IN THE MATTER OF THE ONTARIO *POLICE SERVICES ACT*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THUNDER BAY POLICE SERVICES BOARD
- The Employer

-and-

JAMES MAURO
- The Grievor

AND IN THE MATTER OF a grievance of James Mauro

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Robert C. Edwards	- Counsel
Karen Drake	- Counsel
Andy Hay	- Inspector

On behalf of the Grievor

James Mauro	- Grievor
Leo Karhinen	
Rob Nickerson	
Donna Nickerson	
Bill Mauro	
Shawn Harris	
and others	

Hearing held September 30 and November 5, 2009, in Thunder Bay, Ontario.

AWARD

INTRODUCTION

A Thunder Bay police officer was suspended during part of 2007 and 2008. During his suspension the Employer did not permit the grievor to compete in two promotion competitions. His Union grieved both refusals. The Union settled both grievances with the Employer, but obtained no remedy for the grievor.

Soon thereafter the grievor filed his own grievance.

This award deals with three Employer objections to my hearing that grievance.

THE EVIDENCE

The Thunder Bay Police Services Board, the Employer, operates the Thunder Bay Police Service. The Thunder Bay Police Association, the Union, represents the sworn police officers, including James Mauro, the grievor, who is a police sergeant. The grievor's employment is regulated by the 2007-2010 collective agreement between the Employer and the Union.

The grievor stated that he was a party to the arbitration, not the Union. There was no Union involvement in this hearing.

The Employer and the grievor led no oral evidence. Instead they agreed upon certain documents.

In 2007 the Employer conducted two competitions to identify police officers for

promotion to the rank of Staff Sergeant. The two competitions were conducted pursuant to the Promotional Policy incorporated in the collective agreement.

The grievor had been suspended with pay for incidents which occurred in late 2006 and in early 2007. These two promotion competitions took place during his suspension. The Employer prevented the grievor from participating in either competition. The Union grieved both Employer refusals and both Union grievances expressly raised the Employer refusals.

Those two Union grievances led to a Letter of Understanding between the Employer and the Union. In that Letter the Employer and Union referred specifically to the Union's two grievances concerning this grievor. The Letter of Understanding noted that "the parties wish to resolve all present grievances relating to promotion." The Employer and Union agreed that certain changes would be made to the Promotional Policy, and they further agreed that the Union's two grievances regarding this grievor would be "withdrawn." There was no individual remedy for the grievor.

The changes to the Promotional Policy agreed upon in the Letter of Understanding have since been incorporated into the re-printed Promotional Policy.

The grievor was dissatisfied with the way the Union resolved the grievances. The grievor filed his own grievance regarding the Employer's refusal to allow him to participate in the promotion competitions. He contacted the Ontario Police Arbitration Commission to seek the appointment of an arbitrator. The Solicitor General appointed me as arbitrator under the *Police Services Act* to hear his grievance in which he alleged that he had been prevented on two occasions from competing in a promotion competition. As for remedy, he sought promotion to staff sergeant.

The Employer and the grievor then argued three Employer objections to my proceeding with the grievance:

1. the issues in this grievance were the same as those raised by the Union in its earlier grievances and had been settled;
2. the issues in the grievor's grievance were "moot;" and,
3. the grievor had no right as a member of the bargaining unit to proceed to arbitration on his own.

THE COLLECTIVE AGREEMENT AND STATUTE

The grievor's employment is regulated by the 2007-2010 collective agreement which is governed by the *Police Services Act*.

The grievance procedure in Article XVII of the collective agreement is, in part, as follows:

17.01 Step 1
When a member . . . has a grievance concerning an alleged violation of . . . this Agreement he shall communicate his grievance in writing, to . . . the Thunder Bay Police Association . . . If the Association feels this grievance is justified it shall submit the grievance to the next step . . .

Step 2
The Association will convey to the rank above the grievor's immediate supervisor . . . the alleged grievance . . . If the grievor and the Association are not satisfied with the response at this step the grievance may be filed at the next step of this procedure.

Step 3
. . . The Chief of Police will communicate . . . his decision to the association . . . If the grievor and the Association are not satisfied with the response at this step they may file the grievance at the next step.

Step 4
. . . the grievance may be filed with the Board of Commissioners of Police . . . the Board shall communicate their response (in writing) to the Association. If the grievor and the Association are

not satisfied with the response at this step the grievance may be submitted to Arbitration as provided by the Police Act.

. . .

17.03 Arbitration

No grievance may be submitted to Arbitration unless the grievance procedure specified in this Agreement has been fully complied with.

It is clear that the reference in Step 4 of Article 17.01, above, to the "Police Act" is a reference to the *Police Services Act.* The key provisions of that *Act* are as follows:

123. (1) The Solicitor General shall appoint a conciliation officer, at a party's request, if a difference arises between the parties concerning an agreement or an arbitrator's decision or award made under this Part, or if it is alleged that an agreement or award has been violated.

. . .

124. (1) If the conciliation officer reports that the dispute cannot be resolved by conciliation, either party may give the Solicitor General and the other party a written notice referring the dispute to arbitration.

. . .

EMPLOYER POSITION

The Employer made three separate submissions.

First, the Employer submitted that the Union's two grievances had dealt with the same issues now raised by the grievor. Those two Union grievances had been settled by the Letter of Understanding. The Union, which is the exclusive bargaining agent for the police officers, had directed its mind to these issues and had finally resolved the issues the grievor now wished to arbitrate. The Union had settled and withdrawn those grievances. The Employer said that a settled grievance cannot later be arbitrated and that an arbitrator's jurisdiction following a settlement is limited to the question of whether the parties have adhered to the terms of the settlement.

The Employer said that if the Union had somehow improperly agreed to the settlement, the process for the grievor to pursue was not an arbitration of this same issue against the

Employer, but rather a complaint against the Union alleging that the Union had failed to fairly represent the grievor.

Secondly, the Employer said that there was no longer an existing controversy between the parties so that the matter was now "moot" and, as such, I should not proceed. The Employer said that, like the courts, arbitrators should only deal with matters where there was a "live controversy." Moreover, Section 123 and Section 124 of the *Police Services Act* requires that there be a dispute or difference between the parties to the collective agreement in order to have an arbitration. The Employer said there was no useful purpose in proceeding with an arbitration of this grievance as the Union and the Employer had already agreed to the resolution.

Finally, the Employer said that only the parties to the collective agreement - that is, the Union and the Employer - can arbitrate a dispute under either this collective agreement or the *Police Services Act*. There was no Union involvement in this dispute and the grievor made it clear that he was personally pursuing the matter to arbitration. But the Union is the exclusive representative of the members of the bargaining unit, including the grievor. The Union controls access to arbitration under both the collective agreement and the *Act*. Under the *Police Services Act* only the two parties - that is, the Union or the Employer - can seek conciliation or arbitration of grievances. A union is entitled to settle grievances, as this Union did, and the Employer is entitled to rely upon a settlement it has reached with this Union.

The Employer submitted that if I found for the Employer on any one of its three jurisdictional issues, I should still consider and resolve the other two.

The Employer relied upon the following authorities: *Zehrs Markets v. Retail Clerks Union, Local 1977* [1984] O.L.A.A. No. 11, 14 L.A.C. (3d) 379 (Barton); *Espanola*

(Town) v. Canadian Union of Public Employees, Local 534 [1997] O.L.A.A. No. 172, 61 L.A.C. (4th) 149 (Marcotte); *Air Liquide Ltd. v. United Steelworkers of America, Local 6308* [1998] O.L.A.A. No. 985, 77 L.A.C. (4th) 230 (Verity); *A.G. Simpson Co. v. National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada), Local 222* [1996] O.L.A.A. No. 49, 58 L.A.C. (4th) 411 (Kennedy); *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231; *Toronto District School Board v. Ontario Secondary School Teachers' Federation, District 12* [2008] O.L.A.A. No. 477, 176 L.A.C. (4th) 257 (Craven); *Noël v. Société d'énergie de la Baie James* [2001] 2 S.C.R. 207, [2001] S.C.J. No. 41; *Re Civil Service Association of Ontario and Representatives and Technical Staff Union* [1973] O.L.A.A. No. 122, 4 L.A.C. (2d) 182 (Johnston); *Re Governing Council of the University of Toronto and Service Employees Union, Local 204* [1974] O.L.A.A. No. 28, 5 L.A.C. (2d) 304 (Weatherill); *Noble v. United Steelworkers of America, Local Union 2251* [1981] CanLII 811 (OLRB); *Renaud v. Town of Lasalle Police Association* [2006] CanLII 23904, 216 O.A.C. 1 (Ont. C.A.); *Christi-Anne Marie Lafrance and North Bay Police Services Board* (unreported), January 9, 2009 (Starkman).

GRIEVOR'S POSITION

The grievor addressed the issue of whether he, as an individual employee, can pursue his grievance to arbitration. He noted that some legislation, such as the Ontario *Labour Relations Act* had no application to police officers. He said that cases decided under legislation which does not apply to police officers should not be relied upon in this case. However, he noted that many other pieces of legislation do apply to police officers and he said that I should look to decisions made under that other legislation when seeking precedents. He said that recent decisions by tribunals acting under legislation which does have application to police officers, such as Workers' Compensation appeal decisions

and Pay Equity appeal decisions, and decisions regarding Inquests and Public Inquiries, etc., showed a more liberal attitude toward the rights of employees to have standing in hearings than did the authorities relied upon by the Employer. In addition, he referred to various Ontario arbitration awards which have addressed the rights of individual police officers, especially in promotions. He said that those arbitration cases recognize the importance of promotion to police officers and are favourable to individual participation by police officers. Finally, he relied upon recent arbitral authorities which he said granted employees the right to participate if they had significant contractual benefits at issue, or if the employee was the only employee directly affected by the arbitration. Based on these various authorities he suggested that he should be allowed to proceed to arbitration with his grievance.

In addition, the grievor said that the decision in *Renaud*, above, relied upon by the Employer, provides that an employee can pursue his or her case to arbitration. Similarly, another decision relied upon by the Employer, *Lafrance*, above, suggested that a police officer can pursue a case to arbitration.

As for the issue of the Union settlement of its two grievances, the grievor said that the settlement reached by the Union did not pass a test of reasonableness. He submitted that his rights had not been considered in the settlement. In addition, he said that authorities suggest that when there is a direct financial interest involved, the party affected - the grievor - should have standing.

Finally, the grievor took the position that if I found for the Employer on the question of his standing to proceed to arbitration, I should stop there and not express any conclusions on the issue of whether this matter had been settled by the Employer and the Union, or on the question of whether the matter was moot. The grievor said that if I had no

jurisdiction to hear his grievance, then I should not purport to reach any substantive conclusions about the grievance.

The grievor relied upon the following authorities: Eight (8) Workplace Safety and Insurance Appeals Tribunal Decisions, as follows: *(2001), Decision No. 884/011, 2001 ONWSIAT 1905* CanLII; *(1999), Decision No. 635/991, 1999 CanLII 15720 (ON W.S.I.A.T.); (2007), Decision No. 2198/071, 2007 ONSWIAST 2605* (CanLII); *(1993), Decision No. 672/91, 1993 CanLII 6126 (ON W.S.I.A.T.); (2008), Decision No. 1574/99R2; (1999), Decision No. 599/98, 1999 CanLII 17173 (ON W.S.I.A.T.); (1992), Decision No. 34i/92, 1992 CanLII 5774 (ON W.S.I.A.T.); (1991), Decision No. 522/9112, 1991 CanLII 5617 (ON W.S.I.A.T.); Niagara (Regional Municipality) v. CUPE, Local 1287* (1998), CanLII 14728 (ON P.E.H.T.); *Committee for Justice for Otto Vass v. Lucas* (2006), CanLII 70002, 56 Admin. L.R. (4th) 301, 217 O.A.C. 141 (Ont. S.C.); *Antoncic and Ontario (Ministry of Community Safety and Correctional Services)* (unreported), October 10, 2008 (P.S.G.B., O'Neil); *Ontario Public Service Employees Union and Ontario (Municipal Affairs and Housing)* (2009), CanLII 15413 (ON G.S.B., Gray); *Her Majesty the Queen and Eurocopter Canada Limited* (unreported), May 25, 2004 (O.S.C., Then J.); *Cinderella Allalouf Ad-Hoc Litigation Committee v. Lucas* (1999), CanLII 18723 (ON S.C.D.C.); *The Sarnia Police Services Board and The Sarnia Police Association* (unreported), June 5, 2002 (Snow); *City of Toronto Police Services Board and Toronto Police Association* (unreported), January 22, 2001 (Marcotte); *Toronto Police Services Board v. Toronto Police Association* (2005), CanLII 18277, 198 O.A.C. 100 (ON S.C.D.C.); *Toronto Police Services Board and Toronto Police Association* (unreported), January 20, 2004 (Simmons); *The Metropolitan Toronto Police Services Board and The Metropolitan Toronto Police Association* (unreported), March 1999 (Fisher); *Toronto Police Services Board and Toronto Police Association* (unreported),

March 3, 2000 (Saltman); *Toronto Police Services Board and Toronto Police Association* (unreported), May 16, 2002 (Jolliffe); *The Halton Regional Police Services Board and The Halton Regional Police Association* (unreported), July 17, 2002 (Bloch); *Durham Regional Police Services Board and Durham Regional Police Association* (unreported), March 25, 2008 (McKee); *Canadian Union of Public Employee, Local 101, and The City of London* [2004] O.L.A.A. No. 427, 131 L.A.C. (4th) 56 (Lynk); *The Timmins Police Services Board and The Timmins Police Association* (unreported), March 20, 1996 (Aggarwal); *The Thunder Bay Police Services Board and The Thunder Bay Police Association* (unreported), August 15, 1995 (Aggarwal); *The Sault Ste. Marie Police Association and The City of Sault Ste. Marie Police Services Board* (unreported), April 22, 1997 (Dunn); and *Christi-Anne Marie Lafrance and North Bay Police Association and North Bay Police Services Board* (unreported), September 27, 2009 (Starkman).

CONCLUSIONS

Can the grievor pursue his grievance against the Employer to arbitration?

If I have the jurisdiction as arbitrator to resolve the grievor's promotion grievance against his Employer it is because either this collective agreement or the *Police Services Act* provide that the grievor can pursue his grievance to arbitration. This question involves, fundamentally, the interpretation of this collective agreement and of the *Police Services Act*.

This collective agreement specifies that even the filing of a grievance requires the support of the Union. So, too, the Union must support the grievance if it is to be processed at any of the later stages of the grievance procedure. Finally, the grievance can only be taken to arbitration if the grievance has been processed through the various steps of the

grievance procedure and the Union supports it. There is nothing in this collective agreement which would suggest that the parties intended that a grievor could pursue his or her grievance through the grievance procedure or to arbitration. Instead, I conclude that under this collective agreement the parties intended that only the parties to the agreement - that is the Employer and the Union - can pursue a grievance to arbitration and that an individual employee cannot do so.

Similarly the *Police Services Act* (above) specifies that only the parties to a collective agreement - that is the Employer and the Union - can seek either the conciliation or arbitration of a grievance. There is no language in that *Act* to support the grievor arbitrating his own grievance against the Employer. As with the collective agreement, I conclude that the Legislature intended in the *Police Services Act* that individual employees have no access to arbitration.

Moreover, this collective agreement and the *Police Services Act* should be interpreted within the context of the common understanding of collective bargaining in Canada. Throughout Canada an employer and a union negotiate with one another as equals and the result of their negotiations is a collective agreement which regulates the employment relationship for all the employees in the particular bargaining unit. The union is a separate entity, not simply a collection of the employees in the bargaining unit. A union is free to negotiate without seeking the support of the employees in advance of, or during, the bargaining. While it is common practice for a union to have a tentative collective agreement ratified by the employees, and while ratification is required by some labour legislation, the general understanding is that a union can sign a collective agreement without obtaining the approval of the employees.

No individual employee has a right to unilaterally participate in the bargaining conducted

between the employer and the union, nor to make his or her own proposals to the employer. When a union and an employer sign a collective agreement, the employer is entitled to rely upon that agreement and is not subject to having an individual employee argue what the terms of the collective agreement should be.

The same principles apply after the collective agreement is in effect. Like the negotiation of the collective agreement, the administration of the collective agreement is done by the union. An employer and a union are able to address and resolve any differences, commonly called grievances, that arise under the collective agreement. In the same way that an individual employee cannot unilaterally participate in the negotiations, an employee is not entitled to unilaterally pursue a grievance with the employer, or before an arbitrator. Instead, the union is entitled to decide whether to pursue the grievance, whether to settle it before arbitration or pursue it to arbitration. The union has the right to deal with a grievance in the way that best meets the union's view as to the collective interests of the members of the bargaining unit. The parties' agreement about a grievance is commonly referred to as a settlement, and both parties are entitled to rely upon a settlement.

The collective administration of the collective agreement is as much the union's role as is the collective bargaining of the collective agreement. That is, both the negotiation and the administration of the collective agreement are conducted by the union and the employer - by the two parties to the collective agreement - unless, of course, either the collective agreement or the governing legislation provide otherwise.

Most unions know that as a practical matter they need the support of the employees in the bargaining unit and so they act in a manner which is designed to ensure that members do support the union. Most unions seek the input of the members when formulating

bargaining proposals and in negotiating with the employer. Most unions also consult with and seek the support of a grievor before settling a grievance, especially if that grievance affects only one employee. But the fact remains that it is generally the union's decision as to when and how a grievance is settled. Subject to the duty of fair representation, the union can settle a grievance in such manner as it sees fit.

This system of collective bargaining provides considerable power to a union with respect to the work life of employees in the bargaining unit. The general legislative and judicial response to this union power is to require the union to exercise its authority regarding the members of the bargaining unit in a manner which is not arbitrary, is not discriminatory and is not in bad faith. This is commonly referred to as the union owing to each individual employee in the bargaining unit a "duty of fair representation." This duty of fair representation is intended to protect individual employees from egregious union actions, while allowing the union the freedom to act as it determines is in the best interests of the members. The requirement that a union represent individuals fairly is included in many pieces of collective bargaining legislation and is usually administered by labour relations boards.

I conclude that both this collective agreement and the *Police Services Act* were created in a collective bargaining environment in which individual access to arbitration would be very unusual. I would have expected that if either the Employer and the Union in their collective agreement, or the Legislature in its *Police Services Act*, had intended to provide the unusual result of permitting individual employees access to arbitration, that intention would have been expressed openly and in clear language.

But there is no such language. I conclude that both this collective agreement and the *Police Services Act* are in conformity with the general view of collective bargaining in

Canada outlined above. There is nothing in either which provides a right to this grievor to process his grievance against the Employer to arbitration.

While the Employer submitted that this collective agreement and this statute conformed to the general Canadian model of collective bargaining, the grievor said that they did not. Both the Employer and the grievor relied upon a number of authorities in support of their respective positions.

Dealing first with the many authorities relied upon by the grievor, I find that none of them address this question of his right to arbitrate his grievance against the employer. I will briefly explain why they do not assist the grievor.

The grievor's first eight cases were workers' compensation appeal cases, primarily decisions of the Workplace Safety and Insurance Appeals Tribunal. Each of those cases involved hearings which were going to proceed. That is, there was no issue as to whether an individual or group could bring an appeal. Instead, each of these cases addressed whether some additional person or group could be added as a third party to an existing appeal. That is a different issue than is raised here, and would be more similar to a situation which might have arisen if the Union had taken this grievance to arbitration. If, in that situation, the grievor had sought to be added as a third party and to participate in that hearing, that is to lead evidence, cross-examine witnesses and make submissions to the arbitrator, then these cases might be of some assistance. But none of these eight cases support the grievor's position on the fundamental question before me of whether the grievor can pursue his own grievance against the Employer to arbitration.

The *Niagara* pay equity decision, above, is similarly of no assistance to the grievor. In that case the employer and union were already parties to the hearing. The Pay Equity

Hearings Tribunal decided that since the union took the same position as two individual employees who wished to also participate in the hearing, the two employees would not be added as additional respondents to the employer's application.

The *Committee for Justice for Otto Vas,* the *Eurocopter,* and the *Cinderella Allalouf* decisions, all above, also do not assist the grievor. In each there was a valid proceeding and, in each case, the issue was whether another person or group should have been allowed to participate as an additional party. None of those cases support the grievor in his desire to bring his own grievance to arbitration.

The *O.P.S.E.U. and Ontario* award, above, of Vice-Chair Gray is similarly of no assistance to the grievor. In that 2009 decision the union and the employer were both at a hearing as parties and the question before Vice-Chair Gray was whether that grievor could be represented at the hearing separately from the union. Vice-Chair Gray concluded that the grievor in that matter was not entitled to such status in the reconvened hearing.

None of the other authorities relied upon by the grievor provide support for his assertion of his right to pursue his own grievance against the Employer to arbitration, as distinct from him being added as a third party in an arbitration which is already properly established. In the circumstances, I see no benefit in reviewing those other decisions.

On the other hand, some of the decisions relied upon by the Employer do deal with this issue of an individual employee taking a grievance to arbitration. They are consistent with the general view outlined above about union control of the administration of a collective agreement and about the inability of an employee to take his or her grievance to arbitration. They all find no right of access to arbitration for an employee with a grievance against the employer and indicate that if there is such a right it must arise from

the collective agreement or the governing legislation. The conclusion reached in each of those decisions is consistent with the decision I have reached that no such right exists under this collective agreement or this statute.

The first case is the Supreme Court of Canada decision in *Noël*, above. That case was an action for nullity under the Quebec *Code of Civil Procedure* and it involved a labour arbitration award. An arbitrator had dismissed a union grievance against the employer's decision to discharge Noël and the union declined to pursue the matter any further. However, the discharged employee, Noël, sought to challenge the arbitration award. Noël's application for judicial review was rejected on the basis that he had not been a party to the arbitration and so he did not have standing to review the award. Noël then brought this action in nullity. In its unanimous decision, the Supreme Court included a section which it labelled "Principle of Exclusive Representation under Quebec Labour Law". In that section, the Court stated that one of the fundamental principles of Quebec labour law, a principle which it said is "in common with federal law and the law of the other provinces, is the monopoly that the Union is granted over representation." (para. 41). After outlining how the monopoly works in negotiating collective agreements, the Court turned to the impact on administering the agreement. It stated, at paragraph 45, as follows;

> In administering collective agreements, the same rule will apply to the processing and disposition of grievances. Administering the collective agreement is one of the union's essential roles and in this it acts as the employer's mandatory interlocutor. If the representation function is performed properly in this respect, the employer is entitled to compliance with the solutions agreed on. Collective agreements may of course recognize the right of employees to file grievances and take them to certain levels, even to arbitration, or to participate directly in grievances as parties. That is not the case here. With that exception, the rule is that the grievance and arbitration process is controlled by the union, to which that control belongs [citation omitted]. The union's power to control the process includes the power to settle cases or bring cases to a conclusion in the course of the arbitration process, or to work out a solution with the employer, subject to compliance with the parameters of the legal duty of representation.

The approach expressed by the Supreme Court, above, has been the applied in Ontario for

many years. For example, in 1973, in *Civil Service Association of Ontario*, above, Arbitrator Johnston expressed the common understanding on this issue at paragraph 4, as follows;

> I agree with the Employer's submission that the union as the party to the collective agreement is the appropriate party to make a submission to arbitration and the grievor has no right as an individual employee to make the submission on his behalf.

Similarly in 1974, in the *University of Toronto* award, above, Arbitrator Weatherill wrote as follows:

> It will be observed that while grievances may be submitted by individual employees as well as by the parties to the collective agreement, the submission of a grievance to arbitration is a matter for "either party", and the collective agreement does not appear to have conferred a right to proceed to arbitration on individual members of the bargaining unit. This, it may be said, is not surprising... (Para. 7)
>
> . . .
>
> It is our view that, at least under the collective agreement by which this board is constituted, it is only the parties to that agreement, that is, the trade union and the employer who may proceed to arbitration. It is, we think, an incident of that right that the parties may settle, compromise or, as in the instant case, withdraw cases which they had proceeded to arbitrate. (Para. 11)

More recently, in his January 9, 2009, *Lafrance* award, above, Arbitrator Starkman addressed this issue in a context similar to the one before me. The *Lafrance* matter was decided under this same *Police Services Act*, although under a different collective agreement. Arbitrator Starkman had been appointed by the Solicitor General to hear a grievance brought by a police officer, Ms Lafrance, against her employer, the North Bay Police Services Board. One of the questions before Arbitrator Starkman was whether Ms Lafrance could arbitrate a grievance against her employer. To that extent the case is similar to this one.

However, in the *Lafrance* case the North Bay Police Association appeared at, and participated in, the arbitration hearing. Both the Board and the Association opposed Lafrance's position, submitting that Ms Lafrance could not, as an individual, pursue the matter of her complaint against her employer, the Police Services Board, to arbitration.

Arbitrator Starkman agreed with the position of the employer and union.

On this jurisdictional issue of whether Ms Lafrance could arbitrate her grievance against the North Bay Police Services Board, Arbitrator Starkman wrote in his January 9, 2009, award as follows:

> . . . in my view the case law is very clear that an individual member of an association, which is an exclusive bargaining agent, does not have the right to individually pursue a grievance to arbitration without the consent of the bargaining agent, unless such right has been specifically allowed for by the parties to the collective agreement or provided for in legislation. (at p. 17)
> . . .
> [to] permit individual employees to file grievances and pursue them to arbitration without the consent of their Association . . . would undermine the authority of the Association and would impose an undue burden on employers, who after striking a bargain with the Association would then be forced to negotiate and perhaps arbitrate with individual members of the bargaining unit who felt aggrieved, and the Association would be without the ability, to settle or not pursue grievances with which it felt were not meritorious or otherwise not in the broader interests of the bargaining unit members. (at p. 22)

Arbitrator Starkman decided that Ms Lafrance could not take her grievance against her employer to arbitration.

What is the impact of the Renaud *decision?*

I acknowledge that there may be some confusion in the police community on this point of individual access to arbitration and, if so, that confusion seems to have arisen from the recent decision of the Ontario Court of Appeal in *Renaud,* above, a decision which both parties relied upon as supporting their position. That case involved a police officer - Renaud - in the Town of Lasalle. Officer Renaud had brought a court case against the Lasalle Police Association, the Lasalle Police Services Board, and a number of police officers, some of whom were members of the Police Association executive. Renaud complained about a number of matters including a failure to promote him. All of the allegations were workplace related. The Court of Appeal agreed with the lower court

decision that Renaud's complaints arose out of the employment relationship, a relationship governed by the collective agreement and the *Police Services Act*, and, as a result, the courts had no jurisdiction. Implicit in that decision was the normal requirement that all disputes under collective agreements must be resolved by arbitration. To this point the Court decision was quite ordinary.

The Court of Appeal, however, then addressed the duty of fair representation. It is that part of the decision which seems to have created the confusion. The Court first noted that in an earlier case (*Abbott v. Collins* [2003] O.J. No. 1881) it had decided that the *Police Services Act* and Regulations and the collective agreements were intended "to provide a comprehensive scheme to govern all aspects of the employment relationship" of police officers (at para. 6). Part of the general Canadian collective bargaining regime, or "comprehensive scheme" for collective bargaining, is the union's duty of fair representation owed to the members of the bargaining unit.

The duty of fair representation was first recognized in Canadian labour law in the late 1960's and the best known early decision finding that a union owed its members a duty of fair representation is *Fisher v. Pemberton* (1969), 8 D.L.R. (3d) 521 (B.C.S.C.). In finding that a union owed a duty of fair representation the Canadian courts adopted a concept that had been found to exist under similar legislation in the United States.

The Canadian courts concluded that the duty of fair representation arose by implication from the rights given to unions in the labour legislation and complaints about a violation of the duty of fair representation were initially heard by the courts. However, this duty is now often expressly included by Parliament and the various legislatures in collective bargaining legislation (for example, the duty was included in the Ontario *Labour Relations Act* in 1971) and it is commonly administered by labour relations boards.

Unlike many current pieces of labour legislation, the *Police Services Act* is silent on the duty of fair representation. Moreover, unlike many pieces of labour legislation, there is no adjudicative tribunal which has general authority over matters arising under the *Police Services Act*. That is, there is no tribunal like the Ontario Labour Relations Board, which functions under the Ontario *Labour Relations Act.*

Having previously found that the legislature intended that the *Police Services Act* and Regulations and the collective agreement would be a comprehensive scheme, the Court of Appeal in *Renaud* then addressed the duty of fair representation. I note that the Court decision was an oral decision, released the day of the hearing. The decision on this point is brief and some aspects of the decision are included only by implication. The Court dealt with this issue in one paragraph as follows:

> We cannot accept the position of the appellant [Officer Renaud] that he had no forum to which to bring **his complaint that the Association improperly refused to bring his grievances before an arbitrator** under the Collective Agreement. Section 123 (1) of the Act provides that at the request of a "party", a conciliation officer shall be appointed if a difference arises between the "parties". The respondents accept that that forum is or was available to the appellant. We agree that the word "party" should be given a broad and liberal interpretation in order to facilitate the intention of the legislature that the Act together with the Collective Agreement provide a complete and comprehensive scheme for police officers relating to their employment relationship. (Para. 7, my emphasis)

Three points arise. First, I read the Court decision as saying that there is a duty of fair representation owed by a police union to its members. Secondly, I read the decision as finding that the duty of fair representation arose by implication from the *Police Services Act*. Thirdly, the Court seems to have accepted that collective bargaining matters, such as duty of fair representation complaints, should be resolved by specialised labour relations tribunals, rather than by the courts, and the Court seems to have concluded that

the best way of dealing with these complaints would be through conciliation and arbitration under Sections 123 and 124 of the *Police Services Act.*

The difficulty with conciliating and arbitrating a complaint about a violation of a union's duty of fair representation is this - the language of the *Police Services Act* does not appear to permit it. The *Act* speaks of the parties - that is, an employer and a union - conciliating and arbitrating grievances which have arisen under a collective agreement. So the Court, relying on its earlier decision that the *Police Services Act*, Regulations and collective agreement should be a comprehensive scheme for collective bargaining, a scheme which included a union duty of fair representation, concluded that "party" had to be given a "broad and liberal interpretation" and that an individual can be a "party" in an arbitration in which the issue would be whether the union breached the implicit statutory requirement to provide fair representation.

I interpret the *Renaud* decision as permitting an Ontario police officer (or other member of a police force), whose collective bargaining is regulated by the *Police Services Act*, access to one form of arbitration. If an employee has a complaint that the union has not treated the employee fairly, that is if the union is alleged to have violated the duty of fair representation, then the individual can pursue that complaint to arbitration. That is the only issue an individual employee can arbitrate. The employee and the union would be the necessary parties to that arbitration.

That was also the conclusion reached by Arbitrator Starkman in his January 9, 2009, *Lafrance* award, above. After deciding that Lafrance could not pursue her grievance against the employer to arbitration, Arbitrator Starkman went on to find that much of Lafrance's complaint was that the Association had not represented her fairly. On that matter Arbitrator Starkman found that Ms Lafrance could pursue a claim about a breach

of the duty of fair representation against the Association to arbitration, and furthermore that he would hear that issue in that arbitration. Arbitrator Starkman then heard Lafrance's complaint and, in his second award, September 27, 2009, above, found that the Association had not breached its duty.

In my view, there is nothing in *Renaud* which suggests that a police officer can arbitrate a grievance against his or her employer alleging that the employer has violated the collective agreement. Arbitrator Starkman in *Lafrance* also rejected that idea. He stated that such a right would only exist if either the collective agreement of the *Police Services Act* so provided. I agree with Arbitrator Starkman on this point and I concluded above that this collective agreement provides no such right. Similarly, I concluded above that the *Police Services Act* does not provide any right for an individual employee to arbitrate a grievance against the employer.

At this hearing it appeared that part of the grievor's complaint dealt with the Union's actions in resolving the two grievances. It appeared that the grievor felt the Union had not represented him fairly. I express no opinion on the substance of such a complaint but, if the grievor has a complaint about a Union breach of its duty of fair representation, that is a matter which the grievor can pursue to arbitration against the Union. But he cannot pursue this grievance against the Employer to arbitration.

The grievor did not express a clear complaint about union representation. If the grievor does have an unfair representation complaint that he wishes to arbitrate against the Union, I would note that I was appointed by the Solicitor General to deal with his promotion grievance against the Employer. It would seem necessary that the grievor request the appointment of an arbitrator to hear any complaint of unfair representation.

Other jurisdictional issues

The Employer asked that I also deal with whether the issues raised by the grievor had been settled when the Union and Employer reached their Letter of Understanding, and whether this matter was moot. The grievor opposed that request.

As arbitrator I would ordinarily make no further decisions in an arbitration where I had found the complainant had no standing to bring the grievance to arbitration. There is an even stronger reason here to decline as these matters involve a party not present at the hearing. I therefore express no views on the issues of whether the Union and the Employer have settled this matter or whether this matter is moot.

Summary

I conclude that under this collective agreement the parties intended that only the Employer and the Union can pursue a grievance to arbitration; an individual employee cannot do so.
Similarly, I conclude that under the *Police Services Act* the Legislature intended that only the Union can pursue a grievance against the Employer to arbitration, and an individual employee cannot do so.

Moreover, the recent Court of Appeal decision in *Renaud,* which interprets the *Police Services Act* as allowing individual employees to conciliate and arbitrate complaints against their unions about a union breach of the duty of fair representation, provides no support for the grievor arbitrating his grievance against the Employer.

For the reasons above, I have no jurisdiction to hear this grievance. The grievance is

dismissed.

Dated at London, Ontario this 14th day of December, 2009.

Howard Snow, Arbitrator