Labour Relations Board
Saskatchewan

PATRICK ROBIN, Applicant v. THE PRINCE ALBERT POLICE ASSOCIATION, Respondent

LRB File No. 050-10; October 6, 2010
Chairperson, Kenneth G. Love, Q.C., Members: Brenda Cuthbert and Bruce McDonald

For the Applicant: Terry J. Zakreski
For the Respondent: Ronald G. Parchomchuk

Duty of fair representation – Jurisdiction of Board – Board reviews Section 25.1. and the Saskatchewan Court of Appeal decision in *McNairn v. United Assn. of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 179*

Jurisdiction of Board – Board determines that Essential Character of Dispute in this case is not related to processes governed by *The Police Act, 1990* – Essential character of dispute is the Board's jurisdiction to review whether a union has fairly and reasonably arrived at its decision regarding representation of a member without acting in bad faith or in an arbitrary or discriminatory manner

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

Employee-Trade Union Disputes – Applicant argues that s. 36.1 of *The Trade Union Act* applies in situation where Employee alleges breach of principles of natural justice in the application of Union Constitution.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: Patrick Robin (the "Applicant") filed an application under s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") on May 5, 2010, alleging that the Prince Albert Police Association (the "Respondent Union") had failed in its duty to fairly represent him in respect of his dismissal from his position as a police officer with the Prince Albert Police Service (the "Employer"). By letter dated May 27, 2010, from

counsel for the Applicant, the Board was advised that the Applicant also wished to rely upon s. 36.1 of the *Act* in respect of his complaint.

[2] The Respondent Union raised an objection to the Board's jurisdiction to hear and determine this matter. The parties were invited by the Board to provide written arguments regarding this jurisdictional issue and a hearing of the Board was held on September 13, 2010 in respect to that objection. At the conclusion of that hearing, the Board determined that it had jurisdiction to hear and determine the matter. These are the Reasons for that decision.

Facts:

[3] Because the panel of the Board did not hear evidence on September 13, 2010, the Board, for the purposes of this ruling only, has relied upon the facts outlined in the Application and the Reply filed by the Respondent Union as well as the Briefs of Law of the parties.

[4] The Applicant was employed as a Constable with the Employer in Prince Albert, Saskatchewan. The Applicant's employment as a Police Officer was terminated by the Employer on March 16, 2010. The Applicant appealed his dismissal in accordance with the provisions of *The Police Act, 1990*.

[5] The Respondent Union is a trade union certified on July 10, 1951 to represent "the members of the Police Service, with exception of the Chief Constable and the Inspector of Police, and any member hired on probation." Until the time of his dismissal, the Applicant was a member of the Respondent Association.

[6] The Applicant sought assistance from the Respondent Union with respect to his appeal of his termination in accordance with the provisions of the s. 25 of the Association's Constitution and Bylaws, which read as follows:

> *THE ASSOCIATION SHALL RETAIN A LAWYER. (amended November 1, 1994)*
>
> *A) MEMBERS OF THE PRINCE ALBERT POLICE ASSOCIATION MAY BE ENTITLED TO IMMEDIATE ACCESS TO LEGAL COUNSEL*

AT THE ASSOCIATION'S EXPENSE WHEN THE FOLLOWING SITUATIONS OCCUR:

1) A MEMBER IS SUBJECT TO DISCIPLINARY ACTION OR INVESTIGATION WHERE A MEMBER WAS ACTING IN GOOD FAITH DURING THE LEGAL COURSE OF DUTY, AND:

i) HE/SHE HAS BEEN CHARGED WITH AN OFFENCE PURSUANT TO THE SASKATCHEWAN POLICE ACT.

ii) HE/SHE HAS BEEN, OR IS ABOUT TO BE SUSPENDED FROM DUTY PURSUANT TO THE SASKATCHEWAN POLICE ACT.

iii) HE/SHE HAS BEEN OR MAY BE CHARGED WITH A CRIMINAL OFFENCE.

2) A MEMBER IS THE SUBJECT OF A SUSPENSION OR DISCIPLINARY ACTION IN RELATION TO THAT MEMBER'S TERM OF EMPLOYMENT, PURSUANT TO THE CURRENT WORKING AGREEMENT BETWEEN THE PRINCE ALBERT BOARD OF POLICE COMMISSIONERS AND THE PRINCE ALBERT POLICE ASSOCIATION.

B. ANY EXECUTIVE MEMBER OF THE PRINCE ALBERT POLICE ASSOCIATION IS EMPOWERED TO GRANT IMMEDIATE ACCESS TO LEGAL COUNSEL FOR SUCH MEMBERS REQUESTING ASSISTANCE AS FOLLOWS:

i) WHERE THE MEMBER IS SATISFIED THAT THE COUNSEL ON RETAINER TO THE PRINCE ALBERT POLICE ASSOCIATION WILL FAIRLY REPRESENT HIM/HER, OR

ii) WHERE THE MEMBER IS NOT SATISFIED THAT THE COUNSEL ON RETAINER TO THE PRINCE ALBERT POLICE ASSOCATION WILL FAIRLY REPRESENT HIM/HER, THEN:

1) ANY TWO (2) MEMBERS OF THE EXECUTIVE OF THE PRINCE ALBERT POLICE ASSOCIATION ARE EMPOWERED TO GRANT IMMEDIATE ACCESS TO LEGAL COUNSEL OF THE MEMBERS CHOICE.

2) WHERE TWO (2) MEMBERS OF THE EXECUTIVE OF THE PRINCE ALBERT POLICE ASSOCIATION CANNOT BE REACHED IN AN EMERGENCY, THE MEMBER REQUESTING ALTERNATE LEGAL COUNSEL HAS TWO OPTIONS:

***THE MEMBER MAY RETAIN LEGAL COUNSEL OF HIS/HER CHOICE, AND FINANCIAL RESPONSIBILITY FOR THAT COUNSEL'S FEE WILL BE SUBJECT TO REVIEW AS SOON AS POSSIBLE AT A QUORUM OF THE MEMBERSHIP AT A REGULAR MEETING.*

***THE MEMBER MAY TAKE EMERGENT LEGAL ADVICE FROM COUNSEL ON RETAINER TO THE PRINCE ALBERT POLICE ASSOCIATION UNTIL SUCH TIME AS THE MATTER CAN BE BROUGHT BEFORE A QUORUM OF THE MEMBERSHIP AT A REGULAR MEETING FOR A DECISION, BY MAJORITY VOTE, ON PAYMENT OF LEGAL FEES, OR TWO (2) EXECUTIVE MEMBERS OF*

> *THE PRINCE ALBERT POLICE ASSOCIATION CAN BE LOCATED TO GRANT PERMISSION AS IN B 2 ii ABOVE.*
>
> *C) IT SHALL BE THE MEMBERS RESPONSIBILITY TO DOCUMENT HIS/HER EFFORTS TO CONTACT EXECUTIVE MEMBERS OF THE ASSOCIATION IN THE EVENT A REPORT IS REQUIRED.*
>
> *C. MEMBERS REQUESTING AUTHORITY TO RETAIN COUNSEL SHALL OBTAIN PERMISSION FROM THE EXECUTIVE MEMBERS OF THE PRINCE ALBERT POLICE ASSOCIATION AND SHALL CONTACT EXECUTIVE MEMBERS IN THE FOLLOWING ORDER:*
>
> *1) PRESIDENT*
> *2) VICE-PRESIDENT*
> *3) SECRETARY*
> *4) TREASURER*
> *5) CIVILIAN DIRECTOR*
>
> *D. WHEN AUTHORITY TO RETAIN COUNSEL HAS BEEN GRANTED, THE MATTER SHALL BE FULLY REPORTED AT THE NEXT REGULAR MEETING OF THE PRINCE ALBERT POLICE ASSOCIATION, A QUORUM BEING PRESENT.*
>
> *E. GRANTING AUTHORITY TO RETAIN COUNSEL BY EXECUTIVE MEMBERS OF THE ASSOCIATION SHALL BE SUBJECT TO THE APPROVAL OF THE MEMBERSHIP OF THE ASSOCIATION AT THE NEXT REGULAR MEETING BY MAJORITY VOTE OF THE MEMBERSHIP, A QUORUM BEING PRESENT.*

[7] On April 1, 2010, counsel for the Applicant wrote to the President of the Association requesting that the Association assist the Applicant financially in accordance with the provisions of s. 25 set out above. On Friday, April 23, 2010, the Association met to consider the request for financial assistance. As noted in the brief filed by the Association, "[A]pproval of payment of legal fees is made by majority vote of the Association's membership present at a meeting called for this purpose."[1]

[8] The Applicant provides in his application that he was told by the President of the Association, Sgt. Stonechild, that the decision of the membership to provide financial assistance was a "popularity contest".[2] That comment was not specifically denied by the Association in its Reply to the Board.

