Grievance No. 2000-552-043S

IN THE MATTER OF AN ARBITRATION

BETWEEN:

SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION (Barb Robinson Grievance)

("the Union")

- and -

THE GOVERNMENT OF SASKATCHEWAN

("the Employer")

Grievance Date:	June 13, 2000
Hearing date:	June 6, 2007
Hearing Location:	Saskatoon, Saskatchewan
Before:	Daniel Shapiro, Q.C., C. Arb., Sole Arbitrator
Decision date:	August 13, 2007

Appearances:

For the Union / Grievor: Larry Dawson
For the Employer: Garry Crawford, Don Beazely

INTERIM AWARD

A. Introduction

[1] In this proceeding, as sole Arbitrator, I am seized with a grievance filed by Barb Robinson dated June 13, 2000, alleging that the Employer improperly failed to appoint the Grievor to a supervisory position within the Department of Social Services and in so doing failed to properly apply the seniority provisions of the Collective Bargaining Agreement between the parties covering the period October 1, 1997 to September 30, 2000[1] ("the "CBA").

[2] The hearing was originally scheduled to take place on June 6, 7 and 8, 2007. However, while at that time the parties agreed that the board of arbitration was duly constituted to deal with the entire dispute, they requested an interim ruling on a dispute surrounding the inability of the parties to agree on the documents, if any, to which the Union /Grievor are entitled to receive copies of

[1] Exhibit 1

from the Employer. In particular, the Union seeks production of the reference check materials assembled during the selection process. The parties requested a written decision, setting out their respective rights and obligations in that respect. While there was no *viva voce* evidence, a number of documents were tendered into evidence by consent, for the purposes of dealing with these interim matters. The Employer provided a summary of the reference check materials dealing with the Grievor but not the actual documents.

B. The Issues

[3] The interim issues before me are as follows:

A. Are the reference check materials relevant to the staffing grievance hearing?
B. If the Answer to Issue A is "yes", is the Employer *prima facie* obligated by virtue of Article 21 D) of the CBA (or otherwise) to produce the reference check materials to the Union?
C. If the Answer to Issue B is "yes", is the Employer nevertheless entitled to withhold the reference check materials based on a claim of qualified privilege?
D. If the answer to Issue B is "yes", does *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, as amended ("*FOIPPA*") nevertheless shield the Employer from producing the reference check materials to the Union?
E. If the answer to issues C and D is "no", does the Arbitrator have jurisdiction to compel production of reference check materials to the Union?
F. If the answer to Issue E is "yes", what if any restrictions ought to be imposed on the production of such documents?

C. Background

[4] The Grievor was denied a promotional position arising as a result of a reclassification. The Department of Social Services had reclassified position #352353 from level 7HIS to level 10HIS, Income Security, Saskatoon and appointed the incumbent of the position. This action was challenged by the Grievor under Article 5.4 of the CBA. Article 21 of the CBA provides:

> **Article 21 GRIEVANCE PROCEDURES**
>
> A) ***Every effort shall be made to resolve problems through dialogue at the local level prior to going to grievance. The parties agree to ensure full explanation of issues during initial discussions at the local level.***

B) The parties agree the best resolution of a dispute is one worked out between the parties without recourse to a third party.

C) ...

D) ***The parties shall be required to provide full disclosure at each step of the procedure of all information available regarding the grievance.***

[emphasis added throughout]

[5] Following a Step 1 meeting held September 7, 2000, Don Beazley, Team Leader, PSC wrote, in a letter to the Union dated November 22, 2000[2]:

Re: Barb Robinson Grievance – 2000 552 043S

Detailed reference checks were conducted on this competition in order to assess fully the qualifications of Ms. Robinson. The references were provided with a list of the competencies for the position and were asked to provide comments based on their knowledge and observations. A pattern of behavior emerged in the reference material that showed serious concerns about leadership and team skills and the ability to build and maintain effective relationships with others. These competencies are essential for the satisfactory performance of duties in this supervisory position. Ms. Robinson was deemed not to have met the following competencies:

- Ability to conduct interviews in a compassionate manner with clients and staff in order to gather sensitive information and ascertain needs;
- A team player/facilitator in order to encourage an environment that fosters effective results in teams;
- Respectful in order to engage people and build helping relationships;
- Client service oriented in order to effectively meet needs in a timely conscientious manner;
- Compassionate and supportive of others in order to assist employees to develop confidence, overcome obstacles and achieve personal, professional and organizational objectives;
- A positive role model to inspire confidence in your commitment and abilities by setting examples and standards for others;
- Ability to develop and maintain open and honest work relationships with a challenging and diverse range of individuals, interest groups and related service providers.

[2] Part of Exhibit 3

> This information is provided as per our discussion at the Step 1 meeting.

[6] The Union wrote to the Deputy Minister of Social Services on November 1, 2002,[3] stating:

> The letter dated November 22, 2000 gave a brief summary of the Employer's reasons for not allowing Ms. Robinson appointment to the position.
>
> In the September 7, 2000 meeting, the Union was led to believe that full disclosure would occur. We have had and continue to request copies of all reference checks that were used in this competition. To date, this information has not been received. We require this information to allow us to complete the mediation stage of the grievance.
>
> Further, it is the Union's understanding that Ms. Robinson's Personnel File had no indication that the Employer had any concerns with her abilities. The competencies she has failed on are similar to the competencies required to do her job at that time.
>
> We are hoping to successfully mediate a satisfactory resolution to this grievance. Please contact myself to arrange a suitable time.

[7] There were a number of written communications after this from the Union to the Employer, attempting to elicit the Employer's response. A Step 2 meeting was held in December, 2003 and there were a number of letters from the Union to the Employer after this, proposing a chair for an arbitration board. On May 4, 2005, the Employer's Freedom of Information Access Officer wrote to the Grievor[4]:

> Your application for access was received on May 2, 2005. This is to advise you that the record you requested (reference check information for competition for Level 10 position – all information, including names of referents and all information supplied by them) cannot be released.
>
> Information provided by employment references is exempt from access according to 31(2) of the *Freedom of Information and Protection of Privacy Act*:

[3] Part of Exhibit 3
[4] Exhibit 4

> A head may refuse to disclose to an individual personal information that is evaluative or opinion material compiled solely for the purpose of determining the individual's suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits, where the information is provided explicitly or implicitly in confidence.
> ...

[8] The Grievor appealed the Employer's decision not to release such information to the Saskatchewan Information and Privacy Commissioner. Although evidently this appeal remains pending, the PSC authorized the Privacy Commissioner to release to the Grievor, *inter alia*, the following information supplied by the Employer to the Commissioner under cover of the Employer's letter of August 15, 2005 and released to the Grievor on October 3, 2005[5]:

> **Summary of References**
>
> The panel decided to contact six references and the grievor was notified of the names of the references to be used. The references were ... (names were provided). All six had a supervisory relationship with Ms. Robinson. Current and former colleagues are not used as references. Each reference was provided with a list of the competencies for the position and was asked to provide written comments on each competency. The information received from the references was mixed. Her knowledge was rated as adequate, however, a number of concerns were raised about her abilities in areas relating to leadership and interpersonal relationships. A pattern of behavior emerged in the reference material that showed Mr. Robinson did not have the leadership and supervisory skills necessary to satisfactorily perform the duties of a level 10 position. She was deemed not to have met the following competencies:

- Ability to conduct interviews in a compassionate manner with clients and staff in order to gather sensitive information and ascertain needs/levels
  - 3 references could not comment
  - 1 said yes
  - 1 said not consistently
  - 1 said no and provided information about complaints received about Barb's aggressive pursuit of verification beyond routine

- A team player/facilitator in order to encourage an environment that fosters effective results in teams
  - 2 unable to comment

[5] Exhibit 9

- 1 said yes
- 1 stated minimal contribution
- 1 said no and provided examples of cynical behavior and comments
- 1 said only if other team members meet her criteria; less effective when they don't

- Respectful in order to engage people and build helping relationships
  - 2 unable to comment
  - 1 said yes
  - 1 said no and referenced poor attitude
  - 2 said only on a selective basis; when Barb disliked the person she could be spiteful and vindictive

- Client service oriented in order to effectively meet needs in a timely conscientious manner
  - 2 unable to comment
  - 1 thinks so
  - 1 said no and referenced two incidents
  - 2 said not on a consistent basis

- Compassionate and supportive of others in order to assist employees to develop confidence, overcome obstacles, and achieve personal, professional and organizational objectives
  - 1 said no
  - 1 said generally yes
  - 1 unable to comment
  - 3 said selectively; only if she personally likes the individual

- A positive role model to inspire confidence in your commitment and abilities by citing examples and standards for others
  - 1 unable to comment
  - 2 said no
  - 1 said yes, but has a cynical outlook
  - 1 said yes for some; selective
  - 1 said yes

- Ability to develop and maintain open and honest work relationships with the challenging and diverse range of individuals, interest groups and related service providers
  - 2 said yes
  - 1 said I think so
  - 2 said no and provided examples of rude comments, complaints from agencies and clients
  - 1 said yes, selectively ...

D. Analysis

A. Are the reference check materials relevant to the staffing grievance hearing?

[9] I was called upon to consider a similar issue, albeit in the context of another collective agreement between other parties, in *Re University of Saskatchewan and University of Saskatchewan Faculty Association (Archer)* [1995] 59 L.A.C. (4th) 273. In that case, the grievor alleged bias and discrimination on the part of the employer in its job search for a tenure track faculty position. In particular, the grievance alleged a pattern of discrimination against women by the employer. The union sought production of personnel files for members of the employer's search committee (who were also members of the same union). The collective agreement contained a clause that provided: "The Association is entitled to access to all documents relevant to the grievance, including confidential documents ... (as defined)." I stated, at pp. 278 and 279:

> The definition of "relevance" requires ... consideration. There is no jurisprudence available on this point, specifically in the context of this Agreement between the parties. Therefore, it is helpful to refer to authorities in the field of civil litigation and other arbitral authorities. In civil litigation, I am satisfied that the test for broad relevance in this province is that a party is entitled to discovery of a document if it directly or indirectly enables it to advance its own case or to destroy that of an adversary, or may fairly lead to a train of inquiry which may have either of these consequences: ... (court cases cited).
>
> In the context of arbitral authorities, the above approach is reflected in *Re Toronto Star and Southern Ontario Newspaper Guild* (1983), 11 L.A.C. (3d) 249 (Swan):
>
> > Arbitrators have taken the view, in dealing with issues of relevancy in relation to the breadth of a *subpoena duces tecum*, that a subpoena ought to be allowed to be broad enough to include some measure of "discovery" while being concerned to ensure that it does not go too far beyond the test of relevancy [pp. 259-260]
>
> I have also considered *Re North Vancouver (District) and I.A.F.F., Loc. 1183* (1994), 42 L.A.C. (4th) Taylor. In that case, after considering Section 92(1) of the *Labour Relations Code*, S.B.C. 1992, c. 82...it was stated that "the authority of an arbitrator to compel pre-hearing production of documents is now well established" [at p. 168].
>
> Although not entirely on point, the decision of the Saskatchewan Labour Relations Board in the case of *University of Saskatchewan v.*

> *University of Saskatchewan faculty Association* (LRB File No. 280-88, decided July 7, 1989) serves as a reminder of the fundamental duties imposed on the parties under *The Trade Union Act* to negotiate in good faith for the settlement of employee grievances. In my view, this duty can best be met by the full and frank exchange of information.
>
> In conclusion on this point, providing the documents are "*relevant*" (which at this stage I would characterize as being "*broadly relevant*") to the determination of the proceedings, in my view, with certain limitations, they must be produced....
>
> In the absence of evidence as to the history and context of the present grievance, I am not in a position at this time to make an informed decision on whether or not there are any documents in the files in question which might be considered relevant or admissible at the hearing. I do not feel that at this stage it would be appropriate for me to pass on the issue of potential relevancy, since I am not aware of the subtleties or nuances which the Grievor may consider relevant, which would not be obvious to me.
>
> I am well aware of the difficult task of balancing the interests of the Grievor on one hand with the importance of maintaining the confidential nature of such files, from the points of view both of the employer and of the individuals in question. I believe any order made must be sensitive to those concerns, to the extent possible. The stakes are considerable, from the point of view of both parties. Allegations have been made, which, in the interests of attempting to achieve harmonious industrial relations, require a full and fair hearing. It is in the interests of both sides that the air be cleared in connection with allegations made. If I am to risk error, I would prefer to err in favor of disclosure.... I believe that this route offers a greater likelihood of providing a full airing of the issues between the parties...

[10] The rationale in *Archer* in my view remains applicable today, to the facts before me, a finding that was made in a more recent decision between the parties: *Rattray, infra*. However, the *Archer* case and the present case are far from identical. On one hand, the union in *Archer* sought discovery of documents that were significantly further afield from the narrow scope of documents identified by the Union in this case. Here the documents sought clearly and unequivocally go to the very heart of the issue to be determined in the arbitration of the grievance. It is indeed difficult to conceive of documents that could be more relevant. [On the other hand, the employer in *Archer* did not assert a claim of protection of those documents by virtue of the *Freedom of Information and Protection of Privacy Act*. That issue remains to be addressed here].

[11] For the reasons given above, as a starting point in the analysis, I find that the reference check documents clearly meet the "broad relevance" test that applies at this stage to the staffing grievance. I make this *prima facie* finding subject to a consideration of the following issues: (a) the admissibility of such documents in evidence at the hearing into the substantive issues [a decision in this respect would be made at such hearing]; (b) the possible claim of qualified privilege that may attach to the production of such documents and (c) the possible application of *FOIPPA* to shield the production of such documents.

B. If the Answer to Issue A is "yes", is the Employer *prima facie* obligated by virtue of Article 21 D) of the CBA (or otherwise) to produce the reference check materials to the Union?

Union's Position

[12] The Union argues that the Employer has not specified which referent alleged which shortfalls in competencies, nor did the Employer provide specifics as to the nature, timing, substance, accuracy, validity or assessment of the alleged shortfalls. Without specifics as to the exact questions asked, the specific answers, which referee said what, what materials were recorded, and what investigations were conducted to confirm the details of the references and the incidents that were cited, the Union is unable to determine the accuracy, validity and truthfulness of the alleged incidents which were cited as supporting evidence for the references. This essentially deprives the Union of the opportunity to properly investigate the circumstances, assess credibility of the referees and the underlying circumstances which may have led to biased or prejudicial comments. As such, the Union cannot meet its representational duty under the CBA or under Section 25.1 of *The Trade Union Act*. The Union further argues that Art. 21 A) of the CBA states the basic premise that in order to encourage resolution of problems the parties agreed to ensure full explanation of issues during discussions at the local level. It argues that the Employer has violated Art. 21 D) which provides:

> The parties shall be required to provide full disclosure at each step of the procedure of all information available regarding the grievance.

[13] The Union relies on *Re Northern Telecom Canada Ltd. and Canadian Automobile Workers Local 1535*, [1985] 26 L.A.C. (3d) 46 (Brown), where the arbitrator was asked to decide on an issue respecting pre-hearing disclosure requested by the union to permit preparation of its case. The parties had agreed in the collective agreement (Art. 7.7) to provide each other with all facts and information with respect to grievances at the first step and each subsequent step of the grievance procedure. The arbitrator found:

> The provision of such information such as requested in this matter by the union, would not prejudice the substantive positions of the parties, but is meant to assist them in the grievance process. The normal requirements of proof and onus are not removed or affected by this provision. I am satisfied that the details requested by the union are appropriate in consideration of the issue raised in the grievance, the other articles of the collective agreement referred to on this issue and as a practical procedure for an orderly presentation at subsequent arbitration hearings
>
> Consequently, I find that the Company was obliged by article 7.7 to provide to the Union the information it had available with respect to the grievance and respond thereby to the specific request in the union's letter... By failing to do so, I find that the Company has not followed the clear intent of Article 7.7.

[14] The Union also explicitly relies on the decision in *SGEU and Jason Rattray and Government of Saskatchewan* (unreported, May 19, 2005, Pelton). Arbitrator Pelton was invited to rule on the application of Article 21.4, the virtually identical provision to Article 24 D) of the CBA, of a later collective agreement between the same parties, to a situation where the employer declined to provide the grievor who had unsuccessfully applied for vacancies, with copies of the questions asked of the references, the reference notes and the names of the references beyond those the grievor had given. The Employer maintained that the information sought was confidential and protected by *FOIPPA*. Arbitrator Pelton rejected the Employer's position, stating, at pp. 13-15:

> The obligation imposed on the Government by Article 21.4, however, goes substantially beyond providing sufficient information to enable the Union and Mr. Rattray to enter into a meaningful discussion during the Grievance process. The obligation, which is clearly spelled out, is to provide full disclosure of all information available regarding the Grievance. In our view, the requested information (1. a copy of the questions asked of each referee and the notes made therein. 2. Copies of the notes taken by Tom Ross, during his reference checks. 3. Reasons why all references were not contacted. 4. A copy of the Public Service Commission Policy on Reference Checks. 5. A list of the individuals contacted as referees) ... falls within the phrase "information available regarding the Grievance."
>
> We do not accept the contention that Mr. Rattray and the Union were not entitled to debate the validity or veracity of the references during the grievance process prior to the matter being dealt with at the Arbitration Hearing. In fact, it is the vigorous debate that often occurs during the grievance process surrounding an Employer's decision, that

> results in many grievances being resolved without having to proceed to an arbitration hearing. Furthermore, in the present case, the Parties themselves in the opening paragraph of Article 21.4 have committed to attempting to resolve problems through dialogue and have agreed to ensure full explanation of issues occurs. As such, the argument that the reasonableness of the government's reliance on the references (when the evidence is that in fact the Government did rely on those references) cannot be challenged in the Grievance process, is simply untenable....
>
> Finally, on this issue, we cannot accept the argument that because Article 21.4 requires the disclosure of "information", as opposed to "documents", the requested documents need not be disclosed. The term "full disclosure ... of all information" is very broad and in our view covers the documents which Mr. Rattray and the Union seek. In large part what the Union and Mr. Rattray want to know is, what questions were asked of the references, and what answers were given by them. That is "information" and it does not lose that character because it has been reduced to writing.
>
> In light of the above (and subject to our comments below with respect to the impact of *The Freedom of Information and Protection of Privacy Act*) ....the Government has violated Article 21.4 of the Collective Bargaining Agreement in refusing to disclose the information sought in the present case.

Employer's Position

[15] The Employer contends that the principles of natural justice require that an employee has an opportunity to know the case she/he has to meet. Section 25(2) of the *Trade Union Act* provides that an arbitrator may "(a) summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath in the same manner as a court of record in civil cases". This discretionary power must be exercised in a manner that is related to the specific type of case. It can be exercised in a manner that does not have to be in direct competition with section 4(d) of *FOIPPA*. The intent of both provisions can be met without violating the right to privacy of the references.

[16] The Arbitrator's role is to interpret the words in the CBA within a labour relations context. This context includes applying the principles of natural justice and procedural fairness, and legislation relevant to the issue. At the outset, it is useful to bear in mind the provisions of Art. 22.3 A) of the CBA, which provides:

> The Arbitration Board established under this agreement does not have the authority to add to, subtract from, or amend any of the provisions of this agreement.

[17] Article 6.1.9.4 of the CBA stipulates: "Core competencies developed for all occupations shall constitute the basis for the evaluation of the qualifications of any applicant..." Here, the Employer has explicitly indicated which competencies have not been met. The Union knows the case it has to meet. Arbitral jurisprudence regarding an employer's determination of whether an applicant does or does not meet the qualifications for a position, establishes that the onus is on the union to show that the employer made its decision in a manner that was arbitrary, discriminatory, or in bad faith. Privacy case law options provide the Union with enough information to make these arguments if it is alleged that the employer acted in such a manner.

[18] The Employer contends that the *Rattray* award did not take all factors into account. In particular, the interests of the persons providing their opinions were not dealt with. Further it appeared that the Board in *Rattray* did not have access to the *FOIPPA* privacy case law options to meet the interests of all parties in such a manner as to not subject the Employer (or the Union) to potential legal liability for breaching *FOIPPA*. Arbitrators must carefully balance the legislative requirements (in this case *The Trade Union Act* and *FOIPPA*) as well as the interests of all participants. Privacy case law shows that the persons providing the evaluation have some right to privacy while arbitral jurisprudence provides that the Union must have sufficient information to develop and present its case.

Ruling

[19] In this case, to its credit the Employer eventually disclosed much more information than was the case in *Rattray*. However, it is unfortunate that this disclosure occurred not during the grievance discussions, but rather only after many written requests and after the Grievor and the Union launched an appeal to the Commissioner, and even then, the information came only indirectly, from the Commissioner's office, rather than from the Employer. While there is no doubt that the Employer appears to have been struggling with the extent of its obligations to protect references, this approach is not conducive to achieving the objectives of the Parties as enshrined in Article 21 A) of the CBA.

[20] The *Rattray* award has been in effect for over two years. It has not been the subject of an application for judicial review. Insofar as it dealt with Article 21.4 [the successor to Article 21 D) of the CBA], I am persuaded that the rationale articulated by Arbitrator Pelton is persuasive. Moreover, in the interests of consistency and predictability, particularly within a large province-wide unionized work force, it would be unwise to introduce a potentially contradictory

or conflicting stream of arbitral jurisprudence on the identical issue. Finally, *Rattray* does not stand in isolation from mainstream arbitral jurisprudence, but rather is reflective of a clear trend towards ensuring that full disclosure is the order of the day. The rationale underlying this trend is that harmonious labour relations can best be achieved by the timely and, where possible, bilateral resolution of workplace disputes.

[21] I find that the Employer is obligated both by virtue of Article 21 D) of the CBA and by arbitral jurisprudence to produce to the Union the reference check materials requested. By failing to do so, the Employer has violated Article 21 D) of the CBA, subject to consideration of possible common-law privilege attached to such documents or the possible protection of such documents from production by virtue of *FOIPPA*.

C. If the Answer to Issue B is "yes", is the Employer nevertheless entitled to withhold the reference check materials based on a claim of qualified privilege?

[22] In fairness, the Employer did not explicitly seek to invoke a common-law claim of qualified privilege in respect of the reference checks, relying instead on a claim of statutory exemption from production under *FOIPPA*. Nevertheless, in the interests of completeness, this issue will be addressed briefly.

[23] A common-law privilege claim would have to meet what is known as the "Wigmore" test, adopted by the Supreme Court of Canada in *Slavutych v. Baker*, [1976] 1 S.C.R. 254, which consists of four conditions:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

[24] Indeed the burden of establishing the conditions necessary to meet these criteria rests squarely with the party seeking to invoke the claim for privilege and is a very high threshold to meet, based on the *prima facie* presumption that the material is not privileged. In *The Law of Evidence in*

Canada (2nd Ed.), Sopinka Lederman and Bryant, at p. 623, the learned authors observe the following about the manner in which the Wigmore test has been applied in Canada:

> Anglo-Canadian Law has, for the most part, given priority to the administration of justice over external social values. In fact, the trend in Canada is to limit the recognition of privilege in favour of the search for the truth in the judicial process.

[25] The particular circumstances of each case must be examined in considering whether the privilege could apply. While there could be circumstances in which evidence establishes that the four conditions are met with respect to reference check materials, recognizing that each case turns on its own particular facts, an employer's claim of privilege over documents dealing with reference checks was explicitly rejected in *Re Ontario (Ministry of Transportation) and O.P.S.E.U. (Vangou)*, [2005] 138 L.A.C. (4th) 58 (Dissanayake). It was observed:

> If the references are substantially at odds with the documented record of performance, it would warrant some explanation. (p. 66)
> ...
> If the references are cloaked in secrecy, the grievor and union would have no means of ascertaining if its suspicions were well founded. On the other hand, if references are accorded privilege in these particular circumstances, it would enable an employer to contravene a collective agreement and public policy statutes, without fear of being held accountable. (p. 69)

[26] Except in the rare circumstance in which the existence of the four conditions is inherent or self-evident, evidence would be required to establish this. While some documents were tendered into evidence by consent, there was no evidentiary foundation to meet the four conditions necessary to establish such conditions. There is therefore no basis on these particular facts to allow a common law claim of privilege.

D. If the answer to Issue B is "yes", does *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, as amended ("*FOIPPA*") nevertheless shield the Employer from producing the reference check materials to the Union?

Union Position

[27] As regards *FOIPPA*, in *Liik v. Saskatchewan (Minister of Health)* [1994] SJ No. 399 (Sask. Q.B.)[6], Hrabinsky J addressed the general philosophy and purpose of the act and quoted from the Saskatchewan Court of Appeal decision in *General Motors v. SGI* [1994] 2 W.W.R. 430. There, Tallis J.A. referenced Section 4 of the Act which reads:

> 4. ***This Act***;
>
> (a) complements and does not replace existing procedures for access to government information or records;
>
> ...
>
> (c) ***does not limit the information otherwise available by law to a party to litigation***;
>
> (d) ***does not affect the power of any court or tribunal to compel a witness to testify or to compel the production of documents***; [emphasis added]

[28] At p. 326, in delivering the judgment of the Court of Appeal, Tallis J. held:

> The Act's basic purpose reflects a general philosophy of full disclosure unless the information is exempted under clearly delineated statutory language. There are specific exemptions from disclosure set forth in the Act, but these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. That is not to say that the statutory exemptions are of little or no significance. We recognize that they are intended to have a meaningful reach and application. The Act provides for specific exemptions to take care of potential abuses. They are legitimate privacy interests that could be harmed by release of certain types of information. Accordingly, specific exemptions have been delineated to achieve a workable balance between the competing interests. The Act's broad provisions for disclosure, coupled with specific exemptions, prescribe the "balance" struck between an individual's right to privacy and the basic policy of opening agency records and action to public scrutiny.

[29] The Union essentially contends that the thrust of the "full disclosure" emphasis of *General Motors* applies *a fortiori* to the present situation, where the Parties have contractually bound themselves to full disclosure of all information available regarding the Grievance. The information the Union seeks disclosure of was provided by individuals who were all Government employees.

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[6] Quoted with approval in *Rattray, supra.*

Alternatively, sections 4 (a), (c) and (d) of *FOIPPA*, quoted above, allow for the disclosure of the information being sought as necessary for a fair and just hearing.

[30] The Union relies on *Re Manitoba Liquor Control Commission and Manitoba Government Employees Union* (2003), 114 L.A.C. (4th) 436 (Spivak) in support of its contention that *FOIPPA* cannot restrict or limit proper disclosure in grievance negotiations or the arbitration process. Arbitrator Spivak was asked to decide on the production of documents for a job selection grievance. The documents sought related to selection guide, interview questions and notes of each member of the interview panel, rating guide and selection process for the applicants. At p. 444, after referring to the Manitoba equivalent of Sections 4 c) and d) of *FOIPPA*, Spivak states:

> It is my view that the above provisions do not limit an arbitrator's power under s. 120(1)(e) of the *Labour Relations Act* to order production of documents and I may exercise my discretion without any constraints imposed by FIPPA. This is consistent with the decision of *Re Ottawa-Carleton Roman Catholic School Board and Employees' Association of Ottawa-Carleton (Kelly)* (1998), 75 L.A.C. (4th 123 (Dumoulin) which dealt with similar provisions in the *Municipal Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. M.56. The employer stated that it is a "public body" under FIPPA [s. 1] and the information sought here about an individual's employment is personal information as defined by the Act. In any event, s. 44(1) (e), (m) of (q) allows for disclosure. This section provides as follows:
>
> 44(1) A public body may disclose information only:...
>
> (m) for the purpose of complying with a subpoena, warrant or order issued by a court, person or body with jurisdiction to compel the production of information or with the rule of court that relates to the production of information: ....

[31] The parallel section in the Saskatchewan *FOIPPA* is:

> S. 29(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:...
> (b) for the purpose of complying with:
> (i) a subpoena or warrant issued or order made by a court, person or body that has authority to compel the production of information; or
> (ii) rules of court that relate to the production of information; ...

[32] Arbitrator Spivak ordered the production of most of the documents sought by the Union, imposing conditions on the release of the documents.

[33] As part of the *Rattray* award, Arbitrator Pelton was asked to rule on the issue of whether *FOIPPA* was a bar to the release of the disclosure information. He noted that the Employer sought to invoke Section 31(2) of *FOIPPA*, which states:

> A head may refuse to disclose to an individual personal information that is evaluative or opinion material compiled solely for the purpose of determining the individual's suitability, eligibility, or qualifications for employment ... where the information is provided explicitly or implicitly in confidence.

[34] Pelton held that there was no evidence led to support the employer's submission that the information was provided by the references explicitly or implicitly in confidence. In light of the lack of an evidentiary basis upon which to conclude that s. 31(2) of *FOIPPA* could apply, he found that it did not operate to shield the Government from having to make the requested disclosure. However, since the parties addressed the issue on the broader basis of whether or not *FOIPPA* applied, Pelton offered his comments in *obiter*. Pelton started with a recognition of the general philosophy of full disclosure inherent in *FOIPPA*, as articulated in section 4 of the Act and in *General Motors, supra*. He pointed out that "generally, privacy legislation is not seen as denying access to information in proceedings to which rules of procedural fairness or natural justice apply", relying on *Administrative Law* 4th Edition (Evans, Janisch, Mullan and Risk, 1995 EM Publications Ltd. Toronto, at p. 296). He referred to *Re West Park Hospital and Ontario Nurses' Association*,[7] which, after quoting S. 45 (8.1) of the *Ontario Labour Relations Act* (which authorizes arbitrators to order pre-hearing production of documents), states at p. 165:

> Prior to the enactment of this provision of the *Labour Relations Act*, arbitrators relied on provisions in the collective agreement to found their authority to order pre-hearing disclosure of information and documentation.

[35] Pelton went on to state, at p. 17: "In our view, Article 21.4 in the Collective Bargaining Agreement with which we are dealing, is such a provision". He found that Section 25(1) of *The Trade Union Act* provides the arbitration board with exclusive jurisdiction to determine whether or not the CBA has been violated, as alleged. This jurisdiction to determine whether a violation has occurred, and if so, to direct that the CBA be complied with, brought that case within Section 4 (c) of *FOIPPA*. Further, Section 4(d) of *FOIPPA*, considered in

[7] (1994) 37 L.A.C. (4th) 160 (Knopf), referenced in *Manitoba Liquor Commission, supra.*

the context of s. 25(2)(a) of *The Trade Union Act*, interpreted in light of the arbitrator's obligation to provide a fair hearing and to control the arbitration process, provides the arbitrator with the jurisdiction to issue a *subpoena duces tecum*: *Toronto Star and Southern Newspaper Guild* (1984), 11 L.A.C. (3d) 249 (Swan) and *Re University of Saskatchewan and University of Saskatchewan Employees' Union* [2005] 139 L.A.C. (4th) 18 (Pelton). In light of the foregoing, Pelton went on to find that even if he had found that s. 31(2) of *FOIPPA* was *prima facie* applicable to that case, he would have concluded that the privacy legislation did not excuse the Government from making the requested disclosure.

[36] The Union further submits that it is the bargaining agent and legal representative of the Grievor and all members of the bargaining unit. Its duty to fairly represent its members flows from section 25.1 of *The Trade Union Act.* This duty cannot be effectively extinguished by the Employer's claim that *FOIPPA* bars production of documents. The Union further argues that section 4 of *FOIPPA* stipulates that existing procedures for access to government information and records will remain intact [s. 4(a)], that the Act does not limit the information otherwise available by law to a party to litigation [s. 4(c)] – here the litigation is the grievance arbitration; and does not affect the power of a tribunal to compel a witness to testify or to compel the production of documents [s. 4(d) – this power is spelled out in Sections 25 (2) (a) and (c) of *The Trade Union Act.* Further it is argued that CBA Article 21 D) is an existing procedure. It argues that it should not be necessary to put the Union through the delay and expense of convening an arbitration board in order to compel production of documents.

[37] The Union points out that the Employer's Staffing Reference Guide, dated November 15, 1999,[8] states, at page 56:

> Documentation – Reference Checks
>
> Responses received from each referee must be documented in the same manner as a candidate assessment. Outside of an arbitration situation, the information the referees provide is confidential and it is important to be respectful of that confidence. If a candidate asks what the referees said, general feedback can be provided within the context of all information collected and it is appropriate to indicate what the influence was on the hiring decision. For specific information, the candidate should be directed to the referees.

[38] Finally, the Union also points out that the Employer's current Staffing Reference Guide,[9] taken from the Public Service Commission website, states:

[8] Exhibit 7
[9] Exhibit 8

> Reference information is confidential, but referees need to know that they may be called upon to formally confirm the information they provided (e.g. in an arbitration)...
>
> Information obtained from a reference check should be viewed for assumptions and biases. One negative reference does not necessarily indicate the candidate is not qualified....
>
> Care must be taken to ensure that reference information is relevant to the competency requirements of the job and is behaviourally-based. Irrelevant, biased or unsubstantiated information must be disregarded.
>
> Outside of an arbitration setting, the information the referees provide is confidential and it is important to be respectful of that confidence...

Employer's Position

[39] The Employer contends that the key word in Article 21 D) of the CBA is "available". *FOIPPA* circumscribes the extent of the information that is "available". The *Rattray* decision did not take all factors into account – in particular the interests of the persons providing references were not dealt with. It appears that the Board in *Rattray* did not have access to the body of privacy case law that provides options to meet the interests of all parties and protect the Employer from violating section 31(2) of *FOIPPA*. The Employer argues that, viewed within the context of *FOIPPA,* the information it has supplied to the Union, namely a list of the names of the references and a summary of their comments, meets the requirement to provide all "available information" while respecting *FOIPPA*. However, if the arbitrator determines that is not sufficient, the Employer suggests the following alternatives:

1. Provide the summary document and reference documents to the arbitrator to validate that it is accurate (the Employer supplied the documents to the Arbitrator in a sealed envelope in the event that I decided to apply this option);

2. Provide the reference documents to the Union without identifying which reference made which evaluation.

[40] The Employer relies on *Re Nova Scotia (Department of Health)*, 2000 CanLii 9806 (NS F.O.I.P.O.P.) There, the applicant requested a FOIPOP review of a decision by the Department of Health to deny her request for disclosure of reference checks provided to the hiring panel which had interviewed her for a position. She wished to have access to these documents to confirm that the information provided by these references was correct. The review officer stated: "It is the practice of the Government, one that I have supported in other

reviews, to keep letters of reference or reference checks confidential. The view is that if such references are disclosed the result would be a reluctance by others to provide such references unless, perhaps, they are complimentary". The non-binding recommendation of the Review Officer was that the Department disclose to the Applicant the reference checks after severing the third party's names.

[41] A similar result was arrived at in *Re Halifax Regional Police*, 2006 CanLii 1437 (N.S. F.O.I.P.O.P.) There the applicant asked the Halifax Regional Police for reference checks and other information relating to her attempts to join the police force. HRP provided her with some records and a summary of the reference checks. The Review Officer reiterated that a person's views or opinions about another individual are the personal information of the individual, not of the person who expressed the views or opinions. The Review Officer recommended that the HRP release the reference checks with the third party's (i.e. individuals who were not employees of HRP) personal information severed.

[42] Finally, in *Re Ontario (Government Services)*, 1990 CanLii 3878 (ON I.P.C.), an unsuccessful candidate for the position of Senior Policy Advisor, Justice Unit Ontario Women's Directorate, requested access to: ... "documentation from the hiring process to which she is entitled under FOI, specifically, the list of questions asked in the interview, the score sheets relating to her interview (of all 4 panel members), her score, and the score of the successful candidate." The Ministry of Government Services provided access to the interview schedule, the score relating to the applicant's interview and her own score. Access to the interview schedule was given with the names of other candidates severed. Access was denied to the score sheets of the other candidates, including the successful candidate. Access was denied to reference material in its entirety. The denial of access to the reference materials was denied by the Deputy Commissioner on appeal, relying on Subsection 21 (3) of the Ontario Act, which states:

> 21 (3) A disclosure of personal information is presumed to constitute an invasion of privacy where the personal information,
> ...
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or
> ....

Ruling

[43] I am satisfied that on the facts before me, the Union's position must prevail. The decision in *Rattray* with respect to the possible application of *FOIPPA* is on all fours with the facts before me. It is persuasive and has not been disturbed on judicial review or otherwise. It reflects an appropriate

balancing of the interests of all participants in the process. I adopt its rationale. In so ruling, I accept that this may be a "be careful what you wish for" scenario, as this ruling, while consistent with arbitral authority, may have the unfortunate impact of discouraging referents from being forthright in their assessments.

[44] The Government relies on Sections 24(1)(h) and 31(2) of *FOIPPA*. Given the definition of "personal information" contained in Section 24(1)(h),[10] it is clear that the answers given by the references about Ms. Robinson constitute "personal information." However, in order to conceivably at least *prima facie* bring itself within the privacy parameters of section 31(2) of *FOIPPA*, there must be some evidentiary foundation to support the assertion that the information was provided by the references explicitly or implicitly in confidence. Such evidentiary foundation is lacking in the present case, as it was in *Rattray*. In light of the foregoing, there is no evidentiary basis upon which to conclude that Section 31(2) of *FOIPPA* is applicable. As a result, it does not operate to shield the Government from having to make the requested disclosure.

[45] This lack of evidentiary foundation is understandable. Indeed, it would be difficult to establish that such references were provided explicitly or implicitly in confidence, given the awareness of all participants to the reference process of the long-standing existence of: (a) Article 21 D) of the CBA,; (b) the grievance process generally within the CBA; and (c) the provisions of the Employer's Staffing Guide.

[46] As a result, I am in the same position as was the Board in *Rattray*, in that in light of this finding, my subsequent comments with respect to the possible further consideration of *FOIPPA* are *obiter*.

[47] However, even if the Section 31(2) criteria were met (which in this case they were not), this would only be the starting point of the analysis. One would then have to turn to the issue of whether the *prima facie* ability to withhold production of such documents under Section 31(2) is nevertheless obviated by the application of the basic philosophy of disclosure reflected and enshrined in Section 4 (a), (b) and (c) of the Act. This is particularly the case when considered in the context of the jurisdiction of an arbitrator to summon and enforce the attendance of witnesses in the same manner as a court in civil cases set out in Section 25(2)(a) of *The Trade Union Act*. I adopt the portions of the *Rattray* award dealing with these issues, at pages 16-20 of the Award.

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[10] 24 ... "personal information" means personal information about an identifiable individual that is recorded in any form, and includes:

...

(h) the views or opinions of another individual with respect to the individual;

...

[48] The only new arguments advanced by the Employer in this case that were not considered and rejected in *Rattray* relate to the *FOIPPA* cases supplied by the Employer here. However, a review of these cases indicates that they evidently did not deal with unionized employees. Therefore, the tribunals there were not asked to weigh the potentially competing interests of pursuing rights and remedies available at law under collective agreements against FOIPPA legislation. Further, there was no pending litigation in those cases. Further, unlike the present case, both Nova Scotia cases dealt with third party referents, not employees of the Government institution. Finally, the Ontario legislation does not include the Saskatchewan criterion that "the information is provided explicitly or implicitly in confidence." Therefore, in total, these cases are of limited assistance to the task at hand.

[49] I am of the view that most arbitrators would be loathe to put the Government in a perennially preferred litigant or "super-litigant" position by allowing a reliance on *FOIPPA* to shield it from the labour relations obligations faced by unionized employers generally. This is neither an objective nor a result that was ever contemplated in *FOIPPA*. The Employer evidently continues to have concerns over whether it may be in breach of Section 31(2) of *FOIPPA* by producing such documents. However, hopefully, such concerns may be allayed by reliance on a recognition of the application of Sections 4(a), (c) and (d) of the Act to such requests, particularly when considered against the backdrop of the awards in *Rattray*, the present case and arbitral jurisprudence generally.

E. If the answer to issues C and D is "no", does the Arbitrator have jurisdiction to compel production of reference check materials to the Union?

[50] For the reasons given above, I am satisfied that an arbitrator does indeed have jurisdiction to compel production of reference check materials, either with or without conditions.

F. If the answer to Issue E is "yes", what if any restrictions ought to be imposed on the production of such documents?

[51] Having made the above findings, it remains to be determined whether conditions should be imposed on the production of such documents. Conditions and safeguards can be imposed, giving due recognition to the sensitive nature of such documents and the potential mischief that can be caused by their broad circulation or the improper use of them. Conditions on production were imposed in the *Archer* and *Manitoba Liquor Control Commission* cases. The concern was summarized succinctly at page 444 of the *Manitoba Liquor* case:

> Arbitral law recognizes that in ordering disclosure of documentation, arbitrators should be sensitive to the fact that such documentation may include personal and confidential information. The exercise of discretion requires a balance of the grievor's right to a fair hearing against considerations of privacy. Here the employer seeks to impose safeguards on the basis that the documentation involves confidential human resources concerns and is private to the individuals involved, i.e., the successful and unsuccessful candidates for the position... I am satisfied that these are legitimate concerns, particularly as it relates to the individuals involved, and that some reasonable restrictions should therefore be imposed on the production of this documentation to protect against the risk of harm. That said, such limitations should not unduly restrict the ability of the grievor and the Union to deal with this grievance and arbitration. ... Release of the information to the (Union) bargaining agent is distinguishable from general release to the public.

[52] Legal counsel are subject to an implied undertaking not to use materials provided under disclosure obligations for purposes beyond the confines of the litigation in which they are produced. I see no reason why such conditions ought not to be imposed on the representatives of the Union in this case.

[53] I have not reviewed the documents supplied in a sealed envelope by the Employer and am returning them to the Employer with this Award. The Employer remains free to object to their admissibility at the substantive hearing, if so advised.

[54] I therefore order:

1. That the Employer produce to Mr. Larry Dawson within one week from the date of this Order, the unedited reference check materials supplied in this case.

2. Mr. Dawson shall not copy, read or communicate for any purpose other than the present grievance process (which I interpret to include dealing with internal union processes arising out of or related to this grievance) as well as this arbitration.

3. The documents shall remain in the exclusive possession of Mr. Dawson except for the reasonable use he makes of them in the preparation for and conduct of the present grievance / arbitration process.

4. Except as otherwise provided herein, the documents and their contents shall be kept confidential at all times and Mr.

Dawson shall destroy them forthwith upon conclusion of the grievance / arbitration process and any application for judicial review thereof.

5. If there remains any disagreement between the parties as to the relevancy or admissibility of any of these documents at the hearing of the grievance proper, the arbitrator will make the necessary ruling in that regard.

6. I retain jurisdiction to deal with any issues arising out of the foregoing order. The parties are at leave to convene a conference call for me to deal with them.

7. The arbitration hearing in this matter is adjourned *sine die*, to be scheduled upon request by either party.

Non-binding Recommendations

[55] The parties requested advice on how they might go about reconciling the Employer's duty of production of information under Article 21 of the CBA with its concern that only an arbitrator can decide such matters. The Employer is understandably concerned about the unrestricted dissemination of such materials. The Union is understandably concerned about not having to go through the time and expense of convening an arbitration board to deal with all such requests. It argues that a review of such documents at an early stage may obviate the need to proceed to arbitration.

[56] Short of instructing their respective bargaining teams to squarely address contract language in this respect in the next CBA negotiations, one option would be for the Employer to release such documents only following receipt of a letter signed by the lead Union representative, incorporating the conditions set out in paragraphs 1-5 inclusive of the Order set out at paragraph [54] above. This could be coupled with an amendment to the Staffing Reference Guide, to make it clear that such reference check materials are subject to production under the grievance procedure, so that potential referents would not mistakenly think that this could only happen during an arbitration hearing.

DATED at Saskatoon, Saskatchewan, this 13th day of August, 2007.

Daniel Shapiro, Q.C, C. Arb.
Sole Arbitrator