

IN THE MATTER OF AN ARBITRATION  
PURSUANT TO THE *POLICE SERVICES ACT R.S.O. 1990 Ch P.15*

B E T W E E N:

CHRISTI-ANNE MARIE LAFRANCE

(The "Complainant")

- and -

NORTH BAY POLICE ASSOCIATION

(The "Association")

- and -

NORTH BAY POLICE SERVICES BOARD

("The Board")

AND IN THE MATTER OF A COMPLAINT BY MS LAFRANCE ALLEGING A BREACH  
OF THE ASSOCIATION'S DUTY OF FAIR REPRESENTATION

David K.L. Starkman Arbitrator

APPEARANCES

Ms Lafrance In Person

FOR THE NORTH BAY POLICE ASSOCIATION

Nini Jones Counsel  
Aaron Northrup President  
Sandy Allary Vice-President

FOR THE POLICE SERVICES BOARD

David Migicovsky Counsel  
Deputy Chief Williams

A Hearing concerning this matter was held on April 6, 7, June 8, and 9, 2009 at North  
Bay, Ontario

## AWARD

In a decision dated January 9, 2009 this Board of Arbitration determined that it had the jurisdiction to consider Ms Lafrance's complaint that the North Bay Police Association had violated its duty of fair representation with respect to her claim for indemnification of legal expenses arising from defending criminal charges of assault in December, 2005.

In the course of making that determination the Board recorded the following background facts:

The background facts are not substantially in dispute. Ms Lafrance became a sworn member of the North Bay Police Service on April 22, 2002. In April, 2004 Ms Lafrance was charged with assault under the Criminal Code with regard to an incident that occurred while she was on duty. She was also charged under the *Police Services Act* (PSA).

On April 12, 2005 she resigned, and as a result of her resignation the PSA charges were stayed due to a loss of jurisdiction. On December 14, 2005 Ms Lafrance was acquitted of the criminal charges. In defence of these charges Ms Lafrance incurred legal expenses of approximately \$58,000.00.

Ms Lafrance alleged that she requested assistance of the Association for payment of her legal accounts, and for assistance in having the Board indemnify her for the accounts. The Association denied that Ms Lafrance made such requests, or at least denied that the requests had been made as alleged by Ms Lafrance and at this time I make no finding in this regard.

Ms Lafrance requested indemnification pursuant to article 19.01 of the collective agreement for her legal expenses from the North Bay Police Services Board. The Board in reliance on article 19.03 of the collective agreement refused payment on the basis that her actions were a gross

dereliction of duty and/or a deliberate abuse of power.

The relevant articles provide as follows:

19.01 Subject to the other provisions of this Article, a Sworn Member charged and finally acquitted of a criminal or statutory offence, because of acts done in the attempted performance in good faith of duties as a police officer shall be indemnified for the necessary and reasonable legal costs incurred in the defence of such charges.

19.03 Notwithstanding clause 19.01, the Board may refuse payment otherwise authorized under clause 19.01 where the actions of the officer from which the charges arose amounted to a gross dereliction of duty or deliberate abuse of powers as a police officer.

Ms Lafrance testified that she commenced work with the North Bay Police Services Board in April, 2002. She had previously worked for some years as a police officer in the City of Toronto. Almost immediately an issue arose concerning her rate of pay and her entitlement to certain other benefits in the collective agreement. It affected her relationship with other officers, some of whom believed her salary was too high.

During the summer of 2002 Ms Lafrance testified that she endeavoured to get a copy of the collective agreement which was available on the intranet, but was having access problems and, despite her efforts, the problems could not be resolved.

On October 29, 2002 she responded to a call about a suspect who had allegedly stolen a car. Together with her partner and another officer they pursued and apprehended the suspect. The next day she was approached by Sergeant Solomon who said her partner

had reported that she had used excessive force in the course of the apprehension and that he was investigating. According, to Ms Lafrance, Sergeant Solomon came to her two days later and said he had talked to everyone and that he was satisfied no excessive force had been used.

She testified that she met on two occasions with Inspector Jolly and complained about being harassed at work by fellow officers and by senior officers and complained about false performance reviews. She stated that she also met with Mike Tarini, the President of the North Bay Police Association, in 2003 and asked for assistance in stopping the harassment. She stated that Mr. Tarini gave the impression that he did not like her. There was supposed to be a follow-up meeting with the Association representative, but it did not occur.

Ms Lafrance stated that by the fall of 2003 she realized the Association was not going to assist her with the harassment problems. Commencing in November, 2003 Ms Lafrance was off work on a combination of sick leave and vacation. In January, 2004 her payments from the North Bay Police Services Board were terminated and Ms Lafrance filed a claim with the Workplace Safety and Insurance Board (WSIB) alleging workplace harassment. In late January, 2004 the WSIB denied the claim. No appeal was filed.

By correspondence dated January 21, 2004, Mr. George Berrigan, Chief of Police, wrote to Ms Lafrance in part as follows:

...I note with some concern, the narrative in the WSIB Form 6. In particular this document states:

I first recognized that I was being harassed by my direct supervisors in February of 2003. It progressively got more vicious. This included racial slurs, false allegations and evaluations, required to do humiliating tasks, put in positions that risked my safety. My symptoms were almost immediate, within a couple of weeks.

The conduct described in your statement, if accurate, is unacceptable. In the past, you have been asked to provide specific information regarding these allegations but have refused to do so. I am tasking Inspector Williams with conducting an investigation into your allegations. Once more I am requesting your co-operation in investigating the matter. Inspector Williams will be in touch with you in due course.

You are advised that, as it relates to your employment, Inspector Williams will be your point of contact with our police service. Inspector Williams will determine the method communication. You are advised to desist contacting other members by e-mail or written correspondence.

In Inspector William's absence contact Deputy Chief Cook.

I believe this addresses the concerns in your latest correspondence.

Ms Lafrance retained Mr. Andrew Perrin, barrister, to represent her. Mr. Perrin, by correspondence dated March 4, 2004, wrote to Sergeant Mike Tarini, the President of the North Bay Police Association, as follows:

Dear Sergeant Tarini:

RE: Senior Constable Christi Lafrance #5706  
Possible Claims Against the North Bay Police Service

Further to my letter dated February 9<sup>th</sup>, 2004, wherein I advised that I am retained as Counsel by Senior Constable Christi Lafrance #5706 and that all correspondence regarding her matter be conducted through my office, I am advised by her that you have continued to correspond with her with regard to her loss of pay as a Senior Constable.

As her counsel, I indicate again that any and all correspondence with regard her WSIB claim, or any other matter concerning her employment with the North Bay Police Service, is to be conducted through my office, and not through Ms Lafrance.

Please govern yourself accordingly.

Yours truly,

Andrew Perrin

Ms Lafrance testified that she called Mr Tarini on two occasions in April, 2004 and left him a voice message but that he did not return her calls. She stated that she felt she was being harassed and wanted his assistance in having it stopped.

On April 16, 2004 Ms Lafrance was charged under the Criminal Code with assault in relation to the events of October, 2002. She was also charged until the *Police Services Act* with discreditable conduct arising out of the alleged assault in October, 2002.

On April 26, 2004 Ms Lafrance wrote to Sergeant Tarini as follows:

Dear Sir:

As you are aware I was charged with assault and now require legal representation..

I would ask that the Association immediately provide me with funds so that I may defend this allegation.

If there is a provision within the agreement that I may not choose my own counsel kindly advise me of this as I am taking steps to retain a lawyer so that I may be represented on my first appearance.

Kindly advise the time frame before the funds are issued or a response can be expected. As I am not sure of the process I need some direction on how this is all handled.

Yours truly,

Christi Lafrance  
Badge 5706

On May 10, 2004 Mr. Perrin again wrote to Sergeant Tarini as follows:

You have made comments in the media that are somewhat misleading and quite frankly I cannot understand why; I would have thought that my being retained by P.C. Lafrance would have been enough information for you to know that re-directing your correspondence and/or queries through my office was the logical and orderly thing to do.

You claim in the media that PC Lafrance issued a "cease and desist" direct communication letter through my office. You are correct in your assertion to the extent that she does not wish to communicate with you directly. However, this is not to say that PC Lafrance does not want continued representation from your Association; she simply asks that you communicate with my office directly regarding any matters pertaining to

her file.

Would you kindly respond in writing to my office with respect to your Association's role (if any) in continuing to represent PC Lafrance's labour interest with the North Bay Police Service

Yours Very Truly,

Andrew Perrin  
Barrister

On October 28, 2004 Mr. Paul Cook, Chief of Police wrote to Mr. Perrin initiating Police Service Act charges concerning Ms Lafrance's alleged secondary employment as follows:

Dear Mr. Perrin:

RE: Constable Christi Lafrance - Secondary Employment

Further to my letter to Constable Lafrance dated July 29, 2004, please advise your client, Constable Lafrance that I have initiated a formal Chief's Complaint pursuant to section 56(2) of the Police Service Act regarding her secondary employment. This correspondence should be considered my notice to Constable Lafrance that I have initiated this complaint.

I believe Constable Lafrance is engaged in secondary activities as a paralegal contrary to section 40(1) of the Police Services Act. More specifically I believe the secondary activities of Constable Lafrance contravene the following provisions of section 49:

- The paralegal work would interfere with or influence adversely the performance of her duties as a member of the North Bay Police Service [s.49(1)(a)];
- The paralegal work would place her in a position of conflict of interest or is likely to do so [s.49(1)(b)];

- It may also be argued that Constable Lafrance has an advantage derived from employment as a member of a police service.

In order to assist with this investigation I require a duty report from Constable Lafrance addressing the date she commenced secondary employment and the full particulars of this employment.

Please ensure Constable Lafrance provides a copy of this duty report to Deputy Chief Williams by September 27, 2004.

On December 30, 2004 Ms Lafrance wrote to Sergeant Tarini as follows:

RE Legal Cost - Criminal Matter

Please be advised this is my second request for funds.

The association is responsible to pay my lawyers bills in relation to criminal matters. As you are aware I am presently charged with assault.

I require \$10,000.00 for the above matter. It is expected I will require an additional \$5,000 prior to trial.

Kindly forward the funds directly to my counsel.

Andrew Perrin  
The Darling Building, Suite 501  
96 Spadina Avenue  
Toronto, Ontario  
M5V 2J6

Be advised that you are to deal directly with my counsel in response to this matter. I expect an explanation as to why my first request went unanswered.

Regards

Christi Lafrance

Ms Lafrance testified that the Police Association in the City Toronto would fund the

defence of officers facing criminal charges and, where possible, recover the money from the employer.

On January 9, 2005 Mr. Tarini wrote to Ms Lafrance as follows:

In response to your second request I was of the opinion we were not to communicate with you from the correspondence I received from your legal counsel's last memo to cease and desist.

The North Bay Police Association is a much smaller association than the MTPA. We do not have legal counsel on staff nor on retainer. According to the Ontario labour relations jurisprudence guidelines our association has a duty to assist its members in any manner that it deems appropriate as long as it is done in a fair manner without any prejudices.

That assistance can range from simply advising the member on the appropriate legal counsel to retain, up to representing the member in a Police Act hearing. Our past practice has always been not to provide any monies up front for legal counsel in dealing with any Criminal matters or Police Services Act charges. We are currently continuing with this practice for all of our members.

A number of year ago I was instrumental in advising our member of the existence of a PACP plan. It is a group of smaller associations that self administer a pool of funds that covers members with Criminal charges when in the "performance of your duty and acting in good faith". All of our sworn members have been paying into this plan on a monthly basis. There is an application process and the forms must be submitted within thirty days of being charged. The plan has very specific entitlement provisions and to date has not to my knowledge paid any funds towards members.

Upon conclusion of Criminal charges, if the member is found not guilty then the legal indemnification sections of the collective agreement shall apply, unless it is PSA matter. Our collective agreement does not provide for payment of PSA Act matters.

If the member is found guilty the member can come to the executive with a request of financial consideration up to a limit of \$5,000.00 dollars as per

our constitution. The executive will then put the matter on the next association meeting agenda for a vote from its membership on whether to support this request or not. The membership make the decision based on facts, presented by either the executive or the member themselves.

Therefore we will not be disbursing any funds towards your legal bills, we wish you well in your legal matters and should you have any further questions please contact me at work.

Fraternally yours,

Mike Tarini  
President North Bay  
Police Association

On April 12, 2005 Ms Lafrance resigned her employment with the North Bay Police Service.

On December 14, 2005 Ms Lafrance was acquitted of the criminal charges.

On October 23, 2006 Mr. Freeman, legal counsel, wrote to Mr. Tarini as follows:

We are solicitors for Christi Lafrance whom we are representing in a civil litigation matter.

We understand that while she was a member of the North Bay Police Association, Ms Lafrance was arrested and charged criminally with assault. She was acquitted of these charges late last year. She was represented in this matter by Andrew Pinto.

We understand that Ms Lafrance has contacted the Association on at least two occasions seeking indemnification for the legal fees that she incurred in successfully defending herself. She has not yet received a favourable reply. We have, therefore, been asked to contact you to determine whether or not the Association is prepared to reimburse Ms Lafrance for her legal costs. It is our respectful view that, as she was a member of the Association at the time she was charged (notwithstanding that she later resigned) and the fact that she was acquitted of the charges. The

Association ought to have compensated her for these costs.

Your timely response to this correspondence would be most appreciated

Yours very truly,

Michael Freeman

On October 29, 2006 Mr. Tarini responded as follows:

Further to your fax dated Oct 23, 2006 please be advised that the new President of the Association is Mr. Noel Coulas. I have since stepped down from that position.

In reply to the legal indemnification issue for legal expenses on behalf of Christi Lafrance this is a mute point now that she was found not guilty. We have wording in our collective agreement article 19.01 whereby the North Bay Police Services Board shall indemnify any officer found not guilty of a criminal offence in the performance of his or her duties. I would suggest that a bill for service be forwarded to the NBPSB as per Article 19.01

Mike Tarini  
Past President NBPA

By correspondence dated December 6, 2006 Mr. Freeman sent the account for legal services to Mr. Coulas for payment.

By e-mail dated December 20, 2006 Mr. Coulas responded to Mr. Freeman as follows:

Dear Mr. Freeman:

I have received your letter dated 06 December 2006, regarding your representation of Christi Lafrance. I am not aware of the particulars of

your last correspondence, or who you were corresponding with, but the North Bay Police Association has no obligation to provide compensation for Ms Lafrance. I can tell you that there is a provision in our Collective Agreement that may be of some use and interest to you and Ms Lafrance.

Article 19.01 of the Sworn Collective Agreement states:

19.01 Subject to the other provisions of this Article, a Sworn Member charged and finally acquitted of a criminal or statutory offence, because of acts done in the attempted performance in good faith of duties as a police officer shall be indemnified for the necessary and reasonable legal costs incurred in the defence of such charges.

Article 19.03 of the SCA states:

19.03 Notwithstanding clause 19.01, the Board may refuse payment otherwise authorized under clause 19.01 where the actions of the officer from which the charges arose amounted to a gross dereliction of duty or deliberate abuse of powers as a police officer.

It would be my submission that because the service has never pursued a PSA component of the allegations brought against Ms Lafrance, the Police Services Board has not provided any deliberate abuse of power or gross dereliction of duty which would negate indemnification by the North Bay Police Services Board.

The North Bay Police Association does have an indemnification clause in our Constitution whereby a member can bring a request before the membership for consideration but the amount, which is limited to a maximum of \$5,000.00 is subject to discussion and a vote by our membership.

I hope this information is of some use to Ms Lafrance.

Sincerely

Noel Coulas  
President  
North Bay Police Association

By correspondence dated February 2, 2007 Mr. Freeman wrote to Mr. Coulas again seeking indemnification for legal costs and indicating that he would commence legal proceedings against the Association if the matter was not resolved.

By correspondence dated February 21, 2007 Mr. Freeman wrote again to Mr. Coulas asking for a reply to his February 2<sup>nd</sup> correspondence and asking if Ms Lafrance could address the Association's Board of Directors.

Mr. Coulas in his evidence denied receiving the correspondence of February 2, or 21, 2007.

Ms Lafrance made application to the North Bay Police Services Board for indemnification of her legal expenses, and by correspondence dated August 14, 2007 the Board denied the request as follows:

Dear Ms Lafrance:

RE Request for Legal Indemnification

Please consider this correspondence the North Bay Police Services Board's response to your letter, dated March 28, 2007 in which you requested legal indemnification from the Board as per Article 19.01 of the Sworn Collective Agreement.

After receiving a legal opinion on this matter and follow up discussion the Board has decided to refuse payment authorized under Article 19.01 as we believe your actions on October 29, 2002 were a gross dereliction of

duty and/or a deliberate abuse of your powers as police officer. We are refusing this payment as per Article 19.02 of the Sworn Collective Agreement.

Sincerely,

Peter Chirico, Chair  
North Bay Police Services Board

Mr. Tarini testified that an issue had arisen with respect to Ms Lafrance's rate of pay in the summer of 2003. The matter had been grieved by a fellow officer and the Association had taken over the grievance.

Mr. Tarini stated that when he received the first letter from Ms Lafrance's solicitor in February, 2004 he was taken aback. He phoned Ms Lafrance, and he stated that Ms Lafrance advised that she had retained counsel and did not want to have anything to do with himself or the Association and she hung up the phone. Ms Lafrance denied receiving any telephone call from Mr. Tarini.

With respect to the May 10, 2004 letter from Mr. Perrin, Mr. Tarini stated that he did not contact Mr. Perrin as there was no labour interest and the Association had no involvement with the criminal charges.

Mr. Tarini stated that he explained the situation to Ms Lafrance in his correspondence of January 9, 2005 and never heard further from her. He stated that Ms Lafrance never asked for assistance and did not seek out any advice.

Mr. Tarini stated that Ms Lafrance never called him to talk about employment issues, and that he was unaware she had problems with the intranet and did not have a copy of the collective agreement. He stated there were copies of the collective agreement around the station. He also stated that all correspondence received by the Association was discussed by the Executive which met monthly.

Sergeant Noel Coulas, the President of the North Bay Police Association from September, 2006 until 2008, testified that there are approximately one hundred and fifty members of the Association and that the Executive is comprised of five members. He testified that he first became involved with the situation when he advised Constables Gardiner and Bedard and Sergeant Solomon with respect to *Police Service Act* charges brought against the two constables for failure to properly report the incident involving Ms Lafrance in October, 2002 and against Sargent Solomon for failing to properly investigate the incident when it was reported to him. All three plead guilty to the charges but made submissions to the Hearings Officer as to penalty. Constables Gardiner and Bedard received three day suspensions and Sergeant Solomon received a ten day lost time suspension.

Mr. Coulas stated that the October 23, 2006 correspondence from Mr. Freeman to Mr. Tarini was forwarded to him and he was satisfied with the October 29<sup>th</sup> reply from Mr. Tarini.

Mr. Coulas stated that he was surprised to receive the August 14, 2007 correspondence from Mr Chirico as this was the first time he was aware of Ms Lafrance's request to the North Bay Police Services Board for indemnification for her legal expenses. He stated there was an Association Board meeting toward the end of August at which the correspondence was discussed. He stated that he was never contacted by Ms Lafrance and there was never any request to file a grievance.

He stated that he had an in depth knowledge of the matter from his discussions with Constables Gardiner and Bedard and Sergeant Solomon, and that it was his conclusion that Ms Lafrance had a weak case and that a grievance would not have been successful because she had kicked a prisoner in the head and said "that was for making me run before my morning coffee".

Mr. Coulas stated that both Constables Gardner and Bedard were credible witnesses, and that even though Ms Lafrance was acquitted of the criminal offence, it was a different standard of proof if the matter proceeded to arbitration. He stated that the Executive looked at the wording of the collective agreement. Article 19 had never been tested and that this was not a good case to go forward on. As well he noted that this was a monetary issue affecting only one individual and that it is difficult to sell to the membership the necessity of going forward. In the end he stated that since the Association had not received a request from Ms Lafrance to file a grievance, there was

no need to make a final decision.

Sergeant Coulas stated that the Association did not make any representations to the Board concerning legal indemnification for Ms Lafrance because they were not asked to do so and Ms Lafrance was represented by legal counsel.

The next that the Association heard from Ms Lafrance was when it received a Statement of Claim in December, 2007. At that time the Executive met and reviewed whether it should file a grievance, and decided not to proceed even if it had been asked. He also indicated that the matter was discussed at other meetings of the Executive and it was also determined that a grievance did not have merit and the likelihood of success was nil.

#### THE SCOPE OF THE DUTY OF FAIR REPRESENTATION

Under the provisions of the *Police Services Act* (PSA) the Association is not involved with Part V of the *PSA* which deals with complaints about the conduct of police officers. These are matters between the Chief of Police and individual officers, and the jurisprudence has established that the duty of fair representation only applies to those areas where the union or association is the exclusive vehicle through which the employee may pursue their claim. Thus in *Ms Dee Laljee, Applicant v. Ontario Secondary School Teachers' Federation, Responding Party v. Toronto District School*

*Board, Intervenor*, [2002] O.L.R.D. No. 2560 the Applicant alleged the Association violated section 74, of the Ontario Labour Relations Act by not pursuing a claim the Ontario Labour Relations Board commented at paras. 7 and 8 as follows:

7. There are two parts to the consideration: firstly, does the union have an obligation under s. 74 to pursue a claim it is entitled to pursue for an employee it represents against a person other than the employer? In other words, assuming it customarily does pursue such claims, must it defend itself before the Board on the basis that its decision not to pursue the applicant's claims was not arbitrary, discriminatory, or in bad faith? Secondly, does it have any such obligation if the applicant herself may pursue a claim against a third party.
8. The answer to both these questions depends upon whether the union is the exclusive vehicle through which the employee may pursue their claim. The union is bound by s. 74 in respect of claims by an employee against their employer because the employee is within a bargaining unit represented by the union, the union is the employee's exclusive bargaining agent, and employees may not themselves pursue claims against their employer; *Peter Ropcca*, [1989] OLRB Rep. Apr. 371. The situation is different if the union is not the exclusive agent of the employee. Where the employee retains an individual right of action, there is no duty upon a union to comply with the provisions of s. 74 of the Act. The union's failure to act for the employee does not prejudice the employee because they may themselves pursue the claim: *Dennis Leonard*, [1990] OLRB Rep. May 575.

In *Ouellet v. Union of Canadian Correctional Officers*, [2007] PSLRB 112, G. Nadeau, the Board determined that it did not have the jurisdiction to determine a complaint of unfair representation because the matter complained of was outside the scope of the collective bargaining process. At paras. 29 - 30 the Board stated:

- 29 In section 187, the new Act states that no employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representative, shall act in a manner that is arbitrary or discriminatory or that it is in bad faith in the representation of an employee in the bargaining unit. Many consider that notion to be the “duty of representation.” However, in reading that section, it is clear that it is not the certified union organization’s duty to provide representation in every case submitted by the members of the bargaining unit. The jurisprudence on the duty of representation also clearly establishes that it is a duty strictly related to the representation of members in connection with the employer and that it must not be arbitrary, discriminatory or carried out in bad faith.
- 30 That obligation, which is contained in every act governing labour relations across the country, stems from, as indicated by Justice Chouinard in *Gagnon*, the mandate of exclusive representation that the union acquires through its certification. However, some aspects of the labour relationship, including staffing, are excluded from the scope of the new Act and are instead governed by the *Public Service Employment Act*. It is also notable that the right to file a grievance is not limited to the provisions of the collective agreement and that in disciplinary matters, the union does not have the monopoly on representation. It is only in matters concerning the application of the collective agreement that the union has exclusivity of representation.

In *Mabel Adams, Applicant, v. The United Steelworkers of America Local 13571-34, Responding Party* [2003] O.L.R.D. No. 72 the applicant alleged that the union had breached its duty of fair representation by not providing her with a lawyer to pursue a claim against an insurer for not providing her with benefits. In dismissing the claim the Board noted at para. 11:

- 11 ...The Union is not in control of the dispute resolution process. Ms Adams is entitled to pursue an action in her name without the permission or approval, or indeed even the consent, of the Union. This matter does not relate to a collective agreement issue and

therefore the Union's decision not to retain a lawyer to proceed with a civil action is not a violation of section 74.

For further discussion of the scope of the duty of fair representation see *John Kohut, Complainant v. C.A.W. - Canada, Local 303, Respondent v. General Motors of Canada Limited, Intervener*.

After having reviewed the jurisprudence, I have concluded that the Union's common law duty of fair representation, only extends to matters over which they have the exclusive power of representation. Thus, to the extent that Ms Lafrance's complaints concern the Association's conduct with respect to the PSA charges, or to her workers' compensation claim, the Association has not breached any duty of fair representation, because Ms Lafrance has the ability to defend or pursue these claims on her own behalf and therefore no common law duty of fair representation attaches to the Association's conduct with respect to these matters. I now turn to the Association's failure to file a grievance on Ms Lafrance's behalf, something over which the Association does have exclusive authority.

## THE NATURE OF THE DUTY OF FAIR REPRESENTATION

The *Police Services Act* does not contain any provision that imposes a duty of fair representation on a police association. Such duty is found in the common law as set

out in the decision in *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509 per Chouinard J at p. 527 as follows:

The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. The exclusive power conferred on a 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, and a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences 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 competence, without serious or major negligence and without hostility towards the employee.

Many if not most statutes governing labour relations across the country have a provision concerning a union's duty of fair representation. Section 37 of the *Canada Labour Code* R.S.C. 1985 c. L-2 provides:

Where a trade union is the bargaining agent for a bargaining unit, the trade union and every representative of the trade union shall represent, fairly and without discrimination, all employees in the bargaining unit.

Section 74 of the *Ontario Labour Relations Act S.O. 1995 Ch. 1* provides:

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 may be.

I was referred to a number of cases which discuss the nature of the duty of fair representation. In *Christopher M. Sojka v. Massey-Ferguson Industries Limited and U.A.W. Local 439* [1979] O.L.R.B. 1005 the complainant sought a declaration that the Union had violated s. 74 of the Ontario Labour Relations Act by not carrying his grievance. In dismissing his application, the Board commented at paragraph 7 as follows:

The purpose of section 60 [now section 74] is not to impose upon a trade union an unrealistic standard of infallibility. The complainant will not succeed if the evidence discloses merely that the union's treatment of Mr. Sojka resulted from some error in judgment on its part or resulted from negligence not amounting to gross negligence. The wording of the section reflects a recognition of the limitations within which union representatives, who are often rank and file employees with limited training in industrial

relations, work in the day to day representation of numerous employees. Section 60 was not intended as a ground to second guess a decision, taken by a union in good faith, without discrimination and after due consideration even if that decision is not the one which the Board, in the cold light of a hearing, would have made, (See *Prfinesdoma* [1975] OLRB Rep. May 444; *Barber Coleman of Canada Ltd.* [1976] OLRB Rep. Oct. 613.

In *Isobel Northover, Linda Tower, et. al., Complainants, v. American Federation of Grain Millers, Local 242, Inter-Bake Foods Ltd., Respondents* [1981] OLRB Rep. 1145: the Board commented at para 11 regarding the duty of fair representation and local unions as follows:

...As noted in the Coleman case, section 60 requirements take much of their shape from the fact that union affairs are conducted for the most part by laymen and this is particularly so of local union affairs. Breakdown in communications and errors in judgment inevitably occur. The Board has decided that, given the statutory language employed, the Legislature has acknowledged this reality of trade union organizations and intended it to be accommodated in the administration of the section.

In this respect see also *Kesar Singy Riyait, complainant, v. Local 1590, International Brotherhood of Electrical Workers, Respondent, v. I.T.E. Industries Limited, Intervenor* [1980] OLRB Rep. 1001.

In *Sandra Hall v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 1421 and Smith & Stone (1982) Inc.* [1984] OLRB Rep. 1609 the complainant alleged that the Union had breached its duty of fair

representation by not representing her adequately at the arbitration hearing. In dismissing the complaint the Board noted at para. 16:

16. Thus, the Board has made it clear that mistakes, negligence or errors in judgment do not of themselves amount to a breach of section 68 [now section 74] for arbitrariness. To fall within section 68, conduct must be such that the errors committed are so flagrant as to demonstrate a non-caring attitude or so summary as to be reckless, capricious or grossly negligent. See also *I.T.E. Industries Limited*, [1980] OLRB Rep. July 1001; *Seagram Corporation Ltd.*, [1982] OLRB Rep. Oct. 1571; *Cryovac, Division of W.R. Grace and Co. Ltd.*,k [1983] OLRB Rep. June 886; and *North York General Hospital*, [1982] OLRB Rep. Aug. 1190.

In *William Gordon Switzer, Applicant v. National Automobile Aerospace, Transportation and General Workers Union of Canada and Chrysler Canada Limited* [1997] O.L.R.D.

No. 2605, the Ontario Labour Relations Board summarized the jurisprudence concerning section 74 as follows:

36. Honest mistakes, errors in judgement, and innocent misunderstanding do not constitute conduct which is prohibited by section 74. Nor does the fact that the Board (or some other labour relations expert) might have arrived at a different conclusion necessarily suggest a breach of the duty of fair representation by a trade union. A trade union's approach or decision(s) with respect to a grievance or a proposed grievance must be more than merely "wrong"; it must be arbitrary, discriminatory or in bad faith.
37. There is a great deal of Board jurisprudence which deals with the duty of fair representation, both generally and specifically with respect to the meaning of the words "arbitrary", "discriminatory" and "in bad faith". I find it unnecessary to engage in a lengthy analysis or review of that jurisprudence. Suffice to say that:

- (a) “arbitrary” means conduct which is capricious, implausible or unreasonable, often demonstrated by a consideration of irrelevant factors or a failure to consider all relevant factors;
- (b) “discriminatory” is broadly defined to include situations in which a trade union distinguishes between or treats employees differently without a cogent reason or labour relations basis for doing so;
- (c) “bad faith” refers to conduct motivated by hostility, malice, ill-will, dishonesty, or improper motivation.

Throughout the hearing process Ms Lafrance complained that the Association did not treat her fairly, or put another way that it was unfair that the Association did not provide her with assistance and that it was unfair that the Association did not file a grievance when the Police Services Board refused to indemnify her for legal expenses, and that it was unfair that the Association did not properly investigate her harassment complaints.

The concept of fairness with respect to the processing or filing of grievances was commented on in *Donal Gebbie and J. Longmoore v. United Automobile, Aerospace and Agricultural Implement Worker of America, Local 200 and Ford Motor Company of Canada Limited* [1973] OLRB Rep. 519 at para. 41:

- 41. One of the most difficult areas in applying the duty is in the settlement of grievances. We think it clear that the Union’s obligation to administer the collective Agreement give it the right to settle grievances. An employee does not have an absolute right to have his grievance arbitrated. One should consider that the negotiation of the collective Agreement was a group affair and certain interests yielded to others, and there is no reason why the administration of the collective agreement, including the grievance-arbitration

provisions should not be based on the same considerations. In determining fairness within the meaning of the Act one must consider the merits of the claim, the effect on others in the bargaining unit, the implications of settlement or arbitration on the future and whether there is any evidence of bad faith, discrimination or arbitrariness in the compromises effected. Motive may be significant in assessing prohibited conduct particularly when considering the admonition against bad faith.

A union is not required to take every case to arbitration, and this principle is affirmed in *Henry Savale et. al v. The International Association of Machinists and Aerospace Workers, Local Lodge #2113 v. Vistcon Automotive Systems (formerly known as Ford Electronics, Intervenor* [2000] O.L.R.D. No. 288, *Janey Kitgson v. Communications, Energy and Paperworkers Union of Canada and its Local 544, Responding Party v. G.E. Canada Inc., Intervenor*, [2006] O.L.R.D. No. 381, and *Catherine Syme, complainant v. Graphic Arts International Union, Local No. 28-B, Respondent* [1983] OLRB Rep. 775.

From the evidence it is apparent that the relationship between Ms Lafrance and the Association was fraught with miscommunication. Ms Lafrance believed that she was being harassed by senior members of the police service and by members of the police association. Ms Lafrance pointed out that the PSA charges came some years after the event, that the Association did not conduct a proper investigation of her complaints of harassment, that she could not get a copy of the collective agreement despite repeated requests, that she was harassed at work almost daily and that she believed this was because she had pressed charges against the family or friends of fellow officers, although there were no particulars provided with respect to any of these allegations.

The written record contains several letters from solicitors for Ms Lafrance to the North Bay Police Association asking that the Association not communicate directly with Ms Lafrance, and there is also written communications between Ms Lafrance and the Association. While several of these letters ask the Association for assistance, there is little specificity to the requests, and in particular there is no request either orally or in writing from Ms Lafrance or her solicitors for the Association to consider filing a grievance on her behalf seeking indemnification of her legal fees. It appears that up until at least December, 2006, Ms Lafrance and her solicitor believed that the Association was responsible for advancing and/or paying for her legal fees.

There is evidence that the Association responded on several occasions to Ms Lafrance's written inquiries. Much of the difficulty in this matter might have been avoided had Ms Lafrance or her representatives and representatives of the Association been willing to talk directly to each other. My role in this proceeding however is not to apportion blame but rather to determine whether the Association breached its duty of fair representation. Mr. Coulas, who had knowledge of the events from his dealings with Constables Bedard and Gardiner and Sergeant Solomon and was President of the Association, testified that the Executive of the Association considered the matter on several occasions and determined that a grievance would have no merit. The Association might be wrong in this assessment, but it was a conclusion they were entitled to draw.

From the evidence I am unable to conclude that the Association acted in a manner that was arbitrary, discriminatory or in bad faith. Given the Association's relatively small size, and not having any paid staff, their conduct was not implausible or unreasonable. Ms Lafrance was represented by counsel throughout most of the time frame. The Association responded to correspondence from Ms Lafrance and her solicitors.

Ms Lafrance complained that the Association's conduct was discriminatory as it met with Constables Bedard and Gardiner and Sergeant Solomon with respect to their PSA charges but did not meet with her. As already noted the duty of fair representation did not extend to these charges, but in any event, the PSA charges were stayed when Ms Lafrance resigned her employment.

With respect to the allegations of bad faith, I recognize that Ms Lafrance certainly feels the Association's conduct was guided by malice or ill-will but her allegations in this regard lacked specificity or corroboration and ultimately there was not sufficient evidence presented at the hearing to permit drawing the conclusion that the Association's actions were done in bad faith.

Therefore, I have determined that the Association did not breach its duty of fair representation to Ms Lafrance and her complaint is dismissed.

Dated at Maberly, Ontario this 27<sup>th</sup> day of September, 2009

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David K.L. Starkman