

IN THE MATTER OF THE ONTARIO
COMMUNITY SAFETY AND POLICING ACT, 2019

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ROBERT ELLIOTT
- the Complainant

- and -

DURHAM REGIONAL POLICE ASSOCIATION
- the Union

AND IN THE MATTER OF two complaints of a violation of the Union's duty of fair representation

Arbitrator: Howard Snow

Appearances:

On behalf of the Complainant:
Robert Elliott - Complainant

On behalf of the Union:
Katie Rowan - Counsel
Peter Ling - Articling Student
Andrew Tummonds - Union President

Hearing held May 20, 2026, via Zoom.

AWARD

INTRODUCTION

Robert Elliott, the Complainant, submitted that the Durham Regional Police Association, the Union, had violated its duty of fair representation with respect to two related complaints he had made against the Durham Regional Police Service Board, the Employer.

The Union made a preliminary submission asking that the duty of fair representation complaints be dismissed on the basis that the Union owed no duty of fair representation to the Complainant in these matters. This award deals only with this Union submission.

BACKGROUND

The Complainant was a police officer with the Employer until his retirement in January 2026. As a police officer he was represented by the Union.

The parties made opening statements and produced many documents. The Union's preliminary objection was then argued on the basis of the opening statements.

As an overview, there are four complaints involved in this award and the existence of four complaints is somewhat confusing.

There are two complaints under the *Occupational Health and Safety Act* alleging reprisal by the Employer. This complaint was filed twice - first incorrectly with the Labour Relations Board and later filed correctly under the *Community Safety and Policing Act, 2019*. I have no role in the reprisal complaints.

There are two further complaints by the Complainant against the Union alleging a breach of the duty of fair representation. The first concerns the Union's role in the reprisal complaint filed with the Labour Relations Board and I was appointed to hear that duty of fair representation complaint. At the hearing, the Complainant raised a duty of fair representation complaint about the Union's role in the reprisal complaint filed under the *Community Safety and Policing Act, 2019* and at the hearing the parties agreed to have me also arbitrate that duty of fair representation complaint.

Here are the complaints in greater detail.

December 2025 the Complainant filed an application before the Ontario Labour Relations Board "alleging unlawful reprisal under Section 50 of the *Occupational Health and Safety Act*" by the Employer. That application related to the Employer's denial of the Complainant's request to use sick leave benefits in a Workplace Safety and Insurance Board related disability. The Complainant alleged that the Employer denied him access to his sick leave benefits in retaliation for the Complainant having been an active participant in a formal inquiry regarding the Durham Regional Police Service.

Section 50 of the *Occupational Health and Safety Act* allows employees to pursue their complaints before the Ontario Labour Relations Board on their own without the involvement of their union.

However, subsection 50 (8) of the *Occupational Health and Safety Act* provides that any police officer's reprisal complaint alleging a violation of Section 50 must be pursued using the process set out in Section 191 of the *Community Safety and Policing Act, 2019*, rather than the normal process which the Complainant first used above.

Police officers using the process in Section 191 of the *Community Safety and Policing Act, 2019*, can pursue their complaints on their own without involvement of their union.

January 2026 the Complainant filed a second reprisal complaint against the Employer under Section 191 of the *Community Safety and Policing Act, 2019*, with the Ontario Police Arbitration and Adjudication Commission. The substance of this complaint was the same as the complaint he had filed earlier with the Ontario Labour Relations Board.

As noted above, I have no role in the resolution of either reprisal complaint.

Also in January 2026 the Complainant filed a complaint with the Ontario Police Arbitration and Adjudication Commission alleging that the Union had violated its duty of fair representation in its actions in response to his initial *Occupational Health and Safety Act* complaint filed with the Labour Relations Board. In due course I was appointed by the Chair of the Ontario Police Arbitration and Adjudication Commission as arbitrator to hear that duty of fair representation complaint against the Union.

Turning to the fourth complaint, the Complainant alleged at the hearing that the Union had also violated its duty of fair representation in regard to his pursuit of his second reprisal complaint filed under the *Community Safety and Policing Act, 2019*.

The Union pointed out that the Complainant's duty of fair representation complaint about the *Community Safety and Policing Act, 2019* reprisal application was distinct from the duty of fair representation complaint which I had been appointed to hear. However, as noted above, the parties then agreed that I should arbitrate the duty of fair representation complaints regarding both reprisal applications.

PROVISION OF THE ACT

Section 219 (1) of *Community Safety and Policing Act, 2019*, is as follows:

A police association, so long as it continues to represent members of a police service under this Part, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the members of the police service.

UNION POSITION

The Union asked me to dismiss the Complainant's two complaints in their entirety. The Union submitted the complaints were outside the scope of the Union's duty of fair representation.

As the Complainant had an individual right to pursue an *Occupational Health and Safety Act* reprisal complaint under Section 191 of the *Community Safety and Policing Act, 2019*, the Union submitted that it did not represent the Complainant exclusively so no duty of fair representation arose in this case.

The Union referred to several cases in support of its dismissal request.

In the first *Lafrance* award, below, the Union drew attention to a quotation from a Supreme Court decision holding that the duty of fair representation flows from the Union's exclusive right of representation.

In the second *Lafrance* award, below, the Union noted the conclusion that there was no duty of fair representation in an area where the Union did not have exclusive authority to represent a member. As Lafrance had an individual right to defend herself regarding *Police Act* disciplinary charges, the duty of fair representation did not arise.

The Union then reviewed four additional authorities which it said supported the conclusion that the duty of fair representation was tied to the union's exclusive representational rights and that the duty of fair representation did not arise in a situation where, such as here, the member had a right to pursue the matter individually. For example, in *Luis Lopez*, below, the duty of fair representation was held not to arise in workers' compensation matters where employees could proceed on their own. Likewise, in *Toronto District School Board*, below, no duty of fair representation arose regarding long term disability benefits where the employee had an individual right to proceed by way of a legal action against the insurer. In *Fisher*, below, it was held that no duty of fair representation arose in *Police Act* investigations as the union had no exclusive right to represent the member who could proceed on his own. Finally in *Nordal*, below, it was held that no duty of fair representation arose about whether the union followed its own constitution as the duty arose only where the union had exclusive authority to represent the employee.

The Union asked that both complaints be dismissed.

The Union referred to the following authorities: *Lafrance v. North Bay Police Services Board*, [2009] O.L.A.A. No. 313; *Lafrance v. North Bay Police Association*, [2009] O.L.A.A. No. 675; *Luis Lopez* [1989] OLRB Rep. May 464; *Toronto District School Board* [2002] O.L.R.D. No. 2560; *Fisher v. Orangeville Police Assn.*, [2020 O.L.A.A. No. 101 (Bendel)]; and *Nordal v. Thunder Bay Police Association*, unreported, (January 17, 2025, Marcotte).

COMPLAINANT POSITION

The Complainant agreed that the duty of fair representation arose from exclusive representational rights.

But the Complainant also submitted that when the Union intervenes in a matter in which a member has an individual right to proceed without Union involvement and the Union expresses a judgement about that matter, the Union should be required to act fairly. The Complainant did not suggest any interpretation of the language of the duty of fair representation provision in Section 219 of the *Community Safety and Policing Act, 2019*, above, which would lead to a conclusion expanding the common understanding of the duty of fair representation.

However, the Complainant did rely upon the two cases, below. He said that in each case the Ontario Labour Relations Board was dealing with both a reprisal complaint and a duty of fair representation complaint in the same hearing. The suggestion seemed to be that because the Board was dealing with both complaints in the same hearing, the two awards supported his expanded view of the duty. He agreed, however, that at no point in either award did the Board indicate that a Union owes a duty of fair representation in a reprisal complaint under the *Occupational Health and Safety Act*.

The Complainant referred to the following authorities: *Violet Shearer v. Elementary Teachers' Federation of Ontario* (May 1, 2026) CanLII 44332 (ON LRB); and *Gabrielle Cassanova v. Unifor Local 324-308* (February 12, 2024) CanLII 16433 (ON LRB).

CONCLUSIONS

This Union had the exclusive right to negotiate a collective agreement with the Employer setting out the employment terms for all the police officers in the bargaining unit. The collective agreement between the Union and the Employer included a grievance and arbitration process for the resolution of disputes under the agreement and the Union, not the individual employee, controlled access to the grievance and arbitration process.

The Union's exclusive right to negotiate and administer a collective agreement with the Employer is common to nearly every unionized employment relationship throughout Canada.

Because unions have the exclusive right to bargain and enforce collective agreements, Canadian law imposes on unions a duty to represent all the employees fairly. This "duty of fair representation" was originally developed and enforced by the courts and, as with other judge-made law, is known as a "common law" duty. Since the development of this duty as a common law concept, many statutes regulating collective bargaining have been amended to expressly include the duty of fair representation. The duty of fair representation is contained in Section 219, above, of the *Community Safety and Policing Act, 2019* and is enforced through an arbitration such as this.

The Supreme Court of Canada has described the duty of fair representation in the following terms:

The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

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.** [my emphasis]
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.
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. (*Canadian Merchant Service Guild*, 1 S.C.R.509 at page 527, quoted in the first *Lafrance*

award, above, at p. 22)

The first principle from the Supreme Court decision quoted above indicates that the Union has a duty of fair representation only when the Union has the exclusive power to act for the employee. That has been the conclusion in a number of decisions, some of which were relied upon by the Union here. In the second *Lafrance* award, above, the holding was the Union had no duty of fair representation in matters of discipline since the Union had no role and the employee could represent herself. Similarly in *Fisher*, above, the holding was the Union had no duty of fair representation in *Police Act* investigations as the member could proceed on his own. In *Luis Lopez*, above, it was held that the Union had no duty of fair representation in workers' compensation matters since employees can pursue workers' compensation on their own. In *Toronto District School Board*, above, no duty of fair representation was found as employees could bring their own legal action against the insurer. Thus the consistent conclusion has been that no duty of fair representation exists when employees can proceed on their own without Union involvement.

The above is in essence the Union position, a position with which I agree.

The Complainant, however, sought an expanded interpretation of the duty of fair representation to include situations such as his two reprisal complaints against the Employer where he had a right to proceed without Union involvement.

The sole issue is this:

Did the Union owe a duty of fair representation in either of these two complaints about reprisal where the Union did not have exclusive right to represent the Complainant?

Does the language of the *Community Safety and Policing Act, 2019*, suggest a more expansive view of the duty of fair representation than the view found in the common law as summarized by the Supreme Court above and applied in *Lafrance*, above, or as held by the Labour Relations Board interpreting the duty of fair representation contained in the Ontario *Labour Relations Act*?

Section 219 of the *Community Safety and Policing Act, 2019* imposes the duty of fair representation when the Union represents police officers and it further provides how the Union must act in the representation of those officers. The Complainant gave no suggestion as to how the language of this provision could be interpreted to impose a duty of fair representation upon a union where the union does not represent an officer.

The Complainant relied upon two interim decisions in which the Ontario Labour Relations Board dealt with both a duty of fair representation complaint and a reprisal complaint against the employer under the *Occupational Health and Safety Act* - *Shearer* and *Cassanova*, above.

I find that neither of these interim awards offers any support for the Complainant's position.

First, and primarily, the Board said nothing in either case that might support a finding expanding the duty of fair representation to include a reprisal action against the employer where the individual had the right to proceed without union representation.

Secondly, it appears that in neither case did the duty of fair representation complaint relate to the reprisal action. In *Cassanova* the duty of fair representation complaint related to the union failing to file a grievance about alleged harassment and termination of employment, and not to the reprisal application. In *Shearer* there is no indication what the duty of fair

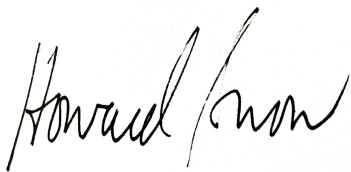
representation complaint involved.

I find that Section 219 of the *Community Safety and Policing Act, 2019* provides that the Union only has a duty of fair representation when it has the exclusive right to represent the employee. I find no basis for extending the duty of fair representation to the Complainant's two reprisal complaints where the Complainant could, and did, pursue the complaints on his own.

I conclude that the Union owed no duty of fair representation in either the initial reprisal complaint filed with the Labour Relations Board or the reprisal complaint subsequently filed under the *Community Safety and Policing Act, 2019*.

Both complaints are dismissed.

Dated in London Ontario, this 22nd day of June, 2026.

A handwritten signature in black ink, appearing to read "Howard Snow", written in a cursive style.

Howard Snow
Arbitrator