Saskatchewan
Labour Relations Board

CARA BANKS, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4828, Respondent Union and THE SASKATCHEWAN FEDERATION OF LABOUR, Respondent Employer

LRB File No. 144-12; August 29, 2013

Chairperson, Kenneth G. Love, Q.C., (sitting alone pursuant to Section 4(2.2) of *The Trade Union Act*)

For the Applicant:	Ronald G. Gates, Q.C.
For the Respondent Union:	Linda M. Dennis[1]/Crystal L. Norbeck
For the Respondent Employer:	Ronni A. Nordal

Duty of Fair Representation – President of local union complains of workplace harassment – Alleges Union failed to properly represent her with respect to harassment complaint against Employer.

Duty of Fair Representation – Board considers whether Union acted in a discriminatory manner, was arbitrary or acted in bad faith by recommending against a grievance being filed under harassment provisions of Collective Agreement – Union urges employee to file complaint as an individual – Individual also files complaint under Occupational Health and Safety legislation and applies for Workers Compensation Benefits

Duty of Fair Representation – Board reviews standard jurisprudence regarding definitions of the terms "arbitrary", discriminatory, and "bad faith" – determines that Union did not violate statutory duty of fair representation.

Practice and Procedure – Employer argues that Board does not have jurisdiction to hear and determine matter because complaint also filed with Workers' Compensation Board – Board determines that it has jurisdiction.

Practice and Procedure – Multiplicity of complaints in various forums – Applicant also files harassment complaints with Workers' Compensation Board and under Occupational Health and Safety legislation – Board determines that usual requirement to determine the essential character of the dispute should apply to determine jurisdiction.

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[1] Ms. Dennis was taken ill part way through the hearing and was replaced as counsel by Ms. Norbeck.

REASONS FOR DECISION

Background & Facts:

[1] **Kenneth G. Love, Q.C., Chairperson:** Cara Banks, (the "Applicant" or "Banks") in this matter is employed by the Saskatchewan Federation of Labour (the "SFL") as an Executive Assistant to the President of the SFL, Mr. Larry Hubich. The employees of the SFL, including the Applicant, are represented by The Canadian Union of Public Employees, Local 4828 for the purposes of collective bargaining.

[2] The Applicant, at the time she filed her application, had worked for over fourteen (14) years at the SFL. She began her career as a summer student, and from there she became an administrative assistant. She next progressed to becoming the Ready for Work Coordinator, then the Balancing Work Coordinator, then to Communications and Research Officer, and finally to her current position.

[3] In addition to being the Executive Assistant to the President of the SFL, the Applicant was also the President of Local 4828. The Local is chartered by the Canadian Union of Public Employees.

[4] The Board heard a great deal of evidence with respect to this matter as the parties felt compelled to ensure that no rock remained unturned. All of the evidence came from the Applicant or from the Union's witnesses. The SFL called no witnesses.

[5] A good deal of the evidence heard was not relevant to the Board's jurisdiction respecting employee-union disputes regarding representation under Section 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). It did, however provide context for the dispute between the parties. This summary of the evidence focuses upon that evidence relevant to the issues between the Applicant and the Union.

[6] As noted above, the Applicant was an employee of the SFL. She was also the President of the Respondent Union. The local was quite small (7-8) employees and comprised all of the employees of the SFL save for its President, Mr. Hubich.

[7] The Applicant worked closely with Mr. Hubich, especially during the time she was the Executive Assistant. As the Executive Assistant, she was the chief staff person for the SFL and reported directly to Mr. Hubich, although her job description states that she ultimately is responsible to the Executive Counsel of the SFL, made up of 36 representatives from 37 unions which are affiliated with the SFL in Saskatchewan.

[8] During the fall of 2011, the Applicant was working on projects for the SFL, one of which was known as the Labour Issues Campaign, which was undertaken through the SFL Political Strategy Committee. The Applicant was the staff advisor to this Campaign. As the staff advisor to this campaign, she was the principal designer and person responsible for the implementation of the Labour Issues Campaign. It should also be noted that this campaign corresponded with a provincial general election which culminated on November 7, 2011 with the re-election of the previous government. Another member of the Political Strategy Committee was a representative from The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, ("RWDSU"), Mr. Larry Kowalchuk.

[9] The other major responsibility was a constitutional challenge brought by the SFL and some of its affiliated unions respecting the validity of certain 2008 amendments to *The Trade Union Act* ("Bill 6") and the passage by the then newly elected government of *The Public Service Essential Services Act* ("Bill 5"). Mr. Kowalchuk was also heavily involved as legal counsel with respect to this challenge. Mr. Garry Burkart, the Secretary-Treasurer for RWDSU, testified that Mr. Kowalchuk, who was, at that time, an employee of RWDSU, had been "lent" to the SFL for the charter challenge to Bills 5 & 6.

[10] The Applicant testified that she was having problems with Mr. Kowalchuk who was regularly in attendance at the SFL's office in Regina. At one point, she testified, which testimony was confirmed by Mr. Burkart, that she telephoned Mr. Burkart to ask him to do something about Mr. Kowalchuk being constantly in the office. Her testimony, as confirmed by Mr. Burkart, was that if he didn't do anything, she would "throw herself off a cliff".

[11] Other witnesses testified that they often heard disagreements and screaming sessions between the Applicant and Mr. Kowalchuk. However, that was only one aspect of the story.

[12] Over that same period there was a falling out between Mr. Hubich and Mr. Kowalchuk, the reasons for which the Board was never advised. It was this falling out between Mr. Hubich and Mr. Kowalchuk that was the genesis for the events which followed.

[13] The Applicant testified that she felt that Mr. Hubich was taking out his anger with Mr. Kowalchuk through her. She indicated that during the provincial election and the trial for the charter challenge, which took place later in November, 2011, that Mr. Hubich became increasingly hostile towards Mr. Kowalchuk.

[14] During December of 2011, the work on the Labour Issues Campaign was reaching a critical point and the committee report, on the work undertaken in the last 3 years, along with recommendations for ongoing work, was in preparation. Sometime around December 19, 2011, a controversy arose over whether or not the final version of the report on the Labour Issues Campaign should be submitted to the SFL Executive Officers for review or whether it should go directly to the Executive Council.

[15] Apparently, two of the other members of the committee, Mr. Kowalchuk and Ms. Britton objected to the report being vetted first by the SFL Executive Officers and were reluctant to provide the report to them. Rather than it being submitted to the SFL Executive Officers, the committee took it upon themselves to distribute the report electronically to a wider audience. The Applicant said that she felt caught in the middle of the dispute between the other committee members and the SFL Executive Officers, including Mr. Hubich.

[16] On December 19, 2011, she sent an email to Mr. Guy Marsden, who was the person responsible for servicing Local 4828 for CUPE National. He was also a long time friend of the Applicant. They ultimately were able to get together on December 24, 2011. The Applicant testified that the meeting occurred on December 21, 2011. While nothing turns on this point, the Board accepts Mr. Marsden's testimony in this regard since the Applicant's schedule shows her being scheduled to attend the Globe Theatre that evening.

[17] During that conversation, the Applicant advised Mr. Marsden of the situation she was in with respect to the dispute between the SFL Executive Officers and the Labour Issues Campaign group. The Applicant also advised Mr. Marsden about the falling out between Mr. Hubich and Mr. Kowalchuk. She advised Mr. Marsden that she felt that Mr. Hubich's actions

amounted to harassment. The Applicant acknowledged that she had been advised by Mr. Kowalchuk to speak to her union about the matter. The Applicant also advised Mr. Marsden that she had had a request made of her by Mr. Hubich to communicate his demand to Mr. Kowalchuk and Ms. Britton that the report be first provided to the SFL Executive Officers first before it was submitted to the other members of the Executive Counsel.

[18] After Christmas, on January 5, 2012, Mr. Hubich circulated a memo to all of the staff at SFL which advised that, based upon a letter he had received from Mr. Burkart (of the RWDSU) which revised the participation of Mr. Kowalchuk in the affairs and programs of the SFL, that SFL staff would not be permitted to have further interaction with Mr. Kowalchuk, with some limited exceptions. The letter from the RWDSU spelled out Mr. Kowalchuk's ongoing role on behalf of RWDSU with the SFL and noted "...Larry Kowalchuk will no longer represent RWDSU on any other SFL Committees and/or programs without a personal written invitation from the President of the SFL".

[19] On that same date, the Applicant sent an email to both Mr. Marsden and Mr. Bill Robb, her uncle, who was at that time the acting Regional Director for CUPE National asking if either of them could be available to talk to her about what was going on in her workplace. Mr. Robb emailed her back that same day, advising that he had had a conversation with Mr. Marsden and that Mr. Marsden would be getting back to her. Mr. Marsden contacted her later that day advising her that he would be available to talk to her that afternoon.

[20] Mr. Robb made notes of his meeting with Mr. Marsden on January 5, 2012. They read as follows:

> ...
> *Local 4828*
> *discussed situation*
> *Guy will get in touch c Cara*
> *Bill will call Larry Hubich*

[21] Mr. Robb met with Mr. Marsden again on January 6, 2012. His notes of that meeting indicate that he had contacted Mr. Hubich prior to his meeting with Mr. Marsden. His notes of his meeting with Mr. Marsden indicate that Mr. Hubich was not looking at the issue surrounding the submission of the report to the Executive Officers of the SFL, as being a

disciplinary matter insofar as the Applicant was concerned. He also scheduled a meeting the following week with Mr. Hubich.

[22] In the meanwhile, the Union raised concerns with Mr. Marsden concerning the memo from Mr. Hubich of January 5, 2012 with respect to contact with Mr. Kowalchuk. At a Union meeting on January 11, 2012, the Union requested that Mr. Marsden contact Mr. Robb asking him not to meet with Mr. Hubich and instead schedule a Labour-Management meeting with Mr. Hubich to discuss, amongst other things, how they should govern their interactions with Mr. Kowalchuk.

[23] Numerous other meetings were held between the various actors in this matter during January, 2012. Because of the Applicant's family and personal connections, she was able to engage the time and consideration of the most senior CUPE national representatives in the Province to deal with her situation. She ultimately took a sick leave from January 18 – 31st. She then was on holiday for some period thereafter.

[24] One meeting of note occurred on January 17, 2012 between Mr. Hubich, Ms. Johb, Mr. Marsden and Mr. Smith, the shop steward for Local 4828. This meeting was intended to be a labour-management meeting to discuss and clarify issues surrounding the January 5, 2012 memo from Mr. Hubich, but instead focused primarily on the issues between Mr. Hubich and the Applicant concerning the submission of the Labour Issues Campaign report to the SFL executive committee prior to its circulation to the SFL Executive Counsel.

[25] Mr. Smith's notes from that meeting outline a number of points of conversation at that meeting. Some of the points made can be summarized as follows:

- *Mr. Hubich and Ms. Johb were complimentary concerning the job which the Applicant had been doing. They were, however, concerned about her having committed a breach of trust by working with others in defiance of the Employer. They noted however, that they had no interest in disciplining the Applicant for her involvement.*

- *They discussed the fact that Mr. Kowalchuk was now removed from the equation and that should reduce the difficulty which the Applicant expressed that she was having working with him.*

- *Mr. Hubich provided a text message stream related to the circulation of the Labour Issues Campaign report, which implicated the Applicant.*

- *Mr. Hubich and Ms. Johb wanted to have the Applicant explain her involvement in the circulation of the report.*

- *Mr. Hubich suggested that when Cara chose to pick sides, she picked the wrong one. She doesn't report to Larry Kowalchuk.*

- *Mr. Hubich and Ms. Johb suggested that the table officers of the SFL had not seen evidence that the Applicant sees a problem with what has happened.*

[26] Mr. Marsden reported to Mr. Robb concerning the meeting on January 17, 2012. Mr. Robb's notes of that meeting disclose the following:

- *Several times a week LK (Larry Kowalchuk) and CB (Cara Banks) had yelling matches behind closed doors and then LK would storm out.*

- *Agreed: GM (Guy Marsden) and Heath Smith will meet with Cara privately and note:*

    - *No harassment by LH (Larry Hubich)*
    - *Legitimate management concerns re: the 3 person report & reaction from JB (Jen Britton), LK & to a lesser extent, Cara.*
    - *Harassment/yelling between CB and LK.*
    - *A harassment charge would be frivolous & subject to discipline.*
    - *CB needs to indicate personal support on a go forward to supporting the program.*
    - *Note JB has apologized to LH.*

[27] On her return from sick leave, the Applicant met with Mr. Marsden and Mr. Smith to discuss the January 17, 2012 meeting. She then went on vacation for part of February, 2012. During March, 2012 she continued to email Mr. Marsden concerning issues she was experiencing in the workplace. On March 19, 2012 she emailed Mr. Marsden to advise him that "[T]he employer is asking for a meeting to discuss 'work-related matters'". That meeting was scheduled for March 26, 2012. On that date, the Applicant was provided a Letter of Reprimand, signed by Mr. Hubich which referenced three (3) main points:

1. *The Applicant's failure to provide a copy of the Labour Issues Campaign report to the SFL President as requested.*

2. *Making a recommendation to the Canadian Labour Congress that they should contact Mr. Kowalchuk with respect to course content for a Labour Law Course contrary to the provisions of the January 5th memo concerning contact between staff and Mr. Kowalchuk.*

3. *Communicating with some of the SFL officers in a manner which he felt undermined decisions which had been made by the SFL Officers.*

[28] On April 17, 2012, the Applicant contacted Mr. Marsden to arrange to meet with him regarding the harassment issue. Mr. Marsden, the Applicant and Ms. Stacey Durning, a member of Local 4828 met on April 18, 2012. At that meeting, the Applicant provided Mr. Marsden with a sample grievance she would like filed along with a 32 page summary of what she considered constituted evidence of the harassment she was suffering. She asked Mr. Marsden and Ms. Durning to review the 32 page summary, share it with Ms. Kagis, but to "keep it confidential" until the next steps were decided.

[29] There was a good deal of evidence given concerning the communications between the Applicant, the Union, and representatives of CUPE National that occurred in respect of the letter of discipline from Mr. Hubich. In summary, that evidence was that the Applicant wanted a grievance filed not only against the letter of discipline, but also pursuant to the provisions of the Collective Bargaining Agreement that provided for a grievance to be filed regarding harassment. The Union and CUPE National counseled against including anything in the grievance concerning harassment.

[30] In the end, the Union decided to file a grievance only against the letter of reprimand. A meeting was set for the first step grievance meeting. Again, there was considerable evidence and correspondence concerning who should represent the Applicant at the meeting. The Union seemed to be frustrated by their inability to get direction from the Applicant. She finally sent an email to the Union which attached a "Grievor's Statement" which she asked the Union to read at the first step meeting. She also emailed the Statement to the Employer.

[31] The Grievor's Statement caused considerable consternation, especially since it had been sent to the Employer without prior discussion with the Union. The Statement included references to harassment, something which the Union had determined would not form a part of the grievance at that time.

[32] The step one grievance meeting went ahead as planned on May 3, 2012. There was no resolution of the grievance at that meeting. Following the meeting, the Union wrote to the Applicant to express its disappointment with her having sent the Grievor's Statement directly to Larry Hubich.

[33] Following the step one grievance meeting, the Applicant went on sick leave. She advised the full SFL Executive of this fact by email. She also began communicating with both the Union and CUPE National concerning the fact that she was not being represented with respect to the harassment issues she was trying to raise with the Employer. She suggested that one solution might be to try to negotiate a settlement/termination package with the Employer.

[34] Discussions also ensued with respect to moving the grievance forward to the second step of the grievance procedure. These discussions were somewhat impacted by the proposal that a settlement/termination package be discussed. Nevertheless, the Union sought, and was granted, an extension of the period in which to move the grievance to the second stage. That extension was until May 31, 2012.

[35] On May 31, 2012, the Union sought another extension of the time for moving the grievance forward until June 15, 2013. That extension was also granted. During that time, the Applicant's sick leave was concluded and she was advised by the Employer that she would be required to make application for Long Term Disability coverage. During that period she also received notification from the Workers' Compensation Board that her claim for psychological injury had been denied. The Union agreed to make a request of the Employer that the Applicant be permitted to access her additional sick leave to tide her over until her Long Term Disability claim could be processed.

[36] The time for moving the grievance forward was again extended until June 29, 2012. However, on June 19, 2012 Mr. Hubich wrote to the Union to advise that "[O]n a without prejudice and non-precedent setting basis we are prepared to remove the letter of reprimand from Cara's file effective immediately as requested in the grievance". The Union advised by letter dated June 19, 2012 that it agreed with the terms outlined in the Employer's letter. The Union then advised that "CUPE 4828 is prepared to consider the grievance fully resolved".

[37] On June 26, 2012, the Applicant sent a grievance to Mr. Hubich, signed by herself alleging a breach of the harassment provisions of the Collective Bargaining Agreement. She later circulated the grievance to all members of the SFL Executive Council on July 24, 2012.

[38] The Union and CUPE National were surprised by this grievance since they had not been consulted with prior to its filing. In her email to the SFL Executive Committee, the

Applicant noted that "[T]he certified bargaining agent, local 4828, supports this complaint process". That comment was absent, however, from the email sent to her Union. Her evidence with respect to this omission was that it was an editing mistake on her part.

[39] The filing of this grievance by the Applicant caused quite a disruption insofar as the SFL, the Union and CUPE National was concerned. It was uncertain whether or not a grievance could be filed by an individual and what the status of the grievance was. On July 24, 2012, the Applicant agreed to file an individual harassment complaint under the Collective Bargaining Agreement, which she also sent to the SFL Executive Counsel as noted above. In her email to the Union she stated:

> *As recommended by the local in your e-mail of July 20, below, please find a copy of my individual harassment complaint filed today, pursuant to Article 29.6(b). It is my hope that this process will result in a resolution which would in turn settle my June 26th grievance.*

[40] On August 10, 2012, the Applicant filed the within application alleging a breach of s. 25.1 of the *Act*. Following the filing of this application, Mr. Hubich wrote to the SFL Executive Council apprising them of the situation. In his memo, Mr. Hubich says:

> *We have contacted Local 4828 to indicate we have been made aware of this "harassment complaint" and asked Local 4828 to contact its member, Cara Banks, and advise that if she wishes to file a harassment complaint it needs to comply with Article 29.6 (or the Local can file on her behalf) "documenting the event(s) complete with time, date, location, names of witnesses and details for each event."*

[41] In addition to her personal harassment complaint, the Applicant also filed a complaint with the Occupational Health and Safety Branch of the Ministry of Labour Relations and Workplace Safety. On October 2, 2012, Mr. Terry McKay, Occupational Health and Safety Officer wrote to Mr. Bob Bymoen, Ms. Barb Cape, and Ms. Rosalee Longmoore, all of whom were then Vice Presidents of the Executive of the SFL.

[42] That correspondence had several impacts. First, it prompted Local 4828 to adopt the draft harassment policy forwarded by Occupational Health and Safety as the local's interim policy. Secondly, it lead to the appointment by the SFL of an investigator to look into the harassment complaint. By letter dated December 5, 2012, the counsel for SFL wrote to Hill

Advisory Services of Assiniboia, Manitoba to retain their services "with respect to a complaint that has been informally made by Cara Banks and, we believe, will be submitted as a formal complaint".

[43] The December 5, 2012 letter went on to say:

> *We understand the complaint will allege harassment and for bullying by Larry Hubich, president of the SFL, Wanda Bartlett, past secretary of the SFL and Lori Johb, treasurer of the SFL. These individuals have excused themselves from any discussions or deliberation regarding Ms. Banks [sic] complaint. The matter is being dealt with by the SFL through a committee made up of Rosalee Longmoore, Bob Bymoen and Barb Cape.*

[44] At the hearing of this matter, it was the Board's understanding that there had been no agreement as to the terms of reference for any investigation.

Relevant statutory provision:

[45] 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.*

Applicant's arguments:

[46] Mr. Ronald Gates, counsel for the Applicant, filed a written Brief which the Board has reviewed and found helpful. His arguments focused on the refusal of the Union to file a grievance on behalf of the Applicant regarding the issue of harassment. Mr. Gates made no arguments in respect of the representation by the Union regarding the discipline grievance.

[47] The main argument advanced by the Applicant was that CUPE National and the Employer conspired to deny, obstruct and silence the Applicant's claims against Mr. Hubich. In support of this theory, the Applicant cited what she described as an agreement made between Mr. Marsden, the CUPE National representative, the shop steward for Local 4828, Mr. Smith, and Mr. Hubich, when they met on January 17, 2012, that the actions of Mr. Hubich did constitute harassment. This agreement, he argued, when coupled with the commitment made by Ms. Kagis, the Regional Director for CUPE National, to repair CUPE's relationship with Mr.

Hubich, formed the backdrop of the alleged conspiracy. Part of the alleged conspiracy was also the fact that CUPE was a member of the SFL and had political and personal connections to Mr. Hubich.

[48] The Applicant argued that a higher standard of representation was due where an employee's critical interests were at stake. In support of that position, she cited several cases.[2] The Applicant argued that CUPE's conduct with respect to the representation of the Applicant exceeded the bounds of their discretion and that the standard of conduct was not sufficient in this case.

[49] The Applicant argued that the Union had not:

1. *properly considered the importance of, and the impact on, the employee of the grievance;*
2. *seriously examined the likelihood of the grievance succeeding;*
3. *directed its mind to the merits of the grievance and did not take adequate care in investigating the complaint made by the Applicant regarding harassment;*
4. *maintained standards of conduct and did not act in accordance with the Union's practice in similar cases; and*
5. *taken into account the fact that no other member's rights or interests would be impacted by the grievance being taken forward.*

[50] The Applicant further argued that the apparent agreement at the January 17, 2012 meeting showed both an unwillingness on the part of the Union to protect its member from harassment and to file a grievance, and bad faith insofar as they argued, the Union made an agreement with the Employer that no harassment had occurred. This, they argued, was a deliberate choice to choose the interests of the Employer over those of the Applicant.

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[2] *Gendron v. Supply & Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, [1990] SCJ No 55, *Brian L. Eamor*, [1996] CLRBD No. 11, 96 CLLC 220-039 and *McPhee v. Canadian Union of Public Employees*, [2007] NSSC 94, 252 NSR (2d) 358.

[51] The Applicant also argued that the Union was in a conflict of interest because the Union was the largest union affiliated to the SFL, a position which allowed it to have two (2) Vice-Presidents on the Executive Council. The amounts of dues tendered by the Union are so significant, they argued, that this made them a "part owner" of the SFL.

[52] The Applicant also argued that the Union was hostile to her and acted in a manner that was injurious to her, which also amounted to bad faith on the part of the Union.

Union's arguments:

[53] The Union argued that the Applicant bore the onus in this matter and that she had failed to satisfy that onus of proving a breach of the duty of fair representation.

[54] The Union argued that they had met the requirements of Section 25.1 of the *Act*, insofar as it had not acted in a manner that was "arbitrary, discriminatory, or in bad faith". In support of this position it cited *Lucyshyn (Re).*[3]

[55] The Union argued that our function as a Board is not to determine if a union was correct in its assessment of the merits of a grievance, but rather is to determine if the union has fairly and reasonably arrived at its decision without acting in bad faith or in an arbitrary or discriminatory manner. Furthermore, it argued that just because a grievor does not agree with the union's decision, that is not sufficient to establish a deficiency in representation.

[56] The Union also argued that even where "critical job interests" are involved, that does not necessarily entitle a grievor to a mandatory arbitration hearing, even when an employee is discharged from their employment.

[57] The Union also argued that:

1. It did not represent the Applicant in bad faith. It argued that the statement attributed to the Applicant's uncle, Mr. Robb that CUPE was supportive of Mr. Hubich was denied by Mr. Robb when he testified. The Union

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[3] *Dwayne Lucyshyn v. Amalgamated Transit Union, Local 615*, [2010] S.L.R.B.D. No. 6, 178 C.L.R.B.R. (2d) 96, CanLII 15756 (SKLRB), LRB File No. 035-09.

argued that such a statement did not make sense in the context of reality where the current provincial President of CUPE had ran against Mr. Hubich for election as head of the SFL;

2. It did not represent the Applicant in any manner which was discriminatory. They argued, to the contrary, the Applicant had enjoyed unprecedented access to senior members of the provincial wing of CUPE National who advocated her interests; and

3. It did not act arbitrarily. They argued that they made certain that they were aware of all facts concerning the harassment issue by requesting that the Applicant provide details of her complaint to them, which she did. They attempted, within the bounds of the constraints put on them by the Applicant, to verify and confirm the information given and were unable to confirm or corroborate the Applicant's information.

[58] The Union argued that they made a reasoned decision with respect to the harassment complaint and considered all of the relevant and conflicting evidence. They also argued that the Union, being a small local, had limited resources with which to pursue a grievance.

[59] The Union further argued that they did not carry out its representation of the Applicant with blatant of reckless disregard. They argued that the Union had met with the Applicant on many occasions which consumed a great deal of the Union's resources. Furthermore, it argued that there was considerable correspondence between the various players as well as other meetings at which the Applicant was not in attendance. They argued that the union had successfully caused the letter of reprimand to be removed from her record and had continuously supported her in filing an individual complaint under the harassment provisions of the Collective Bargaining Agreement.

Employer's arguments:

[60] The Employer restricted its arguments to the issue of remedy. The Employer argued that the Board should not order that the Union proceed with a harassment grievance against the Employer.

[61] The Employer argued that claims from a workplace injury (harassment) are within the exclusive jurisdiction of the Workers' Compensation Board and that the Union would be barred from proceeding with a grievance relating to any claim related to or arising from a workplace injury. In support, the Employer cited *University of Saskatchewan v. Saskatchewan (Workers' Compensation Board)*[4].

[62] The Employer also argued that this application amounted to an abuse of process and offended the principle of finality. The Employer noted that the Applicant had initiated claims in several forums, including a claim for Workers' Compensation benefits, a harassment investigation under the *Occupational Health and Safety Act, 1993*[5], and this application. It argued that the root of all of the applications was the allegations of harassment and the Applicant should not be permitted to proceed in multiple forums to have the same issue determined. In support, it cited *Toronto (City) v. CUPE Local 79*[6], *Weber v. Ontario Hydro*[7], *Regina Police Association v. Regina (City) Board of Police Commissioners*[8], and *British Columbia (Workers' Compensation Board) v. Figliola*[9].

Analysis:

Summary of Board Jurisdiction Regarding Section 25.1

[63] For the reasons which follow, the Application is dismissed. At issue in this case is only the question of representation by the Union in respect of the Applicant's claims of harassment against Mr. Hubich. The grievance filed by the Union in respect to the letter of reprimand has been resolved as between the employer and the Union and no issue remains with respect to the representation of the Applicant with respect to that grievance.

[64] This Board has no jurisdiction to hear and determine any aspects of the harassment claim made by the Applicant against Mr. Hubich. That matter must be dealt with

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[4] [2009] SKCA 17
[5] S.S. 1993, c. O-1.1
[6] [2003] SCC 63
[7] [1995] 125 DLR (4th) 583
[8] [2000] 1 SCR 360
[9] [2011] SCC 52

under either *The Occupational Health and Safety Act*[10] or *The Workers' Compensation Board Act*[11].

[65] The Board's jurisprudence with respect to the duty of fair representation under Section 25.1 of the *Act* is well established. In *Hargrave, et al. v. Canadian Union of Public Employees, Local 3833, and Prince Albert Health District*[12], the Board set out the principles applicable to an analysis of the duty of fair representation, with a particular focus on arbitrariness and the scope of the Union's duty. In that case, the Board said:

> *[27] As pointed out in many decisions of the Board, a succinct explanation of the distinctive meanings of the concepts of arbitrariness, discrimination and bad faith, as used in s. 25.1 of the Act, was made in Glynna Ward v. Saskatchewan Union of Nurses, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at 47, as follows:*
>
> > *Section 25.1 of The Trade Union Act obligated the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favoritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*
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> *[28] In Toronto Transit Commission, [1997] OLRD No. 3148, at paragraph 9, the Ontario Labour Relations Board cited with approval the following succinct explanation of the concepts provided by that Board in a previous unreported decision:*
>
> > *. . . a complainant must demonstrate that the union's actions were:*
> >
> > *(1) "Arbitrary" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
> >
> > *(2) "Discriminatory – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
> >
> > *(3) "in Bad Faith" – that is, motivated by ill-will, malice hostility or dishonesty.*

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[10] Supra Note 5
[11] S.S. 1979 c. W-17.1
[12] [2003] Sask. L.R.B.R. 511, LRB File No. 223-02

> *The behaviour under review must fit into one of these three categories. ...[M]istakes or misjudgments are not illegal; moreover, the fact that an employee fails to understand his rights under a collective agreement or disagrees with the union's interpretation of those rights does not, in itself, establish that the union was wrong – let alone "arbitrary", "discriminatory" or acting in "bad faith".*
>
> *The concept of arbitrariness, which is usually more difficult to identify than discrimination or bad faith, is not equivalent to simple errors in judgment, negligence, laxity or dilatoriness. In Walter Prinesdomu v. Canadian Union of Public Employees, [1975] 2 CLRBR 310, the Ontario Labour Relations Board stated, at 315:*
>
> > *It could be said that this description of the duty requires the exclusive bargaining agent to "put its mind" to the merits of a grievance and attempt to engage in a process of rational decision making that cannot be branded as implausible or capricious.*
> >
> > *This approach gives the word arbitrary some independent meaning beyond subjective ill will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness.*

. . . .

[34] There have been many pronouncements in the case law with respect to negligent action or omission by a trade union as it relates to the concept of arbitrariness in cases of alleged violation of the duty of fair representation. While most of the cases involve a refusal to accept or to progress a grievance after it is filed, in general, the cases establish that to constitute arbitrariness, mistakes, errors in judgment and "mere negligence" will not suffice, but rather, "gross negligence" is the benchmark. Examples in the jurisprudence of the Board include Chrispen, supra, where the Board found that the union's efforts "were undertaken with integrity and competence and without serious or major negligence. . . ." In Radke v. Canadian Paperworkers Union, Local 1120, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, at 64 and 65, the Board stated:

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

[35] Most recently, in Vandervort v. University of Saskatchewan Faculty Association and University of Saskatchewan, [2003] Sask. L.R.B.R. 147, LRB File Nos. 102-95 & 047-99, the Board stated, at 193:

> *[215] Arbitrariness is generally equated with perfunctory treatment and gross or major negligence. This standard arose from Canadian Merchant Service Guild v. Gagnon . . . .*

And further, at 194-95, as follows:

> *[219] In Rousseau v. International Brotherhood of Locomotive Engineers et al., 95 CLLC 220-064 at 143, 558-9, the Canada Labour Relations Board described the duty not to act in an arbitrary manner as follows:*
>
> > *Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.*
> >
> > *Negligence is distinguishable from arbitrary, discriminatory or bad faith behaviour. The concept of negligence can range from simple negligence to gross negligence. The damage to the complainant in itself is not the test. Simple negligence may result in serious damage. Negligence in any of its variations is characterized by conduct or inaction due to inadvertence, thoughtlessness or inattention. Motivation is not a characteristic of negligence. Negligence does not require a particular subjective stage of mind as does a finding of bad faith. There comes a point, however, when mere/simple negligence becomes gross/serious negligence, and we must assess when this point, in all circumstances, is reached.*
> >
> > *When does negligence become "serious" or "gross"? Gross negligence may be viewed as so arbitrary that it reflects a complete disregard for the consequences. Although negligence is not explicitly defined in section 37 of the Code, this Board has commented on the concept of negligence in its various decisions. Whereas*

> *simple/mere negligence is not a violation of the Code, the duty of fair representation under section 37 has been expanded to include gross/serious negligence . . . The Supreme Court of Canada commented on and endorsed the Board's utilization of gross/serious negligence as a criteria in evaluating the union's duty under section 37 in Gagnon et al. [[1984] 1 S.C.R. 509]. The Supreme Court of Canada reconfirmed the utilization of serious negligence as an element to be considered in Centre Hospitalier Régina Ltée v. Labour Court, [1990] 1 S.C.R. 1330.*

[36] In North York General Hospital, [1982] OLRB Rep. Aug. 1190, the Ontario Labour Relations Board addressed the relation of negligence to arbitrariness as follows, at 1194:

> *A union is not required to be correct in every step it takes on behalf of an employee. Moreover, mere negligence on the part of a union official does not ordinarily constitute a breach of section 68. See Ford Motor Company of Canada Limited, [1973] OLRB Rep. Oct. 519; Walter Princesdomu and The Canadian Union of Public Employees, Local 1000, [1975] OLRB Rep. May 444. There comes a point, however, when "mere negligence" becomes "gross negligence" and when gross negligence reflects a complete disregard for critical consequences to an employee then that action may be viewed as arbitrary for the purposes of section 68 of the Act. In Princesdomu, supra, the Board said at pp 464-465:*
>
> > *Accordingly at least flagrant errors in processing grievances--errors consistent with a "not caring" attitude--must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so, implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint.*

[37] In a subsequent decision, Canada Packers Inc., [1990] OLRB Rep Aug. 886, the Ontario Board confirmed this position as follows, at 891:

> *A review of the Board's jurisprudence reveals that honest mistakes, innocent misunderstandings, simple negligence, or errors in judgment will not of themselves, constitute arbitrary conduct within the meaning of section 68. Words like "implausible", "so reckless as to be unworthy of protection", "unreasonable", "capricious", "grossly negligent", and "demonstrative of a non-caring attitude" have been used to*

describe conduct which is arbitrary within the meaning of section 68 (see Consumers Glass Co. Ltd., [1979] OLRB Rep. Sept. 861; ITE Industries, [1980] OLRB Rep. July 1001; North York General Hospital, [1982] OLRB Rep. Aug. 1190; Seagram Corporation Ltd.. [1982] OLRB Rep. Oct. 1571; Cryovac, Division of W.R. Grace and Co. Ltd., [1983] OLRB Rep. June 886; Smith & Stone (1982) Inc., [1984] OLRB Rep. Nov. 1609; Howard J. Howes, [1987] OLRB Rep. Jan. 55; George Xerri, [1987] OLRB Rep. March 444, among others). Such strong words may be applicable to the more obvious cases but may not accurately describe the entire spectrum of conduct which might be arbitrary. As the jurisprudence also illustrates, what will constitute arbitrary conduct will depend on the circumstances.

[38] The British Columbia Labour Relations Board has taken a similar view with respect to matters of process. In Haas v. Canadian Union of Public Employees, Local 16, [1982] BCLB No. L48/82, that Board stated as follows:

> *... similarly, the Board will be reluctant to find a breach of Section 7 by virtue of the manner in which particular grievances are pursued. As stated earlier, a complainant must demonstrate shortcomings in the union's representation beyond the areas of mere negligence, inadvertent errors, poor judgment, etc. The shortcomings must be so blatant as to demonstrate that the grievor's interests were pursued in an indifferent or perfunctory manner.*
>
> *Too often the intended purpose and limits of Section 7 are not well understood. A union is afforded wide latitude in the manner in which it deals with individual grievances; the Board will only find violations of Section 7 where a union's manner of representation of an individual grievor is found to be an obvious disregard for his rights or for the merits of the particular grievance. Broadening the scope of Section 7 beyond the areas described in earlier pages of this decision would not be in keeping with the purpose and objects of the Labour Code; it would encourage the filing of a myriad of unfounded and frivolous Section 7 applications to the Board and it could also force unions to untenable positions in grievance handling because of the weight they would have to give to possible Section 7 complaints hanging over their heads.*
>
> . . .
>
> *Each case must be decided on its own merits; suffice to say, however, that the Board may well find shortcomings in the manner in which the union dealt with a particular matter without finding that such shortcomings support a Section 7(1) complaint. The Board may well find that a union could have been more vigourous and thorough in its investigation of the facts in a particular case; it may even question the steps taken in dealing with a grievance and the ultimate decision made with respect to that grievance. However, that does not necessarily mean that a complaint under Section 7(1) will be substantiated. To substantiate a charge of arbitrariness,*

> *there must be convincing evidence that there was a blatant disregard for the rights of the union member.*

[39] As noted above, the Canada Labour Relations Board took a similar view in Rousseau v. International Brotherhood of Locomotive Engineers et al., supra. In Johnson v. Amalgamated Transit Union, Local 588 and City of Regina, [1997] Sask. L.R.B.R. 19, LRB File No. 091-96, the Board referred to the evolution of the treatment of the issue of arbitrariness by the Canada Board. At 31-32, the Board observed as follows:

> *The Canada Labour Relations Board initially accepted the notion that, in the case of what were termed "critical job interests," the obligation of a trade union to uphold the interest of the individual employee affected would be close to absolute. What might constitute such critical job interests was not entirely clear, but loss of employment through discharge was clearly among them.*
>
> *The Board continued to hold the view that the seriousness of the interest of the employee is a relevant factor. In Brenda Haley v. Canadian Airline Employees' Association, [1981] 81 C.L.L.C. 16,096, the Canada Board made this comment, at 609:*
>
> > *This concept (i.e. critical job interests] is a useful instrument to distinguish circumstances where the balance between the individual and union or collective bargaining system interests will tilt in one direction or another. A higher degree of recognition of individual interests will prevail on matters of critical job interest, which may vary from industry to industry or employer to employer. Conversely on matters of minor job interest for the individual the union's conduct will not receive the same scrutiny and the Board's administrative processes will not respond with the same diligence or concern. Many of these matters may not warrant an expensive hearing. Examples of these minor job interests are the occasional use of supervisors to do bargaining unit work, or isolated pay dispute arising out of one or a few incidents and even a minor disciplinary action such as a verbal warning.*
>
> *They concluded in the Brenda Haley case, however, that this factor should be evaluated along with other aspects of the decisions taken by the trade union. The decision contains this comment, at 614:*
>
> > *As frustrating as duty of fair representation discharge cases may be and as traumatic as loss of employment by discharge may be, we are not persuaded mandatory discharge arbitration is the correct response. It is an easy response but its effect on the group and institutional interests is too harsh. With the same view of the integrity of union officials and the merits of the grievance procedure shared by Professor Weiler we say unions must*

> *continue to make the difficult decisions on discharge and we must continue to make the difficult decisions complaints about the unions' decisions often require.*

They went on to summarize the nature of the duty imposed on the trade union, also at 614:

> *It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.*

[40] Thus, there is a line of cases that suggests that where "critical job interests" are involved (e.g., discharge from employment), depending upon the circumstances of the individual case, a union dealing with a grievance may well be held to a higher standard than in cases of lesser importance to the individual in determining whether the union has acted arbitrarily (including whether it has been negligent to a degree that constitutes arbitrariness). The Board has taken a generally favourable view of this position as demonstrated in Johnson and Chrispen, supra.

[41] However, in Haley, supra, a case involving the missing of a time limit for referral to arbitration, the Canada Board also recognized that the experience of the union representative and available resources are relevant factors to be considered in assessing whether negligence is assumed to be of a seriousness that constitutes arbitrariness, stating as follows:

> *...The level of expertise of the union representative and the resources the union makes available to perform the function are also relevant factual considerations. These and other relevant facts of the case will form the foundation in each case to decide whether there was seriously negligent, arbitrary, discriminatory or bad faith, and therefore unfair, representation.*

[42] In Chrispen, supra, the Board approved of this position also, stating, at 150, as follows:

> *The reason why cases involving allegations of arbitrariness are the most vexing and difficult is because they require the Board to set standards of quality in the context of a statutory scheme which contemplates that employees will frequently be represented in grievance proceedings by part-time union representatives or even other co-workers. Even when the union representatives are full-time employees of the union, they are rarely lawyers and may have few qualifications for the responsibilities which this statutory scheme can place upon them.*
>
> *In order to make this system work, the legislature recognized that union representatives must be permitted considerable latitude. If their decisions are reversed too often, they will be hesitant to settle any grievance short of arbitration. Moreover, the employer will be hesitant to rely upon any settlement achieved with the union if labour boards are going to interfere whenever they take a view different from that of a union. The damage this would do to union credibility and the resulting uncertainty would adversely affect the entire relationship. However, at the same time, by voluntarily applying for exclusive representative status, the union must be prepared to accept a significant degree of responsibility for employees, especially if an employee's employment depends upon the grievance.*

Is this Matter Within the Exclusive Jurisdiction of the Workers' Compensation Board?

[66] The Employer in this application has raised issues concerning the Board's jurisdiction to make the requested orders. The Employer argued that the matter should be dealt with by the Workers' Compensation Board or, in the alternative, that the Applicant should be estopped from litigating the same issue in multiple forums.

[67] The Board is unable to agree with the Employer that *The Workers' Compensation Act*[13] represents a bar to our jurisdiction to hear and determine whether or not the Union acted in a manner which was arbitrary, discriminatory or in bad faith. With respect, the Workers' Compensation Board has not sought to assert exclusive jurisdiction over this matter pursuant to Section 168 of that *Act*. In fact, we are not aware, nor was there evidence to establish, that any application has been made to the Workers' Compensation Board pursuant to Section 168.

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[13] SS 1979 c. W-17.1

[68] In the *University of Saskatchewan* case, Arbitrator Sims made a distinction between claims for monetary compensation and non-monetary claims made in the grievance. At paragraph 14 of the Court of Appeal's ruling, the Court quoted from Arbitrator Sim's ruling regarding his jurisdiction to hear and determine the grievance arbitration. That ruling provided:

> *I find that, under the Saskatchewan legislation, where an employee seeks a judicial or arbitral remedy (i.e. asserts a right to take proceedings of some kind) for an injury arising out of the workplace, the WCB is given the exclusive authority to determine that matter to the exclusion not only of the Courts, but of arbitrators acting under the authority of a collective agreement. I find this is so whether the claim is purely contractual (arising out of negotiated language) or is one allowed by the extended jurisdiction arbitrators are allowed under the Weber [Weber v. Ontario Hydro,1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929] and Parry Sound [Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U), 2003 SCC 42 (CanLII), 2003 SCC 42] line of cases.*
>
> *Examining the grievance in this case, clearly a part of what the grievor seeks is compensation for what, based on her allegations and the WCB's policies, may be a workplace injury arising out of the course of her employment. However, in my view, the grievance goes beyond that. The Union claims and is entitled to claim, non-monetary remedies for workplace harassment. It is also entitled to claim, as I believe it has, that more systemic discrimination exists within the department. In this respect I note the distinction made by the Court at paragraph 98 of Vaid [Canada (House of Commons) v. Vaid, 2005 SCC 30 (CanLII), 2005 SCC 30, [2005] 1 S.C.R. 667].*
>
> *My conclusion is that it is the WCB's right to decide, under s. 168 of the Workers' Compensation Act, whether the claim for monetary compensation made in this case falls within the statutory bars created by the various sections of the Workers' Compensation Act. Despite counsel's able arguments about the paramountcy of collective agreement arbitration, the Saskatchewan legislation does not indicate any intention to disconnect decisions that are integral to WCB entitlements from the scheme of that Act and assign them instead to labour arbitrators. Indeed I find I am precluded from doing so by the Supreme Court of Canada decisions referred to above, particularly Beliveau [Beliveau St-Jacques v. Federation des Employees et Employes de Sevices Publics Inc.,1996 CanLII 208 (SCC), [1996] 2 S.C.R. 345] and Pasiechnyk[Pasiechnyk v. Saskatchewan (Workers' Compensation Board), 1997 CanLII 316 (SCC), [1997] 2 S.C.R. 890].*

[69] The Board concurs with Arbitrator Sims with respect to this matter. It would only be if, and when, issues of compensation were to be considered by an arbitrator that any consideration of the applicability of the statutory bar pursuant to the *Workers' Compensation Board Act* would require consideration by the arbitrator. That situation could only arise if and when an application for a bar of proceedings is applied for and granted by the Workers' Compensation Board. That is not the case here.

[70] The Board's jurisdiction under Section 25.1 of the *Act* has often required the Board to determine if representation by a union was arbitrary, discriminatory or in bad faith in circumstances where allegations of harassment have been made by the complainant or a union on her behalf. Section 168 (or any other provision of *The Workers' Compensation Board Act*) has never been determined to be a bar to the exercise of our jurisdiction pursuant to Section 25.1. In instances where, in the determination of an appropriate remedy under s. 25.1, the Board determines that the matter should be remitted to arbitration, it is conceivable that a party may seek to invoke the statutory protections provided for in Section 168 of *The Workers' Compensation Board Act*, but the mere possibility that that may arise, does not constitute a bar to the exercise of the jurisdiction granted to us by the legislature under Section 25.1 of the *Act*.

What is the Proper Forum for this dispute?

[71] The question here is not so much whether one administrative body or the other has jurisdiction over this matter such that all issues related to the dispute may be resolved by that administrative body to the exclusion of the others, but rather does the Board have jurisdiction under Section 25.1 to hear and determine the matter brought before it. Here, the competing jurisdictions are:

- This application under s. 25.1 of the *Act*
- A claim under the *Workers' Compensation Board Act*
- A claim under the *Occupational Health and Safety Act*

[72] From the evidence provided at the hearing, the status of the other complaints made is as follows:

- The application to the Workers' Compensation Board has initially been turned down, but may be subject to appeal.
- The application under the *Occupational Health and Safety Act* has been initiated under that *Act*. The precise status is not known

[73] We are asked, pursuant to Section 25.1 of the *Act*, to require that the Union file a grievance under the provisions of the Collective Bargaining Agreement, which grievance will also allege that the Applicant has been the victim of harassment. The Employer argued that the subject matter of the complaint, in all cases was the same and they argued, there was a risk that differing forums could lead to different results.

[74] In support of its position, the Employer relied upon the Supreme Court of Canada decision in *Toronto (City) v. CUPE Local 79*[14], *Weber v. Ontario Hydro*[15], *Regina Police Association v. Regina (City) Board of Police Commissioners*[16], and *British Columbia (Workers' Compensation Board) v. Figliola*[17]. Since those decisions, the Supreme Court has again revisited the issue in *Penner v. Niagara Regional Police Services Board.*[18] That decision was a split decision (4-3) by the Court and casts some doubt on the Courts decision in *Figliola*, but reasserts the decision in *Danyluk v. Ainsworth Technologies.*[19]

[75] In *Weber v. Ontario Hydro*, MacLachlin J. (as she was then) stated that two elements must be considered to determine the appropriate forum. These were the nature of the dispute and, in the case of Weber, the ambit of the collective agreement. She added that in considering the nature of the dispute, the decision maker must define the essential character of that dispute.

[76] In *R. v Conway*[20], Abella J., writing for a unanimous court, discussed at paragraph [30], what she described as the "exclusive jurisdiction model" as enunciated by Madam Justice McLachlin in *Weber v. Ontario Hydro*, says the following:

> *[30] The Weber "exclusive jurisdiction model" enunciated by McLachlin J., which directed that an administrative tribunal should decide all matters whose essential character falls within the tribunal's specialized statutory jurisdiction, is now a well established principle of administrative law (Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners, 2000 SCC 14 (CanLII), 2000 SCC 14 (CanLII),2000 SCC 14 (CanLII), 2000 SCC 14, 2000 1 S.C.R. 360, Quebec (Commission des droits de la personne et des droits de la jeunesse v. Quebec (Attorney General), 2004 SCC 39 (CanLII), 2004 SCC 39 (CanLII), 2004 SCC 39, [2004] 2 S.C.R. 185, Quebec (Human Rights Tribunal); Vaughan v. Canada 2005 SCC 11 (CanLII), 2005 SCC 11 (CanLII), 2005 SCC 11, [2005] 1 S.C.R. 146; Okwuobi; Andrew K. Lokan and Christopher M. Dassios, Constitutional Litigation in Canada (2006), at p. 4-15.)*

[77] The Employer argues that the essential character of this dispute is the harassment complaint, which it says is best handled by the adjudicator appointed pursuant to the

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[14] [2003] SCC 63
[15] [1995] 125 DLR (4th) 583
[16] [2000] 1 SCR 360
[17] [2011] SCC 52
[18] [2013] SCC 19
[19] [2001] SCC 44 (CanLII)

Occupational Health and Safety Act, or, in the alternative by the Workers' Compensation Board under its legislative mandate. However, in making these arguments, the Employer did not argue that the Board should defer determination of the complaint "if the board considers that the matter should be resolved by arbitration **or an alternative method of resolution**", as provided for in Section 18(l) of the *Act*. [Emphasis added]

[78] The Applicant argues that the issue is the failure of the Union to file a grievance on her behalf under the harassment provisions contained within the collective agreement. She argues that that the Board has no authority to make any determination regarding the merits of the harassment complaint, but should exercise its jurisdiction under Section 25.1 as a means of assuring that the Applicant obtains proper representation from her union.

[79] With respect, the Board agrees with the position advanced by the Applicant in respect of our jurisdiction. The Board has no jurisdiction to adjudicate or determine if harassment has occurred, nor any jurisdiction to determine any remedy should harassment be found. We do, however, have jurisdiction to determine if a union has properly represented a member regarding a harassment complaint.

[80] This Board has discussed on a number of occasions the obligations placed upon unions to properly represent their members, which is a trade-off for the grant of the exclusive power to represent those employees for collective bargaining purposes. Those principles were first annunciated by the Supreme Court of Canada in *Canadian Merchant Services Guild v. Gagnon*[21]. Those principles concerning a union's duty of representation can be distilled as follows:

> 1. *The exclusive power conferred on a union to act as a spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> 2. *When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> 3 *This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account*

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[20] [2010] SCC 22 (CanLII), [2010], SCC 22 (CanLII), 1.S.C.R. 765.
[21] [1984] 84 CLLC 12,181

the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. *The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*

5. *The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employees.*

[81] Here, the Applicant has raised an issue of proper representation with respect to a harassment complaint which is now the subject of an ongoing harassment investigation. In a narrow sense, the Board clearly has jurisdiction over the narrow issue of the Union's representation of its member, the Applicant. In a broader sense, however, the root of the issue is a determination of whether or not the Applicant was harassed at the worksite by Mr. Hubich and others, as claimed.

[82] Had the Board been faced with a request, prior to embarking on numerous days of hearing of evidence, to defer this matter to the investigator under the *Occupational Health and Safety Act*, such request may well have been granted. However, as we have now heard the evidence from the parties and their arguments on the narrow issue of proper representation and have determined, for the reasons which follow that the Union has not failed to properly represent the Applicant, we decline to defer pursuant to Section 18(l) of the *Act*.

Did the Union Fail in its Duty of Fair Representation?

[83] The onus of proof that the Union failed to properly represent a member falls to the Applicant in this case. She has failed to show that the Union represented her in a manner which was arbitrary, discriminatory or in bad faith.

[84] For ease of reference, the Board willl repeat the definition of these terms as outlined in *Toronto Transit Commission.*[22]

> *(1) "Arbitrary" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*

[22] See paragraph [64] above

> *(2) "Discriminatory – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
>
> *(3) "in Bad Faith" – that is, motivated by ill-will, malice hostility or dishonesty.*
>
> *The behaviour under review must fit into one of these three categories. ...[M]istakes or misjudgments are not illegal; moreover, the fact that an employee fails to understand his rights under a collective agreement or disagrees with the union's interpretation of those rights does not, in itself, establish that the union was wrong – let alone "arbitrary", "discriminatory" or acting in "bad faith".*

Was the Union Arbitrary?

[85] In *Walter Prinesdomu v. Canadian Union of Public Employees*[23], the Ontario Labour Relations Board said concerning the concept of arbitrariness:

> *It could be said that this description of the duty requires the exclusive bargaining agent to "put its mind" to the merits of a grievance and attempt to engage in a process of rational decision making that cannot be branded as implausible or capricious.*
>
> *This approach gives the word arbitrary some independent meaning beyond subjective ill will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness.*

[86] In this regard, the chronology of events is important. The Applicant first brought the issue of harassment to Mr. Marsden's attention on December 24, 2011. The SFL offices were then closed over the holiday season. On January 5, 2012, Mr. Hubich circulated his letter concerning Mr. Kowalchuk. Mr. Marsden met with Mr. Robb on January 6, 2012 at which time the decision was made to attempt to hold discussions with Mr. Hubich concerning the harassment issue.

[87] The plans to deal with the harassment issue got side tracked somewhat by the Local's concerns which arose out of Mr. Hubich's memo of January 5, 2012. Mr. Robb backed out of the process, but Mr. Marsden and Mr. Smith did meet with Mr. Hubich and Ms. Johb on January 17, 2012. That meeting discussed the Applicant's concerns about the harassment she

was experiencing as well as the events surrounding the circulation of the Labour Issues Campaign report.

[88] While the Applicant continued to complain of harassment, it was not until April 17, 2012 that the Applicant outlined in detail the issues she was facing. At that time, however, she required that the information be kept confidential and did not allow Mr. Marsden or Ms. Durning to share the information with anyone other than Ms. Kagis. The evidence was that she later demanded and received all of the information back from Mr. Marsden and Ms. Durning.

[89] The Applicant, in argument, made much of what she alleged was a predetermination of the issue of harassment which occurred at the meeting of January 17, 2012. She points to the notation in the notes of that meeting that state: "No harassment by LH". However, in the Board's opinion, the notation is taken out of context. The context of the meeting was that they were discussing the circulation of the Labour Issues Campaign report and a series of emails/text messages dealing with the request by Mr. Hubich that the report be provided first to the Executive Committee prior to its general circulation and the Applicant's involvement in that message string. While issues related to harassment were discussed at that meeting, those issues were not the purpose of the meeting.

[90] Mr. Marsden testified that he did look for precedents concerning harassment as well as definitions of harassment. It was his testimony that based on his research (which he shared with the Applicant) the claim of harassment was one that was difficult to prove and may have adverse consequences if the claim is made and it is unfounded.

[91] Mr. Marsden confirmed that he had conducted research into the issue of harassment. In her testimony, and in Mr. Marsden's cross-examination, the Applicant questioned Mr. Marsden's qualifications and experience with respect to harassment. Nevertheless, he had formed the opinion, based on his research that a harassment claim would be difficult to establish.

[92] Not acting in an arbitrary manner does not require a standard of correctness, that is, Mr. Marsden was not required to be correct in his analysis. He merely had to take reasonable steps to determine the issue and do so in an honest, straightforward, rational and unbiased

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[23] [1975] 2 CLRBR 310 at 315

manner. His testimony in this regard was uncontradicted and the Board has no hesitation in finding that he formed an honest opinion concerning the chances of success.

[93] Notwithstanding that Mr. Marsden's view was that a harassment complaint stood little chance of success, the union continued to assist in the process, albeit not so far as to file an official grievance. They continued to urge the Applicant to file an individual complaint under the harassment provisions of the collective agreement. Furthermore, they supported the investigation of the complaint under the *Occupational Health and Safety Act.*

[94] The Board finds that the Union did not represent the Applicant in an arbitrary manner.

Did the Union Discriminate Against the Applicant?

[95] The Applicant argued that she was treated differently than other members of the Union with regards to her complaint. In support of that contention, she cited a previous case which had been dealt with by the Courts in *Saskatoon (City) v. Canadian Union of Public Employees, Local 47*[24]. In that case, the Union filed a grievance in respect of a harassment complaint by the grievor who had been found guilty of harassment. The Applicant argued that if a grievance had been filed in this case, one should have been filed in her case.

[96] With respect, the Board does not agree with the Applicant's arguments. In the case cited by the Applicant, the grievance was not filed in respect to any allegations of harassment, but was in response to discipline imposed due to a finding that the grievor was engaged in harassing activity.

[97] The Applicant also argued that in the above noted case, the arbitrator, Mr. Hood, discounted the conclusions reached by the investigator into the harassment complaints, Hill Advisory Services Ltd. (who has also been engaged in this case). However, he did accept the statements given by individuals contacted as a part of the investigation. This, the Applicant argued pointed out the necessity for this matter to be referred through the grievance procedure to an arbitrator who could, potentially reach a different conclusion, based on the same evidence, as was reached by an investigator.

[98] Again, with respect, the Board cannot agree with this assertion. In the Board's view, that would be contrary to the principles of finality and economy of judicial proceedings to have different outcomes resultant from the same set of facts.

[99] Nothing in these items, nor in the evidence or arguments made before the Board, suggest that the decision of the Union not to file a grievance regarding the harassment issue was tainted by any discrimination against the Applicant. On the contrary, the Applicant, as noted above, was given unprecedented access to senior members of CUPE National. Those national representatives, Ms. Kagis, Mr. Robb, and Mr. Marsden acted in what they believed was the Applicant's best interest.

Did the Union act in Bad Faith Against the Applicant?

[100] The Applicant cited the case of *Brian L. Eamor*[25] in support of its claim that the Union acted in bad faith in its representation of the Applicant. Again, it cited the apparent agreement on January 17, 2012 as a demonstration of bad faith. In *Brian L. Eamor,* the Canada Board identified the following as characteristics of bad faith:

> *59 Bad Faith refers to a subjective state of mind or conduct. It arises in circumstances where a union representative acts fraudulently, or for improper motives, or out of personal hostility or revenge.*
>
> *60 The concept of fair representation envisages that such representation by the union will, as the words imply, be fair and genuine and that it will be undertaken with integrity and competence… It presupposes that the union will act honestly and objectively.*

[101] The only point of evidence which may have pointed to bad faith on the part of the Union was the testimony of the Applicant wherein she testified that Mr. Robb had told her that CUPE was going to be supportive of Mr. Hubich in his re-election bid. Mr. Robb strongly denied making such a remark to the Applicant. The Board accepts Mr. Robb's evidence in this regard. His evidence is more consistent with the facts, including that Mr. Tom Graham, the Saskatchewan Division President of CUPE, was a candidate for election against Mr. Hubich at the last SFL election.

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[24] [2012] S.L.A.A. No. 1 William F. Hood, Q.C. Abitrator
[25] [1996] CLLC 220-039, 39 CLRBR (2d) 14, CLRB Decision No. 1162

[102] The Applicant also argued that CUPE was a major contributor to the SFL and was thus an "owner" of SFL which caused an inherent conflict of interest. With respect, the Board sees little support in the evidence for this argument. There was no evidence to support or show that the conduct of the Union was in any way impacted by its involvement as a funder and affiliate of the SFL. This conflict would be manifested more so with respect to representation of the SFL's staff by CUPE, Local 4828. If a conflict were an issue, one would think that CUPE National would be reluctant to bargain large wage or benefit increases for the staff of SFL since they would then be required to contribute more by way of support for SFL to provide for such increases.

[103] There was no evidence of any kind to support such an argument. Accordingly, the Board finds that the Union did not act in bad faith in its representation of the Applicant.

Did the Union Fail to Consider the Applicants Critical Interests?

[104] The Applicant is correct in her assertion that critical interests of the employee must be considered by a Union with respect to its decision not to file a grievance. As noted above, this concept (i.e.: critical job interests) is a useful instrument to distinguish circumstances where the balance between the individual and union or collective bargaining system interests will tilt in one direction or another. This factor must be evaluated along with the other factors to be considered in respect of the Union's representation of the Applicant.

[105] However, while the issue of workplace harassment is not a minor issue in a workplace, the impact on the Applicant to the date of the hearing has been modest. She remains employed and has not been terminated from her employment. She testified that she does not wish to return to the workplace, preferring to obtain a monetary settlement respecting her employment situation and the alleged harassment. She took administrative leave, was permitted to utilize much, if not all, of her sick leave entitlements, and was supported by the Union in obtaining special consideration for those payments. At the time the matter was being determined by the Union, she was still entitled to return to her position (as presumably she is now). That is not to say that she has not been subjected to stress and emotional upset which is, regrettably, somewhat normal in our adversarial system of justice. However, we cannot say that

she has been impacted in such a manner as to place a greater responsibility on the Union with respect to her representation.

[106] For these reasons, the application is dismissed. An appropriate Order will accompany these reasons.

DATED at Regina, Saskatchewan, this **29th** day of **August, 2013.**

LABOUR RELATIONS BOARD

"Kenneth G. Love Q.C."
Kenneth G. Love, Q.C.
Chairperson

CORRIGENDUM

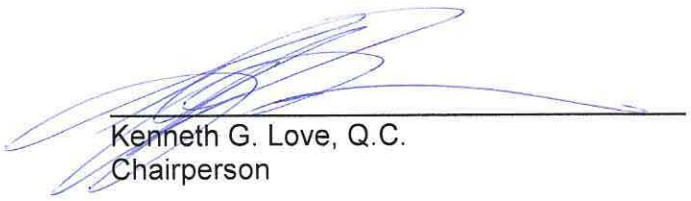
[107] **Kenneth G. Love Q.C., Chairperson**: Paragraphs 4 and 47 of the Reasons for Decision in the within proceedings issued by the Board on August 29, 2013, contained errors. Those paragraphs should read as follows:

> [4] The Board heard a great deal of evidence with respect to this matter as the parties felt compelled to ensure that no rock remained unturned. Most of the evidence came from the Applicant or from the Union's witnesses. The SFL called only Mr. Garry Burkhart.
>
> [47] The main argument advanced by the Applicant was that CUPE National and the Employer conspired to deny, obstruct and silence the Applicant's claims against Mr. Hubich. In support of this theory, the Applicant cited what she described as an agreement made between Mr. Marsden, the CUPE National representative, the shop steward for Local 4828, Mr. Smith, and Mr. Hubich, when they met on January 17, 2012, that the actions of Mr. Hubich did not constitute harassment. This agreement, he argued, when coupled with the commitment made by Ms. Kagis, the Regional Director for CUPE National, to repair CUPE's

relationship with Mr. Hubich, formed the backdrop of the alleged conspiracy. Part of the alleged conspiracy was also the fact that CUPE was a member of the SFL and had political and personal connections to Mr. Hubich.

DATED at Regina, Saskatchewan, this **11th** day of **September, 2013.**

LABOUR RELATIONS BOARD



Kenneth G. Love, Q.C.
Chairperson