The Labour Relations Board
Saskatchewan

CANDACE HARTMIER, Applicant v. SASKATCHEWAN JOINT BOARD RETAIL WHOLESALE AND DEPARTMENT STORE UNION and RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 955 Respondents

LRB File Nos. 226-14 & 016-15; April 3, 2017
Vice-Chairperson, Graeme G. Mitchell, Q.C. (sitting alone pursuant to section 6-95(3) of *The Saskatchewan Employment Act*)

For the Applicant:	Paul Clemens
For the Respondent Union:	Ronni Nordal and Daniel Leblanc, Student-at-Law

Duty of Fair Representation – Timeliness – Applicant filed Duty of Fair Representation application approximately 13 months after events giving rise to it crystallised – Union argued it should be dismissed for delay – Union argued subsection 6-111(3) of *The Saskatchewan Employment Act* applied – Board determined subsection 6-111(3) applied only to unfair labour practice applications – Board reviews its jurisprudence respecting delay in commencing applications – Board concludes the Applicant's explanation for delay is reasonable and Union did not suffer prejudice as a result of delay – Application permitted to proceed.

Duty of Fair Representation – Arbitrariness – Union Local membership had voted to move Applicant's three (3) grievances on to arbitration – At a subsequent Local meeting a motion to reconsider the previous motion was passed by referendum vote – Union did not investigate the grievances nor did Local Executive present a recommendation to membership prior to vote – Fate of grievances left to a majority vote – Board reviewed previous decisions and concluded procedure for making this decision breached Union's duty of fair representation.

Duty of Fair Representation – Discrimination and Bad Faith – Applicant alleged Union's actions were discriminatory and in bad faith – Board concludes evidence insufficient to demonstrate the Union acted in a discriminatory manner or in bad faith.

Duty of Fair Representation – Remedy – Declaratory Order – Applicant no longer employed by Employer and did not want to have grievances arbitrated – Board exercises its discretion to issue a declaratory Order in these circumstances.

Duty of Fair Representation – Remedy – Damages – Board concludes not sufficient evidence to support an order of damages in this case.

Duty of Fair Representation – Remedy – Legal Fees – Applicant sought full indemnification of legal fees incurred in Board processes – Board review its jurisprudence respecting making such an order – Board concludes Applicant should receive some reimbursement from Union for legal fees – Board declines to order costs payable on a solicitor-client basis.

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 Union should be posted in workplace for a period of 60 days.

REASONS FOR DECISION

OVERVIEW

[1] **Graeme G. Mitchell, Q.C., Vice-Chairperson:** Saskatchewan Joint Board, Retail, Wholesale and Department Store Union [the "Union"] has been designated by this Board as the bargaining agent for a unit of employees who work at the Cornerstone Credit Union [the "Employer"] in Yorkton, Saskatchewan. Those employees are members of the Retail, Wholesale and Department Store Union, Local 955 [the "Local"].

[2] Candace Hartmier [the "Applicant"] had been a Union member of long standing. She commenced her employment at Cornerstone Credit Union in 2005 and throughout the years she actively participated in Union activities and governance. Indeed, prior to being terminated by the Employer in November 2013, she had served in a number of capacities on the Local's Executive Committee, including President and, latterly, as chief shop steward.

[3] On October 9, 2014, the Applicant filed with this Board an application under section 6-59 of *The Saskatchewan Employment Act*, SS 2013, c. S-15.1 [the "*SEA*"]. In it, she alleges that the Union failed to represent her fairly in relation to prosecuting a series of grievances flowing from a harassment complaint she brought against her supervisor at the Cornerstone Credit Union. The supervisor named in the Applicant's complaint was also a Union member.

[4] In her formal application, the Applicant particularized her complaint as follows:

> *The Union has acted in a manner that is discriminatory, arbitrary and in bad faith in relation to the complaints of the Applicant to proceed to grievance arbitration, including but not limited to,*

1. *The Union failed to support the Applicant's harassment complaint and provide her with any assistance, and, instead, defended the actions of her harasser, Ms. Aitken, a fellow in scope member.*

2. *The Union did not direct its mind to the merits of the grievance or the impact of the employer's reprimands on the Applicant.*

3. *The Union's investigation of the applicant's harassment complaints was non-existent, or in the alternative, wholly inadequate.*

4. *Ms. Aitken lobbied voting union members to attend the local meeting where the Union voted on whether the Applicant's three grievances should proceed to arbitration, despite these union members not previously being active participants at local meetings.*

5. *Union leadership, including Paul Guillet, had a close friendship with Ms. Aitken, which caused him to be biased in his representation of the Applicant and the effort to have the grievances move toward arbitration. Further, this caused the Union to take the position that that [sic] the Applicant was defiant towards Ms. Aitken. Moreover, Mr. Guillet advised other union personnel that he did not believe the Applicant was harassed despite being provided evidence to the contrary from the Applicant.*

6. *Union leadership, including Gary Burkart, consulted with the Applicant relating to her issues in the grievance process and also acted as a representative for Ms. Aitken. Despite clearly being in a conflict of interest position, Mr. Burkart was involved in making decision that affected the outcome to not proceed with the Applicant's grievances. Moreover, Mr. Burkart asked for a motion in June 2013, at a local meeting to have two of the Applicant [sic] grievances that had previously been accepted to go to arbitration in May 2013, be revisited in September 2013, despite no legitimate reason for this.*

7. *The Applicant took an active and hands on approach to having her grievances proceeds [sic] to a resolution of the issue, however, this caused the Union to act in a hostile manner towards the Applicant, who was already dealing with physical and mental issues of stress from the continued harassment from her supervisor.*

8. *There was a drive organized by Ms. Aitken to have the Applicant removed as chief shop steward which was actively aided by the Union.*

[5] By the time this application came on for a hearing, the Applicant had already left her employment at Cornerstone Credit Union, so she did not ask the Board to direct the Union to prosecute the three (3) grievances at issue here. Instead, she asked for an award of damages as well as Order that the Union underwrite her legal costs on a solicitor-client basis.

[6] The Union disputes all of the Applicant's allegations. First, it maintains that this application should be defeated on the basis that the Applicant delayed excessively in commencing it and this delay has prejudiced the Union in defending against her allegations.

Second, and in the alternative, the Union maintains that all proper procedures were followed in relation to the three (3) grievances, the prosecution of which forms the basis of this application. Third, the Union asserts it acted in the Applicant's best interests a fact that is borne out by the manner in which it dealt with three (3) subsequent grievances, including the grievance of her termination by the Employer.

[7] The Union particularized its defense to this application in its Reply filed with the Board on March 18, 2015. In its relevant parts it reads as follows:

> *3. The following statements are specifically denied:*
>
> . . . . .
>
> *(b) The Union provided reasonable and fair representation to the Applicant with respect to the harassment complaint she filed alleging bullying and harassment by Rhoda Aitken. An investigation was undertaken by the employer and the allegations were found to unfounded. The Applicant filed a complaint with Occupational Health & Safety on or about July 12, 2013 alleging harassment in the workplace based on the same allegations as had been investigated by the employer. The Occupational Health Officer dismissed the complaint by decision dated September 17, 2013. The Applicant appealed the Occupational Health Officer's decision however, in or around September 5, 2014 the Applicant withdrew the appeal.*
>
> *(c) The Union gave careful and appropriate consideration to each of the Applicant's grievances and the Applicant was fairly and reasonably represented by the Union, including by Paul Guillet, Staff Representative for the Union.*
>
> *(d) The Applicant makes in Schedule A, point #4 regarding Ms. Aitken having lobbied voting union members to attend a local meeting. The Union has no knowledge of whether Ms. Aitken lobbied voting union members or not. Even if she did lobby voting union members, there is nothing inherently improper with lobbying other members to attend a meeting. In addition and more importantly, Ms. Aitken is not the Union and therefore this allegation is irrelevant and cannot, even if it is true (which is not admitted), constitute evidence that the Union acted in a manner that is discriminatory, arbitrary or in bad faith.*
>
> *(e) The Union denies the allegations contained in Schedule A, Point #5 and #6. A vote had been held at a Local 955 meeting on May 2, 2013 to refer the 3 grievances in issue to arbitration. It became known that there had been no notice of the May 2, 2013 meeting given to Cornerstone Credit Union members. Other members of Local 955 had inquired what steps, if any, could be taken given the lack of notice of the May 2nd meeting. They were advised that a Motion for Reconsideration of the May 2, 2013 Motion to refer [the Applicant's] three grievances to arbitration could be made pursuant to Roberts Rules of Order.*
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> *At the June 13, 2013 Local 955 meeting a Motion for Reconsideration was made by a member of Local 955 for the issue to be addressed at the September 5, 2013. Gary Burkart did not make any motion. The Motion for Reconsideration was passed. Notice of the September 5, 2013 Local 955 meeting was given including notice of the fact the Motion for Reconsideration would be on the agenda. The 3 grievances were presented at the September 5, 2013 Local meeting and the Applicant had the opportunity to speak and did so. The majority*

of those in attendance on September 5, 2013 voted in favour of reconsideration and the 3 grievances were not referred to arbitration.

(f) The Union agrees that the Applicant took "an active and hands on approach to having her grievances proceed". However, the Union denies having acted in a hostile manner toward the Applicant. The Union continued to reasonably and fairly represent the Applicant.

(g) There was no drive to have the Applicant removed as chief shop steward. The Applicant freely and voluntarily resigned as chief shop steward on or about July 3, 2013.

. . . . .

4. The following statements are specifically commented on:

(a) In addition to the statements made in paragraph 3 above, the Union believes it is relevant that on June 26, 2013 it filed on the Applicant's behalf relating to the Employer requiring medical evidence for sick leave not exceeding 3 consecutive work days.

(b) On August 16, 2013, the Union filed a second grievance on behalf of the Applicant again relating to sick leave and specifically to the employer's request for medical information.

(c) On November 4, 2013, the Union filed a third grievance on behalf of the Applicant for unjust termination.

(d) The 3 grievances filed June 26, August 16 and November 4, 2013 were all referred to arbitration and an arbitration hearing was scheduled for late September 2014. A global resolution of the 3 grievances referred to arbitration and the Occupational Health & Safety Appeal filed by the applicant was negotiated and agreed to by the Employer, the Union and the Applicant was represented by her own legal counsel, Larry Kowalchuk with respect to the Occupational Health & Safety Appeal. The Applicant, through her legal counsel, approached the Union with respect to the terms of a global settlement of the 3 grievances set for arbitration and the Occupational Health & Safety appeal.

(e) The Applicant voiced her displeasure with the June 13, 2013 Motion to Reconsider the May 2, 2013 referral to arbitration and with the September 5, 2012 reconsideration. She indicated on a number of occasions including gin July and September 2013 that she was considering filing a "DFR". The Union advised the Applicant that she had the right to file an application with the Saskatchewan Labour Relations Board if she felt it was appropriate. She did not do so until October 7, 2014.

5. The following is a concise statement of the material facts which are intended to be relied upon in support of this reply:

(a) The applicant was reasonably and fairly represented by her Union. In doing so, the Union did not act in a manner that was arbitrary, discriminatory or in bad faith.

(b) The allegations of workplace harassment made by the Applicant were considered by the Occupational Health & Safety and dismissed. The Applicant withdrew her appeal. If the Applicant intends to rely on evidence of harassment having occurred, the Union respectfully submits that matter has already been

> *determined by way of the dismissal by the Occupational Health Officer and therefore such evidence should not be admitted.*
>
> *(c) The Applicant voluntarily entered into a full and final release of all claims against the Cornerstone Credit Union and of all claims against the Union relating to the 3 grievances referred to arbitration dated June 26, August 16 and November 4, 2013. The Union reserves the right to rely on the Release as a defence to the within application.*
>
> *(d) The Applicant failed to file the within application within a reasonable time and far outside 90 days. The Union will be bringing an Application for Summary Dismissal on the basis of timeliness.*

[8] The Reasons for Decision that follow explain why this Board concluded that the Applicant's application should be allowed in part.

FACTUAL BACKGROUND

A. Review of Procedural History

[9] This matter has had a protracted procedural history.

[10] As already noted, the Applicant filed her application on October 9, 2014.

[11] Some months later, on March 26, 2015, the Union commenced a summary dismissal application pursuant to section 35 of *The Saskatchewan Employment (Labour Relations Board) Regulations*, seeking to defeat this application on the basis of excessive delay in its commencement.[1] Subsequently, on June 2, 2015, the Board pursuant to subsection 6-103(2)(c) of the *SEA* dismissed the Union's application for summary dismissal.

[12] The formal hearing on the main application – LRB File No. 226-14 – began on September 1, 2015 before former Vice-Chairperson Steven Schiefner. Vice-Chairperson Schiefner heard three (3) days of testimony. However, at the conclusion of the third day not all the evidence had been received. As a consequence, the matter was adjourned to November 25, 2015.

[1] LRB File No. 061-15.

[13] On November 13, 2015, the Government of Saskatchewan appointed Vice-Chairperson Schiefner as a Judge of the Provincial Court of Saskatchewan in Prince Albert. As a consequence, the continuation of the hearing of this application had to be adjourned.

[14] Rather than start all over again, the parties agreed that either the Chairperson or the new Vice-Chairperson could continue with the hearing. It was agreed that whoever was assigned to the case would review the tapes and the transcript of the evidence taken in September and hear the reminder of the *viva voce* testimony,

[15] Following my appointment as Vice-Chairperson that took effect on March 1, 2016, I assumed responsibility for this file. Subsequently, I listened to the tapes of the proceedings that took place in September 2015 and, as well, reviewed the transcript of those proceedings.

[16] Ultimately, the hearing of this matter resumed on May 2, 2016 and concluded the following day. At its conclusion, I reserved my decision.

B. Review of the Evidence

[17] Over the course of five (5) days, testimony was received from three (3) witnesses. The Applicant and Mr. Mark Hollyoak testified in support of the application. Mr. Paul Guillet, a staff representative for the Union who had responsibility for Local 955, the local with which the Applicant was affiliated, was the only witness who testified on behalf of the Union.

1. Testimony of Candace Hartmier

[18] The Applicant began her testimony by outlining her employment history with the Employer. She testified that:

- She commenced employment at Cornerstone Credit Union on March 8, 2005.
- Her first job was a MSR1 position as a front-line teller responsible for assisting Credit Union members who came into the facility.
- She then moved to a MSR2 position as a process support officer responsible for such matters including balancing internal accounts, the ATM deposit and withdrawals, and dealing with registered products such as RRSPs and RIPs.
- This was a temporary position.

- Her last job at Cornerstone Credit Union was as a loan support officer with such responsibilities as closing loans, and balancing CUMIS reports.

- Her supervisor in this position was Rhonda Aitken. Like the Applicant, Ms. Aitken was a member of Union Local 955.

- She had a difficult working relationship with Ms. Aitken. Ms. Aitken would belittle the Applicant in front of her co-workers. She would convene staff meetings when the Applicant was not there.

- The Applicant was hospitalized for a week in January 2013 due to work-related stress.

- In March 2013, the Applicant took a further week's medical leave due to work-related stress.

- In July 2013, the Applicant took a month's medical leave.

- In August 2013, the Applicant's doctor placed her on an indefinite medical leave.

[19] On March 8, 2013, the Applicant contacted Mr. Corvyn Neufeld, the Employer's VP of Human Resources to apprise him of her workplace issues. The evidence disclosed that:

- At this meeting, the Applicant alleged that she was being bullied by Ms. Aitken.

- The Employer's Policy on Workplace Harassment did not identify bullying as a form of workplace harassment.

- Mr. Neufeld, however, accepted that bullying could qualify as a form of harassment and agreed to investigate the Applicant's allegations.

- In conducting this investigation, he interviewed the Applicant, Ms. Aitken and three (3) of their co-workers.

[20] On March 27, 2013, the Employer issued a verbal reprimand to the Applicant.

[21] On or about April 5, 2013, Mr. Neufeld met with the Applicant and he disclosed the findings of his harassment investigation. This report was entered into evidence as Exhibit A-1. In its relevant parts, the conclusion states:

> *[I] find absolutely no evidence to support the claim that [the Applicant] has been or is being bullied by her supervisor, Rhoda Aitken. I believe Ms. Aitken has simply been doing what the employer expects of its supervisors and managers – to manage her employees and deal with performance issues and concerns as they arise. Based on my investigation, I believe she has done so in a manner that is respectful and supportive but firm.*

> *Clearly there are behavioural, performance and attendance issues with [the Applicant] that require continued attention from her supervisor. . . .I believe the performance issues observed through this investigation, warrant implementation of progressive disciplinary action. The first stage of the progressive disciplinary action is a verbal warning. A verbal warning will be issued subsequent to delivery of this report.*

(a) <u>The First Three Grievances</u>

[22] These three (3) grievances and the way in which the Union dealt with them lie at the heart of the Applicant's duty of fair representation application.

[23] On April 5, 2013, the Union filed two (2) grievances on behalf of the Applicant. The first grievance alleged in part that the Employer "conducted an improper and incomplete investigation of my harassment complaint against my Supervisor". As well, the Applicant requested an "independent third party" to review her harassment complaint asserting that this was a mechanism provided for in the Employer's personnel policies.

[24] The second grievance challenged the Employer's verbal reprimand which the Union alleged was "unwarranted and based on inaccurate information". It went on to assert that this discipline step was invoked "because of a harassment complaint I filed against my supervisor".

[25] On April 9, 2013, the Employer by way of a letter to the Applicant issued a formal written warning to the Applicant. This letter confirmed in writing the verbal reprimand given to the Applicant on March 27. This was the first disciplinary action that the Employer took against the Applicant since she began working at Cornerstone Credit Union in 2005.

[26] Subsequently, on April 26, 2013, the Employer presented to the Applicant a formal written document entitled "Formal Recorded Warning". This document stated in part:

> *Your behavior and actions toward your supervisor are insolent, defiant and non-cooperative. These actions are highly disruptive within the work unit, negatively affect your relationships with your supervisor and co-workers and are unacceptable in our workplace. This is not the first time these issues have been brought to your attention. You were provided with a verbal warning on March 27, 2013. As discussed with you, your actions have forced the credit union to enact the next step of the Progressive Disciplinary Action procedure. This letter is your first recorded warning – the second step in our Progressive Disciplinary Action procedure.*

[27] The Applicant testified that on that day, she met with Mr. Neufeld and Ms. Naomi Kluk representatives of the Employer. At that meeting she had Mr. Sean Fletcher, a member of the Local's Executive and Mr. Paul Guillet, a union's service representative. During the meeting she was advised of the inadequacies of her work performance.

[28] The Applicant testified further that at that meeting, Mr. Guillet referred to Ms. Aitken, the supervisor whom the Applicant alleged had harassed her as "his friend" on a number of occasions. After the meeting concluded, the Applicant spoke privately with Mr. Guillet and asked him to stop referring to Ms. Aitken in that way as he was acting as her union representative.

[29] On May 3, 2013, the Union filed a third grievance on behalf of the Applicant. This particular grievance challenged the Employer's written disciplinary action taken against the Applicant. It stated that this disciplinary action was initiated because the Applicant had filed a complaint alleging harassment in the workplace.

(b) <u>The Union and the Grievance Process</u>

[30] The Applicant testified that the Local had set of by-laws, as copy of which was entered into evidence as Exhibit A-14. These by-laws by virtue of Article 2 incorporate 'all provisions in the Constitution of the Saskatchewan Joint Board Retail, Wholesale and Department Store Union. The by-laws are silent respecting a process for resolving or prosecuting grievances.

[31] A copy of the Constitution of the Saskatchewan Joint Board Retail, Wholesale Department Store Union that expired on December 31, 2014 was also entered into evidence as Exhibit A-16. This Constitution is also silent respecting a grievance process.

[32] The only document entered into evidence that dealt with grievances and their prosecution was the Collective Bargaining Agreement between the Employer and the Union. A copy of the Collective Bargaining Agreement was entered into evidence as A-17. Article 17 of that document outlines the appropriate process to be followed for the prosecution of grievances. In its relevant parts this Article reads as follows:

> ***17.03*** *Grievances or complaints of employees arising under the Agreement, shall be adjusted or settled by the following procedure:*
>
> *STEP 1* *The complaint or grievance shall be submitted in writing, and presented to the employee's immediate management supervisor with ten (10) working days of the event causing the complaint or grievance, failing which it shall be deemed that there is no complaint or grievance.*
>
> *STEP 2* *The employee's immediate supervisor and the Union shop steward shall discuss the complaint or grievance with the employee affected, present or absent at the employee's option. The employee's supervisor shall give a written reply to the matter within three (3) working days after the filing of the complaint or grievance in STEP 1. If a satisfactory settlement is not reached then the matter shall be taken up as hereinafter set forth under STEP 3 within five (5) working days of the supervisor's written reply, failing which it shall be deemed that the complaint or grievance has been settled.*
>
> *STEP 3* *If the complaint or grievance has not been settled under STEP 2 then the Union's Grievance Committee or a Shop Steward shall take the matter up with the CEO or designated representative, and shall endeavor to arrive at a settlement of the complaint or grievance by discussing the matter with the Union Grievance Committee. The CEO or designated representative shall give a written reply to the complaint or grievance within three (3) working days after the matter has been taken up. It shall be deemed that the grievance has been settled in accordance with the CEO's or designated representative's written reply unless the Union requests in writing, within in ten (10) days of the CEO's or designated representative's written reply, that the complaint or grievance be referred to arbitration. In such event arbitration shall proceed in accordance with article 18.*
>
> ***17.04*** *At any stage of the grievance procedure, the grieving employee may be accompanied by or represented by a Union Steward and/or a Union representative. The Union Grievance Committee may, at any time, be accompanied by a Union representative in any negotiations. At any stage in the grievance procedure, the griever may withdraw the grievance.*
>
> ***17.05*** *Any time limit set forth in this Article 18 may be extended by mutual agreement of the parties.*

[33] As of May 3, the day the third grievance was filed, the three (3) grievances were at different steps of the grievance procedure outlined in Article 17.

[34] The first and second grievances had proceeded through the Step 2 process. The Employer and its representatives had met with the Applicant as well as the Union representatives whom she had selected to attend with her. Contrastingly, the Union on behalf of the Applicant had just filed the third grievance in accordance Step 1 of the Collective Agreement.

(c) Meetings of the Local Relating to the Applicant's Grievances

[35] The Union Local held a regular meeting on the first Thursday of every month. The Applicant testified that typically the Union would send out a notification to each shop steward advising of the meeting date and time, as well as a list of the general items of business to be discussed. Article 15 of the Local's By-laws stipulated that unless otherwise determined by the Local, Roberts' Rules of Order governed the conduct of the meetings.

[36] The Applicant testified that she had regularly attended meetings of the Local since 2008. She stated that attendance at these meetings by the membership was typically sparse with between four (4) to six (6) individuals present. At many meetings, only members of the Executive were present. She indicated that in accordance with the Local's Policies, "Quorum shall consist of the members of the Local in attendance at the Local Meeting".

[37] The Applicant recounted that as shop steward she received the meeting notice for the May 2013 meeting. Consistent with her usual practice, she then posted this notice in the staff coffee room at the Cornerstone Credit Union.

[38] The Minutes of the Local's regular monthly meeting held on May 2, 2013 were introduced into the record. This type-written document reveals the following:

- The meeting commenced at 7:00 p.m.
- Seven (7) members of the Local were in attendance as well as Mr. Mark Hollyoak, a staff representative for the Union;
- The Applicant chaired this meeting in her then capacity as Local President;
- As the position of Secretary was vacant, the Applicant recorded the Minutes;

- A motion to move grievance against the Co-op brought by a Local member named Nagy on to arbitration was made and passed by the meeting.

- The Applicant's two (2) grievances were also presented at this meeting. The Minutes reflected as follows:

    - *6. Cornerstone Credit Union – Hartmier has two grievances in regarding harassment & verbal warning. Motion made by Nagy that in the even [sic] the two grievances are not settled that they proceed to arbitration.*

- The meeting adjourned at 8:00 p.m.

Although this is not reflected in the Minutes, the Applicant testified that she did not participate in the vote respecting her grievances.

[39] The Applicant testified that prior to this meeting she communicated with Mr. Guillet who in April 2013 had been assigned to represent the Applicant in her grievance process, to ascertain whether he would be in attendance to present her grievances to the membership. She explained that as the Local did not meeting during the summer months, and as the Employer did not appear willing to retract the disciplinary actions, she was anxious that her grievances be presented to the Local before summer. Mr. Guillet advised the Applicant he was unable to attend this meeting.

[40] On May 3, 2013, the Applicant e-mailed Mr. Guillet to advise him of what transpired the previous evening. She asked him to commence the formal process for moving thes grievances forward to arbitration something, she asserts, he never did.

[41] The Local's last regular meeting prior to the summer recess took place on June 2, 2013. The Applicant wished to have her third grievance presented to at this meeting and vote on by the membership. Prior to this meeting, the Applicant learned that her supervisor, Ms. Rhonda Aitken, her supervisor and fellow Union member, who was named in her initial grievance, was encouraging other Union members to attend the June 2013 meeting.

[42] The Minutes of the Local's regular monthly meeting held on June 13, 2013 were entered into evidence. This handwritten twelve (12) page document reveals the following:

- The Applicant chaired this meeting in her then capacity as Local President;

- A total of 39 members attended this meeting, 26 of those members were employed at Cornerstone Credit Union. A copy of the sign-in sheet was attached as an Appendix to the Minutes.

- Mr. Gary Burkart, the Union's Secretary Treasurer also attended.

- At the outset of the meeting, Cheryl Robinson was nominated, approved and installed as Secretary for the Local. Ms. Robinson recorded the Minutes.

- The Applicant stepped aside as Chair so as shop steward she could present her May 3, 2013 grievance to the membership.

- A motion to send this grievance to arbitration was moved and seconded.

- Mr. Burkart intervened and proposed that the motions respecting the previous two (2) grievances passed at the May 2, 2015 meeting need to be revisited in part because Mr. Guillet, the Unions' staff representative was not present at that meeting.

- The acting chairperson advised Mr. Burkart that his proposal was out-of-order as it did not comply with the procedure set out in Roberts' Rules of Order.

- The Applicant spoke and advised the meeting that at the May 2nd meeting she had followed the rules respecting the presentation of grievances.

- Mr. Burkart continued to speak and advised the membership that an arbitration costs approximately $20,000 which must come for dues paid by Union members.

- Mr. Burkart requested a member to move that the motion passed in May supporting the Applicant's two (2) grievances should be reconsidered at the Local's next regular meeting in September 2013.

- The motion was made by Angela Filipchuk and seconded by Jody Maumung.

- The Applicant asked that the vote be conducted by secret ballot.

- Mr. Burkart asked for a simple show-of-hands.

- The Motion for Reconsideration was done by show-of-hands and carried.

[43] The Applicant testified that Ms. Rhonda Aitken, a fellow Union member and the supervisor against whom the Applicant's harassment complaint had been made, attended this meeting and participated in the vote.

[44] Subsequent to this meeting, on June 26, 2013, the Applicant filed a fourth grievance. This grievance alleged harassment by the Employer because it had requested the Applicant to produce medical evidence for an absence. The grievance alleged that under the

collective agreement, the Employer can only demand such evidence when the "sick leave exceeds three (3) consecutive working days". Her absence at that time did not extend for that period.

[45] In July 2013, the Applicant began a medical stress leave. On July 3, 2014, she e-mailed Mr. Guillet to advise him that she as resigning as Chief Shop Steward immediately. She indicated in the e-mail that Mr. Guillet's "lack of support has lead me to believe that the union would be better served by someone who had your confidence".

[46] Mr. Guillet replied to the Applicant's e-mail on July 4. He expressed his regret that the Applicant had decided to resign. He denied that he had said he had no confidence in her but allowed that "Launa [MacDonald] and a few other staff advised me you had perhaps lost the confidence of fellow workers". Also in this e-mail he asked the Applicant if she wished to move the June 26th grievance forward, now that Mr. Corvyn Neufed had rejected it. The Applicant indicated in a reply e-mail that she did wish it to proceed and requested Mr. Guillet to move it to the next step of the grievance process.

[47] On August 26, 2013, in anticipation of the upcoming regular meeting of the Local on September 5, 2013, Mr. Guillet sent a letter to all Union members employed at Cornerstone Credit Unit. In that correspondence, he advised that the Applicant had recently resigned as Chief Shop Steward, and that after the Local meeting, a unit meeting for Credit Union staff only would be convened to, among other things, elect a replacement.

[48] To that letter was attached a Meeting Notice that itemized agenda topics. One of these topics was a "Vote on Notice of Motion to reconsider Cornerstone Credit Union Grievance Abritrations". The Applicant testified that in all her time as a Union member she have never seen such detail in a formal Notice. She stated that typically the Notice would only identify "General Local Union Business" without identifying its nature so as not to alert the Employer to what the Local was discussing at its meeting.

[49] The Minutes of the Local Meeting on September 5, 2013 were introduced into evidence. This document disclosed the following:

- The meeting was chaired by the Local's Vice-President, Vaxden Biletski.
- There were 54 Union members in attendance, 26 of those members were from Cornerstone Credit Union.

- Also in attendance were: Gary Burkart, the Union's Secretary-Treasurer; Rocky Luchginger, a Staff Representative from Saskatoon, and Paul Guillet, Administrative Co-ordinator in the Regina office and the designated representative for the Applicant;

- At the outset of the meeting, Mr. Burkart asked that the June Minutes be amended by removing the reference to his intervention at that meeting as "out-of-order". A motion to this effect was made and passed.

- The Applicant's three (3) grievances were put before the meeting and a vote was taken on each of them by secret ballot. The Applicant spoke to each of her grievances prior to the vote being taken.

- The motions to move each of the Applicant's grievances onto arbitration were defeated.

[50] The Applicant testified that she did speak to the merits of each of her grievances prior to the vote being taken. However, she indicated that Mr. Guillet did not speak to the grievances of their merits. Rather, he simply read the grievances with little, if any, elaboration.

[51] The evidence further disclosed that Ms. Rhonda Aitken attended this Local meeting and participated in the reconsideration votes.

[52] On September 9, 2013, the Applicant e-mailed Mr. Guillet. She opened her e-mail by thanking him for presenting her grievances to the membership the previous evening. She also advised him that she would be "appealing to the local executive, the decision that was made by the local membership in attendance last night, on the grounds of their duty to fairly represent me." The testified that upon looking into the issue of an appeal, she learned that there was no ability to appeal to the Local. Instead, she wanted to raise the issue with the Union. In order to pursue this avenue, she requested Mr. Guillet not to advise the Employer of the previous evening's proceedings.

[53] Mr. Guillet promptly replied to the Applicant that he could not do as she requested.

[54] On September 19, 2013, Mr. Guillet wrote to the Employer advising that the Union would not pursue the Applicant's first three (3) grievances. In his letter he expressly noted that the Applicant neither agreed nor supported the Union's decision. He also took the opportunity in

the letter to express the Union's opinion that when a member asks the Employer to conduct an "objective investigation" into harassment allegations, "it is unusual to conduct an investigation recommending discipline on the employee who requested it".

[55] Around the same time, the Applicant filed a formal complaint with the Occupational Health and Safety Division of the Saskatchewan Ministry of Labour Relations and Workplace Safety ("OH&S"). The evidence disclosed that:

- The complaint was commenced on July 12 2013;
- The complaint focused on alleged harassment in the workplace by not only her immediate supervisor but also representatives of the Employer;
- On September 17, 2013, the Occupational Health Officer who investigated the complaint issued her report and concluded that as the Employer had "met legislative requirements regarding complaints of harassment in the workplace", and dismissed it;
- On October 1, 2013, the Applicant appealed the decision of the Occupational Health Officer pursuant to then section 56.3 of *The Occupational Health & Safety Act, 1993*;
- On October 23, 2013, OH&S acknowledged receipt of the Applicant's appeal and advised that it would be referred to a special adjudicator;
- On February 13, 2014, Ms. Rusti-Ann Blanke, an OH&S Special Adjudicator communicated with the Applicant advising she would be in a position to convene an appeal hearing in April 2014;
- A hearing for this appeal was scheduled to take place in September 2014; however this appeal was withdrawn after the Minutes of Settlement discussed later in these Reasons for Decision were achieved and executed.

[56] The Applicant did seek the intervention of the Executive Board of the Saskatchewan Joint Board Retail, Wholesale and Department Store Union, in an attempt to over-turn what happened at the September 2013 Local meeting. The Minutes of a meeting of this body in Regina on October 3, and 4, 2013 were introduced into evidence. These Minutes disclosed:

- That the Applicant attended and is identified in the Minutes as an Executive Board Youth Member;

- That on October 4, 2013, the Applicant was provided with an opportunity to present her case to the Executive Board. At that point, Mr. Burkart left the meeting.

- She presented it in the form of an extended written narrative entitled “My Story”, in which she outlined not only the alleged harassment she experience at Cornerstone Credit Union but also the unusual procedural history of her grievances;

- A motion to appoint a Committee of the Present and three (3) Vice-Presidents “who will seek a legal opinion on whether or not the Sask. Joint Board has the authority to intervene in local matters", was moved and approved. This Committee would reported back it findings to the Executive, and

- Following this vote, Mr. Burkart was asked to rejoin the meeting.

[57] The Applicant testified that subsequently a legal opinion was received from the Union’s legal counsel advising that the Joint Board did not have the authority to intervene in decisions taken by one of its’ locals. She stated that this result left her with no options other than to file a duty of fair representation claim.

[58] At the Local’s regular monthly meeting on October 10, 2013, the Applicant attempted to bring her grievances forward to the membership. The Minutes of the October 10th meeting were entered into evidence and disclosed the following:

- There were 12 Local members present, including Mr. Gary Burkart, Mr. Paul Guillet and Ms. Rhonda Aitken.

- The bulk of the meeting was taken up by debating the Applicant’s grievances.

- The Applicant, having consulted Roberts Rules of Order, sought to have the membership vote on her five (5) grievances, two (2) dated April 5, 2013, and the others dated May 3, 2013; June 26, 2013, and August 16, 2013, respectively. The first three (3) grievances had been revisited at the September meeting. Her motion was seconded.

- Mr. Burkart opposed this motion stating that it was not appropriate to bring these grievances forward.

- Mr. Guillet suggested that a notice of the Applicant’s intention to reconsider the decision taken at the three (3) grievances

- A vote on the motion to move the Applicant’s fourth and fifth grievances dated June 26, 2013 and August 16, 2013 respectively to arbitration was held and passed.

- No further action was taken in respect of the Applicant's first three (3) grievances.

[59] Shortly after this meeting, things unraveled quickly for the Applicant. On November 4, 2013, she was terminated by her employer. That same day, the Applicant grieved her dismissal.

[60] As things stood on November 4, 2013, the Applicant had filed six (6) grievances. Three (3) grievances – two (2) dated April 5, 2013 and the other dated May 3, 2013 – had been defeated by the membership to move forward to arbitration. Nothing had come of the Applicant's attempt to have that action revisited.

[61] Of the remaining grievances, the Local membership at its October 10th meeting had approved the two (2) dated June 26, 2013 and August 16, 2013 moving on to arbitration. The final grievance dated November 4, 2013 which dealt with the Applicant's firing had yet to be considered by the membership.

[62] Over the ensuing months, progress was made respecting the last three (3) grievances. The Applicant testified that an arbitration hearing was scheduled to commence on September 14, 2014.

[63] However, prior to that time settlement discussions were on-going respecting not only these particular grievances but also the Applicant's OH&S appeal. On August 25, 2014, the Union's counsel, Ms. Ronni Nordal communicated with the Applicant by e-mail asking that she execute a formal release. This release stated that as part of the settlement of these various matters, the Applicant "acknowledges that the Union fulfilled its duty of fair representation to her with respect to the [last three (3)] Grievances and with respect to the negotiation and execution of the Minutes of Settlement".

[64] The Applicant testified that she declined to execute this formal release. She stated that she did not believe the Union had represented her fairly throughout the process. In spite of her refusal to execute this document, the Union was prepared to proceed with the settlement of the last three (3) grievances and the OH&S appeal without the comfort of a formal release.

[65] In her testimony, the Applicant explained her rationale for not signing the release as follows:

> *I believe that in the final settlement there was never anything discussed on dealing with workplace harassment and putting a stop to it. And in the settlement document, I believe that I could have gotten a lot more out of it having all of the grievances heard in there and not having them - - impacted it a bit.*[2]

[66] Subsequently, on or about September 5, 2014, the Applicant executed Minutes of Settlement which related to the three (3) grievances dated June 26, 2013; August 16, 2013, and November 4, 2013 as well as the OH&S appeal dated September 17, 2013. In return for abandoning those various processes, the Applicant was to receive "good and valuable consideration". Although any reference to the quantum of this consideration was redacted from the Minutes of Settlement introduced into evidence, the Applicant testified that she received financial compensation in the amount of $17,500.

[67] On October 9, 2014, the Applicant filed this duty of fair representation claim pursuant to section 6-59 of the *SEA*. She testified that the reason she delayed in commencing it was because she needed the Union's assistance in prosecuting the three (3) grievances that were proceeding to arbitration. She believed filing such a claim in respect of the first three (3) grievances that had been voted down could jeopardize her situation and she did not wish "to rock the boat by filing the DFR beforehand"[3].

[68] The Applicant also testified that she knew of Resolution #4 attached as part of the Local's By-laws. This Resolution adopted on May 1, 2003 reads as follows:

> *In cases where any member or nom-member [sic] in good standing with the Retail, Wholesale and Department Store Union Local 955 files and application with the Saskatchewan Labour Relations Board alleging the Union is in violation of Section 25(1) (Duty of Fair Representation) and subsequently the complainant member or non-member either withdraws his/her application of the Saskatchewan Labour Relations Board orders the complainant member or non-member's application be dismissed.*
>
> *Therefore, be it resolved that the Retail, Wholesale and Department Store union Local 955 shall have the right to recover its costs and all applicable legal fees from the complainant by whatever legal means that the law will allow and that the Retail, Wholesale and Department Store Union 955 has incurred in the defence of any Duty of Fair Representation (DFR) application that the Local union is required to defend in accordance with its legal rights.*

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[2] Record of Evidence, Volume I, at pp. 142-3.
[3] *Ibid*., at p. 143.

[69] At the hearing, the Applicant testified that after her termination she obtained employment in Regina with Sherwood Co-op as the supervisor of a gas bar and at present is the steward of that unit. As a consequence, she is not asking the Board to re-instate her or to order the first three (3) grievances proceed to arbitration. Instead, she seeks the following relief from this Board:

- A ruling that the Union did not fairly represent her in relation to those grievances,
- Reimbursement of her legal fees

[70] Under cross-examination by Ms. Nordal, the Applicant's testimony revealed the following:

- She spoke with Mr. Guillet in late February 2013 about treatment she was experiencing from her immediate supervisor, Ms. Rhonda Aitken. They discussed the possibility of filing a harassment complaint in accordance with the Employer's policies.
- She acknowledged that the first two (2) grievances both dated April 5, 2013 were written by Mr. Guillet in consultation with her and she was satisfied with the wording.
- A meeting with the Employer's representative respecting these grievances was held on April 26, 2013. The Applicant attended with Mr. Guillet and Mr. Shawn Fletcher, a new member of the Local's Grievance committee. At that meeting, Mr. Guillet presented the Union's position on those grievances. He expressed the Union's disapproval of the Employer issuing a verbal warning in a meeting intended to receive the report. He also urged the Employer to retain Mr. Ralph Ermel as an independent third party to investigate the Applicant's harassment allegations.
- The Applicant acknowledged that at that meeting the Employer expressed concern about the Applicant's absences from work and particularly that she appeared to be taking sick days before or after flex days and statutory holidays. She stated that she did not think there was such a pattern of absences.
- Following this meeting, Mr. Corvyn Neufeld on behalf of the Employer issued a formal written warning to the Applicant on April 29, 2013.
- The Applicant e-mailed Mr. Guillet upon receipt of Mr. Neufeld's letter. Mr. Guillet drafted the text of another grievance which the Applicant reproduced as the text of the third grievance dated May 3, 2013. The remedy sought was removal of the formal written warning from her employment record.
- On May 17, 2013, the Applicant received a letter from Ms. Naomi Kluk, the Employer's representative advising that it would not withdraw its verbal or written warning and would continue to monitor the Applicant's performance.
- On May 23, 2013, Mr. Guillet wrote to Mr. Kevin Lukey, the Employer's CEO advising the Union wanted to have a meeting with him respecting

the Applicant's grievances. This request invoked Step 3 of the grievance procedure set out in Article17 of the Collective Bargaining Agreement.

- On May 29, 2013, this meeting took place. The Applicant acknowledged that Mr. Guillet spoke about the Union's positions on the grievances. Mr. Lukey listened but, ultimately, the Employer disagreed with the Union. He did state that he felt the giving of a verbal warning to the Applicant at the April 26th meeting was not appropriate.
- On June 7, 2013, Mr. Lukey on behalf of the Employer formally communicated in writing with Mr. Guillet about the May 29th meeting. This correspondence reiterated the discussion that took place at that time and the Employer's formal rejection of the Applicant's claims made in those grievances.
- On June 14, 2013, Mr. Guillet wrote to Mr. Neufeld advising that in the Union's view, Mr. Lukey's response is unsatisfactory and that the Applicant's three (3) grievances would be dealt with at the Local's next meeting schedules for September 5, 2013. Mr. Guillet also indicated that the Union no longer supported Mr. Ermel as an acceptable independent investigator for the Applicant's harassment complaints.

- The Applicant reiterated her testimony in examination-in-chief that at the Local's September 5th meeting, Mr. Guillet read the grievances at the meeting and spoke only briefly about them. She agreed that she did have the opportunity to speak to the grievances and answered the very few questions asked by members.

- At that meeting, the membership voted by secret ballot and decided that none of the grievances should proceed to arbitration, in spite of the previous decision at the May 2013 meeting to have the April 5th grievances proceed to arbitration.

- The Applicant acknowledged that she did not seek to have her first three (3) grievances revisited at the Local's meeting on November 7, 2013.

- The Applicant acknowledged that at least since she became a Local member in 2005, there existed a long-standing practice that votes were held on grievances, and she was comfortable with that practice.

- The Applicant acknowledged that on April 11, 2013, Mr. Guillet moved her grievances dated April 5, 2013 on to Step 2 of the Grievance Process as she had requested.

- The Applicant had retained Mr. Larry Kowalchuk as her legal counsel for purposes of the OH&S Appeal.

- The settlement of that appeal and the final three (3) grievances were initially negotiated between Mr. Larry Seiferling, Q.C., the Employer's lawyer and Mr. Kowalchuk. Only after a general agreement was arrived at was the Union notified of this agreement and became involved.

[71] On re-examination by Mr. Clemens, the Applicant testified as follows:

- The Local's Grievance Committee did not have any power to decide which grievances went on to arbitration. The Committee was in place to try to facilitate a settlement with the Employer respecting a particular grievance.

- The Local's Grievance Committee did not function as an appeal body respecting grievances that were not approved by the membership to proceed to arbitration.

- At the Local meeting held on September 5, 2013 when the reconsideration motion was debated, Mr. Guillet did not provide any written material or legal opinion respecting the merits of the grievances being considered.

- The Applicant attended the Local meeting held on January 9, 2014. There were 12 members at that meeting. Ms. Aiken did not attend. There was no discussion at that meeting about the Applicant's first three (3) grievances.

- The Applicant attended the Local meeting held on February 23, 2014. Ten (10) members of the Local attended this matter. Ms. Aiken was not one (1) of them.

- The Applicant attended the Local meeting held on March 23, 2014. She was the only person from Cornerstone Credit Union who attended this meeting.

2. Testimony of Mark Hollyoak

[72] Mr. Hollyoak joined the Union member in 1986 and became a Union staff representative on April 17, 1989, serving in that position until he left on December 2, 2013. At the time of his testimony, he was also the Applicant's spouse.

[73] In Examination-in-Chief, Mr. Hollyoak's testified as follows:

- He had served as staff representative for Local 568 which was the Union's largest local having between 1200 and 1300 members on a regular basis.

- He occasionally attended meetings of Local 955. This was a much smaller local having on average approximately 600 members.

- He described the grievance process followed by Local 955:

    - Grievances were presented at a regular meeting;

- Members present would vote on whether the grievance should proceed to arbitration;

- Decision to move grievance forward was left to majority of members present at the meeting;

- No appeal from decision of majority of members.

- The Grievance Process followed by Local 568 was somewhat different:

  - Members present at a local meeting would vote on whether the grievance should proceed to arbitration;

  - Decision was by a majority vote;

  - If grievance was rejected, the grievor could take appeal to the local executive following the meeting. Local 568 set up an appeal process because some grievances quite contentious and the vote rejecting it may not have been impartial.

  - It was rare that a grievance would be voted down. In 25 years, only three (3) grievances would have been rejected by the membership.

- Most unions have a vetting process for members' grievances that is removed from the membership. He cited SGEU as an example which has ten (10) pages of its policies devoted to grievances.

- If the Applicant had been a member of Local 568 her grievance would not have gone to the membership from Cornerstone Credit Union in light of their vested interests in its outcome.

[74] Under cross-examination by Ms. Nordal, Mr. Hollyoak testified as follows:

- He acknowledged that there was nothing in either the By-laws or policies of Local 568 respecting the grievance process.

- He believed that in certain cases where the membership could be perceived as unfair to a grievor, the Executive could convene a separate meeting to consider the grievance and make a recommendation on how to proceed to the membership.

3. <u>Testimony of Mr. Paul Guillet</u>

[75] Mr. Paul Guillet is employed by the Union as a staff representative, a position he has held since 1981. He was assigned responsibility for Union members in Local 955, including those employed at Cornerstone Credit Union in Yorkton that same year. At the time of his

testimony, he was temporarily acting as the Union's Administrative Co-ordinator while the Union searched for a full-time Secretary-Treasurer.

[76] In his Examination-in-Chief, respecting the Union's general approach to grievances, Mr. Guillet testified as follows:

- As a staff representative has filed hundreds of grievances over the years. Of these approximately 1 or 2 end up at arbitration. Many grievances are settled and the rest are withdrawn.

- He never withdrew a grievance unilaterally. He always obtained the permission of the grievor to do so.

- He indicated that he often utilized the mediation process provided by the Ministry of Labour Relations and Workplace Safety. Many of his colleagues did not do so.

- Referring to Article 17.03 of the Collective Agreement, he stated it was his practice to write the text of the grievance, himself.

- At the Step 1 meeting with the Employer, a shop steward would attend with the grievor. If the shop steward is not able to attend, a witness should accompany the grievor. A grievor should never attend a grievance meeting alone.

- The Step 2 meeting in this case took place with the Vice-President of Human Resources, Mr. Corwyn Neufeld. A steward or a member of the grievance committee would attend this meeting with grievor. The purpose of the grievance process is to attempt to bargain a settlement to the grievance. Occasionally, a grievance can be settled at Step 2.

- The Step 3 meeting with the CEO of Cornerstone Credit Union is important because it is at this stage of the process that the grievance may be settled since the CEO has the authority to "fix things".

- He always waits for the CEO's final written response following the meeting before he would consider moving a matter forward to arbitration.

- After a response is received after a Step 3 meeting, a decision may be made not to proceed to arbitration; however, that decision is always made in consultation with the grievor.

- He acknowledged that not a lot of grievances were filed out of Cornerstone Credit Union.

- If it is a termination grievance, he will push it as far as it can go.

- He did not know of any appeal mechanism for a grievor. Furthermore, he didn't anything about the kind of appeal mechanism referred to by Mr. Hollyoak.

[77] Respecting the grievances filed on behalf of the Applicant, Mr. Guillet testified as follows:

- He first met her in 2005 and worked with her after that as she served on the Local's Executive.

- In 2013, the Applicant began to contact her about Rhonda Aiken, her supervisor. The Applicant was upset that Ms. Aiken did not support her receiving a bonus from her employer in March 2013.

- The Applicant also complained that Ms. Aitken had called her when she was on sick leave and demanded a medical note. The Applicant had only been sick for one (1) day and the Collective Agreement only requires an employee to present a "sick note" after three (3) consecutive days of absence.

- He advised her to take this matter up with Mr. Corvyn Neufeld and have him start an investigation.

- Subsequently, he was copied on an e-mail from Mr. Neufeld addressed to the Applicant advising her that she would not be granted any leave for union business as she was on sick leave. He was starting to become concerned about the Employer's conduct towards the Applicant.

- On March 11, 2013, Mr. Neufeld met with the Applicant to discuss her allegations of harassment by her supervisor. Mr. Neufeld investigated the allegations.

- On or about March 27, 2013, Mr. Neufeld met with the Applicant, Mr. Guillet and Shawn Fletcher. At that meeting he revealed the fruits of his investigation. Mr. Neufeld concluded that there was no substance to the Applicant's allegations of harassment and issued a verbal warning to her, the first step in the progressive discipline process.

- Mr. Guillet lost his temper with Mr. Neufeld saying that issuing a verbal warning to an employee who made a harassment complaint set a bad precedent in the workplace.

- After the meeting, he discussed with the Applicant the advisability of filing a grievance. He prepared the text for such a grievance.

- On April 5, 2013, the Applicant filed a formal grievance against the verbal warning.

- On April 8, 2013, the Applicant received a formal letter from the Employer rejecting the grievance.

- On April 26, 2013, Mr. Guillet along with the Applicant and Shawn Fletcher met with Mr. Neufeld to discuss the grievance. Mr. Guillet had hoped to persuade the Employer to retain a third party investigator. However, following this meeting, Mr. Neufeld issued a formal recorded to the Applicant for the reason that her improper behavior in the workplace. Mr. Guillet referred to this as the Step 2 response for the Employer.

- On or about May 3, 2013, the Applicant informed Mr. Guillet that at its regular May meeting, the Local had voted to move her three (3) grievances on to arbitration. He was surprised and angry about this development as they had not all moved beyond the Step 3 Grievance Process.

- Shortly after receiving this news, Ms. Aitken called him to say she had heard the grievances had been voted on at the May meeting.

- On May 29, 2013, Mr. Guillet and the Applicant met with Mr. Kevin Luckey, the manager of Cornerstone Credit Union and Mr. Neufeld representing the Employer. This meeting qualified as Step 3 of the Grievance Process. At that meeting, Mr. Luckey listened to the Union's concerns. At that meeting, Mr. Guillet expressed his view that the Employer has "a ruptured harassment investigation process", exemplified by the fact the first employee to utilize it, now faced a disciplinary sanction.

- Prior to the Local's June meeting there was a lot of discussion among the employees at Cornerstone Credit Union about the Applicant's grievances. He testified that Mr. Burkart told him that they wanted to stop those grievances in their tracks. Mr. Guillet indicated that Mr. Burkart advised those members that a proper procedure had to be followed, i.e. a motion to reconsider would have to be initiated and, depending on the result of that vote, the grievances could then be revisited.

- Mr. Guillet did not attend the June 5, 2015 Local meeting. He stated that he believed the only issue would be whether there should be a reconsideration vote which, if successful, would be taken later in the year. As the substance of the grievances would not be discussed, he believed the Applicant was more than capable to speak for herself.

- Mr. Guillet attending the September 5, 2013 Local meeting. He spoke briefly about the Applicant's grievances. His opinion was that the agitation about having those grievances reconsidered came from Cornerstone Credit Union employees and not Ms. Aitken. He took no position respecting the reconsideration motion but personally supported the decision to move the grievances on to arbitration.

- The next day, the Applicant contacted him and requested that he hold off advising the Employer that the Union would not pursue her grievances. He advised her that he could not do that. She also thanked him for his efforts on her behalf.

- On September 19, 2013, he wrote to Mr. Corvyn Neufeld as representative of the Employer, advising him that the Union would not pursue the Applicant's first three (3) grievances to arbitration. In that letter, he also advised Mr. Neufeld that the Applicant neither agreed with nor supported this decision. Mr. Guillet testified that he included this so that if the letter was used in a subsequent matter, it would be clear that the Applicant had objected to the Union's decision.

- Mr. Guillet advised that he attended the January 9, 2014 Local Meeting to present the Applicant's termination grievances to the membership. At that meeting, he spoke about the grievance and the membership voted to move these grievances on to arbitration.

- He stated that if there was no business involving Cornerstone Credit Union to be discussed at Local meeting, it was unlikely that he would attend.

- He testified that he was not involved in the final settlement with the Applicant on the termination grievances and O.H.& S. complaint.

[78] On cross-examination by Mr. Clemens, counsel for the Applicant, Mr. Guillet testified:

- He acknowledged that the Union's By-laws, Constitution and the Local's Policies were the only documents which related to union governance.

- The Local has a grievance committee but there is no written policy document. It has no independent ability to drop a grievance. Neither does it have any ability to hear an appeal from an aggrieved member whose grievances had been voted down. He disagreed with Mr. Hollyoak's testimony that the Union had a mechanism whereby members could seek review in such circumstances.

- He acknowledged that in the Local the normal course is have members vote on whether a grievance should proceed to arbitration.

- He indicated that he agreed with Mr. Hollyoak's testimony that it was extremely rare for a grievance to be voted down by the membership. He accepted Mr. Hollyoak's assessment that may 2 or 3 grievances had been voted down in the past 25 years.

- He testified that he would personally assess the merits of a grievance that was going to the membership for a vote. However, it was the Union's practice not to obtain a legal opinion prior to the vote being taken.

- He did concede on a rare occasion, he had consulted a lawyer about a grievance. That was when the Union had in-house counsel.

- He testified that he had never before seen an employer verbally reprimand an employee for exercising her right. He expressed the view that he thought the treatment of the Applicant was “unfair”. However, he disagreed that it was important to get an arbitrator’s ruling on the fairness of what transpired in order to curb this type of behavior.

- He testified that prior to this case he had never heard of a membership driven motion to reconsider the approval of grievances. It had never occurred before in any of the units for which he was responsible.

- He testified that he had known Rhonda Aitken since 1981 when he became the service representative for Local 955. He indicated that he knew her and considered her to be a friend but this would not influence how he represented the Applicant. He acknowledged that an independent investigation into the Applicant’s harassment complaint had the potential to make Ms. Aitken “look bad”.

- He testified that the attendance at both the June 2013 and the September 2013 Local meetings was extremely and unusually high. He conceded that it had crossed his mind there must be a reason for it.

- At the September 2013 meeting, Mr. Guillet presented each of the three (3) grievances. He disputed the Applicant’s testimony that she did the “lion’s share of the talking”. He focused more on the harassment grievance than the grievances pertaining to the verbal and written warnings. In Mr. Guillet’s opinion, after these presentations, the membership had sufficient information to make a decision about the grievances.

- Mr. Guillet testified that of the 54 Local members in attendance at the September 2013 meeting, 36 were from Cornerstone Credit Union. He stated that this was the highest turnout from that unit at a local meeting ever. He acknowledged there appeared to be “a lot of animosity” towards the Applicant.

- Following the September meeting, he wrote to the Employer to advise that the Union would not pursue the Applicant’s grievances. He did this because he knew there was no ability for her to appeal to the Union’s Joint Board.

- Mr. Guillet testified that the Union was not involved in negotiating the Applicant’s settlement with her Employer. He did not accept that a higher financial award would have been arrived at had there been more grievances “on the table”.

- Mr. Guillet acknowledged the inclusion of Resolution #4 in the Local’s By-laws but indicated that it had never been invoked to his knowledge. He stated as well that the Union has never paid a successful grievor’s legal costs and “never will”.

[79] Counsel for the Union, Ms. Nordal briefly re-examined Mr. Guillet.

ISSUES

[80] This case presents the following three (3), issues for decision:

- Should the Applicant's application be dismissed because of her unreasonable delay in commencing it? [The "Timeliness Issue"]
- 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"]

THE TIMELINESS ISSUE

A. Factual Background

[81] As already stated, the Applicant did not initiate her application under section 6-59 of the *SEA* until October 4, 2014. This was approximately one (1) year after the alleged failure of the Union to represent the Applicant fairly in respect of the first three (3) grievances crystallized.

[82] The Union asserts that this matter should be dismissed on the basis of delay, either under subsection 6-111(3) of the *SEA* or the common law doctrine of abuse of process. The Applicant disputes the Union's arguments asserting that she had no choice but to hold off commencing it because she needed the Union's assistance to prosecute the remaining three (3) grievances on her behalf.

[83] There is no disagreement about the chronology of events culminating in the Applicant's duty of fair representation claim under section 6-59 of the *SEA*. The following chart summarizes the dates and events most relevant to the Timeliness Issue on this application.

June 2, 2013	Motion approved to reconsider vote taken in May to move Applicant's grievances forward to arbitration. The motion would be voted on in September.
September 5, 2013	Motion to reconsider was passed. Votes on the Applicant's first three (3) grievances were conducted by secret ballot. All grievances were rejected by majority of members voting at this meeting.
September 9, 2013	Applicant requested Mr. Guillet not to advise the Employer of the results of the votes taken on September 5. She wanted to present her case to the Union's Joint Board Executive in October, 2013, and seek its intervention.

September 19, 2013	Applicant filed an appeal from Occupational Health & Safety Officer's report dated September 17, 2013 dismissing her complaint filed with the Ministry of Labour Relations and Workplace Safety alleging harassment by the Employer.
October 4, 2013	Applicant presented "My Story" to the Executive of the Union's Joint Board. The Executive determined that it would seek legal advice to determine whether it had the power to intervene in a decision taken by a Local.
October 10, 2013	At a regular Local meeting, the Applicant attempted to have the membership revisit her five (5) grievances revisited. The two (2) most recent grievances were approved to move to arbitration. No action was taken respecting the others.
November 4, 2013	The Applicant was terminated by the Employer, Cornerstone Credit Union. The Union grieved her termination.
February 13, 2104	Letter from OH&S adjudicator acknowledging appeal and attempting to schedule an appeal hearing.
September 5, 2014	Minutes of Settlement respecting last three (3) grievances and OH&S appeal executed.
October 9, 2014	The Applicant filed her application against the Union under section 6-59 of the *SEA*
March 26, 2015	The Union commenced a summary dismissal application seeking to have the Applicant's dismissed on the basis of undue delay.
June 2, 2015	The Board *in camera* dismisses the Union's application for summary dismissal: LRB File No. 061-15

B. Relevant Statutory Provisions

[84] The Union submits that the Timeliness Issue raised in this matter engages subsections 6-111(3) and (4) of the *SEA*. These provisions read as follows:

> ***6-111(3)*** *Subject to subsection (4), the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew or, in the opinion of the board, ought to have known of the action or circumstances giving rise to the allegation.*
>
> ***6-111(4)*** *The board shall hear any allegation of an unfair labour practice that is made after the deadline mentioned in subsection (3) if the respondent has consented in writing to waive or extend the deadline.*

[85] The Board considered these sections for the first time in *Saskatchewan Polytechnic Faculty Association v Saskatchewan Polytechnic*, LRB File No. 229-15, 2016 CanLII 58881 (SK LRB). At paragraphs 14 and 17, the Board stated:

> ***[14]*** *For all intents and purposes subsections 6-111(3) and (4) of the SEA are identical to section 12.1 of The Trade Union Act, R.S.S. 1978, c. T-17 (the "TUA"). The Saskatchewan Legislature enacted section 12.1 only in 2008. In light of the provision's recent vintage, there is little case law from this Board considering it. To date, the leading cases are: Saskatchewan Government and General Employee's Union v The Government of Saskatchewan; Dishaw v Canadian Office & Professional employees Union Local 397, and Peterson v Canadian Union of Public Employees, Local 1976-01 and University of Regina. Neither Dishaw nor Peterson dealt directly with the application of section 12. 1 of the TUA as those cases involved duty of fair representation claim and not unfair labour practice*

> *applications. Nevertheless, in those Decisions the Board made statements of general principle regarding undue delay in commencing labour relations application which were quoted with approval in SGEU, the only decision of the Board section 12.1. [Citations omitted.]*
>
> ***. . . . . .***
>
> ***[17]*** *This case presents the Board with its first opportunity to interpret and to apply subsections 6-111(3) and (4) of the SEA. To begin, the text of these provisions deviates only slightly and inconsequentially from the text of section 12.1 of the TUA. As this is no discernible substantive difference between these various provisions, we conclude that the principles announced in these cases are equally relevant under the SEA.*

C. Analysis of Relevant Case Law

[86] At the outset of its argument, the Union asserted that subsection 6-111(3) should apply in these circumstances and that because the Applicant failed to initiate her application under section 6-59 of the *SEA* within the statutorily mandated 90 day limitation period, it must be dismissed as being out of time. This argument raises the threshold question of whether subsections 6-111(3) and (4) even apply to this matter.

1. Do Subsections 6-111(3) and (4) Apply to This Matter?

[87] This question can be resolved by applying the modern rule of statutory interpretation which "entails discerning [the Legislature's] intent by examining the words of a statute in their entire context and in their grammatical and ordinary sense, in harmony with the statute's schemes and objects": *Krayzel Corporation v Equitable Trust Co.*, 2016 SCC 18, at paragraph 15 (citations omitted) *per* Brown J. Indeed, in recent months, the Board has considered this very question and concluded that the answer is "no".

[88] In *United Steelworkers, Local 7656 v Mosaic Potash Colonsay ULC*, LRB File Nos. 132-16 & 146-16; 2016 CanLII 79631 (SK LRB) ["*Mosaic Potash*"], for example, the Board stayed an unfair labour practice application which had been initiated almost one (1) year after the events giving rise to the alleged unfair labour practice occurred. In the course of its Decision the Board referenced the provision of Alberta's labour relations statute that was similar in effect to subsections 6-111(3) and (4) of the *SEA*. Section 16(2) of the *Labour Relations Code*, RSA 2000, c L-1 provided as follows:

> ***16(2)*** *The Board may refuse to accept any complaint that is made more than 90 days after the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.*

[89] The Board highlighted the principal difference between section 16(2) of the Alberta statute and subsection 6-111(3) of the *SEA*. At paragraph 14, the Board stated:

> ***[14]*** *It should be noted that unlike section 16(2) of Alberta's Labour Relations Code which imposes a 90 day deadline for the commencement of all applications brought pursuant to that statute, and on which subsections 6-111(3) and (4) of the SEA appear to be modelled, those subsections are confined only to unfair labour practice applications. Indeed the SEA did not lay down stringent timelines for commencing any other applications under Part VI. From this, it is apparent the Legislature determined that as unfair labour practice applications typically emerge when serious industrial relations strife exists in a particular workplace, such applications should be commenced with reasonable dispatch. Plainly in the Legislature's view, unfair labour practice applications are a discrete class of applications and need to be initiated and prosecuted without undue or unwarranted delay. [Emphasis added.]*

[90] This passage is technically *obiter dicta*; however, it represents the considered view of the Board that on the face of the legislation, the 90 day statutory limitation period set out in subsection 6-111(3) applies only to unfair labour practice applications.

[91] The question was squarely raised in *Coppins v United Steelworkers, Local 7689*, LRB File No. 085-16, 284 CLRBR 30, 2016 CanLII 79633 (SK LRB) ["*Coppins*"], a claim brought by the Applicant pursuant to section 6-59 of the *SEA* alleging that his union did not represent him fairly or adequately in his dispute with his employer. At the outset of the hearing, the Employer raised a jurisdictional issue. It argued that because the Applicant waited approximately five (5) months to commence his application from the date the alleged unfair labour practice occurred, he failed to comply with the 90 day time line and, as a result, the Board lacked jurisdiction to adjudicate it. Chairperson Love rejected the Employer's argument. He stated at paragraphs 19 – 22:

> ***[19]*** *[S]ection 6-111(3) deals specifically with unfair labour practices. While it may be said that the duty of fair representation initially was processed by this Board as a form of unfair labour practice prior to the inclusion of the statutory duty within the legislation, its genesis is the decision of the Supreme Court of Canada in Canadian Merchant Guild v Gagnon [[1984] 1 SCR 509].*
>
> ***[20]*** *At the time of the Supreme Court decision there was no statutory duty of fair representation as there is now in the SEA and which was inserted into The Trade Union Act [RSS 1978, c T-17] following the Supreme Court decision in Gagnon. In that decision, the Court determined that duty arose out of an equitable duty owed to members by their collective bargaining representative to represent them in a fair manner as a trade-off for their ability to exclusively represent those employees, not as an unfair labour practice.*
>
> ***[21]*** *If the legislature had wanted to preclude applications under the duty of fair representation provisions of the SEA being filed outside of a ninety (90) day*

> *window, section 6-111(3) it would have included a specific reference to those provisions. It did not. As such, the interdiction provided for filing of unfair labour practice applications outside of that ninety (90) day window cannot, in my opinion, be extended to include duty of fair representation applications.*
>
> ***[22]*** *Duty of Fair Representation complaints are filed under Division 11 of the SEA and Unfair Labour Practice complaints are filed under Division 12 of the SEA. There is a clear demonstration of the unique nature of each of these complaints. [Emphasis added.]*

[92] It is now settled that the statutory limitation period set down in subsection 6-111(3) of the *SEA* respecting unfair labour practice applications does not apply to any other claim brought under Part VI, most especially duty of fair representation complaints. As a result, the next question is what considerations are to be applied when addressing arguments of undue delay respecting the initiation of applications under section 6-59. This question will be considered in the next part.

2. Relevant Principles for Analyzing Undue Delay Arguments Under Section 6-59

2.1 Introduction

[93] Long before the proclamation of section 12.1 of the *TUA*, the Board considered whether duty of fair representation claims brought many months after the alleged events giving rise to them, ought to be stayed for undue delay. The Union relies principally upon two (2) more recent, post-section 12.1 Decisions, namely: *Dishaw v Canadian Office & Professional Employees Union, Local 397*, LRB File No. 164-08, 2009 CanLII 507 (SK LRB) ["*Dishaw*"], and *Peterson v Canadian Union of Public Employees, Local 1975-01 and University of Regina*, LRB File No. 156-08, 2009 CanLII 13052 (SK LRB) ["*Peterson*"].

[94] The Applicant, too, relies on these authorities and, in addition, refers to *Leedahl v United Food and Commercial Workers International Union, Local 248-P and Mitchell's Gourmet Foods Inc.*, LRB File Nos. 030-03 &031-03, 2003 CanLII 62856 (SK LRB) ["*Leedahl*"].

[95] In order to place these particular authorities in context, it is useful to review the Board's previous jurisprudence on the question of undue delay generally as well as in the context of duty of fair representation claims.

2.2 Survey of Undue Delay Jurisprudence

[96] One of the earliest decisions to address the issue of delay generally is *Saskatchewan Union of Nurses v South Central District Health Board*, LRB File No. 016-95, [1995] 2nd Quarter, Saskatchewan Labour Report, 281 ["*SUN*"]. A preliminary issue raised in this matter was the approximately 18 month delay in commencing an unfair labour practice application under the former *TUA*. Ultimately, the Board determined that the dispute should be referred to the grievance arbitration process. However, prior to arriving at this conclusion the Board assessed the Employer's preliminary assertion that the application should be dismissed for reasons of undue delay.

[97] On the question of delay, the Board said this at pages 284 – 286:

> *In McKenly Daley v Amalgamated Transit Union and Corporation of the City of Mississauga, [1982] O.L.R.B. Rep. Mar. 420, the Ontario Labour Relations Board commented on some of the factors which may be relevant in considering whether a delay in initiation or pursuing proceedings is excessive:*
>
> > *22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. <u>But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years</u>.*
>
> *Counsel for the Union referred us to Carey v Twohig, [1973] 4 W.W.R. 378, in which Bayda J. (as he then was) outlined the relevant factors for determining whether excessive delay should be a reason for dismissing an action. He referred to the three criteria set out by Salmon L.J. in Allen v Sir Alfred McAlpine & Sons Ltd., [1968] 2 Q.B. 229: that the delay be inordinate; that the inordinate delay be inexcusable; and that the defendant be seriously prejudiced by the delay.*
>
> *Bayda J. went to suggest that the essential test can be posed as follows: can justice be done despite the delay?*
>
> *<u>The questions of delay has a somewhat different resonance in the context of labour relations than in that of civil legal proceedings As the Ontario Labour</u>*

> *Relations pointed out in the City of Mississauga case, supra, time is of the essence in labour relations in a dramatic and often urgent way. The basic questions – and particularly the question of whether justice can still be done – are much the same, however,*
>
> *The Board has not had many occasions to consider the impact of delay on the ability of the parties to bring a question before us, and such cases as there are in which this has been an issue show that the Board has emphasized the specific circumstances of each case.*
>
> *Counsel for the Employer focused on the prejudice which would result to her client if this application were to be considered by the Board. She pointed out that the marshalling of evidence might be difficult, that the Employer has been operating on the premise that the collective agreement which was concluded to take effect on April 1, 1003, and that the employer has also been assuming that the matter would be settled by the upcoming arbitration hearing.*
>
> *We have concluded that none of these factors constitute sufficient prejudice to the Employer that we should refuse to hear the application in the event there are any issues which remain undecided by the arbitrator. The Employer may well have been operating within the framework of the collective agreement, which was negotiated after the Letter of Understanding was signed, but had the retroactive effect from a date predating that document. The difference of opinion concerning the significance of the Letter of Understanding, and its relation to the collective agreement, has however, been clear from a date which was close in time both to the signing of the Letter of Understanding and the negotiation of the collective agreement. It cannot be said that the Employer has been at all taken by surprise by the allegations made in this application. [Emphasis added.]*

[98] In *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting industry of the United States and Canada v Refrigeration Installations and National Automobile, Aerospace and Agricultural Implement Workers of Canada*, LRB File No. 057-94, the Board dismissed an application for reconsideration of a prior decision for reasons of undue delay. The Board stated:

> *Labour relations boards are intended to be a means of providing a swift response to issues arising between parties to collective bargaining relationships, and the issue of delay has a particular resonance in this context. In Journal Publishing Co. of Ottawa Ltd. v. Ottawa Newspaper Guild (unreported, March 31, 1977), the Ontario Court of Appeal, per Estey J. said that "the overriding principle invariably applied is that labour relations delayed are labour relations defeated and denied."*
>
> *. . . . .*
>
> *This does not mean that there is a scientific way of answering the question of how much delay is too much.....*
>
> *A review of the jurisprudence of this Board will reveal [an] "unmechanical" approach to the question of delay. In some cases, notably Construction Workers and General Workers v Revelstoke Companies, LRB File No. 137-85, the Board suggested that a delay of several months might be excessive, while in Saskatchewan Joint Board Retail, Wholesale and Department Store Union v L &*

> *S Equipment, LRB File No. 110-77, the Board held that a delay of six and one half years would not prevent the determination of monetary loss.*
>
> *Among the factors which must be considered is the prejudice to parties other than the applicant for reconsideration, as well as the reasons which the applicant has for the delay. [Emphasis added.]*

[99] Many of the factors identified, and the approach endorsed, by the Board in cases such as *SUN*, *supra*, for assessing allegations of undue delay subsequently migrated to duty of fair representation claims. One of the first cases to apply those factors to such matters was *Kinaschuk v Saskatchewan Insurance Office and Professional Employees' Union, Local 397 and Saskatchewan Government Insuranc*e, LRB File No. 366-97, [1998] Sask. L.R.B.R. 528 ["*Kinaschuk*"]. The Applicant waited almost three (3) years after his union's alleged failure to fairly represent him in a discharge grievance to bring an application under section 25.1 of the *TUA*. The Board citing *SUN*, *supra*, and, in particular, its formulation of the applicable standard, namely "whether justice can still be done", ruled that the application must be dismissed on the basis of undue delay.

[100] The Board explained at pages 10, 11 and 12 as follows:

> *One of the most important factors that affects the ability to do justice despite the delay is whether the respondent union would be seriously prejudiced in its prosecution of the grievance as a result of the delay. The [Ontario Labour Relations Board] has determined in several of its decisions that where there is extreme delay, prejudice is inherent to the party that is unaware that its conduct will be called into question, and it is not necessary for that party to establish specific prejudice. In such a situation, absent a credible and reasonable explanation for the delay, the board will decline to inquire into the complaint[.]*
>
> *The effect of this view is to shift the onus with respect to prejudice to the applicant in cases where the delay is extreme; that is, there is a rebuttable presumption that there is prejudice to the responding parties and the onus is on the applicant to not only provide a credible explanation for the delay, but also to prove that there is no material prejudice to the respondents.*
>
> *. . . . . .*
>
> *We also accept that excessive delay is inherently corrosive to the memory of witnesses, and that cases, which are fact-driven are particularly vulnerable in this regard. But what is excessive or "extreme" delay? In [Evelyn Brody v East York Health Unit, [1997] O.L.R.D. No. 152], the Ontario Board's opinion was as follows at 19:*
>
> > *In determining whether the delay in a particular case is unreasonable or excessive, the Board will consider, among other things, such matters as the length of the delay, and the reasons for it , the time at which the applicant became aware of the alleged statutory violation, whether the remedy claimed would have a disruptive impact upon a pattern of*

> *relations developed since the alleged contravention and whether the claim is such that fading recollection unavailability of witnesses, and the deterioration of evidence would hamper a fair hearing in the dispute. It is generally accepted that the scale of delay that the Board would find acceptable is to be measured in months rather than years…However, there is no specified limit with respect to delay, and the Board will consider the circumstances in each case to determine whether the delay is undue.*

We are in complete agreement with this statement. [Citations omitted.]

[101] The next case of note is *Nistor v United Steelworkers of America*, LRB File No. 112-02, [2003] Sask. L.R.B.R. 15 ["*Nistor*"]. This, too, was a duty of fair representation claim based upon allegations that the Applicant's union failed to represent him properly in a grievance proceeding. The application was commenced approximately "16 months after the imposition of the discipline and almost eight months after the arbitration award was issued": *Nistor*, *supra*, at paragraph 12.

[102] Relying upon *Kinaschuk*, *supra*, the Board concluded that this delay resulted in significant prejudice to the Union, pointing to the fact that the Applicant's employment had been terminated and in the event that his application under section 25.1 of the *TUA* succeeded, the only possible remedy was a damage award against the union. Former Chairperson Gray concluded at paragraph 20 that permitting the application to proceed would work an injustice because:

> *[T]he Applicant was aware that the Union had not referred the suspension grievance to arbitration prior to the termination of his employment and the subsequent arbitration of his termination grievance. He did not explain to the Board why he did not pursue an application under s. 25.1 at some point between the Step 3 meeting on January 23, 2001 and July 1, 2001, the date of the culminating incident. The Applicant is an experienced union member and had the knowledge and ability to bring an application to the Board in a timely fashion. [Emphasis added.]*

[103] Chronologically, the next case to be discussed is *Leedahl v United Food and Commercial Workers International Union, Local 248-P*, LRB File No. 031-03 & 031-03, 2003 CanLII 62856 (SK LRB) ["*Leedahl*"] – an authority relied upon by the Applicant. In *Leedahl*, the applicant alleged that her union did not adequately represent her in a grievance arbitration. However, she commenced her duty of fair representation claim eleven (11) months after she had refused her employer's final settlement offer negotiated on her behalf by the union.

[104] The Board dismissed the union's preliminary application based on undue delay. It offered little in the way of analysis, however. The Board applied the test of whether justice could still be done in these circumstances and offered two (2) reasons for why it could. First, part of the blame for the lengthy delay lay at the feet of the applicant's counsel. The Board accepted counsel's argument that to dismiss the application would punish the applicant for his tardiness in commencing the application. Second, the nature of the remedy sought by the applicant – namely a damage award against the union – minimized any prejudice that the union may have suffered as a consequence of the approximately one (1) year delay in commencing the application.[4]

[105] The following four (4) remaining authorities discussed here all post-date the addition of section 12.1 to the *TUA* in 2008. In chronological order, these authorities are: *Dishaw*, *supra*; *Peterson*, *supra*; *Prebushewski v Canadian Union of Public Employees, Local No. 4777 and Prince Albert Parkland Health Region*, LRB File No. 108-09, 2010 CanLII 20515 (SK LRB) ["*Prebushewski*"], and *Coppins*, *supra*.

[106] In *Dishaw*, *supra*, the complainant waited approximately 23 months before initiating a duty of fair representation claim against the union. He had been terminated by his employer, the Saskatchewan Federation of Labour on October 17, 2005. The union involved commenced a grievance shortly thereafter. What followed were protracted negotiations attempting to settle this grievance. The complainant rejected the final settlement negotiated by the union on September 6, 2006. However, he did not commence his application against the union until August 12, 2008. The Board found this delay to be inordinate and dismissed the application.

[107] In doing so, the Board observed at paragraph 28 that: "A request to dismiss an application because the applicant has delayed bringing it before the Board for an excessive period of time is not granted lightly." That stated, the Board then adopted the standard against which delay applications are to be assessed that was first identified in *SUN*, *supra*, namely, "whether justice could be done despite the delay": *Dishaw*, *supra*, at paragraph 29.

[108] The Board identified two (2) reasons why it decided to dismiss the application on the basis of undue delay. First, the union at issue was no longer the bargaining agent at the workplace, a fact that "greatly impacts its ability to respond to the Application's [*sic*] application and/or to further prosecute any grievance on this behalf": *Dishaw*, *supra*, at para. 33.

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[4] It should be noted that when the Board heard the application on its merits, it was dismissed: *Leedahl v. United Food*

[109] Second, the Applicant himself was well-versed in labour relations matters having been employed in the union movement for approximately 13 years prior to his termination. As a sophisticated complainant, he ought to appreciate, at the very least, the corrosive effect delay has on labour and management relationships in the workplace. On this point, the Board stated at paragraph 34:

> *The Applicant indicates that he both struggled with whether or not to bring his allegations before the Board and delayed doing so in the belief that his grievance may impede his search for employment within the labour movement. While it is understandable that applicants may ruminate for a period of time as to whether or not to bring allegations before the Board and that some applicants may struggle, for a variety of reasons, with their decision to do so, it is also understandable that the parties that are the subject matter of these allegations will expect that any claims, which are not asserted within a reasonable period of time, have been either abandoned or resolved to some reasonable degree of satisfaction.*

[110] The Board also took note of the then recent enactment of section 12.1. Although it declined to decide if this provision applied to duty of fair representation claims, the Board acknowledged at paragraph 36 that its inclusion in the *TUA* "signals an intent by the authors of the legislation; that time is of the essence in dealing with disputes in a labour relations context; that the timely commencement and resolution of outstanding grievances is an important component in maintaining amicable labour relations in this Province; and that parties have the right to expect that claims which are not asserted within a reasonable period of time, or which involve matters which appear to have been satisfactorily settled, will not later re-emerge."

[111] In other words, the Board took the position that the inclusion of a statutorily prescribed time limit specifically for unfair labour practice applications demonstrated the Legislature's more general desire that timely resolution should be the touchstone in all labour relations disputes.

[112] The Applicant's delay in commencing his application in *Peterson*, *supra*, was even more egregious than the delay that defeated the application in *Dishaw*, *supra*. Peterson had been terminated by the University of Regina in October 2003. Shortly after his termination, he had commenced seven (7) duty of fair representation claims against the Union. These applications were consolidated, heard by a single panel of the Board and on December 7, 2004

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and Commercial Workers International Union, Local 248-P, LRB File No. 030-03, 2004 CanLII 65611 (SK LRB),

dismissed in their entirety, see: *Peterson v. Canadian Union of Public Employees, Local 1975-01*, 2004 CanLII 65612 (SK LRB).

[113] Approximately, five (5) years after his termination, the Applicant initiated yet another duty of fair representation claim this time alleging that the union had denied him access to the entire contents of his file while he was medically disabled. The Board determined that justice could not be achieved in the matter as a consequence of the inordinate delay for which no explanation or rationale had been provided by the Applicant.

[114] *Prebushewski*, *supra* involved an Applicant who delayed for approximately two (2) year before commencing a claim against her Union under section 25.1 of the *TUA*. The Applicant had been terminated by her employer in early January 2007. A few days later, her Union filed a termination grievance on her behalf. The Union abandoned this grievance in September 2007, however, after it received information – erroneous, it later learned – that the Applicant had been found guilty of a criminal charge arising out of an altercation with a colleague which was a central reason for her termination. After her acquittal on the criminal charge in November 2007, the Applicant contacted the Union and first learned that her grievance had been abandoned.

[115] Subsequently, the Applicant sued her employer in the Queen's Bench for wrongful dismissal only to discover in the course of her lawsuit that she had commenced her legal action in the wrong forum. She learned she should have brought an application to the Board. Ultimately, on September 22, 2009, she filed her claim under section 25.1, almost 23 months after first being notified that the Union had abandoned her grievance, and more than 2 years after the Union informed the Employer it would not pursue the grievance.

[116] The Board permitted the application to proceed in spite of the extensive delay involved in its initiation. Relying on *Dishaw*, *supra*, and mindful that " the scale of delay that the Board will find acceptable is measured in months; not years", former Vice-Chairperson Schiefner exercised his discretion and proceeded to adjudicate the application on its merits: *Prebushewski*, *supra*, at para. 75. He based his conclusion principally on the fact that the evidence demonstrated both the Employer and the Union involved had prior knowledge of the Appellant's allegations asserting:

> ***[76]*** *In this regard, the Board accepts that both the Union and the Employer would have been/should have been aware that Applicant disputed her dismissal*

> *and the Union's decision to abandon her grievance upon the filing of her Statement of Claim in the Court of Queen's Bench. In addition, the Employer elected not to participate in these proceedings and, thus, the Board must be cautious not to infer injurious consequences (ie. to labour relations in the workplace) if the parties elect not to advance that issue.*

[117] The last case to be analyzed here is *Coppins*, *supra*. The Applicant had been terminated for cause by his Employer, and his Union filed a grievance on his behalf. The grievance committee decided to refer the question of moving the grievance forward to arbitration to a general meeting of the membership. At the meeting on November 5, 2015, the membership was equally divided about moving the grievance forward and the chair cast the tie-breaking vote against proceeding to arbitration. The Applicant filed his duty of fair representation claim with the Board on April 11, 2016, more than five (5) months later.

[118] As already stated, in *Coppins*, *supra*, Chairperson Love determined that subsections 6-111(3) and (4) of the SEA did not apply to duty of fair representation applications. However, in concluding that the five (5) month delay in that case did not disqualify the Board from adjudicating the application, he hewed closely to the criteria utilized by the Board when applying those provisions. He did this not because he believed those criteria necessarily operated in the context of duty of fair representation claims; rather, he did this in case he had "erred with respect to the proper interpretation of section 6-111(3)": *Coppins*, *supra*, at para. 23.

[119] Ultimately, he decided the application could proceed because (1) the delay was not extensive; (2) the applicant was not sophisticated in labour law; (3) no advance notice of a delay application had been given to him prior to the hearing, and (4) no prejudice to the other parties had been demonstrated, and (5) the case involved the withdrawal of a termination grievance which had serious consequences for the other parties. See *Coppins*, *supra*, at paras. 26-28.

[120] This survey of relevant Board Decisions reveals that while each decision turned on the particular facts of the case, nevertheless a number of factors figure prominently in the Board's analysis of undue delay applications in duty of fair representation claims. The more prominent factors include:

- **Length of Delay:** The length of delay is critical. An applicant will bear the burden to explain the reasons for any delay and the longer the delay, the more compelling must be the reasons for the delay in filing the application. Now that the Legislature has mandated

a statutorily prescribed time limit for the filing of unfair labour practice applications, the Board's tolerance for exceptionally long delays has decreased significantly.

- **Prejudice:** Labour relations prejudice is presumed in cases of delay; however, if the delay is extensive or inordinate this factor will weigh more heavily in the analysis. The longer the delay, the greater the prejudice to a respondent. Evidence of actual prejudice to a respondent likely will result in the main application being dismissed.

- **Sophistication of Applicant:** An applicant's knowledge of labour law and labour relations matters, generally is an important consideration when assessing the veracity of the reasons for the delay.

- **The Nature of the Claim:** The issues at stake for an applicant will be weighed in the balance. If the consequences of dismissing an application for reasons of delay are significant to an applicant, this will weigh in favour of permitting the application to proceed despite a lengthy delay in its initiation.

- **The Applicable Standard:** When adjudicating delay applications, the standard which has been applied consistently is: can justice be achieved in the matter despite a lengthy delay in commencing it?

2.3 Application of Principles

[121] Applying the relevant factors emerging from the case law that are identified in the previous section, the Board concludes that on balance while this case falls close to the line, the delay at issue here is not so inordinate, or so prejudicial to the Union, that the Applicant's claim should be dismissed on grounds of undue delay. It cannot be said that justice can no longer be achieved in this case because of the Applicant's delay in commencing it. The Board's reasons follow.

2.3.1 Length of Delay

[122] The first consideration in applications of this kind must be ascertaining the length of the delay at issue. As the Board observed in *Mosaic Potash*, *supra*, at paragraph 13, "it is

important to settle this question at the outset as it functions as the yardstick, so to speak, against which the other…criteria are to be measured and evaluated". Although *Mosaic Potash* involved the application of subsection 6-111(3) of the *SEA*, the significance of the length of the delay in question remains the same in cases involving allegations of undue delay which fall outside the statutory limitation period.

[123] At issue here is a delay of approximately 13 months, *i.e.* from September 5, 2013 – the date of the meeting at which the membership voted to reverse its earlier motion to move the Applicant's first three (3) grievances on to arbitration – and October 9, 2014 – the date the Applicant filed her application with the Board. It is true that the Board has often stated that the delay it will tolerate is measured in months, not years (see, *e.g*: *Prebushewski, supra*, at para. 75); nevertheless, a delay of this length while not so excessive or inordinate as occurred in other cases, still requires a satisfactory explanation from the Applicant as to why she postponed filing her formal application for so many months.

2.3.2 Sophisticated or Unsophisticated Applicant

[124] The sophistication of the application is an important consideration when assessing delay. Typically, if the applicant can be characterized as sophisticated, *i.e.* knowledgeable about labour relations matters generally, this factor will militate against the Board tolerating a lengthy delay in commencing the application.

[125] In the Board's opinion the Applicant should be characterized as a sophisticated applicant. While she was not legally trained, she was very experienced in labour relation matters having been an active member of her Union not only at the local, but also the provincial, level. From her testimony, it was clear that she understood union procedures and the importance of speedy resolution of workplace disputes. In this respect, she resembles the applicants in *Dishaw*, *supra*, and *Nistor*, *supra*, who had either worked or been involved in the union movement for many years and whom the Board concluded should understand the importance of expedition in such matters. This factor should be taken into account when assessing the Applicant's explanation for the delay.

2.3.3 Applicant's Reasons for Delay and Prejudice to the Union

[126] In attempting to explain this 13 month delay, the Applicant indicated she did not immediately file a formal duty of fair representation claim against the Union because she needed its' assistance in prosecuting and resolving the last three (3) grievances relating to her termination from her employment.

[127] The Union submits that this delay was motivated by self-interest and the Applicant effectively "lay in the weeds" until those grievances were settled and formal Minutes of Settlement finalized, a process in which it had only marginal involvement. The Union alleges that it suffered "real prejudice" because the Applicant is now attempting to utilize her claim to obtain more money in the way of damages. The Union also submits that as in most case, the effluxion of time has resulted in faded memories and the possibility of witnesses being unavailable.

[128] The Board accepts as reasonable the Applicant's desire to have the Union act on her behalf respecting her final (3) grievances relating to the termination of her employment. She had experience in grievance management and would know that the support of her Union was critical in having her grievances move forward to resolution.

[129] The Union's displeasure is understandable. Its representatives assisted in resolving the Applicant's termination grievances. However, it is difficult to conclude that any real prejudice flowed to it from the Applicant's delay in commencing her duty of fair representation claim. Throughout the process, the Applicant did not hide the fact she intended to address what she perceived to be the Union's failure to deal appropriately with her first three (3) grievances. This is plainly manifested in the Minutes of Settlement that omitted any reference to those grievances, and excluded them from the final settlement altogether. Consequently, the Union was not taken wholly by surprise when the Applicant initiated this application one (1) month after the Minutes of Settlement were finalized and executed.

[130] As for faded memories, it cannot be denied that the effluxion of time would dim an individual's recollection of past events. However, after listening to the testimony of the witnesses called by both sides it did not appear that any one of them experienced difficulty in recounting the events as they remembered them.

[131] Nor was the Union able to point to anything specifically which could lead the Board to conclude it had suffered actual prejudice as a consequence of the Applicant's delay in commencing her duty of fair representation claim.

[132] On balance then, the Applicant's explanation for the delay is reasonable in the circumstances of this case. While labour relations prejudice flows to the Union as a result of this delay, the Board does not think it is significant enough to warrant dismissing the applicant for that reason.

3.3.4 The Nature of the Claim

[133] The duty of fair representation claim here relates to grievances filed following a written reprimand placed upon the Applicant's file after she alleged workplace harassment by her immediate supervisor, a fellow union member. To be sure, this is not as significant as a termination grievance, yet it is not a trivial matter either. Even Mr. Guillet testifying on behalf of the Union stated that he believed such a consequence was of great concern to the Union as it would only discourage other employees from coming forward to file harassment reports.

[134] The Board concludes that the subject matter underlying this claim is significant enough to weigh in favour of this application proceeding.

3.3.5 Can Justice Still Be Done in This Matter?

[135] To answer this question, it is necessary to take into account all of the factors discussed above. As stated earlier these kinds of applications turn very much on the facts of each case. In this matter, the Board concludes that in spite of the delay at issue, justice between the parties can still be achieved. The delay though extensive has been reasonably explained by the Applicant, there is no great prejudice suffered by the Union as a result of the delay and the subject matter underlying this complaint – workplace harassment – is important in the context of contemporary workplaces.

[136] Accordingly, for all of the reasons, the Board concludes that the Timeline Issue raised by the Union must be dismissed.

THE DUTY OF FAIR REPRESENTATION ISSUE

A. Relevant Statutory Provisions

[137] The statutory provisions relevant to the Duty of Fair Representation Issue in this application 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

[138] Section 6-59 of the *SEA* is the successor to 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 obliged 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.*

[139] The British Columbia Labour Relations Board helpfully 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:

> *Some time 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.*

[140] In Saskatchewan, the origin of the duty of fair representation is unique in that prior to the enactment in 1983 of section 25.1 of the *TUA*, this Board had already utilized its statutory power over unfair labour practices to address such claims. In *Doris Simpson v United Garment Workers of America*, LRB File No. 069-80, [1980] July Sask. Labour Report 43, 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."

[141] In the *Simpson* decision, the Board also 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.*

[142] A few years later, Chouinard J. writing the Supreme Court of Canada in *Canadian Merchant Service Guild v Gagnon et al.*, [1984] 1 SCR 332 reviewed relevant domestic and international case law, and 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.*

[143] As this Board observed 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.

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

[144] This Board has often taken the opportunity to review and reaffirm general principles which over the years have emerged respecting the duty of fair representation. In all 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*"].

[145] 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" and the scope of the Union's duty to represent its members fairly in grievance arbitrations. 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.*

[146] *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. <u>This Board has not</u>*

> *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.]*

[147] 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) sets out the union's 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) ["*Chessall*"], at paras. 20-22.

[148] 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 a 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.

[149] With these general principles identified, the Board in the next section turns to consider the specific allegations made by the Applicant in this matter.

C. Submisisions of the Parties

1. Submissons of the Applicant

[150] The Applicant appears to base her allegations that the Union failed in its duty to represent her fairly on all three (3) of the generally recognized grounds for finding a violation of section 6-59 of the *SEA*. These are: (1) arbitrariness; (2) discrimination, or (3) bad faith.

[151] In her written submission, the Applicant argues that as the Union's grievance process is "so fundamentally flawed", it requires serious sanction from this Board. Her

complaints pertain primarily to the procedure and organizational structure for addressing grievances. To paraphrase her submissions, the principal flaws she identifies include: (1) no written guidelines for members advising them of their rights provided for in the Union's internal documents; (2) grievances are left to be voted on by members of the Local at regular Local meetings; (3) no appeal mechanism to a specialized internal grievance, the Union's Joint Board or another body having labour law expertise is provided to members whose grievances have been voted down by the membership; (4) the Union's Grievance Committee had no power over a grievance, and (5) a reconsideration vote on a grievance may be initiated by members of the Local.

[152] More specifically to her particular circumstances, the Applicant asserts that the Union acted in an arbitrary and discriminatory fashion, and in bad faith, towards her for a variety of reasons. Again paraphrasing the Applicant's written submissions these include: (1) failing to "put its mind" to her grievances; (2) failing to conduct an investigation into the circumstances of her grievances; (3) failing to obtain legal advice respecting these grievances; (4) by allowing a reconsideration vote of a previous decision taken by the Local membership to forward her grievances to arbitration, a vote in which Rhonda Aitken, the Applicant's supervisor and subject of the Applicant's harassment complaint, participated; (5) failing to present her grievances adequately to the membership prior to the reconsideration vote in September 2013; (6) failing to dispute the fairness of the reconsideration vote in light of the fact that many more members, few of whom had ever attended union members before, came out to vote, and (7) attempting to force the Applicant at the time she executed Minutes of Settlement with the Employer to release the Union from any further liability respecting her first three (3) grievances.

[153] In support of her position that these factors amount to a violation of section 6-59, the Applicant relies on the following authorities: *Lucyshyn v Amalgamated Transit Union, Local 615*, LRB File No. 035-09, 178 CLRBR (2d) 96; 2010 CanLII 15756 (SK LRB) ["*Luchyshyn*"]; *McKnight v Communications, Energy and Paperworkers Union of Canada, Local 481*, LRB File No. 135-11 ["*McKnight*"]; *Read v Amalgamated Transit Union, Local 615*, LRB File No. 062-11, 2011 CanLII 75570, affirmed on other grounds *Saskatoon (City) v Amalgamated Transit Union, Local No. 615 and Read*, 2013 SKCA 132 ["*Read*"], and *Petite v International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 55*, LRB File No. 158-08; 2009 CanLII 27858 (SK LRB) ["*Petite*"].

2. Submissions of the Union

[154] Counsel for the Union, Ms. Nordal, at the outset, reminded the Board of two (2) important considerations relevant to every duty of fair representation claim. First, the right now enshrined in section 6-59 of the *SEA* is the right of a Union member to a fair process and not a guarantee to a desired outcome. Second, duty of fair representation claims are by their very nature fact-driven. In particular, she pointed to 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) ["*Banks*"] as exemplifying these propositions.

[155] The Union then submitted that when the evidence presented at the hearing is weighed, the facts established in this case do not support a finding that the Union failed in its duty to represent the Applicant fairly in respect of her three (3) grievances.

[156] These grievances arose out of internal processes at the Cornerstone Credit Union. In particular, Ms. Nordal noted that the grievances related to verbal or written warnings given to the Applicant for performance related issues and not necessarily her filing a harassment complaint. The Union disputes that it failed to support the Applicant in her harassment complaint, as Mr. Guillet assisted her in preparing her grievance as well as providing support as the Applicant moved forward with an Occupational Health & Safety complaint.

[157] Respecting the allegations that the Union failed to conduct an investigation into her grievances, the Union makes a number of assertions. First, it asserts that no written report on the merits of the grievance is required or, for that matter, is a legal opinion necessary. Ms. Nordal noted that Mr. Guillet, despite the fact that he lacked a law degree, had more than 30 years' experience as a service representative and was very well versed in the law surrounding grievances. He was well equipped to provide advice and support on the grievances, which, in the Union's submission, he did. These considerations, Ms. Nordal submitted, distinguish this case from both *Luchysyn*, *supra*, and *McKnight*, *supra*, authorities cited by the Applicant.

[158] Second, the Union asserts that it was not appropriate for the Applicant to ask the membership to vote on the first three (3) grievances at the May 2, 2013 meeting of the Local which by the Applicant's own evidence, was sparsely attended. At that time Step 3 of the internal

grievance process had not been completed. As a consequence, it was premature for the Applicant to seek approval to have any of those grievances move forward to arbitration.

[159] Turning to the reconsideration vote, the Union submits that proper procedures were followed. A motion was made at the June 13, 2013 meeting to provide the membership an opportunity to review the previous vote at the September 2013 meeting. Mr. Guillet sent a letter to all members of the Local advising them of the meeting.[5] The Union asserts there is no independent evidence to demonstrate that Ms. Aikens agitated for members of the Local to attend the meeting and vote against the Applicant's motions. In the alternative, the Union asserts that if Ms. Aikens did that, she did so on her own as she holds no position – either appointed or elected – with the Union.

[160] The Union submits further that the fact there is no appeal mechanism from a decision by the Local not to proceed with a grievance is of little moment. The Union has never had a formal appeal mechanism – despite Mr. Hollyoak's evidence – nor has the jurisprudence of this Board or the courts required unions to have such a mechanism in place for grievance purposes. It is trite law that it is the Union, and not the grievor, that owns the grievance and, ultimately, it is the Union's decision how a grievance should be handled.

[161] Respecting the manner in which the reconsideration vote was conducted, the Union submits that Mr. Gary Burkart acted appropriately. Ms. Nordal pointed to the fact that at that time Mr. Burkart did not represent Ms. Aitken nor did he make a presentation respecting the grievances at any time. She emphasized that the Applicant knew that Mr. Burkart would act as Ms. Aitken's representative in the event the Applicant's grievances moved forward to arbitration.

[162] The Union submitted that no evidence had been forthcoming upon which this Board should find it did not fairly represent the Applicant in respect of her first three (3) grievances. Accordingly, it urged the Board to dismiss her duty of fair representation claim in in its entirety.

[163] In addition to *Banks*, *supra*, the Union relied on the following authorities among others to support its position: *McKnight*, *supra*; *Read*, *supra*, and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Sakundiak Equipment*, 205 CLBR (2d) 139, 2011 CanLII 72774.

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[5] Exhibit A-23.

D. Analysis and Decision

1. Onus

[164] Although it was a not a contentious issue between the parties, it is useful to identify at the outset which side bears the onus in duty of fair representation claims.

[165] 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.]*

[166] Furthermore, in *McDougall*, *supra*, at para. 46 Rothstein J. emphasized that in order to satisfy the 'balance of probabilities' standard of proof, the evidence must be "sufficiently clear, convincing and cogent".

[167] Applying these principles to this matter, the Board must determine if the Application has demonstrated through clear, convincing and cogent evidence that it is more likely than not the Union failed to represent her in respect of the first three (3) grievances? If the Applicant satisfies her onus, then the Union must be found to have violated section 6-59 of the *SEA*.

2. Credibililty of Witnesses

[168] Credibility and, equally important, 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.

2.1 Review of Relevant Legal Principles

[169] 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 a 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"

[170] 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.

[171] 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.

[172] 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.]*

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

2.2 Application of Principles Respecting Credibility and Reliability

[174] The task of assessing credibility in this matter is made somewhat more difficult by the fact that I assumed responsibility for adjudicating it after Vice-Chairperson Schiefner's appointment to the Provincial Court of Saskatchewan and only a portion of the evidence had been received. In order to avoid restarting the hearing from the beginning, both parties consented to me continuing from where the evidence had concluded. I listened to the audio recording of the first three (3) days of testimony before the hearing resumed with the cross-examination of Mr. Guillet by Mr. Clemens, counsel for the Applicant. As a consequence, I was not able to observe either the Applicant or Mr. Hollyoak when they testified before Vice-Chairperson Schiefner, and can only form my opinions respecting the credibility, and veracity, of these two (2) witnesses from listening to the audio-recording of their testimony.

[175] As stated in *Hardychuk*, *supra*, the Board starts from the presumption that the various witnesses testified truthfully. Generally speaking, the Board found the witnesses testified forthrightly and did not find any of them to be evasive or less than honest in their answers. 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.

[176] 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 in the discussion that follows.

[177] It is also important to acknowledge that apart from Mr. Hollyoak, the two (2) witnesses who testified in this matter had a direct interest in the outcome of this application and, therefore, their evidence should be scrutinized with some care. The Applicant testified on her own behalf and the Board needs to be mindful that she has a vested interest in ensuring her application is successful. On the other hand, Mr. Guillet was the Union's service representative whose actions or – if the Applicant is to be believed – inactions were directly impugned in this matter. As a result, it may be assumed that he has a deeply personal interest in the Applicant's duty of fair representation claim failing. Taking these factors into account, however, it does not

follow that these witnesses were anything less than candid. However, they do signal to the Board that it must be mindful of the not insignificant self-interests which are at play in this case.

[178] As for Mr. Hollyoak, while he has no direct interest in how this application is resolved, he is the Applicant's domestic partner or was at the time of his testimony. The nature of his personal relationship with the Applicant might suggest that the Board should also scrutinize his testimony with some care. In the circumstances of this application, however, these concerns are not significant as Mr. Hollyoak's testimony related to matters only peripherally relevant to the resolution of the case. Furthermore, from the audio-recording of his testimony, he appeared to be a forthright witness. The Board harbours no concerns about Mr. Hollyoak's testimony, even where it is inconsistent with Mr. Guillet's respecting whether the Union had an appeal process in place for members to challenge a decision by the membership not to move his or her grievance on to arbitration. This discrepancy and its relevance to this application will be addressed later in these reasons.

3. Analysis and Decision Respecting Duty of Fair Representation Claim

[179] The Applicant has invoked the three (3) traditional bases which would support a duty of fair representation claim that are explicitly enumerated in subsection 6-59(2) of the *SEA*, namely arbitrariness, discriminatory treatment and bad faith. The Board will address each of these claims in turn commencing with a consideration of whether the evidence in this matter discloses discriminatory treatment of the Applicant by the Union.

3.1 Did the Union's Actions Amount to Discriminatory Treatment of the Applicant?

[180] 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 the Union of one 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 ["*Ward*"], and most recently, *Coppins*, *supra*, at para. 35. As the 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 greatly.

[181] It must be remembered as well, that on this aspect of the inquiry, the Applicant bears the onus to prove that it is more likely than not the Union dealt with her grievances in a discriminatory manner. On balance, the Board concludes that the Applicant has failed to satisfy its burden on this particular arm of the duty of fair representation inquiry.

[182] There is some evidence that emerged from the testimony at the hearing to suggest there existed personal animosity towards the Applicant from certain members of her Local, and, perhaps, even the Union's Executive. In particular, the Applicant alleged that Ms. Rhonda Aitken, a fellow Local member and the Applicant's supervisor and one of the subjects of her harassment complaint, had encouraged other union members to attend the June 2013 meeting of the Local to push for a reconsideration of the motions respecting her grievances passed at the May 2013 meeting. She also asserted that Mr. Gary Burkart, the Union's Secretary-Treasurer, was out-of-order when he spoke in support of a reconsideration motion at the Local's May 2013 meeting. She went on to allege that Mr. Burkart, Mr. Guillet and Ms. Aikens were friends. Indeed, she alleged that Mr. Guillet had referred to Ms. Aitken as such at some point during the Step 2 meeting with the Employer. Respecting Mr. Burkart's involvement in this matter, the Applicant submits that the Board should draw an adverse inference as *per Murray v Saskatoon*, *supra*, because the Union failed to call him as a witness, even though he was present for part of the hearing.

[183] Accepting these assertions as true, the Board concludes that they do not provide a substantive enough basis for a finding that the Union handled the Applicant's grievances in a discriminatory manner. To be sure, it is troubling that Ms. Aitken was allowed to participate in the meetings where the grievances flowing from the Applicant's harassment complaint were debated and voted on by the Local membership. However, this is a factor that may more appropriately be dealt with under the arbitrariness branch of the duty of fair representation inquiry.

[184] Respecting the allegations that Mr. Guillet's allegiances were more closely aligned with Ms. Aitken and not the Applicant, the Board acknowledges that this clearly was the Applicant's perception. Yet, Mr. Guillet denied it, and as there is no other evidence which would

support a finding of discriminatory treatment because of his alleged divided loyalties, it is not possible to conclude that the Applicant met her burden under subsection 6-59(2) of the *SEA*.

[185] The most troubling aspect relevant under this heading, however, is the undisputed fact that the reconsideration vote which was taken in respect of the Applicant's grievances was unprecedented in the Union's history, or at least in Mr. Guillet's 31 year career with the Union. Taken together with the Applicant's allegations of personal animosity exhibited by some Union members towards her, this fact could indicate discriminatory treatment by the Union on the basis of personal animosity against the Applicant.

[186] However, the Board concludes that this issue, too, should more appropriately be addressed under the arbitrariness arm of the duty of fair representation inquiry. It is to this inquiry the Board now turns.

3.2 Did the Union Treat the Applicant Arbitrarily?

[187] In *Rayonier Canada (B.C.) Ltd.*, *supra*, Professor Paul Weiler, then Chair of the British Columbia Board described the relevant considerations on this aspect of the duty of fair representation inquiry. He stated at p. 201:

> *[A] union cannot act arbitrarily, disregard 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.*

[188] It is true that Canadian labour relations boards have been loath to intervene in a union's internal workings; however, duty of fair representation claims sometimes may compel a board to assess the appropriateness of a union's internal decision making processes. In *Brenda Haley v Canadian Airline Employees' Association and Eastern Provincial Airways (1963) Ltd.*, [1981] 2 CLRBR 121, the Canadian Labour Relations Board, the predecessor to the Canadian Industrial Relations Board, stated at pp.131-2:

> *It is not the Board's task to reshape union's 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 makes 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. [Emphasis added.]*

[189] This Board in *Guy Stewart v Saskatchewan Brewers' Bottle & Keg Workers, Local Union No. 340*, LRB File No. 029-95, [1995] 2nd Quarter Sask. Labour Rep. 204 when commenting on then recent amendments to the former *Trade Union Act*, RSS 1978, cT-17 – provisions now found in sections 6-58 and 6-60 of the *SEA* – endorsed this view. Writing for the Board, former Chairperson Bilson opined at p. 213:

> *It is our view, however, that provisions now included in The Trade Union Act, such as Section 36.1, signify an acknowledgement on the part of the legislature that there is an important public interest at stake in the proceedings of trade unions. Under the scheme set out in the Act, trade unions have exclusive authority to represent employees with respect to issues of crucial significant in the lives of those employees, namely the terms and conditions under which they will be employed. We understand the premise of legislative provisions such as Section 36.1 to be that, if these matters are to be confined to the complete control of trade unions, it is in the public interest to ensure that those trade unions treat the employees whom they represent equitably and with fairness.*
>
> *Employees and trade union members have traditionally been able to pursue of these question in the common law courts, although this is not a feasible venue for many individual employees. The significance of Section 36.1, in our view, is that it gives employees recourse to the Board to express concerns about their concerns about their status or treatment within the trade union which represents them. As we have indicated in the decisions quoted earlier, the Board has no intention of becoming a body of appeal or of routine review from every decision made pursuant to a trade union constitution or internal procedural rules. Where an allegation is made, however, that a violation of The Trade Union act has occurred, the Board must be prepared to scrutinize the internal workings of the trade union to the extent necessary to determine whether the Act has been breached. [Emphasis added.]*

[190] This application requires the Board to do exactly that, namely "to scrutinize the internal workings" of the Union to the extent necessary to determine whether it breached the *SEA* in its representation of the Applicant. More particularly, if the method by which the Union decided not to proceed with the Applicant's first three (3) grievances amounted to arbitrary treatment under subsection 6-59(2). The central concern is that both the Union's decision to move those grievances forward and the subsequent decision to reconsider that previous decision were done by a referendum vote through a simple show of hands.

[191] To be sure, this is not a novel task for the Board. *Gordon W. Johnson v Amalgamated Transit Union, Local No. 588 and City of Regina*, LRB No. 091-96, [1997] SLRBR 19 ["*Johnson (No. 1)*"] represents the first time this Board chose to intervene in a case where a secret ballot was utilized to decide if a termination grievance should move forward to arbitration. In *Johnson (No.1)*, the Union's Executive recommended it be arbitrated. However, at a meeting of the membership the decision was put to a vote by secret ballot, and the Executive's recommendation was defeated. In the course of its decision finding this process amounted to arbitrary treatment of the Applicant by his union, the Board made the following salient remarks beginning at page 42:

> *Trade unions are democratic organizations, with a tradition of strong reliance on the opinions and directions of their members. This is one of their chief strengths, and one of the foundations for confiding to them the important interests which they are charged with representing.*
>
> *The genesis of the duty of fair representation, however, lies in a recognition that any organization which governed exclusively by majoritarian principles has the potential to be oppressive to individual employees or minority groups of employees. Because these individuals and groups have no option but to rely on the certified trade union to represent their interests, the courts, legislature and labour relations boards which have considered the issue concluded that their bargaining agents must be held to a minimal standard of fairness in dealing with them, a standard. . . defined in terms of a proscription of a trade union decision-making which is arbitrary, discriminatory or in bad faith.*
>
> *The roots of the duty of fair representation lie in a recognition that, in addition to an expression of the will of the majority, democratic principles must provide for the protection of individuals and minorities from the excesses of majoritarianism. An individual, in the scheme of collective bargaining, cannot assert that his or her interest should prevail over others, or that it represents an entitlement of an absolute kind. The duty of fair representation requires, however, that he or she can require that any decision which is made concerning those interests does not reflect malice, ill will, or denigration on discriminatory grounds. More importantly, for our purposes here, those decisions should, to use, language which has become common in the discourse concerning the duty of fair representation, reflect a consideration of all of the factors which are relevant to the decision and of no factors which are not relevant.*
>
> *A decision-making process of the kind followed here falls afoul of the duty of fair representation, in our view, because it is impossible to know whether the decision was based on the appropriate considerations and only those considerations. Mr. McCormick speculated that the vote went against the pursuit of the grievance because "Mr. Johnson's past caught up with him" – that is to say, that his colleagues felt his cumulative record might make dismissal reasonable. Mr. McCormick said that he did not think that the employees disliked Mr. Johnson, who was personally popular, but that they may have felt his work performance justified the criticisms levelled at him by the Employer. Mr. Johnson said that he had heard "talk" about the high cost of arbitration, and his sense was that this might have played a role in the outcome of the vote.*

> *The problem with the use of a referendum ballot as a means of making this kind of decision is that there is no way of knowing whether either of these explanations played a role in the decision or what range of other factors the votes may have taken into account. The decision is neither amenable to explanation nor accountable to Mr. Johnson or to the Union executive which had reached a contrary conclusion through a process of investigation and careful thought. Mr. McComick made considerable efforts, as apparently, did other officers to persuade the employees to support the executive recommendation; it cannot be said, however, whether their activity had any influence at all, or whether the employees considered another set of considerations entirely.*
>
> . . . . . .
>
> *Mr. McCormick and the other members of the executive took what steps they could to ensure that the members of the bargaining unit were properly briefed prior to the vote, and that they understood that the executive was in favour of proceeding to arbitration. The mechanism of the vote among the entire group of employees, many of whom had not participated in the discussion at the membership meeting, and some of whom may not have been in possession of any information beyond what was on the notice, was, in our opinion, inherently arbitrary as a means of making a decision about the fate of an individual employee, however useful it might be as a means of obtaining direction about issues of more general significance. [Emphasis added.]*

[192] In *Johnson (No. 1)*, *supra*, this Board first served notice on unions that they could be exposed to liability in duty of fair representation claims should they wholly delegate to their membership, decisions respecting whether a particular grievance should be prosecuted.

[193] Subsequent decisions of this Board took up this theme. 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 ["*Luchysyn*"] – a decision relied upon by the Applicant – this Board provided direction to unions on how best to process a member's grievances. At paragraph 36, Chairperson Love outlined a "minimum standard of conduct" that Union must satisfy 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.*

[194] 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.

[195] The facts *Stewart Read v Amalgamated Transit Union, Local 615 and City of Saskatoon*, LRB File No. 062-11, 2011 CanLII 75570 ["*Read*"], somewhat resemble what transpired in this case. In *Read*, *supra*, the employee filed a termination grievance against the employer. The Union exhausted the full internal grievance process without a satisfactory resolution. The Union's Executive, then, sought legal advice, and, on the basis of that advice recommended to its membership that the grievance be submitted to arbitration. Initially, the members voted to support this recommendation. At that same meeting, a second motion passed tabling the motion to proceed to the Local's next meeting in order to permit the grievor the opportunity to attend and present his case.

[196] At the subsequent meeting, a second vote was taken and, despite the Union Executive's continued support for prosecuting the grievance, the Local membership voted to rescind the earlier motion.

[197] On a duty of fair representation claim brought by Mr. Read, the Board concluded that the Union's handling of the grievance was arbitrary and violated then section 25.1 of the *TUA*. The essence of the Board's decision is found at paragraphs 21 and 22 as follows:

> *[21] In this case, the Union executive had made a reasoned determination, based on legal advice, to proceed to arbitration. At the hearing, they repeated their desire to have continued to have pressed on to arbitration, but which decision they felt they were prevented from doing by the membership's reconsideration of the original decision to proceed.*
>
> *[22] As noted above, the decision by the Union membership not to proceed with the submission to arbitration, as was the original decision by the membership to proceed, was inherently arbitrary. For these reasons, the application is allowed.*

[198] As a consequence, the Board directed that the termination grievance should proceed to arbitration in accordance with the terms of the collective agreement. In making this Order, the Board also set aside any of the time limitations contained in the collective agreement that might stand in the way of this grievance being arbitrated.[6]

[199] The next relevant case to be considered is *McKnight*, *supra,* another authority cited by the Applicant. The facts in this case are unusual. Mr. McKnight launched a duty of fair representation claim against the union in respect of its handling of his three (3) grievances, the oldest of which dated back to 1998. This application was commenced approximately three (3) years after Mr. McKnight had retired.

[200] Acknowledging the difficulties occasioned in this case by the passage of time, the Board nevertheless addressed the substance of the allegations against the Union. The Board concluded that the Union had failed to satisfy many of the steps recommended in *Lucyshyn*, *supra*. Taking those factors into account and weighing the evidence presented in that case, the Board concluded that the Union had acted arbitrarily because it had "certainly been cursory in its investigation, processing, and pursuit of the three grievances." See: *McKnight*, *supra*, at para. 38. As its remedial Order, the Board crafted a process for resolving those grievances many years after they had been filed.

[201] The final authority to be canvassed here is *Coppins, supra*. In this case, the Board referred a termination grievance back to the Union's grievance committee after the general membership at a regular meeting voted against having the grievance sent on to arbitration. The Union had investigated the circumstances that gave rise to the grievance and went so far as to

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[6] It should be noted that the City of Saskatoon unsuccessfully appealed this decision, see: *Saskatoon (City) v Amalgamated Transit Union, Local No. 615, Steward Read, Saskatchewan Labour Relations Board*, 2013 SKCA 132. The City also applied to Board for a reconsideration of this matter, an application that also failed: *Saskatoon (City) v Amalgamated Transit Union, Local 615*, 2012 CanLII 20614 (SK LRB).

obtain a legal opinion from its lawyer analyzing its chances of success were it to proceed to arbitration. This legal opinion indicated that the grievance was unlikely to succeed.

[202] Armed with this information, the grievance committee chose to put the decision whether to proceed to arbitration to a vote by the Union's general membership. The Union's evidence was that this was done in order to allow Mr. Coppins the opportunity to make his case to his fellow union members. However, there was evidence – which the Board accepted – that the Union had failed to fully apprise him of the time and place of the meeting, and, as a consequence, he was not able to encourage his supporters to attend it.

[203] Invoking *Johnson (No. 1)*, *supra*; *Read*, *supra*, and *Lucyshyn*, *supra*, the Board concluded that the Union's decision to submit the decision whether to prosecute Mr. Coppin's grievance to a vote of its general membership was inherently arbitrary. The Board explained its reasoning as follows:

> *[41] There was no evidence to determine what the parameters were that the membership was voting on. Was it based on personal popularity, monetary concerns, or the strength of the legal opinion? No evidence was provided as to the exact nature of the question posed to the group present at the meeting.*
>
> *[42] The evidence of Mr. Hewlin [a member of the Union's grievance committee] was that there was no requirement to take the question as to the referral to arbitration to a membership meeting, but nevertheless that was done. The recommendation from the membership committee was that the grievance should not be pursued to arbitration. The recommendation from the membership [sic] committee was that the grievance should not be pursued to arbitration.*
>
> *[43] The decision as to whether or not the grievance should proceed to arbitration was properly in the hands of the grievance committee and should have been resolved at that stage.*

[204] These authorities clearly demonstrate that a process in which the Union effectively delegates the question of whether a member's grievance should be sent to arbitration to a vote by its membership, is fraught with danger. Such a process makes it extremely difficult, if not impossible, to identify with any degree of precision what are the true reasons motivating the membership's final decision. Furthermore, a decision reflected in a majority vote is not amenable to explanation or to third party scrutiny, nor, more importantly, is it accountable to the member or members directly affected by it. Instead, it leaves those members and, ultimately, this Board with only "the most impressionistic understanding of what may have motivated people to vote in the way they did." See: *Gilles Charlebois v Amalgamated Transit Union, Local 279* (1993), 91 di 14

(CLRB no. 989), aff'd *Charlebois v Amalgamated Transit Union, Local 279 et al.* (1994), 169 NR 144 (FCA), at 22.

[205] Viewed through the prism of these authorities, the Board concludes that the Union dealt with the Applicant's first three (3) grievances in an arbitrary fashion. In other words, it treated those particular grievances in a most perfunctory and cursory way.

[206] The arbitrariness analysis in this case is complicated somewhat for two (2) reasons. First, it is evident that the Applicant, herself, was quite content to allow the membership to decide the fate of her grievances at the Local's regular meeting in May 2013. She explained that she did this because she knew summer was approaching and it would be difficult to organize an arbitration panel during the summer months. In other words, she wanted "to get ahead of the game" as it were, and have the grievances ready to proceed to arbitration in Fall 2013.

[207] Second, the evidence clearly establishes that the Applicant's third grievance, *i.e.* the grievance dated May 3, 2013 relating to her written discipline for poor performance, had not yet proceeded through Step 3, the third and final stage of the grievance procedure, set out in Article 17 of the Collective Agreement. It was clearly premature for the Applicant to present this particular grievance for a vote at the May 2013 meeting.

[208] Counsel for the Union offers the Applicant's initial actions respecting these grievances as a possible mitigating factor in the analysis under subsection 6-59(2) of the *SEA*. However, the Board is not prepared accept this characterization of her actions. It is true that until the process at issue in this matter turned against her, the Applicant did not object to it. Indeed, in her testimony she accepted that this was the way the Union typically dealt with grievances. Rather, the Board views the Applicant's actions as symptomatic of the lack of any discernible procedure put in place by the Union to address member's grievances generally.

[209] Apart from the extremely informal process used to launch these three (3) grievances, the events that transpired following the initial vote on those grievances might be characterized as chaotic. At the next regular meeting in June 2013 an unusually large contingent of members attended and successfully sought to have the initial vote reconsidered. Among those members was Ms. Aitken who was the Applicant's immediate supervisor and one of the parties

named in her harassment complaint. At that meeting, the membership agreed to vote on a reconsideration motion at the September 2013 meeting of the Local.

[210] The motion for reconsideration was placed before the membership at the regular meeting of the Local on September 5, 2013. Again there was an exceptionally large turnout from the membership, primarily from the Cornerstone Credit Union, the Applicant's Employer, at that meeting. The evidence discloses that Mr. Guillet spoke briefly about the grievances and then a secret ballot was taken respecting each grievance separately. At the conclusion of the balloting, the majority of the membership voted down the previous decision to proceed to arbitration of the Applicant's three (3) grievances.

[211] In a last ditch effort to reverse this decision, the Applicant sought the intervention of the Union's Joint Board Executive. This was an exceptional step because neither the Union's Constitution nor its By-laws provide for any kind of appeal mechanism, Mr. Hollyoak's testimony notwithstanding. The Board concludes that the Applicant likely was able to present her case to the Joint Board only because of her position as a Union representative who often attended meetings of the Joint Board. It can be inferred that this was not an option available to other employees who are simply regular union members. The harsh reality is that for this Union if a motion to move a grievance onto arbitration is defeated, there is no ability for the affected member to seek review of this decision by a grievance committee or the Local Executive committee.

[212] In his testimony, Mr. Guillet candidly acknowledged that the circumstances of these grievances, *i.e.* the filing of a harassment complaint and a verbal reprimand being issued to the Applicant following the Employer's rejection of her complaint, were extremely troubling to him and to the Union. Yet, in spite of this, the Union was content to leave it to the membership, which included an individual who was the subject of that harassment complaint, to vote on whether it should proceed to arbitration.

[213] The Board acknowledges that unions, generally, are given considerable latitude to made decisions concerning the members they represent. However, these decisions must be exercised judiciously especially when critical interests related to employment are at issue. Since *Johnson (No.1)*, *supra*, and, most especially, post-*Luchyshyn*, this Board will scrutinize what transpired to determine if the union fulfilled certain criteria. These include evidence which would demonstrate the union (a) conducted a proper investigation into the full details of the grievance;

(b) clearly turned its mind to merits of the grievance; (c) made a reasoned judgment about its success or failure, and, (d) in circumstances where it decided not to proceed with the member's grievance, provided clear reasons for its decision.

[214] It is apparent that really none of these criteria was satisfied in this complaint. There was no serious investigation into the circumstances of, and the context underlying, these grievances. While the Union pointed to Mr. Guillet's three (3) decades employment as a service representation experience which, admittedly, would provide him with insight into the situation, this is no substitute for a more careful review of the allegations outlined in those grievances.

[215] The evidence did not show that any of the Union's representatives or members of the Local's grievance committee gave any, let alone thoughtful, consideration, to the merits of these grievances. It is true that Mr. Guillet testified about the Union's concern about the implications of the Applicant's reprimand, and the signal it would send to other employees considering whether to file a harassment complaint. However, no evidence was lead to indicate that these concerns were shared with the membership prior to the vote on the reconsideration motion. Rather, the membership voted on the motion with little, if any, information respecting the merits of the grievances.

[216] These factors, together with the fact that the decision respecting the Applicant's grievances was left to a vote of the membership, lead irresistibly to the conclusion that the Union acted in arbitrary manner.

[217] A great deal of the evidence presented at the hearing related to the difficult relationship the Applicant sometimes had with Mr. Guillet, Mr. Gary Burkart, and other Union members. For purposes of this inquiry, the Board does not have to sort out the exact details of all that occurred and who was responsible for what. Suffice it to say, it appears some Union members harboured personal animosity towards the Applicant, and from this it is possible to infer that this animosity may have coloured the views of some members, and infected the vote.

[218] Accordingly, the Board finds that the Union acted arbitrarily in its handling of the Applicant's grievances at issue here for the following reasons:

- The Union failed to investigate in any serious way the circumstances of those grievances, even after acknowledging that the verbal warning issue

to the Applicant following her harassment complaint was of concern to the Union;

- Prior to the vote on the reconsideration motion in September 2013, the Union failed to provide the membership with an overview of the grievances, its considered recommendation on whether they should proceed to arbitration and the reasons for that recommendation;

- The Union permitted the fate of those grievances to be decided solely by a vote of the membership at a regular local meeting at which many more union members than usual, participated, and at least one (1) of those members had been implicated in the Applicant's harassment complaint, and,

- The Union has no internal review mechanism in place to address apparent unfairness to the affected member in circumstances where his or her grievances are voted down by the membership.

3.3. Did the Union Act in Bad Faith?

[219] In light of the Board's conclusion on the arbitrariness aspect of the duty of fair representation, it is not strictly necessary to consider this issue. However, for the sake of completeness it is addressed below.

[220] This particular aspect of the inquiry under subsection 6-59(2) of the *SEA* requires evidence of intentionality. This Board in many of its duty of fair representation decisions has adopted the formulation of the term "bad faith" set out by the Ontario Labour Relations Board in *Toronto Transit Commission*, [1997] OLRD No. 3148. At paragraph 9 of that case, the Ontario Board stated:

> *[A] complainant must demonstrate that the union's actions were:*
> . . . . .
> *(3) "in Bad Faith" – that is, motivated by ill-will, malice hostility or dishonesty.*

[221] The Board is satisfied that the Union's actions which have been found to be deficient, and amount to arbitrary treatment of the Applicant, were not sufficiently motivated by malice or ill-will. As a consequence, there is not sufficient evidence which would justify the Board finding bad faith on the Union's part in this matter.

4. Conclusion on the Duty of Fair Representation Issue

[222] In conclusion, the Board concludes that the Union treated the Applicant's first three (3) grievances in an arbitrary fashion and, as a consequence, violated subsection 6-59(2) of the *SEA*. The remaining aspects of the Applicant's claim under sub-section 6-59(2), however, are dismissed.

THE REMEDIAL ISSUE

[223] The final issue to be addressed relates to the appropriate remedy which the Board should direct in view of its finding that the Union has acted arbitrarily towards the Applicant.

[224] Counsel devoted only a small portion of their submissions – both oral and written – to the Remedial Issue. Counsel for the Applicant seeks three remedial orders from this Board: (1) a declaration stating that the Union breached its duty of fair representation to the Applicant set out in subsection 6-59(2) of the *SEA*; (2) an award of damages as redress for this breach, and (3) costs on a solicitor-client basis. In support of the Applicant's remedial requests, he relied particularly on the following authorities: *Boos v Health Sciences Association of Saskatchewan*, LRB File No. 181-05; 2008 CanLII 47058 (SK LRB) ["*Boos*"], and *Petite v International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 555 and Babcock & Wilcox Canada Ltd.*, LRB File No. 158-08, 2009 CanLII 27858 (SK LRB) ["*Petite*"].

[225] Counsel for the Union submitted that in the event the Board should find a breach of subsection 6-59(2), only a declaration should issue. She submitted that neither a damages award nor an award of costs would be appropriate in the circumstances of this case.

A. Relevant Statutory Provisions

[226] The provisions of the *SEA* most relevant to the Remedial Issue in this matter read as follows:

6-103*(1) Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*

(2) Without limiting the generality of subsection (1), the board may do all or any of the following:

. . . . .

(b) make orders requiring compliance with:

(i) this Part;
(ii) any regulations made pursuant to this Part; or
(iii) any board decision respecting any matter before the board;

(c) make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes of this Act[.]

. . . . . .

6-104*(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:*

. . . . .

(d) requiring any person to do any of the following:

(i) to refrain from contravening this Part, the regulations made pursuant to this Part or an order or decision of the board or from engaging in any unfair labour practice;
(ii) to do anything for the purpose of rectifying a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board;

(e) fixing an determining the monetary loss suffered by an employee, an employer or a union as a result of a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or union the amount of the monetary loss or any portion of the monetary loss that the boards considers to be appropriate.

6-111*(1) With respect to any matter before it the board has the power:*

. . . . .

(s) to require any person, union or employer to post and keep posted in a place determined by the board, to send by any means that the board determines, any notice that the considers necessary to bring to the attention of any employee[.]

B. <u>Declaratory Relief</u>

[227] The principal remedial claim requested by the Applicant is for a declaration from this Board that the Union breached its duty of fair representation set out in subsection 6-59(2) of

the *SEA* in relation to her first three (3) grievances. As already explained above, the Board has made just such a finding.

[228] As the Board recognized in *Petite*, *supra*, at paragraph 92, the typical remedy in circumstances where a union has breached its duty of fair representation to one of its members, is "to order that the matter be dealt with under the grievance procedure in the collective agreement governing the parties in dispute, or, alternatively, as appropriate, to resume the grievance process at the point it became derailed". In this case, the Applicant is no longer employed at Cornerstone Credit Union nor does she wish to have those grievances arbitrated. In these circumstances, a declaratory Order would seem to be a viable option.

[229] This Board has issued declaratory Orders on numerous occasions and it would appear it has the jurisdiction to make such an Order pursuant to subsections 6-103(1), (2)(b), and 6-104(2)(d) of the *SEA*. That said, declaratory orders are discretionary in nature and should not be issued as a matter of course. The Board should be satisfied that a substantially valid labour relations purpose would be served before making a declaratory order. See *e.g.*: *Ledcor Industries Limited*, 2003 CIRB 216 (CanLII), and *Daynes Health Care Limited*, [1983] OLRB Rep. May 632.

[230] In the circumstances of this case, the Board is satisfied that a valid labour relations purpose does exist. The Union failed in its duty to represent the Applicant in this matter, and, since the more traditional remedy in such circumstances is not appropriate here, an Order declaring that the Union fell down in its statutory responsibilities towards the Applicant is warranted as it will serve notice on others as to what transpired here.

[231] Accordingly, the Board will issue an Order declaring that the Union acted arbitrarily towards the Applicant in respect of her first (3) grievances for the following reasons:

- The Union failed to investigate in any serious way the circumstances of those grievances, even after acknowledging that the verbal warning issued to the Applicant following her harassment complaint was of concern to the Union;

- Prior to the vote on the reconsideration motion in September 2013, the Union failed to provide the membership with an overview of the grievances, its considered recommendation on whether they should proceed to arbitration, and the reasons for that recommendation;

- The Union permitted the fate of those grievances to be decided solely by a vote of the membership at a regular local meeting at which many more union members than usual, participated, and at least one (1) of those members had been implicated in the Applicant's harassment complaint, and,

- The Union has no internal review mechanism in place to address apparent unfairness to the affected member in circumstances where his or her grievances are voted down by the membership.

C. Damages

[232] The Applicant's claim for damages advanced in this case is unusual. In summary, she asserts that had the Union decided to proceed to arbitration on her first three (3) grievances she would have been in a stronger position to negotiate a larger global settlement with the Employer than she did. It will be recalled that the Applicant obtained a financial award of approximately $17,500 as part of her over-all settlement with the Employer following her termination. This award compensated her in part for withdrawing her last three (3) grievances. Her argument is that had the first three (3) grievances also been "on the table", her counsel would have been able to demand a higher final settlement figure.

[233] The Board recognizes that by virtue of subsection 6-104(2)(e) it has the jurisdiction where appropriate to order the payment of damages so as to compensate for "the monetary loss suffered by an employee…as a result of a contravention of [Part VI]". The purpose underlying this authority is that which animates damage awards in contract law generally, namely to place the wronged party in the position he or she would have been in but for the breach.

[234] However, in order to achieve such a result it is necessary to have evidence indicating with some precision the quantum which would achieve this end. Unfortunately, in this case, such evidence is wholly lacking. Instead the Board was left to speculate on (1) whether the Applicant could have negotiated a higher settlement offer had there been six (6) grievances, rather than the three (3) in play, and (2) the quantum of that additional amount.

[235] In the absence of such evidence, the Board is in no position to issue a damages award pursuant to subsection 6-104(2)(e). As a consequence, this remedial claim is dismissed.

D. Costs

[236] The Applicant's third and final remedial request is to be fully compensated for her legal expenses. To that end, she is seeking an order directing the Union to reimburse her for counsel fees on a solicitor-client basis.

[237] As this Board noted in *Rattray v Saskatchewan Government and General Employees' Union*, LRB File No. 011-03, 2003 CanLII 62853 (SK LRB), at paragraph 13, "requests for costs are made so often and awards for costs are made so infrequently". It is necessary, therefore, to determine whether this is one of those infrequent cases where a costs order, let alone an order for costs on a solicitor-client basis, is warranted.

1. Relevant Case-Law

[238] Two (2) prior decisions of this Board are of especial assistance when answering this question. These decisions are: *Gordon Johnson v Amalgamated Transit Union, Local 588 and City of Regina*, LRB File No. 091-96 dated February 17, 1998 ["*Johnson (No. 2)*"], and *Petite*, *supra*.

[239] *Johnson (No.2)*, *supra*, was the Board's Decision on the remedial aspect of *Johnson (No.1)*, *supra*. Mr. Johnson made a number of remedial requests including damages and the payment of legal expenses. As the Board had determined that Mr. Johnson's termination grievance should be referred to arbitration, it decided that any award of damages would be premature.

[240] Former Chairperson Gray carefully considered the issue of costs and determined that such an order was not appropriate in that case. However, her discussion of this question generally is enlightening, and is reproduced in full below:

> *With respect to the claim for monetary loss related to legal fees incurred by Mr. Johnson in bringing this application for an unfair labour practice under section 25.1 of [The Trade Union Act, RSS 1978, cT-17], the Board addressed this issue in [K.H. v Communications, Energy and Paperworkers Union, Local 1-S et al., LRB File No. 015-97] and held that in exceptional circumstances such claims will be allowed. In that instance, the applicant was suffering from a mental illness which impaired his ability to represent himself in relation to his employment problems. However, the Board generally adopts a cautious approach to claims for*

damages of this nature. In Stewart v Saskatchewan Brewers' Bottle & Keg Workers, Local Union No. 340, [1996] Sask LRBR 386, LRB File No. 025-95,[7] the Board reviewed the practice in other jurisdictions and concluded as follows, at 395:

> *We are of the view that, like the legislation which is the basis of the decisions of the Canada Labour Relations Board and the British Columbia Labour Relations Board, [The Trade Union Act] confers upon this Board broad powers to fashion remedies like the "make whole" remedies described in those decisions. The powers granted to the Board in ss. 5(e) and (g) of the Act, along with the general remedial power under s. 42 of the Act, permit us a wide latitude in devising remedies which will address the losses suffered by applicants in the context of the objectives of the Act.*
>
> *In this connection, it is perhaps helpful to think of legal expenses in terms other than the notion of "costs" as it is understood in connection with proceedings in civil courts. For reasons which have been alluded to earlier, this Board has never considered it appropriate to award costs in that sense of the term as part of the determination of applications under the Act. This does not mean that there are not circumstances in which the expense of obtaining legal advice might not be part of an extraordinary "make-whole" remedy. In some cases, the essence of the infraction which is alleged by an applicant concerns the representation to which an employee is entitled under the Act. In this sense, granting some compensation for the use by an application of the services of a solicitor is more akin to compensation for a breach of fiduciary duty than to costs in their traditional sense.*
>
> *As counsel for the Union pointed out, this Board has expressed some reservations about the use of private counsel by employees in their dealings with a trade union. In Brent Liick v Canadian Union of Public Employees, [1995] 3rd Quarter Sask. Labour Rep. 78, LRB File No. 237-93, the Board made the following comment at 102-103:*
>
> > *As we indicated in the Berry decision, it is not unusual for an individual employee to seek the advice of private counsel, and it may in some circumstances be appropriate for a trade union to accept assistance from that source. As we have indicated above, however, it is the trade union which enjoys the exclusive right and obligation to represent employees in matters which concern their terms and conditions of employment, including issues related to disciplinary action. This severely restricts the role which may be play by private counsel. It is the trade union which retains control over decision concerning whether and how grievances should be pursued, not the individual employee or his counsel. The employee is bound by the decisions reached by the trade union or settlements reached with an employer; neither the employee nor counsel can exercise a veto over such actions or insist that the trade union comply with their demands.*
>
> *We would reiterate our view that an employee is not entitled to retain legal counsel to make representations every time the employee has a disagreement or difference of opinion with the trade union, or to present the bill for those legal services to the trade union as a matter of course.*
>
> *We must also admit to a concern that we not encourage the view that proceedings before this Board can only be undertaken effectively when an applicant is represented by legal counsel. The Board makes considerable efforts to remain accessible to parties who are not*

[7] The LRB File Number for *Stewart*, *supra*, referenced in the decision is incorrect. It should read LRB File No. 029-95.

> *represented by lawyer and to conduct hearings in which a lay person can participate.*
>
> *Nonetheless, there are, in our opinion, circumstances in which it is justifiable to consider a remedial order to assist an applicant with the expenses associated with legal representation. We expressed our view in our earlier Reasons for Decision that the circumstances which gave rise to this application are exceedingly unusual. As the British Columbia Board point out in the Kelland case, supra, not all cases in which a trade union has committed a breach of the duty of fair representation are cases in which that union has completely disqualified itself from further representation of the complainant. Similarly, not all cases in which an applicant wishes to raise complaints about defects in the procedures followed by a trade union are cases in which the applicant should be permitted to make use of legal services as the expense of the trade union.*
>
> *In our view, this case does not present an exceptional circumstance to bring Mr. Johnson within the rule set out in the Stewart case, supra. The Union's executive committee was found by the Board in its Reasons for Decision to have acted in a supportive fashion toward Mr. Johnson and actively urged the membership of the Union to support the arbitration of his grievance. They followed the procedures which were set out in their constitution for approving the referral of a grievance to arbitration. However, the Board found that this method was arbitrary and resulted in a breach of the duty of fair representation.*
>
> *In these circumstances we cannot conclude that the Union placed itself in a position of completely disqualifying itself from further representation of Mr. Johnson. Similarly, unlike the K.H. case, supra, it is not a situation where Mr. Johnson was incapable of representing his case to the Union, to the Union membership or to this Board. As indicated in the Stewart decision, supra, the Board processes are intended to be utilized by persons without legal training. The Board will take steps both prior to a hearing and during a hearing to ensure that an employee's complaint is fairly put to the Board and that the hearing is conducted in a fashion that takes into account the lack of legal training and familiarity with Board processes. As a result, no Order will issue with respect to any expenses incurred by Mr. Johnson in the Board processes. [Emphasis added.]*

[241] More recently, in *Petite*, *supra*, another duty of fair representation claim, the Board made an order for legal costs payable by the Union to Mr. Petite. The Applicant, a journeyman boilermaker welder, lived on Cape Breton Island in Nova Scotia. While working at SaskPower's Poplar River Plant located in Coronach, Saskatchewan, he was terminated. Although the Union had filed a termination grievance, it failed to take any further action to move it forward.

[242] Chairperson Love concluded the Union had breached section 25.1 of *TUA* and directed that the grievance should proceed to arbitration. As ancillary to this Order, he directed at paragraph 97:

> ***[97]*** *The Applicant has also been put to considerable expense with respect to prosecution of his application against the Union. In order to place the applicant in the same position that he would have been, but for the failure, the Board is of the opinion that it is appropriate to provide some compensation for the expense to which he has been put. Accordingly, the Board further orders:*
>
> 1. *That the Union shall forthwith pay to the Applicant his reasonable and necessary expenses incurred for travel and sustenance from his home to attend the initial hearing of this matter and the continuation of the hearing.*
>
> 2. *That the Union shall pay to the Applicant, or to his counsel upon written direction from the Applicant, a counsel fee for retained counsel in respect of this matter of $750.00 per hearing day.*

2. Analysis and Decision

[243] Applying the principles that emerge from these authorities, the Board concludes that this is one of those rare circumstances where an Order should be made directing the Union to reimburse the Applicant for a portion of her legal expenses. It must be remembered that an order of this kind is discretionary. Furthermore, it is not intended to provide full indemnification of such expenses; rather, as this Board noted in *Stewart*, *supra*, it should be viewed as compensating an applicant for a breach of the statutory duty owed to him or her by the Union.

[244] Two (2) considerations in particular weigh in favour of awarding some monetary relief to the Applicant for legal expenses she incurred in bringing this application to the Board.

[245] First, as outlined above the Union failed to deal with the Applicant's first three (3) grievances in a serious or responsible way. Unlike *Johnson (No. 1)*, *supra*, there was no attempt to investigate the circumstances giving rise to them, no serious consideration given to the merits of these grievances, no recommendation presented to the membership and no attempt to instruct the membership about the grievances prior to the reconsideration motion. In light of these circumstances, the following comments of the Board in *Stewart v Saskatchewan Brewers' Bottle & Keg Workers, Local Union No. 340*, LRB File No. 029-95 (Monetary Loss: Reasons for Decision) dated May 21, 1996 ["*Stewart (No. 2)*"] are especially apposite:

> *A wide range of factors must be taken into account in deciding whether it is appropriate to grant the request of Mr. Stewart for the payment of his legal expenses by the Union. In this case, it is our view that Mr. Stewart was justified in attempting to bring to light the highly irregular conduct of the Union in preventing him and his colleagues from taking part in the democratic processes of the Union*

> *and in making the use of the services of a solicitor to assist him in formulating this unusual application.*

[246] Second, there is an appendix to the Local Union's Bylaws that pertains to costs for legal services expended in defending against a duty of fair representation claim brought against it by one (1) of its members. Although Resolution #4 dated May 1, 2003[8] was set out earlier in these Reasons for Decision, it is reproduced below for ease of reference:

> *In cases where any member or nom-member [sic] in good standing with Retail, Wholesale and Department Store Union Local 955 files an application with the Saskatchewan Labour Relations Board alleging the Union is in violation of Section 25(1) (Duty of Fair Representation) and subsequently the complainant member or non-member either withdraws his/her application or the Saskatchewan Labour Relations Board orders the complainant member or non-member's application be dismissed.*
>
> *Therefore, be it resolved that the Retail, Wholesale and Department Store Union Local 955 shall have the right to recover its costs and all applicable legal fees from the complainant by whatever legal means that the law will allow and that the Retail, Wholesale and Department Store Union Local 955 has incurred in the defence of any Duty of Fair Representation (DFR) application that the Local Union is required to defend in accordance with its legal rights.*

[247] This Resolution is unusual, to be sure. Yet, it is beyond dispute that it authorizes the Local to seek full indemnification for its legal costs from a member or non-member whose duty of fair representation claim is either withdrawn or dismissed by this Board. Apart from the fact that it operates as a serious disincentive to members or non-members who believe their interests have not been adequately represented by the Union from pursuing a claim under subsection 6-59(2) of the *SEA*, it plainly imposes a further potentially significant burden on a member who unsuccessfully chose to pursue a duty of fair representation claim.

[248] It is true Mr. Guillet testified that in all the years he had been a service representative to the Local this Resolution had, to his knowledge, never been invoked, and he very much doubted it would be should the Applicant's application fail. However, this is pure conjecture on Mr. Guillet's part, and in light of all that has transpired in this case, the Board is far from convinced that his faith in the Union's beneficence had the Applicant's claim been dismissed, is well-placed.

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[8] Exhibit A-14, at p. 7.

[249] Accordingly, the Board is of the view that since the Applicant could have been exposed to financial liability had her application failed, there is a modicum of justice in providing her with some compensation for the legal fees she incurred in order to prosecute it. The question remains what is an appropriate quantum for an award of this Board.

[250] At the outset, the Board is not prepared to direct the Union to compensate the Applicant for all her legal expenses, *i.e.* costs on a solicitor-client basis. The jurisprudence of this and other Boards indicates that such an award is intended to be equitable, and not punitive, in nature. See e.g.: *Stewart (No. 2)*, *supra*, and *Repac Construction and Materials Limited v Teamsters*, [1976] OLRB Rep Oct. 610, at 612.

[251] In order to arrive at an appropriate amount, the Board takes guidance from the award made in *Petite*, *supra*, namely $750.00 per sitting day. This award was made almost eight (8) years ago, and the Board is of the view that it needs to be enhanced in order to take into account the passage of a significant period of time.

[252] Accordingly, the Board directs that the Union shall pay to the Applicant, or, with a written authorization from the Applicant, to her legal counsel $1,000.00 per sitting day. As this hearing before the Board comprised 4.5 sitting days, the total amount will be $4,500.00.

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

[253] 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.

[254] 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.

[255] The Board is of the view that despite the fact the Applicant did not seek such an order, it nevertheless should issue. A considerable amount of time has elapsed since the events at the heart of this matter took place. As well, all employees should know that the flaws in the Union's processes in this case, flaws the Board found to violate subsection 6-59(2) of the *SEA*, are no longer acceptable in order to avoid a similar situation arising in the future.

[256] 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, the Union shall post a copy of those documents in a place in the workplace where the Union or its officials normally post notices to its members respecting Union business for a period of 60 days.

ORDER

[257] The Board makes the following Orders:

- **THAT** the Union acted arbitrarily towards the Applicant and contrary to subsection 6-59(2) of *The Saskatchewan Employment Act* in respect of her grievances, two (2) dated April 5, 2013 and one (1) dated May 3, 2013, for the following reasons:

  - The Union failed to investigate in any serious way the circumstances of those grievances, even after acknowledging that the verbal warning issue to the Applicant following her harassment complaint was of concern to the Union;

  - Prior to the vote on the reconsideration motion in September 2013, the Union failed to provide the membership with an overview of the grievances, its considered recommendation on whether they should proceed to arbitration and the reasons for that recommendation;

  - The Union permitted the fate of those grievances to be decided solely by a vote of the membership at a regular local meeting at which many more union members than usual, participated, and at least one (1) of those members had been implicated in the Applicant's harassment complaint, and,

  - The Union has no internal review mechanism in place to address apparent unfairness to the affected member in circumstances where his or her grievances are voted down by the membership;

- **THAT** the Applicant's claim for damages flowing from the Union's arbitrary conduct towards her is dismissed;

- **THAT** the Union shall pay to the Applicant, or, with a written authorization from the Applicant, to her legal counsel, the sum of $1,000 for each sitting day, such sum not to exceed $4,500, and

- **THAT** within three (3) days of receipt of these Reasons for Decision, the Union is to post a copy of these Reasons for Decision together with the Board's Order for a period of 60 days in a place in the workplace where the Union or its officials normally post notices to its members respecting Union business.

[258] 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 **April, 2017**.

LABOUR RELATIONS BOARD

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