IN1

00213_RR-13
#521166
(MI 300560)

In the Matter of the *Labour Relations Act, 1995* S.O. 1995, c.1 as amended

And in the Matter of a Referral to Arbitration thereunder

Between

THE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 27
["CUPE Local 27"; "the Union"]

And

THE GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD
["The Board"]

PRELIMINARY RULING

Appearances

For the Union: Michael Klug

For the Board: Leonard P. Kavanaugh, QC

Heard before Arbitrator Thomas Kuttner, QC at Windsor ON on 19 December 2013, 16 June and 02 July 2014

PRELIMINARY RULING

Introduction

1. On a demand for particulars made by a trade union in arbitration proceedings in which the rights of retired former employees under a collective agreement are at issue, ought an employer be directed to release to the trade union home contact information identifying such retired former employees? That is the question which presents itself here as a preliminary issue for determination in an arbitration between Canadian Union of Public Employees Local 27 ["CUPE Local 27"; "the Union"], and the Greater Essex County District School Board ["the Board"]. It arises under the terms of a renewal Collective Agreement binding between them, effective 01 September 2012 – 31 August 2014, ["the Collective Agreement"; Ex#1.3]. The bargaining unit comprises custodial and maintenance employees of the Board.

2. That Collective Agreement came into effect pursuant to the provisions of the *Putting Students First Act, 2012*[1] ("the PFSA") which was repealed on 23 January 2013 [Doc# 4.6] and it is scheduled by an undated Order-in-Council under the PFSA as being in effect—also since repealed[Doc#4.9 & #4.10]. The Collective Agreement comprises three (3) distinct documents as follows:

   i. The renewed terms of the Preceding Collective Agreement binding between the parties 01 September 2008 – 31 August 2012;
   ii. A Memorandum of Settlement between the Union and the Board, dated 11 January 2013, to which is attached as Appendix "A" all local agreed to terms of the renewal Collective Agreement; designated as the Ratification Document, 12 January 2012; and
   iii. A Memorandum of Understanding entered into between the Ministry of Education and Canadian Union of Public Employees [CUPE] - Ontario School Board Coordinating Committee [OSBCC], dated 31 December 2012, comprising province-wide terms of the renewal Collective Agreement.

3. On the commencement of hearings in this matter, the Union by preliminary motion urged that I answer the question posed above in the affirmative. It requested that I direct the Board to release such home contact information forthwith, namely the

[1] 2012 S.O. 2012, c. 11.

names, addresses and telephone numbers of retired employees of the Board or of their surviving spouses so that it could communicate directly with them in fulfillment of its representational obligations. The Board urged that I answer the question in the negative, first as its relevance to the issue at hand had not been established, second as it would be premature to so direct, and third as such a direction could well be foreclosed by privacy concerns. I reserved on the motion, and hearings proceeded. These have now been completed and for the reasons which follow, I have determined that an Order directing the release of such personal information should now issue, on terms here set out.

Background

4. These proceedings were precipitated by correspondence from Mr. Gabriel Sékaly, Assistant Deputy Minister of Education, dated 03 April 2013, and addressed to Mr. Warren Kennedy, Director of Education for the Board [Ex. 1.4]. There Mr. Sékaly wrote so as "to provide direction regarding the board's non-compliance with the Education Act regarding benefits, more specifically the board's current health and dental benefits plan coverage." Citing in support subsection 177(3) of the *Education Act*[2] Mr. Sékaly advised that the current, and long-standing practice of the Board to "...provide benefits for life..." under the governing Collective Agreement "...is not in compliance with the Act" , inasmuch as "...retirees grandfathered under the existing plan are covered for life." He directed that the Board "...comply with the requirements in the Education Act by August 31, 2014"; and further that the Board "...make available to these affected employees a continued insurance plan, but the premiums must be paid for by the individual, not the board."

5. The provisions of subsection 177(3) of the *Education Act*, with which the Board is said not to be in compliance, stipulate as follows:

> 177(3) If a person retires from employment with a board before he or she reaches 65 years of age, the board may retain the person in a group established for the purpose of a contract referred to in clause (1)(a) until the person reaches 65 years of age.

The provisions of Article 24 of the Collective Agreement pursuant to which the Board has provided benefits to retirees "for life" and paid for the premiums to maintain their participation in the Benefit Plan read in relevant part:

[2] RSO 1990, c. E.2, as amended

24.04 Retiree Benefits

The Board will pay the full cost of premiums, after the retiree reaches their 65th birthday, provided the retiree has participated in such plans up to that date, for the following:

(a) Semi-Private Hospital Supplement

(b) Extended health Care – The plan includes hearing aid and enhanced out-of-Canada coverage.

(c) Generic Drug Plan - $2.00 deductible

On the recommendation and advice of the attending physician, no generic substitution may be made. The drug plan shall exclude over-the-counter drugs.

(d) Basic Dental Plan

Basic Dental Plan will include relining, repairing and rebasing dentures. The dental plan shall provide for a nine (9) month recall visit

(e) Optical (Vision) Care – The plan will pay a maximum of $300.00 towards the purchase of new or replacement eyeglasses, replacement parts of frames or replacement of lenses to existing eyeglasses or the purchase of contact lenses in lieu of eyeglasses, laser surgery, eye exams or any combination thereof. The full benefit is available at two year intervals to commence from the date of most recent purchase made under the vision care plan.

(f)Employees will be provided with $3,000 death benefit effective the first of the month following retirement.

Note: The benefits (a), (b), (c), (d) and (e) listed above will be continued for the surviving spouse of a retired employee. Employees who retired prior to June 1, 1997 will enjoy benefits in effect at the time of their actual retirement.

6. The provisions of section H – Benefits (Health, Dental and Extended) of the Memorandum of Understanding between the Ministry of Education and CUPE-Ontario School Board Coordinating Committee read in relevant part:

2. Benefits after Retirement

(a). Effective September 1, 2013, any new retiree (or his/her family) who has access to post-retirement benefits (health, dental, life, etc.) and pays premiums for such benefits shall be included in an experience pool segregated from all active employees, such that the pool is self-funded.

(b). Effective September 1, 2013, no new retirees (or his/her family) shall be eligible for employer contributions to any post-retirement benefits (health, dental, life, etc.).

(c). Existing retirees(or his/her family) and any employee retiring before September 1, 2013 who has access to post-retirement benefits (health, dental, life etc.) will continue to be included in the experience pool in which they are presently included and pay the appropriate premiums for that existing experience pool. Employer contributions where they currently exist will continue for this group.

7. Following upon receipt of Mr. Sékaly's letter of 03 April, the Board determined to comply with his directive as evidenced first, by its press release of 15 April 2013 under the heading "Changes Ordered to Benefits for Retirees effective August 31, 2014" in which the substance of the ministerial directive was set out [Ex. 1.6]; and second, by its letters addressed to each of the current retirees or surviving spouses,

advising of the substance of the enclosed ministerial directive [Ex. 1.7][3]. The letter advised i) of the cessation as of 31 August 2014 of Board-paid benefits for retirees beyond the age of 65; ii) of the development of an Alternative Benefit Plan for retirees for which each retiree would pay the premiums, and iii) of an undertaking to have staff from its Human Resources Department speak to the matter with each retiree by telephone.

8. These actions on the part of the Board precipitated this policy grievance filed on 22 April 2013 by the Union on behalf of its members and retired members [Ex.1.1]. It alleges breach by the Board of its obligation to pay retiree benefits as stipulated at Article 24 of the Collective Agreement and Section H of the Memorandum of Settlement, by reason of its determination to cease paying for such benefits to retirees beyond the age of 65 as of 31 August 2014. Donne Petryshyn, the Board's Superintendant of Human Resources, denied the Union's grievance by letter dated 25 April 2013 [Ex.1.2]. The Union sought arbitration by way of ministerial appointment pursuant to section 48 of the *Labour Relations Act, 1995*[4] ["the LRA"]. By letter dated 02 July 2013, the Director of Dispute Resolution Services of the Ministry of Labour, acting as authorized by subsection 121(1) of the LRA, appointed me to act as arbitrator thereunder to hear this grievance.

9. Hearings in this matter took place on 19 December 2013, 16 June and 02 July 2014. On the first day of hearing, counsel made preliminary statements outlining broadly the nature of the matter in dispute. Both on that day and on the second day of hearing, 16 June 2014, the parties filed a raft of ministerial documents and statutory materials. Additionally on the second day of hearing, the President of CUPE Local 27, Fred Jamieson, gave testimony as to the history of health benefits for retirees under this and preceding collective agreements between the parties, and in particular the obligation of the Board to pay the full cost of premiums for retired employees or surviving spouses upon reaching the age of 65. On the last day of hearing, 02 July 2014, argument was made on the merits of the dispute between the parties. I reserved, and my decision on the merits is still pending.

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[3] In total, approximately 315 letters were sent out. Of these, 195 were to former members of this bargaining unit or their surviving spouses. The remainder went to former members of two sister bargaining units: one governing clerical and secretarial employees, the other skilled trades persons; and as well to former non-bargaining employees, all of whom were similarly affected. These proceedings address the issue only as it affects the approximately 200 former members of the CUPE Local 27 bargaining unit or their surviving spouses, whom I refer to compendiously as "the retirees".

[4] S.O. 1995, c.1 as amended.

10. In this preliminary ruling, I address the single disclosure issue upon which the parties differ: the release by the Board to the Union of the names, home addresses and personal telephone numbers of those retirees or spouses of deceased retirees over the age of 65 on whose behalf it pays premiums for health and related benefit plans pursuant to Article 24.04 of the Collective Agreement. In addition, the Union seeks the same information of those retirees or their surviving spouses, currently under the age of 65 for whom it would ordinarily pay such health benefit premiums upon reaching that age. The parties made oral submissions on this issue at the 19 December 2013 hearing. On my invitation, they made further written submissions during the month of March 2014 on the effect, if any, upon this issue which the subsequently released decision of the Supreme Court of Canada in *Bernard v. Canada (Attorney General)*[5], might have. I summarize here both the oral and the written submissions made by counsel.

Submissions

11. For the Union, Mr. Klug argues two principal points: first, that in order to fulfill its sole and exclusive representational obligations to the retired employees both under the LRA and the Collective Agreement, it must be able to communicate with retirees and surviving spouses as to this matter which affects each of them profoundly; and second, that such personal contact information being in the custody of the Board which administers the plans, it is incumbent upon it to transmit same to the Union. He acknowledges that such raises privacy concerns but that these are answered by the exception to the *Municipal Freedom of Information and Protection of Privacy Act*,[6] ["MFIPPA"]for legal proceedings relating to labour relations found at section 52(3) of that Act. Mr. Klug pleads in support the decision of the Supreme Court of Canada in *Dayco (Canada) Ltd. v. CAW-Canada*[7], the arbitral decision in *B.C. Rapid Transit Co. and CUPE Local 7000 – (Re Becker)*[8] and the decision of the Ontario Labour Relations Board [OLRB] in *Re York University*[9]. As to the decision of the Supreme Court in *Re Bernard*, Mr. Klug asserts that, while not strictly on point inasmuch as the Board is not here relying upon privacy legislation as was the plaintiff there, nevertheless the thrust of the decision is supportive of the Union's request for disclosure.

[5] 2014 SCC 13.
[6] RSO 1990, c. M.56, as amended.
[7] [1993] 2 SCR 230.
[8] (2008) 180 LAC 4th 204 (Hickling)
[9] 2007 CanLII 22560

12. For the Board, Mr. Kavanaugh argues that until the grievance is allowed and a breach of the Collective Agreement or some applicable statute is determined, the personal information sought is irrelevant and the request premature. The retirees, although former employees of the Board, are no longer employees in the bargaining unit on behalf of whom the grievance under the Collective Agreement has been filed. There is no evidence that they are aware of the grievance or of the arbitral proceedings, nor any evidence that the retirees or any of them have retained the Union to represent them in this matter. As to the *Bernard* case, it is distinguishable on the facts, as it engaged the applicability of federal privacy legislation in circumstances where a Union in the exercise of its representational rights was seeking personal information of employees in a bargaining unit. Moreover the sensitivity of the Supreme Court to the disclosure of personal information would counsel denial of the request made by the Union here, rather than allowing it. Mr. Kavanaugh also asserted that, in any event, the retirees ought to have received notice of the motion to produce the personal contact information and as well of their right to participate in the proceedings in conformity with the decision of the Ontario Court of Appeal in *Re Bradley et al and Ottawa Professional Fire Fighters Association et al*[10].

Ruling

13. The provisions of MFIPPA relevant to this request for disclosure are the following:

> **2.** (1) In this Act,
>
> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> **31.** An institution shall not use personal information in its custody or under its control except,
>
> (b) for the purpose for which it was obtained or compiled or for a consistent purpose;
>
> **32.** An institution shall not disclose personal information in its custody or under its control except,
>
> (c) for the purpose for which it was obtained or compiled or for a consistent purpose;
>
> **33.** The purpose of a use or disclosure of personal information that has been collected directly from the individual to whom the information relates is a consistent purpose under clauses 31 (b) and 32 (c) only if the individual might reasonably have expected such a use or disclosure. R.S.O. 1990, c. M.56, s. 33.

[10] [1967] 2 OR 311; 1967 CanLII 160

52.(3) Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

14. It is common ground between the parties that the personal contact information sought falls within the statutory definition of "personal information" under MFIPPA s.2(1). It touches age and sex under subparagraph (a), status in the Benefit Plan under subparagraph (c), and address and telephone number under subparagraph (d). As such its use or disclosure by the Board, which has the personal contact information of the retirees in its custody and under its control, is governed by the terms of the Act. Mr. Klug argued that my discretion to order the Board to release to the Union the personal contact information under its control could be grounded in the exclusionary provisions of MFIPPA s. 52(3)—the labour relations legal proceedings or negotiations exception. No doubt this is so, and the reference to *anticipated* proceedings would seem to address Mr. Kavanaugh's prematurity concern. But this is a narrow basis upon which to exercise such a discretion, and the recent jurisprudence of the Supreme Court would ground it on much broader grounds not dependent upon adversarial proceedings before a court or tribunal. In *Re Bernard* supra it has found the discretion to direct the disclosure of such personal contact information as that sought here to be rooted in the nature of the relationship between a trade union and those whom it represents.

15. Common subparagraphs 31(b) and 32 (c) of MFIPPA stipulate that both the use and the disclosure of personal information compiled and held by an institution may only be "for the purpose for which it was obtained or compiled, *or for a consistent purpose.*" A purpose can only be said to be "consistent" if the individual to whom it relates "*might reasonably have expected such a use or disclosure*" – MFIPPA s.33(c). Analagous provisions are found in the federal *Privacy Act*[11] which were at issue in *Re Bernard.* There, the Court upheld the decision of the Public Service Labour Relations Board [PSLRB] holding that the release to a union of bargaining unit employee personal contact information obtained and compiled by the employer was a use consistent with the purpose for which it had been originally compiled within the meaning of the *Privacy Act;* and the employer refusal to release same an

[11] RSC 1985, c. P-21, s.8(2):Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed (a) for the purpose for which the information was obtained or compiled by the institution *or for a use consistent with that purpose*.

unfair labour practice under the *Public Service Labour Relations Act*[12], inasmuch as it interfered with the union's representational duties

16. That decision had been challenged unsuccessfully by an employee in the bargaining unit as a breach of her privacy rights. "It is important to understand the labour relations context in which Ms. Bernard's privacy complaints arise", wrote Justices Abella and Cromwell in commencing their analysis for the majority, continuing on:

> A key aspect of that context is the principle of majoritarian exclusivity, a cornerstone of labour relations law in this country. A union 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.[supra n.5 at para 21].

17. The Court found to be "clearly justified"[at para 27] the two labour relations rationales fueling the conclusions of the PSLRB that the refusal of the employer to release the personal contact information sought was an unlawful interference with the union's representation of employees. First "the union needs *effective* means of contacting employees in order to discharge its representational duties [at para 24, emphasis in original]. And second, the union must be "on an equal footing with the employer with respect to information relevant to the collective bargaining relationship" [at para 26]. "Moreover", the Court added,

> an employee cannot waive his or her right to be fairly — and exclusively — represented by the union. Given that the union owes legal obligations to *all* employees — whether or not they are Rand employees — and may have to communicate with them quickly, the union should not be deprived of information in the hands of the employer that could assist in fulfilling these obligations.[at para 29].

18. As for what it described as "the intersecting privacy concerns" [at para 30], the Court found to be reasonable the conclusion of the Board that the union's need for the personal contact information of the employees so as to get in contact with them was consistent with the purpose for which that information was originally obtained from employees and compiled by the employer. It was done so in order to allow the employer to be in contact with employees as to their terms and conditions of work; and disclosure of this personal contact information to the union is a use of the

[12] SC 2003, c. 22 as amended.

information which an employee in a unionized workplace would reasonably expect [at paras. 31-33].

19. In *Re Bernard,* the Court was addressing the representational rights and duties of a bargaining agent vis-`a-vis *employees* in a bargaining unit. Do they have any purchase vis-`a-vis retirees as in the instant case? First it is worth noting that retirees are not strangers to a collective bargaining relationship between a union and an employer. By definition, retirees are *former* employees, and so some-time members of the bargaining unit, and any rights they enjoy are by virtue of one or more of the collective agreements bargained on their behalf between the union and the employer in the past. Indeed, the long-standing benefits retirees now enjoy *in situ,* were at the time of their employment already benefits to which they were entitled, although inchoate in the enjoyment. Given the labour relations context, an argument could be mounted that retirees should be classified as employees for the purposes of the union's representational duties. But neither the courts nor the tribunals have found it necessary to go that far.

20. Thus in *Re York University*[13], the OLRB held that refusal to supply to a trade union retiree personal contact information was an interference with the administration of a trade union contrary to the provisions of the LRA without finding it necessary to make a finding as to their employee status under the LRA [at para.17]. Rather, it rested its decision on the undoubted right, if not obligation of the trade union to enforce provisions of the collective agreement conferring benefits upon the retirees, by way of the grievance arbitration process [at para 21]. Likewise, Arbitrator Hickling in *Re BC Rapid Transit*[14] declined [at para 44] to address the meaning of the term 'employee' or the status of retirees as such under the *Labour Relations Code.*[15] He cited [at para 45] from the decision of the OLRB in *Re Millcroft Inn Ltd*[16] – incidentally a decision recognized as well by the Supreme Court in *Re Bernard* supra as authoritative –the following passage:

[13] Supra n. 9.
[14] Supra n. 8.
[15] RSBC 1996, c. 165 as amended.
[16] (2000) 63 CLRBR (2d) 110.

> 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[at para 22].

Arbitrator Hickling held those observations of the OLRB to be "equally applicable, *mutatis mutandis,* to the retired employees in the present case" whose rights under the governing collective agreement were at issue [at para 45].

21. In *Re Millcroft* Vice-Chair Albertyne had grounded the representational duties of an arbitration Board in the principle of the duty of fair representation as articulated by the Supreme Court in *Canadian Merchant Service Guild v. Gagnon*[17]. There the Supreme Court had adopted the approach of the United States Supreme Court, first articulated in *Steele v. Louisville & Nashville Ry. Co*[18], that the statutory conferral upon a trade union of exclusive bargaining rights on behalf of employees, triggered an inferred statutory obligation to represent them fairly, impartially and in good faith, without discrimination. Six years after the *Gagnon* case, our Supreme Court revisited the issue in *Gendron v. Supply & Services Union of the PSAC, Local 50057*[19] and placed upon it a slight gloss. The duty of fair representation is grounded in the common law and together with its various statutory codifications comprises a single juridical concept. Although the court did not expressly so declare, the common law concept could be said to be premised on the fiduciary nature of the relationship between a trade union and the employees with respect to which it has been granted exclusive bargaining rights. And of what value would a fiduciary relationship between union and employee be if its reach could be severed simply by the transition from active employee status to that of retired employee? Is not the relationship which drives the fiduciary concept—reliance by the one upon the power of the other—identical regardless of the transition from active to retired employment status?

22. That retiree benefits under a collective agreement accrue at the time the active employee assumes retiree status was determined by the Supreme Court in *Re Dayco.*[20] "Retirement benefits," wrote Justice LaForest,

> are in the nature of accrued rights; those benefits may(depending on the terms of the agreement) vest; and vested rights can be enforced by union grievance on behalf of retirees.[at SCC Lexum p.30/46]

[17] [1984] 1 SCR 509; 1984 CanLII 118.
[18] 323 US 192 (1944).
[19] [1990] 1 SCR 1298.
[20] Supra n. 7

Conscious of the remedial challenges which might face retirees seeking to enforce rights arising under a collective agreement were the Union not to file a grievance on their behalf, Justice LaForest made it clear that the law was sufficiently capacious to overcome any remedial roadblock. He wrote:

> There may, as well, be other means by which retirees could surmount the remedial roadblocks that appear to face them. The term "employee" in the Actmay well encompass retired workers in some contexts, thereby allowing retirees to take advantage of the Act's fair representation provisions. Finally, there is a possibility that the relationship between retired members of a bargaining unit and the bargaining agent for that unit is fiduciary in nature. If a union failed to consider the interests of retirees during collective bargaining, or refused to process a grievance on behalf of those retirees, such conduct might form the basis of a claim for breach of fiduciary duty.[at SCC Lexum p. 41/46].

As I have noted earlier, labour boards and arbitrators have since leaped over the remedial roadblocks to ensure access by retirees to benefits conferred upon them by the provisions of a collective agreement.

23. All of the foregoing leads me to conclude that I should exercise the discretion vested in me to direct the Board to release to the Union the personal contact information of the retirees which it seeks: namely, their names, addresses and telephone numbers. The Board is to transmit this personal contact information to the Union on or before 31 July 2014, and periodically thereafter on a schedule to be determined between it and the Union. The Union is to use the personal contact information so transmitted to communicate with the retirees or surviving spouses with respect to these arbitration proceedings, and any further proceedings or other matters related thereto which affect them under the Collective Agreement, or such renewal collective agreements as the parties may enter into in the future. The Union is to maintain such personal contact information in a secure and periodically updated data base, access to which shall be limited to named Union officials and their staff; it is not to be further disseminated or distributed, and is to be used solely for the purposes here described.

Notice

24. Finally, I wish to address the procedural issue raised by counsel for the Board: the lack of notice to the retirees of the disclosure issue before me for determination in these arbitral proceedings. I note first that the authorities teach us that there is no *jus tertii* in matters of procedural fairness. "The right to procedural fairness", then Chief Justice Nemetz of the British Columbia Court of Appeal once noted,

is a personal right and allegations that a decision-maker has violated the doctrine of procedural fairness can only be made in court by the person whose rights in question have been allegedly violated.[21]

25. It is a commonplace entrenched in the compulsory rights arbitration provisions of the LRA at s.48(1)[22] that, absent specific terms to the contrary in a collective agreement, bargaining unit employees have no standing in arbitral proceedings although their rights thereunder are engaged. Rather their trade union as bargaining agent enjoys an exclusive right to represent their interests in that forum. A limited exception to this general rule was laid down in *Re Bradley* supra, and it is this:

> Where two employees or two groups of employees covered by the same collective agreement compete for benefits thereunder which are accorded by the employer to one or to one group only and the disappointed employee or group invoke the grievance machinery to seek redress and their case is taken to arbitration by their bargaining agent (the union party to the collective agreement), it is reversible error on certiorari for the arbitrator to make an award in their favour which strips the other employee or group of the benefits in question if the latter have not been given timely notice that the benefits conferred upon them by the employer would be brought directly into question at the arbitration hearing and might be lost as a result thereof. [supra n.10 at para 2]

It was the late Chief Justice Laskin while still a Justice of the Ontario Court of Appeal who wrote those words. But the right to notice principle there articulated, and hence to standing in the arbitral forum, has no application here.

26. The situation before me is far removed from that dealt with by the Court in *Re Bradley*. There are not here two groups of employees covered by the same collective agreement competing for benefits under its terms, with one group stripped of benefits previously accorded in favour of another group to which they are newly afforded. Rather a bargaining agent, bound to represent fairly before an employer a discrete group of retired employees whose common interests under a collective agreement are in jeopardy, seeks disclosure of their personal contact information held by the employer, so that it can fulfill its representational role. As discussed above, that role is one with common law underpinnings, now rooted in the LRA, and recognized by the parties to the Collective Agreement. Of note in *Re Bernard* supra, where employee privacy rights were at issue, is the Supreme Court's comment that "the usual practice" is not to give affected employees notice of such proceedings[23], and the same would hold here in the case of retirees.

27. That said, both counsel are in accord that the release of the personal contact information sought—the names, addresses and telephone numbers of the retirees—

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[21] *Hundal v. Superintendent of Motor Vehicles*, [1985] 2 DLR (4th) 592, at para 36.

[22] 48(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

[23] Supra n. 5, at paragraph 5.

raises privacy concerns. Moreover, this is confirmed by the seriousness and care with which the Supreme Court addressed the similar privacy issue before it in *Re Bernard* supra. In keeping with the spirit of that decision, I have placed conditions on the release to the Union of the personal contact information sought so as to minimize its being compromised any further than necessary. Similarly, as was the case there, I consider it appropriate to advise the retirees of the decision to have the Board release their names, addresses and telephone numbers to the Union. Accordingly, I direct the Board to transmit to each of them the attached notice, marked Annex "A" to my Ruling, on or before 21 July 2013.

Summary

28. The Union's preliminary motion is granted on terms as here set out:

i. On or before 31 July 2014, the Board is to transmit to the Union the names, addresses and telephone numbers of the retirees, being former members of the bargaining unit, or their surviving spouses; such to be updated periodically on a schedule as agreed to by the parties;

ii. The Union is to use the personal contact information so transmitted to communicate with the said retirees or surviving spouses with respect to these arbitration proceedings, and any further proceedings or other matters related thereto affecting the retirees under the Collective Agreement, and such renewal collective agreements as the parties may enter into in the future;

iii. Such personal contact information is to be maintained in a secure and periodically updated data base, access to which shall be limited to named Union officials and their staff; it is not to be further disseminated or distributed, and is to be used solely for the purposes noted in sub-paragraph ii;

iv. On or before 21 July 2014, the Board is to transmit to each retiree or surviving spouse, by post or other equivalent means on my letterhead, a copy of the Notice attached hereto and marked as Annex "A".

Issued this 14th day of July 2014.

Thomas Kuttner

Thomas Kuttner, QC
Arbitrator

THOMAS KUTTNER, QC
Labour Arbitration & Mediation Services

Annex "A"

PO Box 7116
Windsor ON
N9C 3Z1

14 July 2014

TO: Current Retirees and Surviving Spouses, Custodial & Maintenance Group

FROM: Thomas Kuttner, QC , Arbitrator

Dear Retiree (or Surviving Spouse of a Retiree):

Your former Employer, the Greater Essex County District School Board, advised you in April 2013 that the Ontario Ministry of Education has directed it to bring to an end the Benefit Plan under which you have been receiving health, dental and related benefits. The Board is directed to do this by 31 August 2014. The Benefits Plan is provided for under the terms of the Collective Agreement governing between the Board and CUPE Local 27. Under the terms of that Benefit Plan, once you or your surviving spouse reach the age of 65, the Board must pay the full premium cost for health, dental and related benefits under the Plan.

The Board is offering you the right to participate in an Alternate Benefit Plan for those 65 years of age or older, to come into effect on 01 September 2014. Under the terms of that Alternate Benefit Plan, you or your surviving spouse will be solely responsible to pay the full premium cost for health, dental and related benefits.

CUPE Local 27 has filed a grievance on your behalf, challenging the right of the Board to unilaterally bring your current Benefit Plan to an end. It asserts that you should continue to be entitled under the Collective Agreement upon its expiry on 31 August 2014, to receive the benefits of the Benefit Plan as it now provides. This, CUPE Local 27 claims, would include payment in full by the Board of the full cost of premiums for health, dental and related benefits once you have reached the age of 65. I am the Arbitrator appointed under the *Labour Relations Act, 1995* to hear and determine that grievance. Hearings were held in Windsor ON on 19 December 2013, 16 June and 02 July 2014. I expect to issue a decision on the grievance before 31 August 2014.

CUPE Local 27 would like to communicate with you directly, both in writing and orally by telephone, about the grievance which it has filed on your behalf and about these arbitration proceedings. To do so, it has asked the Board to release your name, current address and telephone number to it. Under the terms of the *Municipal Freedom of Information and Protection of Privacy Act*[MFIPPA], this personal

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contact information is protected from further dissemination or distribution by the Board unless releasing it is consistent with the purposes for which the Board collected it, or it is ordered to do so in any legal proceeding, including an arbitration under the *Labour Relations Act*.

In a Preliminary Ruling issued on 14 July 2014, I determined that the release of this information was consistent with your right to privacy under MFIPPA. I directed the Board to release to CUPE Local 27, the personal contact information it seeks—namely your name, current address and telephone number—on or before 31 July 2014. This will enable CUPE Local 27 to communicate with you directly about the grievance, the arbitration proceedings and its understanding of your rights under the Benefit Plan and the Collective Agreement. I placed certain restrictions on the use by CUPE Local 27 of that information to ensure that it remains confidential with the Local and is not further disseminated or distributed by it.

Because the Courts have held that privacy and its protection are important rights in Canada, I have directed the Board to let you know of my ruling by sending you this notice. If you have any concerns about the release of your personal contact information by the Board to CUPE Local 27, you may raise it with either CUPE Local 27 or the Board.

Thank you for your attention.

Yours Truly,

Thomas Kuttner, QC
Arbitrator