Saskatchewan
Labour Relations Board

DYLAN LUCAS, Applicant v UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 179, Respondent

LRB File No. 166-20; June 25, 2021
Vice-Chairperson, Barbara Mysko; Board Members: Aina Kagis and Brian Barber

Counsel for the Applicant, Dylan Lucas: Louis A. Browne

For the Respondent, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179: Greg Fingas

Application for Reconsideration – First Stage of Reconsideration – Underlying Employee-Union Dispute – Application for Summary Dismissal – *In Camera* Panel – Application Dismissed by the Board – *Remai* Criteria 1, 3, 5, and 6 – Natural Justice – Right to Cross Examine – Related Proceedings – Use of Board Resources – No Critical Fact in Controversy – Application for Reconsideration Dismissed.

REASONS FOR DECISION

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in a reconsideration application with respect to *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179 v Dylan Lucas*, 2020 CanLII 76682 (SK LRB). Dylan Lucas [Lucas] has asked the Board to reconsider that decision on the basis of *Remai* criteria 1, 3, 5, and 6:

a. *If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence. [First Remai Criterion]*

b. *If the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application. [Third Remai Criterion]*

c. *If the original decision is tainted by a breach of natural justice. [Fifth Remai Criterion]*

d. *If the original decision is precedential and amounts to a significant policy adjudication which the Board may wish to refine, expand upon, or otherwise change. [Sixth Remai Criterion]*

[2] The Board's approach to reconsideration applications involves a two-stage process. The hearing of this application, which was held on March 12, 2021, and these Reasons for Decision, are limited to the first stage. In the first stage, the Board is charged with deciding whether any of the grounds raised by the applicant justify reconsideration of the decision. The Board has decided that they do not.

[3] The background to the underlying decision is as follows. Lucas is a member of the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179 [Union]. On February 13, 2020, Lucas made an application to the Board[1], alleging that the Union had breached sections 6-58 and 6-59 of *The Saskatchewan Employment Act* [Act] and section 242 of *The Saskatchewan Insurance Act*. The Union then made an application to summarily dismiss Lucas's application. It requested that its application be heard by an *in camera* panel of the Board. The Board proceeded to hear the matter *in camera* and summarily dismissed Lucas's application.

[4] The following facts, as outlined by the Board in its decision, are relevant to the underlying dispute:

> *[4] The facts in this case are not disputed. Lucas injured himself while not at work, resulting in the loss of three fingers, and the loss of use of the fourth finger, on his right hand (his dominant hand). As a result, he was unable to work as a pipefitter. Unlike the dismemberment insurance policies that apply to many tradespeople, the policy applicable to Lucas did not cover loss of four fingers or the loss of "use" of one hand. Therefore, Lucas did not qualify for lump sum dismemberment insurance. Lucas is of the view that, by not providing proper dismemberment insurance, similar to that provided to members of other Locals, the Union has breached the duty of fair representation it owed to him.*
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> *[5] In 2019 Lucas sued a number of parties, including the Union, in the Court of Queen's Bench, on the grounds of breach of contract, negligence, breach of trust, breach of fiduciary duty and negligent misrepresentation. The Court dismissed his action, finding that the question raised in his action was whether the Union failed in its duty to fairly represent him, in its acquisition of insurance and by failing to advocate for him after the denial of benefits, an issue solely within the jurisdiction of the Board. The Court found that the Board has the jurisdiction to hear his claim. The Court did not rule on the validity of his claim.*

[5] In its decision, the Board dismissed the employee-union dispute for two main reasons. First, the decision about available insurance coverage was made by the Board of Trustees, not the Union, and even if the Union were responsible for that decision, there was no evidence that the lack of coverage resulted from the Union's arbitrary, discriminatory or bad faith action, as required to establish a breach of section 6-59. Dissatisfaction with coverage is not a sufficient

[1]LRB File No. 025-20.

basis to establish a breach. Relatedly, there was no evidence that the Union failed to advocate for Lucas in a manner that was arbitrary, discriminatory or in bad faith. Second, Lucas did not provide any evidence of a dispute between himself and the Union relating to matters in the constitution of the Union, his membership in the Union or his discipline by the Union, as required by section 6-58.

