed to arbitration with the grievance will be given a closer scrutiny by a labour board.

A union does not have to be right in its decision. In fact, the current jurisprudence provides that unions can be wrong, even negligent (but not seriously negligent), and not run afoul of the duty of fair representation. A labour board does not sit in appeal of a union’s decision nor is it the board’s role to “second guess” a union’s decision. Labour boards are mindful that decisions are frequently taken by lay people without legal training (although the level of experience and sophistication of the individual will be considered; the more experienced and more sophisticated the union and the union representative, the greater care will be expected). The board will review the union’s decisions, however, to ensure that they comply with the elements referred to above.

## **COLLECTIVE BARGAINING**

### **Does the Majority Still Rule?**

There is no doubt that the duty of representation extends not only to collective agreement administration but to the negotiation of collective agreements. The U.S. Supreme Court recognized this 60 years ago and in a recent decision of the Supreme Court of Canada, any

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<sup>16</sup> *Mirza Alam, supra* at footnote 15, paragraph 69.

doubts about whether such a duty existed in Canada was put to rest. In *Noel v. Societe d'energie de la Baie James*,<sup>17</sup> the Court stated:

Where the Union has an exclusive representation mandate, the corresponding duty extends to everything that is done that affects the legal framework of the relationship between the employee and the employer within the Company.<sup>18</sup>

As the process of bargaining amendments to an existing collective agreement or for a new agreement involves compromise, reordering of priorities and the usual “give and take”, unions will frequently be required to make decisions that benefit a majority of employees to the detriment of a minority. Labour relations boards and courts have held that there is nothing, *per se*, wrong in making these decisions as long as they are done in a manner that is not arbitrary, discriminatory or in bad faith. Frequently, unions will negotiate better terms and conditions of employment for full-time employees, for instance, and lesser benefits for part-time, temporary or casual employees in the bargaining unit. As long as the decisions made are taken in good faith, without discrimination or serious negligence, a labour board would be unlikely to intervene.

While labour boards have shown considerable deference to the union’s conduct in the process of collective bargaining<sup>19</sup> there will be no deference to a union’s decision which targets a minority group on certain grounds. These grounds include if the minority group is targeted on the basis of a prohibited ground under human rights legislation (sex, race, etc.) or for reasons not grounded in some labour relations purpose. Nor will there be any deference shown where the union has conducted the process of collective bargaining in bad faith.

In a recent decision of the *Canada Industrial Relations Board*, the Board found a trade union had violated its duty of fair representation by agreeing to inferior working conditions for a group of employees who had recently become part of the union’s bargaining unit as a result of a section 18 application. The Board held:

The BLE’s failure to adequately and fairly balance the interest of all its members in circumstances that touched upon the very core of their employment relationship

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<sup>17</sup> [2001] 202 D.L.R. (4<sup>th</sup>) 1

<sup>18</sup> *Ibid*, at page 24. In *Noel*, the Court was reviewing a complaint from Quebec where an employee was challenging the union’s refusal to judicially review an arbitrator’s award. The Court made it clear that the duty under the Quebec statute extended to a consideration of whether or not to judicially review such an award and that a union’s duty did not expire at the end of the arbitration case.

<sup>19</sup> See for instance, *Dan Reid et al.* (1992), 90 di 58

constitutes, in the Board's view, a failure to represent the membership's legitimate interests. This failing to assume its responsibilities with integrity and confidence amount to bad faith as prohibited by the *Code*. The Union's behaviour is tantamount to the absence of representation within the context of collective bargaining. In view of the treatment of the claimants the responding union is liable for the consequences that attach to the Board's findings.<sup>20</sup>

In *Cairns*, the Board ordered the union and the employer to re-open their agreement on certain issues "...with a view to providing for the interests and needs of the minority group". As an interesting aside, the Board also ordered the union to pay the legal costs (on a solicitor-client basis) of the complainants.<sup>21</sup>

Accordingly, while a union has a significant discretion in prioritizing competing interests and goals, the union will still be required to consider the interests of the minority in reaching any agreements.

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<sup>20</sup> *George Cairns et al* [1999] CIRB No. 35.

<sup>21</sup> In a further decision of the Board, (*Cairns et al*, [2003] CIRB Decision No. 230) as a result of the failing of the parties to reach an agreement on the Board's original order, the Board directed the agreement between the parties be amended in certain specific ways to the benefit of the claimants. Despite earlier Applications to the Federal Court of Appeal being dismissed, the latest Board decision is also being reviewed at the Federal Court of Appeal.

## **IMPACT ON AN EMPLOYER**

### **Does the Company end up footing the bill?**

It is now standard practice for a labour relations board to add an employer as an interested party to duty of fair representation complaints. The reason for this is obvious: not only may the employer have relevant information and evidence to give at any hearing, but in the event of a finding of a violation of the duty any remedy will almost certainly have an impact on the employer and its interests.

In a fairly typical duty of fair representation case where a union is found to have violated its duty, boards have a wide discretion with respect to remedy and have frequently – in the case of a claim that the union has failed to take an employee’s grievance to arbitration – ordered the union to take the grievance to arbitration and pay for the employee’s legal counsel. Any time limits are accordingly ordered waived as part of this remedy.

As early as 1973, the Ontario Labour Relations Board recognized the necessity of having the employer participate as a party to a duty of fair representation complaint:

If the Board is to utilize the remedy of remitting matters to arbitration, it will undoubtedly be faced with the criticism that an employer whose rights may be affected is not a party to the proceedings; this is particularly so should the Board require time limits in a collective agreement to yield which may be permissible under section 79(4)(c). In order to avoid a denial of natural justice in these circumstances, an employer should be a party to the proceedings and the Board’s Rules of Procedures, i.e. Rules 28 and 54, may be used to give an employer notice of the opportunity to appear in those proceedings where his rights may be effected.<sup>22</sup>

The Federal Court of Appeal has recently affirmed the legality of an order or remedy that impacts directly on an employer:

“It is true that the order will have an impact upon Via, even though there was no finding of any contravention of the *Code* on its part. However, this impact is a necessary and inevitable result of the Board’s finding against the BLE. The employer was made a party to the original complaint, and permitted to make

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<sup>22</sup> *Gebbie and Longmore v. United Automobile, Aerospace and Agricultural Implement Workers of America, Local 200*, [1973] OLRB Rep. Oct. 519.

submissions before the Board, at least in part due to the recognition that its interests might be impacted by the eventual order.<sup>23</sup>

There is no doubt that there is potential for the employer to incur costs not only associated with the defence or participation in a duty of fair representation complaint, but also costs associated with implementing any order or remedy. As the Court has said, this is “inevitable”. Furthermore, it is submitted that it is quite appropriate in certain circumstances for an employer to be “footing the bill”. Why should an employer be allowed to “hide” behind a union which has failed in its duty of fair representation? There is no rationale for such an outcome. Furthermore, it is not uncommon that in the situation where a union has violated its duty for the employer to be involved in either assisting, aiding or abetting the violation.

### **THE OBLIGATION TO PROVIDE A GRIEVOR WITH HIS/HER OWN COUNSEL**

The simply answer to the question – is a union required to provide a grievor with her own counsel - is, quite simply, no. A trade union is under no obligation to provide any of its members with a lawyer either in a grievance arbitration or in any other proceeding. If it is the practice of a union not to use legal counsel for grievance arbitrations, there is no obligation on the union to use legal counsel simply because an individual employee requests one.

Apart from issues of legal representation at grievance arbitrations, there are a whole host of situations wherein individual employees have requested legal counsel and, having been denied, asserted the right to legal counsel through a duty of fair representation complaint. Almost invariably, labour relations boards and the courts have not found that the duty of fair representation requires a trade union to provide an employee with legal representation.

It is now trite law that a union does not violate the duty of fair representation by refusing to represent (either with or without counsel) an employee before the Workers’ Safety and Insurance Board on workers’ compensation matters.<sup>24</sup>

More recently, there have been frequent complaints arising from the union’s refusal to provide legal representation to employees claiming disability benefits under a collective agreement. As a

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<sup>23</sup> Via Rail Canada Inc. v. Cairns, [2001] 4 F.C. 139

result of several Ontario Court of Appeal decisions, it is now acknowledged that certain disability plans provided for in collective agreements do not form part of the agreement. Accordingly, any disputes about entitlement to benefits under those plans are not covered by the arbitration provisions of a collective agreement. An employee who feels that she has been wrongly denied benefits by an insurer has only the recourse of a civil action in the courts. Unless the union agrees to provide legal representation, the employee is usually without the means or ability to pursue her claim. In a recent decision of the Ontario Labour Relations Board, the Board confirmed the long held belief that a union is under no obligation to represent an employee (with or without legal counsel) in bringing a civil action seeking payment of a benefit provided for under the collective agreement.<sup>25</sup>

One can imagine numerous other similar situations where, on the basis of this reasoning, the union would not be required to provide representation or legal counsel to an employee despite the demand for such. This includes inquests, disciplinary hearings before professional bodies, criminal charges, civil actions for negligent misrepresentation prior to hiring, etc.

The stated rationale is:

... [A] union has a duty of fair representation under section 74 of the *Act* only when an employee's access to justice depends on the union pursuing the employee's claim. When the union is a conduit for the worker's cause of action, i.e. where the union is the exclusive representative of the employee (section 45(1) of the *Act*), the union has a duty of fair representation. When the employee may themselves bring the claim the duty does not exist... where the union was not responsible for the administration of the benefits plan or the claims made under it, the union had no obligation to pursue a benefits claim on behalf of an employee.<sup>26</sup>

While these and other decisions of the Board are sound and logical, it is arguable that they are in conflict with certain statements of the Supreme Court of Canada (ie. See *Noel, supra*, at footnote 15). It is quite possible that we have not seen the last of the judicial pronouncements in this area.

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<sup>24</sup> For example, Luis Lopez, [1989] OLRB Rep. May 464

<sup>25</sup> Mabel M. Adams, [2003] OLRB Rep. January/February 4

<sup>26</sup> Toronto District School Board, [2002] OLRD No. 1837

## CONCLUSION

Duty of fair representation complaints before the Ontario Labour Relations Board comprise well over 40% of all unfair labour practice complaints filed with the Board annually. Despite this volume, less than 2% of these complaints are successful.<sup>27</sup>

It is this writer's opinion that the number of complaints and the success rate will only increase in the future. As a result of changes in the legislation and the development of the jurisprudence (referred to previously), the reach of the union's duty of fair representation today is far greater than it has ever been. Unions now have the duty to protect and enforce through the collective agreement, employees' statutory rights under the *Employment Standards Act, 2000*, the *Human Rights Code* and other employment related legislation. Unions are now also the protector and enforcer (through the grievance procedure under a collective agreement) of the individual common law rights of employees where those rights are affected in the employment context. The individual is now precluded from asserting those rights either before the courts or any specialized tribunal.

There is absolutely no doubt that a union has a duty of fair representation with respect to all of these matters. In other words, all of the usual rules apply with respect to considering grievances whether they allege unjust dismissal, violation of the *Human Rights Code* or the *Employment Standards Act, 2000*, or a grievance alleging a common law tort. Clearly this puts a greater burden on the union not only to be familiar with various types of "causes of action" but also to assess the potential success and effects.

For better or worse, we live in a day and age where individuals are not reluctant to assert, through litigation, any perceived violation of their "rights". In the unionized environment, such individuals will look to their unions to advance those rights. We also live in a climate where certain individual rights are evolving and which union representatives must be familiar with as part of their duty to members.

There may be no better example of such evolving individual rights than the right of privacy. With the advent of the internet, the speed and breadth of the spread of information and remarkable advances in areas such as communications, privacy as a right is more important now

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<sup>27</sup> Source: Ontario Labour Relations Board, 2004

than ever before. Privacy rights are a uniquely individual right which Parliament has recently recognized in recently enacting the *Privacy Act*.<sup>28</sup> The assertion of individual rights, especially the individual rights of privacy, are bound to increase in the future. When it comes to the employment relationship, it will be the union that is responsible for asserting these rights on behalf of their members. The result of course is that unions and their representatives will be required to be familiar with such rights as part of their duty of fair representation.

As the scope of the union's obligation expands, the decisions made – especially decisions made not to proceed to arbitration (or court as the case may be) – are more likely to come under closer scrutiny by labour boards and the courts. A decision by a union not to proceed to arbitration on behalf of their member who is asserting an individual right will effectively end that claim. The affect on the individual is greater than it has been before and it is likely that courts will therefore make unions responsible for ensuring that their members have adequate access to justice.

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<sup>28</sup> R.S. 1985 c. P-21