Saskatchewan
Labour Relations Board

CB, HK & RD, Applicants v CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL NO. 21, CUPE NATIONAL, and THE CITY OF REGINA, Respondents

LRB File No. 034-15, 035-15 & 037-15; October 3, 2017

Vice-Chairperson, Graeme G. Mitchell, Q.C. (sitting alone pursuant to section 6-95(3) of *The Saskatchewan Employment Act*)

For the Applicants:	Mr. Larry Kowalchuk and Mr. Micah Kowalchuk
For the Respondent:	Mr. Robert Logue
For the Respondent Employer:	No one appearing

Duty of Fair Representation – Discriminatory Treatment – CUPE Local 21 filed a generic grievance on behalf of three (3) Applicants following findings by an independent investigator that they had been sexually harassed by male members of the same bargaining unit – CUPE Local 21 did not have any meaningful communications with the Applicants prior to filing the grievance – Grievance was identical in substance to the grievance CUPE Local 21 filed on behalf of the male members who had been found to have sexually harassed the Applicants – Board reviewed previous decisions and concluded CUPE Local 21 breached its' duty of fair representation.

Duty of Fair Representation – Arbitrariness – Board found that CUPE Local 21 dealt with the Applicants' sexual harassment grievance in a perfunctory and non-caring manner – Board concluded that CUPE Local 21 breached its duty of fair representation.

Duty of Fair Representation – CUPE National assumed carriage of the Applicants' sexual harassment grievance to avoid conflict of interest in union representation of members – CUPE National ultimately negotiated settlement of this grievance with the Employer – Board reviewed prior decisions and concluded that CUPE National did not breach its duty of fair representation.

Duty of Fair Representation – Arbitrariness – Applicants also proposed a draft grievance relating to violations of environmental regulations and protocols at Landfill – Neither CUPE Local 21 nor CUPE National investigated these allegations – Board found that allegations were serious and, at a minimum, should have been investigated – Board concluded that CUPE Local 21 and CUPE National breached the duty of fair representation owed to Applicants.

Duty of Fair Representation – Remedy – Declaratory Order – Applicants no longer employed by Employer and did not want

grievances arbitrated – Board exercises its discretion to issue a declaratory Order in these circumstances.

Duty of Fair Representation – Remedy – Board issues Order pursuant to subsection 6-111(1)(s) of *The Saskatchewan Employment Act* that Board's Reasons for Decision and Order upon receipt by CUPE Local 21 should be posted in workplace for a period of 90 days.

Practice and Procedure – CUPE National took over carriage of sexual harassment grievance to avoid conflict of interest – CUPE National apprised of Applicants' concerns over violations of environmental regulations and protocols – CUPE National participated fully in hearing – Board found no prejudice to CUPE National and ordered it to be added as party to these proceedings.

REASONS FOR DECISION

OVERVIEW

[1] **Graeme G. Mitchell, Q.C., Vice-Chairperson**: This is a sad case.

[2] The Applicants, CB, HK, and RD[1] were employed in various capacities by the City of Regina [City] at its Landfill site. Each held a different position, all of them in-scope. They were members of the Canadian Union of Public Employees, Local No. 21 [CUPE Local 21 or the Union] which, by virtue of an Order of the Board is the exclusive bargaining agent for the employees at that workplace.

[3] During their employment at the City's Landfill site, a series of disturbing incidents occurred which left CB and HK, at least, fearing for their physical safety. As a consequence, they left their positions at that workplace. Subsequently, all three (3) applicants were diagnosed with a variety of medical conditions including post-traumatic stress disorder flowing from the harassment they experienced at the hands of their co-workers at the Landfill site.

[4] At the time these applications were heard, none of the Applicants was employed. Their various experiences at the Employer's Landfill site had left them so emotionally and

[1] The Applicants requested that their names be anonymized. In these Reasons for Decision, they will be identified only by their initials.

psychologically scarred, they were still unable to take up full-time employment, a number of years later.

THE APPLICATIONS

[5] On February 26, 2015, CB and HK separately filed with this Board an application under section 6-59 of *The Saskatchewan Employment Act*, SS 2013, c. S-15.1 [the "*SEA*"]. These applications are designated as LRB File Nos. 034-15 and 035-15, respectively.

[6] On March 2, 2015, RD filed an application under section 6-59 of the SEA. This application is designated as LRB File No. 037-15.

[7] These applications assert that CUPE Local 21failed to represent them fairly by initially failing to file grievances on their behalf, and, subsequently, failing to prosecute their grievance flowing from an allegedly flawed investigation and report of their harassment complaints against other individuals at the City's Landfill site. Those individuals – all male – were also members of the CUPE Local 21. As the allegations set out in these applications are essentially the same, they were consolidated, and heard together.

[8] The Applicants, HK and CB, in addition to the grievance relating to sexual harassment and gender discrimination jointly proposed by the three (3) Applicants, also pressed the Union to file a grievance respecting occupational health and safety, and environmental, violations which she had observed at the Landfill site.

[9] CUPE Local 21 filed separate Replies to all of the applications. The defenses mounted to each application, however, were the same. The Union asserts that at no time did it fail to represent the applicants fairly nor did it act towards them in a manner that could be characterized as arbitrary, discriminatory or in bad faith.

A. <u>LRB File No. 034-15</u>

[10] In CB's formal application, the particulars underlying her allegations of the Union's failure to fulfill its duty of fair representation include the following:

> *1. I have been employed by the City of Regina as Technologist II, and a member of CUPE Local 21, at the Landfill since September 16, 2013.*

2. *I have experienced and raised a multitude of health and safety concerns from the moment I started at the City of Regina. These concerns were in regards to violations of health and safety regulations and personal and sexual harassment.*

3. *In January 2014 [HK] and I made an appointment with Tim Anderson, then president of CUPE Local 21, to discuss our safety concerns at the Landfill. I ended up cancelling the meeting because [HK] was mentally ill and off of work and I felt scared to address the issues at the Landfill without the support of my supervisor, [HK]. As well, I was struggling with depression and anxiety at that time.*

4. *I exercised by right to refuse dangerous work on February 4, 2014.*

5. *I submitted eight Harassment Complaint Forms on February 20, 2014. As a result of these complaints, and those of [HK] and [RD], the City of Regina commenced an investigation.*

6. *I became severely ill due to the harassment and dangerous working conditions at the Landfill and as a result, transferred offsite.*

7. *On March 5, 2014, I received a call from [RD] who was upset and shocked. [RD] told me that Tim Anderson just called her and said that "Can you give me a day before you talk (regarding coming forward with her harassment allegations) and do anything." [RD] said that Tim Anderson said "I've known Cory Abotsoway for a long time and I think that if I talked to Cory it would be more effective than anything else." [RD] said that she responded "I feel like I have to go ahead and do this so Cory knows I am serious." After the call with Tim Anderson, [RD] said that she phoned [HK] and told her about the incident. I called [HK] too, to discuss what to do.*

8. *This incident made me feel like the Union had no interest in representing us fail in coming forward with the harassment allegations and I feared that we were going to be targeted by the union and the City of Regina for coming forward. We had been assured by the Human Resources department that our harassment claims were going to remain confidential, and unbeknownst to us, Tim Anderson had the information that we were coming forward with harassment claims, and who we were claiming against, and he tried to persuade [RD] to not come forward.*

. . . . .

10. *On March 5, 2014 I phone Carmel Mitchell, and asked her if we could speak confidentially about our issues with the Union. She was hesitant and asked what was this regarding. I explained that I really needed the support of someone from the Union who was trustworthy and going to be on my side, and the people that are also involved. She said that she would keep everything confidential. I told her about the incident with Tim Anderson, and that we were coming forward with harassment claims and that we were really fearful that we would not have afir and unbiased union support. Carmel Mitchell seemed reluctant to interfere with Tim Anderson and she swore a few times, then Carmel Mitchell agreed to help us and promised that she would keep it confidential.*

11. *I had three interviews with the harassment investigator, with Carmel Mitchell from CUPE Local 21 present. During those meetings she seem*

disinterested and only spoke up when the name Shawn Machdanz came up during my interviews.

. . . . . .

13. *I retained Kowalchuk Law office in April 2014 to assist me with the sexual harassment, unsafe workplace issues and the lack of union representation.*

14. *In April 2014 [HK] and [RD] worked with Kowalchuk Law Office to draft two grievances. We decided to ask the Union to file them for us.*

15. *In April 2014, [HK] informed me by phone call and text that she spoke with and texted Clint Driedger several times during that month regarding submitting grievances on all three of our behalves and that he was reluctant to submit anything.*

16. *In May 2014 [HK] informed me that she contacted Clint Driedger regarding the draft grievances we had prepared and that Clint Driedger said it was Tim Anderson's decision whether or not to file the grievance and that they would not be filing a grievance.*

17. *On June 5, 2014, I filed a Discriminatory Action Complaint under Part III of the Saskatchewan Employment Act. The Occupational Health & Safety Officer issued his report regarding my complaint on July 17, 2014, and I appealed this report to the Executive Director of Occupational Health & Safety on August 1, 2014. An OH&S Tribunal to hear the appeal was appointed by the Labour Relations Board in August 2014.*

19. *Because the Union would not file a grievance on my behalf, I filed a Human Rights complaint under The Saskatchewan Human Rights Code in May 2014…In November 2014 I participated in [HK]'s Human Rights Commission mediation with the City of Regina. The Union is not part of that process and has not applied to be a part of that process.*

20. *The City presented the results of its investigation into my complaints, as well as the complaints of [HK] and [RD], on July 17, 2014 at City Hall. In attendance with me were Cara Banks and Larry Kowalchuk. CUPE 21 had three representatives present.*

21. *That investigation substantiated 15 of my allegations of personal and sexual harassment against several CUPE 21 members, including members of the workplace occupation Health & Safety Committee.*

22. *I applied for Workers' Compensation and eventually received compensation for my workplace injury in July 2014, with the support of the City of Regina who acknowledged my injury was due to sexual harassment that took place at the Landfill, and without the support of the Union.*

23. *The City of Regina Harassment Policy which is not part of the collective agreement permits an appeal. With the assistance of Cara Banks and Larry Kowalchuk, I filed an appeal of the investigation report, alleging that the investigation, despite the serious and numerous findings of harassment, improperly dealt with a significant number of my other allegations.*

……

25 On November 4, 2014, the Union applied for full-party status at my Occupational Health & Safety Appeal Tribunal (which was scheduled to begin November 19, 2014). The Union applied to adjourn the proceedings which did get delayed by a couple of weeks as a result.

26. On November 6, 2014, the Union applied to have the proceedings deferred entirely to the grievance procedure. This was the first time I was made aware that a grievance had been filed by the Union on our behalves.

. . . . . .

28. On November 13, 2014, I was informed by [HK], that Local 21 had filed a grievance on my, [HK] and [RD]'s behalves.

29. No one from CUPE Local 21 has provided me with any information regarding the grievance that was filed on my behalf, other than the fact that it has been filed.

. . . . . .

33. The representation or lack thereof, that I have received from the Union has exacerbated my medical condition which is already very serious.

. . . . . .

36. As a result of the above, I have incurred legal costs for my representation on the issues that CUPE has not represented me on during the past year, costs which would not have been incurred but for the lack of and refusal of representation when I needed it.

[11] In her application, CB requested remedial relief including:

- *Each of the affected employees shall be given a position of their own choice with the City of Regina with no loss of pay or benefits*
- *An amount of $10,000.00 general damages to each employee directly affected by the Employer's violations, for injuries to feeling, dignity and self-respect.*
- *An amount of not less than $100,000.00 for general/aggravated/punitive damages to be paid to the Union and its members of the breaches of the collective agreement and statues including The Saskatchewan Human Rights Code, for the resulting mental and physical injury and disability, including but not limited to chronic stress, chronic anxiety and depression.*

[12] The Union filed two (2) formal Replies to CB's application.

[13] In the first Reply dated March 16, 2015, the Union denied the allegations set out in CB's application. It asserted as follows:

- *By the Applicant's own admission (in statements contained in her Application), the Applicant has only directly requested CUPE's assistance in one instance, when in March 2014 she approach Local 21, Executive Member Carmel Mitchell and asked her to "speak confidentially" about "issues with the union."*

- *The Applicant does not in her Application allege that she has ever personally asked any CUPE representative for assistance or representation with respect to her disputes with the employer.*

- *CUPE has made numerous, repeated attempts to communicate with this Applicant respecting her disputes with the employer. This Applicant has, in most instances, failed to respond to these overtures from CUPE.*

- *Although the Applicant has been reluctant to cooperate with, or share information with, CUPE, CUPE has done its best to provide the Applicant with fair representation in her workplace disputes with the employer, in accordance with its statutory obligations and its contractual commitment to the employer to address disputes through the grievance arbitration process…*

The Union then enumerates numerous instances which it asserts demonstrates it acted appropriately and fairly in relation to CB's dispute with the City.

[14] Subsequently, the Union filed an amended Reply dated September 11, 2015. In this document, the Union repeated many of the assertions advanced in its original Reply and included references to a Memorandum of Settlement executed between the City and the Union, that the Union asserts settled all issues in dispute relating to CB's circumstances.

B. LRB File No. 035-14

[15] In her formal application, HK alleged the Union had failed to represent her fairly in relation to two (2) proposed grievances. One of those grievances related to her concerns respecting breaches of environmental regulations at the City's Landfill site, the particular circumstances surrounding this proposed grievance are outlined in HK's application as follows:

1. *I have been employed by the City of Regina, and a member of Canadian Union of Public Employees Local 21, since November 2010. I was a Technologist II since June 2012, and an acting supervisor at the Landfill since May 2013.*

2. *I have experienced a multitude of safety concerns regarding working conditions at the Landfill including but not limited to sexual harassment and gender based discrimination. I have been asking my Union for general assistance, and specifically, to file a grievance on my behalf, since as far back as late 2013.*

3. *I approached Tim Anderson, the former president of CUPE Local 21, in November 2013 about my job description, the amount of duties that I was responsible for after the City of Regina dissolved the Environmental Engineering department, my safety concerns, lack of training at the Landfill and lack of adequate and qualified management. He agreed with my positions and said that I was not the first person to raise these concerns and we should meet to discuss further.*

4. *Tim Anderson and I tried to set up meetings to further discuss the situation at the Landfill. I was unable to make a couple of attempted appointments because at that time I was experiencing symptoms of anxiety and depression due to the environment at work including the ongoing harassment and discrimination and was mentally and physically ill.*

5. *I went off work due to illness on February 3rd, 2014*

6. *I exercised by my right to refuse dangerous work on February 4th, 2014.*

7. *I filed a harassment complaint on February 20, 2014 and eight more sexual harassment complaints against coworkers at the Landfill in March 2014. I was later notified by the City of Regina that they were hiring an investigator to conduct interviews.*

8. *I retained Kowalchuk Law Office in February, 2014 to assist me with the sexual harassment and the unsafe workplace issues and the lack of union representation.*

9. *[RD] and I met with Carmel Mitchell from CUPE Local 21, in March 2014 to discuss our safety concerns at the landfill. [RD] told her that she was not comfortable with Tim Anderson witnessing our investigation interviews. Carmel Mitchell said she would fill that role instead.*

10. *I started to become concerned with Carmel Mitchell's ability to deal with our situation after I spoke with Guy Marsden, the CUPE National Representative assigned to CUPE, Local 21…*

11. *I phone Guy Marsden in March 2014. He indicated that Carmel had spoke [sic] to him about our situation and was requesting a copy of the City's Harassment Policy. This concerned me because the harassment policy is accessible to all City of Regina employees on the company's internal website. She did not appear to be familiar with the policy and processes involved with dealing with harassment claims.*

12. *I asked about the grievance. He said it was up to the Local to file. I spoke to him about the legal and ethical concerns I had been experiencing at the Landfill. I expressed that I was very concerned about speaking out against my employer for fear of losing my job. He said he thought I would be covered by the 'Whistle Blowers Act' but was unsure. He said he would look into it and call me back in a couple of weeks. To date, I have not been contacted by Guy Marsden.*

13. *I became even more concerned when [RD] told me that Carmel Mitchell had spoke [sic] to Tim Anderson.*

14. *As a result of the sexual harassment complaints filed by myself and two of my co-workers…the City of Regina commenced an investigation.*

15. *Carmel Mitchell from CUPE, Local 21 attended my first investigation interview. After the questioning, I spoke with Carmel Mitchell and asked if she would be filing a grievance on our behalf against the City of Regina. She said she didn't know what grievance could be filed. I explained that the City of Regina had not provided us with a safe work environment, that they were aware of that environment and did nothing and were not paying us while we were off on our workplace injury. I also asked her if she had revealed confidential information to Tim Anderson and she said that she had.*

16. *I left a phone message for Tim Anderson in April 2014, inquiring about filing the grievance and asking to be called back. He phoned back the next day. His tone was very combative…I was shocked that he could be so callous knowing that I was off work due to a mental illness caused by the work environment at the Landfill. He then went on to scold me that he had tried to meet up with CB and myself but we had cancelled. Again, I explained to him I cancelled because I was and still am ill. I asked him about filing a grievance and he said he could not file it until the harassment investigation was complete. I asked him if he could file one based on our right to refuse unsafe work. He told me that since my doctor took me off work, I had given up my right to refuse. He said WCB would never accept my claim. I was devastated because this put me under further financial stress because I was too ill to return to work. I did not hear from Tim Anderson again.*

17. *Cliint Driedger replaced Carmel Mitchell from CUPE Local 21 for the purposes of the harassment investigation. We spoke many times about the situation at the Landfill in person after my interviews, by phone and by text. I had expressed many times that I felt a grievance should be filed on our behalf. I also said I could not understand why the harassers were allowed to continue to work at the Landfill while CB and myself were unable to work due to our workplace injuries and were not being paid ty the City.*

18. *I worked with Kowalchuk Law Office and RD to draft two grievances in mid-April 2014…to take to the Union and request that they file on our behalf with the City of Regina.*

19. *I asked Clint Driedger via text message on April 22, 2014 about where the grievances we had talked about the previous week were at and did he have an update.*

20. *On April 25, 2014, I texted Clint Driedger to see if we could get together because RD and I would like to talk to him about the draft grievances we have and would like to file. I asked if we had to include Tim Anderson, and Clint Driedger replied that it was up to us "but I'm the grievance chair".*

21. *I replied that to be honest, I was not very comfortable with Tim Anderson. I would rather not include him if it wasn't necessary and I explained that RD felt the same way…I asked him to let me know what works for him next week.*

22. I received no reply text from Clint Driedger.

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24. On April 28, 2014, Clint Driedger and I texted, discussing when we can get together to talk. I asked him to please bring a copy of the grievance and he replied that he could bring a grievance form.

25. RD and I went to Julianne Pizza and waited from Clint Driedger. There was a misunderstanding on the location so the meeting did not happen. I requested that the "grievance form" be emailed to me so we could fill it out. There was no response from Clint Driedger.

26. I filed a Discriminatory Action Complaint under…Part III of the Saskatchewan Employment Act on April 16, 2014. The Occupational Health & Safety officer issued his report regarding my complaint on July 17th, 2014, and I appealed this report to the Executive Director of Occupational Health & Safety on August 1, 2014.

27. On May 1, 2014, Clint Driedger texted me to contact Tracy Halverson at pension and benefits about my claim. I thanked him and said I still need to give you those draft grievances and could he let me know where to drop them off.

28. Clint Driedger called me to arrange to meet on Broad Street. I gave him the draft grievances and he said he would have to discuss the grievances with Tim Anderson. He said Tim Anderson is the President so it's his call on whether or not to file a grievance. We also discussed my return to work. I told him I did not feel safe in Building A as the harassers were given free access to pick up the mail from there. Clint Driedger said that I should just "hold my head up high" if I run into the harassers. I told him I wasn't capable of doing that.

. . . . . .

30. On May 7, 2014 I texted Clint Driedger, again asking what was being done with the grievances. He called me and said that they would not file a grievance for us. He said it was Tim Anderson's decision and because he is president there is nothing we can do.

31. Because the Union would not file a grievance on my behalf with the assistance of the Kowalchuk Law Office, I filed a Human Rights complaint under The Saskatchewan Human Rights Code on May 16, 2014.

. . . . . .

33. The City of Regina presented the result of its investigation into my complaints, as well as the complaints of CB and RD, on July 17, 2014 at City Hall. In attendance with me were Cara Banks and Larry Kowalchuk. CUPE Local 21 had three representatives present.

34. That investigation substantiated 22 of my allegations of personal harassment and sexual harassment against several CUPE 21 members including my supervisor and members of my workplace Occupational Health & Safety Committee.

. . . . . .

37. I applied for Workers' Compensation and eventually received compensation for my workplace injury in July 2014, with the support of the City of Regina who acknowledged my injury was due to sexual harassment that took place at the Landfill and without the support of the Union.

38. The City of Regina Harassment Policy which is not part of the collective agreement permits an appeal. With the assistance of Cara Banks and Larry Kowalchuk, I filed an appeal of the investigative report, alleging that the investigation, despite the serious and numerous findings of harassment, improperly dealt with a significant number of my other allegations.

. . . . . .

40. On November 4, 2014, the Union applied for full-party status at my Occupational Health & Safety Appeal Tribunal (which was scheduled to begin November 19, 2014). The Union applied to adjourn the proceedings which did get delayed by a couple of weeks as a result.

41. On November 6, 2014, the Union applied to have the proceedings deferred entirely to the grievance procedure. This was the first time I was made aware that a grievance had been filed by the Union on our behalves.

42. On our behalves, on November 10, 2014, Kowalchuk Law Office asked Ms. Saxberg for a copy of the grievance and she refused to provide a copy of it to our legal counsel claiming that she needed instructions from CUPE 21 to provide a copy to our legal counsel and demanding that I provide written confirmation that my legal counsel are entitled to receive it on my behalf.

43. On November 12, 2014, Clint Driedger texted and asked for my email address so that he could send me a copy of the grievance the Union had filed. I sent him my email address.

44. On November 13, 2014, Clint Driedger phoned me at 8:00 p.m. I received a copy of a grievance by email from Clint Driedger and set it to CB and RD. I told him I had received the grievance and appreciated that they had filed. I asked him what the next steps were in the process and how the process worked. He said that some "things" had to be sorted out and he would let me know the next steps. He said he would me in the loop.

45. [On] November 14, 2014, Clint Driedger texted to ask if I had received the grievance…I confirmed that I had received [it] and I sent it to CB and RD.

46. I have not heard from Clint Driedger since November 14, 2014.

47. No one from CUPE, Local 21 has provided me with any information regarding the grievance that was filed on my behalf, other than the fact that is has been filed.

48. The grievance does not plead gender-based discrimination or sexual harassment and does not plead the Saskatchewan Human Rights Code. It does not plead the discriminatory action I faced because I had complained about occupational health and safety issues at the Landfill that hare unrelated to harassment in the first instance….

> *49. Juliana Saxberg, legal representative for CUPE National, confirmed in wiring on December 24, 2014, it had previously agreed that the Union would not stand in the way of any global settlement that may arise from the discussions between my Employer and my legal team using the Occupational Health & Safety appeal Tribunal mediation proceedings, negotiations which had already began [sic] using the Human Rights Commission mediation process. The Union has since reversed that position.*
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> . . . . . .
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> *52. CUPE has also tried to undermine our negotiations with respect to settlement negotiations respect to our human rights complaint and our OH&S complaints with the employer. We have formally asked for co-operation with our legal team repeatedly and stated that we accept that CUPE has jurisdiction over the settlement of the grievance and that we would include CUPE as one of the parties that would need to sign any settlement negotiated between us, using our legal team, and the employer.*
>
> *53. Ms. Posyniak called me on a Saturday to inform me that the Union and the City will not pay for any of my legal fees and that I should stop using Kowalchuk Law Office as legal counsel because it is just going to cost me more money. She said the only way to get my legal fees paid was to file a DFR but that only three per cent succeed and it would just incur more fees. I felt threated when she said more than once that when and if I receive a settlement I am going to have to walk into the CUPE office to sign it.*
>
> *54. The representation or lack thereof that I have received from the Union has exacerbated my medical condition which is already very serious.*
>
> *55. As a result of the above, I have incurred legal costs for m y representation on the issues that CUPE has not represented me on during the past year, costs which would not have been incurred but for the lack of and refusal of representation when I needed it.*

[16] The remedial relief requested by HK in her formal application was identical to that requested by the other Applicants, CB and RD.

[17] In response to HK's application, the Union filed two (2) formal replies. In the first Reply dated March 16, 2015, the Union admitted that at all relevant times HK was "a member in good standing of CUPE Local 21", but disputed HK's allegations in other respects. The Union goes on to assert that representatives of CUPE Local 21 communicated regularly with HK. The particulars relevant to this assertion as set out in the Union's Reply and read as follows:

- *In November 2013, Tim Anderson, the former president of CUPE Local 21, discussed the Applicant's concerns about her workplace with her, and validated those concerns,*

and attempted to schedule a meeting or meetings with her to further discuss her concerns but the Applicant did not attend those meetings.

- *In March 2014, CUPE Local 21 Executive Member Carmel Mitchell met with the applicant to discuss her workplace concerns.*

- *During the investigation into the Applicant's harassment allegations in March 2014, CUPE Local 21 attended a meeting between the Applicant and the harassment investigator as a union representative.*

- *In addition, during this time CUPE Local 21 President Clint Driedger communicated regularly with the Applicant and attended a number of investigation meetings with her.*

- *The Applicant also discussed her concerns with CUPE National Servicing Representative Guy Marsden during this time.*

- *Members of the CUPE Local 21 Executive including Tim Anderson and Clint Driedger discussed with the Applicant the possibility of filing a grievance in Spring 2014. The Applicant was advised at this time that the Local did not wish to file a grievance until the harassment investigation was completed.*

- *Local 21 Executive Member Clint Driedger attempted to provide the Applicant with assistance in applying for long term disability benefits in May 2014, including providing her with the contact information of the appropriate contact person.*

- *In June 2014, Clint Driedger invited the Applicant to get together. This meeting did not take place.*

- *When the harassment investigation concluded in July 2014, CUPE representatives attended a meeting with the Applicants in which the employer presented the results of its investigation into the Applicant's harassment allegations.*

- *In October 2014 CUPE Local 21 filed a grievance on behalf of the Applicant with respect to her harassment allegations…*

- *In December 2014, after learning about the Applicant's misgivings about her dealing with CUPE Local 21 representatives, CUPE assigned myself (National Service Representative Suzanne Posyniak) to represent the Applicant in her disputes against the employer. I have communicated regularly with the Applicant, and I have worked diligently to pursue settlement of her grievance with the employer, at all times since then up to and including the date of filing of this reply.*

[18] In this Reply, the Union also asserts that the Applicant had been uncooperative with it and failed to share information which would have assisted the Union in advocating effectively with the City on her behalf. The Reply then sets out the following particulars:

- *In March 2014, CUPE Local 21 Executive Member Carmel Mitchell met with the Applicant to discuss her concerns in the workplace. At that time Mitchell advised the Applicant that her concerns would be kept confidential but that some confidential information would have to be shared within the union, and in particular with Tim Anderson, in order to provide representation to the Applicant. When Mitchell*

subsequently discussed the matter with Anderson, Anderson already had this information from his own discussions with the Applicant.

- *During the meeting in March 2014, the Applicant asked Mitchell if she (the Applicant) needed to hire her own lawyer. Mitchell advised the Applicant that the union would take action once the City concluded its investigation into the complaints of harassment, and that it was not necessary to hire outside legal counsel at that time.*

- *When the Applicant spoke to Guy Marsden in Spring 2014, Marsden advised the Applicant that the union would provide the Applicant that the union would take action once the City concluded its investigation into the complaints of harassment, and that it was not necessary to hire outside legal counsel at that time.*

- *In March and April 2014, both Tim Anderson and Clint Driedger discussed filing grievances with the Applicants, and advised that grievance would only be filed before the City completed its investigation into the harassment complaints.*

- *After the first meeting with the harassment investigator and the applicant in March 2014, Mitchell advised the Applicant that as she had to do when they had met earlier in March 2014, she (Mitchell) had discussed the Applicant's concerns with Tim Anderson, and that Tim Anderson was already aware of the Applicant's confidential information, because he had already talked to the Applicant about her concerns and issues in the workplace.*

- *Following the conclusion of the harassment investigation in summer 2013, CUPE representatives met with the employer to attempt to come up with a process to address the appeals against the harassment investigation finding that had been filed by the Applicant and other CUPE Local 21 members who were the subject of the harassment investigation.*

- *In September 2014, CUPE Local 21 President Clint Driedger provided the Applicant with assistance and representation in attempts to accommodate her return to work, including meeting the employer.*

- *In October 2014, CUPE filed a grievance on the Applicant's behalf alleging breaches of the collective agreement and The Saskatchewan Employment Act. Grievances were filed on behalf of the alleged harassers to address their appeals of the investigation report, in an effort to bring the dispute to resolution in accordance with the grievance arbitration process set out in the collective agreement.*

- *With the agreement of employer and the Applicant's assent, the grievance filed on the Applicant's behalf has been held in abeyance to permit the parties to try to negotiate a resolution to the Applicant's disputes with the employer.*

- *In November 2014, CUPE learned that a hearing had been scheduled representing an Appeal of an Occupation Health and Safety Officer's decision that the Applicant had filed, based in part on her harassment allegations. CUPE applied for Intervener status in that hearing based on concerns that the outcome of the hearing could prejudice grievances filed on behalf of the Applicant and/or other CUPE Local 21 members or could negatively impact the employment of the Applicant and/or other CUPE Local 21 members. The hearing did not go ahead because the employer and the Applicant through her legal counsel agreed to a mediation process that would include CUPE.*

- *In December 2014, after learning about the Applicant's misgivings about her dealings with CUPE Local 21 representatives, CUPE assigned myself (National Servicing*

Representative Suzanne Posyniak) to represent the Applicant in her disputes with the employer. A different National Servicing Representative from the Saskatoon Area Office was assigned to represent the accused harassers, and we have been instructed to limit our communication in order to minimize any potential conflict of interests. In addition, the accused harassers have been assigned separate legal counsel and separate representatives within Local 21. This has been communicated to the Applicant.

. . . . . .

- *At no time to my knowledge has the Applicant ever asked CUPE to file a human rights complaint or assist her in pursuing a human rights complain. CUPE only found out that the Applicant had filed a human rights complaint after it was informed of same by the employer in or around November 2014.*

- *CUPE has communicated to the applicant on a number of occasions that the grievance may be amended or new grievances may be filed in the future if circumstances warrant. In particular, the grievance could be amended or a new grievance filed to include allegations of violations of the Saskatchewan Human Rights Code. The Applicant has never asked CUPE to amend the grievance of filed additional grievances on her behalf. Rather, the grievance has been held in abeyance with the Applicant's assent in order to permit CUPE to continue settlement talks with the employer.*

- *As noted above, at the invitation of the employer and the Applicant's legal counsel, CUPE participated in a mediation of the Applicant's Occupational Health and Safety appeal in December 2014 that spanned several days. With the agreement of all parties, CUPE hosted one session of the mediation at its offices in Regina.*

- *Although the mediation process did not produce any agreements between the parties to settle the Applicant's disputes with the employer, CUPE has continued to attempt to negotiate a resolution to the grievance with the employer. I have communicated with the Applicant regularly to ascertain her wishes, and I have negotiated with the employer on several occasions, in an effort to obtain a remedy for the Applicant that will settle the grievance. As of the date of this Reply, CUPE's efforts to negotiate a settlement or the Applicant are on-going.*

[19] The Union filed an amended Reply to HK's Application on September 11, 2015. In this document, the Union included references to a Memorandum of Settlement executed between the City and the Union that the Union asserts settled all issues in dispute relating to HK's circumstances.

C. LRB File No. 037-15

[20] In her formal application, RD particularized her allegations against the Union as follows:

1. *I have been employed by the City of Regina at the Landfill since May 2011.*

2. *I have experience a multitude of safety concerns regarding working conditions at the Landfill including but not limited to sexual harassment and gender based discrimination. I have been asking my Union for general assistance, and specifically, to file a grievance on my behalf, since as far back as late 2013.*

3. *I experienced my right to refuse dangerous work on March 6, 2014 and have not returned since.*

4. *On March 6th 2014, Tim Anderson, then president of CUPE local 21, returned my call around 9:00 a.m. I told him briefly what was going on and that I was going to go through with a formal harassment complaint so that the harasser(s) would take me seriously and stop. He told me that he knows Cory Abstoway on a personal level and to give him a couple days to talk to Cory because he believed that if he came down on Cory it would mean more to him just because of their relationship rather than Lisa Legeault, the manager, or anyone else. I told Tim that whether or not he talks to Cory I still want to put the formal complaint in. he asked me once again to give him a couple of days so I just agreed. Tim then asked me for Cory's phone number so I gave it to him. I told Tim that I was very stressed out over the situation and didn't' want to be at work any longer, and that I wanted to quit my job but I couldn't afford to.*

5. *About 20 minutes later after I had got off the phone with Tim he called me back and said that he talked to Cory. He said he couldn't tell me what he said to Cory because it wasn't very nice but he could assure me that I should see an immediate change in this behavior. I told him I still wanted to go through with the complaint.*

6. *After I got off the phone with Tim I called Tanya Vancuren and told her about the conversation that just took place with Tim. I told her I didn't like the outcome of it and I didn't think it was right of Tim to call Cory and give him shit while we are both at work. I was scared Cory would approach me, I didn't want the negative confrontation. I told her I felt really uncomfortable and unsafe and that I wanted to leave work immediately. She said that she would call Shaun and tell him that I was leaving. She told me to go home relax, and try to come back the next day. Later that day I went to a medi-clinic and got a doctor's note keeping me off work until I could get in to see my family doctor.*

7. *I have not been back to work since.*

8. *On March 19, 2014, I filed nine harassment complaints against my foreman and coworkers, including members of my workplace Occupations Health & Safety committee.*

9. *As a result of the sexual harassment complaints filed by myself and my two co-workers, HK and CB, the City of Regina commenced an investigation. The later notified me that the City was hiring an investigator to conduct interviews.*

10. *HK and I met for lunch with Carmel Mitchell from CUPE 21 in March 2014 and told her our story. . . .*

11. *At some point after that Time called me to clarify that just because he knows Cory and their [sic] friends that I'm still being fairly represented…He flat out said Carme told me everything I said.*

12. *I retained Kowalchuk Law Officer in February 2014 to assist me with the sexual harassment and the unsafe workplace issues and the lack of union representation.*

    . . . . . .

14. *I worked with Kowalchuk Law Office and HK to draft two grievances in mid April 2014 to take to the Union and request that they file on our behalf with the City of Regina.*

15. *On April 22 I texted Clint Driedger from Local 21 and asked him they were filing a grievance and he said that he needs to wait until the investigation is complete, but our stories are lining up.*

16. *I told him I have a draft of a grievance they could use he said he would talk to Tim and get back to me in the afternoon.*

17. *I did not hear anything again from the Union until HK forwarded to me the grievance they filed on my behalf in November 2014.*

18. *I went with HK to meet with Clint Driedger and discuss the draft grievances but there was a misunderstanding on the location so the meeting did not happen.*

19. *Shortly thereafter, Clint informed me that they couldn't file until my harassment complaint investigation was completed and the Tim Anderson had to make that decision. No grievance was filed by the Union.*

20. *Because the Union would not file a grievance on my behalf, with the assistance of the Kowalchuk Law Office I filed a Human Rights complain t under The Saskatchewan Human Rights Code on June 5, 2014. That went to mediation which is ongoing with the City of Regina. The Union is not part of that process and has not applied to be a part of that process.*

21. *The City of Regina presented the results of its investigation into my complaints, as well as the complaints of CB and HK on July 17, 2014 at City Hall. In attendance with me were Cara Banks and Larry Kowalchuk. CUPE Local 21 had three representatives present.*

22. *That investigation substantiated eight of my allegations of personal harassment and sexual harassment against several CUPE 21 members including my in-scope foreman and members of my workplace Occupational Health & Safety Committee.*

23. *I applied for Workers' Compensation and eventually received compensation for my workplace injury in July 2014 with the support of the City of Regina who acknowledged my injury was due to sexual harassment that took place at the landfill and without the support of the Union.*

24. *The City of Regina Harassment Policy which is not part of the collective agreement permits an appeal. With the assistance of Cara Banks and Larry Kowalchuk, I file an appeal of the investigative report, alleging that the investigation, despite the serious and numerous finding of harassment, improperly dealt with a significant number of my other allegations.*

25. *The City of Regina accepted the appeal; however, their policy does not provide for an appeal mechanism up to and including a tribunal…*

> *26. On November 4, 2014, the Union applied for full party status at my Occupational Health & Safety Appeal Tribunal (which was scheduled to begin November 19, 2014). The Union applied to adjourn the proceedings which did get delayed by a couple of weeks as a result.*
>
> *27. On November 6, 2014, the Union applied to have the proceedings deferred entirely to the grievance procedure. This was the first time I was made aware that a grievance had been filed by the Union on our behalves.*
>
> *. . . . . .*
>
> *30. No one from CUPE Local 21 has provided me with any information regarding the grievance that was filed on my behalf, other than the fact that it has been filed.*
>
> *31. The grievance does not plead gender-based discrimination or sexual harassment and does not plead the Saskatchewan Human Rights Code. It does not plead the discriminatory action I faced because I had complained about occupational health and safety issues at the Landfill that are unrelated to harassment in the first instance. As referenced in paragraph 25 above, the grievance does not challenge the findings of the investigation.*
>
> *. . . . .*
>
> *33. I have requested the Union to co-operate and collaborate with my legal teram, who include lawyer Larry Kowalchuk and labour relations consultant Cara Banks of Kowalchuk Law office, in the negotiating process in order to hopefully arrive at a global settlement of all outstanding forums, including the Union's grievance if they so wish. Juliana Saxberg and Suzanne Posyniak, CUPE National staff representative, have refused to meet with me and my legal team and refused my request to the Union to co-operate with my legal team.*
>
> *34. In fact, Ms. Posyniak has suggested and repeatedly tried to convince me to dismiss my legal team for various reasons.*
>
> *35. CUPE has also tried to undermine our negotiations with respect to settlement negotiations with respect to our human rights complaint and our OH&S complaints with the employer. We have formally asked for co-operation with our legal team repeatedly and stated that we accept that CUPE has jurisdiction over the settlement of grievance and that we would include CUPE as one of the parties that would need to sign any settlement negotiated between us, using our legal team, and the employer.*

[21] In her formal application, RD requested the identical remedial relief as CB and HK.

[22] The Union filed its Reply to RD's application on March 16, 2015. It largely mirrors the assertions advance in it replies to both CB's and HK's applications.

FACTUAL OVERVIEW

[23] A helpful overview of events in this matter can be found in an earlier Board Decision: *CB, HK & RD v Canadian Union of Public Employees, Local 21*, 2015 CanLII 90524 (SK LRB). This Decision decided a preliminary application brought by Union seeking to have these applications summarily dismissed. The Board rejected the Union's arguments for summary dismissal and in the process former Vice-Chairperson Schiefner concisely outlined the factual circumstances underlying these applications as follows at paragraphs 4 to 17:

> *[4] The Applicants were employed at the City of Regina and were members of the Union at all material times. As a result of incidents occurring in the workplace, the Applicants filed multiple harassment complaints under the City of Regina's harassment policy in the Winter/Spring of 2014. The allegations of wrongdoing set forth in these complaints involved co-workers of the Applicant, who were also members of the Union.*
>
> *[5] In response to the complaints filed by the Applicants, the City of Regina appointed an investigator in March of 2014. During his investigation, the investigator interviewed the three (3) Applicants. Representatives of the Union were present when the applicants were interviewed by the investigator.*
>
> *[6] In April of 2014, while the investigatory was conducting his investigation, the Applicants retained independent legal counsel.*
>
> *[7] In April of 2014, before the investigator had concluded his investigation, the Applicants asked the Union to file grievances alleging the City of Regina had violated its collective agreement with the Union, together with complaints of discrimination and occupational health and safety violations. To assist the Union, the Applicants provided the Union with copies of draft grievances that had been prepared by their counsel. The Union declined to file grievances on behalf of the Applicants at that time.*
>
> *[8] Prior to the investigator concluding his investigation and issuing his report, each of the Applicants filed discriminatory action complaints under Part III of The Saskatchewan Employment Act with the relevant officials within the Ministry of Labour Relations and Workplace Safety. The Union was not a party to these applications.*
>
> *[9] In addition prior to the investigator concluding his investigations, each of the Applications filed human rights complains with the Saskatchewan Human Rights Commission. The Union was not party to these applications nor did it seek standing to participate in these proceedings.*
>
> *[10] The City of Regina's investigator concluded his investigation and issued his report regarding the complaints of the Applicants on July 17, 2014. In his report, the investigation substantiated many (but not all) of the complaints alleged by the Applicants, including allegations of personal and sexual harassment by the Applicant's coworkers. As noted, the coworkers who were found to have personally and sexually harassed the Applicants were also members of the Union.*

[11] In July of 2014, one of the Applicants, HK applied for (and ultimately received) Workers' Compensation benefits. HK's workplace injury was alleged to be the result of the sexual harassment that took place in the workplace. The Union was not a party to this application.

[12] On August 1, 2014, the Applicants appealed the findings of the City's investigator to the Executive Director of Occupational Health and Safety alleging that the investigator improperly dealt with a number of the complaints of the Applicant's (namely the complaints that were not substantiated by the investigator). The Union was not a party to the appeals filed by the Applicants.

[13] In October of 2014, the Union filed grievances with the City of Regina on behalf of the Applicants alleging violations of the collective agreement, together with contraventions of provisions of Part III of The Saskatchewan Employment Act. In addition, in November of 2014, the Union also filed grievances on behalf of other members of the Union (i.e. the members against whom complaints had been sustained) alleging that the City of Regina's investigator had conducted a flawed investigation into the complaints alleged by the Applicants.

[14] As a result of either appeals filed by the Applicants or the discriminatory action complaints filed with the Ministry of Labour Relations and Workplace Safety, an adjudicator was appointed to hear the appeals and/or complaints of Applicants pursuant to Part III of The Saskatchewan Employment Act. The Union sought and was granted standing before the adjudicator. In doing so, the Union alleged that it had an interest in the proceedings before the adjudicator. The Union asked the appointed adjudicator to defer hearing the appeals/complaints of the Applicants pending prosecution and resolution of the grievances filed by the Union.

[15] In November of 2014 and in January of 2015, the Union wrote to the City of Regina asserting its status as the exclusive bargaining agent on behalf of the Applicants and directing the City to refrain from dealing directly with the Applicants (and/or their counsel) with respect to any matters that could affect their employment.

[16] In February of 2015, the Applicants filed their respective applications with this Board alleging the Union had failed to fairly represent them; being applications bearing LRB File Nos. 034-15; 035-15, and 037-15.

[17] In April of 2014, the Applicants, the Union and the City of Regina entered into memorandums [sic] of settlement wherein the Union agreed to withdraw the grievances it had filed on behalf of the Applicants and the Applicants agreed that their harassment complaints had been concluded and that their human rights complaints, discriminatory action complaints and appeal had all be settled. In exchange, the City of Regina agreed to pay monetary compensation to each of the Applicants. Concomitant with the minutes of settlement agreed to by the parties each of the Applicants signed releases wherein they each agreed to release the City of Regina which reads, in part, as follows:

> ***I…**, of the City of Regina, in the Province of Saskatchewan, do now, for and in consideration (receipt and sufficiency of which I hereby acknowledge) remise, release and forever discharged the City of Regina, its directors, officers, employees, servants, agents and affiliate and each of them (collectively, the "Employer") of and from any action, cause of action, grievance, complaint, claim, demand, loss, damage, charge, expense, cost, and proceeding of any nature or kind whatsoever arising out of, connected with or incidental to the matters grieved by Canadian*

> *Union of Public Employees Local 21 on my behalf identified as Grievance filed October 28, 2014.*
>
> ***FOR THE CONSIDERATION AFORESAID**, I hereby covenant and agree that it will not commence any action or proceeding of any nature or kind whatsoever including, without limitation any grievance or any claim under the collective agreement between the Employer and Canadian Union of Public Employees, Local 21, The Saskatchewan Human Rights Code or The Saskatchewan Employment Act, against the Employer, its affiliates or against any of the Employer's employee benefit providers or against any third party which or who in turn might have a claim against the Employer.*

[24] Former Vice-Chairperson Schiefner dismissed the Union's summary application because he concluded that the issues the Union advanced should not be adjudicated summarily. However, he made it clear that these issues would have to be adjudicated following a full hearing. As framed by him, these two (2) over-arching issues are:

- Are the allegations regarding proceedings other than the grievance/arbitration process beyond the scope of the duty of fair representation imposed by s. 6-59 of *The Saskatchewan Employment Act* and, therefore, beyond the jurisdiction of this Board? (*CK*, *supra*, at page 9.)

- Do the settlements and releases signed by the Applicant's render their applications to this Board moot? (*CK*, *supra*, at page 11.)

[25] These issues, among others, will be addressed later in these Reasons for Decision.

[26] However, it is first necessary to outline in more detail the testimony which the Board heard over eight (8) days in July 2016. Yet, even before it is possible to do that, the Board must consider numerous objections made principally by the Applicants' counsel to the admissibility of certain testimony and documentary evidence lead presented at the hearing.

EVIDENTIARY AND ADMISSIBILITY ISSUES

A. Introduction

[27] Very early in the hearing, it became apparent there were fundamental disagreements between counsel for the Applicants and for the Union about the admissibility of many documents – e-mails, texts, and settlement agreements. As well, objections were raised to

the admissibility of testimony that pertained directly to negotiations, internal meetings of the Union's executive, mediations, and settlement discussions, to enumerate only a few.

[28] As the hearing proceeded, the Board, appreciating that some of these objections raised difficult legal issues, and realizing that ruling on each and every objection as it arose would unduly extend the duration of the proceedings, decided that the objections of counsel would be duly noted, and would be dealt with in the Decision following written and oral submissions respecting those objections.

B. Nature of Objections and Relevant Legal Principles

[29] The nature of the objections advanced at the hearing fell into one (1) or more of the following categories:

- Solicitor-Client Privilege
- Litigation Privilege
- Settlement Privilege
- Labour Relations Privilege
- Mediation Privilege
- Without Prejudice Communications

[30] The Board will first set out the legal principles relevant to the operation of these various legal doctrines below, and then summarize how they have been applied to the facts of this application.

1. Solicitor-Client Privilege

[31] Of all the objections advanced at the hearing, solicitor-client privilege is the most well-known and most established.

[32] Over the past three (3) decades, protection of solicitor-client privilege has evolved from a rule of evidence to a "fundamental and substantive rule of law": *R. v McClure*, 2001 SCC 14, [2001] 1 SCR 445, at para. 17. It applies to any communication that (a) is a communication between solicitor and client; (b) entails seeking or giving legal advice; and (c) is intended to be confidential by the parties. The Supreme Court of Canada has insisted that solicitor-client

privilege "must remain as close to absolute as possible": *Lavalee, Rackel & Heintz v Canada (Attorney General)*, 2002 SCC 61, [2002] 3 SCR 209, at para.36. And, as the Supreme Court acknowledged, "it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis": *McClure*, *supra*, at para. 35. The most commonly recognized exception to solicitor-client privilege is "in order to allow an accused to make full and answer and defence": *R. v. Ward*, 2016 ONCA 568, at para. 32.

2. Litigation Privilege

[33] In earlier times, litigation privilege was referred to as the "'lawyer's brief' rule" and linked to solicitor-client privilege. See: *Susan Hosiery Ltd. v Minister of National Revenue*, [1969] 2 ExCR 27, at 33. *Blank v Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 SCR 319 clarified that these two (2) privileges are "conceptually distinct" even though they seek to secure the same end, namely "[t]he secure and effective administration of justice according to law": *Blank*, *supra*, at para. 31.

[34] Very recently, the Supreme Court in *Lizotte v Aviva Insurance Company of Canada*, [2016] 2 SCR 521, 2016 SCC 52 helpfully summarized the differences between the two (2) forms of privilege, as well as features unique to litigation privilege. Writing for the Court, Gascon J. said at paragraphs 22-24, and 31:

> *[22] However, since Blank was rendered in 2006, it has been settled law that solicitor-client privilege and litigation privilege are distinguishable. In Blank, the Court stated that "[t]hey often co-exist and [that] one is sometimes mistakenly called by the other's name, but [that] they are not coterminous in space, time or meaning" (para. 1). It identified the following differences between them:*
>
> - *The purpose of solicitor-client privilege is to protect a relationship, while that of litigation privilege is to ensure the efficacy of the adversarial process (para. 27);*
> - *Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends (paras. 34 and 36);*
> - *Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services (para. 32);*
> - *Litigation privilege applies to non-confidential documents (para. 28 quoting R.J. Sharpe, "Claiming Privilege in the Discovery Process", in Special Lectures of the Law society of Upper Canada (1984), 163, at pp. 164-65);*

- *Litigation privilege is not directed at communications between solicitors and clients as such (para. 27).*

> *[23] The Court also stated that litigation privilege, "unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration" (Blank, at para. 37). Moreover, the Court confirmed that only those documents whose "dominant purpose" is litigation (and not those for which litigation is a "substantial purpose" are covered by the privilege (para. 60). It noted that the concept of "related litigation", which concerns different proceedings that are brought after the litigation that gave rise to the privilege, may extend the privilege's effect (paras. 38-41).*
>
> *[24] While it is true that in Blank, the Court thus identified clear differences between litigation privilege and solicitor-client privilege, it also recognized that they have some characteristics in common. For instance, it noted that the two privileges "serve a common cause: The secure and effective administration of justice according to law" (para. 31). More specifically, litigation privilege serves that cause by "ensur[ing] the efficacy of the adversarial process" (para. 27) and maintaining a "protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (para. 40, quoting Sharpe, at p. 165.)*
>
> *. . . .*
>
> *[31] Although litigation privilege is distinguishable from solicitor-client privilege, the fact remains that (1) it is a class privilege, (2) it is subject to clearly defined exceptions, not to a case-by-case balancing test, and (3) it can be asserted against third parties, including third party investigators who have a duty of confidentiality.*

3. Settlement Privilege

[35] From a review of the more significant cases discussing settlement privilege, it appears there is consensus that its' existence is determined by a three-part test, namely: (1) the existence or contemplation of a litigious dispute; (2) communications that are made with the intention they remain confidential if negotiations failed, and (3) the purpose of the communications was to achieve a settlement. See: *Thomson v University of Alberta*, 2013 ABCA 391, at para. 10; *Bellatrix Exploration Ltd. v Pen West Petroleum Ltd.*, 2013 ABCA 10, at para. 15; *Tucker-Lester v Lester*, 2012 SKQB 443, at para. 7, and *Fletcher v Davis*, 2015 SKQB 52, at para. 14.

[36] In *Bellatrix Exploration Ltd.*, *supra*, the Alberta Court of Appeal explained the public policy rationale for this form of privilege at paras. 21 and 23 as follows:

> *[21] Settlement privilege is premised on the public policy goal of encouraging the settlement of disputes without the need to resort to litigation. It allows parties to freely discuss and offer terms of settlement in an attempt to reach a compromise. Because an admission of liability is often implicit as part of the*

> *settlement negotiations, the rule ensures that communications made in the course of settlement negotiations are generally not admitted into evidence. Otherwise, parties would rarely, if ever, enter into settlement negotiations to resolve their legal disputes.*
>
> *. . . . .*
>
> *[23] Alberta courts have adopted the public policy rationale for the rule…This approach is consistent with the underlying objective that the parties should be permitted to freely "put all their cards on the table" without having to worry that they may be prejudiced should negotiations fail to resolve their dispute.*

[37] Settlement privilege is a class privilege and, like all such privileges, subject to a number of identifiable exceptions. The Court in *Bellatrix*, *supra*, at paragraph 29 offered a helpful summary of the more commonly recognized exceptions. There the Court stated:

> *[29] As with most forms of privilege, there are exceptions to the rule. Some are universally accepted, while others are more controversial. Among the generally recognized exceptions are the following:*
>
> *(a) to prevent double recovery: Dos Santos (Committee of) v Sun Life Assurance Co. of Canada*, 2005 BCCA4, 207 BCAC 54;
> *(b) where the communications are unlawful, containing for example, threats or fraud;*
> *(c) to prove that a settlement (an accord and satisfaction) was reached, or to determine the exact terms of the settlement: Comrie v Comrie, 2001 SKCA 33, 203 Sask R 164;*
> *(d) it is possible that the settlement posture of the parties can be relevant to costs. That is clearly the case with offers made under the Rules of Court, but also with respect to informal offers: Mahe v Bouliane, 2010 ABCA 74 at paras. 8-10, 201 Alta LR (5th) 277; Calderbank v Calderbank, [1975] 3 All ER 333 (CA).*

[38] In *Fletcher v Davis*, 2015 SKQB 52, at paragraph 17, the Saskatchewan Court of Queen's Bench similarly identified "two general situations" in which settlement discussions or settlement agreements may be introduced into evidence. These were: "1) Where there is a completed settlement in which all matters have agreed to…and 2) Where there is a compelling or overriding interest of justice reason to allow settlement discussions to be introduced apart from enforcement of a concluded settlement".

[39] These principles have also been applied in the labour relations context. For example, in *Grain Services Union (ILWU-Canada) v Viterra Inc.*, 2008 CIRB 430 (CanLII), at paragraphs 13 and 14, the Board *per* Chairperson MacPherson stated:

> *[13] The general principle governing the adversarial common law system of litigation is that all relevant and probative evidence regarding the issue in dispute should be placed before the adjudicator appointed to hear and decide the matter.*

> *However, the common law has recognized certain exceptions to this rule, such as solicitor-client privilege and spousal privilege. Another exception to the general rule that has been recognized is the privilege that attaches to settlement communications, which are generally treated as inadmissible. In his article, Owen V. Gray, "Protecting the Confidentiality of Communications in Mediation" (1998), Vol. 36, No. 4, Osgoode Hall L.J. 667, the author suggests three possible rationales for this exception:*
>
> > *…One explanation is that concessions and offers made in settlement discussions are excluded as irrelevant because they are hypothetical, conditional, or reflect only a desire to purchase peace, and therefore cannot constitute admissions…Another is that when parties to a dispute engage in communications made expressly or impliedly "without prejudice", they do so subject to an implied agreement to preserve confidentiality. The third possible explanation is that settlement communications are excluded on grounds of public policy, because there is a public interest in encouraging the settlement of disputes without involving the courts.*
>
> *[14] Certain exceptions to the common law privilege for settlement discussions have been recognized: when an agreement has been reached, evidence about the settlement discussion may be admitted to prove the existence or terms of the agreement, to assist in the enforcement of the agreement, or to support allegations that the agreement was achieved on the basis of threats, fraud, misrepresentation, duress or undue influence.*

4. Labour Relations Privilege

[40] Labour relations privilege is more accurately characterized as an application in the labour relations context of the Wigmore criteria for identifying when privilege may be claimed for communications made within a confidential relationship. In his seminal text, Evidence in Trials at Common Law (Boston: Little Brown 1961, vol. 8, at para. 2285), Dean John Wigmore of Northwestern University Law School argued that privilege should attach to such communications provided four (4) conditions are satisfied. These four (4) conditions are:

> *(1) The communications must originate in a confidence that they will not be disclosed.*
> *(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties.*
> *(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.*
> *(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.*

[41] The Wigmore criteria have been adopted and applied by the Supreme Court of Canada on many occasions. More recently, see *e.g.*: *R v Gruenke*, [1991] 3 SCR 263; *R v National Post*, [2010] 1 SCR 477, 2010 SCC 16, and *Lizotte*, supra, at para. 32.

[42] In *Service Employees International Union (West) et al. v Saskatchewan Association of Health Organizations et al.*, 2010 CanLII 18139 (SK LRB), the Board offered this extended discussion of labour relations privilege as follows:

> *[49] We note that this Board has considered the existence and application of a "labour relations privilege" for certain documents in but a few cases. In Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v WaterGroup Canada Ltd. [1993] 3rd Quarter Sask. Labour Rep. 114, LRB File No. 099-93, this Board applied the "Wigmore test" to conclude that the notes of members of an employer's negotiating team, which were prepared for and taken during negotiations for collective bargaining, were protected by a labour relations privilege. The Board went onto conclude that this was not a class or "blanket" privilege; rather this was the kind of privilege that must be assessed on a case by case basis. After applying the "Wigmore" test to the notes of members of the employer's bargaining team and concluding that these documents should not be produced, the Board made the following comments relevant to these proceedings:*
>
> > *There can be little doubt that the production of a negotiator's notes and other materials could have this destructive consequence. The process of collective bargaining sanctioned by the legislature is by nature an adversarial one in which the parties are guided by self-interest. If adverse parties are to reach an agreement, they must be able to negotiate in conditions where they feel confident that they can speak freely and forcefully if need be, explore options and take reasonable risks. Creating these conditions for negotiations is a legitimate objective and requires outside third parties like this Board to exercise great restraint when they are requested by one party to call the other party to account for what it said at the bargaining table. A failure to exercise this restraint would have the effect of inhibiting discussion, thereby impeding progress towards collective bargaining agreements, and diverting the attention and resources of the parties from arriving at a settlement.*
> >
> > *In this case, we must take into account, on the one hand, the status of negotiations for collective agreements as a primary object of the statue, the inherent role of negotiators in the statutory scheme of collective bargaining and the need for confidentiality between principal and negotiator if the negotiation process is to work in a straightforward and effective manner. We must also consider, on the other hand, the variety of material that negotiators have in their possession and the infinite number of contexts in which it may be relevant. On weighing these considerations, the Board has decided that in proceedings under The Trade Union Act, it will neither create a blanket privilege over this material nor require negotiators to produce their bargaining books simply because they acknowledge that they exist or that they refreshed their memory from those books in preparation for a hearing before the Board. Rather, the Board will require that persons seeking access to this material must specify what information they are looking for so that any intrusion into this material can be minimized. The Board will then weigh carefully the relevance of the point in issue, the availability of alternative sources of proof and whether the inquiry leads into an area of legitimate privilege.*
>
> *. . . . . .*

> *[52] We are satisfied that the "Wigmore" test continues to be the appropriate vehicle for determining whether or not communications made in a labour relations context are protected by a qualified privilege. The application of this privilege is assessed on a case by case basis following an analysis of the four (4) [Wigmore criteria[.]*

5. Mediation Privilege

[43] Mediation privilege is closely related to settlement privilege. Settlement relates, in the main, to discussions and negotiations leading up to the settlement of a dispute which culminate in a final settlement agreement. Mediation privilege, on the other hand, relates to steps taken to resolve a dispute, typically, outside a traditional court or other adjudicative process. Generally speaking, participation in mediation is voluntary, and this reality underlies the public policy rationale for maintaining confidentiality over mediation processes.

[44] In some labour relations contexts, the statutory regime that governs them provides for mediation in certain circumstances. For example, section 15.1 of the *Canada Labour Code*, RSC 1985, c L-2, provides the Canadian Industrial Relations Board with a general power to assist the parties to resolve any issues in dispute at any stage of the proceedings, by any means that the Board considers appropriate. The one (1) proviso to the exercise of this power is that the parties to the dispute must consent. In the *Grain Services Union* case, *supra*, Chairperson MacPherson endorsed the view of the Public Service Labour Relations Board in *Pepper v Treasury Board (Department of National Defence)*, 2008 PSLRB 8, about the rationale for a privilege of this kind. The Public Service Relations Board stated at paragraph 121 as follows:

> *121 … The voluntariness of the process, however, should not detract from the fact that the participants must be able to have confidence in its integrity. Contrary to the Board's arbitration and adjudication functions, there is no precise regulatory or statutory framework for the Board's mediation function. Accordingly, the integrity of the mediation process must be seen to rest on recognized public policy considerations that led the law-makers to include mediation as a preferred method of dispute resolution as part of the dispute resolution process, the parties will develop a perception that mediation is just an empty gesture and the goals of efficiency and quality improvement to the adjudication process will be all but lost.*

[45] The mediation sessions that took place in this matter were conducted in relation to the Occupational Health & Safety complaints filed by these applicants under Part III of the *SEA*. However the *SEA* does not contain a provision similar to section 15.1 of the *Canada Labour Code*. Nevertheless, this Board has recognized a common law privilege attaching to

mediation or conciliation processes. In *Saskatchewan Joint Board Retail, Wholesale and Department Store Union v Yorkton Credit Union Limited*, LRB File No. 090-06m [1996] SLRBD No. 65, the Board stated:

> *[7] In Saskatchewan Joint Board Retail, Wholesale and Department Store Union v Westfair Foods Ltd. and its Western Grocers Division, [1993] 2nd Quarter Sask. Labour Rep. 100, LRB File Nos. 007-093 and 011-93, the Board set out a general prohibition against the presentation of any evidence concerning interchanges with or through a mediator during the mediation process. The Board has reiterated this policy, in connection with both the mediation and conciliation process, on a number of occasions, though we have acknowledged that this may create a dilemma and a disadvantage to either or both of the parties in some circumstances.*
>
> *[8] The privilege which the Board has created for the exchanges which take place with a conciliator or mediator or through their offices is grounded in a recognition of the value of these processes to the collective bargaining process. It is the health of this process which is one of the main statutory objectives served by the work of this Board and by the provisions of this Act. If conciliation or mediation are to be effective as instruments for advancing the collective bargaining which takes place between the parties, they must, in our view, proceed without prejudice. It must be open to the parties to take whatever position they wish in that setting, and to have confidence that the conciliator or mediator will act in good faith and in the interests of the parties. Conciliators or mediator must also have confidence that they can share whatever information, use whatever methods and devise whatever strategies they think will advance collective bargaining, without concern that their process may be subject to scrutiny before this Board. For these reasons, the Board had created a wall around the processes of conciliation and mediation for purposes of our proceedings, though counsel have often urged a selective or complete revision of this position. As we said to the parties at the hearing, we see no reason to modify our policy in these circumstances.*

6. Without Prejudice Communications

[46] Since at least 1915, courts in Saskatchewan have consistently held that "the rule which excludes documents marked 'without prejudice' has no application unless some person is in dispute or negotiation". See: *Bank of Ottawa v Stamco Limited and Bank of British North America* (1915), 22 DLR 679 (SK Supreme Court).

[47] In more recent times, the Supreme Court of Canada has encouraged courts and tribunal "to adopt an approach that more robustly promotes settlement" by extending a common law privilege to settlement discussions including the content of a settlement. See: *Sable Offshore Energy Inc. v Ameron International Corporation*, [2013] 2 SCR 623, 2013 SCC 37, at paragraph 18.

[48] That said, the inclusion of the phrase "without prejudice" does not, in and of itself, create a privileged communication. The Alberta Court of Appeal in *Bellatrix Exploration Ltd*, *supra*, outlined when such a phrase would be effective as follows at paragraphs 25 and 16:

> *[25] The notation "without prejudice" is not conclusive in establishing privilege. If the contents of a communication are truly in furtherance of settlement, and therefore privileged, it makes no difference whether the communication is marked "without prejudice" or not. A communication that is not in substance privileged does not become so just because one party places "without prejudice" on it. Likewise, the absence of the words "without prejudice" means nothing if the communication is truly privileged.*
>
> *[26] As settlement privilege operates to preclude admission of evidence that might otherwise be relevant, it competes with the court's truth-seeking function. For that reason, courts must ensure the communications come within the tripartite test [for establishing settlement privilege] before applying the privilege. However, once that test is met, the privilege must be given broad scope and attach not only to communications involving offers of settlement but also to communications that are reasonably connected to the parties' negotiations. The privilege belongs to both parties and cannot be unilaterally waived or over-ridden. (Citations omitted.)*

[49] As the effectiveness of "without prejudice" communications is contingent upon them being impressed with settlement privilege, for example, the exceptions to that privilege identified in both *Bellatrix Exploration*, *supra*, at paragraph 29, and *Sable Offshore Energy*, *supra*, at paragraph 19, apply.

7. Waiver

[50] The final topic to be considered in this Part is waiver, as it is a doctrine which applies to all the forms of privilege discussed above.

[51] Waiver is a well-known legal concept and its foundation is based upon knowledge and intention. Typically, it is established when it can be shown that the holder of the privilege "(1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege". See: *British Columbia (Attorney General) v Lee*, 2017 BCCA 219, at para. 53.

[52] Waiver may also be implied by the privilege-holder's conduct. As Hunter J.A. in *Lee*, *supra,* elaborated at paragraphs 55-56:

> *[55] …For example, intentional disclosure of part of a privileged communication may be taken as an implied waiver of the whole communication. Similarly, if a party advances state of mind or relies on legal advice to justify conduct, waiver may be inferred: Soprema Inc. v Wolrige Mohan LLP, 2016 BCCA 471, at para. 22.*
>
> *[56] However, inadvertent disclosure of a privilege document cannot without more lead to an implied waiver: Chapelstone Development Inc. et al. v Canada, 2004 NBCA 96, at paras. 45 and 55; see also: R v Ward, 2016 ONCA 568, at para. 35.*

8. Conclusion

[53] With the principles relevant to the various objections identified and the doctrine of waiver explained, the Board now turns to an application of those principles to the objections made at the hearing.

C. Application of Relevant Principles to Objections Made at Hearing

[54] As indicated above, there were many objections to materials and testimony led at the hearing. Rather than address each and every one of them, the Board sets out below how it applied the various principles outlined in Part B to the evidence presented at the hearing to which exception was taken.

[55] At the outset, it is important to remember that this Board is not strictly bound to follow the rules of evidence. Subsection 6-111(e) of the *SEA* states:

> ***6-111****(1) With respect to any matter before it, the board has the power:*
>
> *. . . . . .*
>
> *(e) to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the board considers appropriate, whether admissible in a court of law or not[.]*

[56] It is apparent that subsection 6-111(e), the successor to section 18(e) of *The Trade Union Act*, RSS 1978, c T-17 [*TUA*], authorizes this Board to relax the strict rules of evidence and accept evidence that would be excluded in a court by virtue of those evidentiary rules. See *e.g.*: *International Brotherhood of Electrical Workers, Local 529 v KBR Wabi Ltd.*, 2013 CanLII 73114, 226 CLRBR (2d) 48 (SK LRB), at para. 74, and *Gina Meacher o/a Gee's*

Family Restaurant v Debra Hunt and Government of Saskatchewan, Director of Employment Standards, LRB File No. 040-17, 2017 CanLII 43925 (SK LRB), at para. 35.

[57] At the same time, it would inadvisable, not to mention legally problematic, for this Board to wholly disregard all the rules of evidence and permit any and all information regardless of its source, to be accepted at a hearing. See especially: *Council of the Saskatchewan Veterinary Medical Association v Murray*, 2011 SKCA 1, 329 DLR (4th) 501. The issue of solicitor-client privilege is a good example. This privilege is so ingrained and fundamental to the operation of our legal system that if the Board accepted evidence covered by this privilege, absent an effective waiver, this would amount to a legal error, and, likely, be reversed on judicial review.

[58] Turning to the specific categories of privilege advanced at the hearing, and taking into account the Board's power set out in subsection 6-111(e) of the *SEA*, the Board will take particular care to ensure that it does not rely on any evidence – either documentary or testimonial – which may be covered by solicitor-client privilege. It will only take into account such evidence if the solicitor-client privilege can be said to have been waived directly or impliedly in accordance with the legal test set out in *Lee*, *supra*. It should be noted, however, that in their final submissions counsel invoked solicitor-client privilege sparingly.

[59] The principal arguments respecting privilege related to claims for either settlement privilege or mediation privilege or both. In the main, these claims pertained to correspondence exchanged between counsel for the Applicants and the City Solicitor's Office respecting proposed settlement terms; discussions which took place in the mediation process surrounding the Applicants' Occupational Health & Safety appeal; correspondence exchanged between counsel for the Applicants and counsel for the Union respecting the Applicants' Human Rights complaint and Workers' Compensation Board matters, and the final settlement agreements themselves.

[60] Again, applying the principles relevant to settlement privilege set out above as well as subsection 6-111(e), the Board concludes that the final settlement agreements arrived at respecting these three (3) applicants are admissible. First, admitting this information comports with the first exception to settlement privilege identified in the authorities cited earlier, in particular, *Bellatrix*, *supra*, and *Fletcher*, *supra*, namely where a final settlement of the disputes

has been achieved. The Memoranda of Settlement settled all outstanding matters involving the City on the one hand, and the Applicants and their Union on the other.

[61] Second and in any event, these documents should be admitted because as the Union submitted they had been already been admitted in a previous proceeding respecting these applications. See: *CB, HK & RD*, *supra*, at paragraph 17. This fact indicates that settlement privilege has been waived.

[62] Counsel for the Applicants, however, submitted that any waiver could not be valid since the City who was party to these Memoranda of Settlement did not participate in these proceedings. As a consequence, it is not known whether the City waived its settlement privilege in respect of these documents.

[63] The Board does not accept this argument. The City received notice of this proceeding and had ample opportunity to consider its position respecting these applications, and whether it should maintain its settlement privilege over these Memoranda of Settlement. It chose not to appear. As a result, the Board is of the view that the City's absence should not stymie the introduction of these documents.

[64] The mediation proceedings here in respect of which mediation privilege is being asserted do not relate to mediation or conciliation proceedings conducted through the auspices of the Board to advance collective bargaining objectives. As a result, the "wall" which the Board has "created...around the processes of conciliation and mediation for purposes of our proceedings" does not apply here. See: *Yorkton Credit Union*, *supra*, at paragraph 8.

[65] As a result, to the extent that discussions which took place in the two (2) mediation sessions relating to the occupational health and safety appeal are directly relevant to the issues on these applications, this evidence will be admitted.

[66] Respecting objections based on labour relations privilege and litigation privilege, the Board concludes that they are not engaged in this matter. Objections based on "without prejudice" relevant to the disputed evidence in this matter will be treated in the same manner as the objections based on settlement privilege for the reason, as discussed above, that they are inter-related.

[67] In conclusion, most of the objections raised by Applicants' counsel to evidence received at the hearing are dismissed.

REVIEW OF EVIDENCE

[68] The various parties presented a large volume of documentary evidence and oral testimony in the prosecution of their applications. Four (4) witnesses testified on behalf of the applicants: CB, HK and RD testified on their own behalves, as well as Ms. Cara Banks who throughout the time period relevant to these matters was employed as a labour relations consultant with Kowalchuk Law Office. Four (4) witnesses testified on behalf of the Union: Ms. Carmel Mitchell who at all material times was a member of Local 21's Executive and had served as a member of the grievance committee; Mr. Tim Anderson who at all material times served as President of Local 21; Mr. Guy Marsden who at all material times was a CUPE National Representative assigned to Local 21, and Ms. Suzanne Poznyak who at all material times was a CUPE National Representative assigned by CUPE to represent the three (3) applicants once it became apparent there was a conflict of interest between the applicants and the alleged harassers who were also members of Local 21.

[69] For purposes of these Reasons for Decision it is not practical to attempt to organize and recount all the details of events testified to by these various witnesses. It is sufficient to focus on the facts most relevant to the issues presented for decision on these applications. Furthermore, as evidence relating to all three (3) applications was heard together, the Board will not segregate it. Rather, it will be recounted chronologically, principally because the testimony and documentary evidence received at the hearing overlap all of the applications.

A. <u>The Applicants</u>

[70] The Applicant, HK provided the most fulsome testimony of the applicants. She played a central role in advocating both for herself and her fellow applicants. As a result her testimony is pivotal in this matter.

[71] HK is an accomplished individual in her field of endeavor holding a Diploma in Environmental Sciences from Lethbridge Community College. She began employment with the City on November 15, 2010 as a Water Technologist. Subsequently, on June 12, 2012, she

commenced work at the Landfill as a Technician II. At the time she left the City's employ on January 31, 2014, she served as the Acting Supervisor of the environmental standards unit in which she worked. Unfortunately, she has not been able to work since that time.

[72] The Applicant, CB is also well-versed in environmental studies holding a certificate in environmental engineering. She commenced her employment with the City at the Landfill on September 16, 2013. She described her work as her "dream job" not only because it involved a subject matter area about which she is passionate, but also because its' schedule permitted her to have a healthy work/life balance. CB's last day of employment with the City was May 5, 2014. By that time, she had left the Landfill because of the harassment, and was working out of the City Waterworks Department. Since that time, she, too, has not been able to work.

[73] The third Applicant, RD started work at the Landfill sometime in May 2011 as a casual employee working outdoors. She was one (1) of only a few women employed at that worksite. Apart from being laid off one (1) summer, she worked at the Landfill until she left the City's employ around the same time as the other applicants. Like the other Applicants, she was not working at the time of the hearing.

[74] At the hearing, it soon became obvious that the events underlying these applications took a considerable toll on the applicants. For example, HK was diagnosed with depression in January 2014 and eventually qualified for worker compensation benefits. However, these benefits were terminated in September 2014 after she had suffered a miscarriage. She testified that she was without income from the end of January, 2014 to November 1, 2014. During her testimony, she occasionally became emotional when recounting the circumstances of the harassment and the events leading up to the final settlement.

[75] Similarly, the events left CB extremely fragile emotionally. She testified that she had been under the care of medical professionals, including a psychiatrist. On or about June 25, 2014, she was diagnosed with PTSD, among other conditions. At the time of the hearing, CB was receiving workers' compensation benefits. She, too, became emotional not only during her testimony but also while sitting at the counsel table with HK and her lawyers for the duration of the hearing.

[76] RD attended the hearing only to give her evidence and, at its conclusion, she left. This was because she was pregnant at the time, and her due date was rapidly approaching.

Although she did not appear to be in as fragile an emotional state as the other applicants, it was apparent that RD had been adversely affected by what had happened to her at the Landfill. Like the other applicants, RD has not worked since she left the City's employ so it cannot be denied that these events also took a toll on her.

B. Events Leading Up to the Release of the Hinchcliffe Report

[77] All of the applicants testified that the Landfill was a toxic workplace. Each gave examples of sexual and gender harassment they had received at the hands of their male colleagues while they were employed at that site. In addition to their sexual and gender harassment concerns, CB and HK, in particular, became disturbed by the failure of many workers at the Landfill to observe strict occupational health and safety, and environmental regulations particularly as they related to toxic chemicals and other hazardous materials.

[78] CB described the Landfill as a "very threatening place to be".

[79] Matters came to a head on or about January 31, 2014, when the door to the laboratory building in which both CB and HK worked was kicked in. CB and HK had a good idea as to which of their co-workers committed this act of vandalism. In her testimony, CB identified them and indicated they were members of Local 21's Executive Committee.

[80] HK testified that prior to the end of January 2014, she spoke to Mr. Tim Anderson who, at that time, was the President of Local 21. She raised with him her concerns about the manner in which her co-workers were treating CB and her. According to HK, Mr. Anderson was dismissive of her concerns and advised her that he was in the midst of CUPE's campaign against the City's plan to privatize the water plant.

[81] In early February 2014, CB contacted Courtney Jacobs, a member of the City's Human Resources Department to apprise her of the pattern of harassment which she and the other applicants had suffered at the hands of their co-workers.

[82] Shortly after this contact was made, the Applicants individually filed numerous harassment complaints against five (5) male co-workers pursuant to the City's Harassment

Policy[2]. These complaints – 41 in all – were initiated in late February and continued to be filed through to early April 2014. These respondents, like the applicants, were members of the Union. These individuals were: Mr. Gordon Antochow [Antochow]; Mr. Cory Abtosway [Abtosway]; Mr. Scott Cameron [Cameron]; Mr. Brian Dulmage [Dulmage], and Mr. Brian Garrett [Garrett].

[83] The City retained Robert Hinchcliffe of Hinchcliffe Investigations to investigate these numerous complaints. He commenced his investigation into HK's complaints on February 25, 2014[3]; into CB's complaints on February 25, 2014[4], and into RD's complaints on March 19, 2014[5].

[84] RD reached Tim Anderson on or about March 6, 2014 by telephone, a conversation that Mr. Anderson confirmed in his testimony. She advised him that circumstances had become so intolerable at the Landfill, she had decided to file a harassment complaint against Abtosway. She testified that Mr. Anderson asked her postpone filing her complaint. He indicated to Abtosway was personal friend, and he believed it would be more effective for him to speak to Abtosway, rather than filing a formal harassment complaint.

[85] Mr. Anderson testified that after speaking with RD, he did contact Abtosway. He stated that Abtosway told him "nothing was going on". Despite this, however, Mr. Anderson told him to stop any behavior that might be viewed as harassing.

[86] Around the same time, CB contacted Ms. Carmel Mitchell who had served as Local 21's grievance chair from approximately June 2013 to December 2014. Ms. Mitchell testified that she took CB's call while she was attending CUPE's Provincial Convention in Saskatoon. She stated that after she learned about what had happened she told CB that the Local's President had not acted appropriately. CB asked Ms. Mitchell to keep the allegations confidential.

[87] Subsequently, both HK and RD met with Ms. Mitchell on or about March 9, 2014 to discuss their circumstances, as well as those of CB. During this meeting, HK became alarmed because Ms. Mitchell told them she had spoken to Mr. Anderson about the situation. HK testified that she felt betrayed by this because CB had plainly asked Ms. Mitchell to keep the circumstances surrounding the Applicants' harassment complaints confidential.

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[2] Exhibit U-1-2, City of Regina Harassment Policy dated August 2011.
[3] Exhibit A-1 – Investigation Report – HK Complaint of Harassment dated June 24, 2014, at 6.
[4] Exhibit A-2 – Investigation Report – CB Complaint of Harassment dated June 24, 2014, at 6.

[88] In her testimony, Ms. Mitchell stated that during this meeting HK and RD had also raised with her issues respecting violations of workplace safety and environmental regulations. However, she testified that their principal concern related to the discriminatory treatment they experienced from their male co-workers.

[89] Although she had lost trust in Ms. Mitchell to assist her, HK agreed to have Ms. Mitchell attend one of her interviews with the harassment investigator in April 2014. At its conclusion, HK asked Ms. Mitchell to file a grievance on behalf of the Applicants. Ms. Mitchell indicated that she did not know how to file a grievance and that she would have to look into it. HK testified that she never discussed filing a grievance with Ms. Mitchell after this conversation.

[90] HK testified that she was quite frustrated because she was not employed. She stated that she felt that these men "harassed her out of a job". They were still employed by the City and she was unable to continue working.

[91] HK expressed this frustration to a friend who was also an acquaintance of Ms. Cara Banks. She gave HK, Ms. Banks' contact information. At that time, Ms. Banks was working as a labour relations consultant with the Kowalchuk Law Office. HK contacted the Kowalchuk Law Office in February 2014. This firm began representing HK at that time. Subsequently, CB retained this law firm in early April 2014.

[92] Sometime in April 2014, the Kowalchuk Law Office drafted two (2) proposed grievances for the Applicants to present to their Union. The first grievance related to allegations of sexual harassment and gender discrimination – the Harassment Grievance[6] – and reads as follows:

> *The Employer has violated the collective agreement, provisions of The Saskatchewan Human Rights Code prohibiting discrimination on the basis of sex and age, and The Occupational Health and Safety Act of Saskatchewan.*
>
> *Remedy sought:*
>
> *All lost wages and benefits, including loss of seniority that directly and/or indirectly resulted from violations of the collective agreement and applicable legislation.*
>
> *Each of the affected employees be given a position of their own choice with the City of Regina, with no loss of pay or benefits.*

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[5] Exhibit A-3 – Investigation Report – RD Complaint of Harassment dated June 27, 2014, at 6.
[6] Formal Application of HK dated February 26, 2015, Appendix A.

> *An amount of $10,000 general damages to each employee directly affected by the Employer's violations, for injuries to feeling, dignity and self-respect.*
>
> *An amount of not less than $100,000 for general/aggravated/punitive damages to be paid to the Union and its members for the breaches of the collective agreement and statues including The Saskatchewan Human Rights Code, for the resulting mental and physical injury and disability, including but not limited to chronic stress, chronic anxiety and depression.*
>
> *Such further and other remedies that are just, fair and reasonable.*

[93] The second grievance related to violations of environmental regulations, occupational health safety standards witnessed by the Applicants at the Landfill. During the hearing, this particular grievance was referred to as the "Whistle Blower Grievance"[7]. In its relevant parts, it reads as follows:

> *The Employer has violated the collective agreement, The Occupational Health and Safety Act of Saskatchewan and Section 74 of The Labour Standards Act of Saskatchewan for retaliatory actions against the members of the Union for attempting to report violations of occupational health and safety and for raising environmental concerns at the worksite.*
>
> *Remedy sought*
>
> *The retaliation cease immediately.*
>
> *The occupational health and safety issues be investigated and immediately corrected.*
>
> *General damages for harm suffered to the members as a result of the retaliation.*

[94] HK testified that at various times she urged various members of Local 21's Executive – Tim Anderson; Carmel Mitchell, and Cliff Driedger – to file these grievances on behalf of the Applicants. She stated that "nobody did anything".

[95] HK testified that because of a personal connection between HK's sister and Mr. Guy Marden's secretary, she managed to have a lengthy telephone conversation with Mr. Marsden, a CUPE National Representative whose assignment, at the time, included Local 21.

[96] Both HK and Mr. Marsden testified about this telephone conversation, and their testimony was consistent respecting the salient aspects of that important conversation. HK

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[7] *Ibid*., Appendix B.

recounted to him, her concerns about Ms. Mitchell's lack of experience and Mr. Anderson's intervention in the process by going to Abtosway with RD's harassment allegations.

[97] HK and Mr. Marsden discussed the appointment of a harassment investigator by the City. Mr. Marsden counselled HK to wait until the investigator's final report was issued before filing a grievance. He confided to her that he know Bob Hinchcliffe by reputation and predicted that Mr. Hinchcliffe would uphold at least some, if not all, of the harassment complaints that had been filed.

[98] Mr. Marsden testified he told HK that if the investigation did not substantiate the Applicant's allegations of harassment or if it proved to be a flawed process, then it would be appropriate to file a grievance.

[99] HK and Mr. Marsden also discussed the Applicants concerns about the failure of staff at the Landfill to comply with environmental, and occupational health and safety, regulations. Mr. Marsden testified that these issues comprised only a brief portion of their telephone conversation, and that HK expressed fear that if she or the other applicants spoke out on these topics their employment might be terminated.

[100] Mr. Marsden testified that he told HK she would likely be protected by whistleblower legislation. However, he was uncertain of that and told HK, he would look into it further and get back to her. He acknowledged in his testimony that he never did communicate further with HK about this issue or any other.

[101] After she left the Landfill, CB accepted an alternate position with the City's Waterworks Department which was not located at the Landfill. She testified that she left that job on or about May 5, 2014, a short time after she started it because she was being stalked by one of the alleged harassers from her former workplace.

[102] With the assistance of their legal counsel, two (2) of the Applicants decided to exercise their rights under legal regimes other than their collective agreement or the City's Harassment Policy.

[103] In late June 2014, the Investigator deposited with the City his investigative reports into the harassment allegations. However, it was not until July 17, 2014 that the City

convened a meeting and revealed to the parties the investigator's findings. At that meeting, in addition to City representatives CD accompanied by Ms. Cara Banks represented the Applicants, and Mr. Clint Driedger represented Local 21.

[104] The investigator filed three (3) separate reports, one relating to the allegations made by each of the Applicants. For purposes of these applications, it is not necessary to review the investigator's findings or to consider his recommendations. Suffice it to say, the Investigator concluded that a substantial number of those allegations were well-founded.

C. Events from July 17, 2014 to December 31, 2014

[105] Following the release of the three (3) Hinchcliffe Investigative Reports, none of the parties involved, including the Union, were pleased with the investigator's findings.

[106] On behalf of the Applicants, Mr. Kowalchuk forwarded under cover of an undated letter to Mr. Jim McLellan of the City Solicitor's Office, an extensive document setting out various grounds for appealing the results of the Hinchcliffe investigations.[8] The City's Harassment Policy provides for a party to the investigation to request a review of the investigation. The document states that this appeal must be in writing and directed to the Manager of Healthy Workplace in the City's Human Resources Department.[9]

[107] On or about July 24, 2014, Ms. Cara Banks on behalf of the Applicants e-mailed Mr. Clint Driedger who had recently assumed the office of President of Local 21 and who had been in attendance at the meeting with the City's representatives earlier that month.[10] She requested that he contact her to discuss issues flowing from the investigation reports and how they might be able to work collaboratively on those issues. No reply to her e-mail or telephone communication was received from Mr. Driedger. There was evidence that in spite of some communication between HK, in particular, and Mr. Driedger no meeting between them was ever held.

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[8] Exhibit A-4, Letter from Mr. Kowalchuk to Mr. McLellan or about August 1, 2014.
[9] *Supra* n. 1, at 10.
[10] Exhibit A-19.

[108] For his part, Mr. Marsden testified that he learned of the Hinchcliffe Investigations' findings when he returned from an extended vacation leave on August 24, 2014. He admitted that no one involved with CUPE was satisfied by the investigator's findings.

[109] He testified that on or about September 25, 2014, he along with other CUPE officials met with representatives about the matters raised in the Hinchcliffe Investigative Reports. Mr. Marsden testified that at that meeting the City's representatives raised the possibility of disciplining the Applicants for bringing forward "vexatious complaints".

[110] This was a startling position for the City to take in light of what the investigator had concluded for a couple of reasons. First, while the investigator had found a number of the complaints to be unsubstantiated because of a lack of corroboration, a significant number of the complaints brought forward had been determined to be well-founded. Second, the City's Harassment Policy itself clearly differentiates between a false accusation and an unsubstantiated allegation. Under the heading "False Accusation", the Policy stipulates:

> *If an investigation reveals a complaint was deliberately or maliciously filed as a false complaint, the complaint will be deemed to be harassment and dealt with accordingly under this policy. A false accusation is different than the inability to substantiate harassment by the complainant. If, for whatever reason, the complaint cannot be substantiated and was not maliciously invented, the complainant is not subject to reprisal. [Emphasis added.]* [11]

[111] Mr. Marsden testified further that CUPE's representatives stated they would look into whether the City's concerns about false accusations were valid. However, it appears nothing further was done respecting the City's curious and, frankly, offensive response to the findings of the investigation which it commissioned.

[112] Ultimately, neither the male respondents nor the Union formally appealed the findings and conclusions made in the Hinchcliffe Investigation Reports pursuant to the provisions of the City's Harassment Policy.[12]

[113] Around the same time that the final Hinchcliffe Investigation Reports were released to the parties, the Applicants further learned that their occupational health and safety complaints filed under Part III of the SEA had been dismissed. They appealed these dismissals

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[11] *Supra* n. 1, at 11.

and on or about August 20, 2016, this Board referred these appeals to an Occupational Health & Safety Adjudicator. With the consent of the Applicants and the City, these appeals were set down for a hearing on November 18, 19, and 20, 2014.

[114] On October 28, 2014, CUPE Local 21 filed two (2) formal grievances. The first grievance filed on behalf the Applicants reads as follows[13]:

> *We, the Union, feel that the City of Regina has failed to ensure a safe workplace freed from harassment at the landfill for [CB], [RD] and [HK], thereby violating Article 14, the Preamble and other relevant provisions of the Collective Agreement, as well as contravening Part III of the Saskatchewan Employment Act. In addition, the Union alleges the City of Regina has discriminated against the Grievors for refusing unsafe work under Part III of the SEA.*
>
> *Therefore, We [sic] request that the City of Regina provide a safe workplace free from harassment at the landfill and all other worksites, make the Grievors whole in all respects, acknowledge the Grievors' statutory rights to refuse unsafe work, and refrain from disciplining the Grievors for initiating harassment complaints. In addition, the Union requests that the City be directed to comply with Part III of the SEA and any other remedies an arbitrator may deem necessary or appropriate to restore the workplace and the Grievors whole.*

[115] On the very same day, CUPE Local 21 also filed a grievance on behalf of the male respondents.[14] This grievance reads as follows:

> *We, the Union, feel that the City of Regina has failed to ensure a safe workplace free from harassment for Gordon Antochow, Scott Cameron and Cory Abtsoway at the landfill in part by conducting a flawed external investigation, thereby violating Article 14, the Preamble and other relevant provisions of the Collective Bargaining agreement, as well as contravening Part III of The Saskatchewan Employment Act.*
>
> *Therefore, We [sic] request that the City of Regina provide a safe workplace free from harassment at the landfill and all other worksites, make the Grievors whole in all respects, acknowledge through a declaration that the Collective Bargaining Agreement and The Saskatchewan Employment Act were violated and refrain from disciplining the Grievors as a result of the flawed investigation. In addition, the Union requests that the City be directed to comply with Part III of the SEA and any other remedies an arbitrator may deem necessary or appropriate to restore the workplace and make the Grievors whole.*

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[13] Exhibit A-10, Letter dated October 28, 2014 from Ms. Carley Makuch to Mr. Brian Legard, Director of Human Resources, City of Regina.

[14] Exhibit A-9, Letter dated October 28, 2014 from Ms. Carley Makuch to Mr. Brian Legard, Director of Human Resources, City of Regina. Mr. Marsden testified that Local 21 withdrew this particular grievance on a "without prejudice" basis because none of the respondents were disciplined by the City as a result of the Hinchcliffe Investigation Reports. Mr. Marsden candidly admitted he found the City's failure to discipline the male respondents "surprising".

[116] In light of the fact that Local 21 had filed two (2) grievances on behalf of members who were in direct conflict, and because the Applicants had lost complete confidence in Local 21's ability to represent their interests adequately, CUPE stepped in and appointed two (2) of their national representatives to represent the individuals referenced in these two (2) grievances.

[117] Ms. Suzanne Posyniak, a national representative based in Regina, was designated by CUPE to represent the Applicants. A national representative based in Saskatoon was appointed to act on behalf of the male respondents. Upon learning that Ms. Posyniak had been assigned to represent the Applicants, Ms. Banks testified that she was delighted. She felt optimistic about being able to work collaboratively with Ms. Posyniak and the Union on behalf of the Applicants.

[118] The filing of a grievance by Local 21 on their behalf came as a complete surprise to the Applicants. None of the Applicants was contacted about it or given advance notice that the Local intended to file it. For example, CB testified that she only learned about this grievance when she received a text from HK.

[119] Following the filing of these grievances, CUPE applied for intervener standing in the Applicants' appeal under Part III of the *SEA*. CUPE wanted the Occupational Health and Safety Adjudicator to defer to the grievance arbitration process. On or about November 21, 2014, CUPE's legal counsel forwarded written submissions to the Adjudicator.[15] The evidence did not reveal whether the Adjudicator responded to CUPE's request and, it appears that events overtook this process.

[120] In December 2014, the Applicants together with Ms. Banks and representatives of CUPE including Ms. Posyniak and Ms. Juliana Saxberg, CUPE's legal counsel attended two (2) mediation sessions relating to the Applicants' Occupational Health & Safety Appeals. Representatives from the City of Regina also attended. The Applicants, as well as Ms. Banks, testified that they believed these sessions and their collaboration with CUPE's representatives signaled a change in how they could work together to resolve the Applicant's issues.

[15] Exhibit A-5, Letter to Rusti-Ann Blanke, Adjudicator dated November 21, 2014 from Juliana Saxberg.

[121] Following these sessions, the City forwarded to CUPE three (3) settlement proposals, one for each Applicant. The Applicants testified about an agreement made between Ms. Banks and Ms. Posyniak at one of the mediation sessions that the Union would not contact any of the Applicants over the Holiday Season. However, in her testimony, Ms. Posyniak stated she was unaware of such an agreement. In any event, Ms. Posyniak did communicate with RD and HK about the City's proposals prior to the end of December 2014.

D. Events Occurring between January 1, 2015 and April 31, 2015

[122] In early January 2015, Ms. Posyniak arranged to speak with the Applicants respecting the City's settlement proposals. She was scheduled to meet with HK and RD on or about January 5. At that time, CB was experiencing serious psychological distress and was unable to participate in any formal meeting.

[123] Ms. Posyniak met with HK on January 6, 2015. At that meeting, they discussed submitting a counter-offer to the City. At that meeting, she requested that HK sign a release allowing the Union to obtain her file from Mr. Kowalchuk's office. HK was reluctant to do so; however, she did allow that she and the other Applicants were growing concerned about escalating legal fees. HK never did sign a release as requested by the Union.

[124] Due to inclement weather that day, RD was not able to travel from Weyburn, Saskatchewan to attend a meeting in Regina. Subsequently, RD spoke with Ms. Posyniak by telephone. They discussed various considerations such as seniority, age, and skill level to name only a few, that came into play when crafting a settlement offer. RD also expressed her concern respecting legal fees owed to the Kowalchuk Law Office.

[125] On February 4, 2015, CB e-mailed Ms.Posyniak.[16] Ms. Posyniak testified that this was the first communication she had received from CB, since she first met her in December 2014. In her e-mail, CB set out a number of questions relating not only to the settlement proposal but also to the grievance which the Union had filed on their behalf. That same day, Ms. Posyniak e-mailed CB to advise she was in a meeting and would respond to her questions the next day. Ms. Posyniak did exactly that.[17]

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[16] Exhibit U-1-25, E-mail from CB to Suzanne Posyniak dated February 4, 2015.
[17] Exhibit U-1-26, E-mail from Suzanne Posyniak dated February 5, 2015.

[126] On February 17, 2015, Mr. Jim McLellan of the City Solicitor's Office wrote to both Ms. Posyniak, and Mr. Kowalchuk outlining the City's revised offers of settlement respecting the three (3) Applicants.[18]

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[127] On or about February 26, 2017, Mr. Kowalchuk replied to Mr. McLellan in separate letters respecting each Applicant. These proposals set out alternative bases to those proposed by the City for resolving the various legal actions taken by the Applicants. Thus commenced what may be characterized as a contest between competing settlement offers.

[128] Shortly after receiving the City's settlement proposals set out in Mr. McLellan's February 17th letter, Ms. Posyniak reached out to the Applicants. She eventually arranged meetings with RD and HK for March 4, 2015.

[129] However, on February 26, 2015 CB and HK filed their duty of fair representation claims with this Board. Subsequently, on March 2, 2015, RD filed a duty of fair representation claim.

[130] On March 9, 2015, Mr. McLellan replied to Mr. Kowalchuk's settlement proposals and advised that the City would not accept them. For present purposes what is significant is that in this letter, Mr. McLellan also advised Mr. Kowalchuk that the City would not negotiate a settlement with his law firm. He stated:

> *Perhaps most importantly, you are unable to negotiate the withdrawal of the grievance concerning Ms. Davidson, and we believe, are unable to negotiate the terms and conditions of a termination of employment. Those would appear to be within the jurisdiction of CUPE Local #21, as best we can determine.*[19]

[131] There was evidence led respecting the many communications between the Applicants and Ms. Posyniak, in particular, relating to the City's settlement proposals. The Board has determined it is not necessary to recount the nature of those communications in detail. Suffice it to say that agreement was achieved between the Union and the City respecting a settlement of the Applicants' various claims. The Applicants obtained independent legal advice prior to executing the requisite legal documentation.

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[18] See *e.g.*: Exhibit U-13, Letter from Mr. McLellan dated February 17, 2015 re: CB, and Exhibit U-18, Letter from McLellan dated February 17, 2015 re: HK.

[132] The Memoranda of Settlement signed by the Applicants were very similar. Each of them contained the following paragraphs which are relevant for present purposes:

> *IT IS HEREBY DECLARED that all matters arising out of the [October 28, 2014] Grievance have been fully and finally resolved on the following terms:*
>
> *1. The Union agrees to withdraw the Grievance referred to in the preamble above as well as any and all outstanding grievances, filed or anticipated to be filed directly or indirectly for or on behalf of the Grievor in relation to her employment with the Employer, without prejudice to similar, unrelated cases arising the future.*
>
> *2. The Grievor agrees her complaints against the city of Regina filed pursuant to The Human Rights Code and The Saskatchewan Employment Act are settled upon satisfaction of the terms of this memorandum. The Grievor also agrees that her harassment complaint has been concluded.*
>
> *. . . . .*
>
> *6. The Union consents and agrees to the terms of this memorandum and the Release to be executed by the Grievor. The Union undertakes and agrees that it will not make any claim of any nature or kind for or on behalf of the Grievor which the Grievor has agreed she will not make.*
>
> *7. The parties acknowledge and agree that this is a compromise settlement of a disputed claim and that the consideration given in respect of this agreement shall not be deemed to be or be construed as an admission of liability by the Employer.*
>
> *. . . . . .*
>
> *10. The parties acknowledge and agree that this agreement has been reached on a without prejudice and non-precedent setting basis and shall not be referred to as a matter of evidence in any other proceedings between the Employer and the Union, including without limitation any arbitration or Labour Relations Board hearing.*
>
> *11. This settlement is made without prejudice to any other matters between the parties and/or any other matters between the Union and the Employer, whether currently pending or arising in the future.*[20]

[133] In addition to the Memorandum of Settlement, each of the Applicants filed a formal Release. This Release contained the following:

> ***FOR THE CONSIDERATION AFORESAID**, I hereby covenant and agree that I will not commence any action or proceeding of any nature or kind whatsoever including, without limitation, any grievance or any claim under the collective agreement between the Employer and Canadian Union of Public Employees,*

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[19] Exhibit U-1-37, Letter from Mr. McLellan to Kowalchuk Law Office dated March 9, 2015.
[20] See *e.g.*: Exhibit U-20, Memorandum of Settlement between the Union, HK and City dated April 2, 2015.

> *Local 21, The Saskatchewan Human Rights Code or The Saskatchewan Employment Act, against the Employer, its affiliates or against any of the Employer's employee benefit providers or against any third party which or who in turn might have a claim against the Employer.*
>
> . . . . . .
>
> ***AND I HEREBY DECLARE** that the terms of this Release have been read by me and are fully understood; that I have obtained advice from the Canadian Union of Public Employees in connection with the terms of my agreement with the Employer; that I have had the opportunity to obtain independent legal advice with respect to the terms of this agreement; and that the payment to be made to me as set forth in the Memorandum of Settlement with the Employer dated ____, 2015 are the sole consideration for this Release and are accepted voluntarily, influenced by any representations on the part of the Employer or any one representing the Employer, for the purpose of making a full and final settlement of any and all claims that I have or may have against the Employer.*

[134] Further to its agreement with the City as reflected in the Memoranda of Settlement, the Union on or about May 4, 2015, withdrew the joint grievance it had filed on behalf of the Applicants

[135] In conclusion, it is important to note that at no time did the Union require, or request, the Applicants to withdraw their applications under section 6-59 of the *SEA* filed with this Board, prior to concluding these settlements with the City.

ISSUES

[136] The issues presented for decision in these applications are:

- Did the Union fail in its duty to represent fairly the Applicant in these circumstances? [The "Duty of Fair Representation Issue"]
- If so, what is the appropriate remedy? [The "Remedial Issue"]

[137] At the hearing, the parties agreed to bi-furcate these proceedings, and reserve the Remedial Issue to a subsequent proceeding, in the event it is necessary to do so.

THE DUTY OF FAIR REPRESENTATION ISSUE

A. Relevant Statutory Provisions

[138] The statutory provisions relevant to the Duty of Fair Representation Issue read as follows:

> ***6-59****(1) An employee who is or a former employee who was a member of the union has a right to be fairly represented by the union that is or was the employee's or former employee's bargaining agent with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part.*
>
> *(2) Without restricting the generality of subsection (1), a union shall not act in a manner that is arbitrary, discriminatory or in bad faith in consider whether to represent or in representing an employee or former employee.*

B. Survey of Relevant Jurisprudence

1. Brief Historical Review of Duty of Fair Representation

[139] Section 6-59 of the *SEA* replaced section 25.1 of the *TUA*, the provision interpreted and applied in much of the Board's large body of jurisprudence respecting the duty of fair representation. Section 25.1 imposed a duty on a trade union to represent its members "in grievance or rights arbitration proceedings…in a manner which is not arbitrary, discriminatory, or in bad faith". In *Gilbert Radke v Canadian Paperworkers Union*, [1993] 2nd Quarter, Sask. Labour Rep. 57, LRB File No. 262-92, for example, the Board explained the rationale for imposing such a duty on a union in respect of employees for whom they enjoy bargaining rights. The Board stated at page 61:

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

[140] The British Columbia Labour Relations Board summarized the historical evolution of a union's duty to fairly represent all of its members in *Rayonier Canada (B.C.) Ltd*

and International Woodworkers of America and Ross Anderson, [1975] 2 CLRBR 196 as follows at page 201:

> *Sometime after the enactment in this form of The Wagner Act – which was the model for all subsequent North America labour legislation – American courts drew the inference that the granting of legal authority to the union bargaining agent must carry with it some regulation of the manner in which these powers were exercised in order to protect individual employees from abuse at the hands of the majority. This came to be known as the duty of fair representation. Beginning with the decision in Steele v Louisville (1944) 323 U.S. 192, which struck down a negotiated seniority clause that placed all black employees at the bottom of the list, the duty has been extended to all forms of union decisions. An enormous body of judicial decisions and academic comment has been spawned. This culminated in the U.S. Supreme Court decision of Vaca v. Sipes (1967) 55 L.C. 11, 731 [386 U.S. 171], which is the leading America precedent in this area of the law. This initiative by the United States judiciary was emulated by one Canadian judge in the case of Fisher v Pemberton (1969), 8 D.L.R. (3d) 521 (B.C.S.C.), where he concluded that the same duty must bind British Columbia unions certified under the old Labour Relations Act (at pp. 540-541). But Canadian legislatures have not waited for the evolution of a common law principle to run its course. Instead, they have uniformly moved to write the obligations explicitly into the statue and entrust its administration of the Labour Relations Board which is responsible for the remainder of the legislation.*

[141] In Saskatchewan, the origin of the duty of fair representation is unique. Prior to the enactment of section 25.1 of the *TUA* in 1983, this Board had utilized its statutory power over unfair labour practices to address claims of this nature. In *Doris Simpson v United Garment Workers of America*, LRB File No. 069-80, [1980] July Sask. Labour Report 43, for example, the Board *per* former Chairperson Sherstobitoff found at page 45 that "through the application of Section 11(2)(c) [failure to bargain collectively with the employer in respect of employees] and Section 2(b) [definition of bargaining collectively] of *The Trade Union Act* the Board can enforce a duty of fair representation on the part of a union, at least with respect to prosecution of grievances."

[142] In *Simpson*, *supra*, the Board adopted the standard for assessing duty of fair representation claims first identified in American jurisprudence, most notably *Vaca v Sipes* (1967), 386 U.S. 171. At page 46, the Board stated:

> *This can best be summarized by quoting from Vaca v Sipes as follows:*
>
> > *"A breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith…Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration*

> *regardless of the provisions of the applicable collective bargaining agreement[.]"*
>
> *The foregoing fairly summarizes the approach taken in Canada with respect to the duty of fair representation and this Board adopts that approach. So as a union, in dealing with a grievance, acts fairly, impartially, and in good faith in deciding whether or not a grievance should be proceeded with, its decision will not be interfered with by this Board as a violation of the duty of fair representation.*

[143] A few years later, Chouinard J. writing for the Supreme Court of Canada in *Canadian Merchant Service Guild v Gagnon et al.*, [1984] 1 SCR 332 [*Gagnon*] reviewed relevant domestic and international case law, as well as academic commentary. He concluded at pages 526-7:

> *The duty of representation arises out of the exclusive power given to a union to act as spokesman for the employees in a bargaining unit.*
>
> *In Sydicat catholique des employés de magasin de Québec Inc. v. Compagnie Paquet Ltée, [1959] S.C.R. 206, Judson J. for a majority of this Court described at p. 212 the status conferred on a certified union of exclusive representative of all employees who are members of the bargaining unit:*
>
> > *The union is, by virtue of its incorporation under the Professional Syndicates' Act and its certification under the Labour Relations Act, the representative of all the employees in the unit for the purpose of negotiating the labour agreement. There is no room left for private negotiation between employer and employee. Certain to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated.*
>
> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> 1. *The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> 2. *When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> 3. *This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> 4. *The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> 5. *The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence and without hostility towards the employee.*

[144] The Supreme Court reaffirmed these principles most recently in *Noël v Société d'energie de la Baie and United Steelworkers, Local 6833*, [2001] 2 SCR 207, 2001 SCC 39, at para. 42ff *per* LeBel J.

[145] As this Board acknowledged in *Gordon W. Johnson v Amalgamated Transit Union, Local No. 588 and City of Regina*, LRB File No. 091-96 [*Johnson*], the Supreme Court's pronouncement in *Gagnon*, *supra*, has had a "unifying influence" on Canadian labour law, at least in relation to duty of fair representation claims. See: *Johnson*, *supra*, at p. 12. To similar effect, see most recently: *Lanigan v Prince Edward Island Teachers' Federation*, 2017 PEICA 3m at paras. 23 and 24.

2. Relevant Jurisprudence Respecting the Interpretation of Section 6-59

[146] This Board has often reviewed and reaffirmed general principles that over the years have emerged respecting the duty of fair representation. In most of the recent cases, the Board has consistently returned to its Decision in *Hargrave, et al. v Canadian Union of Public Employees, Local 3833, and Prince Albert Health District*, LRB File No. 223-02, [2003] SLRBR 511, 2003 CanLII 62883 (SK LRB) [*Hargrave*].

[147] In *Hargrave*, *supra*, former Chairperson Seibel surveyed case law from this Board and other Canadian labour relations boards, and summarized the relevant legal principles emerging from them with particular emphasis on the concept of "arbitrariness". For present purposes, the most salient portions of the Decision are paragraphs 27-28, and 34-42. Those paragraphs read as follows:

> ***[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.*

[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.*
>
> *The behaviour under review must fit into one of these three categories. …mistakes 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 [sic] 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 [sic], 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 2003 CanLII 62883 (SK LRB) 16 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 v. International Association of Firefighters', Local 510, [1992] 4th Quarter Sask. Labour Rep. 133; LRB File No. 003-92]*

[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 fulltime 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.*

[148] *Hargraves*, *supra*, focused primarily on the element of arbitrariness which typically is the central issue in most duty of fair representative claims. However, it is important to remember that subsection 6-59 also covers a union's actions that may qualify as discriminatory treatment of one of its members, or bad faith.

[149] Turning first to discriminatory treatment, the consensus emerging from the decisions of this Board as well as other Canadian labour relations boards is that for purposes of duty of fair representation claims the prohibition against discriminatory treatment by a union of one or more its members means there "can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the *Human Rights Code*) or simple, personal favouritism". See: *Rayonier Canada (B.C.) Ltd*, *supra*, at p. 201. See also: *Glynna Ward v Saskatchewan Union of Nurses*, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at p. 47, and most recently, *Hartmier v Saskatchewan Joint Board Retail, Wholesale and Department Store Union, and Retail, Wholesale and Department Store Union, Local 955*, 2017 CanLII 20060, 290 CLRBR (2d) 1, LRB File Nos. 226-14 & 016-15, at para. 180. As proscribed grounds of discrimination have been enlarged over the years by subsequent revisions to provincial and federal human rights legislation as well as the proclamation of section 15 (1) of the *Canadian Charter of Rights and Freedoms* [*Charter*], the ability of a complainant to base a duty of fair representation claim on other enumerated and analogous grounds of discrimination – sexual orientation, being a good example – has increased.

[150] In *Noël*, *supra,* at paragraph 49, LeBel J., for the majority, described discriminatory conduct for purposes of duty of fair representation claims this way:

> *The law also prohibits discriminatory conduct. This includes any attempt to put an individual or group at a disadvantage where this is not justified by the labour relations situation in the company. For example, an association could not refuse to process an employee's grievance, or conduct it differently, on the ground that the employee was not a member of the association, or for any other reasons unrelated to labour relations with the employer*
> . . . . . .
> *Bad faith and discrimination both involved oppressive conduct on the part of the union. The analysis therefore focuses on the reasons for the union's action.*

[151] Respecting the element of alleged bad faith on the part of a union, LeBel J. in *Noël*, *supra*, stated at paragraph 48 that the concept of bad faith "presumes intent to harm or malicious, fraudulent, spiteful or hostile conduct". He further acknowledged that "[i]n practice, this element alone would be difficult to prove." See also: *Hargrave*, *supra*, at paragraph 28; *Toronto Transit Commission*, [1997] OLRD No. 3148, at para. 9, and *Zalopski v Canadian Union of Public Employees, Local 21 and City of Regina*, LRB File No. 009-16, at paragraph 50.

[152] *Hargrave*, *supra*, and the other Saskatchewan cases referred to in it, all were decided under section 25.1 of the *TUA*. It is well-established that section 25.1 did not exhaustively define the scope of a union's duty to fairly represent its members, however. This point was made in *Mary Banga v Saskatchewan Government Employees Union*, LRB File No. 173-93, [1993] 4th Quarter Sask. Labour Report 88, at 98 as follows:

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

[153] The broader duty of fair representation is now reflected legislatively in section 6-59 of the *SEA*. Subsection 6-59(1) sets out the general right of employees or former employees "to be fairly represented by the union that is or was [their] bargaining agent with respect to [their] rights pursuant to a collective agreement or this Part." It is not limited to grievance or rights arbitration proceedings as was section 25.1 of the *TUA*. Subsection 6-59(2) goes on to stipulate that "[w]ithout restricting the generality of subsection (1)" the union has a duty not to "act in a manner that is arbitrary, discriminatory or in bad faith" when representing its members in all matters covered by the relevant collective agreement or Part VI. See further: *Chessall v Communications, Energy and Paperworkers Union of Canada, Local 649/Unifor and SaskEnergy*, LRB File No. 099-14, 2015 CanLII 80545 (SK LRB), at paras. 20-22.

[154] Since the advent of the *SEA*, this Board has not had to address what may be connoted by the broader duty of fair representation, nor is there any need to do so in this case. However, the Board has indicated that its section 25.1 jurisprudence applies with equal force to claims brought pursuant to section 6-59. See especially: *Coppins*, *supra*, at para. 33; *Chessall*, *supra*, at paras. 27-28, and *Billy-Jo Tebbitt v Construction and General Workers Union, Local 151 (CLAC)*, LRB File No. 264-14, 2014 CanLII 93080.

3. Relevant Principles Related to the Grievance Process

[155] The final topic to be considered in this Part is how the duty of fair representation relates to the grievance arbitration process. This case, like many, if not most, duty of fair representation claims, alleges that the union failed to prosecute the grievances in question in an appropriate manner. Not surprisingly, a large body of jurisprudence has evolved which sets out the principles that should guide a labour relations board when assessing the merits of such claims. An useful summary of these principles can be found in *Mwemera v United Brotherhood of Carpenters and Joiners of America, Local Union No. 2010*, 2016 CanLII 8866 (AB LRB), a decision of the Alberta Board subsequently upheld on judicial review: 2017 ABQB 286. There the Alberta Board states as follows at paragraph 20:

> *This Board's decision in Reid v United Steelworkers of America Local Union No. 7226, [2000] Alta. L.R.B.R. LD-064 (at para. 3) summarizes some of the key principles underlying the duty of fair representation:*
>
> - *The Union need not take every grievance to arbitration. It need not take a grievance to arbitration just because the grievor asked the Union to do so. The Union is entitled to assess the merits of the grievance, the chances of success at arbitration, the costs of the arbitration process and other factors when deciding whether or not to advance a grievance to arbitration.*
>
> - *The Board focuses its examination on the Union's conduct and considerations while the union represented the employee and in making its decision, rather than on the merits of the grievance, which is the question an arbitrator would answer.*
>
> - *The Union is entitled to make a wrong decision, as long as it fairly and reasonably investigates the grievance and comes to an informed decision.*
>
> - *The Union must give the employee a fair opportunity to present the employee's own case to the Union and to provide input on the result of the Union's investigation.*
>
> - *The Union should communicate fairly with the employee about all aspects of its representation. Communication with the employee can play a significant role in representation, but the union need not take direction from the employee or answer all questions to the employee's satisfaction nor must it act within the employee's time limits.*
>
> - *A Union does not breach its duty of fair representation just because it reaches a conclusion with which the employee does not agree.*

[156] Likewise, this Board in *Dwayne Luchyshyn v Amalgamated Transit Union, Local 615 and the City of Saskatoon*, LRB File No. 035-09, 178 CLRBR (2d) 96, 2010 CanLII 157 provided direction to unions on how best to process a member's grievances. At paragraph

36, Chairperson Love outlined a “minimum standard of conduct” a union is expected to meet when handling a grievance. He commended the following steps as a guide:

> *1. Upon a grievance being filed, there should be an investigation conducted by the Union to determine the merits or not of the facts and allegations giving rise to the grievance;*
>
> *2 The investigation conducted must be done in an objective and fair manner, and as a minimum would include an interview with the complainant and any other employees involved;*
>
> *3 A report of the investigation should go forward to the appropriate body or person charged with the conduct of the grievance process within the Union. A copy of that report should be provided to the complainant;*
>
> *4 The Union, Grievance Committee, or persons charged with the conduct of grievances should determine if the grievance merits being advanced. Legal advice may be sought at this time to determine the prospects for success based on prior arbitral jurisprudence;*
>
> *5. At this stage, the Union may determine to proceed or not proceed with the grievance. However, in making that determination, the Union must be cognizant of the duty imposed upon it by s. 25.1 of [The Trade Union Act]'*
>
> *6. At each stage of the grievance procedure, the Union will be required to make a determination as to whether to proceed with the grievance or not. Again, its decision to proceed or not must be made in accordance with the provisions of s. 25.1 of [The Trade Union Act]; and*
>
> *7 It must be recognized that the Union has carriage of the grievance, not the grievor. There may be instances where the common good outweighs the individual grievor's interest in a matter. Where such a decision is made (i.e.: not to proceed with a grievance) which is not arbitrary, discriminatory, or in bad faith, that decision will undoubtedly be supported by the Board.*

[157] In *Lucyshyn*, *supra*, the union involved did not have any semblance of a formal process in place to deal with its members' grievances. As a consequence, the Board found the member's duty of fair representation claim to be well founded, and in its order crafted a process to which the union should adhere respecting his particular grievances.

[158] The Supreme Court *per* Le Bel J. in *Noël*, *supra*, commented as well on the basic level of union representation expected in the grievance process. He stated at paragraph 50 as follows:

> *The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must*

> *investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible. The association's resources, as well as the interests of the unit as a whole, should also be taken into account. The association thus has considerable discretion as to the type and extent of the efforts it will undertake in a specific case. [Citation omitted.]*

[159] When conducting the kind of investigation described in *Noël*, *supra*, it is not always necessary for a union to undertake an independent investigation into allegations made by its member. For example, where an independent third party has investigated the same or similar allegations, the union may be able to rely on the findings made, and conclusions reached, in those investigations when determining whether or not to pursue a grievance in a particular case. See especially: *B.P. v Administrative and Supervisory Personnel Association, and University of Saskatchewan* (2012), 208 CLRBR (2d) 167, LRB File No. 065-11, and *Miller and A.T.U., Local 615* (2010), 181 CLRBR (2d) 275, 2010 CanLII 41137, LRB File No. 139-09 (SK LRB).

[160] *B.P.*, *supra*, is a case not dissimilar to this one as it involved allegations of member-on-member harassment. There the employer retained the services of a third party investigator to look into the complainant's allegations and deliver a report setting out his findings. This Board determined that the union was entitled to rely on that report, and was relieved from conducting its investigation. Former Vice-Chairperson Schiefner stated at paragraphs 67, 68, and 69 as follows:

> ***[67]*** *I am not persuaded by the applicant's argument that, in failing to conduct its own independent investigation report, the union failed to satisfy the "minimum standard of conduct" established by this Board for a trade unions in Luchyshyn and A.T.U., supra. The comments of Chairperson Love in Luchyshyn were not intended to be prescriptive in a literal sense, as the applicant has argued. Rather, these comments were intended to provide guidance and to be instructive on the general expectations of this Board as to the duties expected of a trade union in processing a request for a grievance from a member. . .*
>
> ***[68]*** *In the present case, the union had the benefit of the results of Mr. Roberston's investigation, including both the summary report and later a copy of the full investigation report. As this Board found in Miller and A.T.U., Local 615 [supra], the requirement that a trade union conduct an investigation to determine the merits and facts (of an allegation giving rise to a potential grievance) does not always require that an independent investigation be conducted by that trade union provided it has sufficient knowledge of the mattes in dispute from which it may form its own opinion. . .*
>
> ***[69]*** *In the present case, the union relied upon the investigative report of Mr. Roberson, as did the employer. In my opinion, the union had the right to do so. I*

> *am not persuaded by the applicant's argument that the union was required to conduct its own independent investigation into the applicant's harassment/discrimination claims to satisfy the "minimum standard of conduct established by this Board for trade unions in Lucyshyn and A.T.U., supra. . .*

[161] With these general principles respecting the operation of section 6-59 of the *SEA* in this context identified, the Board turns to consider the specific allegations made by the Applicants in these matters.

C. Adding CUPE National as Party

[162] The Applicants' duty of fair representation claims identify CUPE, Local 21 as the sole respondent. However, CUPE National is also implicated in events forming the basis of these applications, particularly through the involvement of Ms. Posyniak and Ms. Saxberg.

[163] In oral argument, Mr. Logue on behalf of the Union reminded the Board that CUPE Local 21 and CUPE National are two (2) separate juridical entities, and CUPE National should not be held responsible for any inadequacies or shortcomings committed by CUPE Local 21 in its representation of these Applicants. In support of his position, he relied particularly on *Murray v Ben St-Onge Security Consultant & Investigation Inc.*, 2014 NBQB 71, 417 NBR (2d) 344. Subsequently, that case was referred to approvingly by the New Brunswick Court of Appeal in *LeBlanc et al. v Canadian Union of Public Employees, Local 558*, 2016 NBCA 11. Both courts relied on the earlier judgement of an unanimous Supreme Court of Canada in *Fullowka v Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 SCR 132 *per* Cromwell J. (see, in particular paras. 119-120).

[164] The Board accepts as correct Mr. Logue's legal submissions respecting the independence of CUPE Local 21 from CUPE National. However, in my view this is not sufficient to insulate CUPE National from liability should the Board conclude that the Applicants have met their onus under section 6-59 of the *SEA*.

[165] CUPE National's involvement in these matters crystallized, at the very least when Ms. Posyniak was tasked to represent the Applicants in the prosecution of their joint grievance. It might also be contended that CUPE National had actual knowledge of these matters long before that, as a consequence of HK's telephone conversation with Mr. Marsden in

March 2014. It would seem artificial, then, to disregard CUPE National's participation in these events on the basis that it was not formally named in the applications.

[166] The *SEA* has clothed this Board with broad amendment powers respecting applications before it. Of particular relevance here is the Board's remedial authority found in sub-clause 6-112(4)(a). It provides as follows:

> ***6-112****(4) Without limiting the generality of subsections (2) and (3), in any proceedings before it, the board may on any terms that it considers just, order that the proceedings be amended:*
>
> *(a) by adding as a party to the proceedings any person that is not, but in the opinion of the board ought to be a party to the proceedings.*

[167] It is also useful to remind ourselves that for purposes of Part VI of the *SEA*, "person" includes a union. See especially, section 6-3 which states that "[f]or the purposes of [the *SEA*] every union is deemed to be a person".

[168] Furthermore, this Board has determined its remedial authority set out in section 6-112 should be given a large and generous interpretation. See: *North Battleford Community Safety Officers Police Association v City of North Battleford*, LRB File No. 007-17, at paras. 99 – 100.

[169] The Board has concluded that CUPE National should also be added as a party to these applications pursuant to sub-clause 6-112(4)(a). In addition to being implicated in the events leading up to the filing of these applications, CUPE National played a central role in this hearing. Both Ms. Posyniak and Mr. Marsden testified at length about their involvement in these matters. As well, Ms. Posyniak served as Mr. Logue's instructor for the duration of the hearing. As a result, no prejudice will flow to CUPE National should it be added as a party to these proceedings.

[170] Accordingly, for these reasons, the Board directs that CUPE National be added as a respondent to these applications and the style of cause will be amended to reflect accurately its role in the proceedings.

D. Credibility of Witnesses

[171] Credibility and reliability are considerations in all proceedings in which *viva voce* evidence is received. However, no less an authority than Chief Justice McLachlin acknowledged in *R v REM*, 2008 SCC 51, [2008] 3 SCR 3, at paragraph 49 that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization". Prior to outlining the Board's findings on credibility and reliability it is, perhaps, prudent to review the relevant legal principles to be applied for such purposes.

1. Review of Relevant Legal Principles

[172] The foundational authority in this area of the law remains *Farnya v Chorny*, [1952] 2 DLR 354, [1951] BCJ No. 152 (CA). In that case, the British Columbia Court of Appeal laid down the generally accepted standard by which to assess issues of credibility. That Court stated that where witnesses' testimony deviates significantly, "the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions"

[173] Many more recent authorities have refined and added nuance to *Farnya*'s general statements. In *United Food and Commercial Workers, Local 1400 v Calokay Holdings Ltd., White Sands Enterprises Ltd., KKCLG Holdings Ltd. and Gandko Holdings Ltd., operating as Best Western Seven Oaks Inn*, LRB File Nos. 002-16, 013-16, 029-16, 035-16, 044-16 & 088-16, 2016 CanLII 74282, 281 CLRB (2d) 149 (SK LRB) [*Calokay Holdings Ltd.*], for example, this Board endorsed the helpful summary of legal principles relating to credibility set out in *Bradshaw v Steiner*, 2010 BCSC 1398 [*Bradshaw*]. At paragraphs 185 – 187 of that judgment, Dillon J. reviewed factors courts and tribunals should consider when assessing the trustworthiness of a witness' testimony. These include:

- The ability and opportunity the witness had to observe the events about which he or she is testifying;
- The firmness of the witness' testimony;
- Whether the witness is able to resist the influence of their interest in the matter to modify their recollection of the events;

- Whether the witness' testimony harmonizes with independent evidence that has already been believed and accepted;
- Whether the witness' testimony is consistent in direct and cross-examination;
- Whether the testimony seems unreasonable, impossible or unlikely;
- Whether there exists a motivation for the witness to be untruthful, and
- The witness' demeanour.

[174] The Court in *Bradshaw*, *supra*, citing *Farnya*, *supra*, concluded at paragraph 186: "Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time." See further: *Gaebel v Lipka*, 2016 BCSC 2391, at paragraphs 70-72.

[175] In *Calokay Holdings Ltd*, *supra*, the Board also referred to other factor identified in the jurisprudence as follows:

> *[111] When assessing a witness' credibility, tribunals have relied on other factors such as:*
>
> - *the witness' motives [Brar and others v B.C. Veterinary Medical Association and Osborne (No. 22), 2015 BCHRT 151, at para. 79.];*
> - *the witness' powers of observation [Brar, supra, at para. 79]*
> - *the witness' relationship, if any, to the parties involved in the dispute [Shah v George Brown College, 2009 HRTO 920, at para. 14]*
> - *extent to which witnesses may have an interest in the outcome of the case, or have a self-interest in testifying for one of the parties [Shah, supra, at para. 14];*
> - *internal consistency of a witness' evidence [Ibid.];*
> - *inconsistencies and contradictions within a witness' evidence in relation to the evidence given by other witnesses [Ibid.], and*
> - *the failure by a party to call a witness or produce material evidence if able to do so [Murray v Saskatoon (City), [1952] 2 D.L.R. 499, 4 WWR (NS), at p. 239.*
>
> *[112] Furthermore, it is important to recall that truthfulness and reliability are not always the same thing. This point was well-made in Hardychuk v Johnston [2012 BCSC 1359, at para. 10] where Dickson J. (as she then was) said:*
>
> > *The typical starting point in a credibility assessment is to presume truthfulness: [Halteren v Wilhelm, 2000 BCCA 2]. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive recall or narrative capacity to provide reliable testimony. Alternatively,*

> *he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately to lie out of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way. [Emphasis added.]*

[176] With these general principles identified, the Board turns to assess the testimony offered by the witnesses in this matter in accordance with those principles.

2. Application of Principles Respecting Credibility and Reliability

[177] Adopting the approach set out in *Hardychuk*, *supra*, the Board starts from the presumption that the various witnesses testified truthfully. Generally speaking, the Board found all of the witnesses testified forthrightly, and generally did not find any of them to be evasive in their testimony. As is usually the case, and as was the case here, there were some inconsistencies and flaws in the evidence presented by both sides; however, in the Board's view these inadequacies did not render the entire evidence of any of the witnesses unbelievable.

[178] At the same time, the Board is entitled to accept all, some or none of the evidence of the witnesses who testified. These findings will be made when necessary in the discussion that follows.

[179] The Board acknowledges, at the outset, that the three (3) Applicants have a vested interest in seeing their applications succeed, and, therefore, their evidence should be scrutinized with some care. Each of them testified on their own behalf. As noted earlier, for both CB and HK relating some of the events that took place in relation to their applications proved difficult, and both of them became quite emotional at times. At one point in her testimony, CB became confused about the sequence of certain events and, over the objection of Union counsel, the Board permitted her to "refresh" her memory from hand-written, marginal notes on her formal application. Of the three (3) Applicants, RD provided what may be described as the most dispassionate testimony, and proved to be the most composed of the Applicants when testifying.

[180] That said, the Board found these Applicants to be truthful and honest in the presentation of their evidence. While they were some inconsistencies in their testimony when it is compared to other independent witnesses, none of those inconsistencies related to events or

communications that might significantly alter the Board's factual determinations. Accordingly, the Board finds their evidence to be accurate and accepts it almost entirely.

[181] The Board also found Ms. Cara Banks, the last witness called to testify on behalf of the Applicants, to be both credible and reliable. Her testimony related in the main to event leading up to the mediation sessions in December 2014. As well, she acknowledged her own dispute with CUPE that culminated in this Board's decision in *Banks v Canadian Union of Public Employees, Local 4828, and Saskatchewan Federation of Labour*, LRB File No. 144-12, 2013 CanLII 55451 (SK LRB). She stipulated that that dispute did not taint, in any way, her working relationships with CUPE National or its representatives respecting the Applicants' circumstances.

[182] Ms. Posyniak was the Unions' principal witness at the hearing. The Board recognizes that her actions were directly impugned in this case. As a result, it must be acknowledged that she has a personal interest in the Applicants' duty of fair representation claims failing. However, it does not follow that the Board found her to be anything less than candid, as a witness. She spoke of difficulties and disagreements she had with the various Applicants. In particular, she acknowledged that she had urged the Applicants on a number of occasions to leave the Kowalchuk Law Firm and permit CUPE National to provide legal representation to them. The Applicants had already testified about this and their reluctance to the leave the Kowalchuk Law Firm, and the Board concluded that Ms. Posyniak was simply delivering the message from her superiors. On balance, I found her to be a credible and reliable witness.

[183] The Board also found Mr. Marsden to be a credible and reliably witness. He presented his testimony in a forthright manner, and his evidence proved useful to the Board when deliberating on the issues it was called upon to decide in these applications.

[184] The other two (2) witnesses who testified on behalf of the Union were representatives of CUPE Local 21: Ms. Carmel Mitchell, and Mr. Tim Anderson. Respecting Ms. Mitchell, the Board found her to be a credible witness. She was candid in her testimony respecting her lack of experience in the grievance process, and did not shy away from acknowledging errors in her testimony when cross-examined. On the other hand, the Board found Mr. Anderson to be less credible and reliable. He appeared defensive about certain

actions he took on behalf of CUPE Local 21 in relation to these Applicants. As well, he was vague about discussions he had with HK, for example, while he recalled exchanges with others about the Applicants' circumstances with considerable clarity. As a result, the Board places little weight on his testimony.

[185] Finally, the Board also wishes to comment upon the failure of the Union to call Mr. Clint Driedger as witness in these proceedings. It will be noted that Mr. Driedger's name came up quite often as a central player on behalf of CUPE Local 21 in these matters. Counsel for the Applicants, Mr. Larry Kowalchuk, relying on *Murray v Saskatoon (City)*, *supra*, urged the Board to draw an adverse inference against the Unions because of this omission. The Board agrees with Mr. Kowalchuk on this issue. As a result, the Board will rely principally upon the testimony of the Applicants and Ms. Banks respecting Mr. Driedger's participation in these matters.

E. Onus

[186] It is useful, as well, to identify which side bears the onus in duty of fair representation claims. Coincidentally, the Board has addressed this question in two (2) recent Decisions: *Hartmier*, *supra*, and *Zalopski*, *supra*.

[187] In *Zalopski*, *supra*, the Board stated at paragraphs 42 to 44 as follows:

> *[42] It is now well-established that an applicant who seeks to have his or her union sanctioned for failing to represent him or her fairly bears the burden to prove those allegations on a balance of probabilities. As Rothstein J. explained in F. H. v McDougall,[2008 SCC 53, [2008] 3 SCR 41], at paragraph 49:*
>
> > *[49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred. [Emphasis added.]*
>
> *[43] Furthermore, in McDougall, Rothstein J. emphasized that in order to satisfy the 'balance of probabilities' standard of proof, the evidence must be "sufficiently clear, convincing and cogent". [Ibid., at para. 46.]*
>
> *[44] Accordingly, the Board must determine if the Applicant has demonstrated through clear, convincing and cogent evidence that it is more likely than not the Union failed to represent him in respect his supervisory promotional grievance? If the Applicant satisfies this onus, then the Union must be found to have violated section 6-59 of the SEA.*

F. Analysis and Decision Respecting Duty of Fair Representation Claims

1. Introductory Comments

[188] Although it sometimes got lost in the testimony and the arguments of counsel during the hearing, it is important to remember that these three (3) applications related to two (2) grievances. The first grievance related to the gender based harassments complaints brought by the Applicants. For ease of reference, this grievance will be described as "The Harassment Grievance".

[189] The second proposed grievance related to alleged breaches of environmental regulations and protocols by employees at the Landfill who were also fellow union members. For ease of reference, this second grievance will be described as "The Whistleblower Grievance"

[190] In the analysis that follows, the Board found it useful to organize its analysis in relation to each of these proposed grievances. In addition, as there were two (2) legal entities involved – CUPE Local 21 and CUPE National – whose actions over-lapped at times, the Board will further organize its analysis in relation to these two (2) entities.

[191] As well, these Applicants invoked the three (3) traditional bases enumerated in subsection 6-59(2) of the *SEA* which would, if proved, support a finding that the Union breached its duty of fair representation, namely arbitrariness, discriminatory treatment and bad faith. The Board will address these various claims.

2. The Harassment Grievance

[192] The Harassment Grievance took up the vast bulk of the testimony at the hearing. This grievance was ultimately settled in April 2015.

2.1 Submissions of the Parties

2.1.1 The Applicants' Submissions

[193] Counsel for the Applicants submitted that both CUPE Local 21 and CUPE National failed to represent his clients' interests on all three bases identified above.

[194] Turning first to the Applicants' allegations of bad faith, it is important to recall LeBel J.'s observation in *Noël*, *supra*, at paragraph 48 that this concept "presumes intent to harm or malicious, fraudulent, spiteful or hostile conduct". He acknowledged further that "[i]n practice, element alone would be difficult to prove": *ibid*. That said, the Applicants did not rely heavily on this particular ground. Counsel asserted that the evidence could support such a finding by this Board on the basis that actions taken by both CUPE Local 21 and CUPE National exhibited ill-will and hostility towards the Applicants.

[195] Turning next to the Applicants' allegations of discrimination, counsel highlighted the fact that at the heart of the Harassment Grievance lay serious complaints respecting gender-based discrimination and sexual harassment which were investigated by an independent third party, many of which were subsequently found to be well-founded. Counsel acknowledged that discrimination based on sex is prohibited by both *The Saskatchewan Human Rights Code* and the *Canadian Charter of Rights and Freedoms*. He submitted that the subject-matter of this grievance arguably enhances its significance, and, relying on *K.H. v Communications, Energy and Paperworkers Union, Local 1-S and SaskTel*, [1997] Sask LRBR 476, LRB File No. 015-97, this should alert a union that its handling of such matter will be scrutinized more closely than other grievances. Counsel submitted that the manner in which the Unions treated the Applicants' grievance *vis-á-vis* the male respondents' grievance clearly demonstrated the Unions failed to appreciate this difference, and, effectively, perpetuated the gender discrimination already experienced by the Applicants.

[196] Turning to the Applicants' allegations of arbitrary conduct on the part of the Unions, counsel invoked many of the usual elements for establishing arbitrariness. Invoking this Board's analysis in *Banks*, *supra*, he submitted that the Unions exhibited a non-caring and perfunctory attitude to the Applicants' complaint, generally, by failing to inquire into the complaints themselves; to maintain proper communication with the Applicants; to seek the Applicants' views on the proposed grievance, and to advise them of the filing of the grievance.

[197] Finally, the Applicants' asserted that the Unions, more particularly CUPE National breached its duty of fair representation in other ways. These are enumerated at paragraph 5 of the Applicants' Written Argument as follows:

> *5. The Applicants further submits [sic] that the Respondent Union breached their duty of fair representation through their interference in the process that occurred outside the collective agreement through the following actions:*
>
> - *Attempting to insert itself in the other proceedings under statutory processes as the exclusive bargaining agent for the Applicants and obstructing those processes.*
> - *Threatening the City of Regina, the former employer of the Applicants, with an unfair labour practice if it continued to deal with the Applicants other than through the Respondent on all matters related to the Applicants statutory rights;*
> - *Refusing to file a grievance or grievances on behalf of the Applicants;*
> - *Refusing and failing to permit the Applicants to access and exercise the rights pursuant to the collective agreement;*
> - *Restricting and inhibiting the rights of the Applicants pursuant to the harassment policy of the City of Regina, and*
> - *Treating the three Applicants differently from the male members of the Respondent CUPE Local 21 and to their serious detriment as a result.*

[198] In addition to authorities referenced here, the Applicants relied upon the following cases: *Billy-Jo Tebbot v Construction and General Workers Union, Local 151 (CLAC) and PCL Energy Inc.*, LRB File No. 264-14; *Beitel v Unifor, Local 1-S (Canada) and DirectWest Corporation*, LRB File No. 222-14; *Hernandez v Teamsters Local Union 395 and Saputo Dairy Products Canada G.P.*, LRB File No. 242-14; *Chessal v Communications, Energy and Paperworkers Union of Canada, Local 649/Unifor and SaskEnergy*, LRB File No. 099-14; *Beatty v Saskatchewan Government and General Employees Union and Northlands College*, LRB File No. 086-04; *Boss v Health Sciences Association of Saskatchewan and Regina Qu'Appelle Health Region*, LRB File No. 181-05; *Prebushewski v Canadian Union of Public Employees, Local No. 4777 and Prince Albert Parkland Health Region*, LRB File No. 108-09; *McKnight v Communications, Energy and Paperworkers Union of Canada, Local 481 and Saskatchewan Government and General Employees' Union*, LRB file No. 135-11, and *JKR v Canadian Union of Public Employees, Local 737, and Brandon School Division*, 2015 CanLII 89285 (MB LRB).

2.1.2 The Unions' Submissions

[199] The Unions submitted that neither of them breached their duty to represent these Applicants fairly. At the outset, counsel noted that in these matters the Unions found themselves in a difficult position, as both the female complainants and the male respondents were members of the same bargaining unit – CUPE Local 21 – and employed at the

same workplace. In particular on this point, counsel cited *Taucar v University of Western Ontario Faculty Association (UWOFA) and University of Western Ontario*, 2010 CanLII 74589, a decision of the Ontario Labour Relations Board. There the Ontario Board acknowledged the representational difficulties inherent in circumstances of an intra-bargaining unit harassment complaint. Vice-Chair Waddingham stated at paragraph 66:

> *66. Allegations of discrimination and harassment between members of a union put a union in an impossible conflict. These complaints often arise from the contributions of both members. The UWOFA and UWO have negotiated an elaborate process in which the office of Equity and Human Rights Services accepts complaints which proceed through an attempt at informal resolution, investigation, and formal determination. This alternate complaint procedure is entirely reasonable and provides an adequate means for resolving internal conflicts between members. [Emphasis added.]*

[200] It was imperative, counsel asserted, that the Unions remained neutral in these matters, so as not to be perceived as favouring one group of employees over the other. Indeed, counsel emphasized that it was to ensure the Unions' neutrality that motivated CUPE National to appoint separate representation for each group of its members following the release of the Hinchcliffe Investigation Reports.

[201] In spite of this not insignificant challenge, counsel for the Unions submitted that they did not violate the Applicants' rights in any way contrary to subsection 6-59(2) of the *SEA*, or at all. For one thing, it was entirely appropriate and consistent with prior case law from this Board, most notably *Lucyshyn*, *supra*, and *B.P.*, *supra*, for the Unions to await the result of the Hinchliffe Investigation into the Applicants' harassment complaints. Furthermore, the Unions could not be faulted for relying upon the conclusions reached in the Hinchcliffe Investigation Reports. In light of this, it was not necessary to "re-invent the wheel", as it were, and undertake its own investigation which would effectively duplicate the independent third party's work.

[202] The Unions submitted that they maintained appropriate communications with the Applicants, and most, if not all, miscommunications or failed communications were the fault of the Applicants. Relying principally on *Re Canada Post Corporation*, [2010] CIRBD No. 64 (CIRB), counsel submitted that in any event a lack of communication between the Unions and the Applicants respecting their grievance would only amount to a breach of the duty of fair representation if it prejudiced the Applicants' position in some way. See: *Canada Post*

Corporation, *supra*, at paragraph 49. Counsel submitted no evidence was presented which would support such a finding by this Board.

[203] Counsel submitted further that once CUPE National became involved, Ms. Posyniak had a number of interactions with the Applicants in which she advised them of the grievance process, the union's responsibilities, the ability of the applicants to amend the grievance and the settlement discussions which, at the time, were on-going among the City, the Union, and the Applicants' legal counsel, Mr. Kowalchuk. These discussions, he contended, satisfied any requirement upon the Unions to communicate with the Applicants about the joint grievance.

[204] Counsel stated categorically that in their dealings with the Applicants neither CUPE Local 21 nor CUPE National acted in a manner which could be categorized as arbitrary, discriminatory or in bad faith.

[205] Addressing the Applicants' assertions that the Unions inappropriately inserted themselves into other processes, counsel essentially made two (2) submissions. First, he argued that neither union was obliged to represent the Applicants in their formal complaint to the Saskatchewan Human Rights Commission or the Workers Compensation Board. In *Imhoff v United Association of Journeymen and Apprentices, Local 488*. 2013 CanLII 81419, for example, the Alberta Board determined at paragraph 16 that a "duty of fair representation complaint based on the Union's handling of health and safety issues outside the framework of the collective agreement cannot succeed". See also: *Elliott v Canadian Merchant Service Guild et al.*, 2008 PSLRB 3, at para. 198

[206] Second, counsel asserted that when the Union intervened in CB's OH&S appeal, it was exercising its rightful authority as her exclusive bargaining agent to ensure that any alleged breach of her terms and conditions of employment are adjudicated pursuant to the agreed upon process set out in the collective bargaining agreement, *i.e.* grievance-arbitration process. The Union, therefore, cannot be found to have breached its duty of fair representation in attempting to maintain its role as the exclusive bargaining agent and representative of these Applicants in those proceedings.

[207] In addition to the cases already referenced here, the Unions also relied on the following authorities: *McEwan v Canadian Union of Public Employees, Local 1975 and*

University of Saskatchewan, 2007 CanLII 68751, 143 CLRB (2d) 253, LRB File No. 001-06 (SK LRB); *Young et al. v United Mine Workers of America, Local 7606*, 1989 CanLII 4624 (SKQB); *Hernandez*, *supra*; *Thibeault v Canadian Flight Attendants Union et al.*, 2010 CIRB 505, 232 CLRBR (2d) 261; *B.O. v Canadian Union of Public Employees, Local 59 and City of Saskatoon*, [2001] SLRBD No. 1, LRB File No. 035-99; *Sophocleous v Pascucci*, [1998] CPSSRB No. 94; *MacRaeJackson et al. v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, 2004 CIRB 290; *(Re) Canadian Pacific Ltd.*, 63 di 215 (CIRB); *Moose Jaw Firefighters' Association Local 533 v City of Moose Jaw*, 2016 CanLII 36502, 275 CLRBR (2d) 53 (SK LRB).

2.3 Did CUPE Local 21 Breach its Duty of Fair Representation Respecting the Harassment Grievance?

[208] At the outset of the discussion which follows, it important to state that while the parties relied upon many authorities, it is not possible for the Board to analyze each and every one of those cases. Suffice it to say in respect of all of the analysis that follows, the Board read and considered those authorities when preparing these Reasons for Decision.

2.3.1 Introductory Comments

[209] It is important, as well, to remind ourselves about the subject-matter of the Harassment Grievance. It pertained to claims of sexual harassment and gender-based discrimination at the Applicants' workplace. The allegations were extremely serious and numerous, and revealed a long standing pattern of sexual harassment of female employees by their male colleagues in a workplace that was heavily male dominated. In 2017, it hardly needs to be emphasized that workplace sexual harassment is invidious, intolerable, and cannot be ignored. Over a quarter-century ago, the Supreme Court of Canada in *Janzen v Platy Enterprises Ltd.*, [1989] 1 SCR 1252 stated at page 1284:

> *[S]exual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment… [S]exual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being. [Emphasis added.]*

[210] This passage resonates strongly in the circumstances underlying these applications. Perhaps, HK put it best in her testimony when she stated that she had been "harassed out of [her] job". As a result, it is obvious that the subject matter of this grievance directly affects a "critical job interest", namely the Applicants' continued employment. These realities demonstrate the heightened significance of the Harassment Grievance and the concomitant "close to absolute" obligation on the Unions to uphold that interest. See: *Johnson*, *supra*, at page 31, and *K.H.*, *supra*. See also: *Gendron v Supply & Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 SCR 1298,

[211] To say that CUPE Local 21 failed to support the Applicants at a time when they were extremely vulnerable is an understatement. After considering all of the evidence and the submissions of counsel, the Board finds that CUPE Local 21 discriminated against the Applicants, and acted in an arbitrary manner when dealing with their serious allegations and the Harassment Grievance. However, the Board finds that, as inadequate as they were, CUPE Local 21's actions did not exhibit the requisite level of bad faith or malice against the Applicants required by the case law.

2.3.2 CUPE Local 21 Acted in A Discriminatory Manner

[212] It is well-settled in the case law that there "can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the *Human Rights Code*) or simple, personal favouritism". See: *Rayonier Canada (B.C.) Ltd*, *supra*, at p. 201. Regrettably, just such treatment occurred in this case against these Applicants, and the Board finds that CUPE Local 21's actions amounted to gender based discrimination for the following reasons.

[213] First, all of the Applicants testified that prior to filing their harassment complaints with the City they had separately complained to not only their supervisors at the Landfill but also members of the CUPE Local 21's Executive about the harassment they were experiencing from their male colleagues, but to no avail. Both HK and RD testified they communicated with Tim Anderson and Clint Driedger about this harassment but neither of them took any steps to stop it. In fact, RD testified that when things became so intolerable and she felt she had no choice but to file a formal harassment complaint under the City's Harassment Policy,

she telephoned Mr. Anderson to tell him. Rather than assist her, Mr. Anderson tried to dissuade her. He stated that it would be more effective if he spoke directly to Abtosway, one of the individuals involved, because they were personal friends. Shortly after this conversation, Mr. Anderson called RD back to tell him that he had spoken to Abtosway and things would change. He never offered any further assistance to her or the other Applicants, either personally or on behalf of CUPE Local 21.

[214] It is obvious to the Board that these Applicants had no choice but to file harassment complaints with the City. Moreover, the Applicants especially CB and HK were severely traumatized as a result of the harassment they suffered at the hands of fellow employees at the Landfill, and because they received no support or assistance from CUPE Local 21 at the outset, it is hardly surprising that they would seek assistance from another source, in this case, the Kowalchuk Law Office. Once this law firm became involved, it provided the Applicants with much needed advice and support. This fact was attested to by the Applicants, and corroborated by Ms. Banks who provided much of that assistance.

[215] In particular, the Kowalchuk Law Office assisted the Applicants in the preparation of two (2) grievances, one (1) relating to the harassment complaint[21], and the other relating to workplace concerns about violations of environmental regulations and protocols[22]. The significance of these draft grievances will be explained later in this Decision.

[216] Second, the Unions emphasized the fact it would not have been appropriate to file any grievance or to take any action in relation to the Applicants' harassment allegations pending the final report submitted by the Hinchcliffe Investigations. The Board acknowledges that in circumstances of intra-bargaining unit harassment claims, it is appropriate to utilize an independent investigation process to assess the Applicants' allegations and to await the final report of such an investigation. See especially: *Taucar*, *supra*, and *B.P.*, *supra*.

[217] The Board's takes no exception with CUPE Local 21's actions in relation to this process. There is evidence which the Board accepts, that demonstrates members of CUPE Local 21's Executive – Ms. Mitchell and Mr. Driedger – attended certain of the interviews the Investigator had with the Applicants. However, it is what transpired after the Hinchcliffe

[21] See text *supra*, at n. 6.
[22] See text *supra*, at n. 7.

Investigation Reports were released, that in the Board's opinion, further demonstrates gender-based discrimination by the CUPE Local 21 against these Applicants.

[218] The Hinchliffe Investigation Reports were released to the parties on July 23, 2014. CUPE Local No. 21 did not file a grievance – the Harassment Grievance – on behalf the Applicants' until October 28, 2014[23]. That same day CUPE Local No. 21 filed a separate grievance with identical wording on behalf of the male respondents, Abtosway, and Cameron.[24] A few weeks later, on November 7, 2014, this grievance was removed, and a second grievance substituted[25].

[219] Apart from the fact that there was no meaningful communication between representatives of CUPE Local 21 and the Applicants during that period (a matter which will be addressed in the next section), it is the nature of these grievances which in the Board's view, is problematic. These various grievances are identical save for the names. It is simply not possible to ascertain from these grievances the nature of the particular allegations underlying them.

[220] The Board understands CUPE Local 21's desire to be perceived as neutral as between the Applicants and the male respondents. Yet, these grievances take this neutrality to an unreasonable extreme, and, in so doing, simply perpetuate the gender based discrimination against the Applicants. There is no acknowledgement in the grievance submitted on behalf of the Applicants of the extremely serious sexual harassment complaints brought by these Applicants against the City, and the fact that many of those allegations were substantiated by the Hinchcliffe Investigation reports. By equating these two (2) grievances, Local 21 displayed the same indifference to the Applicants' sexual harassment complaints as it had throughout the duration of their employment at the Landfill.

[221] Simply put, the Board is left in little doubt that CUPE Local 21 treated the Applicants' Harassment Grievance differently from the male respondents, and did so on the basis of their gender. Accordingly, the Board finds that Local 21 discriminated against the Applicants on the basis of sex and, and as a consequence, in doing so, breach subsection 6-59(2) of the *SEA*.

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[23] See: Exhibit A-10. This grievance is reproduced at the text *supra*, at n. 13.
[24] See: Exhibit A-8.
[25] See: Exhibit 9. The only difference between these two grievances is that the second added an additional respondent, Antochow.

[222] Before leaving this issue, the Board wishes to comment on the apparent lack of concern exhibited by the City to the findings of the Hinchcliffe Investigation Reports. As already noted, these Investigation Reports substantiated many of the Applicants' harassment allegations. Yet, despite those findings, none of the male respondents was issued even the most modest disciplinary sanction for his actions. Indeed, Mr. Marsden, in the course of his testimony, candidly admitted that he was very surprised these men were not given some kind of disciplinary penalty. As a result, in these circumstances where the Applicants' sexual harassment allegations were mostly vindicated, and in spite of its robust Harassment Policy one is left to wonder how seriously the City views findings of substantiated sexual harassment perpetrated by its employees. On the basis of this case, the Board must conclude – not seriously enough!

2.3.4 CUPE Local 21 Treated the Applicants in an Arbitrary Manner

[223] 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, former Chairperson Gray reproduced at pages 194-95, the following passage from an earlier decision of the Canada Labour Relations Board:

> *[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. [Emphasis in original.]*

[224] "Superficial", "cursory", "non-caring", and "perfunctory" are all words that aptly describe CUPE Local 21's treatment of the Applicants' Harassment Grievance. For reasons that follow, the Board concludes that CUPE Local 21 acted in an arbitrary manner towards these Applicants.

[225] First, CUPE Local 21' Grievance Committee appeared be uncertain how to deal with the Applicants' grievance. Ms. Mitchell who, at that time, had only recently assumed

the position of grievance Committee chair, candidly admitted in her testimony that she was unfamiliar with the mechanics of the grievance process generally. She sought advice from, among others, Mr. Marsden; however, ultimately, advised the Applicants that was nothing to be grieved at that time because they had filed a harassment complaint with the City.

[226] Second, in these circumstances while it may have been appropriate, perhaps, for CUPE Local 21 to await the findings of the Hinchcliffe Investigation respecting the Applicants' harassment allegations, once those findings were revealed to the parties there was no meaningful communications between CUPE Local 21 and the Applicants. Typically, poor or non-existent communications between a grievor and his or her union, in and of itself, is not a sufficient basis for finding that the duty of fair representation has been breached. However, poor communications may be one element that supports such a finding. See e.g.: *Brideau v Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station and Employees and Canadian Pacific Ltd.*, 12 CLRBR (NS) 245 (Can. LRB), at 269, and *Vandervort*, *supra*, at pargraph 295. This is a case where a lack of meaningful communication bolsters a finding that the duty of fair representation was breached.

[227] The Applicants had earlier shared a draft grievance with CUPE Local 21 which set out their preferred wording. While it is true that a union owns the grievance and need not adhere to the wishes of the grievor, this draft grievance made it plain that its gravamen was sexual harassment at the workplace. In the Board's opinion, CUPE Local 21 should, at the very least, have communicated with the Applicants in a meaningful way to assist in the crafting of the grievance it ultimately filed on their behalf. In fact, the Applicants learned that CUPE Local 21 would proceed with the Harassment Grievance only after it was filed. Its failure to do so in this case demonstrates a "non-caring" attitude towards the Applicants and the very serious allegations they brought forward respecting their treatment at the Landfill.

[228] Third, as already noted the two (2) grievances that CUPE Local 21 ultimately filed on behalf of the Applicants and the male respondents were virtually identical. CUPE Local 21 acted unreasonably in maintaining its neutrality in the circumstances of these applications. Mr. Marsden testified that CUPE Local 21 filed the grievance on behalf of the male respondents because it did not want those individuals, some of whom held representative positions on CUPE Local 21's committees, including its occupational, health and safety committee, to be dealt with too harshly. However, CUPE Local 21 did not even make the

slightest effort to highlight the differences between the nature of the concerns underlying these two (2) grievances.

[229] This significant failure by CUPE Local 21 to attempt in any way to differentiate between these grievances, demonstrates a superficial and perfunctory attitude on its part towards the Applicants' serious and legitimate complaints of sexual harassment. Indeed, one could go so far as to say that CUPE Local 21 was more concerned about ensuring the male respondents did not suffer severe disciplinary sanctions for their harassment than the fact that these Applicants had been driven from their workplace because of the actions of those respondents.

2.3.5 Conclusion Respecting CUPE Local 21's Actions

[230] Accordingly, for the foregoing reasons, the Board finds that CUPE Local 21 treated the Applicants in a discriminatory and arbitrary manner. As a consequence, it breached its duty of fair representation codified in subsection 6-59(2) of the *SEA*.

2.4 Did CUPE National Breach its Duty of Fair Representation in Respect of the Applicants' Harassment Grievance?

[231] CUPE National effectively assumed carriage of the Harassment Grievance sometime in November 2014 when Ms. Posyniak was assigned to represent these Applicants. And so began what could be described as a "tug-of-war" between CUPE National and the Kowalchuk Law Office. CUPE National relentlessly tried to have the Applicants terminate their relationship with Mr. Kowalchuk's firm, and to allow it to represent them in these matters.

[232] It must be said that after Ms. Posyniak became responsible for this grievance, she made efforts to communicate with the Applicants and to address their concerns as they arose. This was a decided improvement over what had occurred prior to her involvement. Unfortunately, by that time what little confidence the Applicants had in the ability of CUPE National to represent their interests had completed eroded as a result of CUPE Local 21's inaction. As a consequence, the relationship between CUPE National and the Applicants was tense, to say the least.

[233] A great deal of the testimony at the hearing was devoted to recounting the efforts of CUPE National to take over representation of the Applicants in respect of the Harassment Grievance, and the resistance of the Applicants and Kowalchuk Law Office to those efforts.

[234] As circumstances unfolded, however, CUPE National was able finally to negotiate settlements with the City respecting each of the Applicants in respect of their joint grievance; human rights complaints, and occupational health and safety appeals. Each applicant accepted her settlement and signed a release as against the City. While there was some evidence led at the hearing to indicate that at least RD was not completely satisfied with her settlement the fact remains that all Applicants settled these matters and accepted significant monetary pay-outs from the City.

[235] In light of this, the Board must conclude that CUPE National did not breach its duty of fair representation under section 6-59 of the *SEA*. This finding is consistent with other decisions of this Board where it was determined that because the union had settled a grievance with the concurrence of the grievor, no duty of fair representation claim could succeed. See especially: *Banks*, *supra*, at paragraph 63, and *Vandervort*, *supra*, at paragraphs 228-229, and 261.

[236] Accordingly, for these reasons, the Applicants' claim that CUPE National breached its duty of fair representation to them in relation to the Harassment Grievance must be dismissed.

3. The Whistleblower Grievance

[237] Although in these proceedings the second grievance was referred as the "Whistleblower Grievance", this moniker does not capture its' true essence. For ease of reference, this proposed grievance as drafted by the Applicants is set out below:

> *The Employer has violated the collective agreement, The Occupational Health and Safety Act of Saskatchewan and Section 74 of The Labour Standards Act of Saskatchewan for retaliatory actions against the members of the Union for attempting to report violations of occupational health and safety and for raising environmental concerns at the worksite.*
>
> *Remedy sought*

> *The retaliation cease immediately.*
>
> *The occupational health and safety issues be investigated and immediately corrected.*
>
> *General damages for harm suffered to the members as a result of the retaliation.*

[238] The Applicants, in particular, CB and HK, were well-versed in environmental regulations and protocols. Each of them testified that for much of the time they were employed at the Landfill, they observed many violations of those regulations and protocols, violations that jeopardized the health and safety of the employees. They believed firmly that these violations should be brought to the attention of the City but feared reprisals if they complained too loudly about them.

[239] For reasons that follow the Board concludes that both CUPE Local 21 and CUPE National acted arbitrarily in respect of the Applicants' "Whistleblower Grievance". As a result the Board finds that each of these entities breached section 6-59 of the *SEA*.

3.1 CUPE Local 21 Treated the Applicants Arbitrarily

[240] Turning first to CUPE Local 21, CB and HK each testified they had spoken to their supervisors as well as members of CUPE Local 21's Executive, including Mr. Anderson, about their concerns. As well, following their departure from the Landfill, they forwarded a copy of this draft grievance to Mr. Anderson, Mr. Driedger and Ms. Mitchell. None of them took any action in respect of these allegations.

[241] The Board finds that the failure of CUPE Local 21 to undertake even a cursory investigation of the Applicants' complaints demonstrates arbitrary treatment. CUPE Local 21 did not follow the "best practices" set down by this Board in *Lucyshyn*, *supra*. As described in *Noël*, *supra*, at paragraph 50, once a complaint is made to the union, at a bare minimum it "must investigate the complaint, review the relevant facts or seek whatever advice may be necessary". CUPE Local 21 did not do any of this; rather, it ignored these particular allegations raised by the Applicants. As a consequence, this inaction by CUPE Local 21 amounts to arbitrary conduct and constitutes a violation of subsection 6-59(2) of the *SEA*.

3.2 CUPE National Treated the Applicants Arbitrarily

[242] Turning next to CUPE National, the Board concludes that it, too, failed to treat the proposed Whistleblower Grievance seriously and in doing so also treated the Applicants' legitimate concerns in an arbitrary manner. In his testimony, Mr. Marsden testified that in the course of his telephone conversation with HK in March 2014, HK raised her environmental concerns and her fear of reprisal if she brought them forward. Mr. Marsden stated that he advised HK she likely would be protected by an unidentified whistleblower's law. He undertook to research this a little further and get back to her. He candidly admitted that he did not do so.

[243] The Board also heard testimony that the Applicants raised these concerns with Ms. Posyniak. She testified that these issues were referred to only marginally and the Applicants were far more focused on their sexual harassment complaints. Indeed, Mr. Logue, counsel for the Unions, submitted that these issues did not figure prominently or hardly at all in the Applicants' discussions and interactions with the Unions.

[244] While it may be argued that the Whistleblower Grievance was not of primary significance to the Applicants, it cannot be dismissed for that reason. The Applicants felt strongly enough about these issues to have their legal counsel prepare a draft grievance on their behalf that they could present to their Unions' representatives. The Applicants did just that, yet neither CUPE Local 21 nor CUPE National took any steps to assess the merits of this proposed grievance. Simply because the Applicants were preoccupied with the Harassment Grievance and may not have been as persistent in advocating for investigation into the allegations of their Whistleblower Grievance, it does not follow that the Unions could ignore it. The Board concluded that CUPE Local 21 and CUPE National had a responsibility at the very least to investigate it and to assess objectively whether or not it was meritorious.

3.3 Conclusion Respecting the Whistleblowers Grievance

[245] In conclusion, the Board finds that CUPE Local 21 and CUPE National treated the Applicants' Whistleblower Grievance in an arbitrary fashion and, as a consequence, violated subsection 6-59(2) of the *SEA*. In light of this holding, it is unnecessary for the Board to consider the remaining aspects of the Applicants' claim under subsection 6-59(2) relating to this particular grievance.

4. Conclusions on Duty of Fair Representation Claims

[246] For the foregoing reasons, the Board concludes as follows:

- CUPE Local 21 acted in a discriminatory and arbitrary manner respecting the Applicants' Harassment Grievance. Consequently, CUPE Local 21 breached section 6-59 of the *SEA*.

- CUPE National did not breach section 6-59 of the *SEA* respecting the Applicants' Harassment Grievance.

- Both CUPE Local 21 and CUPE National acted arbitrarily respecting the Applicants' Whistleblower Grievance. Consequently, both CUPE Local 21 and CUPE National breached section 6-59 of the *SEA*.

H. Posting of the Reasons for Decision and the Board's Order

[247] The *SEA*, in subsection 6-111(1)(s), authorizes the Board to direct a union to "post and keep posted in a place determined by the board, or to send by any means that the board determines, any notice that the board considers necessary to bring to the attention of any employee". The obvious purpose behind this statutory authority is an educational one, namely, "it is the most convenient method of ensuring that affected employees are aware of both the conclusion of the Board and its reasons for making the order(s) it has." See: *Saskatchewan Insurance, Office and Professional Employees' Union (COPE), Local 397 v Saskatchewan Government Insurance*, LRB File No. 003-07, 2007 CanLII 68752 (SK LRB), at paragraph 71.

[248] Furthermore, the exercise of this authority is not contingent upon a request for such relief being made by an applicant. The Board in its discretion may direct that its reasons and any such orders flowing out of those reasons be posted either in hard copy in the workplace or electronically on an employer's or union's internal website. See especially: *Hartmier*, *supra*, at paragraphs 253ff.

[249] The Board is of the view that despite the fact the Applicants did not seek such an order, it nevertheless should issue. A considerable amount of time has elapsed since

the events relevant to this case occurred. In addition, the treatment the Applicants experienced at the Landfill was egregious. It is imperative that all employees working at the Landfill should know that CUPE Local 21 especially, failed these Applicants in significant ways that resulted in numerous violations of section 6-59 of the *SEA*. The Board hopes this Decision will signal to all employees that the kind of conduct sanctioned here is not, and should never be, tolerated in the workplace.

[250] Accordingly, the Board directs pursuant to subsection 6-111(1)(s) that within (3) days of the receipt of these Reasons for Decision and the Board's Order, CUPE Local 21 shall post a copy of those documents in a place in the workplace where CUPE Local 21 or its officials normally post notices to its members respecting Union business for a period of 90 days.

ORDER

[251] The Board pursuant to sections 6-59 and 6-103, clauses 6-111(1)(s), and 6-112(4)(a) of the *Saskatchewan Employment Act* makes the following Orders:

- **THAT** CUPE National be added as a party to these applications;

- **THAT** CUPE Local 21 discriminated against, and acted arbitrarily towards, the Applicants contrary to subsection 6-59(2) of *The Saskatchewan Employment Act* in respect of their Harassment Grievance;

- **THAT** CUPE Local 21 acted arbitrarily towards the Applicants contrary to subsection 6-59(2) of *The Saskatchewan Employment Act* in respect of their Whistleblower Grievance;

- **THAT** CUPE National did not breach section 6-59 of *The Saskatchewan Employment Act* in respect the Applicants' Harassment Grievance;

- **THAT** CUPE National acted arbitrarily towards the Applicants contrary to subsection 6-59(2) of *The Saskatchewan Employment Act* in respect of the Applicants' Whistleblower Grievance;

- **THAT** within three (3) days of receipt of these Reasons for Decision, CUPE Local 21 is to post a copy of these Reasons for Decision together with the Board's Order for a period of 90 days in a place in the workplace where CUPE Local 21 or its officials normally post notices to its members respecting Union business.

[252] The parties agreed to bi-furcate these proceedings, reserving remedial issues to a separate hearing pending the Board's decision respecting the Applicants' duty of fair representation claims. Should the parties choose to proceed with a hearing respecting remedies in addition to the foregoing declaration, counsel should contact the Registrar to have this matter appear on a Motion's Day Agenda for scheduling.

[253] I am seized with this matter.

[254] The Board extends its appreciation to counsel for their oral submissions and extensive written briefs. They were very helpful.

DATED at Regina, Saskatchewan, this **3rd** day of **October, 2017.**

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
Vice-Chairperson