Labour Relations Board
Saskatchewan

ROBIN MacNEILL, Applicant v. SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION and CANADA SAFEWAY LIMITED, Respondents

LRB File No. 151-03 & 152-03; July 21, 2005
Chairperson, James Seibel; Members: Pat Gallagher and Ray Malinowski

The Applicant:	Robin MacNeill
For the Respondent Union:	Brian Haughey and Mark Hollyoak
For the Respondent Employer:	Lynn Sanya

Duty of fair representation – Scope of duty – In certain limited circumstances on case-by-case basis, duty of fair representation may extend to seeking judicial review of an arbitration award and further appeal proceedings, however, decision to seek judicial review decision for union to make and Board will not intervene except in rare and compelling circumstances.

Duty of fair representation – Scope of duty – Board does not generally rule on correctness or efficacy of legal advice or representation provided by counsel for union in grievance handling or conduct of arbitration - Board will only review and evaluate quality of representation at arbitration in rare and exceptional circumstances.

***The Trade Union Act*, s. 25.1.**

REASONS FOR DECISION

Background and Facts:

[1] The Applicant, Robin MacNeill, filed an application alleging that the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") committed an unfair labour practice in violation of s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") on two grounds: that the Union's solicitor had improperly presented her case at arbitration; and, that, having advised the Applicant that leave would be sought to appeal her case to the Supreme Court of Canada, the leave application was filed out of time and the Court refused to grant an extension.

Section 25.1 provides as follows:

> *Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*

[2] The basic facts are not in dispute.

[3] At all material times the Union was the certified bargaining agent for a unit of employees of Canada Safeway Limited (the "Employer"). The Applicant was terminated by the Employer in April 1997 after 17 years of employment. The Union grieved the Applicant's termination and the matter was heard at arbitration in May and July 1998. The arbitration award dated January 13, 1999 reinstated the grievor to her employment. In a Judgment dated September 21, 1999 the Saskatchewan Court of Queen's Bench dismissed an application by the Employer for judicial review. In a Judgment dated September 11, 2000 the Saskatchewan Court of Appeal allowed an appeal from that decision and ordered that the matter be remitted to the arbitration board for reconsideration.

[4] The Union provided timely instructions to the solicitor handling the case on its behalf to seek leave to appeal the decision of the Court of Appeal to the Supreme Court of Canada. The Union advised the Applicant that this was to be done. Unfortunately, the solicitor did not make the application within the required time limit. Eventually, with the consent of the Union, the solicitor retained another law firm to make an application to extend the time for filing the application for leave to appeal to the Supreme Court of Canada. The application to extend time was made in May 2003 and was dismissed.

[5] Brian Haughey is an experienced staff representative for the Union and was responsible for handling the Applicant's grievance and instructing the Union's counsel. Mr. Haughey testified that he had instructed the Union's counsel to seek leave to appeal the decision of the Saskatchewan Court of Appeal in a timely matter. Mr. Haughey, who was not aware of the time limit to make such an application, said he made numerous inquiries of the Union's solicitor in following up on the instructions. After the time limit had expired, he said he received assurances from the solicitor that the

delay would not prejudice the application for leave. At the recommendation of its solicitor, the Union agreed to have another law firm prepare and make the application.

Arguments:

[6] The Applicant, who handled the presentation of her case to the Board, argued, firstly, that the Union's counsel who presented the grievance at arbitration did not present the case properly, choosing not to adduce certain evidence (the details of which we decline to describe in these Reasons for Decision) and taking a different approach, over the objection of the Applicant. Secondly, the Applicant argued that the Union was grossly negligent in failing to ensure that the application for leave to appeal to the Supreme Court of Canada was made in a timely manner. In support of her argument, she referred to the decision of the Board in *Radke v. Canadian Paperworkers Union, Local 1120*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92.

[7] Mr. Hollyoak, a staff representative of the Union, argued that the duty imposed by s. 25.1 of the *Act* did not extend to court proceedings. In the alternative, he argued that the Union ought not to be held accountable for the dilatoriness of its solicitor – the Union had made several inquiries of its solicitor as to the status of the matter. In support of his argument on the first point, Mr. Hollyoak referred to the fairly recent decision of the Manitoba Labour Board in *Bednarski v. United Steelworkers of America, Local 4095*, [2003] M.L.B.D. No. 1.

Analysis and Decision:

[8] There are several issues which we must consider, some of which have not been previously specifically addressed by the Board.

[9] The first issue, not previously considered by the Board, is whether the duty of fair representation imposed on a union pursuant to s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") extends to an obligation to seek to appeal to the Supreme Court of Canada the decision of an appellate court reversing the decision of a superior court that in turn had upheld, on judicial review, the decision of a grievance arbitrator.

[10] If so, the second issue is whether, in the circumstances of the present case, the Union fulfilled its duty of fair representation.

[11] The third issue, also not specifically previously considered by the Board, is the breadth and depth of review by the Board of the conduct of a grievance arbitration by counsel for a certified bargaining agent, where it is alleged that such conduct amounts to a failure by a union to fulfill its duty of fair representation.

[12] In the present case, the Applicant did not allege (and indeed the evidence does not support) that the Union failed in its duty by acting in a discriminatory manner or in bad faith. We have accepted that the Applicant has put forward her case on the basis of an allegation that the actions of the Union or its counsel constituted arbitrary conduct within the meaning of s. 25.1 of the *Act*.

General Principles

[13] The Board's approach to applications alleging a violation of the duty of fair representation pursuant to s. 25.1 of the *Act* was summarized in *Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93, at 71-72, as follows:

> *This Board has discussed on a number of occasions the obligation which rests on a trade union to represent fairly those employees for whom it enjoys exclusive status as a bargaining representative. As a general description of the elements of the duty, the Board has indicated that it can do no better than to quote the principles outlined by the Supreme Court of Canada in the case of Canadian Merchant Services Guild v. Gagnon, [1984] 84 CLLC 12,181:*
>
> > *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 a spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
> > >
> > > *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 employees.*

The terms "arbitrary," "discriminatory," and "in bad faith," which are used in the legislative description of the kind of conduct on the part of a trade union which is to be prevented, have been held to address slightly different aspects of the duty. The Supreme Court in Gagnon used the following comments from the decision of the British Columbia Labour Relations Board in Rayonier Canada (B.C.) Ltd. (1975), 2 CLRBR 196, at 201, to convey the distinct attributes of the duty of fair representation:

> *... The union must not be actuated by bad faith, in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favoritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*

This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:

> *Section 25.1 of The Trade Union Act obligated the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favoritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*
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> (emphasis added.)

[14] Unlike the duty of fair representation provisions in the labour relations statutes of other Canadian jurisdictions, s. 25.1 the *Act* does not specifically refer to negligence by a bargaining agent. But, by the Board's acceptance of the principles enunciated by the Supreme Court of Canada in *Gagnon*, *supra* (specifically, item 5), it has taken a broad and remedial view of the provision and determined that the duty of fair representation includes the duty to act without "serious" or "major" negligence in the representation of employees in the bargaining unit. Specific examples of this recognition by the Board include *Johnston v. Service Employees' International Union, Local 333*, [2003] Sask. L.R.B.R. 7, LRB File No. 157-02, *Woodside v. Regina Police Association*, [2000] Sask. L.R.B.R. 496, LRB File Nos. 167-99, 168-99 & 169-99 and *Leedahl v. United Food and Commercial Workers, Local 248-P*, [2004] Sask. L.R.B.R. 114, LRB File No. 030-03.

[15] In *Noel v. Societe d'Energie de la Baie James and United Steelworkers of America, et al.*, [2001] 2 S.C.R. 207, the Supreme Court of Canada referred to the relationship between the concepts of arbitrariness and negligence as follows, at 231:

> *The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible. The association's resources, as well as the interests of the unit as a*

> *whole, should also be taken into account. The association thus has considerable discretion as to the type and extent of the efforts it will undertake in a specific case.*

[16] But clearly, employees may not expect perfection from their bargaining agent in the conduct of such proceedings. In *Noel*, *supra*, at 231 and 232, in reference to the use of the phrase "serious negligence" in the Quebec legislation, the Supreme Court of Canada stated:

> *The fourth element in s. 47.2 L.C. is serious negligence. A gross error in processing a grievance may be regarded as serious negligence despite the absence of intent to harm. However, mere incompetence in processing the case will not breach the duty of representation, since s. 47.2 does not impose perfection as the standard in defining the duty of diligence assumed by the union. In assessing the union's conduct, regard must be had to the resources available, the experience and training of the union representatives, who are usually not lawyers, and the priorities connected with the functioning of the bargaining unit.*

[17] A similar sentiment was expressed by the Board in *Woodside*, *supra*, at 516:

> *Union members may not be entitled to expect perfection from their union representatives and there is certainly no guarantee that advice sought from a union representative will prove to be accurate. Nevertheless, union members are entitled to be treated honestly and in good faith.*

Whether Appellate Proceedings from Judicial Review Proceedings are within the Duty of Fair Representation under s. 25.1 of the *Act*

[18] A threshold question is whether the perfection and completion of appeal proceedings from judicial review of an arbitration award are at all within the purview of the duty of fair representation contemplated in s. 25.1 of the *Act.*

[19] In *Bednarski*, *supra*, the Manitoba Labour Board considered a similar question as to whether judicial review proceedings could ever be within the ambit of the duty of fair representation in the Manitoba *Labour Relations Act*.[1] However, the decision is based upon the decision of the Supreme Court of Canada in *Noel*, *supra*, and the

[1] R.S.M. 1987, c. L-10, s. 20.

plenary decision of the Canada Labour Relations Board in *Rousseau v. International Brotherhood of Locomotive Engineers, et al*. (1996), 96 C.L.L.C. 220-059. The Manitoba Board began its analysis with a review of those decisions. It is appropriate that we do as well in these Reasons for Decision and we acknowledge the excellent summary provided by the Manitoba Board.

[20] In *Noel*, the Supreme Court of Canada also considered the question as to whether judicial review proceedings were within the ambit of the duty of fair representation in the Quebec *Labour Code*[2]. In that case the union took a dismissal grievance to arbitration, but it was dismissed. The affected employee demanded that the union seek judicial review of the arbitration award, but the union refused to do so. Referring to the exclusive representational rights of a certified trade union, the Supreme Court held that, in an appropriate case, the duty of fair representation may extend to include judicial review proceedings, stating as follows at 233 to 235:

> *However, the duty of representation is not limited to bargaining and the arbitration process. Where the union has an exclusive representation mandate, the corresponding duty extends to everything that is done that affects the legal framework of the relationship between the employee and the employer within the company. This Court has clearly recognized that a union could be in breach of its duty of representation by failing to bring an action in nullity against an arbitration award. As the following comments by L'Heureux-Dubé J. in Centre hospitalier Régina, supra, at p. 1347, suggest, the release of the arbitration award neither terminates nor circumscribes that duty:*
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> > *In this connection I should say at the outset that a union's duty of fair representation does not cease in relation to a grievance proceeding once the grievance has gone to arbitration. It may continue even after the arbitrator's final decision ... subject to Gendron v. Municipalité de la Baie-James, supra, which held that in such a case the s. 47.5 L.C. procedure could not be applied.*
>
> *After the arbitration award is made, the union still has the exclusive right to represent the employees. As a corollary, the decision to challenge the legality of an arbitration award is still governed by the principles relating to proper performance of the duty of good faith and by the same prohibitions on acting in bad*

[2] R.S.Q. 1977, c. C-27, s. 47.2, provides as follows:

> *47.2 A certified association shall not act in bad faith or in an arbitrary or discriminatory manner or show serious negligence in respect of employees comprised in a bargaining unit represented by it, whether or not they are members.*

> *faith, in a discriminatory manner or without giving the case the appropriate consideration.*
>
> *The union may believe that at this stage, by taking the grievance to arbitration, it has applied the procedure that is routinely followed in a case of its nature. It does not have a duty to obtain a result for the employee. An unfavourable arbitration award does not create a presumption of improper performance of the duty of representation.*
>
> *How can it be determined whether the union's failure to challenge an arbitration award is a breach of the duty of fair representation?*
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> *In a case like that, the actual nature of the arguments that would be made in a judicial review application to challenge the legality of an arbitration award and asking the Superior Court to exercise its superintending power will have to be examined. This brings us back to the general principles governing judicial review. The grounds on which the validity of an arbitration award could be questioned and the power of the Superior Court to review the award invoked will vary. The inferior tribunal may have been improperly constituted, in a manner contrary to the law. It may also have acted without jurisdiction within the strict meaning of that expression, if the subject matter was not within its authority, having been assigned to another body. The arbitration board may also have committed an error that could be characterized as "patently unreasonable", and in accordance with the decisions of this Court over a period of more than 20 years, this would mean that the legality of the award could be reviewed.*
>
> (emphasis added)

[21] However, at 235 and 236 the Supreme Court also held that there are limitations that abrogate any assertion that a union must routinely seek judicial review of arbitration awards:

> *Given the day-to-day reality of managing collective agreements, the interpretation of arbitration awards, and the abundance of litigation in this area, a union cannot be placed under a duty to challenge each and every arbitration award at the behest of the employee in question on the ground of unreasonableness of the decision, even in dismissal cases. The rule is that the employer and the union are entitled to the stability that results from s. 101 L.C., which provides: "The arbitration award is without appeal, binds the parties and, where such is the case, any employee concerned...". Judicial review must therefore not be seen as a routine way of challenging awards or as a right of appeal. Accordingly, even in discipline and dismissal cases, the normal process provided by the Act ends with arbitration. That process represents the normal and exclusive method of resolving the*

> *conflicts that arise in the course of administering collective agreements, including disciplinary action. In fact, this Court gave strong support for the principle of exclusivity and finality in Weber v. Ontario Hydro, [1995] 2 S.C.R. 929, at pp. 956-957 and 959, per McLachlin J. That approach is also intended to discourage challenges that are collateral to disputes which, as a general rule, will be definitively disposed of under the procedure for administering collective agreements. While judicial review by the superior courts is an important principle, it cannot allow employees to jeopardize this expectation of stability in labour relations in a situation where there is union representation. …*
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> *Recognition of this kind of right to challenge an arbitration award would necessarily offend the fundamental principles governing relations with the employer where there is a right of exclusive collective representation. In a case where the arbitration process has been carried out, in accordance with the collective agreement, the employer is entitled to expect that a grievance that has been disposed of by the arbitrator will, as a rule, be disposed of permanently, and that the arbitration process will not be exposed to challenges that are launched without any control being exercised by its union interlocutor. As a general rule, the proper performance by the employer of the duty to negotiate and apply collective agreements must carry with it an assurance of stability in terms of the conditions of employment in its company.*
>
> (emphasis added.)

[22] In *Rousseau*, *supra*, the Canada Board considered the scope of the duty of fair representation in s.37 of the *Canada Labour Code*.[3] It held that the duty certainly continues after an arbitration award with respect to implementation and enforcement of the award, but also, in certain circumstances, with respect to seeking judicial review. The Canada Board stated, at 143,541 and 143,542, as follows:

> *Regarding this question, we consider that fair representation of employees in respect of rights under a collective agreement may, in some circumstances, involve an obligation to consider seeking judicial review of an arbitral award. Such circumstances would, we expect, be extremely rare. We do not consider that what we are now saying differs substantially from what the Board said in Gordon Newell (1987), 69 di 119 (CLRB no. 623): "In the Board's*

[3] R.S.C. 1985, c. L-2. Section 37 provides as follows:

> *37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employee in the unit with respect to their rights under the collective agreement that is applicable to them.*

> *judgment, a refusal or failure to seek judicial review is not of itself a violation of section 136.1 [now section 37]". … It should be noted, however, that in that case the Board considered that only if the collective agreement imposed a duty to take matters to judicial review would the union's duty extend so far. We do not consider that restriction to be justified by the provisions of section 37 of the Code.*
>
> *The duty owed by a union in determining whether or not to proceed with a judicial review application does not exceed that required in deciding to proceed to arbitration in the first place. Indeed, it is exactly as expressed by the Supreme Court of Canada in the Gagnon case. As indicated by this Board in Eamor, supra:*
>
> > *The union's obligation, pursuant to section 37, to represent its members in grievance matters, does not cease when the arbitration process commences… . It begins at the time the union becomes aware of circumstances which require it to perform in a representational capacity and continues until the final conclusion of the matter. In the appropriate circumstances, it may include the conduct of the union at the arbitration and/or the obligation to proceed to judicial review of the arbitration decision. Section 37 imposes an obligation on the union to make a determination regarding a judicial review application based on the same standards developed with respect to its decision not to proceed to arbitration.*
>
> *Our answer to question 2(b) is accordingly that the duty of fair representation may in some circumstances include an obligation to consider seeking judicial review of an arbitral award.*

[23] In *Bednarski*, *supra*, while the Manitoba Board addressed the same question, the circumstances were different in that the union had made a decision to file an application for judicial review of an arbitration award denying a dismissal grievance, but failed to do so within the time limit mandated by the Manitoba legislation. On the preliminary issue of whether the duty of fair representation in the Manitoba legislation[4]

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[4] Section 20 of the Manitoba *Labour Relations Act*, *supra* f.n.1, provides as follows:

> *20. Every bargaining agent which is a party to a collective agreement and every person acting on behalf of the bargaining agent, which or who, in representing the rights of any employee under the collective agreement,*
> *(a) in the case of the dismissal of the employee,*
> *(i) acts in a manner which is arbitrary, discriminatory or in bad faith; or*
> *(ii) fails to take reasonable care to represent the interests of the employee; or*

encompasses in any circumstance the obligation to seek judicial review of an arbitration award, the Manitoba Board, following the *Noel* and *Rousseau* decisions, both *supra*, held, at paragraph 4, that:

> *…[the section] does not automatically preclude, in proper but very limited circumstances, an application by an employee that the duty of fair representation may include the obligation to seek judicial review.*

[24] We take a broad remedial view of the duty placed upon the Union by s. 25.1 of the *Act* in keeping with the "modern contextual approach" to statutory interpretation espoused by the Supreme Court of Canada in *Re Rizzo Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 and s. 10 of *The Interpretation Act, 1995*,[5] adopted by this Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Pepsi-Cola Beverages (West) Ltd*., [1997] Sask. L.R.B.R. 696, LRB File No. 166-97, and *United Steelworkers of America, Local 5917 v. Jamel Metals Inc. o/a Wheat City Metals*, [2005] Sask. L.R.B.R. ---, LRB File No. 060-05 (not yet reported). Under this approach, the relevant statutory provisions of the *Act* are interpreted so as to promote the objects and purposes of the *Act* as described in s. 3, including the bargaining agent's exclusive right of representation of the employees in the bargaining unit and the concomitant duty that falls upon the bargaining agent.

[25] While s. 25.1 of the *Act* provides that "every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement," it is well established that "the grievance belongs to the bargaining agent" and employees do not enjoy an absolute right to have a grievance carried through to arbitration – the filing of a grievance of an employee's complaint is not necessarily a guarantee or representation to the employee that a complaint certainly will be advanced to arbitration (See, *Noel*, *supra*). That decision is dependent upon a number of considerations, which may

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> *(b) in any other case, acts in a manner which is arbitrary, discriminatory or in bad faith;*
> *commits an unfair labour practice.*

[5] *The Interpretation Act, 1995*, S.S. c. I-11.2, s. 10, provides as follows:

> *10. Every enactment shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects.*

include such matters as the eventual results of the investigation of the circumstances of the complaint and the likelihood of success at arbitration, the gravity of the issue involved, the preservation of time limits, the attempt to derive relative advantage in negotiating a settlement of the dispute, the financial resources and experience of the bargaining agent, the importance of the issue to the commonweal of the bargaining unit as a whole, the relationship of the complaint to matters outstanding in bargaining and many other factors (this list is not meant to be exhaustive.)

[26] By logical extension, the filing of an application for the judicial review of a grievance arbitration award is not necessarily a guarantee or representation that those proceedings will in fact be perfected and completed, and similar and other considerations will factor into the decision as to whether that step is ultimately taken.

[27] Furthermore, in our opinion, just as there may be circumstances where it is necessary for a grievance to be arbitrated as part of the duty of fair representation, so too there may be circumstances where the filing and completion of judicial review proceedings may also be part of the duty of fair representation, and again, by logical extension, of further appeal.

[28] Accordingly, adopting the reasoning in the foregoing decisions, we are of the opinion that the duty of fair representation in s. 25.1 of the *Act* may, in certain limited circumstances on a case-by-case basis, extend to the seeking of judicial review of an arbitration award and further appeal proceedings.

[29] In *Bednarski*, *supra*, at paragraph 65, the Manitoba Board enunciated certain criteria applicable to assessing allegations of breach of the duty in respect of commencing judicial review proceedings as follows:

> *(a) any "duty" imposed on a union after it has taken a grievance to arbitration and received an "unfavourable" award is no greater than the discretion which the union may validly exercise when deciding whether to take a grievance to arbitration or not, in the first instance (Rousseau, supra);*

> *(b) dissatisfaction or disappointment with the result of an arbitration award on the part of (an) employee(s) who grieved (even in a dismissal case) is not a basis upon which an employee can allege there has been a breach of the duty if the union decides, in its discretion, not to initiate judicial review;*
>
> *(c) except in extreme cases (e.g. Samperi) this Board does not function as an appellate tribunal to scrutinize the conduct of a union or its counsel during the presentation of an arbitration;*
>
> *(d) the criteria of bad faith, discrimination, arbitrariness and "reasonable care" (in a dismissal case) are still applicable but they must be assessed in a context of (i) the nature of the privative clause in Section 128 of the Act; (ii) the interests of all parties to a collective bargaining regime to certainty of result through the issuance of a "final and binding" award; and (iii) the limited grounds for judicial review, particularly the standard of "patent reasonableness"; and*
>
> *(e) the foregoing criteria are reflective of the reasoning in Noël, Rousseau and Samperi. The constant reference in those decisions to phrases such as "... in extreme cases" or "... extraordinary" reveals that any duty to undertake a judicial review is the exception to the normal rule that the duty will have been fulfilled after an arbitration award has been issued and its terms fulfilled.*

[30] We agree with this approach. We also consider it apposite to the decision by a bargaining agent not to pursue an appeal of a decision on judicial review, with the appropriate changes to these considerations pertaining to appeal versus judicial review, i.e., the correctness of the superior court decision.

[31] We agree with the observation of the Manitoba Board in *Bednarski*, *supra*, at paragraphs 66 and 67, that the decision to seek judicial review is essentially a decision for the union to make, that the Board will not intervene except in rare and compelling circumstances and that the same may be said of the decision whether to pursue further appeal. Likewise, such an application should reveal such extreme and compelling circumstances so as to establish a *prima facie* case. The Manitoba Board explained as follows:

> *So, the norm is that the decision to seek judicial review is essentially a decision for a union to make and this Board will not second guess the judgment of a union not to file for review except in rare or compelling circumstances. We recognize that unions seek legal advice on this question in virtually all cases. This*

> *deference to a union's judgment recognizes the legitimate realities that a decision to seek judicial review involves broad considerations relating to the nature of the bargaining unit and the varying interests of all employees; the costs of the proceeding; and the deference given to arbitrators' awards by the Courts. It is important for the affected community to realize that it is only in "extreme cases" that this Board will entertain an application by an employee that a union has breached its duty under Section 20 by failing to seek judicial review of an arbitration award. Yet, we cannot say that such a situation may never arise. Some examples were given in Samperi. Others might be where an arbitrator arbitrarily refused to allow a (key) witness to be called for no apparent good reason or refused an adjournment which, on any standard of reasonableness (fairness), should have been granted and which results in serious prejudice to a party in the presentation of its case. These examples reflect violations of basic rules of natural justice. If for some reason, a union does not proceed in the face of a circumstance that "cries out" for judicial review then an employee has the right to come to the Board and argue that such a judicial review application ought to have been filed and that the failure to take this step by its exclusive representative constituted a breach of the standards in Section 20.*
>
> *The extreme or exceptional circumstances alleged by an applicant should be revealed on the face of a Section 20 application, thereby enabling the Board to assess whether a prima facie case has been established either on a review of the application itself or at the outset of a hearing. This is consistent with the Board's existing policy on Section 20 applications.*

[32] In our opinion, it is also the norm that the decision to seek appeal from a decision on judicial review is essentially also a decision for a union to make and the Board will not second guess the judgment of a union not to file an appeal except in exceptional or compelling circumstances.

The Extent of the Board's Review of the Conduct of Arbitration Proceedings

[33] Just as the Board does not rule on the merits of a grievance or an arbitrator's award, neither does it rule on the correctness or efficacy of a legal opinion obtained by a union regarding a grievance nor on the legal advice or representation provided by counsel for a union in the handling of a grievance or conduct of an arbitration. It is only where the Board finds that the union's handling of the grievance was arbitrary, discriminatory or in bad faith that it will intervene and become involved in the merits.

[34] In *Samperi v. Canada Air Line Flight Attendants Association et al.,* [1982] 2 Can. L.R.B.R. 207, the Canada Board dismissed an application seeking an order that the union had breached its duty of fair representation by not taking a case to judicial review based upon the quality of representation provided by the union during the arbitration hearing. The Canada Board held that it was not appropriate to investigate and evaluate the quality of representation, stating as follows at 214:

> *It would be a clear case of the tail wagging the dog if this Board were to effectively quash arbitration awards because we disapproved of the manner in which a union presented a grievance at arbitration. We do not consider it to be within the purview of our role or responsibility to evaluate the competence of union representatives or their counsel. Nor do we consider it to be compatible with the public policy purposes and objectives of party controlled compulsory grievance arbitration as a substitute for mid-agreement work stoppages expressed in section 155 of the Code (see the discussion in James E. Dorsey, 'Arbitration Under the Canada Labour Code: A Neglected Policy and an Incomplete Legislative Framework' (1980), 6 Dalhousie L.J. 41). The duty of fair representation has a role under the Code but it must have its limits. That limit falls short of an avenue of appeal from arbitral decisions based upon a judgment by this Board's legal and non-legally trained members about the competence and performance of union representatives and their counsel.*

[35] More recently, in *Presseault v. International Brotherhood of Locomotive Engineers and VIA Rail Canada Inc*., [2001] C.I.R.B. No. 138, the Canada Industrial Relations Board, after referring to the well-known principles enunciated in *Gagnon*, *supra*, observed as follows at paragraphs 32 and 35:

> *The Board does not sit in appeal of a union's decision, nor will it substitute its opinion or second-guess the union's assessment of a particular situation. It is not a tribunal of last resort, intended to deal with union members who are disgruntled over the results of the union's success at arbitration. A complainant must be able to persuasively demonstrate, in a timely fashion, that the union acted in a manner that was arbitrary, discriminatory or in bad faith.*
>
> *. . . .*
>
> *In deciding whether to intervene, the Board will consider the union's level of sophistication, its resources and its expertise. The Board will be more demanding if a union has the means to rely on experienced and competent representatives and to seek*

> *independent legal opinions in order to guide its decisions. Disputes between a union member and the union about the quality of the legal opinion or its counsel are not within the realm of the Board's jurisdiction, for that would be to second-guess the opinion of a competent professional. Whether the union member agrees or not with that opinion does not mean that the opinion is invalid, or that the union should not have considered it.*

[36] We agree with the position taken by the Canada Board. This is not to say that the Board will never review and evaluate the quality of representation at arbitration (one example might be where the representative was intoxicated or other egregious conduct by counsel or the arbitrator), but such circumstances will be rare and exceptional. No such circumstances are in evidence in this case.

[37] For the foregoing reasons, the application is dismissed. However, we do note that, in the reasons for judgment by the Court of Appeal, the Court remitted the matter back to the arbitration board for reconsideration of some other remedy other than reinstatement and to our knowledge this has not been done and remains an open issue.

[38] Board Member, Ray Malinowski, dissents from these Reasons for Decision with written reasons to follow.

DATED at Regina, Saskatchewan, this **21st** day of **July, 2005**.

LABOUR RELATIONS BOARD

James Seibel,
Chairperson

DISSENT OF RAY MALINOWSKI

[1] It is my opinion that the Applicant's claim should succeed in that the Union failed to fairly represent the Applicant.

[2] The Union gave the Applicant a definite undertaking that it supported her position and undertook to seek an appeal to the Supreme Court of Canada.

[3] The Union failed to follow through in a timely fashion and is claiming that, because the lawyer it hired was the tardy link, the Union is not responsible. The Union is responsible for the delay and the lack of action on behalf of the Applicant. The tardy and negligent actions by the Union (and its lawyer) are evidenced throughout the Applicant's case. Representation for the Applicant was arbitrary – it ignored delays and requests for follow-through that resulted in actions in the Applicant's file being ignored, delayed, and misplaced.

[4] Representation on behalf of the Applicant was discriminatory as marked by unjust treatment in the fact that the Union knew its lawyer was delaying and chose not to act to ensure matters were proceeding in a timely and professional fashion normally afforded to other union members. The Union is responsible for failing to fairly represent the Applicant by failing to bring the matter to the Supreme Court of Canada in time. The delays and negligence were discriminatory and arbitrary in violation of s. 25.1 of the *Act*.

DATED at Regina, Saskatchewan, this **22nd** day of **July, 2005**.

LABOUR RELATIONS BOARD

Ray Malinowski,
Board Member