Saskatchewan
Labour Relations Board

**SASKATCHEWAN POLYTECHNIC FACULTY ASSOCIATION, Applicant v CHAU HA, Respondent, and SASKATCHEWAN POLYTECHNIC, Respondent**

LRB File Nos. 124-22 and 111-22; August 22, 2022

Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

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| Counsel for the Applicant, Saskatchewan Polytechnic Faculty Association: | Gordon D. Hamilton |
| The Respondent, Chau Ha: | Self-Represented |
| Counsel for the Respondent, Saskatchewan Polytechnic: | Kit McGuinness |

**Application for Summary Dismissal – Section 6-111 of *The Saskatchewan Employment Act* – Underlying Employee-Union Dispute – Summary Dismissal Granted.**

**Section 6-58 – Allegation of Breach of Union Constitution – Allegations Not Related to Principles of Natural Justice.**

**Section 6-59 – Allegations Disclose No Rights Pursuant to Collective Agreement or Part VI.**

## REASONS FOR DECISION

**Background:**

**[1] Barbara Mysko, Vice-Chairperson:** On July 25, 2022, Saskatchewan Polytechnic Faculty Association [Union] filed an application for summary dismissal of five employee-union disputes brought by Chau Ha [Respondent]. The Union is the exclusive bargaining agent for a group of employees working for Saskatchewan Polytechnic [Employer]. For the current purposes, the Board will assume that the Respondent is an employee of Saskatchewan Polytechnic and a member of the bargaining unit.

**[2]** One of the five applications is LRB File No. 111-22. In respect of LRB File No. 111-22, the application for summary dismissal complies with section 19 of *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021* [*Regulations*], which requires that the application be

filed before the date for the hearing of the original application is set. A date for the hearing of the original application has not been set.

**[3]** The four remaining applications are LRB File Nos. 023-22, 062-22, 069-22, and 086-22. In respect of those four matters, the Union's application for summary dismissal was filed late, having been filed after the dates for the hearing of the original applications were set. The Union sought an extension of the time to file the application, as required pursuant to subsection 30(2) of the *Regulations*. On August 8, 2022, the Executive Officer denied the request to extend the time to file the application.

**[4]** Therefore, the Board is proceeding to consider the application for summary dismissal only in relation to LRB File No. 111-22. The Union asks the Board to dismiss that application [original application] without an oral hearing, pursuant to subclauses 6-111(1)(p) and (q) of the Act.

**[5]** In the original application, which was filed on July 4, 2022, the Respondent (then the Applicant) states that the Union has breached sections 6-58 and 6-59 of *The Saskatchewan Employment Act* [Act]. The allegations are as follows:

> *4. The applicant alleges that a contravention of The Saskatchewan Employment Act has been and/or is being engaged in by the union by reason of the following facts:*
>
> > *1. 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;*
> >
> > *SPFA Constitution states: ARTICLE XVI - Evaluation of Association*
> >
> > > - *The Association will provide all Members with an annual opportunity to evaluate the performance of the Association and will report the findings to the general membership in writing.*
> >
> > *On the SPFA Website the last survey evaluation is dated 2016 and there has been no report made to the members included in the AGM 2021 information package or in past AGM packages. The SPFA has violated member's right to procedural fairness and due process of evaluating the union.*
> >
> > *Evidence: SPFA Constitution, SPFA evaluation survey results posted on the website is dated 2016, AGM 2021 package without any report to the members of the survey evaluation report.*
> >
> > *2. 6-59 Right to fair representation that is not arbitrary.*
> >
> > *I contacted faculty relations officer {FRO} Cristie Zyla around Feb. 3, 22 stating that morale in the library is low and recommended she solicit feedback from the librarians. CZ did solicit feedback from the librarians but to date, we have no idea*

> *what happened next. CZ has not communicated with the librarians since. She has failed to do the following as per the FRO job posting:*
>
> > *• Provides advice concerning the range of possible approaches to the resolution of issues.*
> > *• Works collaboratively to mediate resolutions where possible and appropriate*
> > *• Provides consultation services to members in the interpretation and application of the collective agreement, employer policies and relevant statutes and legislation.*
>
> *I have no idea what my option is or what our collective option in regards to this low morale problem in the library. I also advised CZ to let the [SGEU] union know of this problem as it is not isolated to librarians. We all talk to each other in the library and based on the people I talk to, morale is low.*
>
> *Evidence: My testimony and the FRO job description.*

**[6]** The Union filed a Reply to the original application on July 11, 2022. In its Reply, the Union states that the Respondent has not alleged or pleaded a dispute between herself and the Union that falls within the parameters of section 6-58 of the Act, nor alleged or pleaded a failure on the part of the Union to represent her with respect to her rights pursuant to the collective agreement or Part VI of the Act, as required pursuant to section 6-59 of the Act. The Union states further that the application is frivolous, vexatious and an abuse of process, and requests that it be summarily dismissed.

**[7]** The Employer filed a Reply to the original application on July 12, 2022. In the Reply, the Employer states that the application raises issues that rest entirely between the Respondent and the Union.

**[8]** After receiving the pleadings in this matter, the Board set deadlines for further written submissions. The Union opted to rely on the application as its initial written submission, the Respondent filed a written submission in reply, and the Union filed a sur-reply. The Employer did not file further submissions. The Board has reviewed the pleadings and has decided that this matter can be determined without an oral hearing.

**Arguments:**

*The Union:*

**[9]** The Union's brief arguments respond to the allegations made pursuant to each of sections 6-58 and 6-59 of the Act, in turn.

**[10]** With respect to section 6-58, the original application puts in issue what is nothing more than day-to-day union activity, that is, the Union's posting of the evaluations on the website. It makes no allegation of a breach of natural justice, which is critical for a claim pursuant to section 6-58. In the absence of such an allegation, there is no reasonable chance that the application will succeed.

**[11]** With respect section 6-59 of the Act, the Respondent has not alleged nor pleaded that the Union has failed to represent her with respect to her rights pursuant to the collective agreement or Part VI of the Act.

*The Respondent:*

**[12]** With respect to the section 6-58 argument, the Respondent states:

> *Procedural fairness is objective decision-making that is free from bias and one that follows procedure (Government of Canada). The EC and FROs have an obligation to its members to follow the SPFA Constitution and the procedures and policies that it creates in order to ensure procedural fairness in its treatment of members. By not following their own constitution, policies, and procedures, they are acting in an arbitrary and unfair manner in its treatment of members. A lack of a policy or procedure is a violation of that procedural fairness because it allows them to use their power arbitrarily.*

**[13]** The Respondent states that the members of the Union have a right to evaluate the Union on an annual basis. The failure to provide this opportunity to the members breaches their procedural rights.

**[14]** With respect to section 6-59, the Respondent makes two main points. First, the Faculty Relations Officer (FRO) failed to communicate with the librarians about the Respondent's concerns. Therefore, it is unclear how she could have investigated or, if she did investigate, what the outcome of that investigation was. Second, section 6-59 has broad application. It is not limited to employees' rights pursuant to the collective agreement but extends to all employee rights.

**[15]** All of the complaints come within sections 6-58 and 6-59 of the Act. They are grounded in questions of fairness, or the lack thereof, in the Union's representation of the Respondent.

**[16]** Lastly, the Respondent states that this Board has already "agreed to hear" four out of five of the complaints. She states further that "[t]here are no procedural error[s] or error[s] in judgement or law from the LRB in agreeing to hear my complaints based on my applications."

**Applicable Statutory Provisions:**

**[17]** The following provisions of the Act apply 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:*
>
> *(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;*

**Analysis and Decision:**

*Preliminary Matter – Board Process:*

**[18]** Further to the Respondent's submissions, the Board wishes to clarify the process in relation to the four related matters. First, the Board has made no substantive determination in relation to the application for summary dismissal as it relates to those four matters. The application, as it relates to those matters, was dismissed due to late filing. Second, the Board has made no determination in relation to the Union's pleading (in its Reply) seeking summary

dismissal of those matters. Contrary to the Respondent's submissions, the Board does not review summary dismissal arguments, contained in a Reply, for the purpose of determining whether to proceed with a hearing on the original application.

*Preliminary Matter – Sur-Reply Brief:*

**[19]** Next, the Union filed a sur-reply brief in this matter, consisting of seven paragraphs, most of which were not within the scope of its right of sur-reply. A sur-reply is supposed to address only the issues raised in the Reply that could not have been anticipated by the applicant. Paragraphs three, four, six, and seven of the sur-reply consist of argument responding to issues that easily could have been anticipated by the Union. The named paragraphs have been struck and disregarded.

**[20]** The Board is disappointed that the Union may have attempted to take advantage of the Board's process to ensure that it had the last word in this matter. Its approach was inappropriate and is to be discouraged.

*Substantive Matter:*

**[21]** It is well established that the Board has authority to summarily dismiss an application, and that it may do so without holding an oral hearing. The source of this authority is found at section 6-111 of the Act:

> ***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;*

**[22]** The authority to dismiss an application without an oral hearing was confirmed in *Siekawitch v Canadian Union of Public Employees, Local 21*, 2008 CanLII 47029 (SK LRB), at pages 4-5:

> *The above provisions, which came in to force in Saskatchewan in 2005, [and] originated in The Canada Labour Code, Part I, have been considered by several cases in the Federal jurisdiction. Those cases are clear authority for the proposition that the Board may proceed, in appropriate circumstances, to dismiss an application without an oral hearing where the documents provided on the application show there is either a lack of evidence or no arguable case. Those documents, which form a part of the record such as the Application and Reply, can be supplemented by reports of investigations conducted by the Board or written submissions of the parties.*

**[23]** Section 19 of the *Regulations* outlines the process to follow in making an application for summary dismissal. In an application for that purpose, the applicant is to request the Board to consider the application either with or without an oral hearing:

> ***19(1)*** *In this section:*
>
> *"application to summarily dismiss" means an application pursuant to subsection (2);*
>
> *"original application" means, with respect to an application to summarily dismiss, the application filed with the board that is the subject of the application to summarily dismiss;*
>
> *"party" means an employer, union or other person directly affected by an original application.*
>
> *(2) A party may apply to the board for an order to summarily dismiss an original application.*
>
> *(3) An application to summarily dismiss must:*
> *(a) be in Form 18 (Application for Summary Dismissal); and*
> *(b) be filed and served in accordance with subsection (5).*
>
> *(4) In an application to summarily dismiss, a party shall specify whether the party requests the board to consider the application with or without an oral hearing.*
>
> *(5) The application to summarily dismiss must be filed, and a copy of it must be served on the party that made the original application and on all other parties to the original application, before the date for the hearing of the original application is set.*

**[24]** In the current case, the Union has requested that the Board consider the application without an oral hearing.

**[25]** The test to be applied in an application for summary dismissal was summarized in *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB) [*Roy*]:

> *[8] The Board recently[5] adopted the following as the test to be applied by the Board in respect of its authority to summarily dismiss an application (with or without an oral hearing) as being:*
>
> > *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant is able to prove everything alleged in his/her claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
> >
> > *2. In making its determination, the Board may consider only the subject application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his/her claim.*
>
> *[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 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.*

**[26]** This test has been consistently and repeatedly relied upon by the Board.

**[27]** There can be no arguable case if the allegations do not fall within the Board's jurisdiction. This point was made in *Soles v Canadian Union of Public Employees, Local 4777*, 2006 CanLII 62947 (SK LRB) [*Soles*]:

> *[27] As stated, in the case before us, it is necessary to examine whether the application discloses an arguable case such that it should not be dismissed without an oral hearing. At this stage, we do not assess the strength or weakness of the Applicant's case but simply determine whether the application and/or written submission discloses facts that would form the basis of an unfair labour practice or violation of the Act that falls within the Board's jurisdiction to determine. In order to make such a determination, it is necessary to understand the elements required to establish that the Union is in violation of s. 25.1 of the Act. […]*

**[28]** Furthermore, the Board may summarily refuse to hear a matter that is not within its jurisdiction, pursuant to clause 6-111(1)(o) of the Act.

**[29]** In summary, the question for the Board to consider is whether, assuming the Respondent proves the allegations, the claim has no reasonable chance of success, that is, whether it is plain and obvious that the application should be dismissed as disclosing no arguable case or a lack of evidence.

**[30]** The Union bears the onus to establish that the Respondent has not put forward an arguable case. In considering whether the Union has met that onus, the Board assumes that the facts alleged in the main application are true or, at least, provable.

**[31]** In her written submissions, the Respondent states that the application does not provide an "opportunity to list my arguments and evidence". However, it is up to the Respondent, in the original application and through any supplementary materials, to provide sufficient particulars to sustain the allegations that the Union breached sections 6-58 or 6-59. The allegations should specify the acts or omissions on the part of the Union that support a conclusion that the Union has failed to satisfy its duties: *Roy* at paragraph 14. The requirement to provide sufficient particulars was emphasized by this Board in *Soles*:

> *The Board in Soles v Canadian Union of Public Employees, Local 4777, 2006 CanLII 62947 (SK LRB), explained the nature of the applicant's onus in a duty of fair representation case:*
>
> > *[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:*
> >
> > > *[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.***
>
> *[Emphasis added in Soles]*

**[32]** In assessing the claim, the Board starts by reviewing the principles underlying the statutory provisions that are alleged to have been breached. The first of these is section 6-58.

**[33]** To appreciate the scope of section 6-58, it is important to understand the source and nature of the Board's "jurisdiction" (colloquially understood as *legal authority*), generally, and the nature of the Board's jurisdiction over internal union affairs, specifically.

**[34]** First, the general. The Board is a tribunal that is continued pursuant to section 6-92 of the Act. It does not have an independent existence. The Board's jurisdiction over disputes comes from the Act. The Board's limited, statutory jurisdiction stands in contrast with the broad jurisdiction of the Court of Queen's Bench.[1] If a matter comes within the Board's jurisdiction, arising as it does from the Board's governing statute, it does so to the exclusion of the Court. If it does not come within the Board's jurisdiction, the Board is barred from hearing the dispute.

**[35]** This does not mean that it is always a simple task to determine in which forum a dispute is to be decided, if any. However, tests have developed over time to assist the Board to determine whether it has jurisdiction. The primary test involves identifying the "essential character of the

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[1] The Court possesses "original jurisdiction" pursuant to subsection 9(1) of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01 as well as "inherent jurisdiction". See, also, *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*], at para 24.

dispute". If the essential character of the dispute comes within the subject matter of a provision of the Act, then the Board has jurisdiction.

**[36]** The essential character of the dispute is to be distinguished from its packaging. It is all too easy to dress up a dispute in legal concepts that bear no relationship to the essence of the dispute. By relying excessively on the packaging of the dispute, one is apt to misconstrue the problem that is sought to be resolved. In *Floyd v University Faculty Association et al*., (1996), 1996 CanLII 5074 (SK CA), 148 Sask R 315 (Sask CA), then Chief Justice Bayda said it well:

> *[2] Our task then is to determine the "essential character" of the dispute between [the parties]. In going about our task we are not to concern ourselves with labels or with the manner in which the legal issues have been framed—in short with the packaging of the dispute. We must proceed on the basis of the facts surrounding the dispute. Given that this is an application to strike out the statement of claim, we must take our facts from the statement of claim and for the purposes of this application must accept as true the facts there pleaded.*[2]

**[37]** More specifically, to understand the Board's jurisdiction pursuant to section 6-58, it is helpful to consider the history of this provision and equivalent provisions. The predecessor provision to section 6-58 is section 36.1 of the now-repealed *Trade Union Act*. The purpose of section 36.1 was considered 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 [s. 36.1] lies in protecting a member of a union from abuse in the exercise of the power conferred on unions by the preceeding 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.*

[2] As cited in *McNairn*.

> *39 Seen in this light, and in light of the allegations of fact made in the statement of claim, subsection 36.1(1) has no effective bearing on the essential character of the dispute between the parties. The Union is not alleged to have breached the duty imposed upon it by this subsection, and nothing material to the action and its determination turns on this duty. The Union's duty to place the names of its unemployed members on the unemployment board in prescribed sequence, which lies at the heart of the dispute posited by the statement of claim, is not to be found in subsection 36.1(1) of The Trade Union Act but in Article 11(d) of the Union's Working Rules and Bylaws. And on the facts of the matter, the complaint is not about Mr. McNairn having been deprived of natural justice by the Union, contrary to section 36.1(1) of the Act. It is about his having been deprived of work, for which he was qualified, because the Union, contrary to Article 11(d) of Working Rules and Bylaws, moved his name to the bottom of the unemployed board following his job-related experience at Burstall.*

**[38]** The Board in *Lalonde v United Brotherhood of Carpenters and Joiners of America, Local 1985*, 2004 CanLII 65627 (SK LRB) also summarized the purpose of section 36.1:

> *[83] The purpose of s. 36.1 as a whole is to codify the common law developments indicating a trend towards increased supervision of internal union decision-making respecting certain types of matters, specifically regarding membership and discipline. There are competing interests at stake between the rights of individual union members and the need for collective action and discipline among members to achieve collective bargaining goals.[6] As the Board observed in Alcorn, supra, at 151, ss. 25.1, 36, and 36.1 of the Act acknowledge the power held by unions over the employment conditions and economic future of the employees they represent, and the trend has been towards closer scrutiny of their internal proceedings given the important public policy considerations involved. […]*

**[39]** To place these quotes in their proper context, section 36.1 stated:

> ***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.*

**[40]** For comparison purposes, section 6-58 of the Act states:

> ***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.*

**[41]** Section 6-58 imposes a duty on a union to abide by the principles of natural justice in disputes between the employee and the union relating to matters in the constitution of the union, the employee's membership in the union, or the employee's discipline by the union.

**[42]** In *University of Saskatchewan Faculty Association v R.J.*, 2020 CanLII 57443 (SK LRB), the Board described the nature of the principles of natural justice, generally:

> *[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][3]*

**[43]** In summary, the purpose of section 6-58 is to protect an employee from abuse in the union's exercise of its power. It affords an employee the right to natural justice (procedural fairness) with respect to the union's decision-making process in relevant disputes between the employee and the union. It means that, depending on the circumstances, the employee will have the appropriate degree of participatory rights in relation to that process. The employee will have a fair opportunity to be heard prior to being adversely affected by a decision.

**[44]** Taking into account the foregoing principles, the Board will now turn to determining the essential character of the dispute brought pursuant to section 6-58 of the Act.

**[45]** In determining the essential character of this dispute, the Board has adopted a liberal approach to interpreting the material filed by the Respondent. The Board has attempted to identify the substance of the Respondent's complaints, having regard for her position as a self-represented litigant.

**[46]** Nonetheless, the claim pursuant to section 6-58 is straightforward. The essence is that, since 2016, the Union has not provided its members with the opportunity to evaluate its performance nor provided its members with the reports of any performance evaluations that have been performed. According to the Respondent, the Union has, in failing to provide said opportunity or reports, contravened Article XVI of the Union's Constitution. In support of her claim, the Respondent uses phrases to invoke the principles of natural justice, such as, the members' "right to procedural fairness" and "due process of evaluating the union". However, the whole of the claim

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[3] Citing 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.

discloses a misunderstanding of the meaning of the "principles of natural justice", as those principles apply within the context of section 6-58, and a misunderstanding of the scope of the protection provided by that provision.

**[47]** In the pleadings, the Respondent suggests that the evaluations and reports are matters in the Constitution of the Union and the failure to comply with the related obligations pursuant to the Constitution is a breach of the principles of natural justice. In her written submissions, the Respondent suggests that the category of "disputes" mentioned in section 6-58 is unlimited and the existence of a "dispute" rests on the fact that she has filed an application with the Board:

> *By filing a complaint with the LRB under section 6-58 and 6-59, I am making a formal complaint. I don't need to explicitly write "this is a dispute" and "this is a failure to represent" after each complaint as it is obvious.*

**[48]** However, there is a difference between a matter the essential character of which relates to the application of the principles of natural justice in respect of a dispute and a matter the essential character of which relates to a breach of a provision of the Union's Constitution. The first matter comes within the jurisdiction of the Board pursuant to section 6-58 of the Act; the second does not.

**[49]** Although it has engendered much extra-legal debate, it is by now a well-established legal principle that the relationship between a union and its members is "in the nature of a contractual relationship". The Supreme Court made this determination in *Berry v Pulley*, [2002] 2 SCR 493, 2002 SCC 40 [*Berry*]:

> *[48] In light of the above, the time has come to recognize formally that when a member joins a union, a relationship in the nature of a contract arises between the member and the trade union as a legal entity. By the act of membership, both the union and the member agree to be bound by the terms of the union constitution, and an action may be brought by a member against the union for its breach; however, since the union itself is the contracting party, the liability of the union is limited to the assets of the union and cannot extend to its members personally. I say that this relationship is in the nature of a contract because it is unlike a typical commercial contract. Although the relationship includes at least some of the indicia of a common law contract (for example offer and acceptance), the terms of the contractual relationship between the union and the member will be greatly determined by the statutory regime affecting unions generally as well as the labour law principles that courts have fashioned over the years. With this in mind, for ease of reference I will refer to the membership agreement between the individual member and the union as a contract.*

**[50]** Consistent with *Berry*, the Court of Appeal in *McNairn* described the relationship as "in the nature of a contractual relationship, though a special one":

> *[29] The allegations of misrepresentation and negligence aside, the constituent elements of the cause of action disclose much about the "essential character" of the dispute. They also disclose how the dispute is framed—in contract and breach of contract. While this is beside the point in determining the essential character of the dispute, there is nevertheless something to be said for the way it is framed. And that is this. The relationship between a union and each of its members is, as a matter of substantive law, in the nature of a contractual relationship, though a special one. Membership in a union entails both the union and the member having agreed to be bound by the constitution of the union, among other things, and generally speaking an action may be brought by a member for breach of the terms thereof. This is borne out by the decision of the Supreme Court of Canada in Berry v. Pulley, 2002 SCC 40 (CanLII), [2002] 2 S.C.R. 493, and the decision of the British Columbia Court of Appeal in Hornak v. Paterson (1966), 1966 CanLII 453 (BC CA), 58 D.L.R. (2d) 175.*
>
> *[30] It remains true, however, that if the dispute between the parties arises out of or is governed by sections 25.1 or 36.1 of The Trade Union Act, as Justice Hrabinsky held it was, then that would be its essential character and it would fall to the Labour Relations Board to entertain it to the exclusion of the Court of Queen's Bench.*

**[51]** Generally speaking, the Board does not have jurisdiction over disputes, the essential character of which is contractual. The courts and the Board have had many opportunities to consider whether the essential character of a particular dispute is contractual.

**[52]** In *McMillan v SUN*, [1999] Sask LRBR 33, the Board's explanation of its role, relative to subsection 36.1(1), continues to provide guidance in matters filed pursuant to section 6-58.

**[53]** The issue there pertained to the union's procedure for amending the collective agreement which was allegedly set out in its constitution and bylaws. Mr. McMillan argued that the Board could enforce the union's procedure through the application of subsection 36.1(1) of the Act. The Board observed that its supervisory power was limited to matters of natural justice and did not extend to determining the interpretation of the constitution and bylaws. The Board concluded that the matter before it was directly related to the interpretation to be given to the constitution and bylaws and, therefore, was outside of the Board's jurisdiction:

> *[25] In the circumstances of the present case, the requirement to hold a ratification vote is founded entirely on an interpretation of the constitution and bylaws of SUN. Mr. McMillan concluded that the constitution and bylaws require SUN to conduct a ratification vote on the letter of understanding, while the elected officers of SUN disagree with this interpretation. In our view, the proper interpretation of the constitution and bylaws of a union rests with the union itself, and not with the Board under s. 36.1(1) of the Act.*
>
> *[26] The Board's role under s. 36.1 (1) of the Act is to ensure that employees are granted the right to participate in the union in a manner that accords with the principles of natural justice. Mr. McMillan has been permitted to raise the issue internally within his union; he has received information from staff representatives and elected officials outlining the reasons for their decision and their interpretation of the constitution and bylaws; there have been no efforts to prevent Mr. McMillan from participating in other democratic avenues that may be open to him to challenge the decision, such as attendance at local union meetings*

> *and annual union meetings. Under s. 36.1(1) of the Act, the Board will supervise the employee's rights to access such internal procedures, but, as outlined in the Alcorn and Detwiller case, supra, and the Stewart case, supra, we do not sit on appeal of every decision made by a trade union under its constitution. The extent of the Board's supervisory power is limited to matters of natural justice and does not extend to determining the actual interpretation to be placed on the constitution and bylaws of a union. Whether or not the Union was required by its constitution and bylaws to hold a ratification vote in these circumstances is a matter that is left entirely to the internal workings of the Union.*

**[54]** Then, in *McRae v Saskatchewan Government and General Employees' Union*, 2002 CanLII 52887 (SK LRB) [*McRae*], the Board described the application of subsection 36.1(1) to union-run benefit plans:

> *[10] We will assume for the purpose of this application that s. 36.1(1) applies to disputes between members, the Union and the plan administrator, and that it requires the Union to apply the principles of natural justice in relation to members' claims for benefits under the long term disability plan. In Staniec v. United Steelworkers of America, Local 5917, [2001] Sask. L.R.B.R. 405, LRB File No. 205-00, the Board noted at 419 that "the provision is not intended to constitute the Board as a body for the routine review of every decision no matter how picayune made by a union pursuant to its constitutional structure and procedures." We do think, however, that the operation of union benefit plans is a matter of great significance to union members and constitutes a matter of membership that would attract Board supervision under s. 36.1(1).*
>
> *…*
>
> *[12] In the context of trade unions, the courts have imposed standards of fair procedure on internal union matters, notably disciplinary matters. In relation to union run benefit plans, similar standards may be imposed by the Board acting on its supervisory powers under s. 36.1(1). The requirements of natural justice in this context are that a union member be provided an opportunity to present his or her evidence and given an opportunity to respond to evidence that may be used against him or her in the determination of his or her benefit entitlements. There is no statutory or public policy requirement that the member be given an oral hearing, nor is there any requirement that the member be given a right of appeal, although these processes may be required under the union's constitution or the plan documents and, if so, will be considered in determining if fair processes have been applied to make decisions on benefit entitlements.*

**[55]** The Board found that the complaints did not fall within the scope of subsection 36.1(1). The essence of the complaint was a disagreement with the arbitration award issued under the terms of the plan and the Union's subsequent actions. The complaints came within the jurisdiction of the arbitrator.

**[56]** On the other hand, the Board in *McRae* described the type of allegations, related to the matters in issue, that could give rise to a "concern" pursuant to subsection 36.1(1), namely: "that there is no shop steward system available to long term disability claimants for the filing of grievances, no system of keeping them informed of activities within the Union which affect them, and no notification of or voice at Union meetings or convention." The complaint did not raise these

concerns within the context of Ms. McRae's personal issues, but rather, for "getting the Union straightened out". The Board concluded that subsection 36.1(1) should not be used for "straightening out" a union's internal structure apart from addressing an employee's personal matters. In other words, "matters of internal structure are not reviewable" pursuant to subsection 36.1(1).

**[57]** Relatedly, in *Taylor v Saskatoon Civic Employees' Union Local 59*, 2007 SKQB 367 (CanLII), the Court of Queen's Bench found, at paragraph 29, that the essential character of the dispute related to the interpretation of an indemnity clause in the union bylaws, and therefore, was "contractual in nature". The Court found that it was "precisely the type of internal dispute that is not within the exclusive realm of the Labour Relations Board".[4]

**[58]** The Board's jurisdiction pursuant to section 6-58 is limited to determining whether the applicant has been afforded the right to the application of the principles of natural justice. It "requires that the principles of natural justice be brought to bear in the resolution of the dispute."[5] It does not extend to assessing the merits of whatever decision or action, by the Union, gave rise to the duty to apply those principles: *Schreiner v Canadian Union of Public Employees, Local 59*, 2005 CanLII 63091 (SK LRB) at para 37.

**[59]** The Union's duties to perform evaluations and report to its members are not found in section 6-58 of the Act, but in its Constitution. The Respondent seeks to enforce the terms of the Constitution that require the Union to perform the evaluations and provide reports. She makes no connection to her participatory rights in a decision-making process nor any reference to specific principles of natural justice.

**[60]** Moreover, the Respondent does not put in issue a relevant dispute between herself and the Union. Instead, she relies on the existence of the original application (before this Board) as the dispute, or perhaps, the source of the dispute. To be sure, she states that she has complained about her concerns to the Union in the past and was reassured that "it will be done", but that after all this time, "[t]here is no point complaining [to the relevant people]". Given her own admissions, it is apparent that she has not sought to be heard by the Union, except in a limited way, has not alleged participatory rights in a decision-making process, and has not indicated in what way any decision by the Union might impact her adversely.

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[4] At para 30.
[5] *McNairn* at para 38.

**[61]** In summary, assuming the Respondent is able to prove everything that she has alleged, it is plain and obvious that her claim pursuant to section 6-58 of the Act discloses no arguable case and has no reasonable chance of succeeding.

**[62]** The next issue is whether the claim made pursuant to section 6-59 of the Act should be dismissed. The Respondent states that the Union has breached her right to fair representation in its response, or lack thereof, to her complaints about low morale in the library and low morale, generally.

**[63]** The Board will assume for the current purposes that the Respondent works in the library. As such, she invokes her own interests as well as those of the other librarians. She seeks an order from the Board that the Union representatives make a "written letter of apology to me and/or the librarians".

**[64]** In her written submissions, however, she focuses on her own interests:

> *I never once asked to know what my colleagues told the SPFA and this was never my complaint. The complaint was FRO CZ failed to represent in regards to section 6-59 of the SEA because she never communicated back to us how she investigated and what action she took and why…*

**[65]** The Respondent takes the position that she has rights in relation to "low morale". In particular, she suggests that she has a right to be informed about the Union's activities to combat the problem.

**[66]** The Respondent argues that the protections afforded by section 6-59 are not restricted to rights pursuant to a collective agreement. This much is accurate. However, she also argues that the "SPFA, as the sole bargaining [agent] of members, represents members on all matters related to our dispute with the employer, grievance and non-grievance issues, collective agreement issues and non-collective agreement issues".

**[67]** To consider this latter argument, it is necessary to review the language of the provision. Section 6-59 sets out the right to be fairly represented "with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part", meaning Part VI of the Act. The Respondent interprets the phrase "[w]ithout restricting the generality of subsection (1)" to mean that subsection (1) should include an unrestricted definition of "employee's rights". To the contrary, the ordinary meaning of the phrase is that the generality of subsection (1) should not be

restricted by the language in subsection (2). The employee's rights must still be situated in a collective agreement or Part VI.

**[68]** Given that the Respondent has not identified rights in issue that are pursuant to a collective agreement, it is incumbent on her to identify rights in issue that come within Part VI of the Act. She has not done this.

**[69]** Furthermore, the notion of "low morale" is not obviously connected to any rights pursuant to Part VI of the Act. "Low morale" is a general term to describe the condition of the workforce. Even if the low morale can be traced to problems related to the employees' working conditions, it is necessary to articulate how those working conditions invoke a right or rights pursuant to a collective agreement or Part VI in order to sustain a claim pursuant to section 6-59.

**[70]** In short, the Respondent does not identify a right that brings the matter within the scope of section 6-59, or at all.

**[71]** In addition, the Respondent suggests that the FRO has failed to fulfill the responsibilities of her job description, including the responsibility of providing "advice concerning a range of possible approaches to the resolution of issues". The responsibilities outlined in an FRO's job description do not necessarily correspond to the Union's duties pursuant to section 6-59. Furthermore, nothing in the original application specifies that the Respondent has sought advice from the Union in relation to a right in the collective agreement or Part VI.

**[72]** The Respondent states that she has no idea what her options are. The Board does not hear applications, pursuant to section 6-59, for the sole purpose of providing advice about the basis or merits of a claim. Employees who allege that their union has violated the Act and who seek a remedy in relation to that allegation must present grounds to sustain a complaint. It is up to the Respondent, in the original application and through any supplementary materials, to present those grounds.

**[73]** Finally, in her written submissions, the Respondent states that the Union has shown hostility towards her by accusing her of harassment at her March 9, 2022 grievance appeal hearing. This allegation is subject to another complaint that is before the Board, in LRB File No. 062-22. It has no bearing on whether the original application discloses an arguable case.

**[74]** In summary, assuming the Respondent is able to prove everything that she has alleged, it is plain and obvious that her claim pursuant to section 6-59 of the Act discloses no arguable case and has no reasonable chance of succeeding.

**[75]** Although the Union's submissions were brief, the issues were straightforward; the Union has met its onus to prove that the original application should be dismissed.

**[76]** Given the Board's conclusions with respect to sections 6-58 and 6-59 of the Act, it is not necessary to deal with the Union's allegations that the original application is frivolous, vexatious or an abuse of process.

**Conclusion:**

**[77]** For the foregoing reasons, the Board has decided to summarily dismiss the original application in LRB File No. 111-22. An appropriate order will accompany these Reasons.

**DATED** at Regina, Saskatchewan, this **22nd** day of **August, 2022.**

**LABOUR RELATIONS BOARD**

Barbara Mysko
Vice-Chairperson