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LAWYERS • AVOCATS

THE DUTY OF FAIR REPRESENTATION

**A Handbook for
Union Representatives**

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1. What is the duty of fair representation?

A. The Nova Scotia *Trade Union Act*

Effective October 1, 2006, section 54A(3) of the Nova Scotia *Trade Union Act* says:

“No trade union and no person acting on behalf of a trade union shall act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employee in a bargaining unit for which that trade union is the certified bargaining agent with respect to the employee’s rights under a collective agreement.”

Section 54A(3) applies to all trade unions certified under the following Nova Scotia legislation:

- *Trade Union Act, Part I*
- *Civil Service Collective Bargaining Act*
- *Corrections Act*
- *Nova Scotia Highway Workers Collective Bargaining Act*

Section 54A(3) does not apply to unions certified under Part II of the *Trade Union Act* (construction industry) or the *Teachers’ Collective Bargaining Act*. For these unions, the common law duty of fair representation continues to apply.

B. The Canada *Labour Code*

Section 37 of the *Canada Labour Code* states:

“A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employees in the unit with respect to their rights under the collective agreement that is applicable to them.”

C. The Common Law

For unions not covered by a statutory duty of fair representation, the common law duty of fair representation applies.

The “common law” refers to the civil law that is applied by courts in Canada.

The substance of the common law duty of fair representation mirrors the duty set out in the *Trade Union Act* and the *Canada Labour Code*.

While the *Trade Union Act* and the *Canada Labour Code* establish complaint processes, the common law duty of fair representation is enforced through a legal action in the courts.

2. Why is there a duty of fair representation?

When a union is certified to represent a bargaining unit of employees, it is given the exclusive power to speak for those employees with respect to their terms and conditions of employment.

The duty of fair representation is the counter-balance to a union’s exclusive power to represent bargaining unit members.

The duty of fair representation is a legal obligation imposed on a union to ensure that it does not abuse its exclusive power.

3. Who is owed a duty of fair representation?

The duty of fair representation is owed to all members of the bargaining unit represented by a union.

It is not restricted to union members or to those paying union dues.

The duty of fair representation applies both when a union is certified and when it is voluntarily recognized.

In certain circumstances, the duty of fair representation may extend to former bargaining unit members.

4. When does the duty of fair representation apply?

The duty of fair representation applies to the following areas of union activity:

- the administration of the collective agreement through the grievance and arbitration process; and
- collective bargaining.

A. Collective Agreement Administration

The duty of fair representation applies throughout the grievance process, including:

- the initial investigation of a potential grievance;
- filing a grievance;
- representing a bargaining unit member at each step of the grievance process;
- investigating the merits of a grievance that has been filed
- settling a grievance; and
- deciding whether to take a grievance to arbitration.

It also applies to the representation of employees at an arbitration hearing, although considerably more latitude is given to unions at this stage of the process.

In administering a collective agreement, a union is responsible not only for those employee rights that are set out expressly in a collective agreement, but also for:

- common law rights and remedies that arise from a collective agreement dispute, and

- rights and remedies under employment-related statutes.

In *Weber v. Ontario Hydro*, [1995] S.C.J. No. 59 (QL), the Supreme Court of Canada said that common law rights and remedies arising from disputes covered by a collective agreement can only be enforced through the grievance and arbitration process and cannot be enforced in the courts. This means that:

- a union's exclusive representation of bargaining unit employees extends to these common law rights; and
- a union's duty of fair representation extends to these common law rights.

Common law rights are civil rights that are normally enforced by the courts in Canada. They give rise to a right to the payment of damages in certain circumstances, such as:

- assault,
- battery,
- intentional infliction of mental suffering,
- negligence, and
- defamation.

In *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)*, [2003] S.C.J. No. 42 (QL), the Supreme Court of Canada said that the substantive rights and obligations in employment-related statutes are implicit in every collective agreement and can be enforced through the grievance and arbitration process. This means that a union should treat alleged violations of employment-related statutes the same as any other grievance, even if the collective agreement does not expressly refer to the statute or the right in question.

Employment-related statutes include:

- human rights legislation,
- employment standards legislation,

- pension benefits legislation,
- privacy legislation, and
- occupational health and safety legislation.

B. Collective Bargaining

The duty of fair representation applies to collective bargaining, including any mid-term negotiations to amend a collective agreement.

Unions have a significant amount of latitude in choosing bargaining priorities and strategies. However, in formulating its bargaining strategies and agreeing to the terms of a collective agreement, a union must:

- engage in a rational decision-making process;
- recognize and consider the competing interests of all the employees in the bargaining unit; and
- have a sound and objective reason for agreeing to collective agreement provisions.

Unions must be especially careful if they agree to take away existing employee rights, particularly in the case of seniority or other accrued rights. Any collective agreement provisions that amend such rights will be closely scrutinized if a duty of fair representation complaint is made.

5. When does the duty of fair representation not apply?

The duty of fair representation does not apply to:

- internal union affairs, such as discipline and membership rules; and
- matters that are beyond the scope of the collective agreement.

Matters that are beyond the scope of the collective agreement may include:

- disputes over workers' compensation benefits, pension benefits, or LTD benefits provided by an insurance company;

- professional discipline; and
- representation in a legal process outside the collective agreement, such as the human rights complaint process, a public inquiry, or a court proceeding.

If a union undertakes to represent a bargaining unit member in matters outside the scope of the collective agreement and not covered by the duty of fair representation, it will be subject to the law of negligence and can be sued in the courts. The law of negligence imposes an even higher standard of conduct than the duty of fair representation.

6. What standard of conduct does the duty of fair representation require?

The duty of fair representation requires a union to treat all bargaining unit members in a manner that is not:

- arbitrary,
- discriminatory, or
- in bad faith.

The duty of fair representation requires a union to treat all bargaining unit members in a manner that is:

- fair,
- objective,
- honest,
- without hostility,
- diligent,
- genuine, and
- competent.

If a grievance concerns a critical job interest, a union's conduct will be more closely scrutinized by the Labour Relations Board or Court, and will be held to a higher standard of representation. Critical job interests include:

- seniority,
- job security,
- discipline and discharge, and
- human rights violation, including a disability that requires accommodation.

The duty of fair representation is not generally concerned with the substance or merits of the decisions and choices made by unions, but, rather, with how the union handles a grievance and the process it uses to make its decisions and choices.

Unions have a large amount of discretion in determining what course of action is in the best interest of the bargaining unit as a whole, provided their choices and decisions are made fairly and without arbitrariness, discrimination, or bad faith.

In making decisions about a grievance, a union must take into account the significance of the grievance for the individual. However, a union can also consider legitimate factors. Except in critical job interest cases, a union may consider factors such as the cost of arbitration in light of the issue, or whether a grievance will have an adverse impact on other bargaining unit employees. A union must weigh these factors fairly against the interests of the grievor.

A union is not required to take a grievance to arbitration simply because an employee wants it to.

7. What do “arbitrary”, “discriminatory” and “bad faith” mean?

“Arbitrary”

A union must not act in a manner that is arbitrary.

“Arbitrary” means:

- acting in a manner that is superficial,
- acting with indifference,

- not caring,
- going through the motions,
- acting without regard for an employee's interests, or
- serious or gross negligence.

“Arbitrary” conduct includes the following:

- failing to adequately investigate an employee's grievance or issue;
- giving only superficial attention to the facts or issues;
- failing to put one's mind to the merits of a grievance;
- acting solely on the basis of the employer's version of events without getting the grievor's side of the story;
- not giving sufficient consideration to an employee's interests when acting on his or her behalf;
- reckless disregard for the employee's interests; and
- serious or gross negligence.

Honest mistakes or poor judgment do not usually amount to arbitrary conduct.

“Discriminatory”

A union must not act in a manner that is “discriminatory”.

“Discriminatory” means:

- discriminating against a bargaining unit member on a ground that is protected under human rights legislation, such as sex, race, age, religion, or disability; or
- treating individuals or groups of bargaining unit employees differently based on irrelevant or irrational considerations, such as favouritism, dislike, or political patronage.

To avoid discrimination, a union must consider the position of all its members and weigh the competing interests of minorities or individuals in arriving at its decisions.

The duty of fair representation does not prohibit all differential treatment. It prohibits differential treatment for no legitimate reason.

“Bad Faith”

A union must not act in “bad faith”.

“Bad faith” refers to conduct that is influenced by an improper purpose, such as:

- personal hostility,
- ill-will,
- revenge,
- deceit, or
- dishonesty.

“Bad faith” conduct includes the following:

- letting personal feelings influence the handling of grievances;
- acting in a conflict of interest;
- lying or deceiving the grievor; and
- putting the interests of political supporters above the interests of an individual employee.

8. What steps can a union take to better meet its duty of fair representation and reduce potential liability?

The following are some steps that a union can take to better meet its duty of fair representation and reduce potential liability for a breach of the duty:

1. Educate and train union representatives.

All shop stewards and other representatives involved in handling grievances should be educated and trained in:

- the requirements of the duty of fair representation;
- grievance handling;
- the grievance process in the collective agreement, including the time limits for each step of the process.

2. Review the union's grievance handling practices.

The union should review its grievance handling practices to determine whether they are sufficient to meet the duty of fair representation and avoid liability.

3. Conduct a thorough investigation.

When an issue is raised or a grievance is filed, it is essential to thoroughly investigate the facts and circumstances surrounding the matter.

A thorough investigation includes the following steps:

- Interview all available witnesses, including the grievor(s).
- Make notes of the interviews, or ask the witnesses for written statements.
- Gather all relevant documentation, including employee files, medical reports or notes, letters of discipline, etc.
- Never rely solely on the employer's version of events.
- Always get the grievor's complete version of events, and afford the grievor an opportunity to comment on the employer's allegations and statements.
- Ask the grievor to describe the circumstances and issues in writing.

4. Know and comply with all time limits.

Know the time limits for filing grievances under the collective agreement, and for proceeding through each step of the grievance process.

When an employee brings forward an issue or problem to the union, the time limit for filing a grievance should be noted and complied with.

Be diligent in processing a grievance.

If a time limit is missed, do not try to hide the error or give up. Ask the employer for an extension of the time limit. Make every reasonable effort to correct the mistake.

5. Communicate with the grievor in a timely and effective manner.

The most frequent source of dissatisfied members and of claims against unions is the failure to communicate with a grievor in a timely and effective manner.

Timely and effective communication includes the following steps:

- Explain the grievance process to the grievor and how long each will take.
- Keep the grievor informed of the progress of his or her grievance at appropriate intervals. The frequency of reporting may vary with the nature of the grievance.
- Discuss how and when the union will communicate with the grievor.
- Respond promptly to the grievor's calls.
- Arrange for another union representative to handle a grievance in your absence, and tell the grievor about the arrangement.
- Be candid about the chance of success.
- Discuss all settlement proposals and offers with the grievor.
- Keep a written record of all communications with the grievor.
- Provide the grievor with a copy of all grievance correspondence.

If the union decides not to proceed to arbitration with a grievance, the union's decision should be confirmed in writing to the grievor.

6. Maintain detailed records and an organized grievance file.

Effective file management will ensure that all relevant information is available for grievance meetings, arbitration, and, if necessary, responding to a duty of fair representation complaint. In responding to a

complaint, written records of the steps taken by the union will be important for substantiating the union's actions.

Effective record-keeping and file management includes the following steps:

- Maintain a file for each grievance.
- Be sure to include contact information for the grievor and all witnesses.
- Make a note of all time limits.
- Keep a detailed record of how a grievance is handled.
- Take notes of all communications with the grievor and the employer, including grievance meetings and phone calls.
- Make a note of telephone messages left and received.
- Be sure to date all records.
- Print out all e-mails relating to a grievance and include them in the file.
- Obtain relevant documents from the grievor and the employer, such as an employee file or a letter of discipline.
- If an employee decides not to file a grievance (particularly where a critical job interest is involved), consider having him or her sign a written statement to that effect.

7. Thoroughly and objectively assess the merits of a grievance.

In deciding whether to proceed with a grievance, always make a thorough and objective assessment of the merits of the grievance.

A thorough and objective assessment of the merits includes the following steps:

- Base all decisions on relevant considerations.
- Carefully weigh the interests of the grievor with those of the bargaining unit as a whole.
- Provided they are weighed fairly against the wishes and interests of the grievor, it is legitimate to consider such factors as:
 - the language of the collective agreement;

- how similar issues have been decided;
- the availability of potential witnesses;
- the credibility of the grievor;
- whether the discipline imposed is reasonable;
- the cost of proceeding to arbitration; and
- the impact on other employees.

8. Exercise extra care when a grievance involves a critical job interest.

While a union should always be diligent and thorough in its representation of bargaining unit members, extra care should be exercised when a grievance concerns a critical job interest, such as discipline, discharge, seniority, job security, or a human rights violation, including a disability that requires accommodation.

9. Consider obtaining a legal opinion on whether to proceed to arbitration.

A union does not need to obtain a legal opinion before deciding not to go to arbitration.

However, if a critical job interest is involved, we advise our clients to obtain a legal opinion. In most cases, a union that obtains and relies on a legal opinion will not be found in violation of the duty of fair representation.

10. Avoid conflicts of interest.

If a union representative has a personal interest or involvement in a grievance, assign the grievance to another representative to ensure that the grievance is handled without bias, or the appearance of bias.

11. Take complaints seriously.

Take complaints about representation seriously.

If a bargaining unit member complains that the union is not adequately representing his or her interests, the complaint should be investigated.

Record the results of the investigation.

Take immediate steps to correct any errors on the part of the union.

9. What is the procedure for making and responding to a duty of fair representation complaint?

A. The Nova Scotia *Trade Union Act*

The following complaint procedure is established by the *Trade Union Act*:

Making a Complaint

- A complaint must be made in writing to the Labour Relations Board.
- A complaint must be made no later than 90 days from the date the complainant knew, or ought to have known, of the circumstances giving rise to the complaint. However, the 90-day time limit does not start to run until all internal union appeal mechanisms have been exhausted by the complainant.

Review by the Review Officer

- The complaint will be reviewed by the review officer. If there is insufficient evidence of a breach of the duty of fair representation, the review officer will dismiss the complaint.
- If the review officer does not dismiss the complaint, the officer will serve notice of the complaint on the affected union and request a response from the union.
- The union will then have to file a response to the complaint within the time directed by the review officer.
- The officer will review the response. If there is insufficient evidence of a breach of the duty of fair representation, the review officer will dismiss the complaint.

- If the review officer believes that there has been a breach of the duty of fair representation, the officer is required to attempt to effect a settlement of the complaint.
- If a settlement is not possible, the review officer must refer the complaint to the Board.
- The review officer has the power to order the parties to produce any documents or things that he or she considers necessary for the full review of the complaint without holding a hearing.
- The review officer's decision cannot be appealed to the Board.

Review by the Labour Relations Board

- The Board can decide the complaint without a hearing, or it can hold a hearing into the merits of the complaint.
- The Board has the power to add any party to the proceeding, including the employer.
- The Board has broad powers to remedy a breach of the duty of fair representation, including the power to extend the time limits of the grievance process, to order a grievance to proceed to arbitration, and to award damages.

B. The *Canada Labour Code*

The following procedure for making and responding to a complaint is established by the *Code* and the rules of the Canada Industrial Relations Board:

Making a Complaint

- A complaint must be made in writing to the Board.

- A complaint must be made no later than 90 days after the date on which the complainant knew, or ought to have known, of the circumstances giving rise to the complaint.
- The Board has said that an employee must cooperate with the union in its attempt to resolve the issue before a complaint is filed: CIRB Decision No. 290.
- A complaint may be filed at any of the Board's regional offices.

Review of the Complaint

- A labour relations officer will review the complaint.
- The officer may request additional information, and the employee has seven (7) days to provide it. If the information is not received within that time, the file will be closed.
- Once the information is complete, a copy of the complaint is sent to the union and the employer. At this stage, the Board does not want a response.
- The complaint is referred to a panel of the Board to assess whether there are sufficient grounds for the complaint to proceed.
- If there is no basis for the complaint, a summary decision will be issued and the file will be closed.

Request for a Response

- If the complaint warrants further consideration, the union and employer will be asked for a response.
- The union and employer have fifteen (15) days to file a response to the complaint.
- The employee may file a reply to the responses of the union and employer. A reply must be filed within ten (10) days.

Settlement or Disposition by the Board

- A “resolution conference” will be scheduled. This is an informal and confidential meeting with a Board officer for the purpose of exploring settlement options.
- If the complaint is not settled, the matter is sent back to the panel of the Board for a decision.
- The panel may decide the matter without holding a hearing.
- The Board has broad powers to remedy a breach of the duty of fair representation, including the power to extend the time limits of the grievance process, to order a grievance to proceed to arbitration, and to award damages.

C. The Common Law

Under the common law, a bargaining unit member complaining that a union has breached its duty of fair representation must commence a legal action in the courts.

An action must be commenced within six (6) years from the time the complainant knew or ought to have known of the circumstances giving rise to the complaint.

The union must then file a statement of defence within the time prescribed by the Civil Procedure Rules, and then proceed through the litigation process set out in the Rules.

10. How should a union respond to a complaint?

The procedure under both the *Trade Union Act* and the *Canada Labour Code* includes several levels of review before a complaint is referred to a hearing. A complaint may be dismissed or decided on the basis of the written materials filed by the parties.

For this reason, if a complaint is made under either the *Trade Union Act* or the *Canada Labour Code*, the most important thing a union can do is file a comprehensive and carefully crafted response. A detailed and thorough response is more likely to result in a complaint being dismissed without a costly hearing.

The following should be borne in mind when preparing a response:

- Make note of any time limit for filing a response, and make sure the response is timely.
- Gather all the relevant documents. A well-documented and organized grievance file will be of great assistance in responding to a duty of fair representation complaint.
- Be careful not to include anything that is privileged, such as a legal opinion, or be sure that you want to waive privilege.
- Based on the documents and recollection, draft a complete explanation of what happened.
- In a written response, documentary evidence will be more persuasive than a simple claim that something happened or was said. Documents will also confirm dates and time-lines.