96-020

File No.

Decision No.

PRINCE EDWARD ISLAND
LABOUR RELATIONS BOARD

IN THE MATTER OF THE UNFAIR LABOUR PRACTICE COMPLAINT

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1174 and BILL McKINNON

COMPLAINANTS

AND:

CITY OF SUMMERSIDE, DIRECTOR GEORGE C. ARSENAULT, DEPUTY DIRECTOR DAVID J. GRIFFIN

RESPONDENTS

Council for the Complainant — **Eugene Rossiter, QC**
Council for the Respondents — **Benjamin Taylor, QC**

DECISION

BACKGROUND

A complaint alleging an unfair labour practise under Section 10(1) of the *Labour Act* R.S.P.E.I. 1988, Cap. L-1, by the Canadian Union of Public Employees, Local 1174 and Constable Bill McKinnon, in his capacity as President of Canadian Union of Public Employees, Local 1174, against the City of Summerside, Director of Police Services, George C. Arsenault, and Deputy Director of Police Services, David J. Griffin, alleging an unfair labour practise under Section 10(1) of the *Labour Act* R.S.P.E.I. 1988, Cap. L-1, was filed with the Labour Relations Board on July 15, 1996.

The complaint of an unfair labour practise as received alleged that the City of Summerside and the Director of Police Services, George C. Arsenault, and the Deputy Director of Police Services, David J. Griffin, did interfere with the administration of a Trade Union by attempting to conduct a hearing with respect to disciplinary charges laid against Constable Bill McKinnon. It is alleged that Constable Bill McKinnon did, issue a press release, in direct violation of the police services standing order dated the 20th of June, 1995, issued by George C. Arsenault, Director of Police Services, stating that no member shall conduct a media interview regarding the operational

planning of the City of Summerside Police Services without first receiving authorization from the Director of Police Services.

It is admitted by the complainants that Bill A. McKinnon, under the auspices of the Canadian Union of Public Employees, Local 1174, and in his capacity as President of the Local, issued a press release dated September 29, 1995, to the newspaper of the City of Summerside. The contents of the press release are as follows:

September 29th, 1995

PRESS RELEASE

JOURNAL PIONEER

The Union representing Municipal Police Officers in the newly Amalgamated City of Summerside is expressing concern about the message relayed to the citizens they police by the Director of Police Services George Arsenault in the article published in the Journal Pioneer on Tuesday September 26th, 1995.

"I couldn't believe what I was reading." said Bill McKinnon President of CUPE Local 1174, Summerside Police. We have no problems with the obvious intent of the article which was to illustrate the benefits of a higher Police profile in the Community with increased foot patrols by Officers in the City. My members fully support the initiative and do everything they can to see the requested foot patrols are consistently done, said McKinnon.

Where the problem begins is the indication by Director Arsenault that since amalgamation the numbers of Officers used to perform these duties has increased so dramatically that ..."they can now better afford the time to get more involved in foot patrolling, general community relations and other things we always wanted to do." I simply could not allow the Director to leave the tax payers of Summerside with the inaccurate impression that our Community is sufficiently staffed with the number of Officers that will ultimately be required to do the job effectively, because it isn't. The fact is, there are no more officers performing patrol duties in the City of Summerside now than there were performing those same duties in the Town of Summerside. The following Workforce comparison will illustrate the situation more clearly:

TOWN OF S'SIDE POLICE DEPT.CITY OF S'SIDE POLICE DEPT.

1	*Chief*	*1*	*Director*
NO	*Deputy Chief*	*1*	*Deputy Director*
9	*Teams of (2) members working the streets.*	*9*	*Teams of (2) members Working the streets.*
1	*Member General Invest. Section.*	*3*	*Member General Invest. Section.*
1	*Court Officer*	*1*	*Court Officer*
NO	*Dispatchers*	*4*	*Dispatchers*
1	*Secretary*	*1*	*Secretary*

Although the total number of the people working in the Police Department has increased by seven (7) there has been no change to the number of Uniformed Officers employed to Patrol the area and take the calls. The exception is that there is now one Dispatcher to dispatch the Officers on each shift freeing up one Officer that would have performed this task prior to Amalgamation.

Now consider the changes to the duties:

1) *The City encompasses four Communities that were previously policed by three police agencies (Summerside, St. Eleanors and the R.C.M.P.).*
2) *The population of Summerside has better than doubled while the Police hired to do patrols stayed the same.*
3) *The workload has easily doubled per member, and this is prior to the initiatives reported by Director Arsenault.*
4) *Summerside is, arguably, as large <u>now</u> as Charlottetown <u>was</u> before Amalgamation yet the Summerside Police Department has nine (9) fewer Patrol Officers than Charlottetown had to police a similar population.*

The membership of CUPE Local 1174 are dedicated Police Professionals and do not relish having to express our views on such matters in a public forum. However, my members are extended to the point that the "Thin Blue Line" is risking fracture, and allowing the tax payers to be misled simply frustrates any efforts we may make to secure extra Officers.

Bill A. McKinnon
President
CUPE Local 1174

I can be reached at 902-436-6174 (h) or 902-436-9225 (w) for comment.

As a result of the press release and following an internal investigation, Bill A. McKinnon, as a Constable employed by the City of Summerside Police Services, was charged with insubordination. A disciplinary hearing was scheduled to take place. However, before the hearing could be held, injunctive relief was sought from the Supreme Court of Prince Edward Island, Trial Division, before Mr. Justice Armand DesRoches, File No. GSC-15358. Mr. Justice Armand DesRoches issued an Order dated July 30, 1996, providing such injunctive relief and restraining the City of Summerside, the Director of Police Services, George Arsenault, and the Deputy Director of Police Services, David J. Griffin, until the Prince Edward Island Labour Relations Board has issued a final Order to an unfair labour practise complaint filed by the Applicants on the 15th day of July, 1996, from taking any further steps whatsoever or conducting any hearing with respect to disciplinary charges laid against the Applicant, Bill McKinnon, on the 10th day of February, 1996. The Board hearing took place on September 5, 1997, with all parties present and represented.

PRELIMINARY MATTER

The Respondents brought a preliminary objection. They allege that the Prince Edward Island Labour Relations Board does not have jurisdiction in this matter. This is an internal matter between Constable Bill A. McKinnon and the City of Summerside Police Services and charges were brought against Constable Bill A. McKinnon pursuant to the police by-law which has been in place since 1984, and should be dealt with pursuant to the system in place under the by-law. If found guilty of a disciplinary matter, the appeal process should be through the grievance proceedings under the collective agreement which eventually would lead to a Board of Arbitration for a binding decision. The Respondents allege that the bringing of the charge through the disciplinary process is not a violation of the *Labour Act*.

The Board made a preliminary ruling that it would not make a ruling on whether the press release was in violation of the standing order as that was a matter for the disciplinary process to determine. The Board ruled that its jurisdiction would be limited to hearing whether the standing order as it was drafted was a violation of the *Labour Act*, as there was an allegation by the Complainant that the standing order interfered with legitimate Union activities and the rights of an employee as a union officer as conferred by the *Labour Act*, particularly Section 10.

The Labour Relations Board, pursuant to Section 4(1), has the exclusive jurisdiction to exercise the powers conferred upon it by and under the *Labour Act*, and to quote from George W. Adams, Q.C., in his text, The Canadian Labour Law, published by the Canada Law Book Inc. in 1985, at p. 593, first paragraph:

> *The Board will not defer.....if a key statutory provision is in issue.*

Adams further states in the second paragraph of p. 593:

> *Moreover, the Board will take jurisdiction where the dispute is unusual and not a matter normally brought before an arbitration board, or where a question arises which is intertwined with fundamental questions of law and policy of the Labour Code.*

The Board, pursuant to Section 4(1), is charged with the responsibility of administering the *Labour Act*. Where there is an allegation of an offence against the *Labour Act*, the Board is of the opinion that it must determine if in fact the offence occurred. Therefore, the Board is of the opinion that it does have jurisdiction to proceed with the hearing to determine if the allegation of an unfair labour practise did in fact happen.

ISSUE

The issue before the Board is the question of whether the standing Order violates the *Labour Act* with respect to an employee's right to participate in the administration of a Trade Union and is not a restraint, or intended to coerce an employee, in the exercise of any rights conferred to that employee by the *Labour Act* in his participation in the legitimate business of a Trade Union, or discriminate against an employee in regards to employment, or any term, or condition of employment, or restraint on the employee from being active in the Trade Union.

Central to this issue is the proper legal balance between the right of an officer of the Union to participate in the legitimate concerns of a Trade Union and the duty of an employee to properly fulfill his or her function as an employee of the employer and to protect the employer' legitimate function, rights and obligations. In neither instance does the employee, as an officer of the Union, have an absolute right without qualification to be critical of his employer, and conversely, the employer does not have an absolute right to restrain its employee from expressing legitimate concerns of the Union in the representation of its members. To quote Chief Justice Dickson, as he then was, in the case of *Neil Fraser*, Appellant and *the Public Service Staff Relation Board*, Respondent, reported in (1985) 2 S.C.R. at 455:

First, our democratic system is deeply routed in, and thrives on, free and robust public discussion of public issues. As a general rule, all members of society must be permitted, indeed encouraged, to participate in that discussion.

Secondly, account must be taken of the growth in recent decades of the public sector--Federal, Provincial, Municipal, as an employer. A blanket prohibition against all public discussion of all public issues by all public servants would, quite simply, deny fundamental democratic rights to far too many people.

Thirdly, common sense comes into play here. An absolute rule prohibiting all public participation and discussion by all public servants would prohibit activities which no sensible person in a democratic society would want to prohibit. Can anyone seriously contend that a municipal bus driver should not be able to attend a Town Council meeting to protest against a zoning decision having impact on her residential street? Should not a Provincial clerk be able to stand in a crowd on a Sunday afternoon and protest a Provincial government decision cutting off funding for daycare centres or a shelter for single mothers? And surely a federal commissionaire could speak out at a Legion meeting to protest against a perceived lack of federal support for war veterans. The examples, and many others, could be advanced, demonstrate that an absolute prohibition against public servants criticizing government policies would not be sensible.

On the other side, however, it is equally obvious that free speech or expression is not an absolute, unqualified value. Other values must be weighed with it. Sometimes these other values supplement and build on, the value of speech. But in other situations, there is a collision. When that happens, the value of speech may be cut back if the competing value is a powerful one. Thus, for example, we have laws dealing with libel and slander, sedition and blaspheme. We also have laws imposing restrictions on the press in interests of, for example, ensuring a fair trial or protecting the privacy of minors or victims of sexual assault.

A similar type of balance is required in the present matter before the Board. These are the competing values of the employer in the exercise of its obligations to the public and legitimate concerns and the obligation of the Trade Union in its mandate to represent the employees. The municipal government objective for the standing order is not contested in this case. It is recognized to be for the protection of the public and the preservation of normality for the members of the police service to the extent necessary to ensure their loyalty to the municipality and the secrecy needed for them to be an effective force in the preservation of the public peace.

However, the balance required in the present matter before the Board has three aspects:

1. The existence of a rational link between the standing order under review and its objective.

2. A minimal impairment to the rights and freedoms of the union members affected.

3. A proper balance between the limiting effect of the standing order and the rights of union members to participate and hold responsibilities in the administration of the union.

The employer has the right to manage its affairs and to maintain an effective and efficient work force in its enterprise. However, the employer's right to manage must not interfere in the union's right to engage in all legitimate union activities.

There are four decisions that declarations to the media by union officials were found to be a part of union administration and representation. *Canada Post Corporation* (654), (1987) 87 CLLC, p. 14, 454, *Quebecair/Air Quebec* (1987), 72 di 44; and 88 CLLC, *Canada Post Corporation* (1988), 88 CLLC, *Ward Air Canada Inc.* (1988), 89 CLLC However, this right is not an absolute right and must be exercised within certain limits. These limits are not pre-determined; they depend on the facts of each case (Ward Air Canada Inc., supra).

In the *Canada Post Corporation* (654), supra, the complainant was the Vice President of the Maritime branch of the Canadian Postmasters and Assistants Association. She was suspended for five days for having expressed, while speaking before a public body, her opinion on the negative effects of the Canada Post Corporation plan on rural services and the potential loss of jobs that could result.

Her criticisms, which were made during collective bargaining, were not directed to her employer but to government policy, in the hope that the public would exercise pressure on the M.P.'s. Her ultimate goal was job security for the union members, not a key issue at the bargaining table. Her public statements were reported by the local newspaper and brought to the attention of her employer. The Board made reference to the existing attitude of arbitration boards and, in particular, to decisions of the U.S. Supreme Court set out in p. 14,460 of the reported decision:

> *Acknowledging that both unions and management will occasionally speak bluntly and recklessly, the Court has sought to set a responsive and realistic standard. The fact that a statement is false and that it might appear harmful to a reputation is not enough to make it actionable. Striving to tailor the law to the realities of industrial relations, the Court has limited actionability to offensive statements that are malicious in that they amount to a deliberate or reckless falsehood.*

The decision of the Board in the *Samson v. Canada Post Corporation (654) supra*:

> *It would seem, therefore, that arbitration boards are of the view that union representatives can criticize their employers providing that statements made by employees who are union representatives are made in the course of their duties as union representatives and they must not be malicious in that they are knowingly or recklessly false.*
>
> *We as a Board, however, have to go a step further in analysing whether, in the instant case, there is a violation of the Code for we have to weigh the competing principle of loyalty to an employer as opposed to the legislative prohibition that prevents an employer from participating in or interfering with the formation or administration of a trade union or the representation of employees by a trade union.*

The Board further stated that representations of employees by a trade union includes not only representations to the employer, but to the public as well, and in any form that the union feels it is in the interests of its members to do so. The Board further stated that a union can take recourse to the media, the government and other influential bodies such as the public in an attempt to influence the employer with relation to matters that directly concern its membership.

It was further stated in *Re Robertshaw Controls Canada Inc. and United Electrical, Radio and Machine Workers of America, Local 512*, reported in 5 L.A.C. (3d), p. 147, in the decision:

> *It is my view that since the rule is an attempt to limit the very precious right of freedom of expression for the preservation of which many within living memory have died, and many have and continue to endure much, vigilance must be exercised to see that it is not improperly confined either by rules or the imposition of discipline. Having the foregoing in mind, and in view of the adversarial nature of the relationship, it is my view that in order to violate the rule a statement must be utterly devoid of factual foundation and truth, or be recklessly made without care as to its truth or utter falseness.*

In the reported case of *Ontario Nurses' Association*, Complainant v. *The St. Catherines General Hospital*, Respondent, 0791-80-U, p. 441, we quote on p. 487, paragraph 48:

> *...collective bargaining can impact the public and vice versa. This is particularly the case in public sector collective bargaining where there is often a clear nexus between public funds and collective bargaining issues. Accordingly, employers as well as trade unions often feel it necessary to speak out and inform the public about collective bargaining issues. Indeed, communication to the public in order to inform and gain support is the essence of picket line activity.*

It was further stated in the paragraph:

> *Against this background, it would be naive and unduly restrictive not to acknowledge the legitimate role of public comment and media interest in the collective bargaining process, although we sense that public posturing is not always a constructive force in resolving labour and management disputes.*

It was argued that the standing order applied to all officers of the force equally and that the complainant is a member of the force and as a result has a duty of fidelity to his employer. In the matter of the *Canadian Union and Public Employees, Local 5*, Applicant, v. *The Corporation of the City of Hamilton*, Responding Party, reported (1993), OLRB REP. NOVEMBER:

> *The Board agreed in the observations of the St. Catherines's Hospital matter, supra, that some balancing of interest in light of the purpose of the Act is required by the Board in cases of this nature.*

However, the employer also chooses to characterize this conduct as a breach of the duty of fidelity. It appears to us that whatever label the employer chooses to place upon the conduct, the fact still remains that the conduct is protected under the Act and therefore discipline is inappropriate. If we were to find that the employer is free to discipline a union official for engaging in a legitimate exercise of rights protected by the Act, simply by stating that the reason for the discipline was something else, the protection provided by the Act would be severely undermined. If the employer's argument is correct, then it would ensure that the employer, through the utilization of disciplinary actions, could define what is permissible or protected union activities.

The Board further found that the union official:

...was not just any employee but one who had the obligation to represent the union's membership. Whether any other employee would have been disciplined is irrelevant to the determination before us. An employer cannot justify disciplining a union official who is engaged in lawful activities under the Act by simply saying that if another employee engaged in similar conduct they would have been disciplined.

In the conclusion of the Board in the *Alliance of Canadian Cinema, Television and Radio Artists and Goldhawk v. Canadian Broadcasting Corporation* 91 CLLC, 14,093, the Board stated at p. 14,116:

Unions are expected by law to be autonomous and free from any domination or attempted domination by employers.

Again, the board found in that case:

The Code indeed gives union officers, in certain circumstances, protection not given to their fellow colleagues who do not hold union office.

In the Supreme Court of Canada decision in the *Canadian Broadcasting Corporation* v. *Canada Labour Relations Board, Alliance of Canadian Cinema, Television and Radio Artists and Goldhawk*, reported 95 CLLC, 141,061, in paragraph 57, it is set out:

Even the most admirable policy cannot permit an employer to amend unilaterally the scope of union rights provided for by statute. Therefore, any conflict between the dictates of the policy and the directives of the Code, as interpreted by the Board as discussed above, must be resolved in favour of the Code.

In the determination by the Supreme Court of whether the decision of the Board was patently unreasonable, the Court concluded that it was not unreasonable for the Board in this case to conclude that included in the dominant purpose of the Canada Labour Code or necessarily incidental to that purpose was the right of the union President to communicate to union members in a union publication on issues of importance to the members in their capacity as journalists, writers and performers. The same can be said for the right of a union to choose its President from among its entire membership and not from a sub-set circumscribed by the employer.

CONCLUSION

It therefore can be concluded upon the basis of the cases submitted to this Board, as well as from the factual situation that Constable McKinnon, in his capacity as President of the Canadian Union of Public Employees, Local 1174, had the definite right and obligation to speak out on behalf of the members in a public forum. However, as previously stated, there is a balancing between the aforementioned right and his obligation to his employer.

In the Arbitration Case re *Brampton (City)* and *A.T.U., Loc. 1573*, as reported in the Labour Arbitration Cases 7 L.A.C., 4th Edition, and in particular the quote of the decision set out on p. 320:

> *The right of a union executive to speak on behalf of the membership of the local union in dealing collectively with management is clearly recognized and that freedom is not curtailed other than in circumstances where statements are made recklessly without a basis of facts and maliciously against management which then goes beyond the freedom of expression in collective bargaining and administration of collective agreements in the normal course of union-management relationships and becomes a cause outside those confines and deliberately detrimental to the viability and the continuing nature of such relationships. The question is in all of these cases whether the language used and the intent of the individual was such as to establish misconduct for which cause disciplinary action can be taken and upheld pursuant to the provisions of the collective agreement. It is a form of insubordination which is by itself a recognized serious breach of an employment relationship and for which disciplinary penalties may be imposed ranging from a warning through to discharge and which have been consistently upheld at arbitration. As noted above, each case of this nature turns on its own facts but the general principles as particularly referred to in the Wardair, Fraser and Stewart awards apply and it is against those principles that the facts must be assessed to determine the issue.*

At p. 161 of the *Ministry of the Attorney-General, Corrections Branch*, and the B.C. GEU (1981), 3 L.A.C. (3rd) 140, the Board stated at p. 161:

> *The issue of the application of an employee's obligation of fidelity towards his employer is far too complex to be sifted into an easy formulation applicable to all cases. In my view, each case must be decided on its own facts, taking into account among other factors, the content of the criticism, how confidential or sensitive was the information, the manner in which the criticism was made public, whether the statements were true or false, the extent to which the employer's reputation was damaged or jeopardized, the impact of the criticism on the employer's ability to conduct its business, the interest of the public in having the information made public and so forth.*

The issue before this Board was the question of police services standing order dated the 20th of June, 1995, which states as follows:

No member shall conduct media interviews regarding the operational planning of the City of Summerside Police Services without first receiving authorization from the Director of Police Services.

BY ORDER
George C. Arsenault
Director of Police Services

and which controls all members including members who are Union officials.

The Board finds that the standing order in itself does not offend Section 10 of the *Labour Act*. This Board finds that, in its implementation, the standing order cannot extend its control to a member of the City of Summerside Police Services in his or her capacity as a legitimate representative of the Union or its members from performing his or her lawful activities under the *Labour Act*. The foregoing is subject to the caveats that the contents of a press release not exceed the bounds of permissible union activities, and is not made recklessly without a basis of fact and maliciously against management.

Therefore, the unfair Labour Practice Complaint is dismissed.

George Lyle
Chair

Elizabeth MacFadyen
Member

Keith Warren
Member

This Decision was made on the 15th day of December, 1999 and issued under the hand of the Chief Executive Officer.

Roy J. Doucette
Chief Executive Officer