



## DUTY OF FAIR REPRESENTATION

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### What the law says

The *Canada Labour Code*, Part 1, the *Public Service Labour Relations Act (PSLRA)*, and most provincial and territorial labour laws address a union's duty of fair representation (DFR).

The language varies from statute to statute, but essentially, the duty of fair representation requires a union to treat bargaining unit members fairly and honestly, in a manner that is not arbitrary, discriminatory or in bad faith. Part 1 of the *Canada Labour Code* (Sec. 37) and Sec. 187 of the *PSLRA* describe it as follows:

#### Duty of fair representation

37. 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 of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

#### Unfair representation by bargaining agent

187. No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.

## Legal principles

In *Canadian Merchant Service Guild v. Gagnon* [1984] 1 S.C.R. 509, the Supreme Court of Canada determined:

*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, after a thorough study of the grievance and the case, taking into account the significance of the grievance and its consequences for the employee on one hand and the legitimate interests 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.*

From these and other case law principles, we know that:

- (i) The duty of fair representation applies to issues between an individual bargaining unit member and the union concerning representation of the employee in relation to the employer.

- (ii) The duty of fair representation does not normally apply to internal union matters, whether or not they relate to representation. Generally speaking, a DFR complaint cannot be used as a vehicle to review the internal affairs of the union on issues such as union procedures with respect to determining union representatives or union decisions on the payment of representation expenses.

It should be noted that both the *Canada Labour Code* and the *Public Service Labour Relations Act* specifically prohibit a trade union from exercising union rules concerning membership or applying standards of discipline in a discriminatory manner.

- (iii) The duty of fair representation in most labour jurisdictions covers matters with respect to a union's administration of the collective agreement (i.e., the grievance and arbitration process). The duty may also apply, depending on the jurisdiction, to the negotiation of the collective agreement itself. In the case of *PSLRA* units, the duty may extend beyond those matters specified in the Act, and apply to, for example, complaints under the *Public Service Employment Act*.
- (iv) The duty of fair representation applies to all members of the bargaining unit. This means members in good standing, Rand Deductees, suspended members, employees exempted from paying dues as a result of a religious exemption provision in the collective agreement or statute, and members on leave without pay status. It is irrelevant if the member of the bargaining unit is, or is not, paying union dues. In the case of someone who changes bargaining units (or has been occupying a position excluded from the bargaining unit), the duty exists if the matter at issue arose at the time the person was a member of a PSAC bargaining unit.
- (v) The duty of fair representation does not guarantee that a union will represent a member of the bargaining unit in all cases. DFR recognizes that a union must balance the needs of the individual with the needs of the membership as a whole, and in doing so, the union may find that it is in the best interests of the membership as a whole to not support a particular grievance. The duty of fair representation requires simply that the decision be made honestly, in a manner that is not arbitrary, discriminatory or in bad faith.

- (vi) The interests of the membership as a whole should not be confused with the “interests of the majority”. The duty of fair representation is in addition to our responsibilities under the respective human rights legislation. While our conduct may satisfy the statutory requirements of the duty of fair representation, it may not meet the standards demanded by human rights legislation if there is a discriminatory impact of our actions on one or more persons from a protected group.

Unions have been held to a higher standard of care in discharging DFR obligations when human rights principles are at issue. This includes the duty to accommodate. It has been established that a union must provide accommodations within the grievance and arbitration process. This may mean exercising greater sensitivity than would normally be necessary, being more proactive or attentive than usual, or taking an extra measure of care or assertiveness. It may also mean taking different approaches to advocating on the member’s behalf or in the processing of a grievance. For example, in the case of a person with a psychiatric disability or someone observing a period of no contact for religious reasons, a union would need to provide more generous time limits for receipt of documents.

- (vii) The particular circumstances will dictate whether or not treatment is found to be arbitrary, discriminatory or in bad faith. Conduct is “arbitrary” if it is superficial, indifferent or in reckless disregard of an individual’s interests. “Discriminatory” practices are when members of the bargaining unit are dealt with unequally on account of factors such as race or sex or through simple personal favouritism, unless there are valid reasons for doing so. “Bad faith” decisions are those based on ill-will, hostility, revenge or dishonesty.

## **Origins of the duty of fair representation**

For some stewards, the notion of providing representation to a scab, or someone who has refused to sign a union card, runs counter to principles they hold in high esteem. For others, the thought of not providing representation on a member’s grievance is just as unprincipled. Therefore, some awareness of how DFR evolved may lead to a better understanding of how it attempts to balance a number of important principles.

The term, “duty of fair representation” was first used in the United States in the 1940s. In 1944, the U.S. Supreme Court dealt with the refusal of a union to admit African Americans as fully equal bargaining unit members in the case of *Steel v. Louisville & Nashville Railroad Co.* 323 U.S. 192. The court ruled that the union’s exclusive right to represent all employees in the bargaining unit included the accompanying obligation to represent all employees without hostile discrimination, fairly, impartially and in good faith.

The development of Canadian law was influenced, in part, by the views of Archibald Cox. In his 1957 article, *Individual Enforcement of Collective Bargaining Agreements*, Professor Cox argued that permitting individuals to advance claims to arbitration would impede the development of good labour relations in four ways.

- (i) The pursuit of ad hoc individual claims would lead to divergent rulings.
- (ii) If some individuals could secure better settlements through their own efforts, it would undermine the effectiveness of the union. This could lead to dissenting groups and competition with the union, and lead to labour relations instability.
- (iii) The possibility of competition and dissension could result in a reluctance of union representatives to settle issues early in the grievance process, and lead to more arbitrations.
- (iv) It would be difficult to distinguish between those claims that could be legitimately brought by individuals and those that could only be brought by a union.

While agreeing that permitting individuals access to the arbitration process would provide the best protection against incompetent or arbitrary union representatives, Professor Cox argued that the cost of such an arrangement would be too high. Ultimately, he called for the development of a duty of fair representation, rather than giving individuals access to arbitration\*.

[\*Unless the collective agreement or a statute so provides, an employee cannot refer a grievance to arbitration without the union’s approval. For example, the *PSLRA* provides for individual access to adjudication in cases of disciplinary action resulting in termination, demotion, suspension or financial penalty, and certain types of non-disciplinary termination, demotion

or deployment. It should be noted that the right of the employee to proceed to adjudication does not absolve the union of its duty of fair representation. In addition, when a union declines referral and representation at adjudication, it is incumbent on the union to notify the person of his/her right to proceed without union support.]

## **It's about a union's right to choose**

The exclusive power of a union to choose whether or not to provide representation is a necessity. The right of a union to make a choice is vital.

To suggest we must represent on every grievance is to remove our ability to choose to further certain causes or to promote certain fundamental interests. How, for example, can we protect and extend workers' rights to an harassment-free workplace if we are forced to provide representation in the case of every member of the bargaining unit accused of harassment? How, for example, can the union promote the accommodation of persons with disabilities or the employment of underrepresented equity group members if we must process the grievance of every member of the bargaining unit who perceives a lost opportunity for themselves as a result? How can we protect and expand collective rights if we must proceed with a grievance with no chance of success and the knowledge that "bad facts make bad case law"? How can the union remain fiscally viable if we must shoulder the huge costs of arbitrating each and every case that an individual member of the bargaining unit believes has merit?

It is true that the pursuit of individual claims, in many cases, advances the interests of the collective. However, that is not always the situation. There are times when individual and collective rights and interests are in conflict, and the union must make a choice. The duty of fair representation recognizes that reality. The duty of fair representation provides the necessary checks and balances to ensure that unions are not motivated by improper considerations in their decision-making. It is the *quid pro quo*\* for a union's right to make choices.

If the union could refuse to represent a scab or someone who refuses to sign a union card, based on those grounds, it would stand to reason that those persons should have the ability to seek representation elsewhere (or

represent themselves). This would surely place collective interests in jeopardy. The possibilities of private deals with the employer would undermine the principles of collective bargaining. The risks of conflicting case law and bad precedent would become unacceptably high. The opportunities to advance social principles and causes would be threatened.

The Supreme Court of Canada recognizes that a union must be free to pursue its legitimate goals and protect its legitimate interests. Protecting and advancing collective interests and rights will mean that the union will have to make some tough decisions. Some will negatively impact on individual members. The care that we take in exercising our duty of fair representation will undoubtedly contribute to building the necessary understanding, analysis and support within a membership that cares about collective interests, and values the union's role as an important vehicle of social change.

[\* *quid pro quo* is a Latin term meaning "something in exchange for something" or "one thing for another".]

## **Discharging the duty**

The reality is that unions provide levels of representation that exceed the minimum standards under the duty of fair representation in an overwhelming majority of cases. The following guidelines will assist representatives in discharging our obligations, and indeed, in meeting the high standards to which we hold ourselves.

## **Tips for Local Officers**

1. Encourage democratic processes for the identification of stewards. Ideally, this means members from a particular work area choosing an effective steward to represent them.
2. Require all stewards and other workplace representatives to obtain the necessary union training. Consider adding such a requirement to the local by-laws.

3. Develop a working knowledge of DFR. Consider organizing a workshop for all local representatives. Become familiar with the legislation covering bargaining unit members and what it says about the duty of fair representation. If the legislation is silent on the subject, our DFR obligations may be implicit or derive from “common law”. Get advice on the precise nature of that duty.
4. Harassment can be one of the most damaging and potentially divisive issues facing a local. Ensure all local representatives, be they executive members or stewards, have a good knowledge and understanding of the union’s anti-harassment policies. Ensure there is a Local Harassment Complaint Steward, and that the local is organized to deal with harassment complaints in a manner that is fully consistent with PSAC Anti-Harassment Policy: The Workplace (#23A).
5. Set up an appeal procedure where members of the bargaining unit(s) can have decisions relating to representation reviewed by the local.
6. Set up a stewards’ network coordinated by the local’s chief steward or vice-president to coordinate representation and promote regular communications and opportunities for training among stewards.
7. Take complaints about representation seriously. Investigate without delay and keep meticulous records. Get advice from the respective component or PSAC representative.
8. If there has been an error on the part of the union, we will want to take immediate steps to correct it. As quickly as possible, get advice from the respective component or PSAC representative.

### **Tips for Stewards**

1. Communicate regularly with other stewards and the chief steward on issues of representation. Gather materials and actively pursue training opportunities to update your knowledge and skills.
2. Develop a working knowledge of DFR. Become familiar with the legislation and the precise nature of our obligations. Read a number of decisions on DFR complaints. Visit the web site of the labour board

administering the legislation that applies to your local (e.g., Canada Industrial Labour Relations Board; BC Labour Relations Board).

3. When looking for advice, always start with local representatives (other stewards, chief steward or a member of the local executive). Also, find out who within the union is your local's "technical advisor" and the normal procedures to contact that person. Every local has access to a Component Service Officer and Regional Vice President (job and position titles vary), or in the case of directly chartered locals, a PSAC Regional Representative. These representatives have further access to a wide range of technical resources and expertise within the PSAC.
4. Become thoroughly familiar with PSAC Anti-Harassment Policy: The Workplace (#23A). Should you be contacted by a member of the bargaining unit concerning harassment issues, carefully review it again and follow it stringently. If in doubt, get advice.
5. While there is considerable uncertainty about how far the duty of fair representation extends, it is always wise to conduct ourselves as if it did. Before telling a member of the bargaining unit we don't provide representation on a particular issue or in particular circumstances, get advice.
6. Talk about settlement possibilities with the member before filing a grievance, while paying attention to the time limits built into the grievance procedure. Try to resolve the matter with the employer as early as possible, keeping in mind that a good settlement is one that is better or as good as one achieved through arbitration. Throughout the entire process, discuss all settlement proposals and offers with the member/ grievor and record a summary for the file.
7. Evaluate the consequences of proceeding, or not, with each and every grievance. Thoroughly examine whether or not the grievance has merit. Carefully weigh the interests of the individual with those of the collective. If a decision is made to not proceed with a grievance, it may be wise to obtain an opinion from the appropriate component or PSAC representative within the time frames established by the grievance procedure. Obtain extensions if necessary.

8. If you find yourself in a conflict of interest situation, take the necessary steps to ensure another steward is assigned. Approach all representation with objectivity, free of any personal bias, hostility or favouritism.
9. Always obtain the grievor's complete version of events and where possible, ask the grievor to describe the incidents and outline the issues in writing. Thoroughly investigate, as early as possible. Never rely solely on the employer's version or conclusions. Interview all available witnesses and ask them for written statements or keep notes of what they tell you. Expect the grievor to be cooperative, straightforward and forthcoming with information. Record all contact with the grievor with a date and brief summary, and place it in the file.
10. Don't make promises you can't control or keep. It is the employer or an arbitrator who decides a grievance, not the union. All we can do is provide the best possible representation, and challenge those decisions we consider unsatisfactory.
11. Never make a commitment to pursue the grievance at each and every level, including arbitration. A decision to present a grievance at one level does not presuppose agreement to proceed to the next level.
12. Approach file management with due diligence. Obtain a copy of the *PSAC Grievance File Checklist* for the front of the file. Include the grievance presentation and transmittal forms, completed Steward Factsheet and a list of all documents. Note time limits. Ensure the original file is forwarded promptly to the union representative responsible for representation at the next level in the grievance procedure.
13. Keep the grievor informed at each stage of the grievance procedure, even if you are not the representative at a higher level. Provide full details of the status of the grievance, and be candid about its chances of success.
14. Where the treatment of a grievor or grievance differs from past practice, ensure it is for valid reasons and note them in the file.

15. If for some reason time limits specified in the collective agreement have been missed, proceed anyway. The employer may fail to object, or may agree to extend the time limits (or, the labour board may extend the time limits).
16. The more serious the consequences the employer's actions are for the grievor (e.g., termination of employment), the more rigorously we will be held to our statutory obligations. As a matter of practice, a steward should approach all representation with diligence and thoroughness.

A final comment about the duty of fair representation is that a representative is required to always take a reasonable and objective view of the problem and its relevant and conflicting factors, and arrive at a thoughtful judgment about what to do. The union will not be held to account if a mistake or simple error in judgment is made. A union's conduct must be more than just wrong. It must be arbitrary, discriminatory or in bad faith.