Fair Representation and Conflict of Interest: Sexual Harassment Complaints between Co-Workers

Lori L. Park

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/djls

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 License.

Recommended Citation
Lori L Park, "Fair Representation and Conflict of Interest: Sexual Harassment Complaints between Co-Workers" (1997) 6 Dal J Leg Stud 121.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Journal of Legal Studies by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.
FAIR REPRESENTATION AND CONFLICT OF INTEREST: SEXUAL HARASSMENT COMPLAINTS BETWEEN CO-WORKERS

LORI L. PARK†

In exchange for the abandonment of individual employee negotiations in the workplace and the vesting of exclusive control over the grievance process to a certified bargaining agent, unions members are owed a duty of fair representation by their union. Given that the union’s purpose is to foster the greatest collective good, union members expect that they will sometimes have to make individual sacrifices. However, where the subject of a workplace grievance is a dispute between two individual union members, as in a complaint of sexual harassment lodged by one bargaining unit member against another, it is not clear where the greatest collective good lies. The union, in the position of representing both the alleged victim and perpetrator, is in a conflict of interest. This situation is further complicated by the imposition of liability on unions for a failure to alleviate human rights violations in the workplace. The author suggests one solution to this problem is to allow a limited right of individual carriage of grievances in such circumstances.

En échange contre l’abandon du pouvoir individuel de négociation de l’employé et contre l’assignation de l’autorité exclusive de négocier les griefs à un agent certifié qui représente la collectivité des employés, les membres d’un syndicat ont le droit d’être représentés de façon équitable par leur syndicat. Sacrifiant leurs intérêts individuels respectifs en vue de favoriser le bien collectif, les membres du syndicat jouent un rôle dans l’exécution par le syndicat de son obligation de représentation. Cependant, lorsque le grief émane d’une dispute entre deux membres individuels d’un même syndicat, comme par exemple, lorsqu’une plainte d’harcèlement sexuel est déposée par un membre du syndicat contre un autre, le bien collectif devient moins bien défini. Le syndicat se retrouve dans une position de conflit d’intérêt lorsqu’il doit représenter à la fois la victime et l’accusé. Cette situation se complique d’avantage lorsque l’on impose au syndicat la responsabilité d’alléger toute infraction contre les droits de la personne sur les lieux du travail. L’auteur suggère la solution d’octroyer un certain droit individuel limité aux employés leur permettant de porter grief dans des circonstances semblables.

I. INTRODUCTION
This article examines the unique position of unions with regard to their membership, and specifically the union’s duty of fair representation in the context of co-worker sexual harassment complaints. It is argued that this context creates the possibility and appearance of a conflict of interest for unions. The collectivist approach that is paramount in the unionized workplace may not facilitate an effective atmosphere for resolving individualist, co-worker against co-worker claims, such as those filed as sexual harassment grievances. This argument is developed through analogy with the legal profession and a review of labour board duty of fair representation decisions. The reaction of two national unions—the Canadian Union of Postal Workers (CUPE) and the Canadian Union of Public Employees (CUPE)—to sexual harassment situations is examined. An argument for a modification of the exclusivity of union control over contract administration is advanced.

II. SEXUAL HARASSMENT IN THE WORKPLACE
Sexual harassment, while often difficult to define or even to recognize, exists as a problem in almost all work environments, both unionized and non-unionized. Arguably, the problem has increased with the widespread participation of women in the paid labour force, particularly in traditional male dominated sectors.¹ This is an unjust view, as it tends to portray sexual harassment as the problem of its victims, whereas the responsibility lies squarely with the perpetrators. There is an ever-increasing awareness of the effects of sexual harassment on its victims and on the workplace, and

¹ The author recognizes that while sexual harassment of men is possible and does occur, the vast majority of its victims are women and the vast majority of harassers are men. This has been documented by a variety of writers on this topic. See e.g. M. A. Hickling, “Employer’s Liability for Sexual Harassment” (1988) 17 Man. L.J. 124 at 127, where the author relates statistics on sexual harassment attesting to the fact that a greater percentage of women experience sexual harassment at work, at a higher frequency, than do men. The generalizations about the sex of both harasser and victim which are made in this article are in no way intended to trivialize the experiences of male victims of sexual harassment.
hopefully, an ever-decreasing tolerance towards harassing behaviours.

Although the phenomenon of sexual harassment obviously dates back more than a few decades, Canadian jurisprudence on sexual harassment really began with the 1980 decision Bell v. Ladas. In that case, Adjudicator Owen Shime held that harassing comments and behaviours directed at women in the workplace by a male supervisor constituted discrimination on the basis of sex under Ontario human rights legislation. This reasoning was picked up in what is considered the leading Canadian case on sexual harassment, Janzen v. Platy Enterprises, a decision of the Supreme Court of Canada.

Writing for the Court, Dickson C.J.C. canvassed a number of academic commentators and judicial decision-makers, and found a common theme in the many different definitions of sexual harassment that existed:

Common to all of these descriptions of sexual harassment is the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands.

In so stating, Dickson C.J.C. creates the impression that sexual harassment can only be perpetrated by a person in an authority position over the victim. To rely only on a workplace’s formal hierarchical power structure to identify and limit the potential sources of sexual harassment would be to ignore practical reality. Male influence and domination over women is not simply a

2 In her book, The Sexual Harassment of Women in the Workplace, 1600 to 1993 (Jefferson: McFarland & Co., 1994), author Kerry Segrave discusses the impact of sex discrimination and sexual harassment on working conditions for women from the pre-Industrial Revolution era to the current decade. She concludes while the topic has obviously received greater recognition in the recent past, employers and male co-workers still blame the victim and many of the American legislative “advances” have had little real impact on remedying the situations of women victimized by sexual harassment.

4 Ibid. at D/156.
6 Ibid. at 1281.
function of job title or organizational status—it is derived from
cultural norms and messages, social conditioning, and a sex-
stereotyped belief system. As noted by Genevieve Eden in "Sexual
Harassment at Arbitration," a man’s economic power over the
women he works with is not born simply of formal authority. It is
also derived from “male rapport and camaraderie with supervisors
or from numerical and social dominance in male-dominated
workplaces.” Dickson C.J.C. seems to recognize these types of
arguments when he adopts his broad definition of sexual
harassment:

Without seeking to provide an exhaustive definition of
the term, I am of the view that sexual harassment in the
workplace may be broadly defined as unwelcome
conduct of a sexual nature that detrimentally affects the
work environment or leads to adverse job-related
consequences for the victims of the harassment. It is, as
Adjudicator Shime observed in Bell v. Ladas, and as has
been widely accepted by other adjudicators and
academic commentators, an abuse of power. When
sexual harassment occurs in the workplace, it is an abuse
of both economic and sexual power. Sexual harassment is
a demeaning practice, one that constitutes a profound
affront to the dignity of the employees forced to endure
it. By requiring an employee to contend with unwelcome
sexual actions or explicit sexual demands, sexual
harassment in the workplace attacks the dignity and self-
respect of the victim both as an employee and as a human
being.

Thus, as defined judicially, the potential for sexual harassment
certainly exists between co-workers within the same organizational
rank.

Incidents of sexual harassment can generally be placed into one
of two categories: *quid pro quo*, or poisoned work environment.

The *quid pro quo* type of harassment is a situation where an

---

8 Ibid. at 120.
9 Supra note 5 at 1284.
10 Described alternatively as “sexual coercion” and “sexual annoyance,” see A. P.
Aggarwal, *Sexual Harassment: A Guide for Understanding and Prevention*
(Toronto: Butterworths, 1992) at 22.
employee is threatened with actual job consequences if she fails to comply with a request for sexual favours. In the poisoned work environment, the general atmosphere of the workplace is made hostile or offensive, although there may not be any direct requests for sexual services or threats of reprisal for failure to comply.\(^{11}\) While Dickson C.J.C. rejected the necessity of categorizing or characterizing instances of sexual harassment in this way,\(^{12}\) the distinction may remain useful as a framework for understanding the types and range of harassing events or episodes that can occur. Complaints of co-worker harassment would typically fall into the category of poisoned work environment, but there have been examples of the *quid pro quo* type of harassment, even between formally equal employees.\(^{13}\)

Recognizing that sexual harassment at work is a serious problem that can be inflicted on a worker even by her own colleagues; what then is the appropriate function for a union in these situations? Arjun Aggarwal identifies four different harassment scenarios unions could potentially play a role in:

**Situation No. 1: Harassment by a Supervisor**

A member of the union has been sexually harassed by a supervisor (who is not a member of the bargaining unit).

**Situation No. 2: Harassment by a Client or a Customer**

A member of the union has been sexually harassed by a client or a customer of the employer.

**Situation No. 3: Harassment by a Co-worker**

A member of the union has been sexually harassed by a co-worker, who is also a member of the same union.

---

\(^{11}\) D. A. Campbell, *The Evolution of Sexual Harassment Case Law in Canada* (Kingston: Industrial Relations Centre, Queen’s University, 1992) at 9.

\(^{12}\) *Supra* note 5 at 1283.

\(^{13}\) See e.g. *Canada Post Corp. and C.U.P.W.* (1987), 27 L.A.C. (3d) 27 (Swan). This case is particularly interesting because it involved a traditionally male locker-room type environment, where the victim of sexual harassment initially participated in the antics; yet the arbitrator recognized that even in such a context, it was possible for some remarks to cross the line.
Situation No. 4: Harassment by an Officer of the Union

(1) An employee of the union has been harassed by a supervisor or manager (who is also an officer or agent of the union).

(2) A member may also be harassed by a shop steward or another union official.14

The focus of this article is harassment by a co-worker (situation No. 3) because it creates a difficult problem for union officials: how does the union discharge the duty of fair representation owed to each member of the bargaining unit where the members’ interests are diametrically opposed?15 The union has a duty to the victim to protect her against harassment and at the same time owes a duty to the harasser to protect him against unfair discipline and/or discharge. The inherent conflict in this position is evident. A re-examination of the duty of fair representation in grievance handling and its adequacy to protect both the complainants and perpetrators of sexual harassment, where both are members of the bargaining unit, should be undertaken.

III. UNION RESPONSIBILITY FOR HUMAN RIGHTS PROTECTION

As the representatives of employee interests in the workplace, unions bear a moral and a legal obligation to protect the safety and dignity of bargaining unit members. The unions’ role would appear to extend to human rights recognition and protection as a logical outgrowth of its historical raison d’être—to protect workers from exploitation. This would accord with the characterization of a union

---

14 Supra note 10 at 112.

15 For the purposes of this article, the assumption is that the hypothetical collective agreement, giving rise to grievance arbitration, contains a general anti-discrimination clause or specific prohibitions against sexual harassment. This would make complaints of sexual harassment against a co-worker the proper subject of a workplace grievance.
as “a tool or an instrument by which workers seek to achieve their personal goals.”

The union’s role of workplace human rights protector, _per se_, becomes less clear-cut and not automatically assumed when labour’s values begin to collide. Unions are essentially political institutions, dependent for survival and success on assuring the satisfaction of the majority. Given this condition, there exists a potential for the union to make politically expedient choices which could either infringe the human rights of some workers or prevent the development of more enlightened workplace policies and practices. For example, as a servant of its membership, what role does the traditional male-dominated union play in encouraging the participation of women and assuring them job security? Can a union justify the use of scarce resources to those ends where they appear to serve a relatively small proportion of the constituency? And, how does a union balance the imposition of human rights standards with the protection of traditional job rights, such as seniority?

Some limits, aside from morality and social pressure, have been placed on unions with respect to the protection of human rights on the job. In several cases, boards of inquiry have held unions liable for both direct and adverse effects discriminatory practices. The duty to accommodate, imposed primarily on the employer, has been extended to unions by the Supreme Court of Canada.

In _Renaud v. Central Okanagan School District_, the Supreme Court of Canada held that a union could become a party to discriminatory practices in the workplace in two ways: by creating

---

16 A. P. Aggarwal, _Sexual Harassment in the Workplace_, 2nd ed. (Toronto: Butterworths, 1992) at 353.
17 For example, prohibitions on sexual harassment and affirmative action hiring plans.
or contributing to the use of a discriminatory work rule or practice, or by interfering with or preventing an employer’s efforts to provide reasonable accommodation to an employee adversely affected by a work rule or practice. One provision of the collective agreement had the effect of requiring the employee in question to work during a particular time period, which was forbidden by his religion. The employer school board was willing to alter the work schedule to accommodate him, but the collective agreement required the consent of the union to vary the schedule. The union refused to give its consent to the employer’s proposal. Ultimately, no other solution was reached and the employee was terminated because he would not work the shift at issue. The employee proceeded to launch a complaint under the British Columbia Human Rights Act, against both the school board and his own union.

One of the issues the Supreme Court of Canada addressed in the case was:

Whether an employer or a labour union representing him is under any duty to effect a reasonable accommodation where, for reasons of religious belief, the employee is unable to work a particular shift. [emphasis added] 22

In answering that question in the affirmative, the Court set the stage for wider union responsibility in developing and maintaining appropriate working conditions for those they represent. This responsibility is not absolute. It is subject to the same bona fide occupational requirements that an employer may resort to. A union will be found in breach of its duty to accommodate where it refuses to consent to reasonable accommodating efforts put forward by the employer, or where it fails to suggest what it would consider to be less onerous concessions.23 Sopinka, J., writing for the Court, emphasized that the union could not evade its responsibility for upholding human rights in the workplace by passing it off to the employer:

[A] union may be liable for failure to accommodate... notwithstanding that it did not participate in the formulation or application of a

21 S.B.C. 1984, c. 22.
22 Renaud, supra note 20 at 981.
23 Renaud, supra note 20 at 992.
THE DUTY OF FAIR REPRESENTATION

discriminatory rule or practice. This may occur if the union impedes the reasonable efforts of an employer to accommodate. In this situation it will be known that some condition of employment is operating in a manner that discriminates . . . against an employee and the employer is seeking to remove or alleviate the discriminatory effect. If reasonable accommodation is only possible with the union’s co-operation and the union blocks the employer’s efforts to remove or alleviate the discriminatory effect, it becomes a party to the discrimination . . . . It cannot behave as if it were a bystander asserting that the employee’s plight is strictly a matter for the employer to solve. [emphasis added] 24

This does not mean that the justificatory standard is a particularly high one. In fact, the employer will be expected “to canvass other methods of accommodation before the union can be expected to assist in finding or implementing a solution.” 25 Moreover, in accordance with the reality that a union owes representational duties to all of the employees in the bargaining unit, and not just to those who are the objects of discrimination, the Court held that a union will generally be justified in refusing its consent to changes where the effect of those changes would mean “significant interference” with the rights of the other members of the bargaining unit. 26

Beyond the unions’ ethical duty to help create a discrimination-free working environment, there is the spectre of joint liability with the employer for failure to take, or consent to, the appropriate actions. 27 It is, therefore, vital that unions respond to real and potential violations of human rights in the workplace. 28

---

24 Renaud, supra note 20 at 991.
25 Ibid.
26 Ibid. at 991: “The duty to accommodate should not substitute discrimination against other employees for the discrimination suffered by the complainant. Any significant interference with the rights of others will ordinarily justify the union in refusing to consent to a measure which would have this effect.”
27 Unions have recognized the significance of the decision in Renaud, supra note 20. In an internal memo, dated 15 March 1993, directed at national representatives of CUPE, solicitor John Elder wrote: “[T]he comments of the Court in Renaud obviously apply to all groups who are protected from discrimination in human rights legislation . . . . [T]he obligation of the union to participate in the attempt to find a reasonable accommodation for the affected employee is clear . . . . [T]his
IV. THE DUTY OF FAIR REPRESENTATION

As a certified bargaining agent, the union has the authority (and obligation) to negotiate with the employer with respect to working conditions and terms of employment for all those who are part of the bargaining unit. The employer is not at liberty to bargain with its employees in the unit outside of the collective bargaining structure, nor is the individual employee free to bargain on his or her own behalf. If one characterizes the employment relationship existing between those hiring and those hired, then the union is the conduit through which employee concerns and demands, and employer communications and offers, are transmitted. The duty of fair representation developed from the origins of the labour movement and its supporting legislation, which is the protection and empowerment of the worker and not simply the creation of a position of power for trade unions for their own sake.

Once a bargain is concluded, the union is charged with the responsibility of administering the collective agreement on behalf of the employees it represents. The control that unions exert over the workplace is in the interests of the employees, collectively and individually. Ideally, all unions would act with pure and proper motives, and all employees would recognize and accept the purity and propriety of those motives. But the reality is that unions are, at least in some respects, political institutions. Since employees will occasionally be inadequately protected (and/or will perceive that

decision is only the start of defining what the respective obligations of the employer and the union may be in a particular circumstance."

See also Ottawa Labour Update (Vol. 5, No. 1, Spring, 1995) at 37, Steve Waller writes: "It is clear that unions must now be prepared to suspend the operation of collective agreement provisions where the only person affected is the employee requiring accommodation, and where no other reasonable method of accommodation is available."

28 Most human rights legislation in Canada include provisions stating that an employee must exhaust all avenues available to her through the workplace before a human rights tribunal will hear the case. For instance the Canadian Human Rights Act specifically states: "the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the commission that (a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available; . . . " (R.S.C. 1989, c. H-6, s. 41 (a)). This seems to make it incumbent on unions to ensure grievance procedures are fair and devoid of impediments to justice. If a person is forced to go through the internal workplace procedures before seeking remedies through human rights legislation, those procedures must be effective and just.
they have been), arbitrators, courts, and legislators have recognized that employees must have some means of safeguarding their own interests. This necessity is underscored by the fundamental economic importance of the employment relationship; for the typical worker, a job is "that most valuable of his capital assets." The means developed to protect employees' interest against improper union action is the duty of fair representation.

Job interests are often protected through the grievance arbitration process, generally set out in the collective agreement. While a union member does not enjoy an absolute right to have her grievance proceed to arbitration, she does enjoy the benefit of a duty owed to her by her union that decisions regarding the carriage of a grievance will be made fairly. Thus, the duty of fair representation acts as a limit on the union's prerogative with respect to the grievance arbitration process.

A doctrine which developed in the United States, the duty of fair representation, is now firmly entrenched in Canadian labour law. It is an explicit statutory duty in most Canadian jurisdictions. Where reference to the duty is not specifically

---

30 P. Weiler, *Governing the Workplace* (Cambridge: Harvard University Press, 1990) at 91. The duty of fair representation is not restricted to contract administration or even contract negotiation. In *Centre Hospitalier Regina Ltee v. Labour Court*, [1990] 1 S.C.R. 1330 [hereinafter *Centre Hospitalier*], the Supreme Court of Canada made reference to the fact that the duty extends up until the point certification is lost.
31 See e.g. *Steele v. Louisville & Nashville Railway Co.*, 323 U.S. 192 (1944); *Vaca v. Sipes*, 386 U.S. 171 (1967). Paul Weiler, *ibid.* at 258, describes the emergence of the duty in the U.S. as "expressly analogous to the obligation that the Constitution imposes on the legislature."
32 The first Canadian application of the duty of fair representation was in *Fisher v. Pemberton* (1969), 8 D.L.R.(3d) 521 (B.C.S.C.) [hereinafter *Fisher*].

A typical example of the fair representation clause is found in the British Columbia Act, s.12(1):

A trade union or Council of trade unions shall not act in a manner that is arbitrary, discriminatory or in bad faith a) in
included in the relevant legislation, the Supreme Court of Canada has held that it is an implied part of a union’s obligations towards those it represents.\footnote{Canadian Merchant Service Guild v. Gagnon, \cite{Gagnon} [1984] 1 S.C.R. 509 at 522, 526-527 \cite{Gagnon}.}

In the leading Canadian case of \textit{Canadian Merchant Service Guild v. Gagnon},\footnote{\textit{Ibid.}} the union argued that it was up to it alone to decide whether a grievance should proceed and therefore, Mr. Gagnon did not have grounds to complain about its decision not to proceed. The Supreme Court of Canada agreed that control over the process resides with the union and therefore the union was not liable to Gagnon on the facts of the case. But the Court found that the union’s discretion was subject to certain limits imposed through the operation of the duty of fair representation. After surveying the academic commentary, judicial and arbitral precedent, Chouinard J. described the main principles of the duty of fair representation:

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union’s decision must not be arbitrary, capricious, discriminatory or wrongful.

\footnotetext{\textit{Representing any of the employees in an appropriate bargaining unit, or b) in the referral of persons to employment, whether or not the employees or persons are members of the trade union or a constituent union of the council of trade unions.}}
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.\textsuperscript{36}

Thus, the duty of fair representation consists basically of an obligation “to weigh the competing interests of the employees it represents and make a considered judgment, the procedure and results of which must neither be arbitrary, discriminatory, nor in bad faith.” [emphasis added] \textsuperscript{37} The duty is a discretionary quid pro quo for the individual rights employees have to sacrifice when a union is certified to bargain on their behalf.

It has been suggested that \textit{Gagnon} has left some confusion as to the actual standard of care required of a union in discharging its duty of fair representation to its membership.\textsuperscript{38} This is particularly true in those jurisdictions without a statutorily-defined duty, since there would be an even greater dependence on the Court’s interpretation of the implied principles of the duty. One might infer from Chouinard’s J. comments that even where “serious or major negligence”\textsuperscript{39} had been established, a union might not have breached the duty if there is an absence of bad faith. Referring to the judgments of the lower courts, who faulted the union for an inadequate investigation into the matter, he said:

With respect, I cannot see how the failure by the Guild to undertake a ‘substantive investigation’ or a ‘thorough investigation’ as the judges of the Superior Court and the Court of Appeal respectively described it in indicating the only fault they attributed to the Guild, can constitute bad faith by the latter and make it liable to [the] respondent.\textsuperscript{40}

A plain reading of this excerpt suggests the necessity of evidence of bad faith to a finding of breach of the duty.

\textsuperscript{36} \textit{Supra} note 34 at 527.


\textsuperscript{38} R. Bell, “A Union’s Duty of Fair Representation” (Paper prepared for Canadian Bar Association, New Brunswick Branch, January, 1993).

\textsuperscript{39} \textit{Supra} note 36, per principle five.

\textsuperscript{40} \textit{Gagnon}, \textit{supra} note 35 at 534.
The duty was considered again by the Supreme Court of Canada in *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*.41 In *Gendron*, four employees applied for a job pursuant to an internal job posting. The union and the employer had agreed on the criteria to be used in assessing the applications. Gendron was successful and the other three grieved on the basis that the procedure had not been complied with properly. They were correct in their assertion and the applications were re-assessed, resulting in Gendron being displaced and ultimately laid off. He commenced an action against his union in court, despite the fact he had been employed in a jurisdiction with an express statutory duty of fair representation. The Court held that the statutory duty could oust the common law duty either expressly or by necessary implication, and that in those instances, there would be no original jurisdiction in the courts to hear a duty of fair representation claim.42 The claim would only be properly before the Canadian Labour Relations Board.

While addressing the union’s dilemma when faced with a conflict of interest between its membership (explored in more detail in the next section), L’Heureux-Dubé J. may have imposed a different standard of conduct on the union than the one imposed in *Gagnon*. As noted by Richard Bell, “although she had earlier referred to the principles set out by Mr. Justice Chouinard in *Gagnon*, her suggestion that liability would follow if the union does not ‘turn its mind’ to all relevant considerations may impose a higher standard than *Gagnon*.43 Bad faith would not necessarily be a part of the *Gendron* formulation of the duty test.44

---

41 [1990] 1 S.C.R. 1298 [hereinafter *Gendron*].
42 Interestingly, and of particular note to the topic of sexual harassment, L’Heureux-Dubé J. indicated that, while the common law duty would generally be inapplicable where the statute contained a codified duty, it might not be the case where human rights violations were at issue as that sort of breach “may not be properly characterized exclusively as a labour relations matter.” This leaves open the possibility that a sexual harassment complainant alleging a breach of the duty of fair representation could have a choice of forum. See *Gendron*, ibid. at 1320.
43 *Supra* note 38 at 4.
44 It is worthy of note that L’Heureux-Dubé J., who wrote the judgment of the Supreme Court of Canada in *Gendron* in 1990, also wrote the judgment of the Quebec Court of Appeal in *Gagnon*, which was criticized by Chouinard J. in his judgment in that case in 1984.
While the duty will not be focused inward to scrutinize internal union affairs, it clearly applies to the way a union deals with grievances and other employee complaints or demands. With respect to the grievance process, a union's duties include:

i) investigate the facts of a grievance;

ii) listen to the grievor’s depiction of the events surrounding the incident or problem in question;

iii) assess the strength and probability of success of the grievance in an unbiased manner;

iv) keep the grievor informed and up-to-date regarding the action being taken on her behalf;

v) avoid acting in a grossly negligent fashion in representing the interests of the grievor; and

vi) obtain assistance as reasonably required considering the gravity of the consequences for the grievor and the resources the union has to rely on.

Nowhere in this list is an obligation to proceed to actual arbitration of the grievance, though the likelihood that the duty may encompass that step increases where critical interests are at stake. In André Cloutier and Cartage and Miscellaneous Employees' Union, Local 931, the Canada Labour Relations Board stated that “it goes without saying that a grievance involving a situation where an employee's career is on the line, demands the bargaining agent’s full attention and energy, more so than any other type of grievance.”

One could contend that the critical job interest argument can be raised on both sides of co-worker sexual harassment complaints. The maintenance or establishment of a harassment-free workplace is

---

46 Ibid. at 20.
47 Union reaction to an employee’s grievance will enjoy greater scrutiny where that grievance concerns something of vital importance to the employee’s career, the most obvious example being employee discharge.
48 (1981), 40 di 222.
49 Ibid. at 226.
critical to the complainant's job rights while the discipline imposed on harassers affects their critical job interests, insofar as discipline affects actual continued employment, significant suspensions, or seniority entitlements.

One final note on the duty of fair representation relevant to the co-worker sexual harassment scenario is that the duty contains both procedural and substantive aspects. Both the procedures which must be adhered to (although not precisely defined) and the ultimate outcome are important enough that either may lead to a breach of the duty of fair representation.

V. CONFLICT OF INTEREST

The relationship between bargaining unit members and the union that represents them is essentially one of dependence and trust. For this reason some commentators have likened the duty of fair representation to a fiduciary duty. George Adams states: "[e]mployees can be considered to be the cestuis que trust and, therefore, are owed a fiduciary duty of fair representation by the trade union which is equivalent to the trustee of a trust." [emphasis added] In the Canadian Law Dictionary, fiduciary is defined as follows:

Relating to or proceeding from trust or confidence. One stands in a fiduciary relationship with regard to another person when he has rights and powers he must exercise for the benefit of that other person.

The rules developed by the legal profession to prevent conflict of interest, which is recognized as a breach of the fiduciary duty between the solicitor and client, provide an interesting and useful backdrop for an examination of conflict of interest in the unionized workplace. The Code of Professional Conduct of the Canadian Bar

51 Ibid. at 13-14.
53 This analogy must be developed in the context of the qualification imposed on the union's standard of conduct in Fisher, supra note 32 at 546: "[T]he standards of
Association contains provisions to regulate a lawyer's actions when dealing with conflict of interest between clients:

The lawyer shall not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the clients or prospective clients concerned, shall not act or continue to act in a manner when there is or is likely to be a conflicting interest.54

The commentary following the rule declares that the reason for the rule is "self-evident"—a lawyer's judgment and freedom of action must be as free as possible from compromising influences so as to not prejudice the interests of a client.

In a system where a union member's right to complain about workplace conditions or discipline through the grievance procedure is vested in his or her union, the potential for a conflict between competing union member interests in a sexual harassment complaint, or the appearance of one, exists and is a cause for concern. The granting of exclusive rights to a union to negotiate and administer collective agreements places the union in a position of responsibility for the employees it represents. Accordingly, it should be obliged to administer its duties for the benefit of bargaining unit members, not for its own advantage as an independently-existing organization. This requires its decisions not be motivated by self-interest, and full disclosure where interests of representees would appear to conflict. Both union members deserve unbiased and effective representation, free from the conflict of interest inherent in representing both sides of a dispute. This is particularly true given the exclusive nature of the bargaining rights granted to unions under the legislative framework, and given the fact that union members are generally afforded no right to carry their own grievances.55


55 Bargaining unit members typically have no right to bring their own grievances to arbitration unless specific provision is made for it in the collective agreement. Even where trade union legislation would appear on its face to accord employees the right to proceed with a grievance, independent of union consent or involvement, the courts have not interpreted this to mean that an employer has an obligation to deal with any grievance presented aside from the mechanism in the collective agreement. See e.g. Lunenberg Police Association v. Town of Lunenberg (1980), 118 D.L.R.(3d) 590 (N.S.S.C. A.D.), leave to appeal to S.C.C. refused.
Even if a single union representative was able to represent the conflicting interests of union members in a sexual harassment complaint without prejudice, this does not address the issue of appearance of fairness. Not only must a union actually follow correct procedures and arrive at appropriate decisions, but the union’s procedures and decisions must be seen to be correct and appropriate by those they affect. This is necessary to foster a sense of satisfaction among members with the union’s performance, thereby ensuring its continued survival, and also encourage acceptance of decisions and settlements once they are reached.

L’Heureux-Dubé J., writing for the Court in Gendron, expressly recognized that unions will often find themselves in situations where the interests of those they represent are in conflict. In these circumstances, the union cannot be expected to completely satisfy all involved and, indeed, the duty does not require it. The Court addressed this situation in the following terms:

In a situation of conflicting employee interests, the union may pursue one set of interests to the detriment of another as long as its decision to do so is not actuated by any of the improper motives described above, and as long as it turns its mind to all the relevant considerations. The choice of one claim over another is not in and of itself objectionable. Rather, it is the underlying motivation and method used to make this choice that may be objectionable. [emphasis added] 56

In an appeal heard the same day as Gendron, the Supreme Court of Canada again touched on the issue of conflict of interests within the bargaining unit.57 However, in Centre Hospitalier, the Court’s underlying premise for the development of the duty is that the conflict, where it exists, will be between an individual employee and the interests of the bargaining unit as a whole.58 The analysis

56 Gendron, supra note 41 at 1328-1329. The motives referred to include personal hostility, political revenge, dishonesty, and unequal treatment of employees on such factors as race, sex, or personal favoritism, see Rayonier Canada (B.C.) Ltd. and International Woodworkers of America, Local 1-217, [1975] 2 Can. L.R.B.R. 196 at 201-202 (B.C.L.R.B.).
57 Centre Hospitalier, supra note 30.
58 Centre Hospitalier, supra note 30 at 1347: “The duty of fair representation raises thorny problems where, as here, by its very function the union has an
does not include those situations where the conflict is derived from the competing interests of two individual members of the same bargaining unit. Thus, it could be argued that the rules and standards for assessing conflicts of interest in the context of the cases considered at the Supreme Court of Canada are not relevant per se to situations of co-worker harassment.

Even going back to the basic principles in *Gagnon*, on which these cases were based, the solution is still unclear. Can a union be fair in its representation of conflicting interests of its constituencies where the cause of complaint is derived from within that constituency? How does a union demonstrate integrity in the dispute resolution process when it effectively represents both sides of a dispute? Given that a union can potentially be held liable for human rights infringements, either directly or by virtue of their duty to accommodate, perhaps their first responsibility is to protect the victim of harassment. If that is the case, the alleged harasser may have serious and well-founded doubts as to the fairness and genuineness of the representation he receives.

**VI. PRACTICAL APPLICATION—BOARD DECISIONS AND UNION STRATEGY**

1. Board Decisions

There are obviously a great many cases, reported and unreported, which address the duty of fair representation and the problems of its application in various fact situations. Proceeding from the generalization that the statutory and implied duties have the same practical effects and content, the following analysis of arbitration and labour board decisions illustrates some of the difficulties that arise with exclusive union control over grievance arbitration. The problem is exacerbated by the relatively low standard of practice obligation to defend the interests of members of the bargaining unit as a whole, as well as those of an individual employee.”

59 Among the principles comprising the duty of fair representation stated in the case was: "The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee," *Fisher*, supra note 32 at 527.
and procedure required for unions to fulfill the requirements of the duty of fair representation.60

The complaint in Abdel Eleje61 was that union officials breached the duty of fair representation when they refused to allow Elejel’s complaint to go to arbitration because the union officials who refused to send the grievance to arbitration were the ones who instigated the actions which led to the complaint. The Ontario Labour Relations Board characterized the official’s attempt to both accuse and defend the grievor on the same fact situation as an unacceptable conflict of interest. The grievance was referred back to arbitration and the union was ordered to provide the grievor with independent counsel. The union’s control over the process in this case did not lead to a more efficient resolution or allocation of union resources. This undermines one argument that might be offered to support the exclusive vesting of control over the grievance process to the union, namely the efficient use of scarce resources.

In Richard Findlay and Brewery, Winery, and Distillery Workers’ Union, Local 300,62 the complainant had been employed at Molson for almost twenty years when he was terminated from his employment. He launched a grievance of his termination, which was withdrawn by the union before arbitration. The union had made attempts to set up the arbitration to his satisfaction, but he was unable to agree with their approach. The union refused to allow him to proceed to arbitration with his own counsel because it would undermine union control and have a negative impact on future grievances for them. The Industrial Relations Council did not consider this to be a breach of the duty, partly because allowing him to proceed with what the union considered an un-winnable grievance would be a waste of resources. Left open to question is how a three-party duty of fair representation hearing can be considered more resource-efficient than a single arbitration?

---

60 The author recognizes, however, that the forum for hearing duty of fair representation complaints is different and the remedies for breach vary accordingly. The purpose of this description is not a specific examination of legislative provisions (or lack thereof) or of the remedies granted by the boards and courts, but is intended to give the reader a general sense of some of the shortcomings of the duty where conflicts of interest arise.


Ed Cherak and General Truck Drivers and Helpers Union, Local No. 31 was a reconsideration of an earlier B.C. Industrial Relations Council decision that found the union in question to be in breach of its statutory duty. The Council reconsidering the case held that a union can breach the duty of fair representation even where a grievance is referred to arbitration if the union has not done adequate preparatory work or investigation, or if it is in a clear conflict of interest with the grievor existed, even where there is no bad faith. This illustrates how complicated the duty can be, both for the union and the employee. The multiplicity of applications and hearings required if an employee seeks to protect his or her job rights to the fullest extent suggests that a more simplified approach may be in order.

Following the decision in Ed Cherak, the union’s investigation of a sexual harassment grievance on the part of a complainant employee arguably compromises the outcome of the harasser’s potential grievance and might lead to a breach of the duty based on a conflict of interest. Even if represented by different shop stewards, the union would still ultimately be the party investigating on behalf of one member, necessarily to the detriment of another member. This suggests an alternative approach to the resolution of co-worker complaints is necessary.

In Darius L’Heureux and Civic Service Union No. 52, the Alberta Labour Relations Board held that the duty of fair representation extends past the actual arbitration of the grievance to encompass the union’s actions in seeking, and during judicial review of the arbitration decision. In that case, the union was seeking a review because they had been ordered to pay compensation to the grievor. The Board found a breach of the duty where the union had

---

63 [1990] B.C.L.B. C202/96 (QL) [hereinafter Ed Cherak]; see also Fritz Steisslinger and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local No. 170, [1991] B.C.L.B. C231/91 (QL), which involved an application to set aside a decision that had found the union which had provoked the applicant’s termination by the employer had breached its duty. The B.C. Industrial Relations Council considered the decision in Ed Cherak where the Council had stated that a union could breach the duty if it stood in a clear conflict of interest with the grievor, or if in investigating a grievance, the union’s conduct compromised the outcome of the arbitration.

proceeded to judicial review without disclosing their conflict of interest with the grievor. The Board seems to have left open the option of allowing the review as long as they advised the grievor of the conflict of interest that the review created.

The idea that a union would even seek review of a decision that was favourable to an employee it represented calls into question the union's motive. Arguably, the union was protesting a decision favourable to one in furtherance of the interests of the majority of the bargaining unit. The question is how satisfactory a response is that to the individual employee who has given up independent control in favour of the protection the union is expected to provide?

In *Steven Blanchard and United Steelworkers of America, Local No. 935*,65 the complainant (Blanchard) was discharged from his employment and initiated a grievance. Before the arbitration was heard, the union withdrew on the advice of its lawyer. In return for withdrawing, the union obtained a cash settlement for Blanchard and a letter of reference from the employer. Blanchard was seeking reinstatement and complained that the union had breached his right to fair representation. The Industrial Relations Council agreed with his assertion that there was a conflict of interest. Evidence of conflict was the union's good relationship with the employer, the low number of grievances, and that the union may have been seeking to protect its own reputation, as Blanchard had been accused of indiscretions involving alcohol and sex with minors. However, this conflict of interest was not enough to find a breach of the duty of fair representation; the Council dismissed Blanchard's complaint. This case demonstrates that where a union drops a termination grievance to maintain its own harmonious relationship with the employer, it might not necessarily breach the duty. If the self-interest of a union trumps such an important individual interest—the actual employment in this case—then the duty of fair representation must be seen as offering little meaningful protection.

*Dutcher v. Construction and General Labourers and General Workers, Local No. 1079*66 involved a consideration of the implied duty of fair representation. The plaintiff Dutcher had been laid off by his employer and his union refused to proceed to arbitration on

66 (1990), 110 N.B.R.(2d) 368 (Q.B.).
his grievance. The Court held that this was not a breach of the duty because there had not been misrepresentations made to the plaintiff and because the union's discretion had been exercised in good faith.

Regardless of how procedurally correct the union's consideration of his case may have been, it is questionable whether Dutcher found great comfort in that knowledge. Where the very continuation of the employment relationship is at stake, it seems rather patronizing to expect an employee to be satisfied with procedures that let his compensated and exclusive representative, his union, opt out of a full hearing of his claim.

In Hotel Employees and Restaurant Employees Union, Local 75 and Toronto Hilton,\textsuperscript{67} the complainant alleged a breach of the duty on the grounds that the union had failed to seriously consider her complaints about scheduling and seniority calculation, and had failed to file grievances on her behalf. She claimed that the union steward did not file her grievances because the steward stood to benefit from the scheduling and seniority procedures of which the grievor complained. This, she argued, was a conflict of interest.

At paragraph 50 of the decision, the Ontario Labour Relations Board quoted its earlier decision in Savage Shoes:

'Bad faith' and 'discriminatory,' ... rest for the presence, in the process or results of union decision-making, of factors which should not be present. ' Arbitrary,' on the other hand, describes the absence in decision-making of those things which should be present.\textsuperscript{68}

The Hilton Board added that it found the element of conflict of interest in the case "most troubling:"

Although the fact that a union representative is somewhat involved in an issue will not always create a conflict of interest, such situations can cause perception problems at the very least. A steward who may be in a position of conflict of interest with a person complaining will seldom give the appearance of fairness to a member, no matter how well reasoned the response.\textsuperscript{69}

\textsuperscript{69} Supra note 67 at para. 57.
Conflict of interest between the union and the individual employee was also at issue in *Ronald K. J. Mah and Canadian Union of Postal Workers.* Mah alleged a breach of the duty of fair representation for the union's refusal to process his overtime grievance. The conflict of interest arose because the grievance officer's wife was the main beneficiary of the overtime allotment being grieved. On reconsideration, the federal Board upheld its original decision that there was a breach of the duty. They held that the official *should* have removed himself from the situation, but that it was not *necessary* to fulfill the duty owed to the grievor. Presumably, the union could have easily had another representative deal with the grievor's complaint, but even this minimal level of accommodation was not required.

In *Dianne L. Anderson and the Manitoba Government Employees' Association,* the applicant Anderson was the successful candidate in a job competition. An unsuccessful candidate sought union support for an appeal of the decision, which was granted. When the applicant also sought union representation for the appeal hearing, it was refused because the union contended that it could not represent both members in the same matter. The Manitoba Board agreed. It held that representing both parties would have been a conflict of interest, and therefore a breach of the duty of fair representation. In choosing not to represent the applicant, the Board found the union could only have breached of the duty of fair representation if its decision was arbitrary or discriminatory, which was not the case on its facts.

This is a relatively low threshold for the union to meet in order to justify the refusal of services to which an employee would otherwise be entitled. According to this decision, it is acceptable to deny representation or to refuse to proceed with a grievance if the union decides the grievance is without merit or if it would be detrimental to the bargaining unit to do so. The emphasis is on the collective good of the unit, over individual access to what might be considered justice. When placed in the context of sexual harassment, the issue is whether this emphasis accords sufficient protection to human rights in the workplace, on the one hand, and serious individual consequences on the other. It is not an acceptable

70 (1991), 86 di 27.
solution to a conflict of interest problem to simply deny representation, and a forum to one side of the dispute.

Finally, in *Wayne Hamilton and Edmonton Police Association*, the Alberta Labour Relations Board found there had not been a breach of the duty in the union’s refusal to advance a termination grievance even though the union did not personally interview the grievor. The membership vote not to proceed with the grievance was ruled sufficient consideration of the complaint in the circumstances.

This decision raises questions about the possibility of bargaining unit popularity contests. If membership votes are seen as adequate protection for individual rights, there is the potential for unfairness. For instance, if the grievor brings an unpopular claim, or the person whose conduct is complained of is well-liked, the membership is not likely to back the grievance. This is an important concern for co-worker sexual harassment complaints. As a relatively new (and often controversial) subject for the grievance process, it might not be considered important enough for allocation of grievance resources. In the traditionally male workplace, there might be a general desire among the membership to suppress such claims out of animosity towards the intrusion of women, or out of a desire to protect their own kind. The potential for such “internal workplace politics” was expressly recognized by the leadership of one national union.  

2. Union Strategy

Some unions have explicitly recognized the potential difficulty posed by conflict of interest in handling complaints of co-worker harassment. Writing as president of Canadian Union of Public Employees (CUPE), Canada’s largest union, Judy Darcy remarked that the union had initially concentrated on harassment by supervisors when sexual harassment “emerged” as a workplace issue, (consistent with the formal power assumptions about sexual harassment discussed in the first section) but:

[I]t quickly became apparent that sexual harassment had other manifestations as well, such as harassment between

---

73 Darcy, *infra* note 74.
co-workers. . . In the latter case, the lines are less clearly drawn than in those involving supervisors. The union is obligated to represent the complainant and the alleged harasser as part of the duty of ‘fair representation’ outlined in federal and most provincial labour legislation. The situation gets even more complicated when you throw in internal workplace politics, friendships and loyalties that can have other workers taking different sides. . . . How can the union adequately represent the interests of both parties in a complaint? Are special complaint procedures necessary, and if so, what should they look like?74

Darcy suggests one solution might be to assign different staff representatives to each of the parties. However, recognizing the drain on union resources this would entail, she proposes another alternative which would stream sexual harassment complaints made against co-workers into an internal union complaint system, thus eliminating the need for employer involvement.75 This might be particularly short-sighted solution in that it ignores the employer’s responsibility and ultimate control over the workplace. It is questionable how fair a completely intra-organizational process would even be, given the “internal workplace politics, friendships and loyalties that can have other workers taking different sides” she identifies.76 Thus, neither of her suggestions are perfect solutions.

CUPE has, however, designed strategies and policies to guide them through the tricky issue of grievances arising out of sexual harassment between co-workers. CUPE’s Harassment Awareness Kit includes a specific resource kit entitled Co-Worker Sexual Harassment.77 The approach is progressive in that it clearly links the concept of union solidarity with the importance of addressing sexual harassment in the workplace. Professing a comprehensive commitment to the equality of women, CUPE states:

---

75 Ibid. at 133.
76 Ibid. at 132.
77 Equal Opportunities Department, Canadian Union of Public Employees, April 1992 [hereinafter Co-Worker Sexual Harassment].
The best strategy in this matter for us as trade unionists is to have an impact on the workplace: making management aware of the problem, making employees aware of the issue (and aware of their rights under legislation and under their collective agreement), and training local union officers and stewards to deal with the problem in the context of their workplaces and within our own structures.\(^{78}\)

In discussing the particular problems posed by co-worker sexual harassment, CUPE indicates that the human rights process, and the grievance arbitration process under the collective agreement are two possible avenues of redress for its victims. Arguably, CUPE recognizes that the human rights process means less money and effort would have to be expended by the union, but they are wary about giving up control of the rights assurance process: "[the] grievance procedure is the first and foremost legal avenue available to union members to deal with workplace harassment, including member to member sexual harassment . . . human rights process need not be, and should not be, used as an alternative to the grievance procedure."\(^{79}\) But CUPE also acknowledges that the grievance process has not proven itself perfectly suited to the resolution of sexual harassment cases:

In theory the complaint is against the employer because it is the employer's responsibility to maintain a workplace free of sexual harassment. In practice the complaint can be perceived by everyone involved as a dispute between two union members. In dealing with the complaint, the employer takes on the role of arbitrator and the Union seems to get caught in the middle.\(^{80}\)

What creates the feeling of being "caught in the middle" is the reality that conflict of interest exists in these scenarios.

The document provides information about the grievance process in light of the fact that the union owes a duty to both the harasser and his victim. The process set out for the victim to follow is, generally, to contact a resource person and document the case.

\(^{78}\) *Harassment Awareness Kit*, Equal Opportunities Department, Canadian Union of Public Employees, October 1991.

\(^{79}\) *Co-Worker Sexual Harassment*, *supra* note 77 at 13.

On the basis that CUPE locals operate under different collective agreements they advise a complainant:

You do not have to have a specific harassment clause in your collective agreement in order to file a grievance. If your contract contains a “No Discrimination” article or even a broad “Health and Safety” clause, you can grieve under either one of those.81

With respect to the alleged harasser, union representatives have an obligation to advise him that he has the following rights:

- To obtain details of the alleged harassment from the employer as quickly as possible;

- To contact his shop steward, local union executive member or staff representative immediately to find out his rights;

- If fired or suspended without pay, prior to a completed investigation, file a grievance on the disciplinary action;

- If suspended with pay or moved to another work location pending investigation, accept the employer’s action until the report of the investigation is available; and

- Even if proven guilty, the alleged harasser’s discipline as meted out by the employer could in some cases be considered too severe and a grievance initiated.82

The other component of CUPE’s strategy is aimed at workplace education. This is certainly desirable, and even necessary for the eradication of the problem, but it does not address the problems of fairness, bias, and adequate representation in the grievance process itself, which, as noted, the union considers the primary vehicle for resolution of these complaints.

CUPE’s strategy is not more specific than this. There are no defined responses to the conflicts of interest inherent in co-worker harassment. The fact that CUPE considers it necessary to have a strategy to deal with the issue, and that the duty of fair

81 Co-Worker Sexual Harassment, supra note 77 at 8.
82 Ibid. at 9-10.
representation can be inferred from their material, indicates they should be aware the problem exists.

Another national union that has demonstrated a significant interest in dealing with the issues surrounding sexual harassment in the workplace is the Canadian Union of Postal Workers (CUPW). They too link the issues surrounding sexual harassment to the general principle of solidarity in the union movement.

CUPW operates on a nation-wide collective agreement, so all their membership has recourse to the same provision (Article 56) when complaining of sexual harassment on the job. This article includes a definition of harassment, provisions to maintain confidentiality, and other more general guarantees governing rights to file grievances.

CUPW produced, as part of a package of materials for shop stewards (parts of which are also distributed to the entire membership), a training handout. It provides general information about the nature and types of sexual harassment faced by their membership. The handout also includes step by step procedures for handling investigations and grievance processing for both the alleged harasser and the victim of the harassing behaviour. The more notable provisions of these procedures are:

i) in investigating complaints, stewards are advised not to disclose the problem to the supervisor or to the person accused of harassment;

ii) if someone must be moved out of the situation, it should not be the complainant who suffers;

iii) if the steward is representing the complainant, he or she must find another union representative to represent the alleged harasser; and

iv) if appropriate, ask the alleged harasser if he would consider apologizing to the complainant, but stress that may not resolve the problem.

---

83 CUPW Atlantic Region, (Materials prepared for CUPW National Education Program during 1993-96 term) [unpublished].

84 Ibid.
In all, CUPW provides its stewards with five pages of specific procedures, based on the collective agreement, to guide the sexual harassment complaint process. The union also provides fairly detailed information to its members about their rights as individuals suffering harassment or being accused of committing it. It explicitly recognizes the difficulty of union conflict of interest by providing that the complainant and alleged harasser will receive separate union representation. But does this go far enough to justify the exclusive nature of the control that the union enjoys, or to guarantee fairness in representation and/or the appearance of fairness?

Separate representation is not a guarantee of unbiased representation. For example, both representatives could easily be a part of the same workplace as the employees involved, and therefore affected by the prevalent mood of the shop floor. There may be consultation between the representatives, creating a single approach to the problem, with only the appearance of a dual approach. The effect of setting out an elaborate sexual harassment policy might confer on the complainants an implied primacy of rights vindication, which could affect the attitudes with which the harasser’s subsequent grievance is approached.

Despite admittedly close attention and apparent commitment to the issues at stake, these problems, as well as the others implicit in a situation where one body represents both sides of a dispute, remain unsolved by the unions’ strategies.

VII. CONCLUSION: SUGGESTION FOR CHANGE

In his article, “The Developing Duty of Fair Representation,”85 Timothy Christian sets out the competing viewpoints developed by Professors Archibald Cox and Clyde Summers regarding whether collective or individual rights should predominate in the workplace. Cox’s argument, supporting the collective rights theory, is based on the notion that allowing individuals independent access to the grievance process weakens the union’s position in the workplace. He argues that arbitration rights must be vested exclusively in the union in order to:

85 Supra note 45.
• permit the development of comprehensive strategies and consistency in arbitration rulings;

• bolster the status of unions;

• encourage settlement of grievances short of actual arbitration; and

• facilitate ease of operation of the process.\textsuperscript{86}

The opposite, individualist view of Summers is based on the idea that allowing individual employees to pursue their own grievances fosters the ultimate purpose of labour legislation—to provide benefits to those individual employees.\textsuperscript{87} To refuse them that right is therefore incompatible with the broader goals and objectives of unionization in the first place.

As can be seen from a review of recent Canadian cases (most notably, the Supreme Court of Canada decisions in \textit{Gagnon} and \textit{Gendron}), and also from a review of Canadian collective bargaining legislation (most examples of which contain an explicit duty of fair representation), the collectivist approach is paramount in the workplace. The union’s control over grievance arbitration is virtually absolute, although mitigated somewhat by its concurrent duty to fairly represent the interests of its workplace constituency. However, it is not necessarily logical to extend this duty, and its accompanying exclusivity of rights, to cases of co-worker sexual harassment.

From the general discussion of the duty of fair representation and the practical effects of conflicts of interest within the bargaining unit, it is evident that the current approach has developed to deal with situations where the competing interests at stake in the bargaining unit are individual versus collective. The duty was not developed to deal with situations where the internal bargaining unit conflict of interest is between individuals. For example, in a grievance about seniority rights, the union balances the interests of the employee launching the grievance, with the collective interests of the bargaining unit as a whole, since an adjustment in seniority of one impacts on the respective ranking of

\textsuperscript{86} \textit{Supra} note 45 at 4.

\textsuperscript{87} \textit{Ibid.} at 5.
all others. However, when one employee launches a grievance on the basis that she has been sexually harassed by another employee in the same bargaining unit, the union is in the position of having to weigh those competing individual claims against each other.

Further support for the proposition that the duty's application to internal union conflicts of interests was developed outside the context of competing individual claims can be found in Centre Hospitalier.88 In that case, the Supreme Court of Canada stated that the duty of fair representation as it applied to a union's handling of a grievance can be described as a two stage analysis:

First, the union must carefully consider the merits of the grievance to decide whether it should be taken to arbitration. At this stage, the existence of a conflict between the interests of the employee involved in the grievance and those of the employees in the bargaining unit as a whole would seem unlikely. At the second stage, if the union decides that the grievance has merit, it must represent the employee without serious negligence, discrimination or bad faith at all subsequent stages of the grievance procedure. The case at bar is at this second stage and it is here that conflicts between an employee and the bargaining unit represented by the union are most likely to occur.89

The language employed here indicates that a conflict between the individual interests of members of the bargaining unit was not in contemplation when the Court held it appropriate to apply the standard duty of fair representation test to internal conflicts. This indicates there is a need to examine the assumed application of the duty in those situations.

Is good faith consideration (to over-simplify the test) a high enough standard to impose on a union where it is potentially in the position of having to choose to represent one member and not another?90 The duty of fair representation would not appear to be

88 Supra note 30.
89 Ibid. at 1349.
90 This generalization is not intended to deny the fact that there is a collective interest in non-discrimination or in seeing discipline fairly administered. However, the emphasis for the purpose of this argument is on the more direct interests at stake.
required in order to vindicate or protect the union's role as protector of the masses, nor does not seem necessary to safeguard the union's status or authority. Indeed, it is inconsistent with the union's responsibility as representative of each of the employees involved, and with labour's (arguable) commitment to workplace democracy. It is argued that the sort of control involved with such an exercise of power functions to inject another unacceptable layer of domination over the ordinary worker's life. This is at the heart of what Ian Hunter contends in his article, "Individual and Collective Rights in Canadian Labour Law."91 Recognizing the important role unions play in providing a greater measure of equality of bargaining power through collective action, Hunter believes that the absolute nature of the exclusive rights unions have been granted with respect to the work force may no longer be warranted. He states:

What may be lost ... are the rights of the individual worker, particularly the worker who dissents from the activities of 'his' union. The individual member's subservience to union decisions is compelled by judicial deference to the union's perceived need for 'effective bargaining authority' and 'internal solidarity.' It may be argued that the degree of subservience was conditioned by turn-of-the-century circumstances which no longer apply; that compelled solidarity is not real solidarity, and that unions in the long run do not gain from such compulsion; even that a consequence is to make unions another layer of control over workers' lives, a sort of 'secondary management' rather than the intended liberating force.92

In the end, the reasonable solution to the problems raised by workplace complaints, such as sexual harassment grievances lodged by one co-worker against another, may be to allow employees a limited right to carry their grievances to arbitration. In fact, it is entirely possible to arrive at this conclusion in consideration of the proposition that the duty of fair representation did not develop in the context of direct conflicts between competing individual claims and remembering that the underlying purpose of the collective bargain structure is the protection of workers' rights.

92 Ibid. at 145.
The idea of giving workers just such a limited right has long been advocated by Paul Weiler where critical job interests, particularly continued employment, are at stake. The central importance the job holds for most people makes it deserving of such special status. Even if one was to argue sexual harassment claims could not be considered critical interests, there are other reasons to include them within the scope of the limited individual right. A union’s duty to accommodate includes finding solutions to human rights violations, which is compatible with flexibility in grievance carriage. In fact, allowing individual carriage could be called one method of accommodation, particularly where a claim would not otherwise be advanced.

Secondly, individual grievance carriage provides a better option than private and potentially harmful internal union processes, and has been advanced by large and influential unions such as CUPE. Channelling co-worker sexual harassment claims through an internal mechanism has the potential to reduce an employer’s sense of responsibility for sexual harassment on the job; to create an attitude of secrecy which could serve to protect perpetrators and vilify victims; and actually decrease individual access to justice since the limited right of fair representation does not apply to internal union affairs.

Professor Bernard Adell argues that any employee grievances should be subject to the option of individual carriage. While some of his supporting arguments are compelling, and are applicable to the position advocated here, to argue for such a broad individual right ignores the legal authority with which the exclusivity of grievance carriage issue has been considered and expounded. The difference with the limited right proposed in the circumstances surrounding co-worker sexual harassment however, is that the

93 Supra note 29 at 138.
94 Supra note 74 at 132.
96 For example, the argument that exclusive union control is needed on the basis of resource allocation efficiency (ibid. at 255) is countered by the heavy costs attendant on duty of fair representation proceedings. In fact, the burden imposed on the parties subject to the process has been considered so taxing that in a report to the B.C. Minister of Labour, Recommendations for Labour Law Reform (1993) at 29, the writers of suggest that a new and less onerous process needs to be developed.
unique individual-versus-individual context can be distinguished from the contexts of the cases in which exclusivity principles were developed.

The vesting of exclusive control over the contract administration processes in the union had to have been intended, at least in part, to foster greater protection of workers' rights through a unified stance and support of union authority and credibility. Unfortunately, in the case of co-worker sexual harassment complaints, this exclusivity has the potential to run counter to this goal. Allowing a limited right of individual carriage of grievances would serve to add another avenue of protection for the rights of aggrieved employees, without having to endure the unnecessary step of making a fair representation complaint. This process could improve members' perception of the union, since individual grievances would rarely come before a union who diligently assessed grievances and presented them on behalf of its membership. Furthermore, the individuals proceeding to arbitration on their own would not enjoy a high success rate, if the union was correct in its initial assessment of the grievance's merit.

The protection of human rights and of crucial job interests are compelling enough reasons to justify an infringement on the union's control of the grievance process. The individual employee cannot and should not be expected to compromise his or her interests in these areas for the perceived collective good. Simply put, there is too much at stake.