DAVID B. LAPCHUK, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent, and GOVERNMENT OF SASKATCHEWAN, Interested Party

LRB File No. 138-11 & 353-13; April 7, 2014
Vice-Chairperson, Steven D. Schiefner, sitting alone

For the Applicant:	Ms. Marianna Jasper
For the Respondent Union:	Ms. Heather L. Robertson
For the Interested Party:	Mr. Curtis W. Talbot

PRACTICE AND PROCEDURE – Production of Documents – Employee files application with Board alleging violation of s. 25.1 of *Trade Union Act* – Employee alleging that trade union violated duty of fair representation in respect of various grievances with his employer - By way of preliminary application, employee seeking broad spectrum production of documents from employer with respect to substance of grievances – Board reviews its jurisdiction with respect to s. 25.1 – Board concludes its supervisory jurisdiction over conduct of trade unions is confined to allegations that trade union's conduct was arbitrary, discriminatory or indicative of bad faith – Board not satisfied that desired documents are relevant to matters within jurisdiction granted to Board pursuant to s. 25.1.

PRACTICE AND PROCEDURE – Production of Documents - Employee files application with Board alleging trade union in conflict of interest with him and unable to represent him in pending grievance proceedings – Employee alleging that permitting trade union to represent employee in pending grievance proceedings would represent a violation of principles of natural justice contrary to s. 36.1 of *Trade Union Act* – By way of preliminary application, employee seeking broad spectrum production of documents from employer with respect to substance of grievances – Board reviews its jurisdiction with respect to s. 36.1 – Board concludes its supervisory jurisdiction over conduct of trade unions is confined to disputes involving discipline imposed on members by trade unions - Board not satisfied that desired documents are relevant to matters within jurisdiction of Board pursuant to. 36.1

UNION – Conflict of Interest – Employee files application with Board alleging that trade union in conflict of interest with him and unable to represent him in pending grievance proceedings – Employee alleging that permitting trade union to represent employee in pending grievance proceedings would represent a violation of principles of

natural justice – By way of preliminary application, employee seeking broad spectrum production of documents from employer with respect to substance of grievances – Board reviews its jurisdiction to supervise trade unions pursuant to *Trade Union Act* – Board concludes that it has no inherent supervisory jurisdiction over the conduct of trade unions – Board concludes that its supervisory jurisdiction is confined to those matters set forth in s. 25.1 and s. 36.1 of *Trade Union Act* – Board not satisfied that it has authority to order production of desired documents.

The Trade Union Act, SS. 25.1 & 36.1.

REASONS FOR DECISION – PRODUCTION OF DOCUMENTS

Background:

[1] **Steven D Schiefner, Vice-Chairperson:** On August 23, 2011, the Applicant, Mr. David Lapchuk, filed an application[1] with the Saskatchewan Labour Relations Board (the "Board" alleging that the Saskatchewan Government and General Employees' Union (the "Union") violated s. 25.1 of *The Trade Union Act*, R.S.S. 1978 c. T-17, (the "*Act*"). In his application, the Applicant alleged that the Union failed to file a grievance with respect to the employer's failure to remove a disciplinary document that had remained on his personnel file beyond limits prescribed in the relevant collective agreement. Prior to the commencement of a hearing, Mr. Lapchuk's employment with the Government of Saskatchewan (the "employer") was terminated. The parties appeared before the Board on December 19, 2013. Believing that the Union was unable or unwilling to represent him in grievance proceedings related to his termination, Mr. Lapchuk sought, and was granted leave, to amend his application to include new allegations.

[2] On December 31, 2013, Mr. Lapchuk filed a new application[2] with the Board alleging violations of both s. 25.1 and s. 36.1 of *The Trade Union Act*. Counsel argues that Mr. Lapchuk's allegations against the Union are now subsumed in his new application. On or about February 11, 2014, Mr. Lapchuk filed an application with the Board seeking an Order directing Mr. Lapchuk's former employer, the Government of Saskatchewan, to produce a number of documents. The Board heard argument from the parties on March 26, 2014 with respect to Mr. Lapchuk's application for production of documents.

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1 Application bearing LRB File No. 138-11.
2 Application bearing LRB File No. 353-13.

[3] After hearing from the parties, the Board dismissed Mr. Lapchuck's application seeking the certain production of documents from the Government of Saskatchewan; save for the production of one (1) document. Counsel on behalf of the employer indicated that the subject document no longer existed; having been previously destroyed. As a consequence, the Board dismissed Mr. Lapchuck's application in it's entirely. These are our reasons for that determination.

The Allegations set forth in Mr. Lapchuk's Application:

[4] In his application, Mr. Lapchuk makes the following allegations:

> *DFR*
>
> *Refusing to file two a grievances on my behalf in 2011 for continued unjust disciplined under section 20.1(c) a disciplinary document from 20045 has been kept on my file in excess of the 2 year time period. This disciplinary letter was only removed from the file and I was only notified in writing as required per 20.1(c) May 2, 2011. This letter is a false untruthful allegation had been reported to me by SGEU Jason Ratray as series of letters that the employer had withdrawn this during quasi legal grievance committee appeal held in Spring 2010 and that as those letters had been voluntarily removed from the file by the employer years prior therefore I had no grievance. This subsequent discovery on May 2, 2011 has tainted my up to then unblemished work-record of five years at the Ministry of Highways Transport Patrol and has provided grounds for a grievance as there has been significant damages arising out of SGEU refusing to represent me as a member in good standing. 4A Continued attachments.*
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> *The second grievance relates to a 2004 disciplinary letter, which surfaced at the same time, that is, in May 2011. As a result of the 2004 disciplinary letter I was subject to involuntary transfer from my position of Program Operator/Traffic L7 at headquarters to the Southern Region field office. This transfer involved additional field duties including enforcement in marked enforcement units. I had no training for these field duties; in particular, I was not trained in self-defense and use of protective equipment. I note, that all officers performing these duties in the past have had training in Pressure Point Control Tactics (PPCT) and the use of full protective equipment. My employer denied me these necessary training opportunities, prior to sending me back to the filed; notwithstanding that I requested such training. Instead, my employer conveyed to Jason Ratray and Corey Hendricks that there had been no change in my duties. This was an untrue statement from my employer.*
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> *I told the union about my change in duties and my concerns over the fact that I did not have appropriate training to ensure my safety and the union refused to consider addressing my concerns.*
>
> *Conflict of Interest*
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> *Pursuant to section 36.1(1) of the Act, addressing employee-trade union disputes, 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.

My position is that the right guaranteed to me by the above provision is being violated for the reasons stated below.

I received a letter dated October 29, 2013 from the Ministry terminating my employment pursuant to s. 28(3) of The Public Service Act, 1998, SS 1998, c P-42.1, for cause, from the Saskatchewan Public Service, effective immediately.

At the time of my dismissal, I worked as a Program Operator/Traffic Officer L7 at the Ministry.

My ability to work has been affected by a number of medically documented physical and psychological challenges. My physical and mental health issues arise from incidents that were accepted as WCB injuries, such as the injury to my right shoulder and PTSD. The latter was initially rejected by WCB and then subsequently acknowledged as workplace injury on November 29, 2013.

Until about September 16, 2013, these challenges used to be addressed through reasonable accommodation by the Ministry. Suddenly, all such accommodation was withdrawn with the explanation that my file with the medical evidence justifying such accommodation was lost.

The stated cause for my dismissal is my conduct on October 17, 2012 in Fort Qu-Appelle when I was the victim of an assault by a member of the public, Shaun Bellegarde (the "Assault").

In or about May, 2013, I met with two investigators from the Ministry. These investigators assured me that they had to interview me just to complete the process of investigating the circumstances of the Assault. They had assured me that they both had extensive experience and understood what actually had occurred. The reassured me that they had understood my position and conveyed that the matter was close to a resolution.

It was my reasonably held view that the interview was a mere formality and I was under no suspicion of any objectionable conduct. I relied on the assurances of the investigators and my conduct reflected this understanding.

I did not hear anything else in respect of the investigation or any other proceeding related to the Assault. I was not given any information or warning that there are proceedings against me. My dismissal on the basis of my conduct during the Assault came as a complete surprise.

Under these circumstances, the investigation and other proceedings in relation to the Assault and my dismissal as a result were carried out with utter disregard for all requirements of procedural fairness. Subsequent requests for reopening the investigation into this incident were denied by the Ministry.

Further, the Ministry has denied access to my personal effects and documents currently in the Ministry's possession that are either my personal property or are necessary for me to properly address the matter of my wrongful dismissal and the 2011 DFR. I will submit a separate application to the Labour Relations Board for a production order in this regard.

I am a union employee within the scope of the Collective Bargaining Agreement between the Government of Saskatchewan and Saskatchewan Government and General Employees' Union, October 1, 2012 to September 30, 2016 (the "Collective Agreement"). Therefore, pursuant to s. 29 of The Public Service Act, 1998, I may appeal my dismissal in accordance with the procedures established by the Collective Agreement.

Accordingly, my individual grievances w3ere to be submitted within 30 days of my receipt of the termination notice by a steward, PS/GE Negotiating Committee Member or a Labour Relations Officer (Article 21.1.B of the Collective Agreement). The grievance has been launched by the General Employees' Union (the "Union").

However, it is my position that the Union is in a conflict of interest in regard to my wrongful dismissal and as such cannot represent me in this matter.

The Union's conflict of interest arises from the following facts:

I am currently involved in a dispute with the Union over my involuntary transfer from head office to the Regional Office, in 2011. In particular, I requested a grievance be initiated in regard to the denial of training that was necessitated by the transfer but never provided to me.

Joe Pylatuk, Labour Relations Officer, is likely to be called as a witness in the grievance proceeding related to the 2004 discipline letter.

Brendon Pylatuk, Joe Pylatuk's son, was the PPCT trained and equipped traffic officer assigned to be our safety officer present at the time of the Assault. Mr. Bellegarde was charged with assault, but the charge was later stayed, in no small part due to the fact that Brendon Pylatuk initially presented the RCMP with a false statement (shown to be false by the video of the incident obtained by the RCMP) then failed to show up at Mr. Bellegard's trial to give testimony.

I made efforts to sort out the matter of the accommodations that the Ministry has withdrawn on or about September 16, 2013. Mr. Bushinsky represented me at the only accommodation meeting in this regard. I was appalled by Mr. Bushinsky's attitude towards the process particularly his comments about my medical condition, and his disclosure of an employer report to my doctors. I told Mr. Bushinsky that I did not want him to represent me and called him an "insolent twat"; although, what I intended to say was "insolent twit". I apologized and clarified that I meant to say "twit". While it is not a grave incident to call a person, under provocation, either silly or even contemptible, it cannot be reasonably expected of Mr. Bushinsky and the Union to be disabused of this incident and provide effective representation to me.

To conclude, the Union is in a conflict of interest; and had handled my brievance in a discriminatory manner, therefore, if I am forced to be represented in my grievance proceeding in regard to my wrongful dismissal, it would be a violation of the principles of natural justice and procedural fairness. This contradicts the rights provided by section 36.1(1) of the Act.

For these reasons, I request that the Board declare that (1) the Union is in a conflict of interest; (2) the Union is disqualified from representing my interests in the wrongful dismissal proceeding; (3) I am allowed to be represented in that proceeding by counsel of my choice at SGEU's expense; (4) THE Union is to pay the costs of these applications.

The Application for Production of Documents:

[5] In his application seeking production of documents from his former employer pursuant to s. 18(b) of *The Trade Union Act*, Mr. Lapchuk seeks the following documents:

> 1. *This is an application to the Labour Relations Board (the "LRB") pursuant to section 18(b) of the Act requesting the LRB to order the Respondent to produce forthwith, the documents and items described in this application.*
> 2. *Section 18(b) of the Act provides authority to the LRB to make the requested order.*
>
> ***Background***
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> 3. *On September 23, 2013 the Respondent suspended my employment without written notice.*
> 4. *On October 4, 2013, the Respondent put me on paid administrative leave.*
> 5. *On October 28, 2013, the Respondent terminated my employment. This happened without the prescribed three-step discipline procedure.*
> 6. *There is a complex history of ongoing proceedings and grievances involving the Respondent, the Saskatchewan Government Employees Union ("SGEU") and me; a very brief summary of these proceedings is as follows:*
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> a. *On May 25, 2011, I requested SGEU to file a grievance on my behalf on grounds that the Respondent failed to remove a disciplinary letter, dated March 24, 2004 (the "March 24, 2004 Disciplinary Letter") from my personal file as required by Article 201. of the collective agreement.*
> b. *The same day, on May 25, 2011, SGEU refused to file the requested grievance claiming that while the Respondent did violate the collective agreement, I suffered no "grievable harm" as a result.*
> c. *Effective April 1, 2011, the Respondent transferred me from my position of Program Operator/Traffic L7 (an office position) at the 1855 Victoria Avenue headquarters to the Southern Region field office at 1630 Park Street. The transfer was involuntary.*
> d. *I have reason to believe that the Respondent's failure to remove the March 24, 2004 Disciplinary Letter from my file caused or significantly contributed to my involuntary transfer.*
> e. *On May 26, 2011, following the SGEU's refusal to submit a grievance in regard to the march 24, 2004 Disciplinary Letter, I commenced a proceeding against the SGEU for breach of the SGEU's duty to fairly represent me (the "**First DFR**")1.*
> f. *Given my medical condition and my permanent accommodating needs, and my lack of training in self-defence and use of force for the tasks I was required to perform in my new position, the transfer put me in a physically dangerous situation.*
> g. *I was aware from the start the situation I found myself in was contrary to Ministry policies regarding officer safety; however, I was afraid to refuse my new assignment as I did not want to be labeled "insubordinate". I was hoping that I would be able to address the safety issues by training. My requests for training, however, were belittled, ignored or outright refused.*
> h. *Shortly after my involuntary transfer, I requested SGEU to submit a grievance on my behalf in regard to the transfer, on the ground that*

my medical condition and the resulting need for permanent accommodations and the lack of training necessary to safely discharge my new duties made me unsuitable for the tasks required of me in my new field position. I was very clear that these circumstances put me into a physically dangerous situation; nonetheless, the Respondent continued to act with utter disregard for my personal safety and health.

i. *On May 27, 2011, SGEU denied to submit this grievance as well.*
j. *On August 23, 2011, following the SGEU's refusal to submit a grievance in regard to the involuntary transfer, I commenced a proceeding against the SGEU for breach of the SGEU's duty to fairly represent me (the "**Second DFR**")*
k. *On October 17, 2012, I was assaulted on the job (the "**Assault**"). The details of the Assault are provided in my Conflict of Interest Application (defined below).*
l. *On or about September 16, 2013, the Respondent deprived me of my previously guaranteed, permanent medical accommodations.*
m. *I requested SGEU to submit on my behalf a grievance in regard to the withdrawal of my medical accommodations. This issue never reached the stage of filing a grievance. On September 23, 2013, at the first and only accommodation meeting, my would be representative, Larry Bushinski, made hurtful discriminatory remarks about my medical records. The incident was very upsetting and it triggered a flare up of my previously diagnosed PTSD symptoms.2 I terminated the meeting and indicated that I did not want Mr. Bushinski to represent me. The details of this incident are provided in my Conflict of Interest Application.*
n. *On October 23, 2013, SGEU submitted a grievance on my behalf in regard to the issue of my suspension on September 23, 2013 on the ground that the Respondent unjustly disciplined me for the sole reason of raising legitimate concerns over my physical safety (the "**Suspension Grievance**").*
o. *December 3, 2013, SGEU commenced a grievance proceeding in regard to the termination of my employment as Wrongful Dismissal with Malice (the "**Termination Grievance**").*
p. *For reasons detailed in my application under section 25.1/36.1 of the Act, dated December 31, 2013 (the "**Conflict of Interest Application**"), I believe that the SGEU is in a conflict of interest and is not in a position to fairly represent me in my Termination Grievance.*

7. *I have had no access to my former office since September 23, 2013.*
8. *I have attempted on numerous occasions to get access/recover my personal effects and the documents relevant to the proceedings listed in paragraph 6 above. To date, the Respondent has denied me access to my personal effects and documents currently in the Respondent's possession. I advised both the SGEU and the PSC about this.*
9. *I am unable to effectively protect my interests in the proceedings described in paragraph 6 above without access to relevant documents in the Respondent's possession.*
10. *Further, I am entitled to have possession of my personal effects currently the Respondent's possession.*

Relief Sought

11. *For the reasons stated above, I request the LRB to issue an order directing the Respondent to provide me with the following:*

a. *All relevant Documents in the Resopdnent's possession that relate to the following proceedings:*
    i. *The Firest DFR of May 26, 2011;*
    ii. *The Second DFR of August 23, 2011;*
    iii. *The Suspension Grievance of December 3, 2013*
    iv. *The Assault on October 17, 2012 including but not limited to:*
        A. *documents of Lyle Heineman, Brandon Pylatuk, Monte Skelton, the Regina investigator, the Central Services Investigators;*
        B. *Record of my work cellular phone activity (number 306-539-4064) for October 17, 2012 and those of the officers I called that day;*
        C. *A copy of the 911 call that Mr. Heinemann placed on October 17, 2012;*
        D. *All Oct 17, 2012 radio dispatch records and the PA 911 and related system for October 17, 2012, for all southern region for Lyle Heineman, Fern Gareau, Brendon Pylatuk, Brendon Tuschere, Scott Kreutzer, Tom Davies and Raymond Pilon as well as the PPCT trainer and his staff.*
        E. *Work cell phone records for the same individuals as in sub-paragraph "D";*
        F. *Work cell phone records for October 17 and 18, 2012, of Lyle Heinemann, Brendon Pylatuk, the Swift Current Investigator, Monte Skeleton.*
        G. *All fuel receipts for Regina area officers, PPCT staff and investigators for the October 17, 2012;*
        H. *All of Southern region radio dispatch records for October 18, 2012;*
        I. *A copy of the signed complaint of Shaun Bellegarde;*
        J. *The mileage records for Brendon Tuschere for October 17, 2012*

    v. *The Termination Grievance of December 3, 2013; and*
    vi. *The Conflict of Interest Application of December 31, 2013.*

b. *All personal documents located in incidental personal directory GOS #463269, GOS G Drive and H Drive;*
c. *A copy of each officer safety policy of the Respondent that was in effect on October 17, 2012;*
d. *A copy of the curriculum and training description for newly hired L8 Traffic Officers;*
e. *A copy of the use of force training materials and the physical requirements for L8 PPCT/Traffic Officers;*
f. *A copy of the module training I received in 2007 as a Level 7 Program Operator;*
g. *A copy of my appointment letter as filed and set out by John Meed for the original full-time Program Operator position;*
h. *A copy of my complete training record;*
i. *A copy of the risk assessment prepared in 2011 after the Coop Road Rage Attack;*
j. *A copy of the PPCT trainers report in regard to what training I needed;*
k. *My hard copy notes that I prepared in regard to the proceedings listed in paragraph 11(a) and which I put into a filing cabinet in my former office;*

l. My MHI issued officer notebooks and the record of my Summary Offence Tickets issued that I left in my ticket book clipboard and desk.
m. The complete PPCT training and refresher course records for Mr. Heinemann and Mr. Pylatuk;
n. A list of all PPCT training events since I started working at the Respondent including all use of force refreshers and tactic training for dealing with assaultive individuals;
o. Copy of the first medical report requested by the Respondent;
p. A copy of all documents in regard to the September 23, 2013 accommodation meeting created by the Respondent, SGEU, Mr. Bushinski, Tom Davies and Dave Smith;
q. The daily journals of Brendon Tuschere for October 1, 2012 and his scheduling to be in Wynard;
r. E-mails sent to Wynard staff advising when Brendon Tuschere would be inspecting their detachment in the morning of October 17, 2012;
s. All notices of contravention and fines levied by Labour and Work Place Safety against the Respondent for failure to issue a BOLF on October 17, 2012 and for having me operate a fully marked enforcement unit contrary to officer safety policies requiring a full PPCT equipped officer for any marked enforcement units.
t. Copy of all my emails to Lance Reiss, OHS officer, and his responses to my demands that safety protocols for my position be reviewed;
u. All information regarding the authorization for the use of outside investigators in regard to the October 17, 2012 assault;
v. Record of any monies paid by the Respondent to Shaun Bellegarde;
w. The following personal items necessitated by the permanent accommodations:
i. Orthopedic desk chair with arm extension;
ii. Grey "ergo" desk hutch with lighting;
iii. Personal items and files that I left in the multi-component bookcase with filing cabinet;
iv. Trackball, custom arm extension;
v. Rubbermaid roll mat;
vi. Wireless "ergo" trackball keyboard;
vii. Articulated keyboard tray;
viii. Wireless phone headset; and
ix. Kneeling chair.

Some of these items are described in Attachment "A" to this application. The items are easily identifiable as they have never been catalogue-stamped by the Respondent.

x. The following personal items of great sentimental value: custom laser cut stainless semi Peterbilt approx. 6 inches long; Riders door hanger; six piece Riders bobble head collection; inspection tools and small screw driver set for working on electronics; Caterpillar work gloves; used old style leather computer black bag; batter operated head light for working on patrol vehicle; bumper sticker from Las Vegas.

(sic erat scriptum)

Relevant statutory provision:

[6] The relevant provisions of *The Trade Union Act* 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.*
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> . . .
>
> *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.*

Applicant's arguments:

[7] Counsel on behalf of Mr. Lapchuk argues that her client's entire relationship with the Union is poisoned through inappropriate conduct on the part of the Union. Counsel argues that the Union's conduct toward her client has placed the Union, including all of its officials, into an irreconcilable conflict of interest. The gravitas of Mr. Lapchuk's new application is to seek disqualification of the Union as his representative in his grievances with the Government of Saskatchewan related to his termination. Counsel argues that the documents his client desires from his former employer will support his assertion that the Union has failed to represent him in the past and is now institutionally biased against him.

Analysis and Conclusions:

[8] In *Service Employees International Union (West) v. Saskatchewan Association of Health Organizations, et.al*, (2012) 210 C.L.R.B.R. (2nd) 229, 2012 CanLII 18139, LRB File Nos. 092-10, 099-10 & 105-10, this Board reviewed its jurisprudence with respect to the production of documents at various stage of proceedings before the Board and made the following comments with respect to requests such as that made by Mr. Lapchuk for pre-hearing production of documents:

> ***Pre-hearing production**: A party to proceedings before the Board can now seek production of documents prior to the commencement of the hearing. Such applications are typically heard by the Board's Executive Officer. The Board's Executive Officer has delegated authority to grant Orders of production and typically does so based on broad and general principles of relevancy. Generally speaking, an applicant seeking pre-hearing production of documents must merely satisfy the Board's Executive Officer that the desired documents are*

> *arguably relevant and/or that there is some probative nexus between the documents or information sought and the matters in issue arising out of proceedings before the Board. However, the greater the number of documents sought, the stronger the probative nexus expected by the Board's Executive Officer, particularly so if considerable expense, time and effort is required to locate and produce the desired documents. In this regard, it is important to note that labour relations boards were established to provide an alternative to the formalistic procedures of courts of competent jurisdiction. While pre-hearing discovery and production of documents may be the norm in civil litigation, such procedures are not the norm in proceedings before tribunals, such as this Board. To which end, while a certain degree of "fishing" is permissible in a request for pre-hearing production of documents (i.e.: to seek out evidence in support of an allegation under the Act), it has not been the practice of this Board to grant broad-spectrum, non-specific or infinite production Orders to in essence, compel the kind of pre-hearing discovery of documents that occurs in civil courts. Similarly, s. 18(b) of the Act (as was the case with its predecessor provision) does not include authority to compel a party to "create" documents or things in response to a production request, such as a statement as to documents. See: Pyramid Electric Corporation v. International Brotherhood of Electrical Workers, Local 529, 2001 SKQB 216 (CanLII), 208 Sask. R. 118 (Q.B.). Simply put, the Board does not have the authority to invoke, nor does it desire to replicate[3], the kind of discovery procedures or production of documents obligation commonly seen in a judicial setting.*

[9] In *Service Employees International Union (West) v. Saskatchewan Association of Health Organizations, et.al*, *supra*, the Board went on to make the following comments with respect to the requirement of the Board that desired documents must be relevant to the matters in issue before the Board:

> *[**44**] **Desired documents must be relevant**: While the test for relevance was not seriously in dispute in these proceedings, the extent to which a party may embark upon a fishing expedition through discovery of documents in proceedings before this Board does warrant some consideration. As indicated, this Board does not have; nor do we wish to replicate; the kind of discovery procedures or the kind of production of document obligations commonly seen in a judicial setting. Generally speaking, an applicant seeking production of documents must satisfy the Board that the desired documents are arguably relevant and/or that there is a probative nexus between the documents or information sought and the matters in issue arising out of proceedings before the Board. The greater the number of documents sought, the stronger the probative nexus expected by the Board, particularly so if considerable expense, time and effort is required to locate and produce the desired documents. As we have indicated, it is also an expectation of this Board that such request will occur early in the proceedings whenever possible.*

[10] For purpose of Mr. Lapchuk's preliminary application, I have assumed that the allegations of facts set forth in his application are true. On the other hand, it should be noted that

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[3] In our opinion, the timely resolution of outstanding labour relations disputes is of real importance in maintaining an amicable labour-management relationship. Because time is of the essence, our procedures must

all applications to this Board are a mixture of both pleadings and facts. As a consequence, not all of the allegations set forth in Mr. Lapchuk's applications are assumed to be true. Many of Mr. Lapchuk's allegations are in the nature of pleadings; being of the allegation of conduct or status giving rise to violations of *The Trade Union Act*. With respect to such allegations, I have assumed they are provable.

[11] After reviewing Mr. Lapchuk's application for the production of documents and after having hearing representations on behalf of the parties on March 26, 2014, the Board concluded that only one of the documents sought by Mr. Lapchuk ought to be produced; that being, item 11(k) – "*My hard copy notes that I prepared in regard to proceedings listed in paragraph 11(a) and which I put into a filing cabinet in my former office*." However, counsel on behalf of the Government of Saskatchewan indicated that this document had been destroyed and was no longer available for production. As a consequence, the Board dismissed Mr. Lapchuk's application for the production of documents in its entirety.

[12] In my opinion, Mr. Lapchuk's request that this Board Order the production of the documents he desires gives rise to two (2) problems. Firstly, Mr. Lapchuk's request for the production of documents is, by definition, broad-spectrum. While counsel argued otherwise, his application seeks production of all documents in the possession of the Government of Saskatchewan related to:

- the impugned disciplinary document that remained on his personal file longer than the period prescribed (his first DFR of May 26, 2011);
- what he alleges was his involuntary transfer in 2011 (his second DFR of August 23, 2011);
- an assault that allegedly occurred on or about October 17, 2012;
- his termination (his termination grievance of December 3, 2013); and his application to this Board alleging his Union is in a conflict of interest with him (his conflict of interest application of December 31, 2013).

[13] As noted by this Board, it has not been our practice to grant broad-spectrum, non-specific or infinite production Orders to, in essence, compel the kind of pre-hearing discovery of documents that occurs in civil courts. As such, Mr. Lapchuk's application for production of documents is contrary to the direction of this Board in *Service Employees International Union*

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promote efficiency and speed in the resolution of labour relations disputes.

(West) v. Saskatchewan Association of Health Organizations, et.al, *supra*. It is not for this Board to cure such defects; for to do so, would encourage applicants to seek broad-spectrum production of documents in the expectation that this Board will do their work for them.

[14] However, in my opinion, a greater and more significant problem lies in the type of document sought by Mr. Lapchuk and the requirement of relevancy. In my opinion, none of the documents he desires are relevant to any matters properly before this Board.

[15] In *Rodney McNairn v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 179*, (2004), 240 D.L.R. (4th) 358, 2004 SKCA 57 (CanLII), the Saskatchewan Court of Appeal concluded that jurisdiction over disputes between trade unions and their members is divided between the Courts and this Board. Cameron J.A. speaking on behalf of the Court of Appeal found that, while this Board has jurisdiction with respect to some disputes between employees and their trade unions, we do not have jurisdiction over all such disputes. The Court of Appeal concluded in *McNairn, supra*, that this Board only has jurisdiction in those areas that have been expressly delegated by legislation; including and in particular, the provisions of *The Trade Union Act*. The jurisdiction of the Courts is the residual consequence of the limits of the authority delegation to this Board. In those areas where jurisdiction has been delegated to this Board, it is to the implied exclusion of the Courts. In other words, in those areas where the legislature has delegated matters to this Board, the Courts lack jurisdiction or are restrained from exercising it. On the other hand, we lack jurisdiction in those areas that have not been expressly addressed in legislation. This Board has no inherent jurisdiction to supervise the conduct of trade unions. Our jurisdiction is confined to those areas that have been specifically delegated to this Board.

[16] As was also noted by the Court of Appeal in *McNairn*, *supra*, sometimes it can be difficult to tell where the jurisdiction of this Board ends and the jurisdiction of the Courts begin. In applications such as this, where the jurisdiction of this Board is at issue, we have been instructed to examine the "essential character" of a dispute without overly concerning ourselves with the labels or the manner in which the legal issues have been framed by the parties. In short, we are instructed to disregard the "packaging" and examine the real issue(s) in dispute between the parties based on the facts surrounding it. With this in mind, we will examine each of Mr. Lapchuck's complaints.

Complaint Pursuant to s. 25.1:

[17] The jurisdiction of this Board in applications alleging a violation of s. 25.1 of the *Act* was well summarized by Chairperson Bilson (as she was then) in *Laurence Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93, at 71-72:

> *This Board has discussed on a number of occasions the obligation which rests on a trade union to represent fairly those employees for whom it enjoys exclusive status as a bargaining representative. As a general description of the elements of the duty, the Board has indicated that it can do no better than to quote the principles outlined by the Supreme Court of Canada in the case of Canadian Merchant Services Guild v. Gagnon, [1984] 84 CLLC 12,181:*
>
> > *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
> >
> > *1. The exclusive power conferred on a union to act as a spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
> >
> > *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
> >
> > *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
> >
> > *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
> >
> > *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employees.*
>
> *The terms "arbitrary," "discriminatory," and "in bad faith," which are used in the legislative description of the kind of conduct on the part of a trade union which is to be prevented, have been held to address slightly different aspects of the duty. The Supreme Court in Gagnon used the following comments from the decision of the British Columbia Labour Relations Board in Rayonier Canada (B.C.) Ltd. (1975), 2 CLRBR 196, at 201, to convey the distinct attributes of the duty of fair representation:*
>
> > *... The union must not be actuated by bad faith, in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favoritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it*

> *and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*

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

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

[18] In *Lorraine Prebushewski v. Canadian Union of Public Employees, Local* 4777, [2010] 179 C.L.R.B.R. (2nd) 104, 2010 CanLII 20515 (SK LRB), LRB File No. 108-09, this Board made the following observations regarding the jurisdiction of this Board pursuant to s. 25.1 that seem particularly relevant to the present application:

> *[55] The obvious corollary of the above captioned description of the duty of fair representation was articulated by this Board in Kathy Chabot v. Canadian Union of Public Employees, Local 4777, supra; that being, that very narrow and specific behaviour/conduct on the part of a trade union is required to sustain a violation of the statute.* ***A common misconception is that this Board is a governmental agency established to generally hear complaints about trade unions. However, from a plain reading of s.25.1 of the Act, it is apparent that this Board does not sit in general appeal of each and every decision made by a trade union in the representation of its membership****. To sustain a violation of s. 25.1, the Board must be satisfied that a trade union has acted in a manner that is "arbitrary" or that is "discriminatory or that it acted in "bad faith". These terms are not mere chalices into which applicants may pour their criticisms of their trade union for presentation to the Board. These terms have specific meanings that define the threshold in the exercise of this Board's supervisory authority. For example, the Board has no jurisdiction to sustain a violation on the basis that a trade union could have provided better representation for a member or on the basis that a trade union did not do what the member wanted. Similarly, the Board does not have jurisdiction to sustain a complaint from a member that he/she received poor service and/or was treated rudely or that there were delays in receiving phone calls or correspondence. While such allegations may be relevant to the Board's understanding of the circumstances of an alleged violation of s.25.1, the Board supervisory responsibility is focused on determining whether or not the impugned conduct of a trade union has achieved any of the thresholds of arbitrariness or discrimination or bad faith. The theory being that conduct not achieving one of these thresholds is more appropriately a matter for that trade union's internal complaint processes and/or for consideration by the membership during the election of their leadership.*
>
> ***(Emphasis added)***

[19] Having reviewed Mr. Lapchuk's application for the production of documents, I am not satisfied that any of the desired documents are relevant to the conduct of the Union in respect of his grievances. It is particularly telling that the documents desired by Mr. Lapchuk are in the possession of his former employer and not the Union. Mr. Lapchuk seeks documents that may well be relevant to the merits of his grievances but none can be said to be relevant to the conduct of the Union in the prosecution of those grievances.

Complaint under s. 36.1:

[20] It is clear from the *McNairn* decision that, while we have been delegated jurisdiction over certain types of internal disputes within trade unions, we have not been delegated supervisory jurisdiction over them all. In the *McNairn* case, *supra,* it was argued before the Court of Appeal that s. 36.1 of the *Act* should be interpreted as granting broad supervisory jurisdiction to the Board regarding internal union disputes, as was found by Hrabinsky J. of the Court of Queen's Bench[4]. However, Cameron J.A. speaking on behalf of the Court of Appeal found otherwise:

> *[37] In significant part, the purpose of [section 36.1] lies in protecting a member of a union from abuse in the exercise of the power conferred on unions by the preceeding section—section 36—and in particular subsections (4) and (5) thereof. These subsections empower a union to fine any of its members who has worked for a struck employer during a strike, provided the constitution of the union made allowance for this before the strike occurred. The purpose also lies in protecting an employee, employed in a unionized shop and required to maintain union membership as a condition of employment, not to be deprived of membership by the union except, according to subsection (3), for failure to pay the dues, assessments, and initiation fees uniformly required of all members.*
>
> *[38] Thus subsection 36.1(1) imposes a duty upon a union (again correlative to the right thereby conferred upon an employee), to abide by the principles of natural justice in disputes between the union and the employee involving the constitution of the trade union and the employee's membership therein or discipline thereunder. As such, the subsection embraces what may be characterized as "internal disputes" between a union and an employee belonging to the union, but it does not embrace all manner of internal dispute. For the subsection to apply, the dispute must encompass the constitution of the union and employee's membership therein or discipline thereunder. And when it does apply, it requires that the principles of natural justice be brought to bear in the resolution of the dispute.*
>
> *[39] Seen in this light, and in light of the allegations of fact made in the statement of claim, subsection 36.1(1) has no effective bearing on the essential*

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[4] *Rodney McNairn v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 179*, 2003 SKQB 328 (CanLII), Q.B.G No. 148 of 2003.

> *character of the dispute between the parties. The Union is not alleged to have breached the duty imposed upon it by this subsection, and nothing material to the action and its determination turns on this duty. The Union's duty to place the names of its unemployed members on the unemployment board in prescribed sequence, which lies at the heart of the dispute posited by the statement of claim, is not to be found in subsection 36.1(1) of The Trade Union Act but in Article 11(d) of the Union's Working Rules and Bylaws. And on the facts of the matter, the complaint is not about Mr. McNairn having been deprived of natural justice by the Union, contrary to section 36.1(1) of the Act. It is about his having been deprived of work, for which he was qualified, because the Union, contrary to Article 11(d) of Working Rules and Bylaws, moved his name to the bottom of the unemployed board following his job-related experience at Burstall.*
>
> *[40] Nor, having regard for the facts alleged in the statement of claim, is the dispute about whether the Union failed to give Mr. McNairn reasonable notice of a meeting, as required by subsection 36.1(2), or unreasonably denied him membership in the Union, contrary to subsection 36.1(3).*

[21] Having reviewed Mr. Lapchuk's application for the production of documents, I am not satisfied that any of the desired documents are relevant to Mr. Lapchuk's membership in the Union and/or is discipline by the Union. Again, it is particularly telling that the documents desired by Mr. Lapchuk are in the possession of his former employer and not the Union. As indicated, Mr. Lapchuk seeks documents that may well be relevant to the merits of his grievances but none can be said to be relevant to Mr. Lapchuk's membership in the Union or discipline by the Union in accordance with its Constitution.

Essential Nature of the Dispute between Mr. Lapchuk and the Union:

[22] An examination of allegations set forth in Mr. Lapchuck's application, together with the remedial relief he seeks, reveals that the essential character of the dispute is his belief that the Union is in a "*conflict of interest*" with him and that it would represent a breach of natural justice to permit the Union to represent him in the pending grievance proceedings related to his alleged wrongful dismissal. Mr. Lapchuk no longer seeks remedial relief with respect to any proceedings involving his employer other than his termination grievance. It is apparent both from Mr. Lapchuk's application, and the tenor of the argument from his counsel, that Mr. Lapchuk believes that the termination grievance is now the focus of his concerns. There can be no doubt that Mr. Lapchuck seriously mistrusts the Union and all of its officials. Mr. Lapchuck asserts that the Union is institutionally biased against him. However, Mr. Lapchuck is not alleging that the Union's conduct with respect to his termination grievance has been arbitrary, discriminatory or in bad faith. Rather, his allegation is that the Union is incapable of fairly representing him in his wrongful dismissal proceedings because of the alleged institutional bias or that it would be a

breach of natural justice to permit the Union to do so. In other words, Mr. Lapchuk is not asserting that the Union has acted arbitrary, discriminatory or in bad faith in the prosecution of his termination grievance, he is asserting that the Union will be arbitrary or discriminatory or that it will act in bad faith in the prosecution of his termination grievance. By way of desired remedial relief, Mr. Lapchuk seeks to opt out of the Union's exclusive right to represent him in his dealings and disputes with his employer (now former employers). Mr. Lapchuk seeks an Order from this Board: declaring the Union in conflict of interest; disqualifying the Union from representing his interests in his wrongful dismissal termination; authorizing Mr. Lapchuk to file and/or prosecute grievance proceedings pursuant to the Union's Collective Agreement with the Employer; and directing the Union to pay Mr. Lapchuk's cost of legal counsel in doing so.

[23] Even assuming that this Board has authority to grant the remedial relief desired by Mr. Lapchuk in his new application (an assumption that has many flaws), disputes of the nature alleged by Mr. Lapchuk do not fall within the limits of the supervisory jurisdiction delegated to this Board by the legislature in any provision of *The Trade Union Act*. As has been noted, this Board does not have inherent jurisdiction to supervise all manner of disputes between trade unions and their members. We only have jurisdiction in those areas that have been expressly delegated to this Board by the legislature and that jurisdiction is found in ss. 25.1 and 36.1. In my opinion, none of the documents desired by Mr. Lapchuk are relevant to the types of disputes falling within the jurisdiction of this Board pursuant to ss. 25.1 or 36.1. To the extent that the documents desired by Mr. Lapchuk may be relevant to other types of disputes, including his allegation of conflict of interest, it is beyond the jurisdiction of this Board to order their production.

[24] For the foregoing reasons, I find that Mr. Lapchuk's request for the production of documents must be dismissed.

DATED at Regina, Saskatchewan, this 7th day of April, 2014.

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson