IN THE MATTER OF AN ARBITRATION

BETWEEN:

CARIBOO PULP AND PAPER COMPANY

(the "Employer")

AND:

UNIFOR, LOCAL 1115

(the "Union")

ARBITRATOR:	John Kinzie
COUNSEL:	Alan Hamilton, Q.C., for the Employer Craig Bavis, for the Union
DATES OF HEARING:	September 29 and 30, 2014
PLACE OF HEARING:	Vancouver, British Columbia

AWARD

I

This proceeding is concerned with the Union's grievance dated July 3, 2013 in which it seeks the disclosure of the names of all of the employees who have elected to take a payout in lieu of one week's vacation pursuant to Article XV, Section 4 (k) of the 2012-2017 collective agreement.

Article XV, Section 4 (k) provides that:

> "Employees who qualify for vacation under Section 1, categories (C), (D), (E), (F) or (G) may at their option elect to forfeit one (1) week of vacation, subject to the Employment Standards Minimum, and be paid the vacation pay they would have received in lieu of the week of vacation.
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> Employees must declare their intention for this option in writing prior to May 1st of each year."

The Employer has provided the Union with some information about the use of Article XV, Section 4(k) including the number of employees who made the election in each vacation period, the position held by each electing employee and the department he works in, redacted copies of the Election for Payout in lieu of Vacation forms and redacted payroll information indicating, *inter alia*, the money paid to the employee in return for forfeiting the one week of vacation. However, it has refused to disclose the employees' names maintaining that the Union has not established any statutory, contractual, or privacy right to have that information disclosed. Further, it points out that all but one of the employees concerned have not consented to the Employer disclosing their names to the Union.

In support of its grievance, the Union relies on the fact that it has been certified as the exclusive bargaining agent to represent the employees at the Employer's operations. It submits that it requires this information to represent its members by ensuring that the Employer is abiding by the terms of Article XV, Section 4(k), that its application is not giving rise to health and safety issues, and that its use is not masking workload issues. Further, it says that under the collective agreement, the Employer has provided a variety of other similar information to the Union regarding matters such as usage of vacation, supplemental vacations, floaters and overtime. It also maintains that disclosure of this information is reasonably required for the purpose of managing employment relationships under the terms of the collective agreement, and that therefore, its disclosure, even without the consent of the employees involved, does not entail a violation of the provisions of the *Personal Information Protection Act*. Finally, the Union argues that employees have given consent to the release of this information through their signing of membership cards in the Union.

II

The background facts to this proceeding are as follows.

The Employer operates a pulp mill in Quesnel, British Columbia. The employees working in that mill are represented by the Union.

Article XV, Section 4(k) first appeared in the current 2012-2017 collective agreement. It also appears that pattern bargaining has become the practice in the pulp and paper industry in British Columbia replacing the old system of industry wide

bargaining. One employer in the industry is selected, and terms and conditions of employment that will apply across the industry are negotiated with it. Those terms and conditions, once agreed upon, then form the pattern for negotiations with the other employers in the industry. In addition to these common terms and conditions, each employer and the union representing its employees will negotiate terms and conditions of employment that are solely applicable to the employees working in the mill. These local terms and conditions of employment agreements are commonly referred to as "bull session" agreements. Thus, the collective agreement in force at the Employer's pulp mill will encompass the common terms and conditions of employment that come out of the pattern bargaining in that round along with the locally negotiated terms and conditions of employment found in the bull session agreement.

In 2012, Canadian Forest Products Ltd. (hereinafter "Canfor") was selected as the employer for the purposes of pattern bargaining. Article XV, Section 4(k) in these parties' 2012-2017 collective agreement was negotiated and agreed upon as part of the unions bargaining with Canfor. After the pattern agreement was settled upon, it was presented to the Employer and the Union and was adopted by them. There was no bargaining between the Employer and the Union over this new provision as either part of the pattern bargaining, i.e., on whether to adopt the agreement negotiated with Canfor, or as part of bull session negotiations.

Glen Barker is the President of the Union. He testified that after the new collective agreement came into force and employees began exercising their rights under Article XV, Section 4(k), the Union moved to ensure that the rules governing its application were being followed. It also became concerned that the practice of employees giving up their vacations might be having a negative impact on their ability to perform their work, particularly from a health and safety perspective. It also wanted to ensure that employees were not being pressured by supervisors to forfeit a week's vacation as a means of reducing the need for overtime in their departments.

As indicated above, the Employer has provided a variety of information to the Union regarding employees' exercising their rights under the collective agreement. However, when the Union requested the names of the employees who had exercised their rights under Article XV, Section 4(k) in 2013, the Employer inquired of the eight employees who had done so as to whether they consented to the Employer releasing their names to the Union. Only one gave his consent. The Employer informed the Union of the name of the one employee who had consented, but refused to release the names of the other seven. The Employer's refusal to release those names to the Union has sparked the grievance.

Barker said that the Union could probably determine from the information it had who the seven employees were. However, he also testified that it would require a lot of work, a fair amount of digging, and a lot of running around.

III

I now turn to address the issues that arise for determination in this proceeding.

As I see it, the Union's request for the names of the employees who have exercised their rights under Article XV, Section 4(k) raises two distinct issues. The first issue is whether the Union can *require* the Employer to produce those names to it. The second issue arises if the answer to the first issue is in the affirmative. If the Employer is *prima facie* required to produce the names, is it precluded from doing so by the provisions of the *Personal Information Protection Act*? I propose to address these issues in order.

With respect to the first issue, there is no express provision in the 2012-2017 collective agreement requiring the Employer to post the names of those who have exercised their rights under Article XV, Section 4(k) or otherwise produce them to the Union. Further, there is no grievance outstanding where production of these names are potentially relevant to the determination of the issues arising in it.

The Union's principal argument is that it requires this information to assist it in ensuring that it fully and properly represents the employees in the bargaining unit at the Employer's operations. I can see where this information would be useful to the Union because it would then be in a position to speak to those employees and inquire as to why they decided to forfeit one week's vacation for the pay in lieu thereof. Through these conversations, it could then assess whether their was any validity to its health and safety

[redacted]

supervisors seeking to reduce overtime worked in their departments.

There has been a series of cases where employers have been required to produce

Having reached this conclusion, it is necessary to move to the second inquiry: what is the business purpose advanced by the employer for refusing the information sought by the Union? In other words, where does the employer derive its right to refuse the information sought by the union? There is no specific business rationale given. It has a policy to protect the privacy of its employees which it has applied to the union as it has with any other person who might use their addresses and telephone numbers to solicit among them. That is not a business rationale. It manifests respect for the individual privacy rights of employees. It does not advance a business purpose. The refusal to give the information to the union does not in any obvious way advance the employer's business. It is informed solely by a concern for the privacy of the individual. That consideration may be of general value, but it is not sufficient to trump the union's interest in being able to represent its bargaining constituency effectively.

The employees' privacy rights regarding the details of their names, addresses and telephone numbers are not such as to off-set the union's interest in being able to contact them readily and easily. They have accepted the union as their bargaining agent, as their collective bargaining representative. By doing so, they have conveyed to the employer and others that they want the union to speak on their behalf in their employment relations with the employer. The union is therefore ascribed the authority to communicate with them efficiently. The employees could have chosen to bargain individually with the employer; then the privacy of their phone numbers and addresses would be restricted [redacted]

bargaining unit."

(at para. 8)

Stan Lanyon, Q.C., had to review this line of cases in *B.C. Public School Employers' Association/Board of Education of School District No. 69 (Qualicum)*, (2012), 219 L.A.C. (4th) 391. The grievance before him concerned an employer refusal to produce to the union teacher-on-call dispatch information. After looking at some of these cases and some of the provisions of the Labour Relations Code, Mr. Lanyon continued:

> "Thus Sections 2, 6 and 12 form the statutory basis of the Board's policy in respect to the disclosure of the contact information for employees within the bargaining unit. However, the Employer states that a distinction should be made between information that is provided to the Union so that it can properly fulfill its statutory duty under the *Labour Code*, and the ability of the Union to negotiate additional access to other forms of document and information. It relies on the distinction set out in *Millcroft, supra*, between statutory rights and collective agreement rights:
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> > 'Rights in labour relations are acquired in two primary ways: under the Act and by agreement in collective bargaining. The rights acquired under each regime are different in quality. The rights under the Act are enabling in character. They provide the basis upon which a collective bargaining relationship can be established and maintained. They create the foundation upon which the edifice of the relationship is built. The substantive rights which a union secures for itself and the employees in a collective agreement are of a different sort. They are substantive entitlements which advance the interests of employees. They are the outcome of the exercise of the enabling rights protected under the Act. Thus, for example, union rights to sit on joint employer-employee committees, to be consulted in planning decisions, to raise grievances, to be present before, at or after disciplinary inquiries, these are the kinds of rights which a union can negotiate with an employer in a collective agreement. They are substantive rights to which the union has no entitlement, other than through the employer's agreement. In contrast, the basic rights, those protected by the Act, are not dependent upon the employer's consent. They exist independently. Their purpose is to ensure that a union is able to meet its statutory obligations, particularly its duty to represent employees in a fair and effective manner.'
>
> (para 19)

. . .

> I concur with the distinction drawn in *Millcroft, supra*, between statutory rights established under the *Labour Relations Code*, and contractual rights a trade union negotiates into a collective agreement."
>
> (at 407-408)

He then stated that:

> "However, the nature of the information arising in those circumstances has properly been characterized as 'contact information'. The Employer says what the Union seeks in this case goes beyond contact information; rather, the nature of information it seeks is solely for the purpose of 'monitoring' the administration of the collective agreement."
>
> (at 408)

He concluded that

> ". . . there is a significant difference between a demand for basic *contact information* concerning the employees of a bargaining unit and the desire of the union *to monitor* the administration of the collective agreement by the Employer. As stated in *Millcroft, supra*, statutory rights are the enabling provisions that establish and facilitate the fundamental rights that underlie the acquisition and conduct of collective bargaining. When those statutory rights and duties arise, the fundamental obligation of the Union is to ensure that all employees in the bargaining unit are fairly represented. Contact information is essential to fulfilling that role; and withholding that information is an unfair labour practice because it interferes with the Union's ability to negotiate and administer the collective agreement.
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> Conversely, a Union's substantive rights arise from the collective agreement. It is what the Employer and the Union have agreed to in collective bargaining. Many collective agreement provisions are common to all workplaces, while others are tailored to a specific workplace. In this collective agreement the provisions relating to TOC are an example of substantive rights tailored to this specific workplace – they are not to be found in the B.C. *Labour Relations Code*.

> There is no express statutory provision that permits a trade union to demand that an employer disclose all documents related to its administration of the terms and conditions of a collective agreement. For example, an employer is not compelled under the *Labour Relations Code* to provide to a Union on a weekly basis all its administrative and accounting documents in respect to the wages and benefits it pays to all its employees.
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> I conclude that the *Millcroft* and *P. Suns* lines of authority apply specifically to the provision of *contact information*; for example, the names and addresses of employees. However, these decisions cannot be read to compel an employer to provide information whose sole purpose is to assist the union in *monitoring* the terms and conditions of the collective agreement. Therefore, the B.C. *Labour Relations Code* does not compel employers to disclose documents whose whole purpose is to assist the union to *monitor* provisions of the collective agreement outside the grievance/arbitration procedure. If there is such an obligation on an Employer it must be found within the terms of the collective agreement."
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> (at 409-410)

This same distinction between statutory and collective agreement rights also formed the basis for the decision in *Maple Leaf Consumer Foods Inc.* (2008), 177 L.A.C. (4th) 86 (Solomatenko). That case dealt with a union request for a list of names of those employees whose weekly indemnity claims had been approved. With respect to a statutory basis for such a request, Mr. Solomatenko stated:

> "To begin with, there has been no allegation in this grievance that the Company has failed to provide a list of names and addresses of *all* the members of the bargaining unit. Therefore, it is not necessary to review the jurisprudence of Ontario Labour Relations Board as set out in such cases as *Co-Fo Concrete* and *Millcroft Inn* for the Board's rationale and policy considerations why an exclusive bargaining agent is entitled to that information. But, that jurisprudence does not stand for the proposition that the bargaining agent is as of right entitled to specific or specialized lists of names which are dependent upon conditions such as being in receipt of disability benefits. Absent jurisprudence or legislation to the contrary, that entitlement arises solely out of the bargain the parties have been able to reach in their collective agreement, as does every other substantive term or condition of employment."
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> (at 93)

With respect to the collective agreement, Mr. Solomatenko concluded that there was no provision in it which required the employer to produce the information to the union that it was seeking. For these reasons, he dismissed the grievance.

I now turn to apply these principles to the circumstances of the case before me. In this case, the Union is not seeking contact information for all of the employees in its bargaining unit. Instead, it is, in my view, seeking a "specialized" list of names, i.e., those who have exercised their right to forfeit one week's vacation pursuant to the provisions of Article XV, Section 4(k) of the collective agreement. In my view, the Employer's refusal to provide these names does not entail an interference with the Union's statutory right to represent the employees in its bargaining unit. Instead, it involves the assertion by the Employer that it is not obligated under the collective agreement to provide such a "specialized" list in the absence of a provision in the collective agreement requiring it to do so.

I have considered the decision in *Howe Sound Pulp and Paper Ltd.*, Award dated June 12, 2003 (S. Kelleher, Q.C.). That case concerned a union grievance objecting to the employer paying out employees who chose not to take floater holidays provided for under the collective agreement. The principal issue that Mr. Kelleher (as he then was) had to deal with was whether the grievance could proceed in light of the withdrawal or abandonment of an earlier grievance by the union. Mr. Kelleher concluded it could not with the result that the practice could continue.

A secondary issue related to the employer's refusal to provide the union with the names of the employees who took the pay in lieu of taking a floating holiday. With respect to that issue, Mr. Kelleher stated that:

> "The remaining issue concerns the Company's refusal to provide the Union with information as to which employees have taken the floater and which have not.
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> The Union argues that there is no room in the collective bargaining regime for confidential arrangements between management and employees. The Union points to Syndicat Catholique des Employes de Magasins de Quebec, Inc. v. Compagnie Paquet Ltee (1959), 18 D.L.R. (2d) 346 (S.C.C.):
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> > 'The union is, by virtue of its incorporation under the Professional Syndicates' Act and its certification under the labour (sic) Relations Act, the representative of all the employees in the unit for the purpose of negotiating the labour agreement. There is no room left for private negotiation between employer and employee.'
>
> (at 353)

> I agree with the Union. The effect of certification as explained by the courts in such decisions as Syndicat Catholique, supra, and McGavin Toastmaster Ltd. v. Ainscough et al. (1975) 54 D.L.R. (3d) 1 (S.C.C.) is that there is no room left for private bargaining. In my view it is wholly inconsistent with the principle of exclusive representation for the Employer to deny the Union the information in question."
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> (Quicklaw, at paras. 32-34)

I am not persuaded by this reasoning. In my view, it has been overtaken by the analysis in the *Millcroft Inn Ltd., supra*, line of cases and as well by *School District No. 69 (Qualicum), supra*, and *Maple Leaf Consumer Foods Inc., supra*. In order to require the production of such a "specialized" list of employees, the collective agreement must contain a provision to that effect. In this case, it does not.

I should say as well that, in my view, this is not a case about collective bargaining and the need for disclosure of relevant information pertaining to bargaining demands. This was the focus of the decision in *Hudsons Bay Company, supra*, and in that respect the Labour Relations Board of B.C. commented that:

> "In this case, the Union's right is with respect to information it needs for collective bargaining. It submits that there is an obligation to disclose information to 'foster rational, informed discussion' as part of the duty to bargain in good faith. See Insurance Council of British Columbia, BCLRB No. B138/99 and Hey-Way'-Noqu' Healing Circle for Addictions Society, BCLRB No. B414/95. We agree that contact and salary information of bargaining unit members must be disclosed as part of that duty."
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> (at para. 27)

In the case before me, there is still over two years to run in the collective agreement. No collective bargaining is taking place and no proposals have been exchanged.

Finally, some privacy legislation does speak to the disclosure of information, requiring its disclosure in certain circumstances. See the *Freedom of Information and Protection of Privacy Act*, sections 4 to 25. However, these provisions only apply to

For all of these reasons, I am of the view that there is no statutory, contractual or privacy obligation imposed upon the Employer to disclose to the Union the names of those employees who have exercised their rights under Article XV, Section 4 (k).

In light of this conclusion, it is not strictly necessary for me to address the second issue as to whether the Employer is precluded by the provisions of the *Personal Information Protection Act* from disclosing this information to the Union. However, I propose to address it because the Employer seemed prepared to disclose the information at issue in this proceeding to the Union provided that the employees concerned consented to the disclosure. In fact, it did disclose the name of the one employee who did consent. Further, the Employer has disclosed similar forms of information to the Union in the past, even though there has not been an express requirement to do so agreed to in their collective agreement.

I see the Employer's willingness to voluntarily disclose such information to the Union as a positive force in resolving workplace issues and promoting conditions favourable to the orderly, constructive and expeditious settlement of disputes. As the Ontario Labour Relations Board said in *Millcroft Inn Ltd., supra* the "employer and the union are equal bargaining partners in their collective relationships." (at para. 30). To the extent that one party has information relevant to the affairs of that relationship, that relationship benefits, in my view, and the purposes of the Labour Relations Code are fostered, if that information is also shared with the other party.

Does the *Personal Information Protection Act* preclude the disclosure of the names of those employees who have exercised their rights under Article XV, Section 4 (k) to the Union without their consent?

One provision of the Act that addresses this subject matter is Section 18 which limits the disclosure of "personal information" without the consent of the individual concerned except for certain specified circumstances. By definition "personal information" includes "employee personal information" which in turn, in my view, captures the information at issue in this proceeding. Section 18 (1) (o) in effect authorizes the disclosure of "personal information" if "the disclosure is required or authorized by law". In my view, that exception cannot apply in this case because the [redacted]

(b) the disclosure is reasonable for the purposes of establishing, managing or terminating an employment relationship between the organization and the individual."

In my view, the Employer and the Union are equal partners in the employment relationships between the Employer and all of the employees who have exercised their rights under Article XV, Section 4 (k). They both have legitimate interests in the management of those relationships. The Union has an interest in ensuring that the provision is utilized in accordance with its terms and that its use does not create health and safety issues for the individuals concerned and for the bargaining unit as a whole. I am satisfied that one of the most effective ways for the Union to address those interests is by speaking to the individual employees who have actually exercised their rights. Thus, I am of the view that the disclosure to the Union of the names of the employees who have exercised their rights under Article XV, Section 4 (k) would be "reasonable for the purposes of . . . managing . . . an employment relationship" between the Employer and the employee concerned. In my view, the Employer would accordingly be justified in disclosing their names to the Union even without their consent, on the basis of Section 19 (2) of the Act.

Having said that, I must still conclude that the grievance must be dismissed because the Union cannot *require* the Employer to disclose the names requested either under the Labour Relations Code, the *Personal Information Protection Act*, or the collective agreement.

It is so awarded.

Dated this 27th day of January, 2015.

John Kinzie

JOHN KINZIE
ARBITRATOR