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[1] See Brief of Law filed by Respondent Counsel at p. 3, para. 9.
[2] See Affidavit of Patrick Robin attached to his application to the Board at para. 15.

[9] The Collective Agreement between the Board of Police Commissioners for the City of Prince Albert and the Association provides for an indemnity for "costs associated with defending a charge or resolving a proceeding" under *inter alia The Police Act, 1990*.[3]

[10] At the meeting held by the Association on April 23, 2010 to consider the Applicant's request for financial assistance, the Applicant says that the President of the Association "argued" that the Applicant's dismissal was justified and recommended against the applicant receiving funding from the Association. The Respondent, in its Reply, while not denying that the Association provided input regarding the request, says[4]"

> 7. Once the executive has completed its investigation we have a *responsibility to report the findings to the membership at an Association meeting, so that the membership can make an informed decision if the member being disciplined is requesting financial support to challenge the discipline being sought.*

[11] The Association, in its Reply says that the decision to dismiss the Applicant was "appropriate" and that its decision was "based upon evidence reviewed". [5] It goes on to say, "it [the Association] could not recommend to the membership at the April 23, 2010 meeting to financially support his appeal of dismissal under *The Police Act* based upon the information we had reviewed and which was provided to us by the Applicant."

[12] At the meeting on April 23, 2010, the membership of the Association determined not to provide financial support to the Applicant. The Applicant then filed this application to the Board.

Arguments:

[13] Both parties agreed that the law governing the jurisdiction of the Board was to be determined in accordance with the Court of Appeal decision in *McNairn v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting*

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[3] See Tab 8 of the Applicant's Brief of Law, at p 20, Article 12.10.
[4] See Reply of the Respondent Association at paragraph 7
[5] See Reply filed by the Association at paragraph 22.

Industry of the United States and Canada, Local 179[6]. However, the parties differed on what was the "essential character" of the dispute.

[14] The Respondent Union argued that the essential character of the dispute was the Applicant's discipline under *The Police Act* and the Association's dealings with him in relation to that proceeding. They also argued that the issue was not a grievance procedure or rights arbitration under a Collective Agreement, but rather a statutory procedure under *The Police Act*, but a process conducted separate and apart from the Association's agreement with the Prince Albert Board of Police Commissioners.

[15] The Respondent Union also argued that Section 36.1 of the *Act* was also inapplicable to the complaint, again based upon the Associations' analysis of the essential character of the dispute as set out in *McNairn*, *supra*.

[16] Counsel for the Applicant acknowledged that if the dispute was related solely to the matters covered by *The Police Act*, the Board would have no jurisdiction. However, he argued that the essential character of the dispute was not the Respondent Union's discipline under *The Police Act*, but rather was related solely to their obligations to provide the Applicant with assistance in his dispute with the Prince Albert Police Service.

[17] The Applicant argued that the Respondent Union's refusal to provide him with any support whatsoever is the factual matrix from which this dispute arises. It is the denial of assistance, and the circumstances surrounding such denial which has necessitated the application to the Board. He argued that the essential character of the dispute pertains to the duty of fair representation owed by a trade union to its members as set out in s. 25.1 of the *Act*.

[18] The Applicant also argued that s. 36.1 can provide the Board with jurisdiction to hear and determine this matter. The Applicant argues that the conduct of Sgt. Stonechild at the April 23, 2010 meeting of the Association are illustrative, and possibly explanatory, of the Respondent Union's general failure to provide fair representation to the Applicant.

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[6] [2004], 240 D.L.R. (4th) 358 (Sask. C.A.)

[19] The Applicant argued that at the heart of the matter was a denial of natural justice with respect to a "matter of membership" under s. 36.1 of the *Act*. The Applicant argued that Sgt. Stonechild denied the Applicant natural justice by advocating against Sgt. Stonechild at the April 23, 2010 meeting.

[20] The Applicant also argued that the nature of the penalty imposed (loss of employment) is a significant factor to be considered by the Board. That is, when an employee is dismissed, they seldom have the resources readily available to defend their livelihood. Their success, he argued, can turn on the "financial, political, and moral support of their unions."

Statutory Provisions:

[21] Relevant statutory provisions are as follows:

> *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.*
>
> *. . .*
>
> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*
>
> *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.*
>
> *(3) No employee shall unreasonably be denied membership in a trade union.*

Analysis & Decision:

[22] The Respondent Union raised its objection to the Board's jurisdiction to hear and determine this matter in reliance upon, *inter alia*, the decision of the Court of Appeal for Saskatchewan in *McNairn v. United Assn. of Journeymen and Apprentices of*

the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 179.[7] That decision involved a dispute between a union member and his union over whether the union, in removing the member's name from the top of the unemployment board, was in breach of its obligations pertaining to maintenance of the unemployment board. The process and procedure related to the maintenance of the unemployment board were governed by the bylaws and working rules of the union.

[23] The genesis of the duty of fair representation comes not from s. 25.1 and s. 36.1 of the *Act*, but arises out of the Board's statutory power over unfair labour practices.[8] The history of the Board's jurisdiction was reviewed in great detail by former Chairperson Beth Bilson in the Board's decision in *Gordon W. Johnson v. Amalgamated Transit Union, Local No. 588 and the City of Regina*[9]. Beginning at p. 29 of that decision, the Board had the following to say concerning the evolution of the principles embodied in the duty of fair representation:

> *The evolution of the duty of fair representation in this jurisdiction was unique, in that the recognition of a duty by this Board was based on an interpretation of existing provisions in the Act, in the case of Doris Simpson v. United Garment Workers of America, [1980] July Sask. Labour Rep. 43, rather than on the addition of a statutory provision which explicitly imposed such an obligation. Section 25.1 was added to the Act as part of a series of amendments in 1983. Despite the unusual course which the development of the duty has followed in Saskatchewan, it seems fair to say that the principles which the Board has articulated in relation to the duty of fair representation are consistent with those followed in other Canadian jurisdictions.*
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> *This may in part be traced to the unifying influence of the succinct summary of appropriate principles provided by the Supreme Court of Canada in Canadian Merchant Services Guild v. Gagnon, [1984] 84 C.L.L.C. 14,043, at 12,188:*
>
> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> *1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a*

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[7] *Supra*, note 6
[8] The first board decision dealing with the duty of fair representation *was Doris Simpson v. United Garment Workers of America*, [1980] July Sask. Labour Rep. 43, LRB File No. 069-80
[9] [1997] Sask L.R.B.R. 19, L.R.B. File No. 091-96

> *grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.*

[24] In *Gilbert Radke v. Canadian Paperworkers Union, Local 1120*[10], the Board commented as follows:

> *The notion that a union owes a duty to those it represents to represent them fairly arose relatively early in the history of the interpretation of collective bargaining legislation in North America. As the legislation conferred the exclusive right to represent all employees in a group delineated as an appropriate bargaining unit, once a majority of those employees had selected a trade union, it was considered logical to impose on that trade union an obligation to be even-handed in its representation of all employees in the bargaining unit, including those who had opposed the selection of that union, had not become members of the union, or who were, for some reason, in a minority within the bargaining unit. The union acquired exclusive status as a legal representative of all employees in a bargaining unit; in recognition of the degree of influence this gave the union over interests important to all employees, labour relations boards and courts imposed on it a duty to represent all employees fairly and without discrimination.*

[25] Similarly, the genesis of s. 36.1 of the *Act* arose out of the Board's supervision of the relationship between a union and its members. The earliest Board decision in this regard was in *Alexander Spalding v. United Steelworkers of America, CIO, AFL, CLC and Federal Pioneer Limited.*[11] In that decision at p. 53, the Board says:

> *It would, in the opinion of the Board, be wrong for the Board to permit a union to punish a member for exercising a right given to him under The Trade Union Act. The Board will not permit the enforcement of any provision in the union constitution which might defeat, abrogate or vary any rights given by statute. Any attempt to enforce such rights by a union amount, in the opinion of the Board, to a violation of Section*

[10] [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92
[11] [1981] Sask. Labour Rep. 50, LRB File No. 001-81

> *11(2)(a) of The Trade Union Act and the Board finds the union guilty of an unfair labour practice accordingly.*

[26] Since these seminal decisions by the Board under the rubric of the duty of fair representation, the Legislature in 1983 added ss. 25.1 and 36.1 to the *Act*. Since then, the Board has relied upon those sections, rather than the provisions related to unfair labour practices in the *Act* in the exercise of its supervisory jurisdiction over internal union matters and the processes involved in grievances and rights arbitrations as well as disputes between employees and their trade union relating to matters in the constitution of the trade union, the employee's membership therein or discipline thereunder.

[27] In *Mary Banga v. Saskatchewan Government Employees' Union*[12], the Board summarized the history of the development of the duty of fair representation at pp. 97 and 98:

> *…As we have pointed out before, the duty of fair representation arose as the quid pro quo for the exclusive status as bargaining agent which was granted to trade unions under North American collective bargaining legislation. Once a certification order is granted on the basis of majority support, members of the bargaining unit have no choice as to who will represent them, whether or not they were among those who supported the union. This exclusive status gave trade unions security and influence; it was, however, viewed as imposing upon them an obligation to represent all of those they represented in a way which was not arbitrary, discriminatory or in bad faith.*
>
> *The concept of the duty of fair representation was originally formulated in the context of admission to union membership. In the jurisprudence of the courts and labour relations boards which have considered this issue, however, it has been applied as well to both the negotiation and the administration of collective agreements. Section 25.1 of The Trade Union Act, indeed, refers specifically to the context of arbitration proceedings. This Board has not interpreted the section in a way which limits the duty to that instance, but has taken the view that the* ***duty at "common law" was more extensive, and that Section 25.1 does not have the effect of eliminating that duty of fair representation in the context of union membership, collective bargaining, or the grievance procedure.*** *[Emphasis Added]*

[12] [1993] 4th Quarter Sask. Labour Rep. 88, LRB File 173-93

[28] In *Gilbert Radke*[13] the Board further expanded on the requirement to avoid "arbitrary" treatment as follows at 64 and 65:

> *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favoritism. 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.*

[29] In *United Steelworkers of America v. Six Seasons Catering Ltd.,* [1994] 3rd Quarter Sask. Labour Rep. 311, LRB File No. 118-94, the Board examined the application of the duty to bargain in good faith in relation to the negotiation of a collective agreement and commented as follows at 318:

> *In the case of the negotiation of provisions for a collective agreement, however, there are obvious difficulties of determining what constitutes a breach of the duty of fair representation. Unlike the situation which obtains in the case of decisions made in relation to grievances, the range of considerations of policy, practicality, strategy and resources which are legitimately taken into account are virtually limitless. Although labour relations tribunals and courts have acknowledged that this aspect of the duty exists, they have shown themselves reluctant to contemplate the chastisement of trade unions for a breach of the duty to negotiate fairly.*
>
> *The difficulty of determining how the principles of the duty of fair representation would apply where the issue arises in the context of the bargaining process is particularly acute in the case of an allegation that the conduct of the union is "discriminatory," which is the sort of charge the Union fears here. Collective bargaining is by nature a discriminatory process, in which the interests of one group may be traded off against those of other groups for various reasons - to redress historic imbalances, for example, or to reach agreement within a reasonable time, or to compensate for the achievement of some other pressing bargaining objective. The role of the union is to think carefully about the implications of the choices which are made, and no employee or group of employees can be assured that their interests will never be sacrificed in favour of legitimate bargaining goals or strategies.*

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[13] *Supra,* at note 10

[30] The principles outlined in *Banga, supra,* were acknowledged by the Board as well in *Roger Johnston v. Service Employees' International Union, Local 333*, [2003] Sask. L.R.B.R. 7, LRB File No. 157-02. That decision was issued by the Board on January 2, 2003. The *McNairn*[14] decision was issued by the Court of Appeal for Saskatchewan on April 19, 2004.

[31] The Board has considered the *McNairn* decision, *supra,* in *Stewart Martin Unique v. Teamsters Local Union 395*[15]*.* That case considered some of the cases referred to by the parties in their arguments and considered both the *McNairn* decisions, *supra* and the *Rollheiser*[16] case, *supra*. In that decision, the Board accepted that it had jurisdiction based upon the facts in that case.

[32] The *McNairn* decision, *supra,* was also mentioned by the Court of Queen's Bench in *Taylor v. Saskatoon Civic Employee's Union, Local 59* (2007) 303 Sask. R. 151. The facts in *Taylor, supra,* are long and convoluted and a detailed recitation is not necessary for the purpose of this decision. In summary, Taylor (a union member) had advanced defamation actions against three officers of the union. As a result, the union passed an indemnity provision to ensure officers who had been sued would have the costs of their defense paid by the union. Taylor was denied the benefit of this clause, resulting in his advancement of a further claim that he was also entitled to the benefit of the indemnity clause in the union bylaws because (in suing the officers for defamation) he was involved in union-related litigation.

[33] Following a review of ss. 25.1 and 36.1, as interpreted in *McNairn, supra,* the Court characterized the dispute as "contractual" in nature, and "indistinguishable" from the dispute in *McNairn, supra*. This dispute was purely internal as it involved the interpretation of a provision from the union bylaws (and thus, automatically outside the scope of s. 25.1 as found in *McNairn, supra*). Furthermore, the claim did not relate to a denial of natural justice and was thus outside the scope of s. 36.1. At para. 30 of the decision, the Court stated:

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[14] *Supra* at note 7
[15] [2008] Sask. L.R.B.R. 211, LRB File No. 006-08
[16] *Lockwood v. Rollheiser* (2006), 279 Sask. R. 113

> *In short, this is precisely the type of internal dispute that is not within the exclusive realm of the Labour Relations Board. The forum for this contest is the Queen's Bench Court.*

[34] What the cases show is, as stated by Mr. Justice Richards in *Lockwood, supra,* "It seems clear enough that s. 25.1 does not bring every dispute with a union or a union representative within the exclusive jurisdiction of the Labour Relations Board." However, the question which the Board must determine in this case is whether or not this case, on the facts presented in the Application and Reply fall within the Board's jurisdiction.

[35] The *Banga* decision, *supra,* however, stated that s. 25.1 was not effective to derogate from the common law duty of fair representation. As noted above, the Board said at 98:

> *The concept of the duty of fair representation was originally formulated in the context of admission to union membership. In the jurisprudence of the courts and labour relations boards which have considered this issue, however, it has been applied as well to both the negotiation and the administration of collective agreements. Section 25.1 of The Trade Union Act, indeed, refers specifically to the context of arbitration proceedings.* ***This Board has not interpreted the section in a way which limits the duty to that instance, but has taken the view that the duty at "common law" was more extensive, and that Section 25.1 does not have the effect of eliminating that duty of fair representation in the context of union membership, collective bargaining, or the grievance procedure.*** [Emphasis added]

[36] Nevertheless, as instructed by the Court of Appeal in *McNairn*, *supra*, for the Board to find jurisdiction in this case, the Board must determine "the essential character of the dispute, having regard for its substance rather than its form."

[37] The Respondent Union relied upon the Supreme Court of Canada decision in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*[17] as authority for the proposition that *The Police Act* provides for exclusive jurisdiction over the discipline and discharge of Police Officers. We concur with the Association in that view. As is the case in grievance arbitrations which are often the subject of applications to the Board under s. 25.1, the Board has no interest in, nor jurisdiction over the process for the appeal

[17] [2000] 1 S.C.R. 360, 2000 SCC 14

against discipline and discharge imposed upon a police officer. The merits of the case against the Applicant will be dealt with by the process established by *The Police Act*.

[38] However, the Board agrees with the Applicant that the essential nature of his complaint has nothing to do with the discipline that was invoked by the Chief of Police, or that he was discharged. He has taken an appeal against that decision in accordance with the procedures established by *The Police Act* and has not asked the Board to become involved in that process. Had he done so, we would have declined to do so.

[39] What the application requests is that the Board engage its supervisory jurisdiction and review the process and procedures utilized by the Association in refusing assistance to the Applicant. It is the nature and extent of the Associations duty to its members in that regard that invokes the jurisdiction of the Board.

[40] In *Leblanc v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 555*[18] the Board made the following comment: respecting the Board's jurisdiction under s. 25.1 of the *Act*:

> *In an application under s. 25.1 of the Act, it is not the function of the Board to determine the merits of a grievance or to substitute our opinion for a union's opinion on the basis that we might think the union was wrong. Our function is to determine whether a union has fairly and reasonably arrived at its decision without acting in bad faith or in an arbitrary or discriminatory manner. This is often difficult for individual members to understand given that the concepts are somewhat legalistically complex and that their individual interests may be in conflict with those of the collective membership. An example is where a union has certain goals it wishes to achieve in bargaining which, in its opinion, are in the interests of its membership as a whole that do not coincide with the interests of an individual member.*

[41] Therefore, in accepting jurisdiction regarding this matter, the Board finds that it does have jurisdiction to supervise the duty of fair representation owed by a trade union to its members, as alleged by the Applicant in this case.

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[18] [2007] Sask. L.R.B.R. 648, LRB File No. 028-07

[42] A hearing of this matter shall be scheduled by the Board in its usual manner.

DATED at Regina, Saskatchewan this **6th** day of **October, 2010.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson