LYLE BRADY, Applicant v. INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 771, Respondent and JACOBS INDUSTRIAL SERVICES LTD., Respondent

LRB File No. 130-15; December 15, 2017

Chairperson, Kenneth G. Love, Q.C.; (sitting alone pursuant to section 6-95(3) of *The Saskatchewan Employment Act*)

For the Applicant:	Larry Kowalchuk
For the Respondent, Local 771:	Gary Caroline
For the Respondent, Jacobs:	Alison M. Adam

Scope of Duty of Fair Representation – Before tendering evidence at a hearing of a Duty of Fair Representation complaint by a union member, Union requests Board provide guidance with respect to changes in wording between now section 6-59 of *The Saskatchewan Employment Act* and former section 25.1 of *The Trade Union Act* (repealed).

Internal Union Dispute - Before tendering evidence at a hearing of a Duty of Fair Representation complaint by a union member, union requests Board provide guidance with respect to changes in wording between now section 6-58 of *The Saskatchewan Employment Act* and former section 36.1 of *The Trade Union Act* (repealed).

Scope of Duty of Fair Representation – Board conducts extensive review of origin of duty of fair representation, former provisions and current provisions – Board finds no significant changes in legislative scheme and hence its applicable jurisprudence.

Internal Union Dispute – Board reviews former provisions and current provisions – Board finds that in the context of the current dispute there are no significant changes in the legislative scheme.

Internal Union Dispute – Board reviews legislative provisions – Board determines that essential nature of the dispute needs to be determined with respect to Board's jurisdiction.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** Lyle Brady (the "Applicant") filed an application against the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local Union 771 (the "Ironworkers") claiming, *inter alia*, that the Ironworkers failed to fairly represent him, contrary to section 6-59 of *The Saskatchewan Employment Act* (the "*SEA*"). Jacobs Industrial Services Ltd. ("Jacobs") was his Employer at the time of the alleged incidents outlined in his application. The Application[1] was brought on July 2, 2015. On July 28, 2015, the Ironworkers applied to have the Application summarily dismissed pursuant to section 6-111(p) of the *SEA*.[2]

[2] The Board commenced a hearing of the application and the summary dismissal application on December 10, 2015. At that hearing, Jacobs and the Ironworkers argued that the Board should adjourn the hearing pending a determination of another matter filed by the Applicant, pursuant to the Occupational Health and Safety provisions of the *SEA* as the matters were similar in substance. The Board granted the requested adjournment.

[3] A determination was made by adjudicator Anne Wallace, Q.C. on August 1, 2016. In her ruling, Adjudicator Wallace dismissed the Applicant's claim under the Occupational Health and Safety provisions of the *SEA,* as being filed outside the statutory timelines for filing of Appeals pursuant to section 4-8 of the *SEA*. Mr. Brady filed an appeal [3]. That appeal was subsequently withdrawn by the Applicant prior to it being heard by the Board.

[4] On May 4, 2017, the Board resumed its hearing of LRB File No. 130-15. At that hearing, the Ironworkers again raised, as a preliminary matter, a summary dismissal application. The Board considered the arguments advanced and by its decision dated July 24, 2017[4], the Board dismissed the summary dismissal application.

[5] The Board resumed the hearing of the Duty of Fair Representation claim filed by Mr. Brady on November 1, 2017. The Board heard evidence from Mr. Brady and from a witness called by the Respondent, Jacobs. Prior to presentation of its case, the Ironworkers requested

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[1] *LRB File No. 130-15*
[2] *LRB File No. 151-15*
[3] *LRB File No. 190-16*

guidance from the Board regarding the scope of the issues which were properly before the Board and to address the scope of the Ironworker's duty of fair representation of Mr. Brady. This request was supported by counsel for both the Applicant and Jacobs. The Board set dates for the receipt of written submissions from the parties in respect of the requested guidance.

[6] The request from the Ironworkers is grounded in portions of the Board's decision related to the summary dismissal proceeding. At paragraphs [51] – [55], the Board said:

> ***[51]*** *While the Union's arguments in this respect are persuasive insofar as any attempt to relitigate the OH & S complaint, it does not, we think, remove the Board's jurisdiction with respect to a determination as to the expected role of the Union insofar as representation of an employee is concerned.*
>
> ***[52]*** *Section 6-59 of the SEA is framed somewhat differently from the previous provision which was found in The Trade Union Act.[11]. Section 25.1 of that Act made specific mention of an employee having the right to fair representation "in grievance or rights arbitration proceedings". Section 6-59is not so limited in its application. Subsection (1) of section 6-59 makes no reference to "grievance or rights arbitration proceedings". Nor does subsection (2).*
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> ***[53]*** *That Board has yet to consider whether or not this difference in wording should be applied to broaden the scope of the representational duty and thereby bring it closer to the duty originally outlined by the Supreme Court of Canada in Canadian Merchant Guild v Gagnon[12].*
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> ***[54]*** *Additionally, this Board has taken the view that it has broader jurisdiction than that stated within section 25.1 of the previous Act. That was determined by this Board in its decision in Mary Banga v. Saskatchewan Government Employees' Union, where, at p. 98 the Board says:*
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> > *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, if has been applied as well to both the negotiation and administration of collective agreements. Section 25.1 of The Trade Union Act, indeed, refers specifically to the context of arbitration proceedings. This Board has not interpreted the section in a way which limits the duty to that instance, but has taken the view that the duty at "common law" was more extensive, and that Section 25.1 does not have the effect of eliminating the duty of fair representation in the context of union membership, collective bargaining or the grievance procedure.*
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> ***[55]*** *This comment, we believe, is equally as applicable in regards to section 6-59 of the SEA. Therefore, what is the extent of the duty owed by the Union to the Applicant in these circumstances raises at least an arguable case.*

[4] 2017 CanLII 68781 (SKLRB)

[7] As noted in paragraph [53] in our July 24, 2017 decision, the Board has not considered the difference in wording between section 6-59 of the *SEA* and section 25.1 of the former *Trade Union Act*.

[8] While the Union's request, at this stage of the proceedings is unusual, the Board appreciates the uncertainty that arises from the above comments. Also, the other parties to the proceedings joined in the request that the Board provide some clarification regarding the scope of the Duty of Fair Representation under section 6-59 of the *SEA* and the union's obligations as set out in section 6-58 of the *SEA;* the Board has agreed to provide this interim decision in respect of those provisions.

Ironworker's arguments:

[9] The Ironworkers' principal argument was that the duty of fair representation must be limited to, or linked with, matters arising from its exclusive rights to bargain collectively on behalf of those employees which it represents. The Ironworkers argued that this duty should not be extended by the Board to cover other statutory rights arising out of other legislation or parts of the *SEA* other than Part VI.

[10] In support of its position, the Ironworkers relied upon *Banks v. CUPE, Local 4828 and Saskatchewan Federation of Labour*[5], *Roy v. Workers United Canada Council and Winners Merchants International L.P.*[6], *Imhoff v. Pipefitters, Local 488*[7], *Villella v. IBEW Local 636 and Ghubb Security Systems*[8], *Holt and Coast Mountain Bus Company Ltd. and CAW-Canada*[9], *McNairn v. Pipefitters, Local 179*[10], and *Stinson v. Teamsters, Local 395.*[11]

[5] 2013 CanLII 55451 (SKLRB), 2013 Carswell Sask 620, [2013] S.L.R.B.D. No. 20, LRB File No. 144-12
[6] 2015 CanLII 855 (SKLRB), LRB File Nos. 154-14, 216-14 & 231-14
[7] Alberta Labour Relations Board Decision dated December 12, 2013, ALRB File No. GE-06740
[8] 2010 CanLII 14772 (ONLRB)
[9] 2009 CanLII 14735 (BCLRB)
[10] 2004 SKCA 57 (CanLII)
[11] 2012 CanLII 101194 (SKLRB), [2012] S.L.R.B.D. No. 19, 217 C.L.R.B.R. 279, LRB File Nos. 116-12 & 119-12

Jacob's arguments:

[11] Jacobs argued that the duty of fair representation fell upon the Union. In support it cited *Banks v. CUPE*, *Local 4828 and Saskatchewan Federation of Labour*[12] and *Roy v. Workers United Canada Council and Winners Merchants International L.P.*[13]

[12] Jacobs also argued that the Applicant's evidence was directed, not at the issue involving the Ironworkers and the Applicant, but at alleged safety practices and safety conditions on the Mosaic Canada Colonsay job site, which were irrelevant to the current inquiry. It argued that the application was being used by the Applicant to re-litigate the January 29, 2015 Occupational Health and Safety decision of Mr. Kent Rhodes, which dismissed any claims.

The Applicant's arguments:

[13] The Applicant, Mr. Brady argued that the application turns upon the Board's interpretation of sections 6-58 and 6-59 of the *SEA* aided by section 18 of the *Saskatchewan Human Rights Code*[14] (the "Code") and informed by s. 2(m.0)(vii); 2(d.1) and s.2(i.1) of the Code. In support, the Applicant relied upon *CB, HK, & RD v. CUPE, Local 21, CUPE National and City of Regina*[15].

[14] The Applicant argued that since the proclamation of section 15(1) of *The Canadian Charter of Rights and Freedoms*[16] (the "Charter"), the ability of a complainant to base a duty of fair representation claim on other enumerated and analogous grounds of discrimination has increased. He argued that the evidence which he presented showed that the Ironworkers refused to and/or failed to represent him in a dispute with Jacobs over safety issues. One of the reasons for that failure, the Applicant argued, was related to his disability (perceived or real).

[15] The Applicant posed that he was improperly denied dispatch as an ironworker and that section 6-59(2) had not been considered in the cases cited by the Ironworkers.

[16] The Applicant further argued that the Board did have jurisdiction to review the decisions of OH & S adjudicators pursuant to section 4-8 of the *SEA*. He also argued that the

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[12] 2013 CanLII 55451 (SKLRB), 2013 CarswellSask 620, [2013] S.L.R.B.D. No. 20, LRB File No. 144-12
[13] 2015 CanLII 855 (SKLRB), LRB File Nos. 154-14, 216-14 & 231-14
[14] SS 1979 c. S-24.1
[15] 2017 CanLII 72974, LRB File Nos. 034-15, 035-15 & 037-15
[16] The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c 11

Ironworkers participated in the OH & S process and why the Ironworkers did not pursue the complaint on his behalf.

[17] The Applicant argued that any evidence provided regarding whether he had "quit" or had been "fired" was irrelevant to the issue before the Board.

[18] The Applicant's evidence made reference to involvement of Mr. Mike Carr, Deputy Minister of Labour Relations and Workplace Safety and a member of the Labour Relations Board, Steven Seiferling who had been involved in counselling the Applicant. Again, the Applicant argued that any such evidence was irrelevant to the issue as to whether or not the Applicant had been properly represented by the Ironworkers.

Analysis:

[19] These submissions raise numerous issues related to the Board's jurisdiction with respect to sections 6-58 and 6-59 of the *SEA*. The Board has a large body of jurisprudence related to section 25.1 and 36.1 of the former governing legislation under *The Trade Union Act*[17] (the "*TUA*") It has interpreted sections 6-58 and 6-59 in conformity with this body of jurisprudence without need for intensive review of the provisions, which is being requested in this case.

Origin of the Duty of Fair Representation:

[20] The origin of the duty of fair representation is the Supreme Court of Canada decision in *Canadian Merchant Service Guild v. Gagnon et al*[18]. That decision recognized several lower court decisions which had dealt with the duty of fair representation as well as noting that numerous Canadian jurisdictions had, by then, recognized the duty in their labour relations statutes.

[21] Mr. Justice Chouinard, in delivering the majority judgment quoted, with approval, from several earlier decisions in his framing of the statutory duty imposed upon a union. Beginning at page 518 (SCR), the Court says:

> *In an as yet unpublished decision of November 15, 1983, No. 443, Lecavalier v. Seaforth Fednav Inc.; Lecavalier v. Seafarers' International Union of Canada, the*

[17] R.S.S. 1978 c. T-17 (repealed)
[18] [1984 1SCR 509, 1984 CanLII 18 (SCC)

Canada Labour Relations Board reviewed and summarized the various factors and tests developed in its extensive earlier case law and applied by it, in deciding on a complaint by a member against his union under s. 136.1:

> *In Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; 81 CLLC 16,096; André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108; and Jean Laplante (1981), 40 di 235; and [1981] 3 Can LRBR 52, the Board had the opportunity to enunciate the main principles of its policy respecting the interpretation of section 136.1 of the Code. A brief review of these principles is in order here. Without limiting the generality of the text of section 136.1, the Board indicated the criteria it would apply in determining whether a bargaining agent had discharged its duty of fair representation: serious negligence, discrimination, arbitrariness and bad faith. The Board stated that it would hold the bargaining agent to a much stricter standard where the career path of a member of a bargaining unit may be seriously affected, the most obvious example being dismissal. It noted that it would consider the resources of the bargaining agent and warned that it would carefully scrutinize its actions in each specific case.*

A decision on which several others in Canada have been based is that of the British Columbia Labour Relations Board in Rayonier Canada (B.C.) Ltd. and International Woodworkers of America, Local 1-217, [1975] 2 Can LRBR 196.

That case concerned a complaint by a member against his union under s. 7 of the British Columbia Labour Code, cited above. The complainant alleged that the union had failed in its duty of representation by deciding not to take the grievance based on his dismissal to arbitration, which he considered unfair in light of the provisions of the collective agreement concerning seniority. The complaint was dismissed on the ground that it had not been shown that the union had acted arbitrarily, with discrimination or in bad faith in the way in which it represented the complainant.

The following review of the duty of representation is contained in this decision, at pp. 200-01:

> *Once a majority of the employees in an appropriate bargaining unit have decided they want to engage in collective bargaining and have selected a union as their representative, this union becomes the exclusive bargaining agent for all the employees in that unit, irrespective of their individual views. The union is granted the legal authority to negotiate and administer a collective agreement setting terms and conditions of employment for the unit and the employer does not have the right to strike a separate bargain with groups of employees directly (see MacMillan Bloedel Industries [1974] 1 Canadian LRBR 313). This legal position expresses the rationale of the Labour Code as a whole that the bargaining power of each individual employee must be combined with that of all the others to provide a sufficient countervailing force to the employer so as to secure the best overall bargain for the group.*
>
> *Some time after the enactment in this form of the Wagner Act—which was the model for all subsequent North American labour legislation—American courts drew the inference that the granting of this 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, which is the leading American 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), 1969 CanLII 726 (BC SC), 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 obligation explicitly into the statute and entrust its administration to the Labour Relations Board which is responsible for the remainder of the legislation. (For the Ontario history, see Gebbie v. U.A.W. and Ford Motor Co. (1973) OLRB 519). The B.C. legislature followed suit when it enacted s. 7 in late 1973.*
>
> *What is the content of the duty of fair representation imposed on a union? Section 7(1) requires that a trade-union not "act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees" in the unit. The relevance of the American background can best be appreciated by these quotations from Vaca v. Sipes which defined the scope of (its) judicially developed obligation:*
>
> > *"Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct… (at p. 18,294).*
> >
> > *A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith… (at p. 18,299)."*
>
> *This comment by the Board follows at pp. 201-02:*
>
> > *Under this language, which has been directly imported into our legislation, it is apparent that a union is prohibited from engaging in any one of three distinct forms of misconduct in the representation of the employees. The union must not be actuated by bad faith in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory matter. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*

[22] The Court then went on to describe the case law from which the statutory duty had been framed, including decisions from the United States which had earlier adopted a similar requirement. At page 522 (SCR) and following, the Court says:

However, as mentioned above, the Canadian cases, following the U.S. precedents, had already recognized the existence of a union's duty of representation and of the resulting obligations.

The first judgment to this effect, which is the starting-point for all this case law, is Fisher v. Pemberton (1969), 1969 CanLII 726 (BC SC), 8 D.L.R. (3d) 521, mentioned in Rayonier Canada (B.C.) Ltd., supra.

The headnote states:

> *The broad authority of a trade union as exclusive bargaining representative of a unit of employees pursuant to the Labour Relations Act, R.S.B.C. 1960, c. 205, carries with it the responsibility of representing the interests of all employees fairly and impartially without hostility to any. Where a member of a trade union who is actively supporting a rival union in a jurisdictional dispute commits a breach of company regulations, an official of his union is not in breach of any duty to the member simply because he reports the breach of regulations to an officer of the company with the result that the member is discharged from his employment. The union has, however, a duty of fair representation of the member in connection with his subsequent grievance. In this respect the standards of a professional advocate cannot be imposed upon the union officials who are involved. Nevertheless, where the union men who appear on the member's behalf are hostile to him, and are anxious to see him out of the company's mill, and where they make no effort to obtain from the member and other witnesses an account of the events constituting the alleged breach of company regulations, so that a defence of the member is never put up, there is a breach of the duty of fair representation, and an action lies against the trade union for damages for breach of this duty. However, where the member would not have been reinstated by the company regardless of the representations which the union might have made and where the prospects of his gaining an arbitration award in his favour are negligible, the case is one for nominal damages only.*

On the law, Macdonald J.A. wrote at pp. 540-41:

> *In the circumstances of this case what duty in law did Spencer owe the plaintiff when acting in the course of his office as acting president of Local 592? That duty is not spelled out in any Canadian decisions of which I am aware, but there are decisions of the Supreme Court of the United States which are in point. They define the duty with which I am concerned in a way which, with respect, appeals to me as sound and I therefore apply them in this case. I refer, first, to the judgment of White, J., expressing the views of five members of the Supreme Court in Humphrey et al. v. Moore (1964), 375 U.S. 335, in which he said the following at p. 342:*
>
> > *The undoubted broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation. Syres v. Oil Workers Union, 350 U.S. 892… "By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially". Wallace Corp. v. Labor Board, 323 U.S. 248, 255.*

> *The exclusive agent's obligation "to represent all members of an appropriate unit requires (it) to make an honest effort to serve the interests of all of those members, without hostility to any…" and its powers are "subject always to complete good faith and honesty of purpose in the exercise of its discretion." Ford Motor Co. v. Huffman, 345 U.S. 330,…*

Mr. Justice White delivered the opinion of the Court in Vaca et al. v. Sipes, Administrator (1967), 386 U.S. 171. He gave this exposition of the duty at p. 177:

> *It is now well established that, as the exclusive bargaining representative of the employees in Owens' bargaining unit, the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining with Swift, see Ford Motor Co. v. Huffman, 345 U.S. 330; … and in its enforcement of the resulting collective bargaining agreement, see Humphrey v. Moore,… The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, … and was soon extended to unions certified under the N.L.R.A., see Ford Motor Co. v. Huffman, supra. Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. Humphrey v. Moore, 375 U.S., at 342.*

After a lengthy analysis of the evidence, Macdonald J.A. held the union liable as follows, at pp. 546-47:

> *There is now the question whether Local 592 was in breach of its duty of fair representation of the plaintiff in connection with his grievance. Now, the standards of a professional advocate cannot be imposed upon the union officials who were involved. These were simply men employed at the mill who happened at the time to be elected to union office. But I am of the opinion that there was a failure of duty here. An important factor is that with the exception of Girbav, all the union men who appeared on the plaintiffs behalf were hostile to him. I am sure that they were all anxious to see him out of the mill. This made it more than usually important to ensure that he was given adequate representation. No attempt was made in connection with the second and third stages in the procedure to obtain from the plaintiff and lay before the Company officials Fisher's account of what happened the evening of July 31st, and his explanations therefor. Nor were the other men present in the pipe shop interviewed. A defence of the plaintiff was never put up. He was in effect pleaded guilty at the outset—and without his consent—and argument directed only to the question of penalty. I recognize that the union representatives may well have been somewhat overwhelmed by the formidable list of past incidents of misconduct which were alleged against Fisher. Counsel for the defendants pointed out that the grievance was processed without delay. However, in the circumstances I am doubtful that this is a factor favouring the union men involved. I*

> *prefer Bryan's evidence to that of Fisher, and think that he may very well have offered on August 7th to assist the plaintiff with a letter to the International. But it was a meaningless gesture in view of the circular, ex. 14, to all locals of the International in British Columbia and Alberta which was put out by Local 592 the same day. In Vaca v. Sipes, supra, White, J., had this to say on p. 194:*
>
> > *In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances. See Humphrey v. Moore…*
> >
> > *Certainly in this case the local union did not make in a non arbitrary manner a decision as to the merits of Fisher's grievance. The whole matter was handled in a perfunctory way. I conclude therefore that the plaintiff has proved against Local 592 the breach of duty charged.*

In an article entitled "Le devoir de représentation des associations de salariés en droit canadien et québécois", (1981) 41 R. du B. 639, Professor Jean Denis Gagnon of the University of Montréal Faculty of Law observed at pp. 645-46:

> *[TRANSLATION] In Canada, before the adoption of legislation concerning associations' duty of representation, the courts heard a number of actions in damages brought against employee associations or their representatives by employees who, following decisions taken by their employer, were disappointed in their expectations that their grievance would be taken to arbitration. In the judgments which they gave, the Canadian courts generally adopted the rules developed in the U.S. cases. Thus, several judgments held that in such cases it is for the plaintiff to show that the union which was supposed to represent him had demonstrated bad faith, had acted arbitrarily, had indicated hostility or had committed serious negligence.*
>
> *These rules were applied in Quebec in several judgments which unfortunately are nowhere to be found in the reports (several of these judgments are mentioned in the judgment of the Labour Court in Boulay v. La Fraternité des Policiers de la C.U.M. et le Conseil de Sécurité de la C.U.M., [1978] T.T. 319), and they were generally followed until the Canadian and Quebec legislators amended the labour codes so as to expressly impose on unions a duty to fairly represent employees for whom they are the spokesmen in respect of the employer. Of the judgments rendered elsewhere in Canada, the decision of the British Columbia Supreme Court in Fishery. Pemberton (1969), 1969 CanLII 726 (BC SC), 8 D.L.R. (3d) 521, is undoubtedly the one which has received the most general comment. (See especially Bernard L. Adell, The Duty of Fair Representation—Effective Protection for Individual Rights in Collective Agreements, (1970) 25 Rel. Industrielles 602.) Discussing the arbitrary attitude of union leaders, the Court applied in its judgment the concept developed by the United States Supreme Court in dealing with such an attitude in Vaca v. Sipes, 386 U.S. 171, stating that the union must genuinely attempt to*

> *effectively represent the employees and cannot limit itself merely to formal gestures made simply to preserve appearances.*
>
> *This brief review of certain U.S. and Canadian cases which have marked the development of the case law on the duty of representation of employee associations seemed to be necessary, as it indicates how the Canadian legislators who adopted rules in this regard after 1971 have been influenced by the rules developed by the courts.*

…

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.

…

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.*

The Statutory Duty in Saskatchewan

[23] The *Canadian Merchant Service Guild v. Gagnon et al.* decision was delivered by the Supreme Court in 1984. Like other provinces had done, Saskatchewan moved to incorporate the Duty of Fair Representation and with respect to Employee-Union disputes within the TUA[19]. Those statutory provisions were as follows:

> *25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective agreement by the trade union certified to represent his bargaining unit in a manner which is not arbitrary, discriminatory or in bad faith.*
>
> *. . .*
>
> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*
> *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.*
> *(3) No employee shall unreasonably be denied membership in a trade union.*

These provisions were, and remain, the basis for the historical jurisprudence adopted by the Board until the enactment of the *SEA* and the substitution of the legislation which is under discussion here.

[24] In *Mary Banga v. Saskatchewan Government Employees' Union*[20], the Board determined that the common law duty as enunciated by the various court decisions was more extensive than the then statutory provision. At p. 98, the Board says:

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

[25] Additionally, the Board, in reliance on the above quote, determined in a letter decision[21] dated April 1, 2011, that the duty of fair representation was also applicable in situations where a union had been voluntarily recognized by an employer.

[26] In its decision in *Banks v. CUPE, Local 4828 and Saskatchewan Federation of Labour*[22], the Board did an extensive review of its jurisprudence, to date, in respect of the duty

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[19] S.S. 1983 c. 81 ss. 8 & 13
[20] [1993] Sask. Labour Rep. 88, LRB File No. 173-93
[21] John Moran v. Retail, Wholesale and Department Store Union and Casino Regina, LRB File No. 062-10
[22] 2013 CanLII 55451 (SKLRB), 2013 CarswellSask 620, [2013] S.L.R.B.D. No. 20, LRB File No. 144-12

of fair representation. It also dealt with arguments regarding whether or not the Labour Relations Board was the proper forum for the determination of the dispute.

[27] With the repeal of the TUA by the enactment of the *SEA,* the legislature made some wording changes in respect of both the duty of fair representation and with respect to employee-union disputes. Those provisions now read as follows:

> *6-58(1) Every employee who is a member of a union has a right to the application of the principles of natural justice with respect to all disputes between the union that is his or her bargaining agent relating to:*
>
> *(a) matters in the constitution of the union;*
> *(b) the employee's membership in the union; or*
> *(c) the employee's discipline by the union.*
>
> *(2) A union shall not expel, suspend or impose a penalty on a member or refuse membership in the union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the union if:*
>
> *(a) in doing so the union acts in a discriminatory manner; or*
> *(b) the grounds the union proposes to act on are that the member or person has refused of failed to participate in activity prohibited by this Act.*
>
> *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 considering whether to represent or in representing an employee or former employee.*

[28] The Board most recently summarized its jurisprudence in relation to s. 6-59 in its decision in *CB, HK, & RD v. CUPE, Local 21, CUPE National and City of Regina*[23]. However, at paragraph 154, the Board declined to address "what may be connoted by the broader duty of fair representation" as there was no need to do so in that case. The Board said:

> *[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 (SK LRB), 2014 CanLII 93080.*

[23] 2017 CanLII 72974, LRB File Nos. 034-15, 035-15 & 037-15

[29] In its decision in *Robin v. Prince Albert Police Association*[24] the Board reviewed the genesis for s. 36.1 of the TUA. In that decision, at paragraph [25], the Board said:

> ***[25]*** *Similarly, the genesis of s. 36.1 of the Act arose out of the Board's supervision of the relationship between a union and its members. The earliest Board decision in this regard was in Alexander Spalding v. United Steelworkers of America, CIO, AFL, CLC and Federal Pioneer Limited.*[25] *In that decision at p. 53, the Board says:*
>
> > *It would, in the opinion of the Board, be wrong for the Board to permit a union to punish a member for exercising a right given to him under The Trade Union Act. The Board will not permit the enforcement of any provision in the union constitution which might defeat, abrogate or vary any rights given by statute. Any attempt to enforce such rights by a union amount, in the opinion of the Board, to a violation of Section 11(2)(a) of The Trade Union Act and the Board finds the union guilty of an unfair labour practice accordingly.*

[30] *Spalding* was decided by the Board prior to the introduction of the statutory provision in section 36.1. In that case, the Board relied upon s. 11(2)(a) of the TUA, which was the provision which made it an unfair labour practice for a union to "interfere with, restrain, intimidate, threaten or coerce" an employee in either encouraging or discouraging them from taking membership, or being active in, a trade union. In *Spalding, supra,* the union had cancelled the membership in the union of Spalding and other workers who had undertaken a decertification effort in the workplace. Having removed their memberships, the union then demanded that the employer terminate their employment for failure to maintain membership in the union as a condition of employment.

[31] In *Nadine Schreiner v. Canadian Union of Public Employees, Local 59 and City of Saskatoon*[26]*,* the Board outlined it approach to allegations made under section 36.1. In that case, the Board said:

> *Section 36.1(1) of the Act confines the Board's supervision to disputes between union members and a union relating to matters in the union's constitution and the member's membership therein or discipline thereunder. The Board's supervision of those matters is further confined to determining whether the member has been afforded the right to the application of the principles of natural justice, as opposed to considering the merits or perceived correctness of the decision by the union. In McNairn, supra, the Saskatchewan Court of Appeal held that for the Board to*

[24] 2010 CanLII 81336 (SKLRB)
[25] [1981] Sask. Labour Rep. 50, LRB File No. 001-81
[26] [2005] Sask. L.R.B.R. 523, LRB File No. 175-04

> *assume jurisdiction pursuant to either s. 36.1 or s. 25.1 of the Act, the "essential character of the dispute" must fall within the subject matter of the provision. The Court stated as follows, at 370:*
>
> > *Thus sub-section 36.1(1) imposes a duty upon a union (again correlative to the right thereby conferred upon an employee), to abide by the principles of natural justice in disputes between the union and the employee involving the constitution of the trade union and the employee's membership therein or discipline thereunder. As such, the subsection embraces what may be characterized as "internal disputes" between a union and an employee belonging to the union, but it does not embrace all manner of internal dispute. For the subsection to apply, the dispute must encompass the constitution of the union and the employee's membership therein or discipline thereunder.*

[32] Having outlined the Board's prior jurisdiction under the TUA, the Board will now turn to an analysis of the new provisions of the *SEA* to determine if any change to the Board's approach is required.

Do the New Provisions expand the Board's Role?

[33] For ease of reference, the Board is providing a side by side comparison of the former provisions and the current provisions.

Trade Union Act Provisions	***Saskatchewan Employment Act Provisions***
25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective agreement by the trade union certified to represent his bargaining unit in a manner which is not arbitrary, discriminatory or in bad faith.	*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 considering whether to represent or in representing an employee or former employee.*
36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade	*6-58(1) Every employee who is a member of a union has a right to the application of the principles of natural justice with respect to all disputes between the union that is his or her bargaining agent relating to:*

union and the employee's membership therein or discipline thereunder. *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.* *(3) No employee shall unreasonably be denied membership in a trade union.*	*(a) matters in the constitution of the union;* *(b) the employee's membership in the union; or* *(c) the employee's discipline by the union.* *(2) A union shall not expel, suspend or impose a penalty on a member or refuse membership in the union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the union if:* *(d) in doing so the union acts in a discriminatory manner; or* *(e) the grounds the union proposes to act on are that the member or person has refused of failed to participate in activity prohibited by this Act.*

Principles of Statutory Interpretation:

[34] When interpreting statutory provisions, the Board is directed by the Supreme Court[27] that statutes are to be interpreted as set out by Elmer Drieger in *Construction of Statutes* (2nd ed., 1983) where he outlines the process as:

> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

[35] In addition to the modern rule of statutory interpretation, we are also required to have regard for section 10 of *The Interpretation Act, 1995*. This was confirmed by the Saskatchewan Court of Appeal in its decision in *McNairn v. U.A., Local 179*. Section 10 provides as follows:

> *Every enactment shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects.*

[27] Rizzo v. Rizzo Shoes Ltd (Re:) 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27

[36] In *Saskatoon Public Library Board v. Canadian Union of Public Employees, Local No. 2669*[28], the Board provided an overview of the scheme of the *SEA* and the TUA. At paras. [14] – [18] the Board says:

> ***[14]*** *In order to place these provisions into their proper context, it is necessary to provide an overview of the scheme of the SEA. Part VI of the SEA replaced what was formerly a stand-alone statute, The Trade Union Act.[9] The SEA, like the former Trade Union Act, enacted a Wagner Act like model of labour relations. It provides for employees to have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.[10] The SEA provides this Board with the authority to make numerous determinations regarding the acquisition of bargaining rights, including the exclusive right[11] to determine whether a proposed bargaining unit constitutes an appropriate unit of employees for whom a trade union may be authorized to bargain collectively. This includes the power to require the employer to engage in good faith bargaining with those employees through a trade union chosen by those employees.*
>
> ***[15]*** *In addition to the acquisition of bargaining rights, the SEA also provides for the termination of bargaining rights on the application of Employees within the bargaining unit or through abandonment. It also provides for the transfer of bargaining rights upon a raid by another union or a successorship or if those rights are transferred from one union to another, or if the employer moves from being governed by the Federal statute to being governed under the SEA.*
>
> ***[16]*** *As in this case, the SEA also provides for the Board to amend a collective bargaining certificate ("certification") to reflect changes that may have occurred in the composition of the bargaining unit.[12]*
>
> ***[17]*** *Other aspects of the SEA deal with the Board's authority to grant relief with respect to Unfair Labour Practices, to become involved in disputes between a trade union and its members, control of strikes and procedures leading up to strikes and with respect to resolution of disputes through arbitration.*
>
> ***[18]*** *The Wagner Act model represented in the SEA is an adversarial model that reflects the prevalent ying vs. yang between management of an enterprise and the labour utilized by that enterprise. It provides for managerial and confidential exclusions from the bargaining unit so that there will be some balance between the two (2) conflicting entities. Inserted between those parties is a trade union who represents the employees within the appropriate unit and who is the exclusive bargaining agent for that group of employees. In addition, the SEA requires that both parties negotiate for a collective agreement in good faith.*

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[28] 2017 CanLII 6026 (SKLRB)

Section 25.1 vs. s. 6-59

[37] The wording of former s. 25.1 and the wording in s. 6-59 are dissimilar. One of the dissimilarities is that additional wording was added to the provision to ensure that former employees (such as employees who had been discharged from their employment and on behalf of whom grievances were or could be filed) were included in the provision.

[38] Additionally, there is no reference to being "fairly represented in grievances or rights arbitration procedure under the collective bargaining agreement" in the new provision. In place of those words are words which provide the right "to be fairly represented … with respect to the employee's … rights pursuant to a collective agreement or this Part".

[39] S. 6-59 can be viewed as more restrictive if we look only at the words themselves which confine the union's requirement to represent the employee "with respect to rights pursuant to a collective agreement", with no reference to "grievance or arbitration". However, we can take judicial notice of the fact that most, if not all, collective bargaining agreements[29] contain provisions that allow for the filing of grievances and for arbitration in the event of no resolution through that process. Even without such provisions in a collective bargaining agreement, s. 6-48 provides access to arbitration for a terminated or suspended employees.

[40] There are also similarities between the two provisions. The statutory duty is still framed by reference to the standards of conduct being "arbitrary, discriminatory, or bad faith". Additionally, overarching the statutory duty is the common law duty of fair representation as outlined by the Supreme Court in *Gagnon*.

[41] Part VI of the *SEA* is a recasting and modernization of the TUA. The basic model of labour relations has not changed from the Wagner Act model embodied in the TUA. Placed in this context, I am of the opinion that, while not identical, section 6-59 is a recasting of section 25.1 and our former jurisprudence is applicable to the new provision.

Other Statutory Schemes

[42] As in this case, difficulties often arise when other statutory schemes which impact on the employee/union and employee/employer relationship arise. Examples of these

[29] See also section 6-45 of the *SEA*

statutory schemes are those provided for in the *SEA* in Part II, Part III and Part IV. These are statutory employment schemes related to employment standards and their enforcement, Occupational Health and Safety and its enforcement and an appeal process related to those statutory schemes. Additionally, there is a scheme provided for under *The Saskatchewan Human Rights Code*[30] and *The Ombudsman Act*[31].

[43] The Applicant sought to have occupational health and safety issues addressed at the Mosaic Colonsay Worksite where Jacobs had engaged the Applicant through the Ironworkers. In the Applicant's view, the Ironworkers should have assisted him in bringing the various safety issues he identified to the attention of both Mosaic and the proper officials at Occupational Health and Safety ("OH & S").

[44] The scheme of Part III of the *SEA* was recently discussed by the Saskatchewan Court of Appeal in *Wieler v. Saskatoon Convalescent Home*[32]. At paras 40 -41, the Court says:

> *[40] It was on the basis of this record that the Board, too, analyzed the case law that had been placed before the special adjudicator, deducing the following principles:*
>
> *…*
>
> *[61] From these cases, we can distill 4 principles. They are:*
>
> *1. Legislation, such as occupational health and safety legislation is for the general benefit of workers, and the benefit thereof may not be bargained away. As pointed out by Mr. Justice Vancise in [Parr]:*
>
> *[10] Occupational health and safety is an issue of substantial public policy. The responsibility to provide a safe workplace is by virtue of The Occupational Health and Safety Act, 1993 the responsibility of the employer. Section 3provides that every employer (which I take to mean union and non-union employer) shall ensure the health, safety and welfare of every worker in the workplace. It is a right owed to all employees by law and is not something an employee or his bargaining agent need bargain. As Professor K. Swinton notes, "the responsibility to provide a safe workplace is the employer's and no worker should be required to exchange his or her wages for increased protection of his or her health.*
>
> *2. However, once a "triggering event" occurs which provides an individual with the right to make a complaint under such legislation, that right becomes personal to the individual. As such, the individual may:*
>
> *(a) ignore the incident and make no application under public benefit legislation;*

[30] S.S. 1979 c. S-24.1
[31] S.S. 2012 c. O-3.2
[32] 2017 SKCA 90 (CanLII)

> *(b) make an application, but withdraw it after it has been filed;*
>
> *(c) negotiate and reach a resolution of the issue without a hearing; or*
>
> *(d) resolve the issue through a hearing and/or appeals in accordance with the legislative scheme.*
>
> *3. Where a release is given in respect to a personal right which has occurred under legislation such as the OHS Act, the validity of that release must be reviewed.*
>
> *4. In addition to consideration of the validity of the release, consideration must be given to the timing of the "triggering incident" and the timing of the release.*
>
> *(Footnotes omitted, Board Decision)*

> *[41] For my part, the above-enunciated principles should be applied in circumstances such as these, with one exception and one addition. The exception is that an event triggering the right to complain "may", but not necessarily "must", become personal to the individual. The provisions of the OHS Act in question have a dual purpose – a broader societal interest in promoting healthy work environments, as well as a private interest possessed by individuals affected by specific violations of the Act. This means that any event should be examined in light of both its public interest implications and its personal consequences. As to the addition, I would add that an occupational health and safety officer has the authority to review a release to determine, as a matter of first instance, whether it is valid and enforceable. In all other respects, this list of principles applies to the resolution of the legal issue in this case: Can a person, who has been personally wronged under the OHS Act, grant an effective release?*

[45] While rights such as those provided by OH & S are "personal" rights that cannot be bargained away, they can be improved upon in a collective bargaining relationship. For example, minimum wage standards are routinely augmented through the collective bargaining process and supplanted with better wage rates. Additionally, holiday entitlements are often bettered through the collective bargaining process.

[46] However, OH & S rights are not normally a part of the collective bargaining process. Safety issues and safety protocols may, and often are, negotiated as a part of a collective bargaining process and would include such matters as who is responsible for the provision of safety training and equipment. These provisions usually supplement OH & S standards rather than replacing or supplementing them. As noted in *Wieler*, OH & S is a general right granted to all employees. It can become personal to an employee only after the happening of a triggering event.

Union Involvement in Other Statutory Schemes:

[47] Because of the personal nature of the rights under these other statutory schemes, a union does not have the obligation to bargain collectively with respect to these rights. However, the union may include such rights[33] within its collective bargaining mandate. Clearly, when it does so, and when such improved rights become enshrined in a collective agreement, the union's duty of fair representation regarding those now collectively bargained rights becomes engaged.

[48] In the Applicant's case, there no evidence of any collectively bargained rights that he was asking the Ironworkers to grieve. He testified that he had safety issues at the Mosaic Colonsay Worksite. He testified that due to safety concerns he took advantage of his right to refuse unsafe work and left the worksite[34]. Without the assistance of the Ironworkers, he filed a complaint with OH & S and filed an appeal[35] against the decision of the OH & S officer who denied his claim.

[49] While it may be difficult for individuals to understand and take action to protect their rights under legislation such as Part III of the *SEA*, that, in and of itself, does not give rise to a duty of representation, let alone a duty of fair representation of a union member. That is not to say, however, that such a duty would not arise if a union voluntarily agrees to assist a member with an appeal filed by that member under another statutory scheme. The effect of that voluntary representation and the duty of care assumed by the union is outside the scope of this analysis.

[50] Additional issues arise when there is a provision in a collective bargaining agreement that duplicates or provides additional avenues respecting complaints such as complaints involving a "respectful workplace" or "harassment" issues. Such complaints often trigger multiple jurisdictions and appeals under a collective agreement, OH & S legislation, Human Rights legislation and judicial processes. Again, however, the duty of care to be imposed on a union in such cases is outside the scope of this analysis.

[51] In summary, to engage the duty of fair representation, the principles enunciated by the Supreme Court in *Cagnon* remain applicable. These are:

---

[33] Eg. Minimum wage standards and holiday entitlements
[34] Jacobs however takes the view and provided evidence that he quit.
[35] Which appeal was determined by Adjudicator Wallace to have been filed out of time.

> *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.*

[52] These principles remain unaltered by the revisions to former section 25.1 of the TUA as embodied in section 6-59 of the *SEA*.

Section 36.1 of the TUA v. Section 6-58 of the *SEA*

[53] The Applicant also raises concerns related to the refusal of the Ironworkers to dispatch him to a job site pending confirmation of his fitness to work. He also provided evidence[36] of the meeting with the Ironworkers that led to his being told he needed to provide confirmation of his fitness to work.

[54] For ease of reference, I am repeating the table above with respect to the former and current provisions:

36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder. *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.* *(3) No employee shall unreasonably*	*6-58(1) Every employee who is a member of a union has a right to the application of the principles of natural justice with respect to all disputes between the union that is his or her bargaining agent relating to:* *(a) matters in the constitution of the union;* *(b) the employee's membership in the union; or* *(c) the employee's discipline by the union.*

[36] Uncontradicted at this point as the Ironworkers have not called evidence to date

be denied membership in a trade union.	*(2) A union shall not expel, suspend or impose a penalty on a member or refuse membership in the union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the union if:* *(a) in doing so the union acts in a discriminatory manner; or* *(b) the grounds the union proposes to act on are that the member or person has refused of failed to participate in activity prohibited by this Act.*

[55] Subsection (1) of s. 36.1 of the TUA and s. 6-58 are similar, with the exception that s. 36.1 references the duty being owed to "employees" and s. 6-58 refers to "members". However, the reference to employees is qualified by being a dispute between an "employee" and the "trade union certified to represent him". The reference in s. 6-58 may be somewhat narrower than the previous provision due to the fact that someone could be represented by the union, but not be a member.[37] This distinction is not material in this case, however.

[56] While appearing to be different, the TUA provisions and the *SEA* are similar insofar as the seemingly new provisions in the *SEA* have their genesis in other provisions[38] of the TUA.

[57] The main provision of section 6-58 is subsection (1) and that provision is, apart from the issue raised above, sufficiently similar to the TUA provisions which it replaced to allow the Board to interpret that provision in accordance with its previous jurisprudence. That jurisprudence, as outlined in *McNairn v. Pipefitters, Local 179*[39], *Nadine Schreiner v. Canadian Union of Public Employees, Local 59 and City of Saskatoon*[40] and *Stinson v. Teamsters, Local 395*[41].

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[37] See, for example, ss. 6-8 or 6-42
[38] See s. 36.1(3) of the TUA and s. 6-4(2) of the *SEA and s. 36(5) & (6) of the TUA and s. 6-58(2)*
[39] 2004 SKCA 57 (CanLII)
[40] [2005] Sask. L.R.B.R. 523, LRB File No. 175-04
[41] 2012 CanLII 101194 (SKLRB), [2012] S.L.R.B.D. No. 19, 217 C.L.R.B.R. 279, LRB File Nos. 116-12 & 19-12principal

[58] Based upon the Board's review of the former provisions versus the current provisions, there appears to be no substantive difference in the provisions to warrant any change in the Board's analysis of these provisions.

[59] The Board agrees in some respects with the Ironworkers as to the scope of the Duty of Fair Representation. In their argument, they described the duty as being that the duty of fair representation must be limited to or linked with matters arising from its exclusive rights to bargain collectively on behalf of those employees which it represents. The Ironworkers argued that this duty should not be extended by the Board to cover other statutory rights arising out of other legislation or parts of the *SEA* other than Part VI.

[60] As noted above, the duty is linked to the exclusive right to bargain collectively as more clearly described in *Gagnon*. However, as noted above, the duty may be extended when statutory rights are enshrined in a collective agreement or collective agreement terms ameliorate statutory rights. Additionally, a duty may arise when a union voluntarily undertakes to represent members with respect to statutory rights. However, neither of these two extensions arise in this case.

[61] Secondly, the issue of being dispatched by the union and the application of the dispatch rules falls outside the scope of the Board's authority as defined in *McNairn* and *Stinson*. However, That does not, in the Board's view, prevent the Board from an inquiry with respect to whether or not a Union acted in conformity with the rules of natural justice in its refusal to dispatch or in respect to the dispute arising between the union and its member related to his fitness for dispatch and the process related to such refusal to dispatch.

[62] What the Board must do, as directed by *McNairn, supra,* is to determine what is the "essential character" of the dispute. That is, is the dispute one that arises out of the dispatch rules, or one which arises out of a breach of natural justice in relation to the dispute. That essential character will have to be framed by the evidence and arguments in the case before us.

DATED at Regina, Saskatchewan, this **15th** day of **December, 2017.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson