

0048-00-U; 1074-00-U Hotel & Restaurant Employee CAW Local 448 National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada, Applicant v. The Milicroft **Inn Limited**, Responding Party

Consent to Prosecute – Interference with Trade Unions – Unfair Labour Practice – Union alleging that employer committing unfair labour practice by refusing to provide union with names, addresses and telephone numbers of employees in the bargaining unit – Unfair labour practice complaint allowed – Board directing employer to provide union with information sought – Board also directing employer to post Board notice in workplace explaining Board's order – Application for consent to prosecute dismissed

BEFORE: *Christopher J. Alberry*, Vice-Chair.

APPEARANCES: *Jeff Andrew, Robert McKay* and *Tyler Langlois* for the applicant; *Justin K. Diggle, Andrew Graham* and *Sharlene Ireland* for the responding party.

DECISION OF THE BOARD; August 25, 2000

The Issues

1. These applications concern an unfair labour practice complaint alleging a violation of section 70 of the *Labour Relations Act, 1995*, S.O. 1995, c.1 ("the Act") and a request for a consent to prosecute.
2. The issue in the unfair labour practice complaint is whether, by refusing to provide the applicant ("the union") with the names, addresses and telephone numbers of the employees in the

bargaining unit represented by the union, the responding employer (“the employer” / “the company”) has violated section 70, which reads:

70. No employer or employers’ organization and no person acting on behalf of an employer or an employers’ organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer’s freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

3. The issue in the consent to prosecute application is whether the employer’s refusal is so egregious as to warrant the Board granting a consent to prosecute. The employer contends the consent to prosecute application is frivolous and vexatious.

The Facts

4. The facts are not in dispute. There are 26 employees in the bargaining unit. The union’s predecessor has been the bargaining agent of the employees for approximately 8 years. The union acquired bargaining rights, under a successorship, on January 10, 2000. At the time the current collective agreement was in effect. Its duration is January 1, 1998 until December 31, 2000. Soon after being declared the successor bargaining agent, the union requested of the employer the names, addresses and telephone numbers of the employees in the bargaining unit. The request was denied. The reason for the denial is that the company’s policy is to respect the privacy of employees by refusing to disclose their names, addresses and telephone numbers without their consent. No request for the information had been made by the union’s predecessor in the approximately 8 years that it was the bargaining agent of the employees.

5. The collective agreement does not impose any obligation on the employer to provide the information sought by the union. The parties are not now in bargaining. They will commence bargaining for a renewal collective agreement in the fall, some months hence.

6. The employer is not opposed to the union having the information sought, it will just not provide it without the employees’ consent. To assist the union to obtain the information the employer suggests various ways in which the union could acquire the information directly from the employees. The parties’ collective agreement provides for a union bulletin board at the employees’ entrance to their workplace. The union is able to use the bulletin board to communicate with the employees. The employer suggests the union could leave a message on the bulletin board for employees to communicate their names, addresses and telephone numbers to the union. Furthermore, suggests the employer, the union has two recognized stewards who can, in their own time, speak to the employees on company premises and gather from them their names, addresses and telephone numbers.

7. There is no provision in the collective agreement which permits a union representative to hold general employee meetings on the employer’s premises.

Argument

8. The union contends that it needs the names, addresses and telephone numbers of the employees if it is to fulfil its statutory duties under the Act to represent the employees fairly and properly. It suggests that the employer’s refusal to provide that information has the effect of interfering with the union’s capacity to represent the employees. That, it argues, is a violation of section 70 of the Act.

9. The employer takes the view that it is not interfering with the union's representation of the employees. At worst, it suggests, it is simply not aiding the union in its representation of the employees. The employer's counsel argues that the union has avenues available to obtain the information it seeks by asking employees to tell the union themselves, either as a result of a bulletin board request or as a result of the stewards speaking to each of the employees.

10. The employer's counsel contends that the obligation to provide the information sought by the union may arise if the parties have negotiated a provision to that effect in their collective agreement, but, in the absence of such a provision, there can be no general obligation to provide the information, particularly in the circumstances of this case when, in counsel's submission, the union can reasonably obtain the information by communicating with their members through its bulletin board or the stewards.

11. The parties referred to the cases discussed below. Counsel for the employer suggests the Board's jurisprudence on the question of supplying the information the union seeks is of limited relevance because the cases referred to concern a particular context: either the parties were engaged in collective bargaining as part of their reciprocal duty to bargain in good faith and the Board felt the union concerned could not fulfil its bargaining obligations without the information, or one of the parties had committed an unfair labour practice and, as part of the remedy of a particular violation of the Act, the Board ordered the production of the names, addresses and telephone numbers of the employees affected by the employer's misconduct. Counsel argues that the cases cited are not authority for a general obligation on employers to supply the information the union seeks.

12. The employer's counsel suggested, if I were disposed to grant the union's relief, that it should be for a specified limited period as the Board has done previously (the *Plaza* and *Ontario Bus Industries* cases, *infra*).

The Company's refusal to provide the information

13. The Board has considered, and generally granted, union requests for the information sought by the union in this case. As the employer's counsel argues, that has usually been done in the context of collective bargaining and the need for the union to confer with employees in the bargaining unit concerned during the process of bargaining; or it has arisen in the context of unfair labour practices committed by the employer concerned: *Plaza Fiberglass Manufacturing Limited* [1990] OLRB Rep. Feb. 192; *Ontario Bus Industries Inc.* [1989] OLRB Rep. Nov. 1115. The Board's considerations in requiring an employer to provide the names, addresses and telephone numbers of employees are set out in *Co-Fo Concrete Forming Construction Limited* [1987] OLRB Rep. October 1213, at 1222-3:

28. A trade union's entitlement to the names and hourly rates of employees in the bargaining unit for which it is negotiating is well settled: *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. Mar. 49; *Radio Shack*, [1979] OLRB Rep. Dec. 1220 (jud. rev. denied, in *Re Trandy Electronics Ltd.*, and *United Steelworkers of America et al.* (1980), 30 O.R. (2d) 29, 80 CLLC 14,017 (Ont. Div. Ct.), leave to appeal to Ontario Court of Appeal refused March 10, 1980); *Globe Spring & Cushion Co. Ltd.*, [1982] OLRB Rep. Sept. 1303; *Northwest Merchants Ltd.*, [1983] OLRB Rep. July 1138, 83 CLLC 16,055; *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sept. 1411; *The Windsor Star*, [1983] OLRB Rep. Dec. 2147; *The Ontario Cancer Treatment and Research Foundation* (Thunder Bay Clinic); [1985] OLRB Rep. May 705; and *Forintek Canada Corp.*, [1986] OLRB Rep. Apr. 453. Once certified with respect to a bargaining unit, a trade union is the exclusive bargaining agent of and for all of the employees who fall within that unit from time to time, not just the employees who wish to be represented by it. With that right comes the obligation to fairly represent all employees in the bargaining unit, both in collective bargaining and in the administration of any collective agreement. It necessarily follows that it has both the right and the need to know the names and existing terms and conditions of employment of each of those employees.

29. The cases cited in the preceding paragraph do not expressly deal with requests for the addresses and telephone numbers of employees in the bargaining unit. The principles on which those decisions

were based, however, support a union bargaining agent's entitlement to that sort of information as well. In *Globe Spring & Cushion Co. Ltd.*, *supra*, the Board cited with approval the observation of the British Columbia Labour Relations Board in *Noranda Metal Industries Limited*, [1975], 1 Can. LRBR 145 at 165 that:

...one would hardly say that an employer who deliberately withheld factual data which a union needed to intelligently appraise a proposal on the bargaining table was making 'every reasonable effort to conclude a collective agreement' ..

In *Consolidated Bathurst Packaging Ltd.*, *supra*, the Board observed that:

A bargaining agent can claim entitlement to information necessary for it to reach informed decisions and thereby to perform effectively its statutory responsibilities.

In making informed decisions and effectively performing its statutory responsibilities, information from the employees it represents can be as important to the trade union as the information the employer supplies. A trade union may need to communicate with some or all of the employees in the bargaining unit, including non-members of the union, in order to properly represent their interests: to get their input, to verify information supplied by the employer or to give notice of a strike or ratification vote (see ss. 72(4), (5) and (6) of the Act [now section 79]), for example, information about how bargaining unit employees can be contacted is, thus, information to which the union is *prima facie* entitled.

30. It is hard to imagine what employer interest in such information could outbalance the union's interest in the addresses and telephone numbers of the persons for whom it has the right and obligation to act as agent. In any event, it is unnecessary to speculate about whether there are some kinds of needed information which an employer is entitled to withhold because of countervailing interests: this employer identified no such purported countervailing interest, nor did it deny having any of the information sought – it simply presumed to make its own assessment of the union's need for the information. It is not for an employer to assess how much such information is or is not needed by its employees' exclusive bargaining agent in order to properly represent those employees in bargaining. Having regard to the analysis in the decisions cited earlier, the employer's failure to comply with the union's request for the names, addresses, telephone numbers and wage rates of employees in the bargaining unit amounts to a "failure of the respondent to make reasonable efforts to conclude a collective agreement" within the meaning of subparagraph (c) of subsection 40a(2) of the Act [now subsection 43(2) of the Act] and, even more fundamentally, also constitutes a "refusal of the employer to recognize the bargaining authority of the trade union" within the meaning of subparagraph (a).

14. During first contract negotiations the Board has seen fit, when asked, to require an employer to provide the names, addresses and telephone numbers of employees, but, as stated in *The Ontario Cancer Treatment and Research Foundation (Thunder Bay Clinic)* [1985] OLRB Reports May 705, at 709, ¶5, the relief is not limited to such situations.

15. The employer's counsel referred to the decision of the Saskatchewan Labour Relations Board in *F.W. Woolworth Co. Limited* [1993] S.L.R.B.D. No. 18, Labour Relations Board File No. 141-92. The Saskatchewan Board found that a union was not entitled to receive the names and addresses of all employees to assist it in a renewed organizing drive. The union's request arose in the context of a contention that the union's organizing campaign and certification application had been thwarted by employer interference. The union had sought, and been refused, automatic certification on grounds of the employer's interference. The Board denied the request for disclosure of the names, addresses and telephone numbers of the employees. The reason for the refusal was that it was not obvious to the Board that conventional organizing opportunities would be ineffective or that the relief was necessary.

16. A violation of section 70 of the Act does not require an anti-union *animus*. If the result of certain conduct is interference in the union's capacity to represent its members, that can be sufficient to constitute a breach of the provision. The conduct may be lawful and *bona fide*; it may be free of any

anti-union taint, yet if its effect is to harm the union's capacity to represent its members, it may be a violation. It will be a violation if there is no business rationale for the interference. As the Board said in *Carleton University* [1998] OLRB Rep. January/February 17:

49. In *International Wallcoverings*, [1983] OLRB Rep. August 1316 the Board acknowledged the utility of having an unfair labour practice provision for which motive was irrelevant. At the same time the Board observed that all legitimate employer conduct which may "interfere" with a bargaining agent should not necessarily amount to an unfair labour practice. For example, where an employer dismisses an inside organizer and the Board finds that the dismissal is not tainted by an anti-union animus, it may very well be that the union's organizing efforts have been interfered with despite the fact that the dismissal is appropriate in the circumstances. These facts should not in every case amount to an unfair labour practice. If they did, then there would be no need for sections 72 and 76 of the Act.

50. The Board in that case, fashioned a test which attempted to balance these competing principles. The test requires a balancing as between the "business purposes" behind the employer's conduct and the union's "protected activity" which may have been interfered with. In paragraph 32 of that decision, the Board described the type of employer conduct which would breach section 70:

cases arise where employer conduct has a significant impact on protected activity and, while supported by good faith, does not reflect a persuasive or worthy business purpose.

17. What needs to be done in this case is to determine in the first instance whether the employer's refusal to give the union the names, addresses and telephone numbers of the employees amounts to interference in the union's capacity to represent them. If that is factually so, then there is a second inquiry: is there a sound business purpose which would counterbalance the adverse impact upon the union's capacity to represent the employees?

18. What is the union's interest in having the names, addresses and telephone numbers of the employees, and is that a *bonafide* labour relations interest? It wishes to have the information so as to be able to communicate easily and readily with the employees it represents in its bargaining unit. It could, arguably, obtain the information as a concession from the employer at collective bargaining, which is due to occur this fall, and it could seek to have the information updated periodically under an agreed provision of the forthcoming collective agreement to be concluded between the parties. Must it wait for that to occur, or does it have a right under the Act to that information for legitimate labour relations reasons at this stage, - without-a provision to that effect in the collective agreement?

19. Rights in labour relations are acquired in two primary ways: under the Act and by agreement in collective bargaining. The rights acquired under each regime are different in quality. The rights under the Act are enabling in character. They provide the basis upon which a collective bargaining relationship can be established and maintained. They create the foundation upon which the edifice of the relationship is built. The substantive rights which a union secures for itself and the employees in a collective agreement are of a different sort. They are substantive entitlements which advance the interests of employees. They are the outcome of the exercise of the enabling rights protected under the Act. Thus, for example, union rights to sit on joint employer—employee committees, to be consulted in planning decisions, to raise grievances, to be present before, at or after disciplinary inquiries, these are the kinds of rights which a union can negotiate with an employer in a collective agreement. They are substantive rights to which the union has no entitlement, other than through the employer's agreement. In contrast, the basic rights, those protected by the Act, are not dependent upon the employer's consent. They exist independently. Their purpose is to ensure that a union is able to meet its statutory obligations, particularly its duty to represent employees in a fair and effective manner.

20. What then are a union's statutory obligations once it has bargaining rights for a group of employees? The obligations are considerable and, in light of the decision in *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583 (S.C.C.), and the decisions which flow from it, those obligations are expanding into areas not previously anticipated. Once workers are covered by a collective agreement many of their individual rights must now be exercised through their union and the grievance procedure it negotiates with the employer, and not through the ordinary courts.

21. Let us look first at the obligations arising directly from the Act, then we can look at the obligations which arise more generally as a result of the jurisprudence which has its origin in the *Weber* case. A union's basic obligations to employees under the Act are contained in sections 74 and 75. (Section 75 has no relevance in this matter since the union is not involved in the business of referring the members of the bargaining unit it represents to jobs that become available). Section 74 reads:

74. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

22. There is much Board jurisprudence on the extent of a union's obligations under this section. A union must diligently pursue the interests of the members of the bargaining unit it represents. To the extent a union has statutory duties under the Act, such as those in Section 74, it possesses corresponding statutory rights which enable it to fulfil those duties. A union must act fairly, genuinely and competently towards the employees it represents: *Gagnon v. Canadian Merchant Service Guild and Laurentian Pilotage Authority* [1984] 1 S.C.R. 509, at 527. What are the kinds of circumstances in which a union can reasonably be expected to represent its bargaining unit members? A union must be able to pursue grievances on behalf of the employees. It must be able to investigate those grievances and to act promptly to achieve their resolution. It must be able to communicate with employees to ensure that the collective agreement it has concluded is being properly administered by the employer concerned. It needs to be vigilant. It is responsible for the enforcement of the employees' rights under the collective agreement. If a union is not vigilant, it may face a claim of estoppel if it allows rights it or the employees possess to fall into disuse and to be overridden or ignored by the employer: *Re Board of Commissioners of Police of the City of Owen Sound* (1984), 14 L.A.C. (3d) 46 (M. Picher); *The Agassiz Teachers' Association of the Manitoba Teachers' Society v. The Agassiz School Division No. 13*, award of Graham, September 17, 1997.

23. The Board will take account of the history of a union's dealings with the employees when assessing whether the union has met its duty of fair representation to them: *Mike Brinovec* [1986] OLRB Rep. May 585; *Scarborough General Hospital* [1977] OLRB Rep. November 770. A union should take reasonable steps, such as communicating with the employee concerned, to hear what the employee has to say before acting in some manner against that employee's interests: *Angelo Ritrovato* [1986] OLRB Rep. October 1401; *Swing Stage Ltd.* [1983] OLRB Rep. November 1920. A failure to communicate with the employee concerned in such circumstances may be deemed to be arbitrary, and hence in violation of the union's duty of fair representation under section 74. A union has an obligation to try to settle grievances early in the process: *Catherine Syme* [1983] OLRB Rep. May 775. To do so it might have to communicate with one or more of the employees in the bargaining unit. In order to assess the merits of a grievance, a union representative may need to speak to several employees in the bargaining unit. He or she may need to trace, contact and interview witnesses. The representative may need to explore with the employees the implications of pursuing a particular grievance. This could involve talking to other employees in the bargaining unit besides the grievor. A union's obligations under section 74 involve the proper investigation of employee concerns. One employee's grievance may affect the rights of other employees. A union representative may need to speak to other employees to assess the impact. A union is obliged to communicate with an employee concerning his or her

grievance: *Four Seasons Hotels Ltd.* [1984] OLRB Rep. October 1406. A union should keep the employee apprised of developments in the pursuit of his or her grievance. A failure to advise an employee that the union has decided not to pursue his or her grievance may constitute a violation of section 74: *Angelo Ritrovato*, above.

24. A union has other statutory obligations besides sections 74 and 75 in relation to the employees it represents, particularly those which arise during the bargaining process. The Board has said on several occasions that a refusal by an employer to provide the names, addresses and telephone numbers of employees during the negotiation of a collective agreement may constitute an unfair labour practice. But this case does not arise in that context. The union wishes to assert its entitlement to the information generally, not restricted to the context of collective bargaining. Therefore I will not explore the considerations regarding the need of a union to communicate with the employees in its bargaining unit during the process of negotiating a collective agreement other than to say that it is clear that the union has a considerable need to communicate with employees to canvass their objectives well in advance of formulating a bargaining position. It should confer with them during the course of bargaining, it will need them to participate in any ratification or strike vote and it will require their endorsement of the positions it adopts in bargaining. All of this entails that the union be able to communicate expeditiously with the employees.

25. There are other trade union obligations to employees it represents under the Act. Section 48(12)(j) of the Act gives arbitrators the power “to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement.” Under section 64.5 of the *Employment Standards Act* a trade union is obliged to enforce all employee claims under the Act at arbitration under its collective agreement. The obligations upon a trade union as described in respect of section 74 of the Act – ascertaining and protecting employee rights under the collective agreement – apply also to rights under human rights legislation and under the *Employment Standards Act*.

26. What is apparent from the examples of the union’s obligations to the employees in its bargaining unit, even during those times when it is not involved in the negotiation of a collective agreement, is that the union has a duty to represent the employees fairly and in a manner which is not arbitrary or discriminatory. What is also apparent is that if the union is to fulfil that duty, it must be able to communicate directly with each employee it represents.

27. I now turn to the wider obligations which the union has incurred as a consequence of the *Weber* case. Despite a long recognized, common understanding between employers and unions to keep certain matters outside of the arbitration arena, the aftermath of *Weber* has been to incorporate within arbitration an array of different causes of action which the parties might not have wanted to be so included.

28. The *Weber* case, and those following its direction (*Dubord & Rainville Inc. and Métallurgistes Unis d’Amérique, Local 7625* (1998) 71 L.A.C. 55 (Frumkin); *Dwyer v. Canada Post Corp.* [1995] O.J. No. 3265 (QL)(Gen. Div.), affirmed on appeal [1997] O.J. No. 1575 (QL); *Veneri v. Bascom* (1996), 28 O.R. (3d) 281 (Gen. Div.); *Quinn v. Morrison* [1997] O.J. No. 2898 (QL)(Gen. Div.); *Ram v. Prasad* [1996] B.V.J. No. 1672; *Giorno v. Pappas* [1998] O.J. No. 18 (QL) (Gen. Div.), affirmed on appeal (1999), 42 O.R. (3d) 626 (Ont. C.A.)), have significantly expanded the scope of the arbitrability of disputes arising in workplaces which are governed by a collective agreement. Even if the cause of action does not arise expressly from a collective agreement, the ratio of *Weber* is that, if it is a dispute between an employer and an employee and it appears that the dispute arises inferentially or essentially from the collective agreement which governs them, then the dispute is to be arbitrated, rather than determined in the ordinary courts. Unions have inadvertently acquired a huge area of

litigious responsibility which they might not have contracted for under collective agreements. In *Weber* the court extended the jurisdiction of the arbitrator in that case to include all causes of action in which an employee 'has been subjected to unfair treatment'. That principle has been extrapolated to apply more generally to employers and employees who are governed by a collective agreement. So, whereas in the past the arbitrability of a dispute depended upon the express provisions of the collective agreement, as a consequence of *Weber* and the cases which follow it, a matter which arises inferentially from a collective agreement including perhaps any claims of unfair treatment is deemed to arise from the collective agreement and must be determined at arbitration. Unions have incurred a considerably wider obligation to employees than they might have contemplated when they concluded their collective agreements.

29. The relevance of this reference to the expanded jurisdiction of arbitrators brought about by the *Weber* decision, and the cases which have followed it, is that the union has a very wide obligation to protect the legal interests of the employees vis-à-vis the employer in the bargaining unit it represents. For the union to be able to fulfil that obligation it must be able to communicate with the employees. Having their names, addresses and telephone numbers will considerably ease their difficulties in doing so.

30. The employer sees no contradiction in it having the names, addresses and telephone numbers of employees and yet advancing a right of privacy concerning that information in relation to the union. The employer and the union are equal bargaining partners in their collective relationship. The employer is in no more preferential position in relation to the employees than is the union in the context of their collective bargaining relationship. In that context, the employer is not entitled to greater rights in relation to the employees than is the union. To the extent that the employer is entitled to know the names, addresses and telephone numbers of the employees, i.e. to the extent that their privacy rights to that information are compromised by the employer sharing it, so too is the union entitled to the information.

31. A consequence of the union possessing exclusive bargaining status on behalf of the employees is that the union is placed in an equal bargaining position with the employer in its collective bargaining relationship. To the extent that the employer has information which is of value to the union in its capacity to represent the employees (such as their names, addresses and telephone numbers), the union too should have that information. The employees' privacy rights are compromised (no doubt legitimately) by the employer having details of their names, addresses and telephone numbers. The union's acquisition of that information would be no greater compromise, nor any less legitimate.

32. The employer has made much of the availability of alternative methods for the union's acquiring the information it wants. Of course, with effort, the union could put a notice on its bulletin board asking each employee to let it have his or her address, and perhaps all, but more likely, less than all of the employees would bother to do so. Also, with effort, the union's stewards could, in their own time (at meal breaks and before and after work), seek out each employee and obtain his or her address and telephone number. That too would probably result in some success. The question, though, is why the union should be put to such toil when the employer can easily, without hardship, supply the information? To my mind, there is no justification for putting the union to the exertion. The employer has the information, the union needs it, the union is entitled to it and it should have it. The employer is best placed to provide it, and it should do so.

33. The establishment of a collective bargaining relationship between a union and an employer entails a change in the employment relationship between the employer and its workers. The change is from an individual to an collective basis of the relationship – the union becomes the agent for the employees and, as such, it is entitled to speak on their behalf as if they were together negotiating as a

group. The individual employees may not make their own individual bargains or deals with the employer. To that end, the union is entitled to take full instructions from them and to represent them. For the union to do so, it must be able to communicate effortlessly with the employees. The alternative methods offered by the employer do not meet that need. They enable the union to obtain the information, but the methods are such as to amount to an obstacle in the path of the union obtaining what it wants. Obstacles have their social value, but not in this case. Here they serve merely to frustrate the union's capacity to do its job properly. The union needs the information and it should have it without the need to pass through the obstacles suggested by the employer.

34. A similar matter has been considered before the Canada Public Service Staff Relations Board, *Public Service Alliance of Canada and Treasury Board* [1996] C.P.S.S.R.B. No. 30, (1996) 29 PSSRB Decisions 7 (Digest), PSSRB File Nos. 161-2-791 and 169-2-584. In that case the employer argued that the provisions of the federal *Privacy Act* prevented it from providing the union with the names and addresses of its employees. The facts in that case were similar to those in this: there was no suggestion of maliciousness, caprice or other improper motive on the part of the employer. Its resistance to providing the information of employee addresses and telephone numbers was occasioned only by a genuine concern to respect the provisions of the *Privacy Act* in relation to the employees. There were some differences between that case and this: there the union required the information in order to make representations concerning a layoff, under its partnership role with the employer as provided for in the federal Workforce Adjustment Directive and an Agreement in Principle of May 30, 1995, which applied to them. There is no equivalent statutory provision of assistance in this case, nor is any employee asserting a privacy interest. In that case the PSSRB found for the union and directed the employer to provide the information sought by the union. It found that the privacy concerns of the employer could not impede the flow of the information sought by the union in the proper exercise of its statutory responsibility to fairly represent the employees in its bargaining unit.

35. Taking all of the above into account, I find that the union's capacity to represent the employees for whom it has bargaining rights is impeded or detrimentally affected by the employer's refusal to provide the names, addresses and telephone numbers of those employees. The employer's refusal to give the union the names, addresses and telephone numbers of the employees amounts to interference in the union's capacity to represent them.

36. Having reached this conclusion, it is necessary to move to the second inquiry: what is the business purpose advanced by the employer for refusing the information sought by the union? In other words, where does the employer derive its right to refuse the information sought by the union? There is no specific business rationale given. It has a policy to protect the privacy of its employees which it has applied to the union as it has with any other person who might use their addresses and telephone numbers to solicit among them. That is not a business rationale. It manifests respect for the individual privacy rights of employees. It does not advance a business purpose. The refusal to give the information to the union does not in any obvious way advance the employer's business. It is informed solely by a concern for the privacy of the individual. That consideration may be of general value, but it is not sufficient to trump the union's interest in being able to represent its bargaining constituency effectively.

37. The employees' privacy rights regarding the details of their names, addresses and telephone numbers are not such as to off-set the union's interest in being able to contact them readily and easily. They have accepted the union as their bargaining agent, as their collective bargaining representative. By doing so, they have conveyed to the employer and others that they want the union to speak on their behalf in their employment relations with the employer. The union is therefore ascribed the authority to communicate with them efficiently. The employees could have chosen to bargain individually with the employer; then the privacy of their phone numbers and addresses would be restricted between them and the employer. But they have not chosen that method of bargaining. They have chosen to bargain

collectively with the employer through the union. Having made that election, they are bound by its consequences. They are represented by the union; the union speaks on their behalf; they may no longer speak directly with the employer over the terms and conditions of their employment, that must be done through the union. Their individual privacy rights as employees have been partially superceded by the union's rights as their representative. In those circumstances the union must be placed in a position where it may easily communicate with them in order to represent them. The information necessary to do so is in the hands of the employer. Therefore, given my finding that the union is entitled to the information, and the employer has it and can give it, that is the easiest and most efficient method for its conveyance to the union.

38. For all of the above reasons, I find that the employer's refusal to provide the names, addresses and telephone numbers of the employees falling within the bargaining unit represented by the union, however well-intentioned, is a violation of section 70 of the Act because it has the effect of interfering with the union's representation of the employees who fall within its bargaining unit.

The union's application for consent to prosecute

39. The union's second application concerns a request for consent to prosecute the employer for its violation of section 70 of the Act. The employer contends the application is frivolous and vexatious.

40. In support of the union's application, counsel referred to *Fruehauf Trailer Company of Canada Limited* [1975] OLRB Rep. January 77 and *A.A. S. Telecommunications Ltd. and Zipcall Ltd.* [1976] OLRB Rep. Dec. 751. Counsel fairly conceded that the *Fruehauf Trailer* case was decided before the Board's powers under section 96 were significantly expanded. The test in applications of this sort was set out *in A.A.S. Telecommunications* at 761, ¶41:

Speaking more generally, it is clear to us that, given the expanded remedial power of the Board, applicants seeking consent to prosecute must bear a heavy onus to establish that a criminal prosecution is consistent with the promotion of good industrial relations in this Province. The remedial powers of this Board have been specifically designed to deal with industrial relations problems. Since full remedial relief from the Board is now available to unions and employers, as well as individual employees, an applicant seeking consent to prosecute should establish why the matter cannot be dealt with effectively by recourse to the Board's remedies alone. This is not to say that consent to prosecute will never be granted, since there may very well be cases where conduct is so flagrant that only the criminal sanction will be the proper deterrent. Nevertheless, before granting consent to prosecute, the Board must be satisfied that the conduct in question cannot be adequately remedied without recourse to the criminal courts.

In that case the application for consent to prosecute was dismissed for failing to meet the heavy onus on the applicant.

41. The union's counsel suggests the employer's refusal to provide the information it seeks is a flagrant violation of the Act and that a consent to prosecute would serve as a deterrent to employers who refuse to give elementary information reasonably sought by a union. The employer's counsel argues that the union has not met the standard for grant of the relief it seeks. Counsel refers to the decision in *Mo/son's Brewery (Ontario) Limited, Toronto* [1977] OLRB Rep. August 530. It is authority for the proposition that a consent to institute a prosecution will not be granted unless the Board is satisfied that a prosecution 'would be consistent with the promotion of good industrial relations between the parties' (530, ¶3).

42. I accept the submission of the employer's counsel. A consent to prosecute should not be granted unless the violation is egregious or flagrant. There must be a public purpose in granting the consent, and it must serve some labour relations interest as between the parties to the dispute. It is likely

that a consent will not be granted unless the Board's usual remedies prove insufficient or inadequate, such as the flouting of a Board order or a repeated refusal to comply with the provisions of the Act.

43. The employer's counsel suggests that the union's application for a consent to prosecute is an abuse of process and for that reason should be struck. He refers to *Fitzhenry and Whiteside Limited* [1987] OLRB Rep. April 504, particularly 508, ¶14 in support of the suggestion.

44. The union's application does not meet the standard required for the grant of the relief it seeks. The employer's conduct has been *bonafide*. It has adopted a position out of genuine concern for the privacy of its employees. I have found that position to be a violation of section 70 of the Act, but the violation is neither egregious nor flagrant. There has been no previous Board order on the matter in respect of the employer or even in respect of these particular circumstances with any other employer. The employer might reasonably have thought that it was not in violation of the Act when it adopted the stance it did. There is no suggestion of non-compliance by the employer with a Board order. In these circumstances, the union's application must fail. It will therefore be dismissed.

DISPOSITION

45. In light of the above, I make the following declarations and Tissue the following orders and directions:

1. The employer has violated the provisions of section 70 of the Act;
 2. The employer is directed to comply with section 70 of the Act by forthwith providing the union with the names, addresses and telephone numbers of the employees in the bargaining unit represented by the union;
 3. The union's application for consent to prosecute the employer is dismissed.
 4. The employer is directed to post the Notice to Employees attached to this decision on employee notice boards where the Notice is likely to come to the attention of the employees affected by this decision. The Notice is to remain posted for a period of 30 days from the date of this decision.
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Appendix

The Labour Relations Act, 1995

NOTICE TO EMPLOYEES

Posted by order of the Ontario Labour Relations Board

The Hotel and Restaurant Employee CAW Local 488 ('the union'), which is your bargaining agent, has brought an application before the Ontario Labour Relations Board in which it has sought an order that your employer, The Millcroft Inn Limited ('the employer'), provide it with your names, addresses and telephone numbers. Up to now the employer has refused to disclose this information on the basis of your individual privacy rights.

The Board has been persuaded that the union is entitled to receive the information from the employer in order to fulfil its obligations under the *Labour Relations Act, 1995* to represent you fairly. The Board has found that the information is necessary to enable the union to communicate with each of you easily and readily. The Board has therefore ordered the employer to provide the union with the details of your names, addresses and telephone numbers.

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 30 consecutive days.

DATED this 25th day of August, 2000.