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

LRB File No. 130-15 & 151-15; July 24, 2017

Chairperson, Kenneth G. Love, Q.C.; Board Members: Jim Holmes and Ken Ahl

For the Applicant:	Self Represented
For the Respondent:	Gary Caroline
For the Respondent Employer	Alison Adams

Summary Dismissal – Union requests summary dismissal of application alleging breach of Duty of Fair Representation – Board reviews materials filed with the Board and finds that an arguable case exists for review – Summary Dismissal application dismissed.

Summary Dismissal – Section 6-111(1)(p) of *The Saskatchewan Employment Act* – Board considers request to dismiss application filed for summary dismissal of Application by employee under section 6-59 of *the Saskatchewan Employment Act*.

Practice and Procedure – Delay – Board considers whether application should be dismissed for delay – Board establishes 5 factors to be considered with respect to the issue of delay.

Practice and Procedure – Delay – Board considers whether application should be dismissed for delay – Board confirms that section 6-111(3) does not apply with respect to complaints under section 6-59 of *The Saskatchewan Employment Act*.

Practice and Procedure – Abuse of Process – Board considers whether application amounts to an abuse of process when Applicant raises similar issues to those previously adjudicated by Adjudicator appointed under the provisions of section 4-3 of *The Saskatchewan Employment Act*.

Failure to Dispatch – Board considers prior jurisprudence regarding the failure of a Union to dispatch its members.

REASONS FOR DECISION

Background:

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

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

[3] A determination was made by adjudicator Anne Wallace on August 1, 2016. In her ruling, Adjudicator Wallace dismissed the Applicant's claim under the Occupational Health and Safety provisions of the *SEA* as being filed outside the statutory timelines for filing of appeals which left her without jurisdiction to hear the matter. That ruling was appealed to this Board pursuant to section 4-8 of the *SEA*. That appeal was withdrawn by the Applicant prior to it being heard by the Board.

[4] On May 4, 2017, the Board resumed its hearing. At that hearing, the Ironworkers again raised as a preliminary matter a summary dismissal application. The Board heard argument from the parties on that issue. This decision relates to this renewed application for summary dismissal by the Union.

[5] There are two possible processes whereby an application for summary dismissal may be raised with the Board. In the normal course, an application for summary dismissal is first reviewed by an *in camera* panel of the Board who will determine if the application should be

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

advanced to be heard by the panel scheduled to hear the underlying application, or if the application should be dealt with *in camera*. If the panel determines that the matter can be dealt with *in camera*, the Board Registrar contacts the parties and requests written submissions from them. Those submissions are reviewed, along with the materials filed in respect of the matter and a decision made concerning the summary dismissal of the matter.

[6] As was the case here, the Board the application was initially considered by an *in camera* panel who determined that the application was not one which could be conveniently dealt with *in camera* and it was referred to be raised as a preliminary matter before the panel established to hear the underlying matter. Accordingly, the summary dismissal application was raised when the Board first considered this matter on December 10, 2015 and again when the Board reconvened following Adjudicator Wallace's decision regarding the Occupational Health and Safety appeal by the Applicant.

[7] The Board clarified[3] and adopted this procedure following comments by Justice Popescul[4] (as he was then) in respect of the Board's process for summary dismissal which had been outlined in *Beverly Soles v. Canadian Union of Public Employees, Local 4777*[5] .

[8] In KBR Wabi[6], the Board established the following test with respect to the exercise of its authority to summarily dismiss an application for lack of evidence or no arguable case[7]. At paragraphs [79] & [80] the Board said:

> ***[79]*** *Taking all of this into consideration, we adopt the following as the test to be applied by the Board on the exercise of its authority under s. 18(p) of the Act.*
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> > *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant proves everything alleged in his claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this*

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[3] See International Brotherhood of Electrical Workers, Local 529 v. KBR Wabi Ltd. [2013] CanLII 73114 (SKLRB), LRB File Nos. 188-12, 191-12 - 193-12, & 198-12 – 201-12.

[4] See Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers (United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Saskatchewan Labour Relations Board [2011] SKQB 380

[5] [2006] Sask. L.RB.R. 413, LRB File No 085-06

[6] International Brotherhood of Electrical Workers, Local 529; International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870; Construction and General Workers' Union, Local No. 180; International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771; United Association of Journeyman & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179; International Union of Painters and Allied Trades (AFL-CIO-CLC), Local 739; United Brotherhood of Carpenters and Joiners of America, Local 1985 and United Brotherhood of Carpenters and Joiners of America, Millwright Union, Local 1021 v. KBR Wabi Ltd., Construction Workers Union, Local 151, KBR Canada Ltd., and KBR Industrial Canada Co. [2013] CAnLII 7314 (SKLRB),, LRB File Nos. 188-12, 191-12, 192-12, 193-12, 198-12, 199-12, 200-12 & 201-12

[7] The KBR Wabi decision was rendered pursuant to the Board's authority which was then section 18(p) of The Trade Union Act. That provision has been re-enacted in the SEA 6-111(1)(p) in identical terms.

> *ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
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> *2. In making its determination, the Board may consider only the application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his claim.*
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> ***[80]*** *However, the Soles case, supra, also provided for summary dismissal without an oral hearing pursuant to s. 18(q) of the Act. While we recognize that these two powers need not be exercised together, there are occasions when the Board may determine that a matter may be better dealt with through written submissions, without an oral hearing. This was the procedure contemplated by Soles.*

Materials Before the Board:

[9] The Board has the following materials before it to consider with respect to the Ironworker's application for summary dismissal of the Applicant's Duty of Fair Representation complaint.

1. The Applicant's application alleging a breach of the Duty of Fair Representation by the Ironworkers;
2. The Reply to that application filed by the Ironworkers;
3. Particulars provided by the Applicant in response to a request from the Ironworkers;
4. Additional documents provided by the Applicant in relation to alleged contraventions of the *SEA;*
5. The Summary Dismissal application filed by the Ironworkers on July 28, 2015; and
6. Renewed Submissions made by the Ironworkers regarding summary dismissal dated April 3, 2017.

Summary of the Materials before the Board:

The Application:

[10] The Application by the Applicant was filed with the Board on July 15, 2015. Under paragraph 4 of the application, where facts regarding the contravention alleged are to be provided, the Applicant wrote:

> *Discrimination. Failure to provide a safe working environment. Failure to follow Sask. OHS Regs. Failure to give first aid to an injured worker. Failure of union representative. Defamation Arbitrary Bad Faith*

[11] Under paragraph 6 of the application wherein specifics regarding, if a grievance was involved, the Applicant wrote:

> *The Union called to order a special executive board meeting where it was voted and found that I was not longer employable because of workplace conduct.*

[12] Under paragraph 7 of the application where details of the Ironworkers' appeal procedures under the Union Constitution were to be described as well as the results of the Applicant's participation in those processes, he wrote:

> *Article 9 of the Provincial Iron Workers' Agreement*
>
> *9:01 June 13, 2014 I presented to Jacob's Industrial an argument of unsafe work and failure to provide first aid to a [sic] injured worker.*
> *9:02 I am a foreman and a witness to the job-site accident.*
> *9:03 June 16 2014 I presented my grievance to Wayne Worall, Jeff Hay, Colin Daniels (all executive board members of the Ironworkers((Local 771)*

The Ironworkers' Reply

[13] The Ironworkers Reply, sworn by Colin Daniels, Business Manager for the Union, denied all of the allegations made by the Applicant and admitted none of the Applicant's submissions. Under paragraph 4, the Union commented that; "Mr. Brady's complaint is entirely lacking in particulars".

[14] At paragraph 5 of its reply, the Ironworkers provided the following:

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

(a) I am the Business Manager of the Iron Workers, Local771 (the "Union").

(b) The Union has always fairly represented Mr. Brady. In particular, the Union has never treated Mr. Brady arbitrarily, discriminatorily or in bad faith. Nor has it defamed him.

The Union Context

(c) The Union operates on a hiring hall model. Based on an employer's request for labour, a qualified and available iron worker is dispatched to work for that employer. If hired and when the work is finished, the dispatched worker is laid off and returns to the Union hall for another dispatch.

(d) Most iron workers dispatched to unionized contractors work under the Provincial Iron Workers' Collective Agreement. However, iron workers dispatched to Jacobs Industrial Services Ltd. ("Jacobs") work under a different agreement because the work performed is maintenance not construction work. Jacobs employs iron workers under the General Presidents' Maintenance Committee for Canada Project Agreement.

Mr. Brady's Dispatch History

(e) Mr. Brady has a history of being fired and banned by iron worker employers.

(f) In August 2012, while working for Balzer's Canada, Mr. Brady drove the company truck while impaired, Mr. Brady was stopped by police and the truck-containing the company's tools was impounded. The impounding caused the company lost time since its tools were unavailable. Balzer's Canada fired Mr. Brady.

(g) In November 2012, Mr. Brady was working for PCL when he threatened to hurt himself at work. Mr. Brady was fired. PCL informed the Union that for an indefinite period of time, no company in the PCL family would rehire Mr. Brady. PCL is a major contractor in the Saskatchewan construction market.

(h) In January 2014, BFI Constructors Ltd. fired Mr. Brady because (i) his welds were of an unacceptably poor quality and (ii) he violated BFl's respect in the workplace policy by threatening and swearing at co-workers. BFI, another major Union contractor, also banned Mr. Brady from being rehired.

The Jacobs Dispatch

(i) In the spring of 2014 Jacobs required iron workers for a project at the Mosaic Colonsay potash mine. The project was completed on or around July 19, 2014.

(j) Mr. Brady was dispatched to work for Jacobs on March 31, 2014. He voluntarily quit the job on June 14, 2014. He was not fired or laid off.

(k) After quitting, Mr. Brady called the Union dispatch hall asking to be dispatched to another employer. He told the Union's dispatcher that he had quit the Jacobs job because he was having problems with a foreman.

0) Mr. Brady never filed any grievance(s) against Jacobs. Mr. Brady never asked the Union to file any grievance(s) against Jacobs.

(m) To the Union's knowledge, Mr. Brady did not raise any concerns with an Occupational Health Officer acting under Part III (Occupational Health and Safety) of The· Saskatchewan Employment Act until December 2014, at which time Mr. Brady claimed that Jacobs had discriminated against him for raising health and safety issues while employed earlier that year.

(n) In a report dated January 29, 2015, the Occupational Health Officer dismissed Mr. Brady's complaint.

(o) To the Union's knowledge, Mr. Brady did not appeal this finding.

After the Jacobs Dispatch

(p) On July 1,2014, after Mr. Brady quit his Jacobs job, the Union dispatched him to work for Aecon at its McClean Lake project. He was laid. off on July 16, 2014. Aecon's layoff notice: listed the reason for the layoff as "medical".

(q) Mr. Brady was dispatched to work for Icon Construction Ltd. from July 21 to July 28, 2014.

(r) The Executive Board of the Union met with Mr. Brady on August29, 2014 to discuss his dispatch record. Mr, Brady told the Union that he wished to pursue a career in Workplace safety. The Union expressed its willingness to support and assist Mr. Brady in obtaining rehabilitation as well as retraining as a safety officer; The Union informed Mr. Brady that until he was deemed fit for work, he could not be dispatched by the Union as an iron worker;

(s) Nine months later, Mr. Brady sent a letter to the Union asking why he could not be dispatched [Attachment A] .

(t) I responded on behalf of the Union in a letter dated June 16,2015 [Attachment B].

Particulars provided by the Applicant

[15] The Applicant provided considerable documentation to the Board in particularization of his claims. He divided these documents into four (4) categories:

1. *Particularization on Contraventions of the Saskatchewan Employment Act to the Labour Relations Board against the Iron Workers Local 771.*

2. *Phone Calls and cell phone history.*

3. *Report submitted to Iron Workers Local 771.*

4. *Gallery One pictures with explanations.*

5. *Additional Documents provided August 4, 2015.*

Particulars regarding Contraventions of the *SEA*

[16] The Applicant described a meeting held June 16, 2014 at the Ironworkers office. In attendance at the meeting were Wayne Worrall, the Local's president, Ryan Tappin, the Local's Vice-President, Colin Daniels, Business Manager of the Local, and Jeff Hay, the Business Agent/Dispatcher for the Ironworkers. The Applicant says that he verbally reported to the group that he "had a grievance with Jacobs and that safety was the reason for the grievance".

[17] He went on to explain, as follows:

> *I explained that Jacobs was also not being faithful in contract to Mosaic and were using the Ironworker crew as their reason for prolonged delays and major cost over runs. I suggested that the union talk to Jacobs. I said consider that several union members were at risk of losing their jobs because of the way Jacobs was reporting costs to Mosaic. I explained that the job losses would be wide spread and effect many unions not just the Ironworkers. I proposed that possibly the Ironworkers would consider speaking with other unionized contractors about replacing Jacobs as the prime contractor if the union could not fix the Jacobs problems. I suggested that Mosaic liked South East Construction of Esterhazy.*
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> *At this time, Vice President Ryan Tappin said that he would like to see if Custom Steel might consider the contract. I said I felt comfortable with speaking to South East Construction because I knew superintendant [sic]Kevin Prince well and got along well with him. Ryan gave me his private cell number and told me to stay in contact so we did not get two contractors involved and also we were still giving Jacobs a chance to fix this safety problem the mediation had just began. I said I would report every move and that the Ironworkers would know what was going on. I was told to do what I could do. Colin Daniels said that he was not happy with Jacobs that there were many problems; he said he had a contract with Jacobs to supply men to Jacobs. Daniels stated if the ironworkers failed the Jacobs contract it could cost them financial costs of breach of contract. We all understood this. I asked again what about the men and their safety? Wayne said someone has to do something and that he would phone Jacobs right away and find out what was going on. Colin said he couldn't report accidents to the mines inspector because of his contract, I said what if I report the site. Yes ok you can, just keep the ironworkers out of it. I agreed. We all understood that changing the contractor was rare, but the concern was for the safety of the men and to maintain Mosaic as a union client.*

[18] Another meeting was held at the Ironworkers office on June 17, 2014 about which, the Applicant says the following:

> *June 17, 2014- Ironworkers office meeting- Once again, I presented the safety problems of Jacobs Industrial Services and to include new messages (text messages) from workers at the Jacobs job site. The new messages include reports of ongoing unsafe work practice, injuries and a safety stand down. (This is a second time the crew has stopped work because of safety). I explained that I would report to the Mines Inspector. I would talk to South East Construction and to Mosaic. I explained that the contact with South East Construction and Mosaic would be informal and of information based nature and that 1 would seek first the approval of the ironworkers before any further talks continued after this. The texted messages were serious; a large steel piece fell during rigging and just missed two workers not involved in the rigging work. The second accident was a second worker was now electrocuted with a 440 power line. I was asked to make a report in writing which I did and brought to the Ironworkers 771in the next few days.*

[19] On June 19, the Applicant had contacted a Saskatchewan Occupational Health and Safety Mines Inspector in Saskatoon and arranged to meet with him on June 23, 2014.

[20] The Applicant had also contacted Mr. Gordon Prince of Mosaic Potash. A meeting was set up with Mr. Prince at his office in Regina. He described the meeting as follows:

> *This meeting was explained to Ironworkers 771 during the previous Ironworker meetings. I explained that I would see the Mines problems and the history of other structural problems like this one, I felt that the issue should be addressed. Mr. Prince was given several pictures and an explanation to the pictures in writing. Mr. Prince asked me what the problems were. Mr. Prince opened up by saying he did not understand why Mosaic was having so much trouble with Jacobs at Colonsay. I felt this statement confirmed my discovery of the problems. I then presented the cost and billing troubles I knew of and that my crew and others were being blamed for cost overrun that was not the case, but that Jacobs was intentionally holding back important evidence of structural problems as a way to present more costs to the already cost overrun project. Mr. Prince then asked me what my objective of the meeting was. I explained that the men were all good workers just needed support from management. I explained that only on rare occasions had I ever even witnessed this happen but the ironworkers did support a new contractor if the new contractor would keep the workers hired and continue the work as planed with new ironworker supervision. The examples I provided were the building of the Saskferco plant and the building of the Watson Saskatchewan Cargill Grain elevator. In both of these jobs, the prime contractor lost the client contract and a new contractor was supported by the ironworkers and the job continued without job loss or work interruption. Mr. Prince said why do we have no problems with the Jacobs crew at Belle Plaine and yet Colonsay is full of problems. I said I had worked at Belle Plaine as well; the answer I gave was some people are like that I guess, they get into a problem and then hide the truth. I said Belle Plaine is a solution mine and is supervised by the 555 local Boilermakers because most of the work is pipe and vessel which is outside the ironworkers regular work type. I had worked there and they were a great crew. Mr. Prince said what would you do then? I said if the ironworkers allow and you allow I will present to you a new contractor, that being South East construction, again I stated if all parties agree, meaning, the ironworkers, the Mosaic company and South East Construction. Mr. Prince said this could present a lot of work. He then said that he was not upset that Jacobs took so long to do the work or that it*

> *was so over budget, but that it was that they kept on lying to his engineers. I now knew that he was aware prior to me coming to see him. I said I would contact the ironworkers and South East Construction right away to continue the talks and that I would contact him again with the results of the talks.*

[21] On July 7, 2014, the Applicant received a call from Mr. Hey, the dispatcher for the Ironworkers, to advise that he was being pulled off the Mosaic job and was being dispatched elsewhere. He described the conversation as follows:

> *July 7, 2014 - Mr. Jeff Hey, dispatcher and member of the Executive Board of Ironworkers 771 phoned me and that he has to pull me off and dispatch me to another job. But I said, what about Jacobs? Mr.Hey replied, he had a lot of problems with Jacobs and to come over to the office. I met with the Ironworkers again to see about the Jacobs's job and grievance. Mr. Wayne Worrall said to me, don't contact OHS any more ok? I said, Wayne, Its already done. I said I contacted OHS a few days ago and Mosaic as well. I said I was here and told you that! Wayne said, yes I know, just don't do it any more, Colin is right upset. I agreed to not phone any one even stating that Mosaic was waiting on my call back.*
>
> *Wayne was insistent "do not talk to anyone, just wait for us, we have it under control". I agreed not to call Mosaic back explaining I did not understand but that I would just follow orders. I leave Wayne's office and am told to go see Jeff Hay. I entered Jeff's office and asked me to do him a favor while I wait for the outcome the of Jacobs Industrial grievance. I asked what the favor was. He had a problem with some welds in the Cigar Lake Mine and asked if I could go up and take a look, and fix the welds up. I was uncertain, totally willing to help out just was not sure of the grievance process now. I asked if this would interfere in the grievance in any way. I was told not at all. Really, I asked? No, said Jeff this job shouldn't take long and you will be back in the city (Regina) quickly. OK, I said if the Jacobs grievance is going to take some time then I will help you with the welding at Cigar Lake.*

[22] The Applicant describes his reassignment to Cigar Lake. He describes some difficulties he had at the camp and with some welding he was assigned to do. After a difficult conversation with his wife, he requested and was granted emergency leave to be with his wife and left the camp to return to Regina.

[23] He met with the Ironworkers again on July 17, 2014 when he was called to the Ironworkers office by Mr. Daniels. He described that meeting as follows:

> *July 17, 2014- In Regina, Colin Daniels called me to the Ironworkers union hall. I entered his office. He said no one in this country can possibly get surgery that fast. I didn't feel I have to explain anything. Colin Daniels orders Wayne Worrall, Ryan Tappin and Jon Haasen to the meeting. Colin said I told you to leave the Jacobs thing alone! I said, I did as you asked. Daniels said I specifically said do not talk to anyone. I again said, I assure you I have not talked at anyone as I have been doing a small job for Jeff, Colin made me promise to him and to shake his hand that I would listen to his specific orders. I agreed.*

[24] On July 21, 2014, the Applicant again called the Ironworkers office "to ask about the Jacob's project/grievance, where did I stand?" He received no response to that inquiry other than to be summarily dispatched to another job with Icon Construction that was to commence the next day at an out of town location. That job lasted until July 28, 2014 and by the Applicant's report, went well, but he was advised by the Icon supervisor that he was being pulled off the job that day at the Ironworkers' request.

[25] On his return to Regina on July 29, 2014, he met with the Ironworkers and says he was advised by Colin Daniels that: "You are unemployable, you have post traumatic stress disorder". He was then escorted out of the building by Daniels. His particulars state:

> *Colin Daniels walked me to the front door and told me to get out of the building. Daniels insisted that I was intentionally trying to disrupt his progress with Jacobs. He said Jacobs got a new contract with Mosaic. I said, I didn't know that but that it would not affect anything I did. I said if Mosaic gave Jacobs the new contract then good for Jacobs. Colin said Mike Brodziak phoned him and said that I reported him to the Mines Inspector. I said, "I told you that,weeks ago and you agreed that I do it". He then said Brodziak was now ordering more men to add to his crew.*

[26] During the period July 30 – August 6, 2014, he says that he called the Ironworkers many times, but never had a call back concerning a return to work. He went to the Ironworkers office on July 7, 2014 to be told everyone was out. On August 8, 2014 he was summoned to the Ironworkers Office by Ryan Tappin, Vice President for a meeting of the Ironworkers' Executive Board. He went to the Union Office on August 15, 2014 but again, he was advised no-one was in. When he returned home, he phoned the President, Wayne Worrall. After several attempts, he reached Mr. Worrall and asked about the status of the Jacob's complaint. He was advised that the Union was still trying to determine what really happened.

[27] The Applicant did not work further in August and applied for Employment Insurance. In doing so, he noted that he had not received a Record of Employment from Jacob's.

[28] On August 28, 2014, he was advised that the Executive Board would meet with him on August 29, 2014. He described this meeting as follows:

August 29, 2014 - Before this Ironworker Executive Board meeting started, I am padded down and searched for electronic recording devices. My phone was taken and turned off and I was not allowed to write anything down.

Mr. Colin Daniels and the Executive Board opened the meeting. I am asked to respond to the Jacobs grievance and explain what happened. I was told to explain my job history of the last 5 years and to explain my mental and physical health.

Present as the Executive Board members were Colin Daniels, Wayne Worrall, Jeff Hay, Jason Dalshnider, Andy MacDonald, Randy Bernier, Jon Haasen, Ryan Tappin and myself, Lyle Brady .

In response to the Jacobs job, I stated that I was the 7th foreman in 8 months and that I had found structural damages the engineers were concerned about. Equipment like chain falls were missing their braking system but were being used even though I had ordered them removed several times. I explained the chain falls were wired shut and flagged out of service but would still be sent back to my
jobsite without repairs. I mentioned that a worker was injured and did not get first aid and that the worker was on medication for his heart and that he was electrocuted with high voltage. I said I was ordered to respond to a written statement that was read out loud, and that I disagreed with the statement and explained that I wanted to speak to my union which was later granted in a phone call from the site manager Mr. Ralph Larson. Daniels now asks who is Larson? Why didn't you contact us sooner? Daniels now totally denies seeing me June 16, 2014. Daniels said, you didn't mention anything to Brodziak, you didn't even ask for his help. I explained that Mr. Larson was the Jacobs manager that had contacted the Ironworkers the day 4 of my men left the job site early because of rain. They left and I had alternative work so Mr. Larson suspended the 4 men for one week. Again, everyone denied knowing Ralph Larson Site Manager for Jacobs.

Mr. Daniels - "did you contact OHS"? "Yes, I replied, you know that." Daniels denied this in front of the board members. He continued, saying, "I told you to back off and to leave the Jacobs job alone but you continued to interfere". I said, "I don't know what day the Mines Officer went to the mine". (I had assumed he would go sometime closer to June 23rd as that was when I met the Mines Officer).

I explained that men from the sight had text messaged me to ask me to tell you that the safety problems were continuing and that 2 men were almost hit by a heavy steel piece that slipped its rigging and fell from its hoist nearly striking these 2 workers and that a 2nd man had been electrocuted as well after an electrician of Jacobs incorrectly wired a 440 power line inside a building. Daniels said, "why didn't these men phone me"? I explained, "I am their Foreman and they asked me to contact you because they knew I was reporting to you aboutJacobs's safety".

At this point, the meeting turned into a shouting match.

Jeff Hay - I don't know why that if you knew the chain falls were no good, why you did not remove them from the job. I answered, "Jeff, I was the guy that wired them shut and ordered them taken away, 3 times. I said I threatened to cut the chains if they came back again. I stated that, in the safety meeting at Jacobs. Brodziak's son reported the chain falls had been repaired, he was the worker certified to repair them".

Mr. Jason Dalshinider - when you came out to the Coop upgrade you completely freaked out over smelling gas. He said, "the place makes gas what do you expect? I said the emergency gas leak alarm had rang and we went to a muster. All the men waited for about 30 minutes but no one came to do a head count of the workers so the workers left the worksite because it was now quitting time. I said "before I became an Ironworker, I

was an oil field driller and I know H2s gas from other gas. I explained, not doing a head count is not right, you do not know if you have a man down in the gas area. Also, I pointed out that some of the welders were grounding to the frame of the oil pipe racks because there was not enough welding cable for the work to take place. The welding machines were too far away from the work area of the welds. I said energizing the entire pipe rack is insanely unsafe work practice in an Oil and Gas refinery. (At the Co-op Refinery welders are required to be no farther from the ground cable than 18 inches with the positive cable to prevent gas explosions)".

Mr. Ryan Tappin - what is this about the crane at Estevan? "I said, a large crawler crane, about a 200 ton crane had its boom come down without an operator in the crane. I said the crane boom missed the lunch trailers of BFI and PCL by less than 15 feet". Ryan continued, "So what if the boom came down on the road what's the big deal here?" I felt completely insulted and stood up and said, "Ryan, 25th May 1990, men were killed by a crane falling in Estevan when the lunch trailers were too close to the working cranes".

Mr. Daniels - your welding at BFI was all garbage and none of it passed. I said, "it was 55 below outside. I was on an unsafe scaffold, working alone, no traps, no propane and I was given one chance to do the work and no chance to correct any poor welds. I said even the pipe lines give you one chance. I said I welded the crane mono rails for the over head cranes and they passed xray. The BFI building had all the columns standing and the sheeting was starting and the main beams were still outside in a snow bank. Everyone called the main beams crane rails. When they went to install the main beams, the columns all were leaning 25 mm. to the south, the entire building was leaning south. So they installed the beams with a torch because none of the holes lined up. Now they installed the gantry crane rails on top of those beams. So in time the cranes will cause a shifting and could even shear the beams bolts. BFI put the roof on the winch house then took the sheeting off and cut the proper slop in the columns then re sheeted the roof. The wall sheeting was taken off put on correctly but with no insulation then off came the sheeting again, then the insulation went in backwards. The sheeting was taken off 4 times. When Glen and Pat asked me how to hide all the holes, I said, try clear caulking, they didn't have clear so they used black, the siding was bright yellow. When Donny Toye superintendent came over to look at it, he just shook his head, he couldn't believe it, I walked over to see that job too . I said Donny just give the building to Cameco as a gift so it is off the books or you're not going to get anything else, the men did what they were told to do but we'rejust lost in directions, no prints, supervisors guessing what to do next. Back at the main building, the roof is now sheeted and BFI didn't install the cranes onto the rails. So now, we needed to come inside and lift with no head room for the 50 ton. So Randy Toye and I lifted the cranes as high as possible then hung the cranes in slings then lifted the cranes into place with the gib line and boom hydraulic lift cylinders. We came outside and see the front wall (north side) the iron does not line up to the cement. The cement is 2 inches narrower in O.D. No one checked the prints.

I said the Everaz job for Balzer's Canada, where the steel plate fell off the wall and nearly crunched 8 men and four welders failed the xray. And my welds only were the ones that held the steel plate to the wall so that everyone could escape the plate. I said, the other four workers were kept on as full time workers and I was let go". Mr. Daniels said, yes and Everaz dealt with that issue and it's over. I said "you didn't even retest the workers welding ability or drug test."

I then asked, what happened at Jensen Mine? A heavy beam got torn out of a frame then dropped onto the main hoisting drum breaking the drum anchors and sending a drilling machine to the bottom of the shaft were men are working. Those ironworkers get put on a bus and sent to the nurse for a drug test and the only man that passed the drug test was the bus driver. Every Ironworker failed. Then BHP Billington releases every ironworker from the site and finishes the project with CLAC non union workers. I continued saying, it's

also interesting that many of these workers were showing up on other job sites right after this, when they are required to go through a rehab that takes 90 days. Many of these men were on the Jacobs site well before 90 days. I asked, who the Ironworker's third party drug tester is.You charge $500 for failing a pre job drug test, but when there is a job accident, drug test failure is free of charge. If they even do a drug test. They didn't do any drug test at Everaz.

Andy Macdonald- one executive shouted out, your paranoid. I think you're too afraid to do this work. Mr. Daniels - asked for a vote on that statement. All eight members said they felt I was unable to perform mentally and physically. I again stood up and said, if I am too present my health records so be it but we will need to examine my fall accident where my Foreman Allen Genereau refused to give me first aid after I fell 40 feet and landed on a steel floor on my back.

At this moment, the meeting became very hot. Wayne shouted out, "we have been over this 100 times and it's over, we are not going back to that accident". I said "if you want the truth you need to read the documentation, and I need to have a chance to present this case. I said, just because you (the union) believed the ironworker supervisor Allan Genereau and the Engineer Lorne White, does not mean the statements are not lies. I said several ironworkers have signed witness statements but this union has refused to even interview them. I explained Tyson Mining gave first aid to a second worker when Allen Genereau wasn't anywhere do be found until the blood spatter needed to be cleaned up before safety got there. I explained, Tyson Mining gave first aid to a second worker when Allen Genereau would not.

This accident caused injuries to my back, feet, and head. I spit out several teeth, I had seizures. This was the 6th accident on this site. In six weeks, that was never reported to the OHS or anyone else. I explained that by having a supervisor that represents the ironworkers and the company, nothing ever gets reported and that what is reported is fixed before the Mines Inspector gets it.

For PCL, I said, I put 6 beams in the roof of the Regina Airport computer room. I was warned that I could not damage any of the 200 or so computer wires because it would affect the control tower .The wires were strung all over the room even reaching from the ceiling to the floor. I got the job done with very high praise from the PCL supervisor and I am given leads to 6 other projects. When I phoned into the hall you guys told me if you need men the contractor needs to phone in and you dropped my leads not even interested in helping me get the work. Again, when I asked for help on a new bridge at Halbrite, no one in the Ironworkers 771 union hall even cared.

You have had at least nine big expansion jobs with the potash mines in Saskatchewan and you had workers come from every province, and I was not even invited to one of these major jobs during start up.

Everytime I bring up a safety issue, there was never a proper grievance procedure.

[29] The outcome of the Executive Meeting was that the Applicant was declared unfit for work and was asked to undergo a mental health evaluation.

[30] In his other particulars, the Applicant provided the history of his concerns related to employee safety at a number of locations where he was working and described conditions

which he felt were unsafe for workers, particularly in respect of the Jacob's job at Mosaic Potash. These particulars included screen shots of text messages between workers on site, a summary of comments and discussions concerning safety issues, and photos of areas which the Applicant determined were unsafe working conditions.

[31] He provided additional documents to the Board on August 4, 2015 regarding his compliance with the Ironworkers's request that he undergo medical evaluation. In this material, it showed that he had attended 4 sessions of counselling with respect to *Learning techniques to manage different stressors*. These sessions spanned the period September 11, 2014 to September 30, 2014. In each of the session reports, the counsellor identified the risk level as "1-none"

[32] The Applicant, in January, 2015 wrote to the Deputy Minister of Labour Relations and Workplace Safety, Mr. Mike Carr. In that letter, he noted that he was currently prevented from working by the Ironworkers and was concerned about his pension rights. He also raised issues concerning the revocation of his union membership as an Ironworker. Additionally, he raised issues concerning occupational health and safety concerns with respect to a heavy structural beam that had been ripped from a bolted frame position during an improper rigging procedure.

[33] Mr. Carr met with the Applicant sometime prior to April 13, 2015. On April 15, 2015, Mr. Carr, in his role as Deputy Minister, wrote a letter requesting a medical opinion "as to Mr. Brady's fitness to engage in active work as a Welding Foreman/Supervisor…". In addition, the Applicant provided his consent to the release of medical information by his treating health care professional to Mr. Carr on April 15, 2015.

[34] On May 25, 2015, the Applicant also sent a letter to the Union requesting that he be dispatched without delay. In his letter, he noted:

> *If you are unwilling to do so, I request that you provide me with the reasons for your decision, in writing, again, without delay. I would also appreciate full disclosure of all materials your decision is based upon, as well as the details of any appeal mechanism which I may access to challenge your decision.*

[35] On July 2, 2015, the Applicant submitted (8) eight Access to Information requests to the Ministry of Labour Relations and Workplace Safety requesting information concerning safety events which he was aware of at various construction sites. In all cases, save one where

no response was received, no information was found concerning any reports of safety issues or incidents at these workplaces. The responses included a serious incident in which the Applicant was injured at a worksite in Yorkton, Saskatchewan between July 2009 and July 2010.

The *in camera* Summary Dismissal Application

[36] The Ironworkers applied to have the Applicant's complaint summarily dismissed on July 28, 2015. In its application, the Union noted several facts. Principle among them was the fact that "[A]t no time during or after his employment with Jacobs did Mr. Brady ask the Union to file a grievance on his behalf. Nor did Mr. Brady ever file a grievance on his own behalf." The Ironworkers asked that this application for summary dismissal be considered by the Board through its *in camera* process for dealing with summary dismissal applications.

[37] A panel of the Board (Love, Sommervill and Werezak) considered the request for summary dismissal *in camera* on October 27, 2015, at which hearing, the panel determined that the application as filed, was not exigible to summary dismissal and that it would proceed to hearing on December 10 & 11, 2015 as previously scheduled.

[38] The Board convened its hearing on December 10, 2015, but was requested to defer consideration of the complaint pending a determination of a complaint filed by the Applicant pursuant to the Occupational Health and Safety provisions of the *SEA* as the matters were similar in substance as noted in paragraph 2 above.

The April 3, 2015 Submissions

[39] The Applicant did not appeal the decision by Adjudicator Wallace on August 1, 2016, which dismissed his OH & S application on the basis of timeliness of filing his appeal. Upon the expiry of the time provided for appeal, this matter was again scheduled for hearing by the Board to be heard on May 4 & 5, 2017.

[40] Prior to the commencement of the hearing, on April 3, 2017, the Union filed supplementary submissions regarding summary dismissal of the application which it asked the Board to consider along with its July 28, 2015 submissions. These submissions alleged that the application was an abuse of process insofar as the Applicant was seeking, through the Duty of

Fair Representation application, to relitigate the OH & S issue which had been finally determined by Adjudicator Wallace.

Relevant statutory provision:

[41] Relevant statutory provisions are as follows

> ***Internal union affairs***
> ***6-58*** *(1) Every employee who is a member of a union has a right to the application of the principles of natural justice with respect to all disputes between the employee and the union that is his or her bargaining agent relating to:*
>
> *(a) matters in the constitution of the union;*
>
> *(b) the employee's membership in the union; or*
>
> *(c) the employee's discipline by the union*
>
> (2) A union shall not expel, suspend or impose a penalty on a member or refuse membership in the union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the union if:
>
> *(a) in doing so the union acts in a discriminatory manner; or*
>
> *(b) the grounds the union proposes to act on are that the member or person has refused or failed to participate in activity prohibited by this Act.*
>
> . . .
>
> ***Fair representation***
> ***6-59*** *(1) An employee who is or a former employee who was a member of the union has a right to be fairly represented by the union that is or was the employee's or former employee's bargaining agent with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part.*
>
> *(2) Without restricting the generality of subsection (1), a union shall not act in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee.*
>
> . . .
>
> ***Powers re hearings and proceedings***
> ***6-111*** *(1) With respect to any matter before it, the board has the power:*
>
> . . .
>
> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;*

Union's arguments:

[42] The arguments presented by the Ironworkers were 3 fold. Firstly, the Union argued that there was no arguable case demonstrated by the Applicant and that the application should therefore be struck pursuant to section 6-111(1)(p) of the *SEA*. The Union argued that the concerns raised by the Applicant did not engage sections 6-58 or 6-59 of the *SEA* as the Applicant had not requested a grievance to be filed regarding his leaving from the Jacob's project at Mosaic Potash.

[43] The Union argued that the materials and application provided by the Applicant did not demonstrate any discrimination against the Applicant. Nor, it argued was there any arbitrariness or bad faith demonstrated. The Union argued that the Applicant's complaints were directed towards workplace safety and not to his treatment as a union member.

[44] The Union also argued that the application should be dismissed for unreasonable delay. The substance of the complaint, the Union argued, arose in or around mid-June, 2014, but no complaint was filed until July 3, 2015, over a year after the happening of the events complained of.

[45] Finally, the supplemental submissions argued that the Applicant was seeking to re-argue the OH & S determinations made by Adjudicator Wallace and was an abuse of process.

Applicant's arguments:

[46] The Applicant in the substantive matter, as an individual, had limited understanding of the summary dismissal process. However, he relied upon the materials he had provided to show that he had an arguable case to proceed to hearing.

Analysis:

Is There an Arguable Case?

[47] In *KBR Wabi*[8], the Board reconsidered and restated the test for summary dismissal that had been formulated by the Board in *Beverley Soles v. Canadian Union of Public Employees, Local 4777*[9]. At paragraph [68] – [69], the Board considered the authority of the Court of Queen's Bench to determine if a case should be struck. Quoting from the Saskatchewan Court of Appeal decision in *Sagon v. Royal Bank of Canada*[10] , the Board said:

> ***[69]*** *The Courts have the inherent jurisdiction to dismiss actions. That inherent jurisdiction is set out in Rule 173 of The Queen's Bench Rules of Court. The jurisdiction of the Courts is far greater than the jurisdiction provided to the Board in the Act. The Saskatchewan Court of Appeal, in a judgment[45] authored by a former Chairperson of this Board, Mr. Justice Sherstobitoff, the Court says:*
>
> > *In determining whether a claim should be struck as disclosing no reasonable cause of action, the test is whether, assuming the plaintiff proves everything alleged in his claim, there is nevertheless no reasonable chance of success, or to put it another way, no arguable case. The Court should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the court is satisfied that the case is beyond doubt: Marshal v. Saskatchewan, Government of, Petz and Adams (1993), 1982 CanLII 2387 (SK CA), 20 Sask. R. 309 (C.A.); The Attorney General of Canada v. Inuit Tapirsat, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735. The Court may consider only the statement of claim, any particulars furnished pursuant to demand, and any document referred to in the claim upon which the plaintiff must rely to establish his case: Balacko v. Eaton's of Canada Limited (1967), 1967 CanLII 369 (SK QB), 60 W.W.R. 22 (Sask. Q.B.); Lackmanec v. Hoffman (1992), 1982 CanLII 2585 (SK CA), 15 Sask. R. 1 (C.A.)*
>
> ***[70]*** *As noted above, the powers given to the Board under section 18 are discretionary powers, as are the powers of Courts to dismiss either through their inherent jurisdiction or pursuant to Rule 173. The jurisdiction exercised by the Courts is to be exercised only in plain or obvious cases and where the court is satisfied the case is beyond doubt. That same principle should guide the Board.*

[48] Later, at paragraph [98] – [99] of the *KBR Wabi* decision, the Board discussed what may be considered to be an arguable case. It says:

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[8] *Supra* Note 6
[9] *[2006] Sask. L.R.B.R. 413, LRB File No. 085-06 and see paragraph 8 supra*
[10] *1992 CanLII 8287 (SK CA), [1992] S.J. No. 197, 105 Sask. R. 133.*

[98] *What amounts to an arguable case has been extensively reviewed by the Courts. They have used the term somewhat interchangeably with "no reasonable chance of success,"[56] having a "cause of action that might succeed,"[57] no "prima facie" case"[58] or "a reasonable possibility of success at trial."[59] Tied to that was a requirement that the Court would assume that the "plaintiff proves everything alleged in his claim" in making its determination.[60]*

[99] *In the Board's recent decision in Tercon, supra, the Board was also dealing with applications for summary dismissal of applications by various unions that alleged that the Construction Workers Union, Local 151 was a company dominated organization. In that case, quoting from the Board's jurisprudence in P.A. Bottlers Ltd o/a P.A. Beverage Sales and Sascan Beverages v. U.F.C.W., Local 1400 and the Alberta Board's decision inVikon Technical Services at paragraphs 162 and 163, the Board said:*

> *[162] In P.A. Bottlers Ltd., the Board alluded to its earlier comments in the WaterGroup case and placed those comments in the context of other factors which must also be considered by the Board, at 251:*
>
> *The Board has thus made it clear that it is necessary for an applicant to state with some precision the nature of the accusations which are being made, both in terms of the specific events or instances of conduct which are considered objectionable, and of the provisions of the Ad which have allegedly been violated. The Board has linked this requirement with the capacity to provide a fair hearing to a respondent.*
>
> *On the other hand, the Board must balance the requirement for a fair hearing with other values which are also of pressing importance to the Board, including those of expedition in the hearing of applications, and maintaining relative informality in Board proceedings. Whatever might be the case in a civil court, the nature of the proceedings before this Board cannot accommodate extensive pre-hearing or discovery processes without running the risk that the ability to respond in a flexible and timely way to issues which arise in the time-sensitive context of industrial relations will be seriously impaired.*
>
> *We do not interpret the requirement for the provision of sufficient particulars, in any case, to contemplate a complete rehearsal of evidence and argument in the exchange between the parties prior to a hearing. What is necessary is that an applicant make it clear what conduct of the respondent is the subject of their complaint, and how this conduct, in the view of the applicant, falls foul of the Act. In assessing the degree to which an applicant has met this requirement, the Board must be guided not only by our desire to ensure a fair hearing, but by the demands placed upon us by the objectives of efficacy and timeliness in our proceedings.*
>
> *[163] In addition, the Alberta Labour Relations Board, in the case of Vikon Technical Services supra, articulated a helpful policy explanation for the need for an applicant to provide reasonable particulars in support of his/her application:*
>
> *Before turning to the particulars given in this case it is useful to make some general observations on the need for particulars in applications, before this Board. When a party commences an application or complaint before us they must give particulars of what they are applying for, or why they are complaining. What this means is that in their initial*

> *correspondence they should set out in plain English a set of allegations of fact which, if accepted as true, would establish that the section of the Act in question may apply, or have been violated. They are not required to prove their allegations in the initial application, they must just make them. It is not enough to recite the section in question and then say some other person has violated it. The Board, when reading a complaint, should get a clear understanding of when, how, and by whom, the Act was violated. When receiving an application the Board should get a clear understanding of how the facts alleged justify the use of the section of the Act referred to, and justify the granting of the order or remedy sought.*
>
> *This requirement for particulars is not a request for a "legalistic" approach. A layman, reading a complaint or application should be able to get a clear understanding of what the matter is about and why the Board is being asked to use its powers. Most sections in the Labour Relations Act are not complex. The particulars should make it clear why the facts referred to make the section or sections of the Act applicable. This is not an onerous task. Applications that lack these basic particulars will not be accepted initially, and will not be processed further.*
>
> *We insist on particulars in order to ensure fairness to all parties. We have broad powers given to us by the Legislature. The exercise of these powers may cause major inconvenience to the party complained against. Answers must be given, officer's investigations cooperated with, records that would otherwise be confidential disclosed, hearings attended, and lawyers sometimes retained. We will only enter into or continue this process when there is an allegation that, if true, would lead us to believe that the legislation might apply or have been violated. If an applicant cannot even allege facts that would, if proven, result in a Board order or remedy, then there is no justification for the process being started.*

[49] In this case, we have significant documentation regarding the nature of the allegations that the Applicant takes against the Union. Primarily, these allegations suggest that the Union failed to support the Applicant in respect of numerous workplace safety issues which the Applicant tried to bring to the attention of his union and in particular with respect to unsafe working conditions and safety violations of one of the contractors working at the Mosaic site, Jacobs Industrial Services Ltd.

[50] The Union ably argued that for the Board to accept jurisdiction to deal with matters of workplace safety would constitute an abuse of process as these issues were, it argued, dealt with in the Occupational Health and Safety ("OH & S") complaint filed by the Applicant, which application had been dismissed by Adjudicator Wallace.

[51] While the Union's arguments in this respect are persuasive insofar as any attempt to relitigate the OH & S complaint, it does not, we think, remove the Board's jurisdiction

with respect to a determination as to the expected role of the Union insofar as representation of an employee is concerned.

[52] Section 6-59 of the *SEA* is framed somewhat differently from the previous provision which was found in *The Trade Union Act*.[11]. Section 25.1 of that *Act* made specific mention of an employee having the right to fair representation "in grievance or rights arbitration proceedings". Section 6-59 is not so limited in its application. Subsection (1) of section 6-59 makes no reference to "grievance or rights arbitration proceedings". Nor does subsection (2).

[53] That Board has yet to consider whether or not this difference in wording should be applied to broaden the scope of the representational duty and thereby bring it closer to the duty originally outlined by the Supreme Court of Canada in Canadian Merchant Guild v Gagnon[12].

[54] Additionally, this Board has taken the view that it has broader jurisdiction than that stated within section 25.1 of the previous *Act*. That was determined by this Board in its decision in Mary Banga v. Saskatchewan Government Employees' Union, where, at p. 98 the Board says:

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

[55] This comment, we believe, is equally as applicable in regards to section 6-59 of the *SEA*. Therefore, what is the extent of the duty owed by the Union to the Applicant in these circumstances raises at least an arguable case.

[56] Additionally, there is mention in the application of breaches of article 9 of the Provincial Iron Workers Agreement as well as reference to a "grievance" being presented by the Applicant to Wayne Worall, Jeff Hay, and Colin Daniels on June 16, 2014. If a grievance was

[11] R.S.S. 1978 c. T-17 (repealed)
[12] *1984 CanLII 18 (SCC), [1984] 1 S.C.R. 509*

filed (or requested to be filed), there is nothing, other than a general denial in the Union's reply, to indicate what occurred with respect to this grievance. Again, this raises an arguable case as to the prosecution of any such grievance by the Union.

[57] At paragraphs [104] – [106] of *KBR Wabi*, the Board cautioned that it should only summarily dismiss cases where it is "plain and obvious" that the application cannot succeed. It says:

> ***[104]*** *The Saskatchewan Court of Appeal in Sagon v. Royal Bank, in addition to establishing the test for striking statements of claim for disclosing no reasonable cause of action, cautioned that the Court's power to strike on this ground should only be exercised in "plain and obvious cases where the court is satisfied that the case is beyond doubt.*
>
> ***[105]*** *In Odhavji Estate v. Woodhouse, the Supreme Court relied upon the test set out by Wilson J. in Hunt v. Carey Canada Inc. as follows:*
>
> > *. . . assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect . . . should the relevant portions of a plaintiff's statement of claim be struck out . . . .*
>
> ***[106]*** *The Court then went on to say at paragraph 15:*
>
> > *The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether there it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment. See also Attorney General of Canada v. Inuit Tapirisat of Canada, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735.*

[58] It is not plain and obvious that this case should be summarily dismissed. The Union provided nothing new in its submissions other than to argue that the Board should not allow the Applicant to relitigate his OH & S complaint as an abuse of process. At this stage of the proceedings we are not determining the strength of the Applicant's case. But simply seeking to determine if there is sufficient allegations of a breach of the duty of fair representation.

Was there Inordinate Delay in Making this Application?

[59] The Union also argued that the application should be struck due to the delay in filing the complaint. The substance of the complaint, the Union argued, arose in or around mid-June, 2014, but no complaint was filed until July 3, 2015, over a year after the happening of the events complained of.

[60] In its arguments, the Union raised a question regarding the applicability of section 6-111(3) to this case, which provision provides the Board with the discretion to refuse to hear "any allegations 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".

[61] In *Coppins v. United Steelworkers Union, Local 7689*[13] the Board concluded that section 6-111(3) does not apply to any other claim brought under Part VI, most especially duty of fair representation complaints. Nevertheless, the Board has long been vigilant to insure that complaints of duty of fair representation are brought in a timely fashion, without undue delay.

[62] In *Hartmier v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 955*[14] Vice-Chairperson Mitchell reviewed the relevant principles for analyzing undue delay arguments under section 6-59 of the *SEA*. At paragraph [120] he outlined the following (5) five factors gleamed from the Board's jurisprudence:

> 1. *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.*
>
> 2. *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.*

[13] *[2016] CanLII 79633, 284 CLRBR 30, LRB File No. 085-16*
[14] *[2017] CanLII 20060 (SKLRB)*

3. *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.*

4. *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.*

5. *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?*

[63] In *Hartmeir,* Vice-Chairperson Mitchell considered a delay of approximately the same duration as is under consideration here. He concluded that such a delay, while not as inordinate or as excessive as some delays encountered by the Board should require an explanation from the Applicant.

[64] The Board has no basis on which to consider what prejudice may occur to either party at this early stage before evidence has been heard and final arguments presented.

[65] In this case, the Applicant is not a sophisticated applicant. As such, as Vice-Chair Mitchell reasoned in *Hartmier*, consideration must be given to the Applicant's status.

[66] The Nature of the claim mitigates in favour of the Applicant in this case. He is obviously the person who has potentially suffered harm by virtue of the failure of representation by the Union. Again, however, we have nothing other than the documents referenced above on which to base a conclusion.

[67] Whether or not justice can be done in this case, is also seriously compromised by the lack of satisfactory evidence on this point. What remedies may be available will be determined based upon the case as finally presented.

[68] In conclusion, on this point, the Board would not strike the claim, at this stage, on the basis of undue delay. Part of the considerable delay in the hearing of this matter has been at the request of the Union[15] and by its applications for summary dismissal of the Applicant's claim against it. That delay has been more substantial than the delay in bringing forward the initial claim by the Applicant.

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[15] *The deferral of the hearing of this matter until after the OH & S complaint was heard.*

Is There an Issue Regarding the Union's Failure to Dispatch?

[69] The documents referenced above also suggest that the Applicant complains about a failure to dispatch him as a member of the Union. This issue, however, may have been determined by the Saskatchewan Court of Appeal decision in *Rodney McNairn v. U.A. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179*[16].

[70] The question in *McNairn* was whether or not the Courts had jurisdiction to deal with an action in damages brought by Mr. McNairn against his union, which included allegations of breach of contract by the union for breaching the union hall rules governing the allocation of jobs among unemployed union workers. In that case, where *McNairn* was asking for damages against the Union for failing to dispatch him, the Court held that it had jurisdiction because the provisions of then sections 25.1 and section 36.1 of the then *Trade Union Act* were not broad enough to encompass the dispute that *McNairn* had with its union.

[71] We cannot, of course, at this stage of the proceedings, embark upon a determination of our jurisdiction or make the required inquiry as to the essential character of the dispute. We note, however, that there may have been a broadening of the Board's jurisdiction when section 6-59 was enacted. Additionally, there has, we submit, with the changes initiated by the Supreme Court in *Dunsmuir v. New Brunswick*[17] been some shift in the traditional jurisprudence between the Courts and other administrative tribunals.

[16] [2004] CanLII SKCA 57
[17] [2009] 1 S.C.R. 190, SCC 30 (CanLIIa0

[72] In summation, we find that the Applicant has demonstrated an arguable case. The Union's application for summary dismissal is denied.

[73] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **24th** day of **July, 2017.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson