ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: 3454-17-R
List of Employees

United Food and Commercial Workers International Union (UFCW Canada), Applicant v The Original Cakerie Ltd., Responding Party v Ontario Federation of Labour, Intervenor

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - August 13, 2018

DATED: August 13, 2018

Catherine Gilbert
Registrar

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Ontario

# ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **3454-17-R**

United Food and Commercial Workers International Union (UFCW Canada), Applicant v **The Original Cakerie Ltd.**, Responding Party v Ontario Federation of Labour, Intervenor

**BEFORE:** Bernard Fishbein, Chair

**APPEARANCES:** Micheil Russell and Kevin Shimmin appearing on behalf of the applicant; Ron LeClair, Tishar Anandasagar and Adri Britz appearing on behalf of the responding party; Lindsay Lawrence and Daniel Sheppard appearing on behalf of the intervenor

**DECISION OF THE BOARD:** August 13, 2018

## I. Background

1. This is an application filed under section 6.1 of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended ("the Act") for an order directing the responding party ("the Employer") to provide to the applicant ("the Union") a list of employees from the bargaining unit the Union claims to be appropriate for collective bargaining.

2. By decision dated March 29, 2018, the Board determined, subject to the constitutional question raised by the Employer, that the Union was entitled to a list of employees pursuant to section 6.1 of the Act, and directed it be provided to the Union under certain conditions.

3. In accordance with that decision, the Employer filed a full Notice of Constitutional Question ("the Constitutional Question" or the "*Charter* Question"), challenging section 6.1 of the Act as being contrary to the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). Both the Union and the Attorney General of Ontario ("the Attorney General") responded to the Constitutional Question, asserting that section 6.1 of the Act does not violate the *Charter*, and in any event, the Employer

had no standing to make such an argument on behalf of its employees. As well, the Ontario Federation of Labour ("the OFL") subsequently sought to intervene on this *Charter* Question.

4. A Case Management Hearing ("CMH") was held on May 28, 2018 to deal with the *Charter* Question. At the CMH the Employer challenged the OFL's standing to intervene in the *Charter* Question, that being the only remaining issue in the application. After receiving and considering the written submissions of the parties (the Attorney General choosing not to make submissions), by decision dated July 5, 2018, the Board granted the OFL's status to participate in the *Charter* Question.

5. As noted, both the Union and the Attorney General challenged the status of the Employer to raise the *Charter* Question on behalf of its employees. They were joined in this challenge by the OFL. The parties agreed at the CMH to bifurcate the *Charter* Question, first determining whether the Employer had the status to raise the *Charter* Question on behalf of its employees and, only after that, determining the merits of the *Charter* Question. A hearing was held to deal with this first question on July 23, 2018. This decision deals with the status of the Employer to raise the *Charter* Question. Shortly before the hearing the Attorney General, withdrew its intervention without explanation and therefore did not participate in the hearing. The style of cause is amended to reflect this.

6. For the reasons explained below, I conclude that the Employer does not have standing to raise the *Charter* Question on behalf of its employees.

## II. The Ability of an Employer to Argue Issues on Behalf of its Employees – Generally

7. Not surprisingly, in such a frequently adversarial context as labour relations, this Board, other labour relations Boards across the country, and the courts, have been particularly wary of permitting an employer to argue the interests or issues on behalf of its employees. A foundational case may be said to be *Commission des Relations de Travail du Québec v. Cimon Limitée,* [1971] SCR 981, 1971 CanLII 143 (SCC), where the Supreme Court of Canada held that the employer was not entitled to invoke the rights of another party before the Labour Relations Board of Quebec:

> No basis was suggested for Cimon Limitée being entitled to invoke the rights of another party before the Labour Relations Board. …

In a subsequent decision, *Canada Labour Relations Board v. Transair Ltd.,* [1977] 1 SCR 722, 1976 CanLII 170 (SCC), the Supreme Court of Canada further elaborated on this at pages 743-745

> There is another ground upon which, apart entirely from untimeliness, the Federal Court and this Court may properly refuse to entertain Transair's attack upon the certification order when based on the Board's refusal to consider the employee petition. This ground is indicated in the judgment of this Court in *Cunningham Drug Stores Ltd. v. Labour Relations Board*, where Martland J., speaking for all but one member of the full Court, said this (at p. 264):
>
> > There is a further question which arises in respect of the issue now raised by the appellant, and that is as to its right to seek to set aside the Board's decision because it alleges that the rights of other parties were not observed. In *La Commission des Relations de Travail du Québec v. Cimon Limitée,* (1971 CanLII 143 (SCC), [1971] S.C.R. 981) the employer company sought the rescission by the Quebec Labour Relations Board of its order directing a vote on the application of a trade union for certification on the ground that notice of the petition for certification had not been given to another union, whose earlier petition for certification had been rejected following an employee's vote. The company contended that the unsuccessful union was successor to former unions which had been certified, whose certification had not been cancelled, and that it was therefore entitled to such notice.
> >
> > The Board ruled that the company was unlawfully pleading on another's behalf an objection in which it had no legal interest. This position was sustained in this Court, which held that the company was not entitled to invoke the rights of another party before the Board.
>
> True, the issue in the *Cunningham* case was a different one from that presented here, but only in the fact that the employer there objected to the failure to give employees further notice where a radical change in the bargaining unit was proposed by the Board (they had notice of the original application for certification and no employee had objected)

> while here the objection of the employer was to the failure to consider a petition of employees who did not themselves in any representative or other capacity seek to intervene in the proceedings. Transair did not make the dissident employees parties to its s. 28 application, nor did it seek to have them joined when the Federal Court of Appeal directed by an order of November 1, 1974, that the petition should be made part of the record "without prejudice as to the rights of the parties as to its relevancy". **If there is any policy in the *Canada Labour Code* and comparable provincial legislation which is pre-eminent it is that it is the wishes of the employees, without intercession of the employer (apart from fraud), that are alone to be considered vis-à-vis a bargaining agent that seeks to represent them. The employer cannot invoke what is a *jus tertii,* especially when those whose position is asserted by the employer are not before the Court.**
>
> [emphasis added]

8. Notwithstanding how much has been written by the Supreme Court of Canada or other courts or tribunals about standing of third parties or employers to raise such issues (see discussion below), I was referred to no decision where the decision in *Transair, supra,* was ever overruled or explicitly disparaged.

9. This approach, as elaborated in *Transair*, has been the consistent approach of the Ontario Labour Relations Board to date. Just by way of example, the Union and the OFL pointed me to *DTR Drywall T-Bar Restoration Ltd.,* 2002 CanLII 27602 (ON LRB) at paragraph 9; *Struct-Con Construction Ltd.,* 2007 CanLII 29266 (ON LRB) at paragraphs 18-19; *Bristol Acoustic & Drywall Inc.,* 2004 CanLII 41635 (ON LRB) at paragraph 20; *Baywood Carpentry & General Contracting Ltd,* 2012 CanLII 69865 (ON LRB) at paragraph 3; *J.G. Roger Electric (1981) Ltd.,* 2017 CanLII 8120 (ON LRB) at paragraph 56.

## III. Has Anything Changed as a Result of the *Charter*?

10. The Employer says all of this must be reconsidered in view of the *Charter*. In particular, the Employer points me to section 52 of the *Constitution Act*, which provides:

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions

> of the Constitution is, to the extent of the inconsistency, of no force or effect.

11. The Employer says that the *Charter* is the primary law of the country and that it contains a constitutional right to privacy and therefore it should have the right to argue that section 6.1 of the Act is invalid under the *Charter*, particularly when that provision of the statute will mandatorily require the employer to perform acts (the granting of a list of employees with their names and addresses to the Union, without their consent) which on their face are an invasion of their privacy rights and therefore contrary to the *Charter*.

12. The Employer says that since it makes its challenge under section 52 of the *Charter* and not section 24(1) (which by way of contrast, on its face, sets out a remedy for individuals – "anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed, or denied may apply to a court of competent jurisdiction …"), it may invoke the *Charter* rights of third parties.

13. In fact, the Employer argues that the Board's own Rules of Procedure ("the Rules") "explicitly contemplate" that any party to any proceeding before the Board has standing to file a Notice of Constitutional Question challenging the validity of a provision of the Act. The Employer points me to Rule 4 which requires "a party" (defined to include a "person" – which is defined to include an employer named in an application – as the Employer is here) intending to challenge the "constitutional validity" of any law to give notice to the Board and the Attorney General. It also points to the Board's Form A-107, "Notice of Constitutional Question" which the party giving notice of the challenge must complete when it intends to "question the constitutional validity" or "claim a remedy" under section 24(1) of the *Charter*. The Employer says that since Form A-107 distinguishes between questioning "constitutional validity" and a section 24 *Charter* challenge, it clearly contemplated that the Employer has standing to make a section 52 challenge as part of questioning the constitutional validity of a provision of the Act.

14. With all due respect, such an argument both oversimplifies and overstates the significance of the Board's Rules and forms. They are only administrative in nature and are intended only to notify and inform the Board and the parties of issues and constitutional questions that may be raised. They are not intended to – nor do they explicitly state that they – determine such significant substantive legal issues as an employer's standing to argue *Charter* rights on behalf of its employees.

15. In any event, the approach of the Board in cases where *Charter* issues have been raised so far does not support the Employer's distinction or assertion that the Board's fundamental approach has changed. Even in *Charter* cases, the Board has declined to hear or give effect to employers arguing the *Charter* rights of their employees. Both the Union and the OFL took me through a long line of Board and Court decisions demonstrating this.

16. In *FDV Construction Ltd.*, [1986] OLRB Rep. May 617, an employer sought to argue that section 1(4) of the Act, which allows the Board to declare that two or more employers may be treated as one for the purposes of the Act, infringes the guarantee of freedom of association provided in section 2(d) of the *Charter* . The Board dealt with the question of the standing of the employer at paragraph 22:

> The applicant also raised another issue with respect to the standing of counsel for FDV and Bluebird to challenge the constitutional validity of section 1(4). The applicant argued that the respondents did not assert that section 1(4) interfered with their constitutionally protected rights, but rather with the constitutionally protected rights of others. The applicant relied on a number of cases where the courts had been reluctant to permit an employer to invoke on behalf of other persons, and in particular, on behalf of employees, rights which did not belong to the employer but did belong to other persons. Having regard to the decision of the Supreme Court of Canada in Canada Labour Relations Board and *Transair Limited*, (1976) 1976 CanLII 170 (SCC), 67 D.L.R. (3d) 421 and *Cunningham Drug Stores Limited v. B. C. Labour Relations Board*, (1973) 1972 CanLII 143 (SCC), 31 D.L.R. (3d) 459, the Board finds that FDV and Bluebird do not have the standing to raise the constitutional validity of section 1(4) of the Act.

The Board did go on to deal with the merits of the *Charter* argument and ultimately rejected it.

17. In *R-Theta Inc.,* [1997] OLRB Rep. January/February 116, the employer again sought to raise a *Charter* question at paragraph 3(3):

> That there has been a denial of employee rights under section 15 of The Canadian *Charter* of Rights and Freedoms, in that an employee in the proposed bargaining unit who speaks Gujarati misunderstood the ballot since it was not in her own language, and misrecorded her vote. The Attorney

> General was given notice of this issue prior to the hearing, but indicated his office would not be intervening at this stage.

At paragraph 61 the Board stated:

> We are also of the view that the employer does not have standing to complain of the violation of an individual employee's rights. There is nothing to suggest any reason why any affected employees could not have done so themselves, and it is the employees' individual *Charter* rights which are at issue here. See *C.L.R.B. and Transair*, cited above at pg. 438, where this issue is dealt with in the general labour law context. For the *Charter* context, see *Canadian Council of Churches v. Canada*, (1992) 1992 CanLII 116 (SCC), 88 D.L.R. (4th) 193.

18. In *Twin Lakes Terrace Retirement Home* 2003 CanLII 19498 (ON LRB), which was a termination application under the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c.H.14 ("HLDAA"), the intervening employer sought to argue (at paragraph 3):

> … If s. 12(1) of HLDAA removes the right of employees governed by it to terminate the representation rights of a Union where no collective agreement has been made one year after certification, then the employees' right to freedom of association under s. 2(d) of the *Charter* is infringed. Since this infringement cannot be justified under s. 1 of the *Charter* as a reasonable limit in a free and democratic society, s. 12(1) of HLDAA is unconstitutional and of no force and effect.

19. The Board entertained arguments of the parties about the status of the employer to make those *Charter* arguments (see paragraph 10-13), and stated at paragraph 16 and 17:

> 16. At the conclusion of the parties' submissions summarized in paragraphs 10-13, the Board took a short recess, and then delivered this oral ruling:
>
> > We are not persuaded that the intervenor has standing to raise a constitutional challenge to section 12(1) of HLDAA based on an alleged infringement of the applicant's rights under section 2(d) of the *Charter*. Nor are we satisfied that the applicant herself takes issue with the constitutionality of the provision in question. All parties having agreed that, but for the question of

> constitutional validity, this application was not timely pursuant to section 12(1) of HLDAA, it is hereby dismissed.

> 17. The reasons for the above decision may be briefly stated. The right to be heard does not extend to the right to be heard on issues in which one does not oneself have a legal interest. Had the applicant asserted an infringement of her section 2(d) rights, all parties would have had an opportunity to address that issue. She did not raise that issue in writing or verbally before the Board. The intervenor lacked standing to raise that issue on her behalf. In the Board's view, the following excerpt from the *Transair* decision is equally applicable to proceedings respecting the termination of bargaining rights:

> > If there is any policy in the Canada Labour Code and comparable provincial legislation which is pre-eminent it is that it is the wishes of the employees, without intercession of the employer (apart from fraud), that are alone to be considered vis-a-vis a bargaining agent that seeks to represent them. The employer cannot invoke a *jus tertii*, especially when those whose position is asserted by the employer are not before the Court. (at p. 438)

> The Board would only note that there is even less reason to permit the employer to invoke a *jus tertii* when the employees are present and do not themselves assert it, as was the case here.

20. In *Maple Leaf Consumer Foods Inc.*, 2006 CanLII 27507 (ON LRB) an employer sought to have ballots from a representation vote declared void since the ballots were not translated to either Chinese or Punjabi, and there was not an interpreter present or allowed to be used at the vote to assist the voters. The issues the employer sought to raise are summarized at paragraph 6:

> Counsel for the employer in making this submission states there are six issues raised in the proceeding:

> > 1. Does Maple Leaf Consumer Foods have standing to raise arguments relating to the *Canadian Charter of Rights and Freedoms* (the "*Charter*") in the present case?

> 2. Did the Board violate section 2(d) of the *Charter* in refusing to allow translated ballots or the presence of translators at the certification vote?
>
> 3. Did the Board violate section 14 of the *Charter* in refusing to allow translated ballots or the presence of translators at the certification vote?
>
> 4. Did the Board violate section 15(1) of the *Charter* in refusing to allow translated ballots or the presence of translators at the certification vote?
>
> 5. If the Board did violate either section 2(d) or section 14 or 15 of the *Charter*, is this violation justified by section 1 of the *Charter* ?
>
> 6. Did the Board violate the *Ontario Human Rights Code* (the "Code") in refusing to allow translated ballots or the presence of translators at the certification vote?

21. Counsel for the union objected to the standing of the employer to make such arguments at paragraphs 40-42:

> 40. On this issue of standing counsel referred to a number of cases including *Re Canada Labour Relations Board and Transair Ltd.* 1976 CanLII 170 (SCC), 67 D.L.R. (3d) 421; *Image Painters L.M. Inc.*, [1988] OLRB Rep. Aug. 807; *Steeves & Rozena Enterprises Ltd*. [2003] O.L.R.D. No. 450 and *The Canadian Council of Churches, supra*.
>
> 41. Counsel referred to *Transair, supra,* where the court held at p. 438:
>
> > … If there is any policy in the *Canada Labour Code* and comparable provincial legislation which is pre-eminent it is that it is the wishes of the employees, without intercession of the employer (apart from fraud), that are alone to be considered, vis-à-vis a bargaining agent that seeks to represent them. The employer cannot invoke what is a *jus tertii,* especially when those whose position is asserted by the employer are not before the Court.
>
> In counsel's view *Image Painters, supra,* put the issue quite succinctly: "As a general rule, the Board does not permit an employer to speak for employees in an application for certification absent allegations of fraud, intimidation or

> coercion in the obtaining of membership evidence" (See also *R. Theta Inc., supra,* at paragraph 61).
>
> 42. In regards to employer's counsel reference to *The Canadian Council of Churches, supra* counsel pointed out that the court noted that *The Canadian Council of Churches,* a federal corporation, "represents the interest of a broad group of member churches. Through an inter-church committee for refugees it co-ordinates the work of churches aimed at the protection and resettlement of refugees". It could hardly be said that this employer is a recognized organization to protect employee rights. In any event this employer does not meet the tests set out in this case to have standing. To have standing the employer must meet all three tests set out in such decision. Regarding such criteria counsel submits in this instance given the thirty year history of the Board on this issue, it is not a serious issue. Further the employer does not have a genuine interest in the issue as it does not have a history of protecting new Canadians. Most significantly there is a reasonable and effective way to deal with the issue by the employees themselves. They are encouraged to raise concerns with the Board and have done so in the past – see for example *Northfield Metal Products Ltd.,* [1989] OLRB Rep. Jan. 57 (at paragraph 4). Finally it should be noted that in *The Canadian Council of Churches* (the "Council") decision (supra) the court did not grant public interest standing to the Council. Thus, counsel submits the motion of the employer should be dismissed as it has no standing to bring such motion.

22. The Board agreed and found that the employer had no such standing at paragraphs 49-51:

> 49. On the first issue the Board finds that the employer has no standing to bring this motion. On the other issues the Board is not persuaded that it has breached either the *Charter* and/or the Code.
>
> 50. Dealing first with the issue of standing, the Board is of the view that the applicant has not satisfied the tests referred to in *The Canadian Council of Churches, supra,* to be granted public interest standing. The Board agrees with the argument of union counsel that the employer is certainly not a party representing the broad interest of employees generally. Given that the practice of the Board is long standing and individual employees are invited to make their concerns known, in this instance it would be reasonable to

> expect if there was a concern an employee would have raised such issue. Yet no employee has raised such issue. In these circumstances the Board does not [sic] agree that the employer is entitled to be granted public standing. The Board agrees with the statement in *Image Painters, supra,* that "as a general rule, the Board does not permit an employer to speak for employees for certification about [absent] allegations of fraud, intimidation or coercion in the obtaining of membership evidence". These latter exceptions do not apply in these circumstances. For much the same reasons the Board would not exercise its discretion to allow the employer to have standing. The Board sees no reason to allow standing in a situation of a long established practice where no employee raises the issue despite numerous notices posted by the Board giving employees the opportunity to raise such issues. As union counsel points out, employees are invited to raise their concerns at several stages of the certification process. In fact in *Northfield Metal Products Inc., supra,* employees did raise such concerns as a party. It is to be noted that employees were provided translations by the parties of the certification process and of a sample ballot. The Board sees no reason why in these circumstances the employer should be permitted to speak on behalf of the employees.
>
> 51. The Board would therefore conclude that the responding party has no standing to bring this motion. However in the event the Board is incorrect in arriving at this conclusion, it will nevertheless deal specifically with the submissions of the parties dealing with the *Charter* and the Code.

23. This is not just the position of the Board, it has been endorsed by the Courts in Ontario as well. See *My Building Corporation v. Labourers' International Union of North America, Local 183* [2000] O.J. No. 3587, where an employer sought judicial review of the Board decision certifying a union. The Divisional Court stated at paragraph 4:

> The Notice of Application and the Applicants' factum raised certain *Charter* issues which were not addressed by Applicants' counsel in his submissions. **The *Charter* issues raised are all alleged infringements of the *Charter* rights of the employees and, in our view, the law is clear that such issues cannot be raised by the employer**. ...
>
> [emphasis added]

24. Equally the Courts in Ontario have applied this analysis in contexts other than the Act. In *R. v. Inco Ltd.*, 2001 CanLII 8548 (ON CA) (leave to appeal to the Supreme Court of Canada dismissed, March 7, 2002) the Ontario Court of Appeal dismissed an appeal from a conviction under the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40 for discharging untreated mine effluent into a creek and failing to report it forthwith. Among the grounds Inco raised, was the conduct of the Investigation and Enforcement Officer in questioning some of Inco's employees, which Inco alleged violated the employees' *Charter* rights. The Court rejected this position at paragraphs 40-43:

> [40] Inco also requests a stay of the charges based on the alleged violation of the employees' rights under ss. 7, 9, and 10(b) of the Charter. Inco asserts that it has standing to raise the constitutionality of regulatory measures used against it, even if the rights invoked belong to natural persons. It is well accepted that corporations cannot claim the protection of s. 7 of the Charter: see *Irwin Toy Ltd. v. Quebec (Attorney General),* 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927 at p. 1004, 24 Q.A.C. 2, and *Thomson Newspapers Inc. v. Canada (Director of Investigation & Research, Restrictive Trade Practices Commission),* 1990 CanLII 135 (SCC), [1990] 1 S.C.R. 425 at p. 572, 39 O.A.C. 161. Nor can corporations invoke ss. 9 or 10(b) of the Charter, because corporations cannot be arrested or detained: see *Canadian Egg Marketing Agency v. Richardson,* 1997 CanLII 17020 (SCC), [1998] 3 S.C.R. 157 at p. 183, 166 D.L.R. (4th) 1.
>
> [41] Inco relies on *Canadian Egg Marketing Agency, supra,* in support of its argument that it has standing to advance the Charter claims of its employees. In that decision, the Supreme Court of Canada explained that a court has residuary discretion to entertain Charter arguments from parties that would not normally have standing where the question involved is one of public importance. **The Supreme Court also established that a corporate accused charged with an offence has standing to challenge the constitutionality of the legislation giving rise to the proceedings, as does a corporate defendant in civil proceedings instigated by the state under a regulatory regime.**
>
> [42] **In my view, Inco's Charter claims are not raised out of public interest, nor do they constitute a matter of public importance**. The claims arise in the context of a

> legislative scheme that has subsequently been amended and their claims are focused on the conduct of an individual investigator whom they claim overstepped his lawful authority in the circumstances of this particular case. Furthermore, Inco is not attacking the constitutionality of the OWRA and, in fact, Inco acknowledges that the type of regulatory powers at issue have been upheld by the *Supreme Court in R. v. McKinlay Transport Ltd.,* 1990 CanLII 137 (SCC), [1990] 1 S.C.R. 627, 39 O.A.C. 385 and *R. v. Fitzpatrick,* 1995 CanLII 44 (SCC), [1995] 4 S.C.R. 154, 129 D.L.R. (4th) 129, and are not impugned in this appeal.
>
> [43] **Accordingly, Inco lacks standing to advance a claim for relief based on the alleged violation of its employees' Charter rights**. The only basis for its abuse of process argument is s. 8 of the Charter and the associated issue whether the IEB Officer was acting beyond his statutory authority when he entered Inco's premises.
>
> [emphasis added]

More about the *Canadian Egg Marketing Agency* decision, and its applicability, later.

25. This is not only the approach in Ontario, but the approach in other provinces as well. In *Gil-Son Construction Limited v. International Brotherhood of Electrical Workers,* Local 625, 2009 NSLRB 9 (CanLII), the Nova Scotia Labour Relations Board dismissed an appeal of an employer from an earlier certification order. In particular, the employer challenged the Nova Scotia jurisprudence and practice (which is the same as it is in Ontario) of excluding from the bargaining unit persons “not at work at the site on the date of application”, as being contrary to the rights of its employees under section 2(d), the freedom of association (or not to associate) set out in the *Charter*.

26. The Nova Scotia Labour Relations Board, in dealing with the standing of the employer to make those arguments, stated at paragraphs 26-28:

> 26. The Applicant Employer’s second argument is that it has an interest in the certification which entitles it to advance *Charter* section 2(d) arguments on behalf of its employees in order to protect its own interests from adverse effects of unconstitutional procedures as occurred in *Big M Drug Mart*, supra. The Applicant Employer cites the eminent authority, Professor Peter Hogg, from pages 59-16 and 59-17, for the

proposition that in order to obtain a *Charter* remedy under section 52 (a declaration of invalidity, rather than a remedy under section 24(1)), a litigant ought to be given standing merely because he or she is affected by the law, regardless of whether this may be in a self-interested sense. However, Professor Hogg recognizes that is not the position which currently predominates in the Supreme Court of Canada. The majority of the Court in *Canadian Egg Marketing v. Richardson*, 1997 CanLII 17020 (SCC), [1998] 3 S.C.R. 157 speaking through Iacobucci and Bastarache, J.J. states at para.35:

> "Generally speaking a party seeking to invoke the *Charter* may be granted standing under four broad heads: as of right, the Big M. Drug Mart exception, public interest standing and under residuary discretion."

The first of these heads is not available to the Applicant Employer because, unlike the situation of the Intervenors, it has no *Charter* section 2(d) "freedom not to associate" right even plausibly at stake in these circumstances. As to the *Big M Drug Mart* exception, the Court in the *Canadian Egg Marketing Agency* case at para.39 stated that "What *Big M Drug Mart* created was an exception which granted standing as of right to an accused charged under legislation alleged to be unconstitutional", and extended that to "involuntary" regulatory regime whose injunctions could be enforced by contempt of court proceedings. This is a far cry from being required to negotiate, or being bound by sector negotiations, with a union because the Applicant Employer's employees have successfully sought certification through the exercise of their constitutional right to associate with one another for the purpose of collective bargaining.

27. The third head under which standing to invoke constitutional rights may be granted is that the applicant represents a significant public interest as summarized in the *Borowski* decision, supra. The Panel finds that while there may be a plausible argument that the Panel's jurisprudence or policy on bargaining unit determination or membership assessment process may infringe *Charter* section 2(2), a subject which will be addressed in substance below in relation to "*Charter* values**", this is an argument to be made, if at all, by employees, not the employer.** However, the Panel holds that while certification may have a commercial impact upon the Applicant Employer or may result in a *defacto* change in its management

> processes in order to deal with the union in the negotiation or administration of a collective agreement, the Applicant Employer does not have a "genuine interest as a citizen in the validity of the legislation". **Whether recognized by the Applicant Employer or not, an employer's interests are often (though not necessarily always) in conflict with the constitutionalized rights of employees to engage in collective bargaining. To allow such employer private interests to be advanced under the guise of "the public interest" would be to lead a Trojan horse into the statutory stable of collective bargaining which could promote rot in its foundations.** Finally, of course, as was demonstrated at length above, there is another reasonable and effective manner in which the issue of the application of the principle of the *Charter* section 2(d) right "not to associate" may be brought before the Panel - employees can do this themselves. Thus, the Panel has not granted standing to the Applicant Employer under the "public interest" head since at least two of the three "Borowski conditions" are not met. Moreover, these same arguments militate against granting standing under any residuary discretionary authority which the Panel might purport to exercise in these circumstances.
>
> 28. In conclusion then, the Panel in its interim ruling stated **that the Applicant Employer, for the above reasons, had no standing to advance the employees *Charter* section 2(d) rights.** …
>
> [emphasis added]

27. Again, I will have more to say about the exceptions referred to in *Gil-Son, supra,* later.

28. The only two cases to which the Employer refers me are *International Brotherhood of Electrical Workers 804, et al,* 2016 CanLII 43317 (ON LRB) and *Tom Jones & Sons Limited*, *et al,* 2012 CanLII 17167 (ON LRB), where unions raised *Charter* challenges that the Board determined on their merits notwithstanding the unions were not "natural persons" and therefore arguably could not have any *Charter* rights that were allegedly infringed. Leaving aside whether that characterization by the Employer is fair or accurate (and I note that the *IBEW 804 et al* cases were a series of termination applications where the bargaining rights of the unions were sought to be terminated, and the *Tom Jones et al* cases were a series of construction industry referrals where the unions were seeking to file grievances under collective agreements and

bargaining rights that had been extinguished by then section 160.1 of the Act and the regulations made thereunder - so that there was no question that the unions involved and the employees they represented had a direct interest and were directly affected), the Employer conceded that in neither case was any question of standing raised or discussed, and accordingly those cases are of no real assistance to the Employer.

29. As well, the Employer did refer to my earlier decision of July 5, 2018, granting the OFL standing in these proceedings and my reference at paragraph 16 to the Employer having chosen to make a broad and sweeping *Charter* challenge “as is its right”. However in response to my questioning, counsel for the Employer readily conceded that the Employer was not asserting that I had in any way at that time determined or suggested the outcome of the question of the Employer’s standing to raise the constitutional rights of its employees in this part of the case.

30. The Employer seeks to distinguish all of these cases relied on by the Union and the OFL because they involve different issues, such as a certification application, or section 1(4) of the Act, etc. and not a “list question” under section 6.1. That is obviously true since section 6.1 has only been the law since January 2018.

31. However, I fail to see why this distinction is at all relevant or salient. The Employer says section 6.1 is different. It imposes **mandatory** obligations on the employer to provide lists. I do not doubt the mandatory nature of the obligations on the employer when the Board makes a section 6.1 order. However, there are mandatory obligations that follow as a consequence of many other Board proceedings (which the Employer seeks to distinguish) – for example, a successful application for certification leads to the mandatory requirement on an employer to recognize the union and to bargain in good faith with it. The Employer says the consequences of a section 6.1 order require the Employer to violate *Charter* protections. Even assuming a right to privacy as alleged here is such a *Charter* protection (it is not explicitly enumerated in the *Charter*), why should that be any different from treatment of alleged *Charter* violations of section 2(d), the freedom of association, raised in the other cases by employers and which neither the Board nor the Courts allowed employers to pursue?

32. The Employer suggests and argues that the section 6.1 infringement is somehow more serious and more fundamental than any of the other *Charter* infringements alleged in the other cases. Again,

even assuming that the right to privacy is *Charter* protected, I do not see why it is more "important". A list that is directed under section 6.1 is clearly intended to facilitate union organizing. Union organizing may or may not be successful. A union may or may not contact individuals on the list provided by the employer (e.g. it may know certain people to be strong opponents of a union and therefore may not even attempt to contact them). Even employees whose contact information has been furnished to the union through the list can immediately refuse and easily end all such union contact, either by hanging up the telephone, deleting an email or slamming the door in the face of a union organizer. This seems to me far less serious than the consequences of, for example, a union certification which not only requires the employer to recognize and bargain in good faith with the union, but actually precludes any employer and employee direct negotiations as long as the union remains the exclusive bargaining agent. That is to say nothing of a section 1(4) application where bargaining rights will be extended to another legally separate company, or a certification resulting in an employer being automatically bound to a sector collective agreement as was the result in *Gil-Son, supra*, at paragraph 26 (previously quoted at paragraph 23 above). In all of these contexts, employers have been precluded from attempting to argue the alleged infringement of *Charter* rights of their employees.

33. I am not at all persuaded that section 6.1 is more significant, raises more serious questions, or has more serious or substantial implications or consequences than any of the other *Charter* infringements which employers have consistently been precluded from arguing on behalf of their employees.

## IV. The Exceptions

### *(a) The Big M Drug Mart exception*

34. Notwithstanding the general view that parties are not permitted to argue the interests of or on behalf of third parties (whether they are employees or not), there have been some exceptions made in the context of *Charter* litigation. The first is *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. There, a retailer was charged with unlawfully carrying on the sale of goods on a Sunday contrary to the *Lord's Day Act*. The retailer was permitted to challenge the validity of the *Lord's Day Act* on the basis it violated the *Charter* guarantee of freedom of conscience and religion. The retailer, as a corporation, obviously had no freedom of conscience and religion itself, let alone that was being

infringed. Since the supremacy of the *Charter* declared in section 52 dictates that no one can be **convicted** under an unconstitutional law, the Supreme Court held that any accused, whether corporate or individual, may defend a criminal charge by arguing the constitutional invalidity of the law under which the charge is brought.

35. The Supreme Court itself described the impact of *Big M Drug Mart, supra,* in the subsequent case of *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 at paragraph 39:

> 39. What *Big M Drug Mart* created was an exception which **granted standing as of right to an accused charged under legislation alleged to be unconstitutional.** A person whose constitutional rights are violated has standing as of right to challenge the violative act of government in proceedings brought either by or against that person. *Big M Drug Mart* extended that right to an accused whose own rights are not in fact violated but who alleges that legislation under which the accused is being prosecuted is unconstitutional.
>
> [emphasis added]

Here, clearly the employer is not charged with any violation of any statute, whether criminal or quasi-criminal. The Employer is involved in a proceeding before the Ontario Labour Relations Board between it and a union. It is not a criminal proceeding even if it could be said the Employer is somehow "mandatorily" brought before the Board as a result of the initiation of the application by the Union.

36. The Employer suggested that because there are offences created under section 104 of the Act for various individuals and entities (including employers) who "contravene any provision of [the] Act, or any decision, determination, interim order, order, direction, declaration or ruling under [this] Act", and because the Board is required to consent to a prosecution of an offence under the Act under section 109, *Big M Drug Mart, supra,* was applicable.

37. I do not see this at all. First, these are not proceedings under section 104 or 109 in any aspect. It is merely a private application under a new statutory provision by a union to which the Employer is a responding party – and it certainly does not encompass offences or criminal or quasi-criminal charges. Second, no matter how one looks at those sections, even if the Board consents to a prosecution (and no

party provided or referred me to any authority that consent was required if the Crown on its own determined to prosecute), it will never be the Board itself that is prosecuting anyone for a violation of the Act. It will either be the party that might consent under a private prosecution or perhaps the Crown. Finally, to the extent this is even relevant, consent to initiate to prosecute applications have very rarely been seen before the Board over the past number of decades.

38. The OFL also pointed me to *Shaw Almex Industries Ltd. v. Ontario (Ontario Labour Relations Board)*, [1988] O.J. No. 45, which it says also supports this conclusion. There, the Divisional Court dismissed a judicial review of a Board decision alleging, *inter alia*, that the reverse onus section of the Act (section 89(5), now section 96(5)) infringed section 15 of the *Charter*:

> **Constitutional Standing**
>
> Does the applicant have standing to challenge the decision on the grounds that s. 89(5) of the Labour Relations Act has no force and effect because it is inconsistent with s. 15 of the Canadian Charter of Rights and Freedoms?
>
> The applicant does not move under s. 24(1) of the Charter or seek declaratory relief, or seek to rely on the rights of others. The applicant says that the Board in ruling against it on the basis of the provisions of s. 89(5) lost jurisdiction by relying on a statutory provision that is of no force and effect because it is inconsistent with the Charter rights secured to the applicant by s. 15.
>
> The threshold question is whether s. 15 secures any rights to a corporation. Mr. Gordon presents an attractive argument that his corporate client has standing to challenge the decision and he bases that argument largely on the word "personne" in the French text of s. 15, arguing that this extends to corporations the protection of s. 15.
>
> The strong weight of authority, however, is against his argument. Hughes J. in *K Mart Canada v. Millmink Developments Ltd. et al.* (1986), 56 O.R. (2d), 422 at p. 434 concluded that the use of the word "personne" did not extend protection to corporations. *In Parkdale Hotel Ltd. v. Attorney- General of Canada et al.* (1986), 27 D.L.R. (4th) 19 at pp. 36-37, Joyal J. held that the language of s. 15 did not extend to a corporation or other "personne morale".

> The same conclusion, that s. 15 does not apply to corporations, was reached by the Court of Appeal in *R. v. Stoddart* (1987), 20 O.A.C. 365 at p. 371, and by the Divisional Court in *Re Aluminum Co. of Canada, Ltd. v. R.* (1986), 55 O.R. (2d) 522, at p. 531, a case in which leave to appeal was denied, and *in Omni Health Care Ltd. v. C.U.P.E. Local 1909* (Ont. Div. Ct., January 19, 1987, unreported), another case in which leave to appeal was denied.
>
> **We see nothing in the *R. v. Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321, to detract from the weight of these authorities on s. 15, particularly in a case like this where there are no penal or quasi-criminal proceedings against the applicant.** The substantial weight of authority is that s. 15 does not secure any rights or protection to corporations. Because it affords no protection to corporations, it secures no rights to the applicant and affords the applicant no standing to enforce that which it does not have.
>
> In the result, the application is dismissed.
>
> [emphasis added]

### *(b) The Canadian Egg Marketing Agency exception*

39. The *Big M Drug Mart, supra,* exception was further extended by the Supreme Court of Canada in *Canadian Egg Marketing Agency, supra,* to include civil proceedings. As the majority of the Court explained (and on the question of standing the dissenting judges did not disagree):

> 36. As a general rule, a provision of the *Charter* may be invoked only by those who enjoy its protection. Section 7 of the *Charter*, for example, extends protection only to natural persons: *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at p. 1004. Similarly, corporations cannot invoke those provisions of the *Charter* that provide protection following arrest and detention because corporations cannot be arrested and detained.
>
> 37. In *Big M Drug Mart*, however, this Court held that a corporation can invoke s. 2(*a*) of the *Charter*, which protects freedom of religion, even though a corporation cannot hold religious beliefs. Big M Drug Mart was charged with violating the terms of the *Lord's Day Act*, R.S.C. 1970, c. L-13, which prohibited certain kinds of commercial activity on

Sundays. In its defence, Big M Drug Mart sought to have the Act declared unconstitutional. This Court granted Big M Drug Mart standing. Dickson J. (as he then was) stated the following, at pp. 313-14:

> Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law . . . .
>
> Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid . . . .
>
> . . . The respondent is arguing that the legislation is constitutionally invalid because it impairs freedom of religion — if the law impairs freedom of religion it does not matter whether the company can possess religious belief. An accused atheist would be equally entitled to resist a charge under the Act. The only way this question might be relevant would be if s. 2(*a*) were interpreted as limited to protecting only those persons who could prove a genuinely held religious belief. I can see no basis to so limit the breadth of s. 2(*a*) in this case.
>
> The argument that the respondent, by reason of being a corporation, is incapable of holding religious belief and therefore incapable of claiming rights under s. 2(*a*) of the *Charter*, confuses the nature of this appeal. A law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(*a*) of the *Charter* and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue. [Emphasis added.]

...

39. **What *Big M Drug Mart* created was an exception which granted standing as of right to an accused charged under legislation alleged to be unconstitutional.** A person whose constitutional rights are violated has standing **as of right to challenge the violative act of government** in proceedings brought either

> by or against that person. *Big M Drug Mart* extended that right to an accused whose own rights are not in fact violated but who alleges that legislation under which the accused is being prosecuted is unconstitutional.
>
> 40. **In our opinion, the logic of *Big M Drug Mart* extends to give standing as of right to the respondents**. While they might seek public interest standing, we do not believe they need do so. **They do not come before the court voluntarily. They have been put in jeopardy by a state organ bringing them before the court by an application for an injunction calling in aid a regulatory regime.** Success of that application could result in enforcement by contempt proceedings. If the foundation for these remedies is an unconstitutional law, it appears extraordinary that a defendant cannot be heard to raise its unconstitutionality solely because the constitutional provision which renders it invalid does not apply to a corporation.
>
> 41. It seems wrong to us that someone in the position of the respondents should have to seek "public interest" standing. They do not seek to attack the legislation out of public interest. They seek to defend themselves against a law that is sought to be applied to them against their will which will directly affect their "private" interest.
>
> ...
>
> 44. **Our expanding the *Big M Drug Mart* exception to civil proceedings in these limited circumstances is not intended to provide corporations with a new weapon for litigation. The purpose of the expansion is to permit a corporation to attack what it regards as an unconstitutional law when it is involuntarily brought before the courts pursuant to a regulatory regime set up under an impugned law.** Surely, just as no one should be convicted of an offence under an unconstitutional law, no one should be the subject of coercive proceedings and sanctions authorized by an unconstitutional law.
>
> [emphasis added]

40. However I do not think *Canadian Egg Marketing Agency, supra*, assists the Employer either. First, the Employer has not been put in jeopardy in these proceedings "by a state organ bringing them before the court by an injunction calling in aid a regulatory regime" or

otherwise. In my view, these are not coercive proceedings of the kind contemplated by the Court in *Canadian Egg Marketing Agency, supra*, where the very matter before the Court was an injunction. Rather, it is a union application, another private party, that has commenced or initiated these proceedings – not "in aid of a regulatory regime" but purely to advance its own self-interest in organizing employees. Second, other than the legislation itself, designed to facilitate the employees right to organize in pursuit of collective bargaining (itself already held to be protected activity pursuant to the employees' freedom to associate under the *Charter*), there is simply no "state" action here – which otherwise might entitle one to involve the *Charter* rights of third parties to protect oneself from that "state" action. It does not seem to me that this either falls within (let alone warrants) any exception to the general rule that a provision of the *Charter* can only be invoked by those who enjoy its protection – to allow the employer to invoke, not its own privacy rights (assuming it has any), but those of its employees in a purely civil proceeding, in which it has no particular liability.

41. In my view, to interpret the *Canadian Egg Marketing Agency, supra*, as broadly as the Employer asserts here, is tantamount to permitting any employer to challenge any portion of labour relations legislation on the grounds that it affects the *Charter* rights of its employees. Not only would that swallow up the general rule that a provision of the *Charter* can only be invoked by those who enjoy its protection, it would also undermine the entire purpose of the approach which the courts and the Board have used since the *Transair* case that limits employers from addressing their own interests by trying to "bootstrap" on the alleged rights of their employees.

### *(c) Public Interest Standing*

42. The Employer also asserts that it should have standing to make these *Charter* arguments as a matter of "public interest standing". I must admit to some confusion as to how a party who clearly already has standing in a proceeding (and the Employer is clearly the responding party in this application) can seek to invoke public interest standing in order to make an argument, it would not otherwise be entitled to make. Usually, it seems to me, public interest standing is designed to be invoked by someone who is not party to a proceeding who wishes to participate in (or perhaps initiate) the proceeding because there are important public policy issues at stake and which that non-party believes it can bring something "extra", something of value, to that debate and determination. Here, the Employer's argument seems to conflate its

standing to participate (which the Employer has) with the ability to argue about rights that do not belong to it, which I would have thought are two separate and distinct issues.

43. Having said that, the Supreme Court of Canada in *Canadian Egg Marketing, supra,* seems to contemplate that possibility at paragraph 38:

> 38. ***Big M Drug Mart*** **did not foreclose the possibility that a party in the position of the respondents who did not come before the court voluntarily could be granted public interest standing notwithstanding that the party's own rights were not being violated.** The majority held that in such circumstances the party would have to satisfy the status requirements of the standing trilogy (*Thorson v. Attorney General of Canada*, 1974 CanLII 6 (SCC), [1975] 1 S.C.R. 138, *Nova Scotia Board of Censors v. McNeil*, 1975 CanLII 14 (SCC), [1976] 2 S.C.R. 265, and *Minister of Justice of Canada v. Borowski*, 1981 CanLII 34 (SCC), [1981] 2 S.C.R. 575). In the view of the majority, the respondent Big M Drug Mart did not have to fulfill those requirements because as an accused it did not come before the court voluntarily and no one should be convicted under a statute that is constitutionally infirm. In these circumstances, an accused corporation or an individual was said to be "entitled to resist a charge under the Act" notwithstanding that the accused's own rights were not violated.
>
> [emphasis added]

and at paragraph 40 (previously quoted at paragraph 33 of this decision):

> … While they might seek public interest standing, we do not believe they need do so. …

44. As well, many of the cases also seem to have addressed this standing question on a public interest standing basis too (e.g. *Maple Leaf Consumer Foods Inc.*, *supra, Gil-Son, supra,*), so I will address it as well.

45. The leading Supreme Court of Canada authority on public interest standing is *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* [2012] 2 SCR 524, to

which I was extensively referred. The Court explained public interest standing as follows:

> [1] This appeal is concerned with the law of public interest standing in constitutional cases. The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government: *Finlay v. Canada (Minister of Finance)*, 1986 CanLII 6 (SCC), [1986] 2 S.C.R. 607, at p. 631. **The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.**
>
> [2] In exercising their discretion with respect to standing, the courts weigh **three factors** in light of these underlying purposes and of the particular circumstances. **The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court:** *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 116 (SCC), [1992] 1 S.C.R. 236, at p. 253. **The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner"** (p. 253).
>
> [emphasis added]

46. The Union and the OFL say the Employer fails on all three branches of the test, even as liberally applied by the Court in *Downtown Eastside Sex Workers, supra,* at paragraph 3:

> … The appeal raises one main question: whether the three factors which courts are to consider in deciding the standing issue are to be treated as a rigid checklist or as considerations to be taken into account and weighed in exercising judicial discretion in a way that serves the underlying purposes of the law of standing. In my view, the latter approach is the right one. …

47. The Employer says applying the test of *Downtown Eastside Sex Workers* liberally and purposively it should be entitled to public interest standing:

> [22] The courts have long recognized that limitations on standing are necessary; not everyone who may want to litigate an issue, regardless of whether it affects them or not, should be entitled to do so: *Canadian Council of Churches*, at p. 252. On the other hand, the increase in governmental regulation and the coming into force of the *Charter* have led the courts to move away from a purely private law conception of their role. This has been reflected in some relaxation of the traditional private law rules relating to standing to sue: *Canadian Council of Churches*, at p. 249, and see generally, O. M. Fiss, "The Social and Political Foundations of Adjudication" (1982), 6 *Law & Hum. Behav.* 121. The Court has recognized that, in a constitutional democracy like Canada with a *Charter of Rights and Freedoms*, there are occasions when public interest litigation is an appropriate vehicle to bring matters of public interest and importance before the courts.
>
> [23] This Court has taken a purposive approach to the development of the law of standing in public law cases. In determining whether to grant standing, courts should exercise their discretion and balance the underlying rationale for restricting standing with the important role of the courts in assessing the legality of government action. At the root of the law of standing is the need to strike a balance "between ensuring access to the courts and preserving judicial resources": *Canadian Council of Churches*, at p. 252.

Even adopting this liberal and generous approach I believe the Employer still fails to make out a case for public interest standing.

### *(i) Does the case raise a serious justiciable issue?*

48. The Employer says that this factor should be manifestly clear – "a number of Supreme Court of Canada cases… clearly recognize the constitutional right to informational privacy", and "Canada and many international organizations are focusing on the risks associated with breaches of privacy".

49. The Union and the OFL say that any serious justiciable issues even with respect to privacy or the *Charter* in this type of labour relations context have already been resolved by the Supreme Court of Canada in *Bernard v. Canada (Attorney General),* [2014] 1 SCR 227, 2014 SCC 13 (CanLII). In that case the Supreme Court rejected a judicial review application filed by Ms. Bernard, a bargaining unit (but not a union) member, of a Public Service Labour Relations Board ("PSLRB") order to disclose to the union home contact information for members of the bargaining unit, obviously including hers, and to which Ms. Bernard objected. The Court not only found that the PSLRB's interpretation and order did not violate Ms. Bernard's rights under the *Privacy Act*, but also explicitly rejected Ms. Bernard's arguments that this in any way violated her *Charter* rights either under either section 2(d) or 8 of the *Charter*:

> [37] Ms. Bernard's freedom of association argument has no legal foundation. Her argument was that since the Board's order required the employer to provide her personal information to the union, she was thereby being compelled to associate with the union, contrary to s. 2(*d*) of the *Charter*. In our view, the compelled disclosure of home contact information in order to allow a union to carry out its representational obligations to all bargaining unit members does not engage Ms. Bernard's freedom not to associate with the union. This Court's decision in *Lavigne v. Ontario Public Service Employees Union*, 1991 CanLII 68 (SCC), [1991] 2 S.C.R. 211, is determinative and its conclusion is supported by the more recent decision in *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70 (CanLII), [2001] 3 S.C.R. 209.
>
> [38] In *Lavigne*, the Court concluded that the payment by Rand Formula employees of union dues for the purposes of collective bargaining did not amount to unjustified "compelled association" under s. 2(*d*). Even though s. 2(*d*) protected freedom *from* association as well as freedom *of* association, the majority concluded that s. 2(*d*) does not provide protection from all forms of involuntary association,

> **and was not intended to protect against association with others that is a necessary and inevitable part of membership in a modern democratic community. In other words, s. 2(*d*) is not a constitutional right to isolation:** *Lavigne*, at pp. 320-21. While in *Advance Cutting & Coring* three different approaches to the right not to associate emerged, on none of them would Ms. Bernard have a plausible s. 2(*d*) claim.
>
> ...
>
> [40] In the case before us, providing Ms. Bernard's home contact information to the union was reasonably found by the Board to be a necessary incident of the union's representational obligations to her as a member of the bargaining unit. Based on the Court's jurisprudence, therefore, Ms. Bernard's freedom from association claim has no legal foundation.
>
> [41] **Ms. Bernard's s. 8 *Charter* argument alleging that the disclosure constituted an unconstitutional search and seizure similarly has no merit.** As the Attorney General of Canada correctly points out, in this context there can be no reasonable expectation of privacy in that information.
>
> [emphasis added]

The Employer's claim that section 6.1 somehow violates section 7 of the *Charter* – the right to life, liberty and security of the person – equally is far from clear. In light of the decision in *Bernard, supra,* it is hard to see this claim as raising a serious issue as required by the first prong of *Downtown Eastside Sex Workers, supra.*

50. The Employer seeks to distinguish *Bernard, supra*, by saying that it dealt with a situation in which a union had already established itself as a bargaining agent, which is not the case here where the Union is seeking to become the bargaining agent (which by definition is always the case in a section 6.1 application). Although the distinction is factually correct, it is not clear to me that it matters. As the Union put it, this is a distinction without a difference. In either case, a union is seeking to exercise statutory its rights to organize and represent employees, which are included in the very purposes of the Act).

51. It is hard to see why the *Charter* infringement, if there is one, is somehow worse for someone before they are a member of a

bargaining unit instead of after. I simply do not see how it can be said that an employee (like Ms. Bernard) has somehow lost a *Charter* protected right (assuming privacy is one) merely because they later became a member of a bargaining unit represented by a union (particularly if, like Ms. Bernard, they never actually became a union member only a member of the bargaining unit). It may be true that a union has no representational obligations to someone until they are a member of a bargaining unit – but that, in my view, goes to the justification of any alleged invasion of privacy rights, not to their existence or the question of whether they have been violated.

### *(ii) Whether the party bringing the action has a real stake or a genuine interest in the outcome*

52. It is not clear to me what is the real stake or genuine concern of the Employer, a business engaged in the making of cakes and other bakery products, in the privacy interests of its employees? No doubt the Employer would prefer to remain non-union, but even assuming that a section 6.1 order to produce a list will inevitably lead to a successful certification application, that interest alone is insufficient for standing and was rejected by the Nova Scotia Labour Relations Board in *Gil-Son, supra,* said at paragraph 27:

> … the Panel holds that while certification may have a commercial impact upon the Applicant Employer or may result in a *defacto* change in its management processes in order to deal with the union in the negotiation or administration of a collective agreement, the Applicant Employer does not have a "genuine interest as a citizen in the validity of the legislation". …

It cannot be enough to attempt to disguise what may be the Employer's private interest here, as not only the public interest in the legislation, but also as an interest in the privacy rights of its employees. I return to how the Ontario Court of Appeal described Inco's interests in *R. v. Inco Ltd., supra,* (already quoted at paragraph 21 above) – they are not raised out of public interest. Or, again, as the Nova Scotia Labour Relations Board elaborated in *Gil-Son, supra* (already quoted at paragraph 23, above):

> Whether recognized by the Applicant Employer or not, an employer's interests are often (though not necessarily always) in conflict with the constitutionalized rights of employees to engage in collective bargaining. To allow such

> employer private interests to be advanced under the guise of "the public interest" would be to lead a Trojan horse into the statutory stable of collective bargaining which could promote rot in its foundations.

53. Whatever is being disclosed to the Union, it does not go to the heart of the Employer's operations. Whether it may or may not be at the heart of the employees' privacy rights, it is not at the heart of the Employer's.

### *(iii) The proposed suit is a reasonable and effective means to bring the case to the Board*

54. The OFL and the Union say that the Employer fails on this criterion as well. Allowing the Employer to raise privacy interests of its employees, particularly when those employees are not present before the Board (and apparently have chosen not to attend) is neither a reasonable nor effective means to bring the case to the Board. There is no reason why those employees could not bring their concerns forward to the Board on their own. If anything, cases such as *Bernard, supra, Lavigne v. Ontario Public Service Employees Union*, 1991 CanLII 68 (SCC), [1991] 2 S.C.R. 211 and *Govan Brown & Associates Limited*, 2018 CanLII 27199 (ON LRB) (where the Board found that the issue of standing of the employer to raise *Charter* freedoms on behalf of its employees was moot because the employees themselves had intervened to argue their own *Charter* rights) demonstrate that employees when concerned about their *Charter* rights can (and do) bring a case before a tribunal and the courts. To allow an employer to do so is not only not necessary, but unreasonable in the sense that it imperils the very foundations of labour relations law, whether as expressed in *Transair, supra*, or as expressed as a "Trojan horse" being allowed to enter and "rot the foundation of the stable of bargaining", as in *Gil-Son, supra,* at paragraph 27. No one disputes the Court in *Downtown Eastside Sex Workers, supra,* called for a purposive and flexible approach in applying the criteria for public interest standing, and in particular, the third criterion. However, in my view, this still does not assist the Employer here.

55. In *Downtown Eastside Sex Workers, supra,* at paragraph 51, the Court indicated some of the factors that might be useful to take into account in assessing the third discretionary factor:

> - The court should consider whether the case is of public interest in the sense that it transcends the interests of

> those most directly affected by the challenged law or action. Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.
>
> - **The court should turn its mind to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination.** ...
>
> - The potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account. **Indeed, courts should pay special attention where private and public interests may come into conflict.** As was noted in *Danson v. Ontario (Attorney General)*, 1990 CanLII 93 (SCC), [1990] 2 S.C.R. 1086, at p. 1093, the court should consider, for example, whether "the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and factually established complaints". The converse is also true. **If those with a more direct and personal stake in the matter have deliberately refrained from suing, this may argue against exercising discretion in favour of standing.**
>
> [emphasis added]

There is no reason for the Board to assume, nor has the Employer established, that the employees are incapable of asserting their privacy rights on their own. Again, cases such as *Bernard, supra, Lavigne, supra* and *Govan Brown & Associates Limited*, *supra,* are evidence to the contrary. There are realistic and preferable alternatives to allowing the Employer to make this argument on behalf of employees – namely, the employees could have done so on their own. Again, that is not an unusual set of circumstances before this Board, or the courts for that matter. In fact, this is likely a set of circumstances where the Board should "pay special attention" because the private interest of the employer "may come into conflict", not only with the public interest (as espoused both in the Act and in section 6.1 to promote trade union organizing and thereby promote collective bargaining), but with the

private interests of the employees themselves. They have chosen, for better or for worse, not to participate in these proceedings, as they are clearly entitled to do. There is no reason to assume that **their** privacy interests are either congruent with the Employer's interests in opposing or not wishing to facilitate an application for certification by a trade union, or whatever the Employer asserts them to be.

56. The Employer pointed me to paragraph 71 of what the Court wrote (and it ultimately did grant standing to the Downtown Eastside Sex Workers):

> "… However, being a witness and a party are two very different things. In this case, the record shows that there were no sex workers in the Downtown Eastside neighbourhood of Vancouver willing to bring a comprehensive challenge forward. They feared loss of privacy and safety and increased violence by clients. Also, their spouses, friends, family members and/or members of their community may not know that they are or were involved in sex work or that they are or were drug users. They have children that they fear will be removed by child protection authorities. Finally, bringing such challenge, they fear, may limit their current or future education or employment opportunities (Affidavit of Jill Chettiar, September 26, 2008, at paras. 16-18 (A.R., vol. IV, at pp. 184-85)). As I see it, the willingness of many of these same persons to swear affidavits or to appear to testify does not undercut their evidence to the effect that they would not be willing or able to bring a challenge of this nature in their own names. There are also the practical aspects of running a major constitutional law suit. Counsel needs to be able to communicate with his or her clients and the clients must be able to provide timely and appropriate instructions. Many difficulties might arise in the context of individual challenges given the evidence about the circumstances of many of the individuals most directly affected by the challenged provisions."

With all due respect, I do not see these set of circumstances in *Downtown Eastside Sex Workers, supra,* to be remotely or at all comparable to the employees of the Employer. Leaving aside that the record does not indicate anything like this (and to the extent that there is a record about anything, asserted privacy rights notwithstanding, it indicates that some employees were prepared to sacrifice their privacy concerns to complain **to the Employer** about this alleged invasion of their privacy rights – more about this later), I simply do not see why

employees concerned about their privacy rights could not have intervened in the proceedings before the Board directly rather than have (or rely upon) the Employer, with at a minimum, arguably mixed motives, to say nothing of its own arguably dominating interest in not being certified, do it for them.

57. The Union and the OFL say that the granting of standing to the Employer is not necessary to ensure that the legislation would not be immunized from challenges – a concern of the Court in *Downtown Eastside Sex Workers, supra.* This is just about who is the appropriate party to bring such a challenge.

58. The Employer also argues that the Board itself did not adequately communicate or invite those employees concerned about their privacy rights to participate in these proceedings. However upon closer scrutiny, this argument also does not hold up.

59. There is no dispute that the section 6.1 application, and the Notice to the Employer of the application, were posted in the workplace. As well, the Employer's response (which explicitly raised concerns about the violation of the privacy interests of the employees) was also posted. The Employer, as it was required to do, returned the confirmation of posting form, confirming these postings. All of those forms, and in particular the notice to the Employer, indicate the address and telephone number of the Board and how to get in touch with it.

60. What the Employer specifically complains of is that there was no specific notice to its employees, as there is in an application for certification or an application for a declaration terminating bargaining rights, inviting them to communicate with the Board if they had questions or wished to participate in the proceedings and explaining how. That is accurate. However that is also not surprising due to the fact that in an application for certification or an application for a declaration terminating bargaining rights, a Board conducted vote among the employees will take place at the workplace within days of the application, and employees will be invited to participate. There is an obvious need for a notice to the employees explaining this procedure and their ability to participate or question it. Section 6.1 of the Act does not have any comparable procedure. It does not require employees to do anything. In fact, it only requires employers to do something (and only if the union can demonstrate that it has the requisite membership support). However, the Board still directs that the application and the response be posted, so that employees are made aware of it.

61. Moreover, there is equally no dispute that, on March 26, 2018, the Employer's plant manager posted in the workplace the following notice:

> **Re: UFCW Application for Employee Personal Information**
>
> The company has received notice from the Labour Board that the United Food and Commercial Workers (UFCW) has submitted an application for your personal contact information.
>
> Please note the following:
>
> 1. In its application the UFCW is requesting from the Labour board that we be required to provide the Union with your personal contact information. This type of order may require us to provide your full name, personal email address, phone number, fax number and other contact information to the UFCW.
>
> 2. This is NOT an ongoing application for the Union to certify the employees of The Original Cakerie.
>
> 3. We have concerns about sharing your personal information with the UFCW and will be raising our concerns with the Labour Board.
>
> 4. If you have questions, ask – make sure you are getting all the facts.
>
> 5. We will keep you informed – stay tuned.

Even if there was some legitimate concern about the adequacy of merely posting the application, Notice to the Employer and the Employer's response, as a means of informing the employees (and it is far from clear that there is), it would appear that any such deficiency was cured by the Employer's self-help with its own posting. In any event, none of the employees communicated to the Board in any way.

62. If this were not enough, as noted at the outset of this decision, a CMH decision on how this *Charter* Question raised by the Employer was to be dealt with was released following the CMH on May 28, 2018. There was some dispute as to whether the Employer was required to post that decision in the workplace, and after complaints from the Union, the Board issued a further direction for the posting of that decision in

the workplace, with which again there is no dispute that the Employer complied. Again, the decision indicated what was happening with the application, the procedure, and the name and address of the Board.

63. Again, if somehow all of this information was inadequate in advising the employees of what was occurring, the Employer again resorted to self-help with its own posting. There is no dispute that the Employer posted the following notice in the workplace on May 30, 2018:

> On May 28, 2018 the Ontario Labour Relations Board conducted a meeting in Toronto. In attendance were representatives from both the company and the Union seeking to gain access to your personal information. Following the meeting the Labour Board issued a written communication which is now posted beside this memo. Here is a brief summary of what happened at the meeting in Toronto:
>
> - The Union is seeking to gain access to our employee's personal information, and company continues to argue that the Union should not be given your personal information without your consent. The Union is also asking the Labour Board to prevent the company from continuing to protect your constitutional and privacy rights.
>
> - The company is preparing for the next hearing date in this case which is scheduled for July 23, 2018. The company will continue to fight for your privacy rights because we feel strongly that only you should get to access your private information!
>
> - **Several of you have come forward and asked about what you can do to protect your individual privacy throughout this process. On the posting, the Labour Board has provided its contact information, where you can direct your inquiries or communications.**
>
> Obviously we will provide you with an update when more information is available.
>
> [emphasis added]

The Board makes no criticism of, or suggests there is anything improper in, the Employer making these postings or the content of these postings.

However, having made these postings, with information more explicit than it says the Board itself provided, the Employer cannot now complain of the lack of specificity of the Board's notices or that employees would not know they could have directly participated in these Board proceedings to air any concern about or protect their own privacy rights. Even assuming some deficiency in the Board's notices, it would appear that the Employer has more than corrected them. And again, no employees have intervened or sought to intervene in these proceedings.

64. In my view, the Employer has failed to meet the criteria to be granted public interest standing, even assuming such standing is available to it, whether under a more relaxed approach arguably adopted in the *Downtown Eastside Sex Workers* case, *supra,* or otherwise. In fact, were I to accept the Employer's position, as the Union and the OFL pointed out, it is hard to envisage that the Board would ever be able to decline standing to any employer wishing to argue some *Charter* violation of the rights of its employees – contrary to all the jurisprudence earlier referred to – to say nothing of what impact that would have on the Board's statutory mandate of the quick and expeditious resolution of labour disputes.

## *V.* One Other Issue – The Employer Affidavits

65. On the date of the hearing, the Employer provided to the Board two sworn affidavits. The first was the affidavit of Ms. Adri Britz ("Britz"), Manager of the Employee Experience department, indicating that since March 23, 2018 a "number of employees" had approached the members of her department, "asking that we make sure that their confidential information is not transmitted to the Union". Britz deposed that there were 24 such individuals. The affidavit contained no further specifics (such as the reasons for the employees' objections), the names of the individual employees, or what Britz said in response to them (other than advising them that while the Employer "opposed the Union application, it will be obligated to disclose their contact information to the Union if ultimately ordered to do so by the Labour Board"). The second affidavit was from a member of the law firm representing the Employer, confirming that the names of those employees provided to him by Britz (without divulging them) were among the names that appear on the schedule of employees in the bargaining unit filed in connection with this application.

66. Not surprisingly, both the OFL and the Union objected to the admission of these affidavits.

67. The Employer said that the affidavit evidence demonstrated that there was a live privacy concern among the employees, and that they did not wish to come forward because they were concerned about their privacy being compromised.

68. The Board does not put any reliance on these affidavits. First, even as hearsay, they do not actually say what the Employer asserts they say – that employees refused to participate in a proceeding of the Board because they were concerned that their privacy would be compromised (about which I observe they are not only entitled to participate but granted statutory protection to do so under section 87 of the Act – the anti-reprisal protection for participating in a Board proceeding).

69. In any event, this is simply not how the Board operates or has operated in the 75 years of its history. That cannot be a surprise to either the Employer or its experienced counsel. The Employer has already been the subject of a number of previous unsuccessful certification applications before the Board.

70. Simply put, the Board, in the field of labour relations, where the power imbalance between an employer and an employee is so profound, has never permitted employers to speak on behalf of employees, especially through affidavit evidence where not only are the employees not identified, but not subjected to any cross-examination whatsoever, including, most significantly, why or how these statements came about. See for example, *National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. Canada), Local 195 and National Radiator,* [1989] O.L.R.D. No. 2309, at paragraph 4 (the Board does not normally admit affidavits into evidence). This is not to suggest any conclusions by the Board that the Employer improperly secured this affidavit evidence. However that always remains a possibility, whether through overt threats or improper actions by the employer, or whether through the employees recognizing the power imbalance and wishing to appear to be publicly identifying and aligning themselves with the interests of the employer. In its labour relations experience the Board has been aware of this as far back (if not further) as the oft quoted *Pigott Motors (1961) Ltd*. case, 63 CLLC ¶16,264 (see also *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. October 1387):

> The Labour Relations Act contains detailed provisions designed to protect the rights of employees to become members of, and to select or reject a particular or any trade union as their collective bargaining agent and to bargain

> collectively or individually with their employer. It is an important function and duty of this Board under the legislation to be circumspect and vigilant to see that these rights are preserved and not made illusory.
>
> There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of these facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interest and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason, and because the Board has discovered in a not inconsiderable number of cases, that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence in a form and of a nature which will provide some reasonable assurance that a document, such as a petition, signed by employees purporting to express opposition to the certification of a trade union truly and accurately reflects the voluntary wishes of the signatories. (See for instance, the *Sinnott News Case*, *CCH Canadian Labour Law Reporter*, 1955--59, *Transfer Binder* ¶16,114 at p. 12,209, and the *Fleck Manufacturing Ltd. Case, CCH Canadian Labour Law Reporter*, vol. 1, ¶16,236, at p. 13,201). In seeking this assurance, the Board draws no distinction between documents which purport to express a desire on the part of employees to resign from the union and those which purport merely to express opposition to the applicant as their collective bargaining agent. In other words, for this purpose, it does not seek to distinguish between the two matters of membership and representation.

That is why employees have always been required (and permitted) to fully participate in Board proceedings - but for and by themselves (whether represented or not). There is no reason to depart from those long held truths here or to assume otherwise, particularly in a 6.1 application, where all the union is seeking is a means of access and to communicate with the employees. This is even more so when any actual contact is neither mandated nor guaranteed to be successful and, again,

can be so readily and easily ended or terminated by any objecting employee – whether by deleting an email, hanging up the telephone or slamming a door in an organizer's face.

71. In the end this fact remains incontrovertible – notwithstanding the posting in the workplace of the Notice to the Employer of the application, the application itself, the Employer's response, the CMH decision, the two notices from the Employer itself with the implicit (if not explicit) urging to contact the Board, the not so subtle warning of Britz to some 24 employees that notwithstanding any of their purported privacy concerns the Employer would be obliged to hand over their personal contact information to the Union if directed to do so by the Board, no employees attended at any stage of this application or communicated with the Board in any way whatsoever.

**Disposition**

72. As a result, for all of the foregoing reasons, the Board concludes that the Employer does not have the status to raise these constitutional questions. It cannot speak for its employees, by asserting *Charter* rights not belonging to it (but to its employees who have chosen not to appear before the Board and not to participate). There is no reason in the circumstances of this case to grant the Employer standing to do so.

73. Accordingly, the Employer is directed to comply with the earlier Board decision dated March 29, 2018 and forthwith furnish the Union with the list of employees in accordance with the conditions set out in that decision. The hearings scheduled for September 17 and October 19, 2018 are cancelled.

74. The responding party is directed to post copies of this decision immediately, adjacent to all notices and decisions posted previously. These copies must remain posted for 45 days.

"Bernard Fishbein"
for the Board

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