IN THE MATTER OF AN ARBITRATION

BETWEEN:

LAURENTIAN UNIVERSITY

("the Employer")

and

LAURENTIAN UNIVERSITY FACULTY ASSOCIATION

("the Union")

Union Grievance 2017-31 (Re: Article 2.50.8)

Before:

Larry Steinberg, Sole Arbitrator

Appearances:

For the Employer:

Daniel J. Michaluk, Counsel
Marc Saini, Associate Director, Faculty and Staff Relations

For the Union:

David Wright, Counsel
Dr. Linda St. Pierre, Chief Grievance Officer

Hearing held in Sudbury on December 13, 2018.

[1] This matter concerns a union grievance filed on December 5, 2017 alleging a violation of Article 2.50.8 of the collective agreement between the parties which provides as follows:

> Nothing in this Article is meant to preclude either side of the Collective Agreement from making reasonable requests for additional information from time to time. Both parties agree to fulfil such requests.

[2] The grievance lists four requests for information that were allegedly not satisfied. By way of remedy, the union requests that the employer be directed to provide the requested information as well as full redress and such other relief as may be appropriate.

[3] By the time of the hearing the only request that was still the subject of some controversy was a "copy of the agreement for an unpaid leave provided to Dominic Giroux [the former President of the employer] or confirmation that he was not given a leave".

[4] By way of background, counsel for the union wrote to counsel for the employer on January 15, 2018 advising that the union intended to expedite the grievance to arbitration if a timely resolution was not achieved. Counsel for the employer responded by letter dated February 2, 2018 advising that, with respect to the above request, the terms of the former President's employment were governed by two employment agreements which were subject to a right of access under the *Freedom of Personal Information and Protection of Privacy Act* ("*FIPPA*") and inviting the union to make an application for access to them under *FIPPA*.

[5] Apparently, counsel was not aware that one of the contracts had been disclosed to the union in an access request in 2009 and that the other contract had been disclosed to another union in 2014. I was advised by counsel for the employer that the significance of these disclosures is that, once publicly disclosed, it is not necessary to make a further request for access under *FIPPA* and that the contracts should have been provided to the union

[6] Without prejudice to its position that the information was required to be produced pursuant to Article 2.50.8 of the collective agreement, the union did make an application under *FIPPA* and the two contracts were provided to it by the employer on July 13, 2018. As well, the union was advised by the employer that the individual in question was on an unpaid leave of indeterminate length with the right to return as a full professor in the bargaining unit and entitled to an administrative leave of one year.

Position of the Parties

Employer

Preliminary Issue—The Grievance is Moot

[7] As a preliminary matter, the employer argues that the grievance is moot because the union has received the very documents and information that it requested in the grievance.

[8] The employer acknowledges that because of the prior disclosure of the contracts, it was reasonable for the University to have provided them to the union without requiring the union to make a request under *FIPPA*. Moreover, the employer is in agreement with the union that the following matters are not covered by *FIPPA* and a request for access under that statute was not necessary—that the individual was on an unpaid leave of absence, that the leave was indeterminate, that after the leave he was entitled to a one year paid administrative leave, and that he would have a right to enter the bargaining unit.

[9] The employer argues that the immediate matter is moot. The employer asserts that since the contracts were made public, the union is, in effect, seeking an answer to the hypothetical question whether or not the union should have been provided with copies of the contracts and the additional information regarding the individual's unpaid leave under Article 2.50.8 without having to make a request pursuant to *FIPPA.*

[10] The employer argues that this is too fine a factual issue to be safely addressed as a hypothetical question. The employer argues that the answer to the above hypothetical question will turn on the specific facts in any given case.

[11] The employer refers to the decision in *Re-Trillium Lakelands District School Board and Elementary Teachers' Federation of Ontario*, 2007 CarswellOnt 10489, 169 L.A.C. (4th) 19 (Burkett)("*Trillium Lakelands District School Board*").

[12] The union argues that the grievance raises a fundamental issue about the scope of Article 2.50.8 and its relationship with *FIPPA*. The union asserts that this issue is one that is likely to be raised each time the union requests information pursuant to the collective agreement that might possibly raise issues under the legislation. The union points out that, in the absence of prior disclosure, the legal issues raised in the grievance will remain unresolved whenever future requests for information are made.

[13] As a result, the union strongly asserts that there is a valid labour relations purpose in proceeding and that the parties would benefit from an award.

Merits

[14] The parties also addressed the merits of the grievance. Their arguments are summarized below.

Union

[15] The union argues that Article 2.50.8, when read in the context of the entire collective agreement, provides a broad right of access to information so long as the request is reasonable. The union asserts that the request is reasonable if it advances the purposes of the collective agreement. In the union's view, all of the information that it requested regarding the former President (right to return, right to enter the bargaining unit, length of leave, terms of the leave) fall within the provision.

[16] The union asserts that *FIPPA* must be read in light of the status of the union as the exclusive bargaining agent under the *Labour Relations Act, 1995* (" the *Act*") and the provisions of section 70 of the *Act*. The union asserts that since it has a statutory right to the information to ensure that the terms of the collective agreement were not violated by the agreements with the former President, the request pursuant to Article 2.50.8 must be reasonable.

[17] The union also argues that the request is not contrary to the provisions of *FIPPA*. In making its argument the union referred to sections 21(1)(a)(f), 21(3)(d), 21(4)(a)(b), 23, 42(1)(a)(c) and (e).

[18] The union relies on *Laurentian University Faculty Association v. Laurentian University*, 2010 CanLII 32256 (ON LRB) ("*Laurentian University"*); *York University Staff Association v. York University*, 2007 CarswellOnt 4967 (OLRB); *Re Greater Essex County District School Board and CUPE, Local 27*, 2014 CarswellOnt 11089, 248 L. A. C. (4th) 160 (Kuttner); *O.S.S.T.F., District 25 v. Ottawa-Carleton District School Board*, 2001 CarswellOnt 4902 (OLRB); *Michelle Taschner v. United Food & Commercial Workers Canada 175 & 633 v. Holiday In Express & Suites*, 2018 CarswellOnt 3480 (OLRB); *H.R.E.U., Local 448 v. Millcroft Inn Ltd.*, 2000 CarswellOnt 3073 (OLRB) ("*Millcroft Inn*"); *Bernard v. Canada (Attorney General)*, 2014 SCC 13.

Employer

[19] The employer argues that providing the contracts directly to the union would have been unreasonable for three reasons. First, it would put the employer in arguable breach of *FIPPA*. Second, it would deprive the former President of procedural rights granted by *FIPPA.* Third, it would deprive the employer of the statutory protection from civil proceedings for good faith disclosure or failure to give notice where reasonable care has been taken to give such notice.

[20] The employer argues that Part III of *FIPPA* arguably prohibits the disclosure of the contracts and the personal information outside of the *FIPPA* process. In making its argument the employer refers to sections 42(1)(a)(c) and (e), 65(6) and (7).3 of *FIPPA*.

[21] The employer also relies on the provisions in sections 21(1)(f) and 28 to argue that *FIPPA* creates a delicate balance regarding the release of personal information and provides procedural protections for individuals such as the former President, who are entitled to notice of a request for access, the right to make submissions, the right to be notified of a decision regarding access and the right to appeal a decision to grant access to a record.

[22] Finally, the employer argues that the request under Article 2.50.8 would be unreasonable since it would deprive the employer of its statutory immunity from a civil proceeding for damages under section 62(2) of *FIPPA* where disclosure is made in good faith or reasonable care is taken to give notice but notice has not in fact been given.

[23] The employer relies on *Re McMaster University*, 2008 CanLII 4966 (ON IPC); *Re Halton Regional Police Services Board and HRPA (Canapini)*, 2015 CarswellOnt 11905 (Sheehan)("*Halton Regional Police Services Board*"); *British Columbia Public School Employers' Assn. v. B.C.T.F.*, 2012 CarswellBC 1438 (Lanyon)("*British Columbia Public School Employers' Assn.*"); *The Society of Energy Professionals v. New Horizon System Solutions*, 2018 CanLII 8489 (ON LRB).

Decision

[24] On the merits, this case raises important issues about the relationship between the collective agreement right to information and the provisions of *FIPPA*.

[25] It is apparent from the arguments of the parties that the resolution of this issue requires a detailed analysis of statutory regime in respect of both privacy law and labour law. For example, the union's argument regarding section 70 of the *Act* requires a

searching analysis of whether the reach of that provision, as interpreted in, for example, *Millcroft Inn* and *Laurentian University*, can extend to the type of information requested in this case (see for example *Halton Regional Police Services Board* (at paras. 64-74) and *British Columbia Public School Employers' Assn*. (at paras. 63-66)).

[26] Moreover, it is apparent that depending on the information that is sought, tribunals charged with interpreting the *Act* and *FIPPA* may render conflicting decisions on virtually the same facts (see for example the decision of the arbitrator in *Ottawa-Carleton District School Board* and the decision of the Information and Privacy Commissioner referred to at para. 11 of the arbitrator's award).

[27] There is also the fundamental question of whether what is "reasonable" under Article 2.50.8 is to be determined by reference to the potential impact on the employer and former President of proceeding outside of the *FIPPA* process, as argued by the employer, or whether by reference to whether it advances the purposes of the collective agreement, as argued by the union.

[28] These are all important issues in the context of the relationship between the parties, the provisions of the collective agreement, the provisions of the *Act* and the provisions of *FIPPA*. I agree with the employer that the answers to these questions are dependent on the specific facts of each case. Without intending to be exhaustive, the resolution of any dispute about whether particular information must be disclosed under the collective agreement without invoking the provisions of FIPPA, will depend on facts such as what information is requested, who it concerns, the relationship of that person to the union and the employer, and the purposes for which the information is sought.

[29] The union is in receipt of the very information it requested and the specific remedy requested in the grievance has been satisfied. In these circumstances, arbitrators are cautious about adjudicating a grievance which would practically amount to a hypothetical exercise.

[30] In *Trillium Lakelands District School Board*, the employer filed a policy grievance regarding a union memorandum advising its members that performing certain work of striking employees would be a contravention of the collective agreement. As matters turned out, there was in fact no strike as the employer and the union settled their differences.

[31] The union asked that the grievance be dismissed as moot. Arbitrator Burkett determined that the issue raised in the grievance was whether the disputed assignments were required by the *Education Act* and whether the refusal in concert to perform them would constitute an unlawful strike within the meaning of the collective agreement. He stated as follows (at paras. 5-7):

> 5. This issue is central to the free collective bargaining relationship that exists between these parties. The determination that we are being asked to make goes to the core of this relationship. In declaring which of these broadly described assignments members must perform and which they are free not to perform, the effect will be to alter the economic and political balance in favour of one side or the other. It is, therefore, an issue that ought to be decided in response to a real controversy and on the basis of hard facts so that the nuances can be understood and applied.
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> 6. In this case, none of the assignments at issue were ever given and none were ever refused and there was no concerted activity. We have before us, therefore, a broadly described abstract question that does not arise upon existing facts— in other words, we are being asked at this time to provide an answer to a hypothetical question that has the potential to significantly impact upon the collective bargaining dynamic.
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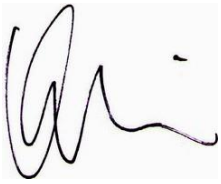
> 7. Having regard to the foregoing, we are satisfied that this grievance is moot and we hereby so declare. We are not prepared to engage in a hypothetical exercise that has the potential to significantly impact upon the collective bargaining dynamic.[1]

[1] See also the decision of the OLRB in *New Horizon System Solutions* in which the Board, exercising its statutory discretion not to inquire into an application, refused to hear an application alleging bargaining in bad faith by the employer's refusal to provide documents after the parties had entered into a collective agreement. The Board followed previous Board authority that the question should be determined "in a genuine adversarial context".

[32] While the issues in this case are not perhaps as central to the relationship of the parties as the issues in the case before Arbitrator Burkett, they are nonetheless significant and, as in that case, engage the intersection of statutory and collective agreement rights.

[33] In view of the nature of the issues raised by the grievance and the parties in their submissions and in view of the fact that the answers to the questions raised will be dependent on the specific facts of each case, I agree with the employer that this grievance is moot and so declare. Like Arbitrator Burkett, I do not think that engaging in a hypothetical exercise that affects significant rights of the parties is a beneficial labour relations exercise.

Dated at Toronto, Ontario this 11th day of January 2019.



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Larry Steinberg