

**The Labour Relations Board
Saskatchewan**

**D.M., Applicant v. UNITED STEELWORKERS OF AMERICA, LOCAL 5890 and
IPSCO INC., Respondents**

LRB File No. 046-05; November 28, 2006
Vice-Chairperson, Angela Zborosky

The Applicant: D.M.
For the Respondent Union: Neil McLeod, Q.C.
For the Respondent Employer: Larry LeBlanc, Q.C.

Duty of fair representation — Practice and procedure — Applicant's substantive complaints against union essentially complaints of discrimination on basis of disability and same complaints as those made in applicant's human rights complaint - Saskatchewan Human Rights Commission empowered to adjudicate complaints and suitable alternative remedies available through human rights proceedings - Board defers jurisdiction over applicant's substantive complaints to Saskatchewan Human Rights Commission and adjourns duty of fair representation application *sine die*.

Duty of fair representation — Practice and procedure — Nature and extent of applicant's disability, if any, could determine both level and type of assistance union must provide to applicant to meet duty of fair representation — Prior determination on disability and accommodation by Saskatchewan Human Rights Commission essential to Board's analysis of applicant's procedural complaints in duty of fair representation application — Board defers jurisdiction over applicant's procedural complaints to Saskatchewan Human Rights Commission and adjourns duty of fair representation application *sine die*.

The Trade Union Act, ss. 18(1) and 25.1.

REASONS FOR DECISION

Background:

[1] On March 11, 2005, **D.M.** (the "Applicant") filed an application under s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "Act"), claiming that the United Steelworkers of America, Local 5890 (the "Union") failed to fairly represent him

competently and failed to take a grievance filed against his employer, Ipsco Inc. (the "Employer"), to arbitration after promising to do so.

[2] Attached to the application was a summary of facts relied on by the Applicant to support his position that the Union failed to represent him fairly. In essence, the Applicant alleges that he suffers with the disabilities of addiction and depression and that these disabilities resulted in a denial of sick leave benefits and his improper termination by the Employer. The Applicant's summary included the following claims against the Union:

- *The Union forced him to sign a conditional reinstatement agreement against his wishes and while not of sound mind;*
- *The Union discriminated against him and violated his human rights by forcing him to sign a conditional reinstatement agreement (which was not within the Employer's right to require and which was not within his ability to live up to) which in effect signed away his rights for representation, all because of his disability;*
- *The Union did not provide him with options to return to work in December of 2003 other than through a conditional reinstatement agreement;*
- *The Union failed to take his termination grievance to arbitration after promising to do so, and the Union allowed itself to be blackmailed by the Employer through payment of his sick leave benefits in return for withdrawing his grievance;*
- *The Union discriminated against him by not representing him in his best interests and by not representing him with competence;*
- *The Union discriminated against him by not believing that his addiction is a disability.*

[3] The Applicant's summary of facts also contained certain claims against the Employer. They included:

- *The Employer violated his confidentiality, right to privacy and his human rights through the disclosure of his medical condition by the EAP program to the Employer's personnel director, all of which led to him signing the conditional reinstatement agreement and his eventual termination;*

- *The Employer cut off his sick leave benefits in November 2003 yet did not declare him fit to return to work;*
- *The Employer violated his human rights by not allowing him to return to work and by forcing him to sign a conditional reinstatement agreement in circumstances where he had not been suspended or faced any job action, and when he had no control over his disease, having not had the opportunity to complete treatment for drug addiction;*
- *The Employer violated his human rights by improperly suspending him without pay or sick benefits after he failed a drug test in June 2004 and then by using payment of sick benefits to get the Union to drop a grievance concerning his termination;*
- *The Employer improperly terminated him in September 2004, after indicating it would not do so and after his successful completion of treatment; and*
- *The Employer failed to accommodate his disability by not allowing him to get required treatment*

[4] On April 15, 2005, the Union filed a reply to the application in which the Union took the position that it did not fail to represent the Applicant fairly. The Union indicated that the Applicant had not demonstrated to the Union that he had a disability of drug and alcohol dependency and had not provided any medical documentation substantiating alcoholism or drug addiction. The Union stated that it had investigated the allegations of the breach of confidence with respect to the Applicant's medical information and found that the allegations were unsubstantiated. The Union denied the allegation that it had not counseled the Applicant with respect to his options for returning to work — the conditional reinstatement agreement was reviewed with the Applicant and the Applicant did not take issue with it until after he had been terminated. The Union further stated that it decided not to proceed with a grievance on behalf of the Applicant over his termination only after a thorough investigation and assessment and after review of the decision by the membership. Lastly, the Union denied that it accepted payment of the Applicant's sick leave benefits in return for abandoning the termination grievance.

[5] Following a pre-hearing held on July 7, 2005, the Applicant filed an additional summary of facts and allegations to support his application. This summary includes much of the same information as provided in his application, although it also contains the following allegations against the Union:

- *The Union failed to fairly represent him by not asking any pertinent questions regarding the representation of his grievances;*
- *The Union failed to represent him in a genuine fashion by (i) ignoring the statement of facts he provided when at a grievance meeting with the Employer; and (ii) meeting with him for only a half hour prior to the grievance meeting, during which time the Union's representative accused him of falsehoods and swore at him;*
- *The Union failed to represent him with integrity or competence by (i) confusing issues; (ii) not providing credible counsel; (iii) being lazy or incompetent in requiring him to sign the conditional reinstatement agreement that was not within the Union's right to have him sign; (iv) failing to do due diligence on the drug screening program and failing to force the Employer to adhere to the program; and (v) failing to get his sick leave benefits or investigate whether he had received them or not;*
- *The Union was grossly negligent (i) by failing to investigate the breach of privacy concerning his medical records; (ii) in the manner in which it dealt with his termination and failed to show support for him in the presence of the Employer; (iii) by failing to go to arbitration; and (iv) by disregarding information given to it and failing to advocate for him; and*
- *The Union acted in bad faith and in a discriminatory manner in dealing with him by (i) failing to return phone calls; (ii) hanging-up on him; (iii) slandering him at union membership meetings through accusing him of lying and by calling him names; (iv) lying to him about the status of his sick pay, making an agreement with the Employer to a reduce his benefits, and refusing to go to arbitration concerning those benefits; (v) accusing him of heinous acts while in treatment; and (vi) while at the membership meeting, suggesting he was not a member in good standing before allowing him to be heard, disallowing him the opportunity to answer members' questions and disregarding the members' wishes to have another meeting where a professional could educate the membership about drug addiction.*

[6] On November 19, 2004, the Applicant filed a complaint with the Saskatchewan Human Rights Commission in which he alleged that the Employer discriminated against him in the terms and conditions of his employment because of his disability. Specifically, the Applicant complained that the Employer discriminated against him by requiring him to sign a last chance agreement and by terminating his employment. He asserted that the Employer refused to continue to employ him because of his disability and that the Employer should have accommodated his disability as required by *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 (the "Code-").

In his human rights complaint the Applicant also alleged that the Union had discriminated against him by refusing to take his issue to arbitration, which amounted to discrimination in relation to employment because of his disability, also contrary to the *Code*.

[7] The application came before the Board for hearing on December 20, 2005. At that time, the Board asked the parties to address the preliminary issue of whether the Board should defer its jurisdiction over the application to the Saskatchewan Human Rights Commission.

[8] These Reasons for Decision address the preliminary issue.

Facts:

[9] The facts were presented on this application through counsel for the Union and through the Applicant, without the testimony of witnesses. While many of the facts underlying the dispute itself are in contention, the nature of the dispute is not. In situations where the Board is determining whether deferral to another statutory tribunal or to arbitration is appropriate, it is only necessary to determine and assess the nature of the dispute and this assessment may be made on the basis of the information contained in the pleadings and in any documents the parties provide to the Board) In addition to the pleadings, the parties provided us with copies of relevant documents in the human rights proceedings taken by the Applicant, including his complaint, correspondence from the Saskatchewan Human Rights Commission to the Union outlining the basis of the Applicant's complaint and the responses of the Union and the Employer to the human rights complaint. The information contained in these documents and in the pleadings is accepted by the Board in the form it was presented for the purpose of determining the preliminary issue.

[10] The Applicant was employed with the Employer in a variety of positions from 1980 until he was terminated on September 23, 2004. The Applicant stated that his drug use started in early 2003 but had spiraled out of control when, in September 2003,

See: *Administrative and Supervisory Personnel Association v. University of Saskatchewan*, [2005] Sask. L.R.B.R. 541, LRB File No. 070-05 and *Metz v. Saskatchewan Government and General Employees Union and The Government of Saskatchewan*, [2003] Sask. L.R.B.R. 28, LRB File No. 164-00.

he went to the Employer's EAP for assistance. He believes that the contact person, Ms. Deters, took him to the Employer's personnel director, Mike Carr, and breached confidentiality by disclosing his condition to the Employer. He stated that he was then placed on sick benefits while he attended treatment with a private counselor. He also indicated that he went to an in-patient treatment center on November 7, 2003, however, he did not complete the treatment program at that time. The Applicant stated that, on November 21, 2003, the Employer cut off his sick benefits but would not indicate he was fit to return to work.

[11] The Employer's version of events differs from the Applicant's. The Employer stated that, on September 22, 2003, the Applicant was absent from work without leave and the Employer therefore advised its medical department that a discipline hearing would be required upon his return. Late that afternoon, the personnel director, Mr. Carr, received a phone call from Ms. Deters, the Employer's health nurse, requesting that she and the Applicant meet with Mr. Carr on an urgent matter. At this meeting, the Applicant acknowledged that he had been absent without leave and indicated that he had been arrested the day prior and had been unable to contact the Employer because he had no access to a telephone while spending the night in jail. He also indicated he had been charged with a criminal offence and that he was struggling with drug abuse. The Applicant requested assistance to determine whether he was suffering from an addiction. The Employer indicated that the Applicant was offered union assistance but declined. Mr. Carr advised the Applicant that his absence without leave would be subject to discipline but that the Employer would provide assistance to address the addiction issue. The Employer indicated that the disciplinary process relating to the Applicant's absence would be held in abeyance until his treatment and counseling were completed. The Employer also indicated that it advised the Applicant that, given the admission of the abuse of illegal drugs and the safety sensitive nature of his employment, his continued employment would have to be subject to certain terms and conditions in accordance with the Employer's Alcohol and Drug Screening and Treatment Program Protocol. The Employer stated that the Applicant indicated his acceptance of those terms and conditions and expressed gratitude.

[12] The Employer also stated that, at this meeting, the Applicant was advised that he would be provided with an immediate mandatory referral to an addictions

counselor for assessment and placed on weekly indemnity sick benefits. The Applicant was also advised that he would be required to abstain from the use of substances of addiction, follow recommendations of the addictions counselor and complete the recommended treatment plan. The Employer stated that the Applicant proceeded with the assessment process, participated in counseling and was diagnosed with an addiction to drugs. The Employer stated that the Applicant commenced a 12-step program but, when he attended for in-patient treatment in November 2003, he was ejected part way through the program for violating the rules of the program. The Applicant stated that he "self-discharged" prior to the completion of the program.

[13] The Employer stated that at the end of November 2003 the Applicant indicated that he wanted to return to work, but the Employer had concerns about his fitness for work and risks associated with him returning to safety sensitive work. The Applicant met with representatives of the Employer on December 1, 2003 and the Employer advised him he had a right to union representation, which he declined. The Employer stated that they had a further discussion about the Applicant's treatment and his inability to complete the in-patient treatment program. The Employer stated that the Applicant was advised he could return to work if he entered into a conditional reinstatement agreement and suggested that his counselor and a representative of the Union should be involved.

[14] A meeting was held on December 5, 2003 with representatives of the Employer and the Union, the Applicant and his counselor. The Employer stated it advised the Union's representative and the Applicant's counselor of the terms and conditions under which the Applicant's employment would continue. These conditions were set by company policy and included attending work regularly, abstaining from use of illegal narcotics, participating in a 12-step program, following all treatment recommendations of his counselor, contacting the medical department each month to advise of any conditions threatening abstinence, keeping the Employer informed of treatment progress for 24 months and being subject to mandatory random drug screening for a period of 24 months. These conditions were set out in a conditional reinstatement agreement that the Applicant signed on December 5 or 6, 2003. The Union and the Applicant disagree about whether the Union properly explained the agreement to the Applicant and advised of other options, if any, for returning to work.

The Union stated that the Applicant expressed no concerns about the agreement at that time. The Applicant returned to work on December 10, 2003.

[15] The Employer stated that, on June 11, 2004, the Applicant underwent a random screening and tested positive for drug use. Upon receiving those results on June 15, 2004, the Employer declared the Applicant unfit for duty and he was suspended indefinitely. The Applicant stated that he was cut off sick leave benefits at this time. The Employer stated that a meeting was held on June 24, 2004 with the Applicant and representatives of the Union at which time the Applicant admitted to using illegal drugs but indicated his wish for further in-patient treatment. The Employer stated that termination was the usual consequence for a violation of the conditional reinstatement agreement but that, on the request of the Union, the Employer would hold any disciplinary decision in abeyance until the Applicant could complete further treatment.

[16] The Applicant completed a three-week in-patient treatment program on September 10, 2004. At a meeting held on September 23, 2004 with the Applicant and representatives of the Employer and the Union, the Employer explained that it had reviewed the matter and determined that the Applicant's employment would be terminated for just cause related to a breach of the terms and conditions of the conditional reinstatement agreement, specifically, that the Applicant failed to abstain from the use of illegal narcotics by testing positive on June 11, 2004, that he failed to follow the treatment recommendations of his addiction counselor and that he had not advised his counselor or the Employer's medical department of any conditions threatening abstinence. The Employer also took the position that the Applicant's failure to accept responsibility for recovery had damaged the employment relationship and his behaviour posed an unacceptable risk in the workplace.

[17] It appears that, following the termination of the Applicant, the Union filed a grievance on his behalf. The Union took the matter through the grievance procedure but at some point determined not to proceed to arbitration of the grievance. The Union stated that it made this decision following a thorough investigation. This decision was subsequently reviewed at a union membership meeting in November 2004 and the decision not to proceed to arbitration was upheld.

[18] The Union stated that it was not aware that the Applicant suffered from alcoholism and drug addiction until he stated so following the termination of his employment in November 2004 and that the Union had never received medical information in support of the Applicant's statements.

[19] With regard to the Applicant's sick leave benefits, the Union stated that sick leave benefits should be available if the Applicant attended for treatment during the relevant time, but that the Applicant has not responded to the requests of the Union to provide proof of such attendance. The Union maintained that the offer of the Employer to pay sick leave benefits was not exchanged for the Union dropping the Applicant's termination grievance.

[20] The Union indicated that the reasons it decided not to proceed to arbitration with the Applicant's grievance were: (i) the Applicant had not been honest with the Union or the Employer; (ii) the Applicant was evasive about the truth of his condition and his commitment to deal with the condition; and (iii) the Applicant violated the conditional reinstatement agreement by not advising the Employer of his set back until it was discovered through random screening. The Union maintained that the Applicant has not demonstrated to the Union that he suffers from a disability and has not provided it with medical documentation substantiating same.

[21] As previously stated, the Applicant filed a complaint with the Saskatchewan Human Rights Commission on November 19, 2004 alleging discrimination against both the Employer and the Union, on the basis of disability. At the hearing of this matter, the Union provided the Board with a copy of correspondence sent by the Saskatchewan Human Rights Commission to the Union dated December 15, 2004 which provided notice to the Union of the Applicant's complaint against it and asked for the Union's response. The letter itself provides more detail of the Applicant's complaint against both the Employer and the Union. With respect to the allegations against the Union, the Saskatchewan Human Rights Commission provided further specifics, which may be summarized as follows:

- *The Applicant believes the Union has not represented him adequately because: (i) the Union did not made clear to him the reasons why he had to sign the conditional reinstatement agreement (no job action was pending against him); (ii) the Union did not act in his best interest when it had him sign the agreement when there were other alternatives; (iii) the Union did not counsel him on options other than the agreement (no "due diligence"); and (iv) the Union told him the agreement was a standard form and not to worry about what it said; and*
- *The Union failed to properly represent him in accordance with its duty to do so, by: (i) agreeing to accept payment of the Applicant's sick leave benefits in return for dropping his termination grievance; and (ii) refusing to take the Applicant's termination grievance to arbitration.*

Arguments:

[22] The Union argued that the Board should defer its jurisdiction over the entire duty of fair representation application to the Saskatchewan Human Rights Commission. Counsel for the Union referred to the *Metz* case, *supra*, as authority for the proposition that the Board should defer to the Saskatchewan Human Rights Commission in circumstances where the complaint of the Applicant is essentially the same as that contained in the duty of fair representation. The Union urged the Board to defer the Applicant's substantive complaints to the Saskatchewan Human Rights Commission on the same basis as it did in *Metz*. The Union argued that, although the Board in *Metz* retained jurisdiction over what would be considered the "procedural" aspects of the claim, the Board should in this case defer the procedural complaints to the Saskatchewan Human Rights Commission as well.

[23] Counsel pointed out that the Applicant seeks an order that the Union proceed to arbitration. The Union argued that the Board should not hear the Applicant's procedural complaints because the only Board remedies for such violations are orders of costs or damages to be paid by the Union, a remedy not sought by the Applicant in these proceedings. In addition, where the issues of representation principally involve a claim that the Employer failed in its duty to accommodate (and the Union failed in its obligations to assist in achieving an accommodation), all the matters should be dealt with in the context of the human rights proceedings.

[24] The Union also argued that the Board should defer both the procedural and substantive complaints to the human rights process because, for either type of complaint to succeed, there must first be a determination that the Applicant suffered a

disability protected by the *Code*. At the root of the Applicant's duty of fair representation claim is that the Union should have recognized that he had a disability and that its failure to do so tainted the manner in which the Union proceeded to handle his workplace problems. Those alleged workplace problems include the failure of the Union to prevent him from signing the conditional reinstatement agreement, the failure of the Union to recognize features leading to relapse and the failure of the Union to grieve the termination by the Employer on the basis it had no right to terminate him for actions resulting from his disability, all of which are contrary to human rights principles. In essence, the Applicant's argument, even in relation to his procedural complaints, is that there are certain things the Union should have done or processes it should have followed, all because of the Applicant's disability. In the Union's view, the Board cannot separate the substantive issues from the procedural issues because the Applicant identifies the Union's primary deficiency as its failure to identify and properly respond to his disability, in accordance with human rights principles. In these circumstances, the Board would be unable to assess process issues in isolation from the substantive issues. In order to determine the process issues in question, the substantive issues which first require determination are whether the Union ought to have come to a different conclusion concerning the issue of whether the Applicant was disabled and whether the Applicant deserved some other form of accommodation by the Employer. These are the substantive issues that the human rights proceedings would consider if the Board defers all the substantive issues in the duty of fair representation application to the Saskatchewan Human Rights Commission.

[25] Prior to making argument on the preliminary issue, the Applicant suggested that he would drop the human rights complaint against the Union in favour of proceeding with the duty of fair representation application before the Board believing he could obtain the same remedy against the Union as he could through the human rights proceedings. He also advised that, during a break at the hearing, he spoke to a representative at the Saskatchewan Human Rights Commission who he said suggested that he proceed in this manner in order to get the Union to take his case to arbitration or get the Union "on his side" at the human rights hearing and that taking this position would allow the Board to immediately proceed with the duty of fair representation hearing on its merits. When it was explained to the Applicant that the Board would need to address the preliminary issue of deferral whether or not he withdrew his human rights

complaint against the Union, the Applicant proceeded to make argument on the issue of deferral.

[26] The Applicant argued that his claim in his duty of fair representation application centers around the issue of the Union's failure to represent him contrary to s. 25.1 of the *Act* and not whether he has a disability or not. He argued that the failure of the Union to properly represent him at grievance meetings with the information available to it and the Union's failure to proceed to arbitration bring his claim squarely within s. 25.1 and the fact that he has a disability has no bearing on those issues. Similarly, his claims that the Union did not acted genuinely, that it lied and acted capriciously and with gross negligence, have nothing to do with his disability. The Applicant stated that examples of the failure to represent include the failure to advise of options other than a conditional reinstatement agreement for returning to work, the failure to force the Employer to abide by its drug and alcohol policy, the disregarding of information he gave the Union, the Union allowing itself to be blackmailed with regard to his sick leave benefits and the failure to return his phone calls and hanging up on him. The Applicant stated that he never asked the Union to look at his drug addiction as a basis for representing him in a certain way. His problem with the conditional reinstatement agreement is a procedural one. He says that, because the Union is his bargaining agent, he cannot be a party to any agreement with the Employer or that it was somehow improper for him to be required to comply with a treatment plan contained in an agreement between the Union and the Employer

[27] The Applicant argued that the remedies he seeks from the Board include an order that the Union represent him fairly, that the Union represent him at the Saskatchewan Human Rights Commission hearing, that the Union proceed with his termination grievance to arbitration or at least to the third step of the grievance procedure and that the Union file grievances on the issue of payment of sick leave benefits and the alleged breach of trust.

[28] In response, the Union submitted that any issues concerning the conditional reinstatement agreement and the Employer's ability to rely on it all deal with the human rights issue of accommodation and that the only way it could be challenged at arbitration is on human rights principles and not the procedure followed by the Union

in entering into the agreement. The Union believes the Applicant's primary concern with the agreement is that he should not have been required to enter into it because of his disability.

[29] Counsel for the Employer made no submissions on the preliminary issue.

Relevant statutory provisions:

[30] Relevant statutory provisions are as follows:

18 The board has, for any matter before it, the power:

to defer deciding any matter if the board considers that the matter could be resolved by arbitration or an alternative method of resolution;

25.1 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.

Analysis:

[31] The preliminary issue that the Board must determine is whether it should defer this matter, or any portion of it, to the Saskatchewan Human Rights Commission. It is apparent that the Board has jurisdiction in a general sense over the subject matter of the Applicant's application in relation to his claim against the Union that the Union failed to fairly represent him in connection with the conditional reinstatement agreement he entered into and the grievance concerning his termination of employment. In our view, it appears that the Applicant alleges that he entered into the conditional reinstatement agreement and was terminated as a result of the Union's discrimination against him because of his disability. Also, the Applicant alleges that the Union discriminated against him by failing to advance his termination grievance to arbitration.

[32] The analysis of the Board in *Metz, supra*, is very helpful in making a determination on this application although, because of the differences in the nature of

the dispute and the stage at which the Applicant finds himself in the human rights proceedings in this case, we come to a slightly different result. It is therefore necessary to review the Board's reasoning in *Metz* in some detail.

[33] The Board, in *Metz, supra*, first examined the Union's duty of fair representation under s. 25.1 of the *Act*. At 37 through 39, the Board stated:

[39] When the Board considers a claim that a union has failed to fairly represent an employee, the Board measures the conduct of the Union against the standards set out in s. 25.1 of the Act, that is, did the Union conduct itself in a manner that demonstrated bad faith, discrimination or arbitrariness. The elements that constitute "bad faith, discrimination or arbitrary treatment" have been described as follows by our Board and other labour relations boards:

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 favouritism. 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 (Rayonier Canada (B.C.) Ltd., (1975), 2 CLRBR 196, at 201).

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 favouritism. 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 it (Ward v. Saskatchewan Union of Nurses and South Saskatchewan Hospital Centre, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88).

[40] In Radke v. Canadian Paperworkers Union, Local 1120, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, the Board pointed out that the inquiries concerning bad faith and discrimination require the Board to assess the presence of improper motives or discriminatory impact of the Union's decisions without inquiring into the quality of those decisions. However, when the Board is considering whether a Union has treated the Applicant in an arbitrary fashion, it will assess the quality of the Union's decisions at least to the extent that the Board will determine whether the Union has acted without serious negligence. As explained in Radke, supra, at 64, the overall obligation on the Union requires it to:

... act honestly, conscientiously and without prejudice or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.

[41] As well, the duty of fair representation has both procedural and substantive elements. That is, the Board will examine both the procedures adopted by the Union in representing the Applicant and the outcome of the representation against the standards set out in s. 25.1. On most occasions, if the outcome of the representation is favourable to the Applicant, the procedural elements will not be found to be wanting.

[42] However, this is not always the case. For instance, in Gagnon v. Cartage and Miscellaneous Employees' Union, Local 931 et al. (1992), 88 di 52, the Canada Labour Relations Board found that the outcome of the union's representation, that is, a decision not to proceed with a termination grievance, was made

following serious investigation and on legal advice, and was not a violation of the duty of fair representation, while the steps taken by the union in processing (or, better put, not processing) the Applicant's grievance did constitute a breach of the duty of fair representation. At 74, the Board summarized its findings as follows:

In conclusion, the evidence reveals that Mr. Gagnon did not receive this minimum representation to which he was entitled from his union. Its inaction or superficial action until November 1990 shows, in our opinion, such a total abdication of its responsibilities that the problem is not one of simple communication, but rather a lack of representation. The Board therefore allows this part of Mr. Gagnon's complaint.

What of the subsequent abandoning of the grievances? On this question, the Board does not see how it could conclude that the union breached its duty of fair representation in deciding to withdraw Mr. Gagnon's grievances on the eve of their hearing at arbitration.

That decision followed the serious investigation conducted by Mr. Lehrer and was taken on his recommendation. Moreover, counsel for the complainant himself acknowledged, during his argument, the validity of the legal opinion on which the union based its decision not to proceed to arbitration.

It may seem paradoxical to find the processing of certain grievances contrary to the Code and at the same time find their eventual abandonment consistent with the Code. This contradiction is merely apparent. The right to representation is of an ongoing nature; however, it does not carry an obligation for a union to refer all grievances to arbitration. It must, however, address them. In the instant case, only after a serious examination of them, could the union have abandoned them without violating the Code. Had it decided not to pursue them in as nonchalant a manner as it displayed earlier, it would have unquestionably violated the Code as well. It is not the decision to drop per se that offends the Board, but rather the way in which the decision has been made.

The real paradox, however, as we are well aware, is telling the complainant that he was not the victim

of poor representation when the decision was made to abandon his grievances.

[43] In Gagnon, supra, the remedy awarded by the Canada Labour Relations Board consisted of reimbursement of expenses, including legal fees, incurred by the applicant in his efforts to obtain union representation.

[emphasis added]

[34] The Board in *Metz, supra*, determined that the application before it consisted of both procedural and substantive complaints in relation to the union's duty of fair representation. Those that were considered to be "procedural" in nature related to the process the union used to consider the applicant's workplace problems and they included a refusal to return phone calls and the delay in filing grievances or in processing the grievances. On the other hand, those that were characterized as "substantive" complaints included matters such as the settlement related to accommodation, the proposed financial settlement and the settlement of the grievances. The Board noticed that in the *Metz* case the Saskatchewan Human Rights Commission had already determined that the applicant had been accommodated into a job and that it would not proceed to a tribunal hearing because it approved of the financial settlement proposed by the union and employer during the grievance procedure. The Board therefore found, at 40, that it was faced with a situation where "one statutory tribunal, the Human Rights Commission, has already considered and ruled on a good portion of the matter that is currently before this Board."

[35] In *Metz, supra*, the Board was required to determine whether the substantive portion of the claim before the Board should be deferred in favour of the Saskatchewan Human Rights Commission. In order to do so, it was necessary to examine the law concerning overlapping jurisdiction and reach a certain conclusions. The Board stated at 40 through 42:

[52] In Brown v. Westfair Foods Ltd., [2002] 213 D.L.R. (4th) 715 (Sask. Q.B.), Ball J. summarized the state of the law on the question of overlapping statutory jurisdictions as follows at paragraph 80:

Given the judicial authorities cited above, it is fair to say that it remains unclear in any particular case whether a statutory tribunal or an arbitrator has

exclusive, paramount, or concurrent jurisdiction over a dispute in a unionized workplace. If the contest is between court action and labour arbitration, the exclusive forum is labour arbitration (Weber v. Ontario Hydro; New Brunswick v. O'Leary, *supra*; St Anne Nakawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R. 704 and a multitude of other authorities). Paradoxically, if the contest is between court action and a statutory tribunal other than labour arbitration, the court has a shared or concurrent jurisdiction with the statutory tribunal (Kolodziejski v. Auto Electric Service Ltd., *supra*). Finally, if the contest is between labour arbitration and another statutory tribunal (as it is in this case), a tribunal's jurisdiction over a matter will be exclusive if that is what the legislature intended (Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners, *supra*). On the other hand, the jurisdiction of a tribunal established under The Human Rights Code in respect of fundamental human rights" is concurrent (Cadillac Fairview, *supra*), the jurisdiction of a tribunal established under The Occupational Health and Safety Act, 1993 in respect of rights related to workplace safety is "paramount" (Prince Albert (District Health Board), *supra*) and the jurisdiction of a tribunal established under The Labour Standards Act in respect of other employment rights is concurrent if, in the court's view, the employee cannot succeed by grieving under the collective agreement (Dominion Bridge, *supra*).

[53] *In* Cadillac Fairview Corp. v. Saskatchewan (Human Rights Commission) (1999), 173 D.L.R. (4th) 609 (Sask. C.A.), **the Court held that a complaint before the Human Rights Tribunal takes priority over a claim that could be dealt with under The Trade Union Act where the essence of the dispute is an alleged human rights violation.** In the Cadillac Fairview case, *supra*, employees had filed a complaint of sexual harassment with the Human Rights Commission. The Employer argued that the employees ought to have filed grievances under the "no discrimination" provision contained in their collective agreement with the Employer as s. 25(1) of The Trade Union Act requires the parties to a collective agreement to settle their differences through grievance and arbitration provisions. **The Court of Appeal held that parties cannot contract out of fundamental, quasi-constitutional, public rights, such as the rights enshrined in The Human Rights Code and that such rights take priority over other statutory regimes, when they are in conflict.**

*[58] Applying the principles of Cadillac Fairview, supra, to the present case, **we find that the Human Rights Commission has primary jurisdiction over the Applicant's complaints that the Employer failed in its duty to accommodate her due to her disability. Although the Applicant raised similar issues in her duty of fair representation complaint against the Union and her unfair labour practice application against the Employer, the underlying issues in the complaint relate to discrimination on the basis of disability, a right established by The Human Rights Code. Although the Labour Relations Board has the obligation to consider and apply human rights law when it interprets the provisions of the Act, our primary focus is on the enforcement of rights under the Act and, unlike the Human Rights Commission, we have no specialized knowledge or practice in the area of human rights law or adjudication.***

[emphasis added, footnotes omitted]

[36] Upon making a determination that the Saskatchewan Human Rights Commission had primary jurisdiction over matters where the underlying issue related to discrimination on the basis of disability, the Board in *Metz, supra*, noted that the human rights complaint subsumed three aspects of the complaints contained in the applicant's duty of fair representation application before the Board. These complaints were the "substantive" ones and included: (i) all aspects related to the failure to accommodate the applicant's disability; (ii) all aspects related to the proposed financial settlement; and (iii) all aspects related to the settlement of the applicant's grievances. Based on the findings of the Saskatchewan Human Rights Commission concerning those three aspects, none of those issues remained outstanding for determination by the Board. In the face of this overlapping jurisdiction and the findings of the Saskatchewan Human Rights Commission, the Board stated at 42 and 43:

*[56] **Given this overlapping jurisdiction, the Board will defer its jurisdiction under s. 25.1 and will not determine if the agreements entered into by the Union and the Employer meet the tests under s. 25.1. If the Board did not defer its jurisdiction over these aspects of the Applicant's duty of fair representation complaint, we would be required to examine the agreements reached on the accommodation and the financial settlement. Although the Board may use slightly different standards to judge the two agreements, nevertheless, the results of its examination might conflict with the ruling of the Human Rights Commission. If the Board were to find a breach of the duty of fair representation and order the parties to refer the Applicant's grievance to arbitration, an arbitration board would surely be bound by the findings of the Human Rights Commission that accommodation had been achieved and the financial settlement was satisfactory. By deferring to the***

Human Rights Commission, we avoid unnecessary litigation and potentially contradictory results.

[57] In this regard, we would also refer to United Food and Commercial Workers. Local 1400 v. Saskatchewan (Labour Relations Board) (1992), 95 D.L.R. (4th) 541, [1992] S. J. No. 425 (Sask. C.A.) where the test for determining if deferral is an appropriate response to an unfair labour practice application was set out as follows:

Morris Rod Weeder speaks of "an alternative remedy of the same grievance" and makes clear the principle that where a trade union elects both the grievance-arbitration procedure provided for in the collective agreement between the parties and an application to the Board for an unfair labour practice order to resolve the same dispute, the Board may consider the trade union's election to use the grievance—arbitration procedure as a relevant factor in determining whether to dismiss the application. The case is authority for the proposition that for such an elective to constitute a relevant (as opposed to an "extraneous" or Irrelevant, consideration three preconditions must coexist: (i) the dispute put before the Board in the application for an unfair labour practice order and this dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute; (ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance-arbitration procedure, and (iii) the remedy under the collective agreement must be a suitable alternative to the remedy sought in the application to the Board.

[58] In the present case, the Applicant's complaint against the Union, to the extent that it raises issues of discrimination on the basis of disability, refusal to accommodate and denial of compensation for the period of non-accommodation, are matters that are squarely before the Human Rights Commission. The Commission has primary authority for enforcing compliance with The Saskatchewan Human Rights Code and it has equal or superior remedial powers to rectify the complaint. On these grounds, the Board should also exercise its discretion to defer to the Human Rights Commission and its processes.

[emphasis added]

[37] Having deferred to the Saskatchewan Human Rights Commission all of the substantive elements of the duty of fair representation complaint against the union, the Board in *Metz, supra*, recognized that there still remained "procedural" aspects to the applicant's claim against the union that it failed to represent her fairly. In relation to these "process" complaints, the Board determined at 43 and 44:

[61] The remaining issues (i.e. those relating to the processes used by the Union) may give rise to a breach of the duty of fair representation in the sense described above in the Gagnon case, supra. That is, the outcome of the representation (the agreements) may be unassailable (here, by reason of the ruling of the Human Rights Commission), while the processes used to get to the agreements in question may be flawed by bad faith, discrimination or arbitrary treatment and require some compensation to the Applicant from the Union. To this extent, the Applicant's duty of fair representation complaint is not totally subsumed by the human rights complaint and the Board retains jurisdiction to determine this aspect of the complaint.

*(63) The Board will retain jurisdiction over the Applicant's duty of fair representation complaint to determine whether any of the processes that the Union used to arrive at the accommodation, financial or grievance settlements were taken in bad faith, with discrimination or in an arbitrary fashion. **If the Board were to determine that the Union had not processed the Applicant's grievances in accordance with the standards set down in s. 25.1 of the Act, liability would affect only the Union, not the Employer. On this limited aspect of the application, there is no possibility that the Board would order the Union to refer any of the Applicant's grievances to arbitration.** Vis-a-vis the Union, the Employer and the Applicant, the settlement of these matters are in the hands of the Human Rights Commission.*

[emphasis added]

[38] Since the rendering of the Board's decision in *Metz, supra*, s. 18 of the Act has been amended to specifically enumerate the powers of the Board. While it has long been accepted that the Board has the power to defer to other statutory tribunals and to grievance arbitration proceedings,² the enumeration of such a power in s. 18 confirms this authority. Section 18(1) reads as follows:

² See, for example, *Administrative and Supervisory Personnel Association v. University of Saskatchewan*, [2005] Sask. L.R.B.R. 541, LRB File No. 070-05 and cases cited therein where the Board deferred to

18 *The board has, for any matter before it, the power*

to defer deciding any matter if the board considers that the matter could be resolved by arbitration or an alternative method of resolution;

[39] In the case before us, the Applicant's claims contain both "substantive" and "procedural" complaints against the Union in respect of its obligation to fairly represent him in accordance with s. 25.1 of the *Act*. The substantive complaints include claims that the Union did not fairly represent the Applicant in relation to various aspects of the conditional reinstatement agreement including a failure to accommodate, various aspects of his representation concerning his sick leave claim, the Union's handling of his termination grievance including the decision not to proceed to arbitration and, generally, the Union's failure to accept that he has a disability. The procedural complaints made by the Applicant against the Union were primarily detailed in the additional summary of facts provided by the Applicant following the pre-hearing. They include that the Union's representatives did not ask pertinent questions, ignored the statement of facts the Applicant provided, did not meet with him for sufficient periods of time, swore at him, accused him of being untruthful, called him names, failed to return his phone calls, hung up on him, lied to him and to others about him, among others. We shall first deal with the issue of deferral on the substantive complaints.

[40] A factor distinguishing this case from *Metz, supra*, is that the Saskatchewan Human Rights Commission had, as of the date of the hearing, not yet considered or made a determination with regard to any of the Applicant's complaints. In our view, however, that does not suggest that there is no basis for deferral. It is often the case that, when considering issues of deferral before the Board involving possible overlapping jurisdiction between the Board and the grievance arbitration process under a collective agreement, there has not been a prior determination by the other tribunal.

grievance and arbitration proceedings and *Metz v. Saskatchewan (Labour Relations Board)*, [2004] Sask. L.R.B.R. c-8, (2004) 247 Sask. R. 285, where the Saskatchewan Court of Queen's Bench, on judicial review, upheld the Board's decision to defer portions of the applicant's claim to the Saskatchewan Human Rights Commission.

While the status of a proceeding before another tribunal (whether an arbitration board or a statutory tribunal such as the Saskatchewan Human Rights Commission) might have an impact on the nature of the Board's order if it decides to defer, it does not affect the primary question of whether the Board should defer in the first instance. To make that determination in the context of this case, it is necessary to consider whether the Applicant's complaints, in their essential nature, relate to an alleged human rights violation. If they do, the Saskatchewan Human Rights Commission has primary jurisdiction. Also, if the dispute before the Board and the Saskatchewan Human Rights Commission is the same and the Saskatchewan Human Rights Commission has the ability to enforce a violation and provide suitable remedies, the Board will defer to the Saskatchewan Human Rights Commission.

[41] In our view, the Applicant's human rights complaint does subsume all the substantive complaints of the duty of fair representation application. The substantive claims in the application before us are, in their essential nature, complaints of discrimination on the basis of disability, as prohibited by the *Code*. The Applicant complains that the Employer failed to accommodate his disability, specifically drug addiction and alcoholism. Although the Applicant characterizes his complaints as a simple failure to represent, the essential complaints are that the Union discriminated against him because of his disability and, in the course of representing him, did not take into account his disability. The Applicant alleged that this discrimination occurred by: (i) the Union generally failing to recognize his disability; (ii) the Union failing to properly represent him in relation to various aspects of the conditional reinstatement agreement; (iii) the Union failing to properly represent him in relation to various aspects of the handling of his termination grievance including the refusal to proceed to arbitration; and (iv) the Union failing to properly represent him in relation to sick leave benefits. These are essentially the same allegations made by the Applicant against the Union in his human rights complaint. If we were to proceed to hear the duty of fair representation application, we would be examining the same issues as the Saskatchewan Human Rights Commission with the primary focus being whether the Union discriminated against the Applicant directly, or through its representation of him, on the basis of his alleged disability. Given the potential for contradictory results and our lack of specialized knowledge or practice of human rights law or adjudication, it is only appropriate that we

defer all aspects of the Applicant's substantive claims to the Saskatchewan Human Rights Commission.

[42] In addition, we note that, if the Applicant is successful with his human rights complaint against the Employer and the Union, he could be reinstated to his employment and paid his monetary loss, which is a more complete remedy than that available to the Applicant on a duty of fair representation application where the Board has the power to make orders only against the Union, the most typical of which is a direction to file grievances and proceed to arbitration with those grievances. Given that the substantive complaints of the Applicant against the Union are the same as those in his human rights complaint, that the Saskatchewan Human Rights Commission is empowered to adjudicate those complaints and that suitable alternative remedies (and arguably, more complete remedies) are available through the human rights proceedings, it is appropriate that we defer the Applicant's substantive complaints to the Saskatchewan Human Rights Commission.

[43] We turn now to the issue of the Applicant's procedural complaints contained in his duty of fair representation application. In *Metz, supra*, while deferring that portion of the application that dealt with substantive complaints to the Saskatchewan Human Rights Commission, the Board determined that it would hear the procedural complaints. However, underlying this determination was the fact that all the parties accepted that the applicant had a disability and they were well aware of the nature of her disability. This is critical in that the nature and extent of the disability suffered by the applicant would have been a relevant factor in the determination of the appropriate standard the union had to meet in its duty of fair representation. For example, the Board assessed certain procedural complaints in relation to the union's efforts to assist in the accommodation of the applicant's disability only because it had previously been established by the Saskatchewan Human Rights Commission that she suffered with a disability recognized under the *Code*. It follows then in this case that only if it is determined by the Saskatchewan Human Rights Commission that the Applicant suffers with a disability (a "substantive" issue) does an obligation arise upon the Union to assist in an accommodation of the Applicant. In other words, the Board cannot determine procedural complaints against the Union concerning its efforts to accommodate if there is no requirement on the Union to assist in accommodating the Applicant. Similarly, the

nature and extent of the disability, if any, suffered by the Applicant could determine both the level and type of assistance the Union must provide to meet its duty of fair representation — that is, the specific features of that mental disability might be relevant in assessing the fairness of the processes utilized by the Union in its representation of the Applicant.

[44] This factor was considered in *K.H. v. C.E.P., Local 1-S and SaskTel*, [1997] Sask. L.R.B.R. 476, LRB File No. 015-97, where the Board determined that a union's processes might need to be modified where the applicant has a mental disability. At 501 through 506, the Board stated:

In this case the issue is a less contingent one, and arises from the direct obligation of a trade union to deal with members in a non-discriminatory way. This issue is whether the policies and practices followed by the Union in dealing with the circumstances of K.H. were discriminatory, and whether their discriminatory effect could have been lessened by taking reasonable measures.

There were differences of opinion about many things in this case, but there was never a disagreement over the basic fact that K.H. was suffering from a mental disorder at the time he requested time off from work in May of 1995.

Among the factors which they considered, and which they raised when the grievances were being discussed with representatives of the Employer, were the medical problems which were faced by K.H. In our view, however, they failed to make allowance for the fact that K.H. was a disabled person. In this respect, though the process they followed might have been more than sufficient to satisfy their duty to represent employees fairly, it was inadequate to address the particular situation of ICH., and had a differential impact on him which must be considered to constitute discrimination.

We would not claim that it is an easy task for trade unions to find ways of ensuring that policies and practices they have devised - which may serve fairly and adequately the legitimate expectations of ordinary employees - are applied with sufficient flexibility that

these policies will not have a discriminatory effect on individuals or groups within a bargaining unit. It is likely that none of these challenges are more difficult than those related to mental disabilities. K.H. himself acknowledged that his disability made it difficult for him to respond rationally, consistently, or cooperatively in all of his dealings with the Union or other employees. His mental condition made it difficult for him to assess his own situation, to articulate his concerns, or to deal effectively with the representatives of the Union who were responsible for overseeing his grievances. It was, in our view, particularly difficult for him to gain any benefit from the appeal mechanism available to him.

One must have some sympathy for the representatives of the Union who were responsible for dealing with the grievances filed on behalf of K.H. They approached their tasks in good faith, and reasonably conscientiously, and were no doubt frustrated by the difficulties and delays which occurred. Nonetheless, it is our view that overall the Union failed to take sufficient account of the disability experienced by K.H., and that they therefore discriminated against him in handling his grievances.

[45] In *Metz, supra*, the Board also had the benefit of the prior determinations of the Saskatchewan Human Rights Commission concerning the applicant's substantive complaints when it assessed and ruled on her procedural complaints. **These** determinations appear to have assisted the Board in properly assessing at least some of the procedures used by the union in meeting its duty of fair representation to the applicant. For example, having concluded that the employer did not discriminate against the applicant by properly accommodating her in her employment, the Board was required to consider the applicant's process complaint against the union that the union agreed with the employer that the applicant would undergo an assessment for placement in a position to accommodate her disability, over the applicant's objections to doing so, which resulted in a further delay in placing the applicant in that position. In determining that the union's support for the further work assessment did not violate the duty of fair representation, the Board concluded that the "work assessment was a necessary part of the Employer's and the Union's efforts to accommodate Ms. Metz" and that the "delays in the return to work were occasioned both by the need to ensure that the work was modified to permit Ms. Metz to perform it adequately and by her resistance

to the work assessment process."³ Therefore, in our view, the resolution of the substantive complaints through the human rights proceedings might be helpful to the Board's determination of some of the procedural complaints, including, for example, the Applicant's complaint that the Union was lazy and incompetent by requiring the Applicant to sign the conditional reinstatement agreement when it was not within the Union's rights to do so. A determination by the Saskatchewan Human Rights Commission concerning the issue of whether the conditional reinstatement agreement met the duty to accommodate could affect how the Board views the processes used by the Union in relation to its representation of the Applicant in entering into the conditional reinstatement agreement.

[46] In our view, the standard or scope of the Union's duty of fair representation, even on procedural matters, will vary depending on the Saskatchewan Human Rights Commission's determination of (i) whether the Applicant has a disability; and (ii) if so, the nature of that disability. The determination by the Saskatchewan Human Rights Commission on the substantive complaints might also be of assistance. Therefore, a prior determination by the Saskatchewan Human Rights Commission on these matters is essential to the Board's analysis of the Applicant's procedural complaints in his duty of fair representation application before the Board. It follows that, if we were to exercise our jurisdiction and proceed to hear the Applicant's procedural complaints, we would need to first determine whether the Applicant suffers with a disability. Such a determination gives rise to the potential for results conflicting with those reached by the Saskatchewan Human Rights Commission. While this may be of less import in determining procedural complaints as opposed to substantive complaints, where a possible remedy is to order the Union to proceed to arbitration regarding the Applicant's workplace problems, it is necessary to consider which tribunal has special expertise in such matters. In this case, it is the Saskatchewan Human Rights Commission that has special expertise in the matter of whether an individual is suffering with a disability within the meaning of *the Code* and the nature of that disability. It is for these reasons that we must conclude that the Applicant's complaints in his duty of fair representation application that are procedural in nature must also be deferred at this time to the Saskatchewan Human Rights Commission.

³ See *Barbara Metz v. Saskatchewan Government and General Employees' Union*, [2003] Sask. L.R.B.R. 323, LRB File No. 164-00 at 333 and 334.

[47] We note that it is also possible in this case that, if the Applicant is successful with his human rights complaint, he may obtain complete relief under the *Code*, rendering further proceedings before the Board unnecessary. While the Applicant seeks to be returned to the workplace and paid his monetary loss, he also seeks damages for what he alleges was improper treatment by the Union and the Employer. These forms of relief appear to be available to the Applicant through the human rights proceedings. It therefore makes little sense for the Board to proceed to hear the Applicant's procedural complaints if full redress could possibly be obtained from the Saskatchewan Human Rights Commission in parallel proceedings.

[48] In concluding that we will defer all of the Applicant's complaints, both substantive and procedural, to the Saskatchewan Human Rights Commission, we are not dismissing this application. In the event that any of the Applicant's complaints are not addressed upon the conclusion of the human rights proceedings or he does not obtain the entirety of the relief he seeks, the Applicant may return to the Board for further hearing of his complaints and to seek other remedies. We note, however, that, if the Applicant does return to the Board following the conclusion of the human rights proceedings, it may be necessary for the Board to again determine whether to defer to the Saskatchewan Human Rights Commission, if the Saskatchewan Human Rights Commission has disposed of the complaints in question (i.e. similar to the situation in *Metz, supra*).

[49] Lastly, we note that the documents provided to the Board at the hearing of this matter included a copy of a letter from counsel for the Union to the Saskatchewan Human Rights Commission dated March 24, 2005. In that letter, the Union was asking the Commission to either (i) dismiss the complaint without an investigation because it was "without merit, raises no significant issue of discrimination, and there is no reasonable likelihood that an investigation will reveal evidence of a contravention of the Act"; or alternatively, (ii) defer the human rights complaint because: (a) the issues raised in the complaint essentially relate to the Union's duty of fair representation of the Applicant (which is governed by *The Trade Union Act*) and not discrimination against the Applicant; and (b) the Labour Relations Board could grant appropriate remedies if the Union was found to be in violation of its duty to fairly represent the Applicant. We were

not provided with a copy of the response of the Saskatchewan Human Rights Commission, if any, although we were advised that the Saskatchewan Human Rights Commission was proceeding with its investigation. As such, the Union's request of the Saskatchewan Human Rights Commission does not affect our conclusion to defer all matters raised by the Applicant in his duty of fair representation application for determination in the first instance through the human rights proceedings.

Conclusion:

[50] In summary, the Board:

1. defers its jurisdiction over the Applicant's duty of fair representation application to the Saskatchewan Human Rights Commission with respect to both his substantive and procedural complaints;
2. adjourns the Applicant's duty of fair representation application *sine die* to be brought back to the Board at the conclusion of the processes of the Saskatchewan Human Rights Commission if there are any complaints remaining that were not dealt with by the Saskatchewan Human Rights Commission that the Applicant alleges are contrary to s. 25.1 of the *Act*.

DATED at Regina, Saskatchewan this **28th** day of **November, 2006**.

LABOUR RELATIONS BOARD

ad At Ait
Angela Zb' •sky
Vice-Chairperson

