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DISMISSAL NO. 2093
Case No. 113/13/LRA
C/R Case No. 161/12/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

Manitoba Association of Health Care Professionals,
Applicant Union,

- and -

PRAIRIE MOUNTAIN HEALTH,
(Formerly known as "WESTERN REGIONAL HEALTH AUTHORITY",
"BRANDON REGIONAL HEALTH AUTHORITY INC.",
"PARKLAND REGIONAL HEALTH AUTHORITY INC." and
"ASSINIBOINE REGIONAL HEALTH AUTHORITY"),

Employer,

- and -

Manitoba Government and General Employees' Union,
Respondent Union.

BEFORE: C.S. Robinson, Chairperson

This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.

SUBSTANTIVE ORDER

WHEREAS:

1. On May 3, 2013, the Manitoba Labour Board (the "Board") by way of Certificate No. MLB-6918, certified the Manitoba Government and General Employees' Union, for a bargaining unit described as:

> ***"All employees employed by Prairie Mountain Health in the Province of Manitoba in both facility and community health care in technical/professional paramedical classifications who hold a degree, licence or certificate and are employed in a paramedical capacity, excluding physicians, nurses, and those who fall within the support units, those employed at Fairview Home and those excluded by the Act."***

2. On May 6, 2013, with additional documentation filed May 7, 2013, the Applicant Union, through Counsel, filed an application pursuant to Section 143(3) of *The Labour Relations Act* (the "*Act*") and Section 17 of the *Manitoba Labour Board Rules of Procedure* (the "*Rules*") seeking Review and Reconsideration of Certificate No. MLB-6918 issued May 3, 2013, and asked that the Board order a new representation vote to be conducted by in person vote.

3. On May 16, 2013, following an extension of time, Counsel for the Employer filed correspondence with the Board indicating it would not be filing a Reply.

4. On May 16, 2013, following an extension of time, Counsel for the Respondent Union filed correspondence with the Board indicating it would not be filing a Reply.

5. The grounds upon which the Applicant seeks Review and Reconsideration of Certificate No. MLB-6918 are as follows:

   a) The Board's decision to not provide the Unions with the residential addresses of the employees in the bargaining unit effectively deprived the Applicant of the opportunity to communicate with the employees eligible to cast a ballot in the Representation Vote (ordered by the Board by virtue of its decision set forth in Interim Order No. 1527). The Applicant states that the voting constituency is located in a vast and largely rural region and that the "only effective means of communication with employees of PMH is by telephone, post or possibly email". As a consequence, the Applicant claims that it was at a competitive disadvantage relative to the Manitoba Government and General Employees' Union which possessed contact information for a greater percentage of the voting constituency.

   b) By denying the request for the addresses of the employees eligible to cast a ballot in the Representation Vote, the Board abridged the Applicant's right to freedom of expression set forth under section 2(b) of the *Charter of Rights and Freedoms* (the "*Charter*").

c) The Board's conduct of the vote deprived supporters of the Applicant of their right to freedom of association guaranteed under section 2(d) of the *Charter*.

d) The Board's determination that the vote be conducted by means of a mail-in ballot resulted in an unfair voting process.

e) The Board failed to follow its own procedure set forth in Section 26(1) of the *Rules*, by not affording the Unions, including the Applicant, the opportunity to examine the lists of employees in the bargaining unit supplied by the Employer.

f) The Board failed to conduct an oral hearing to determine the issues regarding whether employees' residential addresses should be provided to the Unions; the Board's decision to conduct the Representation Vote by means of a mail-in ballot; and the Applicant's refusal to sign a Fair Vote Certificate.

6. The procedural history touching upon the matters at issue in the present Application includes the following:

a) The Western Regional Health Authority was created by Regulation 63/2012 passed pursuant to *The Regional Health Authorities Act*. The Regulation, which came into force on May 30, 2012, amalgamated Parkland RHA, Brandon RHA, and Assiniboine RHA into the Western Regional Health Authority. On November 16, 2012, Counsel for the Employer advised that the Western Regional Health Authority changed its name to Prairie Mountain Health.

b) As a result of the amalgamation, the Applicant Union filed an application with the Board for a Board Determination and Order pursuant to Sections 56(1), 59(1) and 142(5) of the *Act* on June 8, 2012.

c) Following the receipt of replies, the Board, based on the material filed by the parties, issued Interim Order No. 1527 on July 16, 2012 in which it determined, *inter alia*, that a single bargaining unit of all employees in "technical/professional paramedical classifications" in the amalgamated Regional Health Authority, now referred to as Prairie Mountain Health, constituted an appropriate bargaining unit and that a Representation Vote was to be conducted among the affected employees in the said unit with the Applicant Union and the Respondent Union appearing on the ballot to determine the wishes of the majority of the intermingled employees as to their choice of sole bargaining agent.

d) Further to the Board's Interim Order No. 1527, on July 16, 2012, the Board advised the parties that copies of the alphabetical listing of employee names would be made available to the Applicant Union and the Respondent Union prior to the Planning Meeting into the conduct of the Representation Vote.

e) The Applicant Union and the Respondent Union subsequently wrote to the Board to request that they be provided with a listing of the addresses of the eligible voters.

f) By letter dated July 19, 2012, the Board denied the request that the Unions be provided with the said addresses. In the letter, Chairperson W.D. Hamilton explained:

> "…the Board's practices and procedures have been impacted by privacy concerns arising under *The Freedom of Information and Protection of Privacy Act* ("*FIPPA*"). One of the critical changes brought about by *FIPPA* was the decision of the Board not to make any reference, on Board documents, to the personal addresses of individuals. Further, since January 1, 2007, all decisions of the Board posted on its website have been depersonalized by omitting personal identifiers.
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> As to the application of *FIPPA* to the current request made by both unions, the Board took into account the following criteria and/or principles:
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> - The Board is bound by *FIPPA* and must adhere to the spirit and intent of that legislation;
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> - The Board is prohibited from disclosing personal information regarding any individual except as authorized under Division 3 of *FIPPA*. Personal information is defined in Section 1 of *FIPPA* and this definition includes an individual's name and an individual's home address or telephone number;
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> - Section 42(2) of *FIPPA* prescribes that every use and disclosure by a public body (i.e. the Board) of personal information must be limited to the *minimum* amount of information which is *necessary* to accomplish the purpose for which it is used or disclosed;
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> - The *Act* requires the Board to conduct representation votes among employees in order to determine their wishes. The circumstances where a vote may be required includes an application under Section 56(2). In order to meet the statutory purpose of ascertaining the employees'

wishes, both the *Act* and the Board's Rules of Procedure (the "Rules") prescribe steps which the Board must undertake in order to conduct a vote among employees and this includes the need to finalize and publish a voters' list;

- Once a voters' list is finalized, then all parties to a proceeding have access to the voters' list. A copy of the voters' list (names only) is posted with the Notices of Election. This enables the employees affected to know that they are eligible to cast a ballot in the proceeding at issue. This disclosure of the names of the employees is necessary in order to properly conduct a vote mandated by the *Act*. Rule 26 expressly contemplates the disclosure of names but makes no mention of addresses;

- Accordingly, the publication of names on a voters' list is a necessary or required disclosure within the meaning of *FIPPA* because it is a step which must be undertaken by the Board in order to conduct a vote authorized by the *Act* and/or the Rules;

- However, in the Board's view, it is not "necessary" (to track the wording used in Section 42(2) of *FIPPA*) for the Board to release the addresses of employees in order to achieve the purpose of ascertaining employees' wishes through the conduct of a vote by secret ballot.

In the result, it is the Board's decision to reaffirm the position outlined in the letter of July 16, 2012, namely, that the voters' list and any employee list distributed to the parties shall only contain the names of employees and not addresses."

g) The Applicant Union and the Respondent Union each wrote to the Board on July 20, 2012, to take issue with the Board's decision as contained in Chairperson Hamilton's letter of July 19, 2012. The Board responded by letter on July 23, 2012, wherein Chairperson Hamilton specifically addressed the submissions set forth in the parties' letters of July 20, 2012 and concluded that the Board's decision respecting the release of addresses would stand.

h) Subsequently, the Applicant Union and the Respondent Union initiated separate Applications for Access for Information under Part 2 of *The Freedom of Information and Protection of Privacy Act* ("*FIPPA*") seeking the addresses of all of the employees to whom a ballot was mailed.

i) By letters dated October 4, 2012 (in response to the Applicant Union's request) and October 29, 2012 (in response to the Respondent Union's request) the Board refused to grant the Unions' requests that employee addresses be provided. In the October 4 and 29, 2012 letters, Chairperson Hamilton reviewed the germane provisions of *FIPPA* and concluded that an individual's home address is "personal information" as defined in *FIPPA* and that the disclosure of the requested personal information would be an unreasonable invasion of third party privacy. Therefore, the Board determined that it was required to refuse access to the requested personal information.

j) The Applicant Union, on October 15, 2012, and the Respondent Union, on November 6, 2012, filed separate complaints with the office of the Ombudsman disputing the Board's decision to refuse access to the requested information under *FIPPA.*

k) In Investigation Reports dated January 28, 2013 and February 12, 2013, the Ombudsman determined that the complaints filed by the Applicant Union and the Respondent Union, respecting the Board's decision to refuse access to the employee addresses, were not supported. In arriving at these conclusions, the Reports indicated, *inter alia*, the following:

- "Clearly, the information requested…(i.e. the home addresses of employees) meets the criteria for personal information as defined by the Act." (see: page 11 of the January 28, 2013 Report; page 10 of the February 12, 2013 Report);

- "The employees are third parties, as defined under FIPPA, and therefore the information in question is personal information of third parties." (see: page 12 of the January 28, 2013 Report; page 10 of the February 12, 2013 Report);

- "…our office would agree with the Board's determination that disclosure of home addresses…would be inconsistent with the purpose for which the personal information was collected for and as such clause 17(3)(i) of FIPPA applies." (see: page 21 of the January 28, 2013 Report; page 19 of the February 12, 2013 Report);

- "Our review to this point has determined that the Board's application of two of the exceptions – clauses 17(3)(c) and 17(3)(i) – support its

decision to refuse access to the requested information." (see: page 21 of the January 28, 2013 Report; page 19 of the February 12, 2013 Report)

- "The Board determined that none of the provisions in subsection 17(4) of FIPPA applied and our office is in agreement with this position" (see: page 20 of the February 12, 2013 Report);

- "…our office is of the position that employees have not provided the required consent under 17(4)(a) of FIPPA that would allow for the release of their personal information by the Board" (see: page 24 of the January 28, 2013 Report).

l) The Ombudsman's Investigation Reports each conclude as follows:

> "In refusing access…, the Board considered four provisions in section 17 of FIPPA. Our office determined that two of those provisions – clauses 17(1)(3)(d) and 17(1)(3)(f) – did not support the Board's decision to refuse access to the complainant.
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> However, with regards to the other clauses – 17(1)(3)(c) and 17(1)(3)(i) – we agree with the Board's application of those provisions in this matter and therefore find that the Board was justified in refusing access.
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> The Board indicated that none of the limits to the exceptions as identified in subsection 17(4) applied to the requested information and our office agrees with this position.
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> CONCLUSION
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> Based on the findings of the Ombudsman, the complaint is not supported."

m) In accordance with subsection 67(3) of *FIPPA*, the Applicant Union and the Respondent Union filed separate appeals regarding the refusal of access to the employee addresses with the Court of Queen's Bench. Those Applications have not been heard and are currently adjourned.

n) In addition to asking the Board to review its decision denying employee addresses, initiating access requests for the employee addresses under Part 2 of *FIPPA*, and filing the separate complaints with the office of the Ombudsman disputing the Board's decision to refuse access to the requested information referred to above, the

Respondent Union sought an interlocutory injunction to prevent the Board from conducting the Representation Vote until such time as the Court of Queen's Bench reviewed the Board's decision regarding the release of employee addresses. The Applicant Union supported the Respondent Union's application.

o) In *Manitoba Government and General Employees Union v. Manitoba Labour Board et al*, 2012 MBQB 281 (CanLII), Madame Justice Greenberg dismissed the motion for an injunction in an oral judgment delivered on October 15, 2012.

p) In the course of her reasons, Madame Justice Greenberg considered the submission that the Board's decision to deny employee addresses infringed upon the Respondent Union's right to freedom of expression under the *Charter.* At paragraph 46, Greenberg J. ultimately concluded "that the *Charter* argument does not raise a serious issue". She explained her conclusion is this regard as follows:

> "[44] Insofar as MGEU's application is based on s. 2(b) of the *Charter*, I have some difficulty in finding that even the low threshold for serious issue to be tried has been met. Unlike the situation with the argument based on *FIPPA*, there is an established body of case law regarding the interpretation of s. 2(b). While that case law has established a broad scope to s. 2(b), there are also clear limitations to the protection it provides. Section s. 2(b) prevents a government entity from interfering with a person's right to express himself (a negative obligation), but the section generally does not require the government entity to provide the person with a means of expression (a positive obligation). This distinction between negative and positive rights was discussed by the Supreme Court in *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component*, 2009 SCC 31, (CanLII), 2009 SCC 31, [2009] 2 S.C.R. 295, [2009] S.C.J. No. 31 (QL), a case that is in fact relied upon by MGEU. Writing for the majority in that case, Deschamps J. stated:
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> > 29 As well, although s. 2(b) protects everyone from undue government interference with expression, it generally does not go so far as to place the government under an obligation to facilitate expression by providing individuals with a particular means of expression (*Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995). Thus, where the government creates such a means, it is generally entitled to determine which speakers are allowed to participate. A speaker who is excluded from such means does not

> have a s. 2(b) right to participate unless she or he meets the criteria set out in *Baier*. …
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> . . .
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> 34 In *Baier*, Rothstein J. stated (at para. 35):
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> To determine whether a right claimed is a positive right, the question is whether the appellants claim the government must legislate or otherwise act to support or enable an expressive activity. Making the case for a negative right would require the appellants to seek freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage, without any need for any government support or enablement.
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> [45] There is no suggestion here that the Labour Board's order or decision has prevented the MGEU from communicating with the employees. On the face of it, what the MGEU is claiming is that the Board has a positive obligation to facilitate that communication. MGEU presented no argument that would lead me to construe its claim as anything but a claim to a positive right. As such rights are generally not protected by s. 2(b), in my view, the MGEU has failed to meet the first part of the injunction test insofar as its argument is based on the *Charter*."

q) The decision of Greenberg J. was not appealed.

r) The Board conducted a Representation Vote by means of a mail-in ballot between September 14, 2012 and November 30, 2012.

s) On December 5, 2012, the Board advised the parties of its intent to commence the procedure for counting the ballots cast in the Representation Vote in accordance with the *Rules*.

t) The Applicant Union refused to sign the Fair Vote Certificate for reasons set out in a written statement filed with the Board on December 10, 2012. The Respondent Union signed the Fair Vote Certificate "without prejudice" to any position which it "may take at a later date in another forum". The Board received further correspondence between December 13, 2012, and December 18, 2012, regarding the issue of the Fair Vote Certificate. The Board determined that the issues regarding the Fair Vote Certificate could be determined on the basis of the written material filed with the

Board. The Board went on to conclude that the vote was conducted in a fair and proper manner and ordered that the ballots cast in the Representation Vote be counted.

u) Following consideration of the results of the Representation Vote, the Board determined that the majority of the employees in the bargaining unit who voted wished to have the Respondent Union represent them as their bargaining agent. The Applicant Union requested that the Board not issue a Certificate on the basis of the results of the Representation Vote until a hearing was conducted by the Board into issues raised by it; however, the Board refused that request and proceeded to issue Certificate No. MLB-6918.

7. The Board, following consideration of the material filed, has concluded the following:

a) An oral hearing is not necessary as the application may be determined on the basis of the written material filed;

b) The Board is satisfied that it acted within its jurisdiction under the *Act* in denying the Applicant Union and Respondent Union the residential addresses of the employees in the bargaining unit. The Board is bound by *FIPPA* and it properly considered and applied the relevant provisions of *FIPPA* in refusing to provide the Unions with the employees' addresses. The Board's decision to refuse access to employee addresses was set forth in a detailed manner citing specific provisions of *FIPPA*. In extensive reasons found in the Investigative Reports referred to above, the office of the Manitoba Ombudsman determined that the complaints filed by the Applicant Union and the Respondent Union respecting the Board's decision to refuse access to the employee addresses were not supported.

c) The Board is also satisfied that it acted within its jurisdiction when it ordered that the Representation Vote be conducted by means of a mail-in ballot. Pursuant to Section 48(2) of the *Act*, the Board has the authority to "make such arrangements and give such directions as it considers necessary for the proper conduct of the vote, including the preparation of ballots, the method of casting and counting ballots, and the custody and sealing of ballot boxes". As with other cognate Canadian labour relations boards, this Board has accepted that a mail-in ballot may be utilized in limited circumstances, where deemed appropriate. For example, mail-in ballots may be used by the Board in circumstances in which a large voting constituency is distributed amongst many work locales and/or where the work locale(s) is/are remote. In the present circumstances where the large voting constituency was spread amongst many workplaces, the Board deemed this to be an appropriate situation in which to utilize a mail-in ballot to conduct the Representation Vote.

d) The Applicant Union's position that "the only effective means of communication with employees of PMH is by telephone, post or possibly email", overlooks the fact that there are a variety of additional means of communicating with employees. These means may include: media advertising; community meetings and events; utilization of social media; promotion through Union websites; distributing written material directly to employees; and by having union officials, supporters and activists speak directly to employees regarding the Union. Moreover, the Board did not prevent the Applicant or Respondent Union from communicating with the employees. The crux of the Applicant's position is that the Board ought to have *facilitated* its communication with employees by providing their personal addresses. The Board determined that providing the addresses of employees would have been contrary to the provisions of *FIPPA,* a position that was subsequently supported by the Manitoba Ombudsman.

e) With respect to the Applicant Union's position that the Board abridged its rights to freedom of expression under section 2(b) of the *Charter*, the Board rejects this submission for the reasons expressed by Greenberg J. in *Manitoba Government and General Employees Union v. Manitoba Labour Board et al, supra*, wherein she concluded that the *Charter* arguments advanced by the Respondent Union, supported by the Applicant Union, did not even meet the "low threshold" of constituting a serious issue to be tried. In particular, the Board is of the view that the Applicant Union is really seeking an order from the Board that it had a "positive" obligation to provide the Applicant Union with a means of expression, contrary to the judicial interpretation of the limitations which apply to the protections afforded by section 2(b) of the *Charter*.

f) The Applicant's submission that the Board's "conduct of the vote has deprived the 179 employees of the PMH who voted for the MAHCP of the bargaining unit of their choice without a democratically held election" thereby depriving those individuals (including those persons who sat as directors of the Applicant's Executive Council) of their section 2(d) *Charter* rights to freedom of association, is founded upon the unsupported assertion that the Representation Vote did not afford a fair opportunity to employees to express their wish as to their choice of bargaining agent. The Board is satisfied that the vote was conducted in a fair and proper manner. The essence of the Applicant's submission with respect to section 2(d) of the *Charter*, is simply the expression of its dissatisfaction with the *result* of the vote and the effect of that result which is the issuance of certification to the Respondent Union. That dissatisfaction does not constitute a breach of the freedom of association set forth in the *Charter* and to so find would mean that any person(s) or union adversely affected by the result of any representation vote conducted by the Board pursuant to the *Act*

could assert that section 2(d) of the *Charter* had been violated simply on account of the numerical results of the vote.

g) The Applicant's submission that the Board failed to follow its own procedure set forth in Section 26(1) of the *Rules*, by not affording the Unions, including the Applicant, with the opportunity to examine the lists of employees' names and addresses in the bargaining unit supplied by the Employer, reveals, in the Board's judgment, a fundamental misreading of the *Rules* by the Applicant. Section 26(1) of the *Rules* does not refer to the provision of employees' addresses to the union(s) involved in a Representation Vote. Moreover, the practice followed by the Board in the present case with respect to employees' addresses is entirely consistent with the manner in which the Board deals with other intermingling votes, as well as applications for certification and applications for de-certification/termination of bargaining rights which require votes to be conducted. In all cases, although employees' addresses are furnished to the Board for its own purposes, those addresses are not released to the other parties in such proceedings.

h) The Board acknowledges that it did not conduct oral hearings regarding whether employees' residential addresses should be provided to the Unions; the conduct of the Representation Vote by means of a mail-in ballot; and the Applicant's refusal to sign a Fair Vote Certificate. The Board is not required to conduct an oral hearing and, having regard to the nature of the issues and the documentation filed by the parties, the Board determined that oral hearings were not necessary in the circumstances. As Clearwater J. noted in *Kolench v. Manitoba Labour Board et al.* 2008 MBQB 190 at paragraph 16, courts are required "to give considerable deference" to the decisions of the Board, including "deference to its decision [consistent with its legislated mandates, ss. 140(1), 140(7) and 140(8) of the Act] not to hear the matter, not to reconsider its earlier decision, and not to provide further written reasons". Courts have repeatedly acknowledged that it is clearly within the jurisdiction of the Board to make determinations regarding matters under the *Act* without conducting an oral hearing [see, for example: *Rowel v. Hotel and Restaurant Employees and Bartenders Union, Local 206 et al.* 2003 MBCA 157 (CanLII), 2003 MBCA 157, 184 Man.R. (2d) 7, and *Rhodes v. United Food and Commercial Workers International Union, Local 330W et al.* 2000 CanLII 27041 (MB CA), (2000), 145 Man.R. (2d) 147 (Man. C.A.)].

i) Having regard to the foregoing, the Board is satisfied that there is no basis to review or reconsider the original decisions as requested by the Applicant Union.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the application seeking Review and Reconsideration of Certificate No. MLB-6918 filed by the Manitoba Association of Health Care Professionals on May 6, 2013.

DATED at **WINNIPEG**, **Manitoba** this 16th day of August, 2013, and signed on behalf of the Manitoba Labour Board by

"Original signed by"

C.S. Robinson, Chairperson

CSR/lo/lo-s