[6] The reasons provided in support of Lucas's reconsideration application are many. At the center of these reasons is Lucas's belief that he was denied an opportunity to present his case to the Board. He was self-represented when he filed the underlying application. He now says, through his counsel, that the Board failed to take into account *The Statement of Principles on Self-represented Litigants and Accused Persons* adopted by the Canadian Judicial Council in September, 2006 [*Statement of Principles*], and endorsed by the Supreme Court in *Pintea v Johns*, 2017 SCC 23 [*Pintea*]. The Board misunderstood Lucas's arguments, and in that respect erred in drawing the conclusion that the matter was appropriate for summary dismissal.

[7] In addition, Lucas believes that the Board did not understand that the civil action referenced as Q.B.G. 1415 of 2019 is extant as against the other defendants.

[8] Lucas filed an extensive application which included argument and related case citations in support of his request for reconsideration. The Union filed a Reply, as well as a written brief with related case authorities. Both parties made oral submissions at the hearing of this matter. The Board has reviewed all of the filed materials and is grateful for the parties' assistance.

Arguments of the Parties:

Lucas:

[9] Lucas's arguments focus on his status as a self-represented litigant in the underlying dispute and his expectation that he should have had an oral hearing before the Board.

[10] Lucas believes that he should have been provided with an opportunity to cross examine a key Union witness with respect to the insurance gap. The Board noted that other unions provide the very coverage that Lucas was denied and that Lucas has been seeking. Following the denial of benefits, he understood that this gap in coverage was going to be addressed, and it was not. He has numerous questions about why it was not addressed, and wants to be able to ask the Union these questions, and get some answers. He denies that he is engaging in a fishing

expedition, and instead insists that the circumstances give rise to obvious questions and inconsistencies that need to be resolved.

[11] The unintended effect of the Board's decision has been to prejudice Lucas's interests in the civil action, which is continuing as against the other defendants. Lucas wanted to address the issues arising from his injury in one proceeding – not multiple proceedings. Instead, the Union made an application which resulted in its liability being addressed and determined by this Board. The issues were split into a "bifurcated" process but are overlapping and engage the same factual matrix. The summary dismissal of the employee-union dispute has prejudiced the remaining interests engaged by the Queen's Bench action.

[12] This Board should take into account the *Statement of Principles* in dealing with Lucas as a self-represented litigant. The summary dismissal is contrary to those principles, and Lucas's lost opportunity for cross examination is contrary to the principle of natural justice. In arriving at its conclusions, the Board relied on decisions that were released prior to *Pintea* and prior to *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*]. The latter decision provides binding direction and guidance for administrative tribunals. Contrary to what the Union suggests, Supreme Court of Canada decisions are not optional. This summary dismissal, via an *in camera* panel, is a significant, concerning precedent, and as such, it should be carefully reviewed and refined.

Union:

[13] The Union stresses that it is not the role of the Board on a reconsideration application to allow a party to re-argue or provide a different perspective on a case that has been dismissed. Relatedly, Lucas is not entitled to use the Board's resources to leverage his claim in another proceeding.

[14] The Union does not contest that the Supreme Court has endorsed the *Statement of Principles*; however, the principles are to be understood and applied not in a vacuum but in context. The context includes what is a wide spectrum of capabilities attributable to specific self-represented litigants. Lucas falls on the capable end of the spectrum. He does not present as someone who is uncomfortable with these proceedings; in fact, he has held himself out as someone who is capable of helping others navigate similar proceedings.

[15] Lucas has not identified a critical fact which is in controversy and about which he wishes to adduce evidence. Instead, he asks the Board to identify issues that are not before it and then

leave those issues to be decided on another day. It is not reasonable to expect the Board to identify or address all possible allegations that might be made, but were not pleaded. It is not reasonable for the Board to leave a matter open only for the purpose of cross examination on matters that are speculative, or to assist a litigant in discovering evidence for purposes of a parallel proceeding.

[16] There has been no breach of natural justice in this case. The Board has taken the facts pleaded as true and the evidence submitted as not contradicted. This approach has operated to Lucas's advantage. There is no concern that Lucas lacked time or notice to respond to the absence of an arguable case. Following notice of the issue, Lucas had the opportunity to adduce further evidence. He did so, but the Board found that the evidence was insufficient. Lucas is now seeking another opportunity to adduce further evidence and to remedy the existing deficiencies.

[17] Furthermore, a party is not entitled to begin one proceeding for the purpose of gathering information or discovering parties in another proceeding. To commence a claim for that purpose is improper. That is what Lucas is attempting to do in this case.

[18] There is no inherent right to cross examine witnesses. Here, there was no hearing involving contested evidence and no right of cross examination arising in said hearing. The Board relied on Lucas's evidence which was uncontested. The decision was based on written submissions. Lucas had a full opportunity to reply to all submissions made by the Union. Nothing was considered without being subject to his reply.

[19] The *Statement of Principles* does not require that the Board adopt a checklist for self-represented litigants that must be applied uniformly in every case. There is no reason to believe that the Board's policy should be revisited, and even if there were, this is not the case in which it would be appropriate to do so.

Applicable Statutory Provisions:

[20] The following statutory provisions are applicable to this matter:

> ***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:*
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> > *(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:*
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> > *(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.*
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> ***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.*
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> *(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.*
>
> ***6-115****(3) Notwithstanding subsections (1) and (2), the board may:*
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> > *(a) reconsider any matter that it has dealt with; and*
> > *(b) rescind or amend any decision or order it has made.*

Analysis:

[21] A reconsideration application is not to be treated like an appeal; nor is it an opportunity to re-litigate issues that have already been addressed in the underlying matter. It is an exceptional exercise of the Board's discretion.

[22] The Board in *Amalgamated Transit Union, Local 615 v City of Saskatoon*, 2018 CanLII 127679 (SK LRB) outlined the premise of any such application:

> *[48] On a reconsideration application, the Board starts from the premise that Board decisions are to be considered final in all but exceptional circumstances. The Board has emphasized this principle in many decisions. For example, in Canadian Union of Public Employees, Local 600-3 v. Government of Saskatchewan (Community Living Division, Department of Community Resources), 2009 CanLII 49649 (SK LRB), the Board stated:*
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> > *[21] The Board has consistently applied the same stringent test in determining whether or not a reconsideration application should be allowed. As set out by the Board in Grain Services Union v. Saskatchewan Wheat Pool et al.*
> >
> > > *A request for reconsideration is not an appeal or a hearing de novo, nor is it an opportunity to reargue a case, raise new arguments or present new evidence, but rather, it generally allows important policy issues to be addressed, such as evidence to be presented that was not previously available, or errors to be corrected.*

[23] The grounds for a reconsideration application are well-established and have been recited by the Board on many occasions. They were first articulated by the Board in *Remai Investment*

Corp. v Saskatchewan Joint Board, RWDSU, [1993] Sask Lab Rep 103 (SK LRB) [*Remai*], as follows:

> 1. *If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence.*
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> 2. *If a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons.*
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> 3. *If the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application.*
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> 4. *If the original decision turned on a conclusion of law or general policy under the code which law or policy was not properly interpreted by the original panel.*
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> 5. *If the original decision is tainted by a breach of natural justice.*
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> 6. *If the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

[24] In the underlying application, Lucas relied on sections 6-58 and 6-59 of the Act. Therefore, it may be useful to review the principles that govern applications brought pursuant to these sections.

[25] Section 6-58 of the Act provides an employee with a right to the application of the principles of natural justice with respect to certain disputes between the employee and the union that is the bargaining agent. The disputes that are contemplated relate to matters in the union's constitution, the employee's membership in the union and the employee's discipline by the union. The Board's jurisdiction is limited to those three categories.

[26] Section 6-59 sets out a union member's right to be fairly represented by the union that is or was the bargaining agent with respect to a right pursuant to the collective agreement or Part VI. In *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB), the Board confirmed the analysis to be applied on a duty of fair representation complaint:

> *[15] Furthermore, it is a common misconception that this Board is a governmental agency established to hear any and all complaints about or involving trade unions. However, a review of The Saskatchewan Employment Act quickly establishes that such is not the case. Numerous decisions of this Board have demonstrated that this Board's supervisory responsibility pursuant to now s. 6-59 … is not to ensure that a particular member achieves a desired result or avoids an undesirable outcome; rather the purpose of the provision is to ensure that, in exercising its representative duty, a trade union does not act in a manner that is arbitrary, discriminatory or in bad faith. As a consequence, to sustain a violation of 6-59 of the Act, an applicant must allege and then satisfy this Board through evidence that his/her trade union has acted in a manner that is "arbitrary", "discriminatory" or in "bad faith". …*

[27] There is a wealth of case law in which this Board has considered the meaning of the terms "arbitrary", "discriminatory", and "bad faith" in the context of a duty of fair representation application. This includes *Berry v Saskatchewan Government Employees' Union*, [1993] SLRBD No 62, 1993 4th Quarter Sask Labour Rep 65, and the cases cited therein. The Board has also routinely relied on the description of those terms contained in *Toronto Transit Commission*, [1997] OLRD 3148. In short, the meaning of the terms is well-established.

[28] The Union also relies on *Beitel v Unifor*, *Local 1-S (Canada)*, 2015 CanLII 886 (SK LRB), which involved an allegation that a union breached its duty of fair representation when it negotiated a CBA that eliminated bonus payments. There, the Board recognized that tradeoffs are a normal part of collective bargaining and that, as a result, "[i]ndividual interests cannot always be fully protected or benefited" (paras 54-8). As was observed in *United Steelworkers of America v Six Seasons Catering Ltd.*, [1994] 3rd Quarter Sask Labour Rep 311, LRB File No. 118-94, at 318:

> *Collective bargaining is by nature a discriminatory process, in which the interests of one group may be traded off against those of other groups for various reasons - to redress historic imbalances, for example, or to reach agreement within a reasonable time, or to compensate for the achievement of some other pressing bargaining objective.*

[29] Next, the thrust of many of Lucas's arguments is that it is inappropriate to summarily dismiss, without an oral hearing, the application of a self-represented litigant. Therefore, it may be helpful to outline the source of the Board's authority to take this approach.

[30] First, the Board has authority to determine the applicable process on an application. This includes the authority to summarily dismiss a matter and to decide any matter without holding an oral hearing:

> ***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;*
> *(q) to decide any matter before it without holding an oral hearing;*

[31] The Board has repeatedly and consistently interpreted these provisions to mean that it has authority to proceed, in appropriate circumstances, to dismiss an application on a summary basis without an oral hearing, and specifically, to dismiss an employee-union dispute involving a self-represented applicant: *Siekawitch v Canadian Union of Public Employees, Local 21*, 2008 CanLII 47029 (SK LRB) [*Siekawitch*].

[32] It should also be observed that the Board has broad authority to accept evidence, including evidence that is not admissible in a court of law:

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

[33] Many, if not most, duty of fair representation applications are launched by self-represented litigants. This should not come as a surprise when it is considered that these applications are intended to engage allegations of a breach of a representative duty. It is therefore common for the Board to encounter self-represented litigants in the course of these specific types of proceedings. The Board in *Siekawitch* articulated its awareness of the care that must be taken with litigants who may otherwise be at a disadvantage in a legal proceeding (at 5-6):

> *Caution must be observed by the Board when dealing with self represented Applicants as is most often the case when dealing with s. 25.1 of the Act. In its decision in McRae-Jackson and Jacolin Shepard v. CAW-Canada and Air Canada Jazz and Edwin Snow v. Seafarers' International Union of Canada and Seabase Limited [2004] CIRB No 290, C.I.R.B.D. No 31, the Canada Industrial Relations Board adopted the comments made in its earlier decision in Stephen Jenkins et al., June 9, 2004 (CIRB LD 1102) where it says:*
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> > *In a majority of cases under Section 37, complainants are not represented or assisted by legal counsel. … They often do not fully appreciate what the Board can and cannot do for them, if anything, under the law. Where the issue is a dispute between an individual and the union representing him over the union's decision to drop or not pursue a grievance, the complainant frequently expects that the Board will be able to make a decision on the actual merits of the grievance – to decide whether the suspension, or whatever took place is appropriate and, if not appropriate, to modify or nullify it.*
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> *Notwithstanding the care that must be taken with respect to those who are self represented and who may not appreciate fully the nature of the application and the burden of proof which they face, the Board followed the consistent practice with respect to requests for summary dismissal of s. 25.1 application. This practice provides for opportunity for the Applicant to provide the factual basis for his complaint such that the Board could judge whether or not he has an arguable case. Similarly, the Union, by its request for particulars, attempted to assist both themselves and the Board with respect to framing the issues to be determined and the case which it was required to meet.*

[34] Next, the Board will revisit the claims contained in the underlying application. The application includes a Fiat by the Court of Queen's Bench, dated January 24, 2020, granting dismissal of Lucas's claim against the Union and alleges a breach of *The Saskatchewan Insurance Act*, as well as misrepresentation and non-disclosure. Lucas does not specify in what manner, when, or by whom there was misrepresentation and non-disclosure.

[35] In the Fiat, the Court describes the claims as including breach of contract, negligence, breach of fiduciary duty, breach of trust and negligent misrepresentation, but finds that the matters raised as against the Union fall within the exclusive jurisdiction of this Board. The essential question raised by the dispute is "whether the union failed in its duty to fairly represent the plaintiff in its acquisition of insurance" (para 21), and secondarily, whether the Union breached its duty by failing to advocate for Lucas after the benefits were denied.

[36] In the Union's application for summary dismissal, it states that the facts asserted do not raise a breach of the duty of fair representation even if taken as true. In response to that application, Lucas attached a number of documents, listed by the Board in its decision as follows:

> *[3] In response to this application, Lucas filed notarized transcripts of four meetings between himself and the Union's business manager; two affidavits; the Union's Collective Bargaining Agreement with employers in the plumber/pipefitter trade; the Union's Constitution; Trust Agreement and Declaration of Trust respecting the Saskatchewan Piping Industry Health and Welfare Trust Fund; and various accidental death and dismemberment insurance policies applicable to other unions.*

[37] Next, the Board will consider each of the grounds relied upon by Lucas, in turn.

If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence

[38] To justify reconsideration on this ground it is necessary to indicate which finding of fact is in controversy. In his argument, Lucas does not outline the finding of fact that is in controversy, but instead raises questions about potential scenarios that could be investigated through the cross examination of a witness or witnesses at a hearing. In this way, Lucas seems to be requesting a discovery process for purposes of establishing a claim, rather than putting in issue a controverted fact.

[39] Along these lines, Lucas advises that he has prepared questions for the purpose of cross examining Bill Peters [Peters], who was the Business Manager for the Union during the material times. According to Lucas, Peters can provide evidence about events that occurred before the injury and after. For instance, Peters can testify about the process of nominating Trustees of the Health and Welfare Fund, the Union's support of the Trustees, as well as reporting mechanisms, and other related matters. Lucas says, for example, that "[w]e don't know whether any other bias was operating during the appointment, supervision, resourcing, etc. of the Respondent's appointments to the Trust Fund, because the applicant was denied the opportunity to have a

hearing on this and many other relevant issues." Lucas acknowledges that he is left to speculate about potential problems with the Trust Fund.

[40] He also states that the transcripts raise issues of credibility and that these transcripts were relied upon by the Board. He questions, in particular, why Peters dissuaded him from bringing a motion at the AGM to amend the coverage. Clearly, this is an issue relating to the Union's representation of Lucas after the denial of his benefits. On this issue, the Board concluded as follows:

> *[21] With respect to the claim that the Union failed to advocate for him, the transcripts Lucas filed of his meetings with the Union business manager indicate just the opposite. When the Union realized he did not qualify for a lump sum dismemberment payment they did their best to have that decision reversed. Their inability to do so is not evidence of arbitrary, discriminatory or bad faith action.*

[41] Lucas seems to be suggesting that the Union might have acted in an arbitrary, discriminatory, or bad faith manner. The Union might have breached its duty. This is speculation, and it is consistent with Lucas's request to engage in a cross examination at a hearing before this Board, and through that cross examination, to uncover facts that might establish a breach. This Board has found that the decision as to what insurance was provided was made by the Board of Trustees, not the Union. Even if the Union were responsible for that decision, neither Lucas's questions about the Union's involvement with the Board of Trustees nor his questions with respect to the Union's advocacy raise controverted findings of fact.

[42] Even if Lucas's questions about the Union's advocacy could be found to be controverted findings of fact, these questions are not sufficiently critical to justify reconsidering the Board's decision. The Board in its decision observed that Lucas is dissatisfied with the gap in insurance coverage. The responsibility for deciding what insurance is provided rests with the Board of Trustees. It is not subject to negotiation. Even if it were subject to negotiation, the Union's duty of fair representation does not guarantee a specific negotiated outcome.

[43] Lucas also relies on section 6-58 to suggest that the Union breached the principles of natural justice with respect to disputes between them relating to matters in the constitution of the Union and Lucas's membership in the Union. In the underlying decision, the Board drew the following conclusion with respect to section 6-58:

> *[25] In his application Lucas claimed that the Union breached section 6-58 of the Act. However, he did not provide any evidence of a dispute between himself and the Union relating to matters in the constitution of the Union, his membership in the Union or his*

> *discipline by the Union. Therefore, his application pursuant to section 6-58 of the Act also fails.*

[44] Lucas now says that the Board "erred" in coming to this conclusion. However, he does not specify which matter within the constitution of the Union is in issue or which matter with respect to his membership in the Union is in issue.

[45] In *Siekawitch*, the Board quoted *Soles v Canadian Union of Public Employees, Local 4777*, 2006 CanLII 62947 (SK LRB) at paragraph 37, confirming that the onus is on the applicant to provide particulars and documents:

> *[37] We agree with the decision of the Canada Board in McRaeJackson, supra, where it is made clear that the onus is on the applicant to provide particulars and documents to support its allegations that a union has violated the duty of fair representation. In that case, while determining that certain applications should be dismissed without an oral hearing, the Board stated at 16 and 17:*
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> > *[49] The Board is an independent and adjudicative body whose role is to determine whether there have been violations of the Code. Although the Code gives the Board broad powers in relation to any matters before it, it is not an investigative body. Accordingly, it is not mandated to go on a fact-finding mission on behalf of the complainant, to entertain complaints of poor service by the union, to investigate the union's leadership or to investigate complaints against the employer for alleged wrongs suffered in the workplace. Employees who allege that their union has violated the Code and wish to obtain a remedy for that violation must present cogent and persuasive grounds to sustain a complaint.*
> >
> > *[50] A complaint is not merely a perceived injustice; it must set out the facts upon which the employee relies in proving his or her case to the Board. A complaint goes beyond merely alleging that the union has acted "in a manner that is arbitrary, discriminatory or in bad faith." The written complaint must allege serious facts, including a chronology of events, times, dates and any witnesses. Copies of any documents that are relevant, including letters from the union justifying its actions or decision, should be used to support the allegations.*

[46] In the underlying decision, the Board at paragraph 22 stated that it was "incumbent on Lucas to provide some factual basis for his claim that the Union acted in an arbitrary or discriminatory manner, or had in some fashion acted in bad faith toward him". It is equally necessary that Lucas provide a factual basis for his claim pursuant to section 6-58.

[47] Through the current application, Lucas has not identified which finding of fact is in controversy. Instead, it is the conclusion of law with which Lucas takes issue. Therefore, the request for reconsideration based on the first ground is denied.

If the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application

[48] Lucas states that he is concerned that, because he has been deprived of an opportunity to adduce evidence against the Union and its employees and/or agents, his claim as against the remaining defendants in the civil action has been prejudiced. In that action, he anticipates encountering objections to seeking to question Peters, on the basis that his questions pertain to the matter over which this Board has jurisdiction. Peters's evidence would be a piece of the puzzle necessary to make a case in the civil action. If Lucas is denied an opportunity to cross examine Peters, he will be forced to examine Peters in chief, which is far from ideal. Lucas says that the Board could not have intended to prejudice Lucas's case in the civil action. For this reason, the decision has operated in an unanticipated way.

[49] It would not be appropriate for the Board to allow its processes to be used for the primary purpose of discovering evidence for proceedings commenced in other forums. For a similar proposition, the Union relies on *Commonwealth Marketing Group Ltd. v Banasiak et al*, 2007 MBQB 202 (CanLII) [*Commonwealth Marketing*]. The Court in *Commonwealth Marketing* made the following remarks about the commencement of a claim brought for the purpose of subjecting the defendants to discovery:

> *[15] It is also clear that the plaintiffs sought to name these defendants in the first action as well as in this action solely for the purpose of being able to conduct examinations for discovery of them. I can see no other rationale for the second action. It does not allege new grounds nor does it seek to establish liability on a different head than alleged in the first action.*
>
> *[16] An abuse of process claim is one that is not often dealt with in civil matters. Clearly, however, where proceedings are instituted that amount to a duplication of another proceeding and are instituted for an improper purpose, the court will intervene to prevent its processes from being used in such a manner. I am satisfied that in this instance the statement of claim against the defendants, Banasiak and Roy, was issued for an improper purpose and should be dismissed. The plaintiffs will be able to litigate their claim fully in the first action and there is no sound basis for allowing the second action to proceed. Indeed the fact that in the plaintiffs' view it should only be allowed to proceed as a consolidated action with the first one heightens the impropriety of it.*

[50] It is true that Lucas does not have access to the Board's process for the purpose of discovering evidence to be used in another proceeding. However, it is not true that this is an unintended effect of the decision. The summary dismissal process is designed to promote the efficient use of the Board's resources. By preventing the Board's resources from being used as an alternative means of discovery, the summary dismissal process has operated as intended.

Allowing a litigant to use the Board's resources in this manner would be inappropriate and unexpected.

[51] Finally, the Board notes that Peters is listed, along with the other trustees, as a defendant in the civil claim.

[52] In summary, this ground does not serve as a basis for reconsidering the decision.

If the original decision is tainted by a breach of natural justice

[53] It is well established that the content of "natural justice", or what is known as "the duty of fairness", is not uniform. It will depend on the circumstances in which it is being considered: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]. This includes the nature of the statutory scheme and the legitimate expectations of the parties, as well as the importance of the decision to the individuals affected. Along these lines, it is important to note that the statutory authority for summary dismissal is explicit and the procedure is well established before this Board.

[54] Through this process, Lucas had an opportunity to produce evidence to support his claim. In doing so, he had the benefit of having reviewed the Union's position with respect to his application. He also had an opportunity to adduce better particulars and evidence than that which was contained in the application. He provided a number of documents to the Board in support of his claim. The Board identified the many documents that were filed and considered in arriving at its decision.

[55] According to Lucas, the *Statement of Principles* was not followed or acknowledged. The Board did not refer Lucas to appropriate sources of information, engage in case management activities, explain the process, provide information about the law or evidence, or provide him with information to assist in his understanding and asserting his rights. Lucas was denied a fair opportunity to be heard. He was provided no opportunity to be heard.

[56] The Union observes that the challenges experienced by self-represented litigants are not new, rare, or misunderstood by the Board. The Union points, in particular, to cases in which these challenges were addressed directly, including *Brenda E. Mcdonald v Saskatchewan Union of Nurses and Saskatchewan Health Authority (Formerly Heartland Regional Health Authority)*, 2018 CanLII 68446 (SK LRB) [*McDonald*].

[57] *McDonald* involved an application for a non-suit brought by the Union against a self-represented litigant. In that case, the Board permitted the application for a non-suit without requiring the Union to make an election and then granted the application on the basis that the applicant had failed to establish an arguable case. Similar to this case, the applicant in *McDonald* was not permitted to cross examine the Union's witnesses without having first established a *prima facie* case.

[58] In this case, the decision to summarily dismiss was made on the basis of written materials. Following the filing of the application, Lucas had an opportunity to reply, at which time he took the opportunity to file extensive additional documentation. As is the usual process in these applications, the materials considered by the Board were taken as true. There is no indication that Lucas misunderstood the nature of the application; nor is there any indication that Lucas would have benefited from additional assistance, or that any additional assistance was required to protect his rights and interests. It is revealing that, despite his representation by counsel on the current application, it remains the case that no controverted finding of fact, or no critical one, has been put in issue.

[59] Implicit in Lucas's argument is that the inability to cross examine Peters is a denial of natural justice. However, the right to cross examine is not an inherent, free-standing right, absent a dispute about credibility respecting the facts in issue. As mentioned, Lucas has not raised a disputed fact that gives rise to an issue of credibility, but has voiced only speculation about potential facts and potential conclusions of law.

[60] In this vein, the Union relies on *Innisfil Township v Vespra Township*, 1981 CanLII 59 (SCC), [1981] 2 SCR 145 [*Innisfil*]. *Innisfil* suggests that the right to cross examine is contextual. The context in that case included that the board had an unlimited duty to hold a public hearing, inquire into the merits, and then dispose of the application. A witness had been proposed for cross examination and the parties had assumed that the cross-examination of that witness should and would take place.

[61] *Innisfil* confirms that the content of natural justice, and particularly, the right to cross examination, is dependent on the circumstances:

> *We are here concerned with that sector of the common law sometimes referred to as the principles of natural justice, fairness, and audi alteram partem. These principles, of course, are of diminished impact in instances such as we have here where the constituting statutes themselves outline the necessity for a hearing and, by direction and indirection, establish the procedure to be followed in the conduct of such hearing. In proceeding to examine*

> *some of the authorities, new and old, one must constantly be cautious that the overriding consideration is the statutes themselves. Nevertheless, a reference to some authorities is helpful in applying the statutes to these proceedings. One may refer, for example, to Halsbury, vol. 1, 4th Ed., p. 94, para. 76, where it is stated:*
>
> > *Rejection of a request to be permitted to cross-examine witnesses who appear at a hearing for the other side will normally be construed as a breach of natural justice; but it is not a necessary ingredient of natural justice that one who has submitted relevant evidence in writing or ex parte must be produced for cross-examination, provided that the evidence is disclosed and an adequate opportunity is given to reply to it.*

[62] The Board has authority to determine the applicable process on an application. In appropriate cases, that process may include the authority to summarily dismiss a matter, to decide any matter without holding an oral hearing, and to accept evidence that would not be admissible in a court of law. To decide a matter by written materials is not equivalent to the denial of a hearing. It is not the case that Lucas was denied an opportunity to be heard, or a fair opportunity to be heard. Nor is there any indication that, by choosing to receive and review written materials on the application for summary dismissal, the Board committed a breach of natural justice.

[63] The request for reconsideration of the decision on the basis of the fifth ground is denied.

If the original decision is precedential and amounts to a significant policy adjudication which the Board may wish to refine, expand upon, or otherwise change

[64] Lucas states that all of the cases relied upon by the Board were decided prior to the decisions in *Pintea* and *Vavilov*. Furthermore, he is unaware of any decisions of this Board, subsequent to *Vavilov*, that have involved the dismissal of an application brought by a self-represented litigant. The summary dismissal of such an application is a significant policy adjudication, and as a policy adjudication, it sets a precedent.

[65] It is not correct to describe this decision as a precedential policy adjudication. There are numerous decisions that have granted summary dismissal of a self-represented litigant's application, including by *in camera* panel, in the last year: *Saskatoon Co-Operative Association Limited v Craig Thebaud*, 2020 CanLII 35487 (SK LRB*), Saskatchewan Power Corporation v Joel Zand*, 2020 CanLII 36086 (SK LRB), *University of Saskatchewan Faculty Association v R.J.*, 2020 CanLII 57443 (SK LRB).

[66] The Board's power to reconsider its decisions must be used sparingly. In exercising this power, "the Board must balance the need for policy refinement and error correction with the

overarching need for finality and certainty in our decision-making process:" *Kennedy v Canadian Union of Public Employees, Local 3967*, 2015 CanLII 60883 (SK LRB), at para 9. It is therefore appropriate to apply a narrow interpretation of the sixth ground. Understood in the broadest sense, however, the underlying decision is not a significant policy adjudication. Even if it were, the implication of the argument is that the Board should use its reconsideration powers for purposes of reviewing the reasonableness of the decision, taking into account the principles as outlined in *Vavilov*. That is not the purpose of a reconsideration application.

[67] Therefore, the arguments made pursuant to this ground do not provide any basis to reconsider the underlying decision.

[68] Lastly, it is worth noting that in some cases litigants come before the Board believing that the application they have filed will resolve all of their grievances, only to find out much later, after much effort, that this was not the case, and that, because of its inherent limits, the law, or the particular process, was not the panacea that they had hoped. It is therefore not accurate to view applications for summary dismissal merely as the malevolent weapon of overly aggressive counsel. Nor is it helpful to disregard the consequences of allowing matters to proceed when they have been found to be patently defective.

[69] Accordingly, the application for reconsideration of the underlying employee-union dispute in LRB File No. 119-20 is dismissed.

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

DATED at Regina, Saskatchewan, this **25th** day of **June, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson