UNIVERSITY OF SASKATCHEWAN FACULTY ASSOCIATION, Applicant v R.J., Respondent and UNIVERSITY OF SASKATCHEWAN, Respondent

LRB File Nos. 179-19 & 167-19; August 18, 2020
Vice-Chairperson, Barbara Mysko; Board Members: Aina Kagis and Allan Parenteau

For the Applicant, University of Saskatchewan Faculty Association:	Gary L. Bainbridge, Q.C.
For the Respondent, R.J.:	Self-Represented
For the Respondent, University of Saskatchewan:	David Stack, Q.C.

Application for Summary Dismissal – In Camera Panel – Sections 6-58 and 6-59 of *The Saskatchewan Employment Act* – Internal Union Affairs – Duty of Fair Representation – Board grants Application for Summary Dismissal – Failure to Disclose Violation of Act.

REASONS FOR DECISION

Background:

[1] **Barbara Mysko, Vice-Chairperson:** The University of Saskatchewan Faculty Association [Union] has filed for summary dismissal of LRB File No. 167-19, an employee-union dispute filed pursuant to section 6-59 of *The Saskatchewan Employment Act* [Act]. The Respondent to the Application for summary dismissal, and the applicant on the employee-union dispute, is R.J. For the following Reasons, the Board has decided to grant the Union's Application for summary dismissal.

[2] In its Application for summary dismissal, the Union relies on clauses 6-111(1)(o) and (p) of the Act. Clause 6-111(1)(o) gives the Board the power to summarily refuse to hear a matter that is not within its jurisdiction. Clause 6-111(1)(p) gives the Board the power to summarily dismiss a matter if, in the opinion of the Board, there is a lack of evidence or no arguable case.

[3] The Union has asked the Board to consider its Application for summary dismissal on the basis of the written materials alone, pursuant to clause 6-111(1)(q), which gives the Board the power to decide any matter before it without holding an oral hearing.

[4] The Union seeks summary dismissal on the basis that the Board has no jurisdiction over the matters complained of, or alternatively, on the basis that the complaint discloses a lack of evidence and no arguable case. The underlying application was filed on July 15, 2019. In it, R.J. alleges that the Chair of the Union's Executive refused to initiate an official investigation or inquiry into allegations made against him. Despite repeated requests for an investigation, no formal investigation was undertaken, the Chair determined R.J.'s guilt without regard to due process, and R.J. was ultimately compelled to retire. R.J. states that the Union was obligated and failed to follow the rules and regulations of its own Constitution, the USFA Harassment Policy (2016), the University of Saskatchewan's Collective Agreement, and the "Saskatchewan Occupational Health and Safety Act".

[5] The underlying application explicitly invokes section 6-59 of the Act, the provision related to the duty of fair representation, but relies extensively on the principles of natural justice, which puts in issue section 6-58 of the Act. The Union's argument addresses those principles in response. The Union states as follows in its Reply:

> *The Applicant's complaint at its base alleges a "failure to investigate", an obligation that exists neither by statute or under the Union's constitution. Instead, the Applicant's complaint relates to internal Union matters which do not fall within the prescriptions in section 6-58 of the Act, and which this Board has long said do not fall within its jurisdiction.*

[6] Therefore, the Board will consider the Application for summary dismissal taking into account section 6-58 of the Act.

[7] As mentioned, R.J. filed the underlying application with the Board on July 15, 2019. The Employer and Union filed their respective Replies on July 25, 2019 and July 26, 2019. The Union then filed the within Application for summary dismissal on July 29, 2019. R.J. filed additional information to clarify his initial application, including a lengthy response to the Application for summary dismissal on February 10, 2020 and another version of the "complaint" on March 16, 2020. The Board provided the Union with an opportunity to file a Reply to this latter submission, which the Union declined. The Employer has not replied to or otherwise participated in the proceedings related to the Application for summary dismissal.

[8] Due to the exhaustive nature of the submissions, the Board decided that the Application for summary dismissal could be considered *in camera* without any further submissions.

Argument on Behalf of the Parties:

USFA:

[9] The Union says, first, that R.J. has no dispute with his Employer and therefore no basis to claim that the Union breached its duty of fair representation. R.J.'s sole dispute is with the manner in which the Union investigated allegations against him. He has never been charged with or found guilty of any wrongdoing. Despite this, R.J. is pursuing a harassment complaint against the Union, a matter over which the Board has no jurisdiction, whether pursuant to section 6-58 or otherwise. Despite there being no duty to investigate, a harassment investigation has been conducted and concluded.

[10] Next, the underlying application should be dismissed for abuse of process. R.J. has filed a harassment complaint pursuant to the Union's internal harassment policy, which complaint was fully investigated. The allegations forming the basis of the harassment complaint are identical to those in the present Application. The complaint was determined to be unfounded, and has been rejected or dismissed by the Employer, the President of the University, the Occupational Health and Safety Division, and the Union. The Board is not a court of last resort for disaffected union members.

[11] Lastly, R.J. is guilty of excessive delay in bringing the application. He has been aware of the facts giving rise to the application since May 8, 2015 - more than four years prior to the filing of the application.

R.J.:

[12] Although R.J. provided multiple versions of his submissions both in Reply to the Application for summary dismissal and to revise his original application, he repeats his main concerns at many points throughout the materials.

[13] During the material times, R.J. was a Grievance Officer and then a Senior Grievance Officer with the Union. In or around May 2015, R.J. was made aware that he was implicated in allegations about improper conduct toward a Union staff member. According to R.J., the allegations were fabricated by members of the Union with improper motives related to Union politics. The Union's Executive held meetings to determine how to proceed in response to the allegations. According to R.J., in conducting those meetings, the Union breached its duty of confidentiality, spread rumors about him, and then failed to clear his name.

[14] R.J. says that he has suffered harm to his reputation. He filed a harassment complaint but was dissatisfied with the outcome. He now seeks a formal investigation for the purpose of clearing his name.

Facts:

[15] The following is a summary of the allegations as disclosed by the underlying application and related materials.

[16] R.J. was employed as a faculty member of the University of Saskatchewan from around July 1991 until December 31, 2018. Since the mid-90s, he was an active member of the Union.

[17] Around May 22, 2015, the Chair of the Union, Douglas Chivers [Chivers], and another Executive colleague, Eric Neufeld [Neufeld] made the Executive aware of the allegations against R.J. Chivers announced to the Executive that he had convened a meeting of the USFA Personnel Committee to be held June 15, 2015 to discuss next steps. After that meeting, Chivers told R.J. in an impromptu and private conversation that he was the accused.

[18] R.J., through his lawyer, sought a cancellation of the Personnel Committee meeting on the basis that it would violate his confidentiality. The meeting took place on June 15, as planned. The next day, Chivers called another *in camera* Executive meeting. There, Chivers asked the Executive to place their trust in his formal investigation and the Personnel Committee's approval that he and Neufeld had followed due process. Chivers made no mention of R.J.'s innocence. Chivers reiterated that the accused's actions were "egregious".

[19] R.J. sought an official investigation into the accusation, which request was refused:

> *Chivers rejected my official requests, along with the requests from other Executive members (Stewart, Moraros, Fowler-Carey, et al), for the USFA to conduct an impartial and independent investigation of the [allegations] (April-June, 2015).*

[20] According to R.J., Chivers claimed that he and Neufeld had already conducted their own informal investigation and had concluded that a staff member was the victim and he was the perpetrator. Chivers determined R.J.'s "guilt" without interviewing him or providing him with any relevant details. It appears that there were no charges laid against R.J., nor formal proceedings taken against him, nor any discipline imposed.

[21] The foregoing events were precipitated by an escalating conflict involving compensation and term limits for Executive members. R.J. actively supported and lobbied for a new Chair. Meanwhile, the election for new Executive officers was to be held on June 19, 2015. R.J. was running as Senior Grievance Officer, and Chivers (and Neufeld) opposed his election.

[22] In April 2017, staff members wrote a collective letter refuting the allegations. To R.J.'s surprise and dismay, the letter did not trigger a formal investigation.

[23] R.J. filed a complaint with OHS and a preliminary investigation was conducted on June 21, 2017. The complaint was considered the exclusive domain of the Union.

[24] The University Harassment Officer, Warren Postlewaite, started an informal investigation but then dropped his inquiry. R.J.'s appeal to the University President was met with sympathetic concern but no follow up. The University chose not to investigate the complaint.

[25] All requests for a formal investigation were rejected by the Union.

[26] Larry Stewart returned as Chair in July, 2017, and later that Fall accepted R.J.'s request for an official harassment investigation. In January 2018, Alma Wiebe, Q.C. began investigating the complaint, focusing on the timeline from 2016, onward. The investigation report was released in September 2018.

[27] That same month, Chivers chaired an Executive meeting in which discussion of the investigation report took place. R.J. was made to review a highly redacted version of the report on a computer screen in the office of the former Vice-Chair.

[28] R.J. retired on December 31, 2018, earlier than expected, due to the lingering rumors and an ongoing, intolerable working environment.

[29] On February 5, 2019, R.J. received an email from the Executive committee which reads:

> *We are writing to you as an Executive to formally respond to your email request of January 10, 2019. The USFA has spent considerable time and expense devoted to addressing your concerns related to a personnel issue arising in 2015. We have repeatedly investigated what transpired and we are satisfied that no further action can be taken by the Executive. Former USFA Chairs, Drs. Stewart and Findlay, along with our Sr. Grievance officer, Prof. Patricia Farnese, have previously come to the same conclusion. In addition, the USFA hired an external investigator to address your concerns of personal harassment against Dr. Chivers. This charge was not substantiated.*

We understand that you remain upset by what has transpired. However, we have done everything in our power to satisfactorily address your concerns. We would like to take the opportunity to reiterate statements made to you previously. ***There has never been a formal investigation of your conduct. This means that there has never been any finding of wrong doing on your part.*** *As your many years of experience with the Association Grievance Committee will confirm, in keeping with principles of procedural fairness, only formal complaints can be investigated. This is undoubtedly frustrating for the recipients of such an informal complaint, such as yourself, as no opportunity is available to 'clear your name'. You have many friends amongst the USFA Executive, past and present, who hold you in high regard and are appreciative of your commitment to serve our members over the past many years. The current Executive genuinely hopes that you choose to stop bringing this topic to the forefront as we wish future Executive members to learn only of your legacy of devoted service.*

We hope you can appreciate that a significant amount of Executive member time and member resources have been expended over the past several years to respond to your concerns. We are not in a position to continue revisiting this issue. Therefore, the Executive has decided that we will not consider further requests from you about this issue. We hope that you can agree it is in the best interest of the USFA membership that we all put to rest this issue. Any future correspondence related to this matter will be forwarded to our legal counsel, Gary Bainbridge. He has been instructed to respond where he deems appropriate. The Executive and staff will no longer respond to your requests.

The USFA Executive and staff wish you luck in your retirement and we thank you again for all of your work on behalf of USFA members.

[30] R.J. filed the underlying application approximately five months after the date of this email.

Applicable Statutory Provisions:

[31] The following provisions of the Act are applicable:

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.

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.*
>
> *. . .*
>
> ***6-111****(1) With respect to any matter before it, the board has the power:*
>
> > *. . .*
> >
> > *(o) to summarily refuse to hear a matter that is not within the jurisdiction of the board;*
> >
> > *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;*
> >
> > *(q) to decide any matter before it without holding an oral hearing;*
> >
> > *. . .*
>
> ***6-112****(1) A technical irregularity does not invalidate a proceeding before or by the board.*
>
> *(2) At any stage of its proceedings, the board may allow a party to amend the party's application, reply, intervention or other process in any manner and on any terms that the board considers just, and all necessary amendments must be made for the purpose of determining the real questions in dispute in the proceedings.*
>
> *(3) At any time and on any terms that the board considers just, the board may amend any defect or error in any proceedings, and all necessary amendments must be made for the purpose of determining the real question or issue raised by or depending on the proceedings.*

Analysis:

[32] In deciding whether to dismiss summarily, the Board assesses whether the allegations, assuming that they are true and will be established, disclose a violation of the Act. In performing that assessment, the Board refrains from weighing evidence, assessing credibility or evaluating novel statutory interpretations.[1] The facts are taken as pleaded.

[33] In *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB), the Board explained:

> *[9] Generally speaking, summary dismissal is a vehicle for the disposition of applications that are patently defective. The defect(s) must be apparent without the need for weighing of evidence, assessment of credibility, or the evaluation of novel statutory interpretations. Simply put, in considering whether or not an impugned application ought to be summarily dismissed, the Board assumes that the facts alleged in the main application are true or, at*

[1] See, for example, *Re KBR Wabi Ltd. et al*., 2013 CanLII 73114 (SK LRB) [*KBR Wabi*].

> *least, provable. Having made this assumption, if the Board is not satisfied that the main application at least discloses an arguable case, and/or if there is a lack of evidence upon which an adverse finding could be made, then the main application is summarily dismissed in the interests of efficiency and the avoidance of wasted resource.*

[34] On an application for summary dismissal, the Board may consider the subject application, any particulars that have been provided, and the documents (referred to within the claim) upon which the applicant relies to establish his or her case. If the Board concludes that the application has no reasonable prospect of success then it may dismiss the application on a summary basis, but it should do so only in plain and obvious cases, or in cases where the underlying application is patently defective.

[35] The Board has considered all of the materials filed by R.J. in support of the underlying application. These materials must be considered against the backdrop of the applicable statutory provisions. On this basis, the Board will therefore consider, first, whether the application discloses a violation of section 6-59 of the Act, and second, whether the application discloses a violation of section 6-58.

[36] The first issue pertains to section 6-59 of the Act, which reads:

> ***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.*

[37] In assessing whether the underlying application has a reasonable prospect of success, the Board must consider whether the allegations, assuming that they are true and will be established, disclose a violation of section 6-59. As the Applicant, R.J. bears the onus to plead allegations that disclose a violation of the Act. A violation of section 6-59 is premised on the application having disclosed a right pursuant to a collective agreement or Part VI. For an employee to benefit from the right to be fairly represented by the union, he or she must rely on a right pursuant to a collective agreement or Part VI of the Act.

[38] The duty of fair representation requires a union, as the exclusive bargaining agent for a unit of employees, to fairly represent all employees in the unit. This may necessitate a balancing of interests. A union has the right to decide whether to take a grievance to arbitration, and enjoys considerable discretion in determining whether to do so.

[39] As explained by the Board in *Prebushewski v Canadian Union of Public Employees, Local No. 4777*, 2010 CanLII 20515 (SK LRB):

> *[59] The exclusive right to represent a unit of employees brings with it many responsibilities for a trade union. In representing a member in grievance proceedings, a trade union may be required to make a number of difficult decisions, including how best to investigate the circumstances of a dispute between a member and his/her employer, assessing the relative strength or merits of a potential grievance; determining whether or not to advance a desired grievance and, if so, deciding how best to present and prosecute the case on behalf of the grievor. In doing so, the trade union must take into account both the interests and needs of the individual member(s) directly affected by the grievance and the collective interests of the remaining members of the bargaining unit, including how best to allocate the trade union's scarce resources.*

[40] The Board routinely recognizes the following principles in cases involving the duty of fair representation:[2]

a. The Board does not sit in appeal of every decision made by a union;
b. A union does not have an obligation, pursuant to section 6-59, to fairly represent an employee or former employee on matters that fall outside the collective bargaining agreement or rights pursuant to Part VI;
c. A union's conduct may not amount to a breach of the duty if it took a reasonable view of the circumstances and made a thoughtful decision not to advance a grievance;
d. The Board does not sustain violations on the basis that a union could have provided better representation for a member or a union did not do what the member wanted. A union may settle a grievance over the grievor's objection; and
e. The conduct of the union must be assessed on a case-by-case basis.

[41] As per *Re Chabot*, [2007] SLRBD No 19,

> *…The Board has no jurisdiction to take action against a union if the complaint is, for example, that the union was wrong, could have given better representation or did not do what the member wanted. The Board does not sit in appeal of decisions made by unions, does not decide if a union's opinion of the likelihood of success of a grievance was correct and does not minutely assess and second guess every union action. […]*[3]
>
> [Citations removed]

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[2] See, *Prebushewski v CUP, Local 4777 (2010)*, 179 CLRBD (2d) 104 (SK LRB), at paras 55-60.
[3] *Re Chabot,* [2007] SLRBD No 19 at para 71, citing, for example, *Datchko v Deer Park Employees' Association* [2006] Sask LRBR 354.

[42] A union's discretion to take a grievance to arbitration was described in *Canadian Merchant Services Guild v Gagnon*, [1984] 84 CLLC 12, 181, and cited in *Chabot* at para 70:

> *This Board has discussed on a number occasions the obligation which rests on a trade union to represent fairly those employees for whom it enjoys exclusive status as a bargaining representative. As a general description of the elements of the duty, the Board has indicated that it can do no better than to quote the principles outlined by the Supreme Court of Canada in the case of Canadian Merchant Services Guild v. Gagnon, [1984] 84 CLLC 12, 181:*
>
> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> > *1. The exclusive power conferred on a union to act as a spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
> >
> > *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
> >
> > *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
> >
> > *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
> >
> > *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employees.*

[43] In determining whether the Union has breached its duty of fair representation, the Board considers whether the Union has acted in a manner that is arbitrary, discriminatory, or in bad faith. R.J. suggests that the Union's conduct satisfies all three categories. In *Glynna Ward v Saskatchewan Union of Nurses*, [1988] SLRBD No 9, the Board described the meaning of these concepts:

> *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.*

[44] The Board also regularly relies on the description by the Ontario Labour Relations Board in *Toronto Transit Commission*, [1997] OLRD 3148, at paragraph 9:

> *(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.*

[45] The Board will take the foregoing guidance into account in assessing whether R.J. has disclosed a violation of section 6-59 of the Act.

[46] Although R.J. has made numerous allegations, three themes are apparent and sufficiently extricable to allow for an assessment by the Board. First, the Union failed to investigate, or adequately investigate, allegations made against him. Second, the Union failed to fairly represent R.J. in relation to his harassment complaint against the Employer. Third, the Union failed to fairly represent R.J. in relation to his harassment complaint against the Union. The Board will address each of these allegations, in turn.

The Union failed to investigate, or adequately investigate, allegations made against him

[47] First, the Board will address R.J.'s assertion that the Union failed to investigate, or adequately investigate, the allegations, and that said failure was a breach of the Act. Significantly, R.J. does not rely on a specific provision of a collective agreement or on a provision found in Part VI of the Act. Despite this, the Board will consider R.J.'s suggestion that the Union owes a duty to a member to investigate allegations in the absence of a formal proceeding, generally.

[48] It is worth repeating that R.J. did not initiate the allegations; by his own admission, he was the supposed wrongdoer, or in his view, the target. Despite this, he insists that the allegations should have been thoroughly investigated:

> *Along with other colleagues, I requested a formal investigation in order to discover the credibility of the evidence undergirding Chivers' allegations. Given the number of unanswered questions, it was an ethical matter of searching for the truth. Chivers refused to initiate a formal investigation (impartial and independent). Chivers claimed that they had already completed a formal investigation and the aggressor had been determined.*
> *…*
> *One consistent fact of this internecine melodrama is that Chivers refused the multiple requests from me, and other Executive colleagues, to conduct a formal investigation. Chivers' refusal is consistent with his* modus operandi.*[…]*

[49] R.J. associates the alleged failure to investigate with what he describes as a denial of his basic human rights:

> *Chivers denied my basic human rights enshrined in the OHSA guidelines, the RRO, and relevant labour legislation. Specifically, Chivers denied me:*
>
> - *any formal or informal interview with a neutral witness present;*
> - *access to any USFA legal advice;*
> - *access to a USFA legal representation;*
> - *access to a USFA advocate to represent me at any formal meetings where my alleged actions were discussed.*
>
> *Note: Denying an accused person the right to be interviewed or to present his/her defence against a serious allegation is a fundamental violation of natural justice (RRO, CONFIDENTIAL INVESTIGATION BY COMMITTEE, pp. 656-659). Similarly, the USFA policy entitled "Statement of Role of Association in Harassment/Discriminations" guarantees the right to representation. See below:*
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> *"If the faculty member is a respondent or witness, our role [USFA] again is to ensure that the process is fair and that the faculty member is given the opportunity to refute any allegations made against them or to fully provide relevant information as a witness. We also ensure that the investigation is carried out in accordance with the collective bargaining agreement and relevant policies." (p.1)*

[50] He also claims that he had a right to respond to the allegations against him:

> ***Note:** Chivers rejected my right to respond to any allegations against me. This right is enshrined in the USFA's "Statement of Role of Association in Harassment/Discrimination Investigations"; the UofS* [sic] *Collective Agreement (12.3.2); (Roberts Rules of Order: 11th Edition, pp. 656-659); and other relevant legislation.*

[51] Significantly, R.J. points to no formal proceedings or penalty against him. He even acknowledges that Chivers made the following statement in an email:

> *There has never been a formal investigation of your conduct. This means that there has never been any finding of wrong doing on your part.*

[52] R.J. does not deny that there was no finding of wrongdoing. Despite this, he argues about the lack of or inadequacy of the investigation into the allegations against him. In essence, he appears to be seeking an investigation for the purpose of clearing his name, or, proving that the allegations were false:

> *8. If Bainbridge had followed the documentary record, he would have realized that Chivers' allegations of my guilt were fabricated and should have recommended a formal investigation…*
>
> *9. Bainbridge acknowledged that I had **not** been found at fault for any wrongdoing, but implied that my preference for the word "innocent" was **not** warranted….*

[emphasis in original]

[53] R.J.'s desire for a complete, or "unambiguous", exoneration is a central feature of his underlying grievance with the Union, as disclosed by the following statement:

> ***Note:*** *I expected that when Chivers admitted that I was NOT found at fault for anything he would have shared this fact with the Executive. He refused to do this. That is essentially all that I have requested since 2015. I repeated that request two weeks ago. (E-mail to me, April 9, 2018).*

[54] The Union says that it did not launch a formal investigation against him, and therefore there is no formal proceeding that may be subject to the duty of fair representation. R.J. counters that the Union and its counsel have provided conflicting accounts of whether a formal investigation occurred, pointing to the aforementioned Executive meetings at which related discussions took place. However, there is nothing in the underlying application that discloses a formal investigation into the allegations, and certainly not a formal investigation resulting in any penalty to R.J.

[55] In short, a union does not owe a member, against whom allegations have been made but not formally pursued, a duty to investigate those allegations for the purpose of "clearing" that member's name. In the absence of a duty, there is no breach. Nor can there be anything arbitrary, discriminatory, or in bad faith in the conduct on the part of the Union. It is plain and obvious that these specific allegations assuming that they are true and will be established, do not disclose a violation of the Act.

The Union failed to fairly represent R.J. in relation to his harassment complaint against the Employer

[56] That, however, does not end the Board's inquiry into the alleged failure to investigate, or the alleged failure to investigate adequately. R.J. raises this issue as evidence of a pattern of harassment on the part of certain Union officials. He says that at various times the Union failed to represent him in his complaint, whether against the Employer or the Union.

[57] According to R.J.'s materials, the allegations were connected to one or more interactions that were said to have occurred at a Union-sponsored event, or events, on campus between one or more Union officers and a Union staff member. The staff member purportedly spoke to representatives of the Executive following the event(s). The result was a series of conversations and meetings, apparently for the purpose of determining how best to proceed.

[58] At some point, R.J. attempted to enlist the Employer's support. The Employer refused his requests for a formal investigation, and according to R.J., failed to provide him with a safe work environment free from intimidation, bullying and personal harassment. The Employer wrongly believed that R.J.'s complaints were the "exclusive jurisdiction of the USFA":

> *Similarly, the University of Saskatchewan (University) refused my requests for a formal investigation, and ipso facto, failed to provide me with a safe work environment which was free from intimidation, bullying, and personal harassment. The University considered that my complaints were the exclusive jurisdiction of the USFA.*

[59] In his materials, R.J. has not specified in what manner the Employer could be responsible for events that ensued between a Union staff member and a Union official at a Union-sponsored event, or between Union officials in the context of an ongoing conflict about Union matters. Nor does he explain how such circumstances could engage his right as an employee or former employee pursuant to the Union's collective agreement with the Employer.[4]

[60] The Executive agreed that there was no dispute with the Employer. R.J.'s own materials confirm that the Executive had sufficient information to consider this issue and arrive at an informed conclusion.

[61] Further, R.J. has put in issue no rights pursuant to Part VI of the Act. He has made no allegation, for example, that the Union failed to fairly represent him in collective bargaining with the Employer.

[62] The duty of fair representation relates to matters between the Union member and the Employer, not between the Union member and another Union member or between the Union member and the Union.[5] The collective agreement, in particular, contains negotiated terms and conditions of employment between the Union and the Employer. It does not define the relationship between Union members, set out rights or obligations between Union members, or provide recourse to Union members in relation to Union action.

[63] There is no duty on the part of the Union to fairly represent a member in relation to a matter falling outside the collective agreement or Part VI. In the absence of a duty, there is no breach. Nor can there be anything arbitrary, discriminatory, or in bad faith in the conduct on the

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[4] R.J. does reference section 12.3.2 of the collective agreement, but in the context of Chivers refusing to provide him with a summary of allegations against him.
[5] See, for example, *Re McRae*, [2002] SLRBD No 3.

part of the Union. It is plain and obvious that these specific allegations assuming that they are true and will be established, do not disclose a violation of the Act.

The Union failed to fairly represent R.J. in relation to his harassment complaint against the Union

[64] Third, the Board will address the allegation that the Union failed to fairly represent R.J. in relation to his harassment complaint against the Union. Again, R.J. states that he had requested an independent and impartial investigation into the conduct of specific Executive members, and that the investigation was either absent or inadequate.

[65] The Union states that the essential character of the underlying dispute is a harassment complaint. The Board agrees to the extent that the underlying application seeks an answer to the question whether harassment occurred. Viewed in the following manner, it does exactly that.

[66] To summarize, R.J. claims that he blew the whistle on Union governance issues and, in turn, became the target of "unwarranted verbal and written attacks". Motivated by political ambition, Chivers invented and then perpetrated a fiction about him. Chivers breached confidentiality by pursuing the matter in the Personnel Committee, and then let the allegations remain unanswered for years. Finally, Chivers and Neufeld launched an unsuccessful campaign to oust him from office.

[67] R.J. seeks to have their behavior called out for what it is and to have the record cleared once and for all; he seeks yet another investigation, but this time on his terms.

[68] In *Re Banks*, [2013] SLRBD No 20 [*Re Banks*], the Board made the following observation with respect to the Board's jurisdiction in matters involving harassment allegations:

> *With respect, the Board agrees with the position advanced by the Applicant in respect of our jurisdiction. The Board has no jurisdiction to adjudicate or determine if harassment has occurred, nor any jurisdiction to determine any remedy should harassment be found. The Board does, however, have jurisdiction to determine if a union has properly represented a member regarding a harassment complaint.*[6]

[69] To the extent that the underlying application represents a harassment complaint, the Board agrees that it does not have jurisdiction to review the merits of the complaint. However, R.J. has taken pains to argue that he was not fairly represented by the Union in respect of his harassment complaint.

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[6] *Re Banks*, [2013] SLRBD No 20 at para 79.

[70] As in *Re Banks*, R.J. has (in broad strokes) raised an issue of fair representation in relation to a harassment complaint. Unlike in *Re Banks*, R.J. does not rely on an applicable provision of a collective agreement.

[71] *Re Banks* was decided pursuant to the former section 25.1 of *The Trade Union Act* which read:

> ***25.1*** *Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*

[72] Section 25.1 was clear that the right to be fairly represented was limited to grievance or rights arbitration proceedings under a collective bargaining agreement. Although section 6-59 does not contain the same explicit restriction, the employee's or former employee's right must arise from a collective agreement or Part VI of the Act.

[73] In *Re Chaklanabis*, [2018] SLRBD No 4 [*Re Chaklanabis*], the Board considered a union's role in relation to a workplace harassment complaint outside of a grievable process:

> *[43] The workplace harassment complaint by Dr. Chaklanabis was also not a grievable matter. The complaint arose, not under the Collective Bargaining Agreement, but under the U of S policy related to respectful workplaces.*
>
> *[44] In the Board's recent decision in Lyle Brady v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 717[6], there is no duty of fair representation incumbent upon a trade union with respect to legislative provisions related to harassment or policies regarding such issues. The duty can be engaged if the Union undertakes to represent the employee with respect to such provisions. At paragraph [50], the Board says:*
>
> > *Additional issues arise when there is a provision in a collective bargaining agreement that duplicates or provides additional avenues respecting complaints such as complaints involving a "respectful workplace" or "harassment" issues. Such complaints often trigger multiple jurisdictions and appeals under a collective agreement, OH & S legislation, Human Rights legislation and judicial processes. Again, however, the duty of care to be imposed on a union in such cases is outside the scope of this analysis.*
>
> *[45] In this case, the Union provided advice to Dr. Chaklanabis regarding his complaint, but did not undertake his representation regarding the complaint. They cannot be faulted for attempting to assist a member and providing advice to him as was done by Johnson.*

[74] Similarly, R.J. filed the complaint pursuant to the Union's internal harassment policy. The collective agreement between the Union and the Employer does not apply to the current circumstances. Nor did the Union undertake to represent R.J. with respect to the policy.

[75] On this basis, the foregoing allegations, assuming that they are true and will be established, do not disclose a violation of section 6-59. The application does not disclose a right pursuant to a collective agreement or Part VI. The Union does not have a duty to represent a member on a matter that falls outside the collective agreement or Part VI. Nor is the Union obliged, pursuant to section 6-59, to fairly represent members in relation to matters that are internal to the Union.

[76] With no right or obligation, there can be no breach. Nor can there be anything arbitrary, discriminatory, or in bad faith in the conduct on the part of the Union. It is plain and obvious that these specific allegations assuming that they are true and will be established, do not disclose a violation of section 6-59 of the Act.

[77] Even if there were a duty, the Board must ask whether the Union took a reasonable view of the circumstances and made a thoughtful decision not to advance a grievance on behalf of R.J. In this respect, the Board is guided by the B.C. Board's description in *Judd v Communications, Energy and Paperworkers' Union of Canada*, *Local 2000* [2003] BCLRBD No 63 [*Judd*], as cited in *Chabot*, *supra.* There, the B.C. Board described the "very narrow, specific behavior" that represents arbitrary and bad faith conduct.

[78] As for arbitrariness, the B.C. Board explained that a union, in deciding whether to pursue a grievance, must ensure that it is aware of the relevant information, make a reasoned decision, and carry out its representation of the member without blatant or reckless disregard.[7] A specific form of investigation is not required in every case:

> *[62] The requirement that the union must "make sure it is aware of the circumstances [and] the possible merits of the grievance' is often referred to in shorthand form as "conducting an adequate investigation". It is important to note, however, that not every case will necessarily require an "investigation". There may be some grievances where the relevant information is already in the union's possession.*
>
> *[63] In the more typical case, however…gathering the relevant information will require an "investigation". An adequate investigation may include considering the sequence of events, learning, the grievor's point of view, obtaining information from potential witnesses, and offering the grievor a chance to respond.*
>
> *[64] The key is that the union must take reasonable measures to ensure it is aware of the relevant information. What is "reasonable" will depend on the particular circumstances – including the significance of the issues for the employee.*

[7] *Chabot* at para 72.

[79] For greater clarity, the Board in *Dwayne Lucyshyn v Amalgamated Transit Union, Local 615*, 2010 CanLII 15756 (SK LRB) [*Lucyshyn*] set standards for the manner in which a union should deal with and investigate a grievance. The Board in *BP v Administrative and Supervisory Personnel Association, Respondent and University of Saskatchewan*, 2012 CanLII 9617 (SK LRB) [*B.P.*] explained that these standards provide guidance, not specifications:

> *[67] I am not persuaded by the Applicant's argument that, in failing to conduct its own independent investigation and instead relying upon Mr. Robertson's investigation report, the Union failed to satisfy the "minimum standard of conduct" established by this Board for trade unions in Lucyshyn v. Amalgamated Transit Union, supra. The comments of Chairperson Love in Lucychyn were not intended to be prescriptive in a literal sense, as the Applicant has argued. Rather, these comments were intended to provide guidance and to be instructive on the general expectations of this Board as to the duties expected of a trade union in processing a request for a grievance from a member. In my opinion, the conduct of the Union in the present case differed markedly from the circumstances before this Board in the Lucyshyn case. In that case, the union (which was found to have violated s.25.1) had failed to conduct any meaningful investigation of the alleged complaints and could not even locate their records of the applicant's complaints. Simply put, in that case, the impugned trade union had no means, and had made no effort, to determine the relevant facts and, thus, could not reasonably have turned their mind to the merits of the alleged complaints.*

[80] The Board agrees that the applicable process for a particular "investigation" depends on the factual circumstances of a given case.

[81] On the question of bad faith conduct, the B.C. Board in *Judd* made the following helpful comments:

> *[49] Representation in bad faith will typically involve either representation with an improper purpose or representation with an intention to deceive the employee.*
>
> *[50] Some examples…are listed in Rayonier…*
>
> *[51] Another example of an improper purpose would be if the union conspired with the employer to have an employee terminated: for example, if the union agreed to attempt to bring about circumstances in which the employee was likely to be disciplined. However, the mere fact that the union makes an agreement with an employer that the employee feels is detrimental to his or her interests is neither a conspiracy or bad faith. It is perfectly legitimate for a union to reach decisions (or make agreements) based on its view of the merits of a case or based on the interests of other employees…*
>
> *[52] Similarly, it is not a conspiracy simply because the union, after assessing a situation, reaches the same view as the employer. For example, there may be tensions in the workplace between one employee and others. The employer may conclude it is the employee's fault. The union, after assessing the situation, may agree. That does not make it a conspiracy against the employee.*
>
> *[53] The second sub-category of bad faith – representation with an intention to deceive the employee – addresses "dishonesty"…[The Act] does not give the Board any general authority to intervene when someone lied to someone else. However, if a union's*

> *dishonesty directly affects the quality of the union's representation of an employee's interests, that could be representation in bad faith.*

[82] A union, in deciding whether to pursue a grievance, must ensure that it is aware of the relevant information, make a reasoned decision, and carry out its representation of the member without blatant or reckless disregard. Here, the materials disclose no basis to assert that the Union did anything less than ensure it was aware of the relevant information and make a reasoned decision about whether to represent R.J. in relation to his complaint. There is absolutely no basis to assert that the Union treated R.J. with blatant or reckless disregard.

[83] Lastly, the materials disclose no basis for the assertion that the Union discriminated against R.J. in failing to fairly represent him. While R.J. posits that the Union was motivated by personal and political antagonism, the labour relations rationale underpinning the Union's actions is abundantly clear.

Section 6-58

[84] Lastly, the Board will deal with section 6-58 of the Act, which reads:

> ***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.*

[85] The predecessor provision reads:

> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*
>
> *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.*

> *(3) No employee shall unreasonably be denied membership in a trade union.*

[86] The Board outlined the purpose of the predecessor provision in *McNairn v United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 179*, 2004 SKCA 57 (CanLII) [*McNairn*]:

> *[37] In significant part, the purpose of this section lies in protecting a member of a union from abuse in the exercise of the power conferred on unions by the preceeding* [sic] *section—section 36—and in particular subsections (4) and (5) thereof. These subsections empower a union to fine any of its members who has worked for a struck employer during a strike, provided the constitution of the union made allowance for this before the strike occurred. The purpose also lies in protecting an employee, employed in a unionized shop and required to maintain union membership as a condition of employment, not to be deprived of membership by the union except, according to subsection (3), for failure to pay the dues, assessments, and initiation fees uniformly required of all members.*
>
> *[38] Thus subsection 36.1(1) imposes a duty upon a union (again correlative to the right thereby conferred upon an employee), to abide by the principles of natural justice in disputes between the union and the employee involving the constitution of the trade union and the employee's membership therein or discipline thereunder. As such, the subsection embraces what may be characterized as "internal disputes" between a union and an employee belonging to the union, but it does not embrace all manner of internal dispute. For the subsection to apply, the dispute must encompass the constitution of the union and employee's membership therein or discipline thereunder. And when it does apply, it requires that the principles of natural justice be brought to bear in the resolution of the dispute.*

[87] Section 6-58 and its predecessor provision are substantially similar. The purpose of section 6-58 is to protect a member of a union from abuse in the exercise of the power conferred on the union in relation to disputes falling into the categories that are set out. Employees are afforded the 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.

[88] The Board must consider whether R.J. has put in issue a dispute between himself and the Union relating to one or more of those three circumstances. For this purpose, the Board accepts that, during the material times, R.J. was an employee of the University of Saskatchewan and a member in good standing of the Union.

[89] The Board will begin with clause (b), the employee's membership in the union. This clause protects employees, who are employed in a unionized workplace and required to maintain Union membership as a condition of employment, not to be deprived of membership by the Union. R.J. does not allege that the allegations impacted his membership in the Union. He simply states that

he was compelled to retire as a result of the alleged impact on his reputation. Therefore, clause (b) is not engaged on the underlying application.

[90] Clause (c) deals with the employee's discipline by the union. R.J. does not allege that the Union imposed any discipline on him as a result of the allegations or in relation to the surrounding circumstances. Therefore, clause (c) is not engaged on the underlying application.

[91] This brings the Board to clause (a), matters in the constitution of the union. The Hon. George W. Adams, Q.C. , in *Canadian Labour Law*, explains:[8]

> *The union constitution, rules and by-laws constitute the terms of the individual's contract of membership and may contain any conditions not prohibited by law. This is in accordance with the principle of freedom of contract. Therefore, the range of terms that may appear in the contract of membership is vast.*

[92] Next, the Board will consider the materials that R.J. relies upon in establishing his complaint.

[93] First, R.J. refers to the Anti-harassment and Non-Discrimination Statement of the Canadian Association of University Teachers [CAUT], dated April 2012. Articles 1 and 2 of that Statement indicate:

> ***1*** *The Canadian Association of University Teachers is committed to ensuring that all CAUT events are free of harassment and discrimination. Harassing or discriminatory behaviour that undermines an individual's right to participate fully and equally in the work of CAUT as well as undermines the purposes and goals of our organization.*
>
> ***2*** *Neither discrimination nor harassment will be tolerated at any CAUT event.*

[94] This statement pertains to CAUT events and is obviously inapplicable.

[95] Second, R.J. refers to the Harassment Policy of University of Saskatchewan Faculty Association (USFA). That policy was enacted on April 8, 2016. Noteworthy portions of the policy include:

> ***Preamble***
>
> *The USFA deals with the employer (U of S) while being itself an employer. The USFA currently employs four staff members to support the work of the USFA Executive covered by and beyond the Collective Agreement, the USFA's extensive committee structure, and the broader goals of the Association.*

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[8] George W. Adams, *Canadian Labour Law*, loose-leaf (June 2020) 2nd ed, vol 2 (Toronto: Thomson Reuters, 2019) at 14-84.

…

To this latter end, USFA recognizes the need for and benefits of an anti-harassment policy that is understood to govern conduct between members of the Executive and between Executive members and the USFA office staff.

…

Employer's Commitment

The USFA, and its Executive members and supervisory personnel, will take all complaints of harassment seriously. We are committed to implementing this policy and to ensuring it is effective in preventing and stopping harassment, as well as creating a productive and respectful workplace.

Employee's Duty

In accordance with Section 3-10 of the SEA, all Executive members of the USFA, and employees employed by the USFA shall refrain from causing or participating in the harassment of another employee or Executive member, and co-operate with any person investigating harassment complaints.

…

Complaint Procedure

Through its Chair or Vice-Chair, the USFA will discuss options to resolve the complaint with the complainant. Where the conflict cannot be promptly resolved in a manner satisfactory to the complainant, the USFA will notify the alleged harasser of the complaint, provide the alleged harasser with the information concerning the circumstances of the complaint and undertake a confidential investigation. In the interests of confidentiality, any costs associated with such an investigation will be authorized by the Chair or Vice-Chair without prior approval from the USFA Executive.

Following the conclusion of the investigation, the USFA will inform the complainant and the alleged harasser of the results of the investigation.

Where harassment has been substantiated, the USFA will take appropriate corrective action to resolve the complaint.

Confidentiality

The USFA will not disclose the identity of the complainant or alleged harasser or the circumstances of the complaint, except where disclosure is necessary for the purposes of investigating or taking disciplinary action in relation to the complaint, or where such disclosure is required by law.

Vexatious claims of harassment are themselves infractions of this Policy.

Any allegations of harassment and the resulting investigation (if applicable) will be kept securely on file in the USFA solicitor's office, in case there are any further proceedings relating to alleged harassment by a particular individual and/or of a particular employee or colleague.

Other Options for Complaints

Nothing in this policy prevents or discourages any USFA employee or Executive member from referring a harassment complaint to an Occupational Health Officer under the SEA,

> *or filing a complaint to an Occupational Health Officer under the SEA, or filing a complaint with the Saskatchewan Human Rights Commission. A complainant also retains the right to exercise any other legal avenues available, including requesting the assistance of an Occupational Health Officer under the SEA to resolve a complaint of harassment. Saskatchewan people have a right to healthy and safe work environments free from harassment.*

[96] The materials do not disclose that this policy is a matter in the Constitution of the Union. If it is not a matter in the Constitution of the Union, then the underlying application must fail.

[97] In case the policy is a matter within the Constitution of the Union, the Board will consider whether there was a breach of the right to the application of the principles of natural justice pursuant to section 6-58 of the Act.

[98] The principles of natural justice govern individuals' participatory rights with respect to decision-making processes that may adversely affect their privileges, rights, or interests. Given the breadth of circumstances in which these rights may arise, their content is variable depending on the context, including the applicable statutory scheme. However, the principles of natural justice are generally concerned with ensuring that a person has a fair opportunity to be heard before being adversely affected by a decision, and with ensuring that the decision-maker is free from bias and the appearance of bias.[9]

[99] R.J. seems to suggest that the decision of the Union not to investigate, or to investigate inadequately, had an adverse effect on him for denying or dismissing his allegation of harassment.

[100] However, there is nothing in the underlying application disclosing allegations that the Union denied R.J. a fair opportunity to be heard. R.J.'s materials disclose that he was provided numerous, early opportunities to make himself heard. Ultimately, the Union retained an external investigator to investigate his complaints. R.J. acknowledges this, first, by recognizing the agreement to do so:

> *Stewart returned as USFA Chair (July, 2017). Later that fall, my request for an official Harassment Investigation against Chivers was accepted.*

[101] And then, his harassment complaint was investigated:

> *In January 2018, Larry Stewart returned as USFA Chair. Ms. Alma Wiebe investigated my harassment complaint against Chivers.*

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[9] Donald J.M. Brown, Q.C. and the Honourable John M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (April 2019) Vol 2 (Toronto: Thomson Reuters, 2017) at ch 7, 9.

[102] R.J. concedes that the investigator concluded that his complaint of harassment was unfounded. According to R.J., the investigator found that Chivers' actions did not meet "the threshold of a violation of the U ofS Harassment [sic]",[10] and that R.J.'s "complaints did not constitute harassment as defined by the *Saskatchewan Employment Act*"'.[11]

[103] In essence, R.J. complains that the investigator erred. According to R.J., she focused on events that took place after May 22, 2015, following the *in camera* meetings held on May 9 and May 22. Similarly, she did not interview the alleged victim, other staff members, or other key witnesses, and then wrongly accepted Chivers' version of events.[12] Her report was "handicapped".[13] These and many other allegations amount to requests in the nature of an appeal of the investigation decision. They do not disclose a breach of the principles of natural justice.

[104] Lastly, R.J. suggests that the redacting of the report, and the manner in which it was shared with him, impeded his ability to respond. This complaint assumes that R.J. has a right to appeal the investigator's decision – not a proceeding against him, but an investigation into his own complaint. Not all disputes between a member and a Union demand an appeal process. In this case, the Union was entitled to a measure of finality by relying on the investigation report.

[105] On the question of bias, R.J. states that the Executive breached the applicable parliamentary procedure in conducting its meetings, by failing to observe recusal requirements:

> ***Note:*** *It is important to stress that Robert's Rules of Order: Newly Revised (11th Edition, 2013) is our definitive reference for clarification concerning any and all disputes over parliamentary procedure, rules and committee investigations. Robert's Rules of Order (RRO) are specifically referenced in the USFA Constitution (p. 5), as well as in the Harassment Policy of the USFA (p. 1).*
>
> *Chivers (as Chair), as well as USFA Executive members had access to an office copy of RRO. Individual copies were also made available for each Executive member.*

[106] The USFA Harassment Policy also refers to Robert's Rules:

> *Members of the USFA Executive have the most frequent interactions with the office staff, and they are committed to making relationships among themselves, and between themselves and the USFA staff, professional and appropriate in all ways. This commitment entails in part conducting meetings according to Robert's Rules of Order (currently in its 11th edition), a manual of parliamentary procedure which includes rules governing, for example, when and why meetings move in camera and out of camera, to protect staff from*

[10] Letter to the Board June 10, 2019 at 17.
[11] *Ibid* at Appendix B.
[12] *Ibid* at 19-20.
[13] *Ibid* at 19.

> *discussion which might confuse or threaten their roles as advisors to and supporters of the decisions of the USFA Executive Committee.*

[107] R.J. says that, contrary to Robert's Rules, Chivers was required to recuse himself from the Personnel Committee meeting[14] and from any discussion of the investigation report.[15]

[108] There is no basis to claim that Chivers should have recused himself from the Personnel Committee meeting. R.J. first denied the original allegations, and then accused Chivers of harassment for engaging in discussions about the Union's next steps. This expectation of recusal is both *ex post facto* and unreasonable.

[109] Nor is there any basis to claim that Chivers should have recused himself from any discussion of the Investigation Report. By this point the investigator had concluded that the harassment allegations were unsubstantiated. In another circumstance, the Union may have had a decision to make, that is, whether to rely on the investigation report to pursue a grievance. There was no such decision in issue here.

[110] R.J. relies on Robert's Rules, the source of parliamentary procedure for meetings, as the basis for the requirement of an independent, impartial investigation, describing the Rules as "the final and definitive source for the adjudication of disputes".[16] The question before the Board is not whether the Constitution has been breached, but whether there has been a denial of natural justice. It cannot be that the Union, by having incorporated Robert's Rules into its Constitution to govern its meeting procedure, has assumed greater responsibility for investigations than that which is encapsulated by the principles of natural justice.

[111] R.J. expresses a desire for an independent, impartial investigation of his harassment complaint. However, the Union retained an external investigator to accomplish exactly that. R.J. remains dissatisfied. He claims that the offending Executive members interfered in the investigation in various ways. The details are vague, internally inconsistent, and not capable of forming the basis of a violation of section 6-58. For instance, R.J. alleges that Chivers attempted to "influence" the investigation by indicating that R.J. had never been found at fault for any wrongdoing. This is simply a statement of fact – not an undue influence, and certainly not an allegation disclosing a breach of natural justice. R.J. states further that the Union encouraged

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[14] *Ibid* at 20.
[15] *Ibid* at 21.
[16] Letter dated February 7, 2020 at 4.

witnesses not to "testify" despite the fact that Ms. Wiebe, not the Union, would have been in charge of the external investigation.

[112] Finally, R.J. makes no allegations that put in issue the independence of the investigator. In fact, he describes her as "professional, courteous, competent and respectful".[17] It is abundantly clear that R.J. is simply dissatisfied with the investigator's approach to the investigation, and more significantly, with her conclusions.

[113] In summary, the underlying application does not disclose a breach of natural justice, whether for failure to provide a fair opportunity to be heard or for bias on the part of the decision maker.

[114] In conclusion, it is plain and obvious that the allegations contained in the underlying application, assuming that they are true and will be established, do not disclose a violation of section 6-58, or section 6-59, of the Act. The application has no reasonable prospect of success.

Forum Shopping and Delay

[115] The Union argues that the application should be dismissed for abuse of process by way of collateral attack, or forum shopping, and for excessive delay. Given the foregoing conclusions, it is not necessary for the Board to consider these arguments.

Conclusion:

[116] The Board makes the following Order pursuant to subsection 6-111(1) of the Act:

a. The Application for summary dismissal in LRB File No. 179-19 is granted; and
b. The application in LRB File No. 167-19 brought by R.J. is dismissed.

[17] *Ibid* at 36.

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

DATED at Regina, Saskatchewan, this **18th** day of August**, 2020.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson