Saskatchewan
Labour Relations Board

DAVID B. LAPCHUK, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent and GOVERNMENT OF SASKATCHEWAN, Respondent

LRB File No. 353-13 and 263-16; February 23, 2022
Chairperson, Susan C. Amrud, Q.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

For David B. Lapchuk:	Self-represented
For Saskatchewan Government and General Employees' Union:	Heather L. Robertson
For Government of Saskatchewan:	Curtis W. Talbot, Q.C.

Duty of fair representation, LRB 353-13 – Applicant asked Union to file grievance when it was determined that Employer had not removed letter of reprimand from his personnel file, as it agreed to do in 2004, until 2011 – Union did not breach duty of fair representation – Carried out reasonable investigation – Explained decision not to file grievance – Decision arrived at in fair and reasonable manner.

Contravention of section 36.1 of *The Trade Union Act* – No contravention proven – Issues raised by Applicant not relating to matters in the constitution of the Union or his membership in it or discipline under it.

Duty of fair representation, LRB 263-16 – Union conducted arbitration in arbitrary, discriminatory and bad faith manner – Union representatives did not understand basic rules of evidence, causing considerable evidence to be disregarded by Arbitrator – Union representatives proceeded to conclusion of arbitration without necessary medical evidence to prove their defence – Union representatives allowed termination grievance to not be concluded for over 33 months, despite provisions in collective agreement indicating time is of the essence in a termination grievance.

Remedy – Insufficient evidence before Board to determine remedy – Hearing to be reconvened to receive further evidence and argument on remedy.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: These Reasons address two applications[1] filed by David Lapchuk alleging that his union, Saskatchewan Government and General Employees' Union 1101 ["Union"] failed in its duty to fairly represent him ["DFR applications"].

[1] LRB Files No. 353-13 and 263-16.

[2] The hearing of the DFR applications ran for 37 days (not all full days) commencing June 26, 2018 and ending on November 3, 2021.[2] For the first 13 days of the hearing, Lapchuk was represented by a lawyer; for the final 24 days of the hearing, he was self-represented. During the hearing 162 exhibits were filed, 58 by Lapchuk and 104 by the Union. Lapchuk called two witnesses: himself and his father, Donald Lapchuk. The Union called seven witnesses: four Labour Relations Officers ["LROs"] employed by the Union who represented Lapchuk at some point (Cory Hendriks, Larry Buchinski, Marie Amor and Kelly Hardy); Rod McCorriston (Director of Labour Relations for the Union); Lori Jardine (administrative assistant for the Union); and Leslie Peace (expert witness respecting handwriting analysis).

[3] In 2004, a letter of reprimand was placed on Lapchuk's personnel file. After the Union filed a grievance, Lapchuk's employer, the Government of Saskatchewan ["Government"], agreed to remove the letter, and the grievance was withdrawn. The first DFR application filed by Lapchuk[3] ["LRB 353-13"] alleges that the Union breached its duty of fair representation by refusing to file a grievance when, in 2011, it was discovered that the letter of reprimand had remained on his file until April 1, 2011. LRB 353-13 was amended and refiled on December 13, 2013 to add an allegation that, because of its filing, the Union was in a conflict of interest and therefore unable to properly represent him in further issues he was having with the Government, particularly the grievances that became the subject of the second DFR application ["LRB 263-16"]. He alleged that having the Union represent him in the pending grievance procedure would put them in a conflict of interest that would represent a contravention of the principles of natural justice and procedural fairness.

[4] Prior to the amendment of LRB 353-13, on October 4, 2013, the Government suspended Lapchuk for three days for inappropriate email use. On October 28, 2013 the Government terminated his employment for cause. The Union filed grievances on his behalf against both of these actions that were dismissed by an Arbitrator on August 31, 2016[4] ["Arbitrator's Decision"].

[5] Lapchuk filed LRB 263-16 on November 25, 2016. In it he alleges that the Union failed to properly represent him in the issues he was encountering with the Government that led to his termination. This included failing to assist him in ensuring that the Government provided him with

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[2] LRB File No. 353-13 was originally scheduled to be heard on June 22 and 23, 2015, but was adjourned *sine die* at Lapchuk's request and with the consent of the other parties. Dates subsequently scheduled in May 2017 were also cancelled.
[3] LRB File No. 353-13 was originally filed on August 23, 2011 and assigned LRB File No. 138-11. It was substantially amended and re-filed on December 31, 2013, at which time it was assigned LRB File No. 353-13.
[4] *SGEU v Saskatchewan Government*, 2016 CanLII 95947 (SK LA).

the accommodations that he required to do his job. The Union also failed to properly represent him in the preparation for and conduct of the arbitration hearing of the suspension and termination grievances.

[6] On April 7, 2014 the Board dismissed an Application for Production of Documents filed by Lapchuk, on the basis that the requested documents were not relevant to the matters in issue before the Board.[5]

[7] On November 6, 2019 the Board dismissed another Application for Production filed by Lapchuk, on the basis that the requested information was not relevant to the DFR Applications, was not sufficiently particularized, did not exist or had already been provided.[6]

[8] The Board issued a further decision on September 9, 2020, granting Lapchuk's application for the hearing to continue as an in-person hearing, given he was self-represented by this point and had technological challenges to participating in a video hearing.[7]

[9] In addition to the DFR applications, Lapchuk filed actions and applications with other tribunals and courts, in an attempt to get his job back or otherwise receive compensation for his termination.[8]

Evidence:

[10] The Board encountered considerable challenges in determining what evidence to rely on in this matter. There were issues with the credibility of many of the witnesses. Based on the Board's assessment of the credibility of the oral evidence, and the review of the Exhibits filed during the hearing, set out below is the Board's determination of the facts of this case. It is to be noted that, even though it is very lengthy, this is just a brief summary of the most important events relied on by the Board in reaching a decision in this matter. Numerous other events and submissions were considered in making a determination of these facts and reaching a decision in this matter.

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[5] *Lapchuk v Saskatchewan Government and General Employees' Union*, 2014 CanLII 16077 (SK LRB).
[6] *David B. Lapchuk v Saskatchewan Government and General Employees' Union and Government of Saskatchewan*, 2019 CanLII 107291 (SK LRB).
[7] *David B. Lapchuk v Saskatchewan Government and General Employees' Union and Government of Saskatchewan*, 2020 CanLII 65812 (SK LRB).
[8] *Lapchuk v Saskatchewan*, 2015 SKQB 28 (CanLII); *Lapchuk v Saskatchewan*, 2015 SKQB 358 (CanLII); *Lapchuk v Saskatchewan (Government of)*, 2016 SKQB 72 (CanLII); *Lapchuk v Saskatchewan (Highways)*, 2017 SKCA 68 (CanLII); *Lapchuk v Saskatchewan*, 2019 SKCA 98 (CanLII); *Lapchuk v Ministry of Highways and Infrastructure* (28 February 2019) (Adjudicator Rusti-Ann Blanke); *David Lapchuk v Government of Saskatchewan*, 2020 CanLII 65814 (SK LRB); *David Brian Lapchuk v Government of Saskatchewan*, 2020 CanLII 97896 (SK LRB); *Lapchuk v Government of Saskatchewan* (10 December 2021) LRB File No. 062-19 (SK LRB).

[11] On March 24, 2004, Lapchuk received a letter of reprimand for what was described as "rude behaviour". At this time he was employed at the Apprenticeship and Trade Certification Commission of the Government. The Union filed a grievance respecting the letter. The grievance was settled by the Government agreeing to remove the letter from his personnel file. The letter was not actually removed until April 1, 2011. It had remained on Lapchuk's personnel file until that time.

[12] In 2007, Lapchuk transferred to the Ministry of Highways and Infrastructure ["MHI"] as a program operator. His job at MHI included operating remote control weigh scales and taking enforcement action against drivers or carriers who were not complying with weight and dimension, load security and other laws applicable to commercial vehicles. For the most part he did this work remotely, while seated at his desk. Occasionally he participated in enforcement blitzes but did not have face to face contact with commercial vehicle operators. His role was to operate portable weigh scales from within a specially equipped vehicle [Motor Vehicle Inspection Station or "MVIS"]. He was designated as a peace officer so that he could issue summary offence tickets. He was not a traffic officer, and therefore did not have training in the use of force or equipment for that purpose. The only applicable training he had received was in 2007, when he received training from Verbal Judo Canada on "Tactical Communications for Contact Professionals". The purpose of this training is to enhance skills to de-escalate conflict. He received only theory training with no practical experience or training in scenarios.

[13] On May 25, 2011 at 3:19 pm Lapchuk emailed Hendriks, asking that a grievance be filed respecting the failure of the Government to remove the 2004 letter of reprimand from his personnel file. At 4:48 pm the same day, Hendriks wrote back to Lapchuk, advising him that she had contacted human resources, discovered that the letter had now been removed and decided that the error was inadvertent. In any event, she advised him, no harm had been done to him and the collective agreement provided that the letter could not be used against him. Hendriks declined to file a grievance, deeming the failure to remove the letter to be an oversight on the Government's part that had caused him no harm.[9]

[14] On May 26, 2011, Lapchuk wrote to Hendriks again. He was of the view that management at MHI had become aware of the letter of reprimand when it was finally removed from his personnel file and returned to him at his MHI office in April 2011. He was of the opinion that,

[9] The Board notes that Hendriks was a particularly non-credible witness. A determination about what occurred at this time was made primarily on the basis of the documentary evidence filed as Exhibits.

because of the letter, he had been transferred out of his position at head office to the south region. The Board does not accept the assertion that he was moved out of head office because of the letter. The Union filed evidence that indicated that effective April 1, 2011, a major reorganization of the MHI occurred, which moved Lapchuk's duties from the Planning and Policy Division into the Regional Services Division. This resulted in the move of his office out of head office to the south region office.

[15] Lapchuk also interpreted these changes as meaning that he would be working more frequently in the field. He began to lobby MHI management for self-defence training, to prepare him for working in the field. He also requested that his job description be reclassified as a program specialist. MHI management did not approve the reclassification or the self-defence training, saying that his duties had not changed.

Fort Qu'Appelle incident:

[16] In mid-October 2012, Lapchuk accompanied two traffic officers to Yorkton for a three-day safety blitz. On their way home on October 17, 2012, when they stopped in Fort Qu'Appelle for lunch, the officer driving the MVIS, Lyle Heinemann, parked in a private parking lot. A car drove up beside them, on the passenger side of their vehicle, and the driver ["Mr. B"] started yelling at them. Heinemann told Lapchuk to see what Mr. B wanted. Mr. B angrily told Lapchuk to move the MVIS. Mr. B and Lapchuk became involved in an argument that deteriorated into a physical altercation. The RCMP were called, and Mr. B was charged with assaulting a peace officer.[10]

[17] Lapchuk suffered physical injuries and a recurrence of his post-traumatic stress disorder ["PTSD"] as a result of this incident. He was off work from shortly after the incident until he returned on a graduated basis in May 2013 and resumed full time duties in mid-July 2013.

Events leading to termination:

[18] On his return to work Lapchuk requested assistance from the Union. On August 20, 2013 McCorriston assigned Buchinski to represent Lapchuk. Lapchuk asked Buchinski to attend two meetings with him and MHI that were scheduled for August 27 and 28, 2013. Buchinski agreed to attend and made efforts to determine in advance the subject matter of the meetings. Lapchuk and Buchinski attended the meeting on August 27th, the purpose of which Lapchuk described as follows: "The first is a email use discipline meeting for contacting my manager as to why my JAF

[10] The charge was later stayed.

[reclassification request] has not been completed as submitted a year ago?". During the meeting Lapchuk disclosed that he was receiving treatment for PTSD and MHI denied knowledge of this. As a result, the meeting was adjourned and the meeting scheduled for the next day, to discuss his reclassification request, did not proceed.

[19] On August 28, 2013 Lapchuk signed and emailed to Buchinski an Authorization for Release of Information that provided Buchinski permission to access: his personnel files with the employer; SGEU Long Term Disability ["SGEU LTD"] Plan Claim file; Workers' Compensation Claim file; and Canada Pension Disability Claim file. Lapchuk also wrote a note on the bottom of the document: "Information consented for 2012 Assault attack Oct 17, 2012 and Only as allowed by HIPA" [Health Information Protection Act][11].

[20] On August 29, 2013 Lapchuk advised Buchinski that he was on sick leave until September 11, 2013.

[21] On September 16, 2013, Joella Moore from the Public Service Commission of the Government ["PSC"] asked Lapchuk for past medical information, which he provided the same day. Buchinski received copies of both emails.

[22] The Government scheduled two meetings with Lapchuk on September 30, 2013, the first at 1 pm for Moore to review his medical information, and the second at 2 pm to discuss Lapchuk's email use. At the first meeting, Lapchuk and Buchinski met with Moore to review Lapchuk's accommodation requests and medical information. In 2001, following Lapchuk's injury in a motor vehicle accident, an ergonomic assessment was performed of his workstation. Saskatchewan Government Insurance, the motor vehicle insurer, paid for the equipment and furniture that was purchased to accommodate Lapchuk's return to work and, as a result, this equipment and furniture was his personal property. When Lapchuk moved to MHI in 2007, his personally owned ergonomic equipment and furniture moved with him. When he moved to the regional office, some of his personally owned ergonomic equipment and furniture did not move with him, and MHI management said it was lost. The meeting with Moore did not go well. A four page document was provided by Moore for the meeting. It included a list of medical reports from 2001 to 2013. It stated:

> *You have indicated that the medical documentation relating to your request for your own office and you* [sic] *work station has been previously provided to the employer (GOS) and that it should be contained in your medical file. The medical documentation you refer to*

[11] Exhibit A17.

> *was not in your PSC managed medical file until you provided it the week of September 23 2013 (no documentation prior to your May 2013 return to work). Thank you for providing the numerous documents (see attached list)*[12]

[23] During the meeting, Moore advised Lapchuk and Buchinski that she had been unable to find the Government's previous file respecting Lapchuk's ergonomic assessment and accommodations. Lapchuk was upset that PSC would have lost this material. He was also of the view that Buchinski was not advocating on his behalf at the meeting. Lapchuk became frustrated, agitated and angry. He called Buchinski a rude name. During their testimony at the hearing of this matter, each claimed the other was at fault. Based on his testimony and his notes of the meeting, the Board is not inclined to believe Buchinski's version of events.

[24] Buchinski left the meeting and called McCorriston for advice on how to proceed. On Buchinski's return, Lapchuk said he did not want Buchinski to represent him any longer, and asked Moore to adjourn the meeting until he could obtain a different Union representative. Moore and Lapchuk agreed to adjourn the meeting.

[25] Lapchuk returned to his office. He called McCorriston to try to obtain a different Union representative for the 2 pm meeting. They were unable to connect. Moore and Tom Davies, a MHI manager, attended at Lapchuk's office at approximately 2:10 pm to ask him to attend the email use meeting. He advised them he could not, because he did not have a Union representative to attend with him. While Lapchuk asked Moore and Davies to postpone the meeting, they declined. Davies advised Lapchuk that he was being suspended without pay for three days for inappropriate email use and told him to leave the building immediately.

[26] On October 2, 2013, McCorriston responded to what he described as the many emails Lapchuk had sent to him. Despite the Union's possession of numerous psychological reports, McCorriston did not recognize or acknowledge Lapchuk's mental health issues. Instead he chastised Lapchuk for his "openly defiant disrespect" and "disrespectful behaviour". He went on to say that he was assigning a new LRO, Kelly Diebel, to represent Lapchuk, but that Buchinski would also be in attendance at future meetings to report back to him. Later the same day Lapchuk replied, revoking the Authorization for Release of Information he had provided to Buchinski.

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[12] Exhibit U12.

[27] On October 4, 2013 a meeting was held at which MHI provided Lapchuk with a letter confirming the suspension and the rationale for the suspension. On October 23, 2013 Diebel filed a grievance respecting the suspension:

> *The Employer failed to provide the grievor the option of having union representation at the discipline meeting. As well, the grievor was given a 3 day suspension without pay, in violation of the Employer's Corrective Discipline Policy.*[13]

[28] At the October 4, 2013 meeting, Lapchuk was also given a letter from MHI management indicating "Given the serious nature of your recent behaviour, you are being placed on Paid Administrative Leave pending an investigation"[14]. On October 28, 2013 he received a letter from the Government dismissing him for cause effective immediately ["Termination Letter"]. The Termination Letter indicated that a third party investigation report had concluded that Lapchuk was familiar with the expectations of him in a situation like that encountered during the Fort Qu'Appelle incident, however he did not comply with policy or use verbal techniques to de-escalate and manage the conflict situation with the standard of behaviour expected of a Highway Traffic Officer. It concluded:

> *The violations of professional standards and employer policies and procedures in the on-duty altercation which occurred on October 17, 2012, your reluctance to accept responsibility for your actions and tendency to deflect blame on others as well as, the disrespectful behaviour has harmed and compromised your credibility as a peace officer which also has had a detrimental impact on other Highway Traffic Officers working with you.*[15]

[29] On November 19, 2013 Diebel filed a grievance respecting the termination, claiming:

> *Termination without just cause, with malice.*[16]

Grievance process:

[30] Diebel provided Lapchuk with copies of the grievances. She continued to be in contact with him after they were filed. A Step 2 meeting respecting the termination grievance was scheduled with the Government for December 13, 2013. Diebel asked for it to be rescheduled given the Government had not yet provided full disclosure of pertinent information. It was eventually held on January 30, 2014. On December 13, 2013 at 12:53 pm, Diebel emailed Lapchuk for two purposes. First, she asked him to complete an Authorization for Release of Information form allowing her access to his information. Second, she passed on a request from

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[13] Exhibit U19.
[14] Exhibit A22.
[15] Exhibit A23.
[16] Exhibit U22.

the Government for more information about the ergonomic furniture and equipment that belonged to him.[17] He replied at 4:12 pm that day denying both requests. With respect to the first request he noted:

> *I will NOT be giving blanket authorizations for any of my medical records and I will have to keep the access to my medical information WCB files under my direct and complete control.*[18]

[31] McCorriston explained the grievance process. The collective agreement between the Union and the Government contemplates that attempts be made to resolve issues at the local level before a grievance is filed. If that is unsuccessful, a grievance must be filed within 30 days from the date the employee became aware of the alleged infraction. At Step 1, a written response to the grievance is to be provided by the Government within seven days. At Step 2, the Union has 14 days to advance the grievance to the permanent head. A meeting between the parties will be scheduled within 30 days from the date the Union requests a meeting. Failing agreement at Step 2, the Union may apply for arbitration within seven days. At this point, the Union turns to an internal process to decide whether to proceed to arbitration. The LRO puts together a Request for Decision that is reviewed by the regional grievance committee which makes a recommendation to the screening committee, which makes the final decision whether to proceed. The Government refused Lapchuk's grievances at Steps 1 and 2. The suspension grievance was rejected at Step 2 by letter dated November 27, 2013. The termination grievance was rejected at Step 2 by letter dated February 3, 2014.

[32] Amor replaced Diebel as Lapchuk's representative on April 25, 2014. For each of Lapchuk's grievances, Amor prepared a Request for Decision that was approved by the regional grievance committee on January 28, 2015 and by the screening committee on February 19, 2015. With respect to each grievance, the regional grievance committee recommended that "a full panel arbitration may be advantageous for this case"[19]. The Request for Decision respecting the termination grievance included a number of documents that focused on Lapchuk's health issues, including May 9, 2013[20] and July 11, 2013 reports from Dr. Pam Clarke; November 29, 2013 WCB Decision of the Appeals Department; May 29, 2014 Summary by Greg Petroski and David Lapchuk of events; and a document entitled "Accommodating Mental Illness in the Workplace". The recommendation of the regional grievance committee stated: "David should have had medical

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[17] Lapchuk encountered considerable difficulty in getting his personal furniture and equipment back from the Government after he was terminated.
[18] Exhibit U24.
[19] Exhibits U30 and U31.
[20] The report is dated May 9, 2012 but it refers to the Fort Qu'Appelle incident that occurred in October 2012. The parties agreed this was a typographical error and the report was actually signed on May 9, 2013.

consideration prior to dismissal" and the screening committee noted: "Failed to consider medical info".

[33] Despite the grievance committee's recommendation, a full panel was not used for the arbitration. The letter Amor provided to Lapchuk on March 24, 2015 confirming that his grievances were approved for arbitration stated: "Your grievances went before the Screening Committee on February 19, 2015 and were approved for single panel arbitration"[21]. On March 24, 2015, Amor wrote to MHI providing notification that the Union "is now prepared to proceed to single panel arbitration" and confirming that "As agreed, Sheila Denysiuk will act as the Arbitrator for this hearing".[22]

[34] On April 6, 2015, the dates for the arbitration hearing were confirmed, to take place September 14 to 18, 2015. Amor testified that during this five month period, she met with Lapchuk and Lapchuk's father at least six times. She was also in contact with Lapchuk by email and phone. Throughout her testimony she emphasized the importance of medical information to the Union's defence of Lapchuk. The Union needed to show a nexus between his mental health disability and the Fort Qu'Appelle incident and how the incident triggered his PTSD and his response. They needed to show that he would not have reacted that way without the disability.

[35] On April 24, 2015 Amor emailed Lapchuk suggesting dates in June when she could meet with him to discuss the arbitration. She enclosed a blank Authorization for Release of Information form that she asked him to sign to give her access to: his personnel files with the Employer; SGEU LTD Plan Claim File; Canada Pension Disability Claim File; and Workers' Compensation Claim File.

[36] On the same date, he faxed the form back to her, having signed both the consent to the release of information on the top half of the document, and the portion at the bottom of the document indicating that he declined to consent to disclosure of any information to her ["Authorization/Revocation document"]. Amor testified that she reviewed it, filed it and never discussed it with Lapchuk. When McCorriston was asked what he would expect of a LRO who received the Authorization/Revocation document, his answer was that she should have asked Lapchuk for more information.[23]

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[21] Exhibit U33.
[22] Exhibit U33.
[23] Much more can be found about this document at paras 74 to 98.

[37] Hardy was assigned to assist Amor with Lapchuk's arbitration in June 2015. Hardy testified that Lapchuk and Lapchuk's father attended file preparation meetings with her and Amor, where they put together documents, discussed strategy and gathered information and evidence. She said she provided Lapchuk with a full set of the documents to be filed in the arbitration.

[38] Amor and Hardy both stated that, while they addressed all of the issues raised in the termination letter, the main defence was medical, especially PTSD. The Fort Qu'Appelle incident triggered his PTSD, which triggered his reaction. Lapchuk's PTSD was the cause of his failure to de-escalate the dispute during the Fort Qu'Appelle incident.

[39] Hardy and Amor testified that, in addition to the medical defence, the other theory of the case was that the Government failed to recognize that putting Lapchuk into the field without sufficient training caused risk, because he was in full uniform, in a law-enforcement-looking vehicle. Lapchuk also believed that the incident was a setup by his co-workers.

[40] The gas station next to where the Fort Qu'Appelle incident occurred had a video camera. The RCMP obtained a copy of the video of the incident for potential use in Mr. B's trial. Lapchuk obtained a copy from the RCMP and arranged and paid for it to be reviewed by Michael Plaxton, Certified Forensic Video Analyst. Plaxton's resume[24] and Analysis of Digital Images[25] ["Plaxton Report"] were entered into evidence in this matter. Lapchuk wanted the Union to enter the video and the Plaxton Report at the arbitration, as he is of the view that they prove he did not exceed appropriate use of force during the incident. He is of the view that they would have provided significant evidence that he was not at fault in the incident, that would have contradicted the Government's evidence. On September 8, 2015 Lapchuk forwarded an email to Amor with Plaxton's contact information and his authorization for Plaxton to talk to her. Amor never talked to him. Amor indicated that she tried to contact Plaxton but he did not answer his phone and did not return her call. According to the Arbitrator[26], the parties chose not to show the video at the arbitration; she makes no mention of the Plaxton Report. Plaxton did not testify at the arbitration.

[41] Lapchuk's father gave evidence at the hearing. The Board considered him to be a credible witness. Although currently retired, Lapchuk's father had during his lengthy career worked in human resources, mostly as an employee of the Saskatchewan PSC, with experience in classification, staffing and labour relations. At the time of his retirement he was the Assistant

[24] Exhibit A25.
[25] Exhibit A26, dated August 24, 2014.
[26] At para 81.

Director of Human Resources at MHI. He acted as a support person for Lapchuk in the meetings with the Union when they were preparing for the arbitration and attended most of the arbitration hearing.

[42] He stated that during the preparation meetings that he attended, all of Lapchuk's health care practitioners were discussed with Amor and Hardy: Greg Petroski, Dr. Cheshenchuk, Dr. Amundson, Dr. Clarke and Dr. Natarajan. He came away with an understanding that the Union was going to ask for reports from all of them and arrange for all of them to appear at the arbitration.

[43] He also noted that he and Lapchuk raised the video and the Plaxton Report with the Union several times. His interpretation of the Union's response was that they decided not to spend the money to bring in Plaxton to give evidence.

[44] He said he initially felt comfortable raising issues with Amor and Hardy, but gave up because he thought they were ignoring him and Lapchuk.

[45] During the course of the arbitration, the Union became concerned about Lapchuk's conduct. At the conclusion of the first day of the hearing, September 14, 2015, Amor sent him an email at 3:43 pm that included the following request:

> *I understand that this can be a hard process for you, please refrain from using body language in regard to Employer witnesses or anyone else during this arbitration (I was told that you gave Tom Davis the finger).*

[46] Lapchuk replied at 5:20 pm the same day:

> *Major PTSD event for me, to restrain myself from physical force now comes out and I don't even realize as I am doing everything as I know that the result of not restraining self due to my size would be bad for me!*
>
> *Just the sight of him creates a reaction as I know what he's done to me and my family!*
>
> *PTSD it overwhelms best attempts and know some times I don't even know it's happening till to late!* [27] [as written]

[47] Lapchuk was not in attendance for all of the arbitration hearing because the Government's evidence was triggering his PTSD. He explained this to Amor in emails dated September 16, 2015. At 4:03 pm September 16, 2015 Lapchuk emailed Amor to indicate that he would not attend the hearing the next day when Heinemann would be testifying. He stated: "I am sorry this has

[27] Exhibit U40.

been harder then I can handle as I am still in treatment!"[28]. Amor replied at 4:38 pm, that this was not a problem. Lapchuk wrote back at 5:00 pm:

> *I am sorry for this unfortunately PTSD relapses and liars trigger set. Me off huge and I am only getting small portion of 4 grams a day.*
>
> *For counselling always made sure to have my medication taken in advance it does not last long , under stress I apologize in advance if it seems I am unable to continue most of time I can struggle thru but I am so sorry?* [29] [as written]

[48] The arbitration hearing ran September 14 to 17, 2015. It was then adjourned to November 12, 2015 because the Union did not have their medical evidence ready. There was considerable controversy among the witnesses as to the reason for the absence of medical evidence that was acceptable to the Arbitrator. The Arbitrator stated: "medical evidence is critical"[30]; "[m]edical evidence is crucial in this case"[31]. At the end of the hearing dates in September 2015, the Arbitrator adjourned the hearing to November 12, 2015 to allow the Union time to gather medical evidence:

> *13 At the outset, the Union indicated that in addition to calling Lapchuk, it intended to call Greg Petroski, a psychologist who had been treating Lapchuk, and possibly one other psychologist. However, the Union didn't have a current report from Mr. Petroski or the other witness. From this, it was evident that the Union wasn't in a position to call expert testimony on the September dates which necessitated setting additional dates in November.*

Medical evidence:

[49] During the hearing of this matter, the Board was provided with submissions respecting a number of medical practitioners who, Lapchuk argued, were available to the Union to call to provide evidence during the arbitration hearing.

[50] The first was Greg Petroski. On September 16, 2013, Lapchuk provided an email to Moore and Buchinski that indicated that he was not diagnosed with PTSD "until after 2007-08 by Dr. Greg Petroski". He indicated that "both the initial assessment report from Wascana Rehab and their expert as well as CBI's expert [Dr. Clarke] both diagnosed extreme PTSD". He also indicated "So Dr Petroski could submit further report regarding the 2012 assault attack, as well as WCB designated treatment team at CBI and Wascana rehab., those experts could be consulted for a

[28] Exhibit U44.
[29] Exhibit U44.
[30] At para 11.
[31] At para 139.

most current report".[32] Amor met with Petroski twice, in person. At the arbitration a report authored by Petroski was filed[33] and he testified at the arbitration.

[51] With respect to Petroski, the Arbitrator stated:

> *155. Following testimony on qualifications and experience, the Employer took the position that Mr. Petroski shouldn't be allowed to provide an opinion as to a diagnosis given that he hasn't done a psychological assessment, this notwithstanding that he has treated Lapchuk for symptoms of PTSD from the outset.*
>
> *156. After considering the submissions, I concluded that Mr. Petroski should not be allowed to provide opinion evidence on a diagnosis in the circumstances. However, I concluded that he has expertise in the treatment of PTSD and could provide opinion evidence in that regard, as well as testifying about the specific treatment provided to Lapchuk. I advised the parties that the burden remains on the Union to prove not only a disability, but also a link between the disability and the misconduct. I also expressed my continuing concern that Mr. Petroski was not in a position to provide the best evidence on these issues.*

[52] Second, as mentioned above, Lapchuk was examined by Dr. Pam Clarke, PhD, Registered Doctoral Psychologist at the CBI Physical Rehabilitation Centre, who wrote a report on May 9, 2013. She reported "Mr. Lapchuk meets diagnostic criteria for PTSD, chronic"[34]. She wrote a further report on July 11, 2013 in which she noted "Mr. Lapchuk's symptoms of PTSD appear to be in complete remission"[35]. She also indicated that, at that time, there were no psychological or psychosocial barriers to him returning to work. With respect to Dr. Clarke's reports, the Arbitrator stated:

> *231. It is not disputed that Lapchuk has been treated for depression and anxiety from time to time in the past, including in the period immediately after the incident. Dr. Clarke provided two reports to the WCB after the incident. The first report indicates that Lapchuk presented with symptoms of depression, stress and general anxiety, including sleep disruption, concentration issues and feeling overwhelmed. Dr. Clarke opined that Lapchuk met the diagnostic criteria for PTSD. <u>However, the Union didn't present Dr. Clarke as a witness at the hearing. Accordingly, I am unable to consider her opinion as evidence that Lapchuk in fact suffered from PTSD.</u> Nonetheless, based on the report, and Lapchuk's own testimony, I accept that he was suffering from depression and anxiety in the aftermath of the incident* [emphasis added]

[53] Third, Lapchuk's family doctor, Dr. Cheshenchuk wrote a letter dated October 4, 2014 indicating Lapchuk "has been suffering of depression and PTSD as along as he known to me (since Sept. 12, 2007)"[36]. She also provided a report dated November 6, 2015[37] that the Union

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[32] Exhibit U45. The evidence indicated that Petroski did not do a formal medical diagnosis of PTSD, but was educated and experienced in treating people with PTSD, and treated Lapchuk on that basis.
[33] Dated sometime after November 5, 2015.
[34] Exhibit A15.
[35] Exhibit A16.
[36] Exhibit A31.
[37] Exhibit U80.

filed at the arbitration. While Hardy met with Dr. Cheshenchuk, in the end the Union did not call her as a witness at the arbitration.

[54] With respect to Dr. Cheshenchuk, the Arbitrator stated:

> *145. The Employer argues that Dr. Cheshenchuk's report should be disregarded in its entirety for a number of reasons. To start, the Union didn't provide a CV outlining Dr. Cheshenchuk's credentials. Without that, there is no evidence she has a focus on mental health or, more particularly, PTSD. Importantly, the report doesn't outline Dr. Cheshenchuk's diagnostic procedures or provide any basis for her opinion. Finally, Dr. Cheshenchuk didn't attend the arbitration and wasn't available for cross-examination.*
>
> *146. The Employer also submits that Dr. Cheshenchuk's report doesn't support the Union's argument that Lapchuk's conduct was caused by PTSD. The Employer notes that one of the characteristics referred to in the report, that Lapchuk has a delayed response to danger or an inability to react in stressful situations, isn't what occurred in the Fort Qu'Appelle where Lapchuk's conduct is more properly characterized as an immediate and exaggerated overreaction versus a delayed response.*
>
> *147. The Employer's concerns regarding Dr. Cheshenchuk's report are well-founded. There is no indication that Dr. Cheshenchuk has the necessary expertise to diagnose PTSD and she wasn't produced as a witness in any event. Accordingly, although I allowed the Union to file the report, I did so for the limited purpose of outlining Dr. Cheshenchuk's role in Lapchuk's care and treatment. The report otherwise has limited value and doesn't assist in establishing PTSD in the first instance or its connection to the misconduct.*
>
> *. . .*
>
> *233. The Union proposed to call evidence from two sources – Dr. Cheshenchuk and Mr. Petroski. I allowed the Union to file Dr. Cheshenchuk's report, but only for the limited purpose of outlining her role in Lapchuk's care and treatment. Beyond that, it would be inappropriate to give any weight to Dr. Cheshenchuk's report given that the Union didn't produce her as a witness which meant that the Employer didn't have an opportunity to examine her qualifications or ask questions about the basis for her opinion. In the end, Mr. Petroski was the only witness to testify at the hearing on the disability issue*. [emphasis added]

[55] Fourth, on April 29, 2015, Lapchuk emailed a copy of a report, prepared by Holly Parkerson, Clinical Psychology Doctoral Student and reviewed by Dr. Gordon Asmundson, PhD, Registered Doctoral Psychologist at the Department of Psychology, University of Regina, to Amor with the note: "Here are my most recent medical confirmation of PTSD prior and after treatment"[38]. The report, dated April 17, 2015, described his participation in a treatment study, eligibility for participation in which required a primary diagnosis of PTSD. This report was emailed from Lapchuk to Amor again on September 2, 2015[39] with a note indicating:

> *Expert witness Dr Amundson This is a formal DSM diagnosis. Penny the grad student that conducted the study exposure therapy. I believe they are essentially doing cutting edge research into PTSD and are world class experts. I was being monitored and the study was*

[38] Exhibit U36.
[39] Exhibit A39.

> *to determine brain chemistry and tracing an enzyme in the blood of patients with active PTSD and best protocols of treatment. I am coming up to my 6 month review it is all encompassing and is the end of Sept after arbitration.*
>
> *This would be very good expert witness as to an overview of PTSD.*

[56] Amor indicated that the report was filed in the arbitration, but neither Parkerson nor Dr. Amundson was called as a witness. Amor made no attempts to ask Dr. Amundson to testify. The Arbitrator does not even mention this report therefore the Board is not convinced that it was filed in the arbitration. Even if it was, it would presumably not have been relied on by the Arbitrator, suffering the same fate as Dr. Clarke's and Dr. Cheshenchuk's reports.

[57] Fifth, Lapchuk was referred by SGEU LTD to Dr. Dhanapal Natarajan. Dr. Natarajan, a fully licensed specialist in psychiatry, undertook an Independent Medical Examination Psychiatry Assessment respecting Lapchuk, and prepared a report dated December 24, 2014[40]. He diagnosed Lapchuk as suffering from major depressive disorder and chronic PTSD. Despite the sworn evidence of Hardy, Amor and McCorriston that they were unaware of this report before Lapchuk sent it to them in January 2016, in the end all of them had to admit that was not true.

Adjournment of the November arbitration hearing dates:

[58] On October 21, 2015 Lapchuk emailed Amor and McCorriston asking for an update on the Union's work on tracking down the necessary medical information for the continuation of the arbitration. The email included the following paragraph:

> *Additionally has SGEU booked the medical experts in particular the Phd. Univ of Regina PTSD study Dr. Amundson and Greg Petroski for medical expert's Nov 12-13, 2015 continuation of my arbitration. These professionals need to be booked by the union and what is the situation currently have they been booked and confirmed.*[41]

[59] Amor replied the same day that she had been in contact with Petroski and Dr. Amundson and had an appointment with Petroski the next day. Lapchuk replied that Dr Cheshenchuk was working on her report and "getting it completed hopefully this weekend".[42]

[60] On October 28, 2015 the Government's lawyer wrote to Amor respecting the medical evidence the Union was planning to tender when the arbitration resumed on November 12, 2015. The purpose of the letter was to advise Amor that the Government intended to object to Petroski

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[40] Exhibit A28.
[41] Exhibit U46.
[42] Exhibit U46.

and Dr. Cheshenchuk being called as witnesses both because the Government took "serious issue" with their qualifications and because the Government had not yet received reports from them to review in advance of the arbitration reconvening. The Government was of the view that Dr. Cheshenchuk had "no particular expertise in diagnosing and treating mental health issues".[43] The Government also noted that Petroski was a counselor who provided therapy to Lapchuk but could not provide a diagnostic report. The letter concluded:

> *The Government maintains that, following the adjournment of the arbitration in September, it was clear that any expert to be called must be able to conduct a fresh psychological assessment of the* [sic] *Mr. Lapchuk, diagnose him with any potential mental health issues, and identify a proper treatment plan. The expert should be able to speak to Mr. Lapchuk's readiness to return to the workplace, whether with or without treatment.*
>
> *At this point, the Government would suggest that a conference call be scheduled with the arbitrator to discuss this issue and to canvas new adjourned dates for the arbitration. With the additional time, the Government and Union will be able to work jointly to find an appropriate psychiatric expert.*
>
> *The Government once again reiterates its offer to assist in the search for an expert and pay half the costs of the expert jointly chosen by the Government and the Union.*[44]

[61] Amor emailed a copy of the letter to Lapchuk. A troubling email exchange then occurred between Lapchuk and Amor. Lapchuk was clearly frustrated with the idea of another adjournment. He expressed his frustration at a further adjournment in an email dated October 28, 2015 at 3:42 pm, in another email on November 4, 2015 at 5:02 pm and in another on November 4, 2015 at 8:38 pm[45]. In response to this final email Amor emailed Lapchuk on November 5, 2015 at 2:45 pm. She did not respond to any of the issues raised by Lapchuk in his three emails. She admitted that the Union has not received any medical reports. Then she stated:

> *As no medical has been received, SGEU advice is to postpone the arbitration until proper medical has been secured to support your claims.*
>
> *We have heard your concerns that you wish to precede forthwith Arbitration concluded. Therefore in order to proceed, written confirmation is required that you wish to proceed contrary to SGEU's advice. We will require a witnessed authorization to remove SGEU for liability in respect to this issue. This will allow the arbitration to continue conclusion as per scheduled dates.*[46] [emphasis added]

[62] Lapchuk, understandably, refused to provide such a document. His full response, as sent later the same day to Amor reads as follows:

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[43] It was not clear how the Government could have reached this conclusion at this point, having not yet received any information from Dr. Cheshenchuk. The Union provided no evidence of challenging this assertion.
[44] Exhibit U48.
[45] Exhibits U48, U49 and U50.
[46] Exhibit U50.

> *Checked with the doctors Chesenchuk office this report has been ready for days and they are awaiting payment from union, as this has not been done by union it has not been faxed. Why has this not been done why is it my responsibility to procure and pay for the specific medicals that union was to pay for and reason arbitration was adjourned for in Sept, 2015. I will attend her office immediately at 9 am pay for and fax the report to your attention immediately. They say they called SGEU and no body returned the call or paid.*
>
> *Greg Petroski's medical report will as well be faxed to you I believe Friday have you made arrangements there to pay for it, or do I need to do that ?*
>
> *The employer already has pre knowledge somehow of the reports and have made it clear they protest medical reports therefore they should have their expert in place for the November 12-13, 2015. They would have known this for years but never requested this until a week prior I am not buying that. As both of the requested medicals will be available tomorrow Nov 6, 2015 have you prebooked Greg and Dr Chesenchuk for Nov 12-13. 2015. This is the unions responsibility as it paying for reports neither appears to have been undertaken as I have had to ferret this out myself.*
>
> *As for employer 13th hour request it is a new and totally inappropriate to the 2013 grievance. It was not requested at adjournment so that ship has sailed.*
>
> *I will not be signing anything, as I have secured the 2013 medicals requested at adjournment and assume the union has booked medical report authors for Nov 12-13, 2015 arbitration. Please advise of how union will proceed putting in your case as SGEU has carriage of this grievance……*
>
> *Respectfully,*
>
> *David Lapchuk* [47]

[63] In a further email from Lapchuk to Amor on November 6, 2015 at 8:49 am, again he expressed his frustration with the Government's request for more medical reports and a further adjournment of the arbitration hearing. He concluded the email:

> *Email me the date that this will be adjourned until and why you are doing it and again it should be weeks not days!* [48]

[64] That afternoon Hardy wrote to Lapchuk recommending that Dr. Clarke be used as the expert witness to attest to Lapchuk's PTSD diagnosis and indicating that she and Amor would be meeting with Dr. Clarke. In response Lapchuk sent a three-page email indicating his opinion that Dr. Clarke could not be a witness as she would be in a conflict of interest. He then went on to provide further opinions about how the Union should proceed and asked 16 questions about the Government's suggestion that the arbitration be adjourned to allow time for additional medical

[47] Exhibit U51. Note, the assertion that Dr. Cheshenchuk's report was ready "for days" does not appear to be accurate. The only date on the report (Exhibit U80) is November 6, 2015.
[48] Exhibit U53.

evidence to be obtained. Hardy's only response was that, if Lapchuk wanted to proceed with just Dr. Cheshenchuk and Petroski, he should line them up to testify at the hearing the following week.

[65] A series of emails was entered as Exhibit A34[49]. The final email in the string, from Lapchuk to Hardy, dated November 7, 2015, 12:30 am, is critical to understanding the positions of the parties as to the failure of the Union to file medical evidence that the Arbitrator was prepared to accept as establishing their medical defence. Accordingly, it is set out in full, as follows:

> *It is something that the union has I am told agreed to with the employer and is to have in place not my choice . I am advising you she* [Dr. Clarke] *is probably in a conflict of interest for the already stated reasons. The union will have to determine that for themselves, as for her credentials she only has PHD. And WCB has determined the PTSD valid claim Nov 2013.*
>
> *As I told Marie and I am telling you that these were the only 2013 medical providers and were EFAP PTSD counselor Greg Petroski provided as expert for my treatment, and the medical doctor Dr Chesenchuk. The union has agreed to find another expert per your discussions with the employer just recently . And there is a list of questions I have asked . Answers would be appreciated from the employer and I have asked the union to put forward or answer if they can.*
>
> *Union has full carriage of the grievance as I have agreed to in prior email but to find the new expert as far as I know that well is dry for 2013 treatments and my health at that time. It's the unions responsibility so I ask that this be done in weeks rather than months as it is a thirteenth hour request.*
>
> *I will not sign any release of the union, so stop with the nonsense as you are proceeding as union has already agreed to this with employer. I am simply advising you of the reality of whom I saw at the time of Wrongful of wrongful Dismissal. The union can line up whomever hasn't got a conflict of interest, if union determines it is Clarke its out of my control and I will attend immediately any expert that the union chooses, I just have no additional plausible alternative medical leads .*
>
> *As for lining up Dr Petroski and Dr Chesenchuk that was for union to have done, and continues to be your responsibilities . It's enough that Dr Chesenchuk report was done days ago but SGEU neither returned their call or paid for the report so I did at 8:30 today. I have the receipt this in order to have the reports required for Thursday, Friday morning. Technically both done Thursday.*
>
> *It's the unions case to proceed with and new delay seems to be open ended with no return date as I know of no other PHD or higher I attended for PTSD treatment. This for something never asked for at Sept 2015 adjournment. Additionally it is foolish of me to suggest those witness's that are barred by the consent forms I signed to never be witnesses for me such as LTD psychiatrist. It would seem SGEU might access that psychiatric expert easily with SGEU LTD 's permission. He is definitely qualified and you can work his issues out internally with SGEU to access his professional opinion. Other than that please outline how union proposes to find some other expert and timeline its only up to the union .*
>
> *All other avenues that have been adjourned by employer for the arbitration I will be pressing to move forward on as this new medical expert is the employers new request cannot be*

[49] These emails were also entered as Exhibit U54.

> *used as an excuse to adjourn those actions further . Employer has stalled this process as the union has agreed to find a new medical expert for some date in the future.*
>
> *Union has carriage of the grievance if they have agreed to adjournment it's the unions business.*
>
> *Let me know when this is adjourned to and who you setup for this whatever expert I will attend .*

[66] Lapchuk's interpretation of this message is that he was resigned to the fact that the November 2015 dates for continuation of the arbitration hearing were going to be adjourned so that further medical information could be gathered. He suggested there may be challenges in obtaining reports or testimony from Dr. Clarke or the SGEU LTD psychiatrist, Dr. Natarajan, but leaves it to the Union to work out those issues. While an earlier email in this chain from Hardy to Lapchuk suggests that Lapchuk should arrange for Petroski and Dr. Cheshenchuk to provide evidence, he also indicates that it is the Union's responsibility to make those arrangements. The Union's response to this message was to proceed with the arbitration hearing on November 12, 2015 with only Petroski as a witness, filing reports from Petroski, Dr. Clarke and Dr. Cheshenchuk, and not making any inquiries about obtaining reports or evidence from Dr. Amundson or Dr. Natarajan. Further emails confirm that Lapchuk's interpretation of the message was clearly communicated to the Union. Lapchuk's view that the Union was not listening to him is borne out by the documentary evidence filed by both parties.

[67] For example, in an email from Lapchuk to Hardy and Amor on November 9, 2015 at 10:01 am, Lapchuk inquired as to whether the November 12 and 13 arbitration dates were being adjourned, until when, and who the new expert would be. Hardy replied, asking that they speak on the phone about these issues. A further email from Lapchuk to Hardy and Amor, at 11:56 am the same day, asked that all communications be in writing, and asked again about an adjournment. He indicated that whether to proceed with just Petroski and Dr. Cheshenchuk as witnesses was the Union's decision:

> *I suggest you tell me is SGEU proceeding with arbitration November 12- 13. 2015 its pretty simple . As there will be no release of SGEU and it is SGEU's arbitration to conduct properly.*[50]

[68] Conference calls were held among the Union, Government and Arbitrator on November 4 and 6, 2015 in which the Government raised concerns about the sufficiency of the medical evidence that the Union proposed to tender. The Arbitrator advised the Union that she shared the

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[50] Exhibit U58.

Government's concerns. Despite this, when the hearing reconvened in November the Union did not submit any suitable evidence.

[69] Petroski testified. The Union did not ask Dr. Cheshenchuk to testify early enough that she was able to accommodate the request in her calendar and they did not consider subpoenaing her. They did not enter Dr. Amundson's report. They did not take any steps to obtain a copy of Dr. Natarajan's report. They did not ask Dr. Clarke, Dr. Amundson or Dr. Natarajan to testify.

[70] On January 26, 2016 Lapchuk's lawyer sent a copy of Dr. Natarajan's report to Amor, and Lapchuk also sent it to Hardy and McCorriston. On January 29, 2016 Hardy provided a copy to the Government and the Arbitrator, advising that "We only became aware of this document on January 26th 2016".[51] The Union attempted to obtain leave of the Arbitrator to file it at this late date, but was denied.

Arbitrator's Decision:

[71] After the Arbitrator's Decision was received, a meeting was held at the Union office on September 8, 2016 to consider whether an application for judicial review of the Arbitrator's Decision should be made. McCorriston and four LROs, including Amor and Hardy, were in attendance. They decided that there were no viable grounds for judicial review. The minutes also noted: "Medical evidence was crucial".[52]

[72] Hardy testified that the Arbitrator accurately described the Union's state of readiness to provide medical evidence to the arbitration in the following paragraph:

> *13. At the outset, the Union indicated that in addition to calling Lapchuk, it intended to call Greg Petroski, a psychologist who had been treating Lapchuk, and possibly one other psychologist. However, the Union didn't have a current report from Mr. Petroski or the other witness. From this, it was evident that the Union wasn't in a position to call expert testimony on the September dates which necessitated setting additional dates in November.*

[73] Hardy testified that she was not surprised when the Arbitrator said the medical evidence was insufficient. Hardy agreed that it was up to the Union to obtain that evidence, and they fell short. The medical evidence the Union filed did not prove their defence. Hardy agreed that the Arbitrator accurately described the shortcomings in the Union's medical evidence.

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[51] Exhibit U66.
[52] Exhibit U84.

Authorization for release of medical information to LROs:

[74] A source of great contention during the hearing of this matter was whether Lapchuk had provided authorization to the Union to obtain his medical information.

[75] On February 5, 2019, while Lapchuk was giving evidence in this matter, Exhibit A40 was entered. It was an email from Amor to Lapchuk dated April 24, 2015 enclosing a blank Authorization for Release of Information form that Amor asked Lapchuk to fill out and return to her, to give her access to his information including, but not limited to: personnel files with the Employer; SGEU LTD Plan Claim File; Canada Pension Disability Claim File; and Workers' Compensation Claim File.

[76] Lapchuk's evidence was that he signed it and faxed it back to her, though he had no documentary evidence to back up that statement. Since the fax came from him, the original version of this document, if it existed, would have been in his possession.

[77] When the hearing reconvened on March 4, 2019, Lapchuk's lawyer made a number of surprising submissions. First, he said that Lapchuk did not have the original of the Authorization he had allegedly faxed to the Union because he had given it to the Union's lawyer and she must have lost it (an assertion that the Union's lawyer vigorously denied). It was then disclosed to the Board that, following Lapchuk's assertions on February 5, 2019 that he had signed an Authorization, at the request of Lapchuk's lawyer the Union had undertaken a search of their files for the alleged signed Authorization. On February 28, 2019 the Union's lawyer disclosed to Lapchuk's lawyer a previously undisclosed document that this search had uncovered: the Authorization/Revocation document. On March 1, 2019, the Union's lawyer provided a further document to Lapchuk's lawyer, a screen shot of the Authorization/Revocation document as it had been scanned to the Union's database on April 24, 2015. On receipt of these documents, Lapchuk's lawyer engaged a forensic analyst on March 1, 2019 who provided a report to him on March 3, 2019 that the document was a forgery and contained evidence of tampering and alterations. At this point only Lapchuk's lawyer had seen this report. He had not given the other two parties' lawyers advance notice that he had requested and/or received the report. Accordingly, the hearing was adjourned, with an Order for Lapchuk's lawyer to provide copies of the report to the Union's and Government's lawyers.

[78] With respect to the discovery of the Authorization/Revocation document Hardy provided the following evidence. After the February 5, 2019 hearing she asked the Union's administrative assistant, Lori Jardine, to search the Union's paper files and electronic database for a copy of an Authorization signed by Lapchuk. Jardine found the Authorization/Revocation document. Jardine also showed Hardy a copy of the search result from the Union database, and Hardy asked her to obtain and provide a screenshot of the results. Hardy had not previously accessed Lapchuk's files. She said there was no need to access the files; whatever was relevant had already been taken out of them before she was assigned to assist Amor in representing Lapchuk. She first saw the Authorization/Revocation document in February 2019. She was surprised it was in the Union file.[53]

[79] Lori Jardine was an administrative assistant for the Union from 2012 to 2020. She testified that she conducted a search of the Union's electronic database and paper files and located the Authorization/Revocation document on the termination grievance file on February 25, 2019 and on the suspension grievance file on March 1, 2019. She indicated that, according to the information in the database and the paper files, she had uploaded the Authorization/Revocation document to the database on April 24, 2015. According to the information she added to the database on April 24, 2015, the Authorization/Revocation document was provided to the Union office by fax. Her usual process would have been that, when a fax was received, she provided it to the LRO assigned to the file, in this case Amor. At the LRO's direction, she would have added the faxed document to the database. The Board accepts Jardine's evidence.

Expert witness:

[80] Leslie Peace is a Forensic Document Examiner. He trained in this role as a member of the RCMP, and was employed in their Forensic Laboratory system for almost 20 years. When he retired in 1988 he commenced a private forensic consulting service. Since 1988 his company has provided expert advice and assistance in a wide range of forensic examinations in approximately 1500 cases. Lapchuk objected to Peace testifying, on the basis that he was in a conflict of interest and that he lacked qualifications to testify on the issue before the Board: he is an expert on paper, but not in Adobe or other modern computer technology; he is not up to date.

[53] On April 24, 2015, the date of the Authorization/Revocation document, Hardy was not yet assigned to represent Lapchuk.

[81] After hearing argument from all parties, and considering the numerous authorities filed[54], the Board decided that Peace would be accepted as an expert witness.

[82] In *White Burgess Langille Inman v Abbott and Haliburton Co* [55], the Supreme Court of Canada described the analysis to be undertaken when considering the admissibility of expert evidence as follows:

> *[23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four Mohan factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: J.-L.J., at paras. 33, 35-36 and 47; Trochym, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: Abbey (ONCA), at para. 82; J.-L.J., at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: D.D., at para. 57; see D. M. Paciocco and L. Stuesser, The Law of Evidence (7th ed. 2015), at pp. 209-10; R. v. Boswell, 2011 ONCA 283, 85 C.R. (6th) 290, at para. 13; R. v. C. (M.), 2014 ONCA 611, 13 C.R. (7th) 396, at para. 72.*
>
> *[24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In Mohan, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in J.-L.J., Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para. 47. Doherty J.A. summed it up well in Abbey, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.*

[83] At the first step, the Union was required to establish the threshold requirements of admissibility. With respect to the four *Mohan* factors, the Board found all four were established.

[84] *Relevance*: since the Union had put the Authorization/Revocation document into evidence[56] and intended to rely on it, Peace's evidence was relevant.

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[54] *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII), [2015] 2 SCR 182; *Matsalla v Rocky Mountain Dealerships Inc.*, 2017 SKQB 335 (CanLII); *Silzer v Saskatchewan Government Insurance*, 2021 SKCA 59 (CanLII); *In the Estate of Gary Peter John Lutz, Deceased* (August 17, 2018) Moose Jaw, QBS 109/2014 (SKQB); *Oh v Robinson*, 2012 SKCA 27 (CanLII); *Stewart v Leonard*, 2009 SKPC 142 (CanLII); *Law Society of Alberta v Riccioni*, 2012 ABLS 15 (CanLII); *Murrell Estate (Re)*, 2013 ABQB 758 (CanLII); *Chrystian v Topilko*, 2010 ABQB 456 (CanLII); *Bortnikov v Rakitova*, 2015 ONSC 1163 (CanLII); *Charlebois v SSQ, Life Insurance Co.*, 2015 ONSC 2568, 2015 CarswellOnt 7825; *Stewart v Humber River Regional Hospital*, 2009 ONCA 350 (CanLII); *Labbee v Peters*, 1996 CarswellAlta 1140 (ABQB).

[55] 2015 SCC 23 (CanLII), [2015] 2 SCR 182.

[56] Exhibit U90.

[85] *Necessity in assisting the Board*: Peace has specialized knowledge, skill and experience. His evidence was necessary to assist the Board in assessing the arguments raised about the authenticity of the Authorization/Revocation document.

[86] *Absence of an exclusionary rule*: no exclusionary rules are applicable in this matter.

[87] *Properly qualified expert*: Peace is properly qualified to do handwriting analysis and comparison. He is also qualified to speak to the issue of reproductions. He was questioned specifically on this issue and his response was that over the last ten years he has prepared dozens of reports that addressed the digital manipulation of documents and prepared numerous reports respecting the electronic alteration of documents.

[88] The second part of determining whether Peace was a properly qualified expert required an analysis of his willingness and capacity to provide the Board with fair, objective and non-partisan opinion evidence.

[89] In *Silzer v Saskatchewan Government Insurance* [57], the Court stated:

> *The Supreme Court's decision in White Burgess established that a challenge to an expert's lack of independence and impartiality must be addressed at the admissibility stage and not left as a question of weight. Expert opinion evidence, it said, "'should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility'" (at para 45, quoting R v J.-L.J., 2000 SCC 51 at para 28, [2000] 2 SCR 600).*

[90] In *Matsalla v Rocky Mountain Dealerships Inc* [58] ["*Matsalla*"] the Court found:

> *In White Burgess, the Supreme Court described the required duties of an expert witness in terms of being impartial, objective and free from bias. As set out in para. 46 of that decision, a proposed expert witness who is unable or unwilling to fulfil these duties to the court is not properly qualified to perform the role of an expert and his or her expert opinion evidence is not admissible. As a result of these duties being subsumed into the qualification process, the willingness and ability of the proposed expert to fulfil these duties is a threshold issue for a determination of admissibility.*

[91] In carrying out this analysis the Board considered that it has the power pursuant to clause 6-111(1)(e) of the Act "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". However, in *Matsalla* the Court found that "While the procedures are less formal under the [*Small Claims*] *Act*, the basic requirement that an expert be able to fulfil this fundamental duty

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[57] *Supra*, note 54, at para 56.
[58] 2017 SKQB 335 (CanLII), at para 24.

still applies".[59] In the interests of providing a fair hearing to all parties the Board determined that the following finding in *Matsalla* should be applied here:

> *[25] Civil procedure rules for superior courts across Canada require proposed experts to understand and acknowledge their duty is to the court and not to the parties that retained them. For example, Rule 5-37 of The Queen's Bench Rules in Saskatchewan states the following:*
>
> > *5-37(1) In giving an opinion to the Court, an expert… has a duty to assist the Court and is not an advocate for any party.*
> >
> > *(2) The expert's duty to assist the Court requires the expert …*
> > *(a) to provide opinion evidence that is objective and non-partisan*
>
> *[26] While The Queen's Bench Rules do not apply to a proceeding in Provincial Court under the Act, Rule 5-37 illustrates the role an expert is expected to fulfil in providing opinion evidence for the assistance of the court at any level. An expert must be willing and able to fulfil her or his duty to the court by being fair, objective, and non-partisan. When opinion evidence from an expert is sought to be tendered, the court must consider, at the threshold stage, the nature and extent of the interest or connection between the expert and the litigation or a party thereto, as well as whether the expert has assumed the role of an advocate for a party. As set out in White Burgess at para 32, the "acid test is whether the expert's opinion would not change regardless of which party retained him or her".*

[92] The Board was satisfied that Peace understood his duty to the Board to give fair, objective and non-partisan opinion evidence. He was aware of this duty and able and willing to carry it out.

[93] The Board examined the nature and extent of the alleged connection between Peace and Lapchuk. The Board had no hesitation in finding that Peace was not in a conflict of interest. The evidence showed that Lapchuk phoned Peace. Peace advised Lapchuk that he does not accept private engagements. Peace emailed his introductory material to Lapchuk's lawyer, but never heard back. Neither Lapchuk nor his lawyer sent any documents to Peace. There was no evidence that Peace was retained by Lapchuk's lawyer. The parties agree there were no communications between Lapchuk's lawyer and Peace. Peace was not retained by Lapchuk because Peace does not accept retainers from private individuals. There would have been nothing improper in the Union's lawyer retaining an expert that was previously retained by Lapchuk's lawyer to provide an opinion with respect to issues arising in this matter. What is prohibited, however, is the transmission of solicitor-client or litigation privileged information via the expert.[60] There being no communications between Lapchuk's lawyer and Peace, there was no opportunity for a disclosure by Lapchuk's lawyer to Peace of solicitor-client or litigation privileged information and no discussions of litigation strategy. Even if he had been retained and received privileged information

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[59] At para 27.
[60] *Charlebois v SSQ, Life Insurance Co*, *supra* note 54, at para 31.

from Lapchuk's lawyer, he still could have given evidence, subject to appropriate restrictions. Since he was not retained by and did not receive privileged information or any information from Lapchuk's lawyer, no restrictions were required.

[94] The Board then turned to the second, discretionary gatekeeping step. The Board determined that the potential benefits of admitting Peace's evidence justified its admission.

[95] The Board was satisfied that Peace could give evidence as an expert in this matter, and so ordered.

[96] The Union had provided to Peace the Authorization/Revocation document and 15 documents containing specimen signatures and other handwriting purportedly written by Lapchuk[61]. Peace prepared two reports. The first was dated July 19, 2019. The purpose of the report was described as follows:

> *These exhibits were submitted by Ms. Robertson for the purpose of a formal forensic examination and comparison to determine whether or not two handwritten signatures, each appearing to represent the name "D. Lapchuk", and each appearing on an Information Release document, were written by the same person who produced a number of sample signatures on various employment and union documents, allegedly David Lapchuk*.[62]

[97] His conclusion was that "there is a high probability that the two questioned *"D. Lapchuk"* signatures on Exhibit A were written by the person who produced the sample signatures on Exhibits B (1-15), purportedly David Lapchuk."[63] The likelihood that the two signatures on the Authorization/Revocation document were produced by another person was, in Peace's opinion, "extremely remote"[64]. While Lapchuk cross-examined him extensively on the distortions on the Authorization/Revocation document, Peace was unwavering in his expert opinion that the distortions were caused by the fax process. The Board accepts Peace's expert opinion that the two signatures on the Authorization/Revocation document were placed there by Lapchuk before he faxed the document to the Union.

[98] The second report prepared by Peace was a critique of the report that Lapchuk's forensic analyst prepared to review the Authorization/Revocation document. Lapchuk did not bring forward

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[61] Twelve of these specimen signatures were considered by Peace to be "a good submission of relatively contemporary sample material produced by one person, and a reliable basis for comparison with one or more disputed signatures", Exhibit U96, at page 6.
[62] Exhibit U96 at page 1.
[63] Exhibit U96 at page 7.
[64] Exhibit U96 at page 8.

the author of his report to be qualified as an expert witness. Therefore, her report, and Peace's response to her report, were not entered into evidence.

Relevant Statutory Provisions:

[99] LRB 353-13 alleged a contravention of the following (now repealed) provisions of *The Trade Union Act*:

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

[100] LRB 263-16 alleged a contravention of the following, comparable provisions of *The Saskatchewan Employment Act* ["Act"]:

> *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.*
>
> *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.*

[101] Since the enactment of the Act, the Board has made it clear that these provisions are sufficiently similar that cases decided pursuant to sections 25.1 and 36.1 of *The Trade Union Act* apply to the interpretation of sections 6-58 and 6-59 of the Act.

Argument on behalf of Lapchuk:

[102] Lapchuk relies on the following description of the duty of fair representation that the Union owed to him, found in *Gendron v Supply and Services Union of the Public Service Alliance of Canada, Local 50057* [65]:

> *The Duty of Fair Representation*
>
> *It is not strictly necessary to consider the reasons of the Court of Appeal as regards the duty of fair representation because I have concluded that a determination of this point is within the original jurisdiction of the Canada Labour Relations Board. I will however make some brief comments about the factors that must be examined in determining whether the union has breached its duty and their application to the facts by the Court of Appeal in this case.*
>
> *The leading case in this area is Canadian Merchant Service Guild v. Gagnon, supra. While the facts giving rise to the claim in Gagnon occurred prior to statutory codification of the duty, the principles set out by Chouinard J. were based on a review that included both cases based on statutory formulations and those that were not and drew no distinction between the cases based on the different statutory terms which set out the duty. After an impressive and lengthy review of the Canadian jurisprudence, Chouinard J. for the Court lists at p. 527 the principles governing the duty of a union to fairly represent its members:*
>
> > *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
> >
> > *1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
> >
> > *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
> >
> > *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
> >
> > *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
> >
> > *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.*
>
> *In distilling these five principles Chouinard J. relied heavily on Rayonier Canada (B.C.) Ltd., supra, a decision by the British Columbia Labour Relations Board. At pages 201-2 the Board states:*
>
> > *The union must not be actuated by bad faith in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex . . . or simple, personal favoritism. Finally, a union cannot act arbitrarily, disregarding the*

[65] 1990 CanLII 110 (SCC), [1990] 1 SCR 1298 at p. 1327-1329.

> *interests of one of the employees in a perfunctory matter. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*
>
> *The principles set out in Gagnon clearly contemplate a balancing process. As is illustrated by the situation here a union must in certain circumstances choose between conflicting interests in order to resolve a dispute. Here the union's choice was clear due to the obvious error made in the selection process. The union had no choice but to adopt that position that would ensure the proper interpretation of the collective agreement. In a situation of conflicting employee interests, the union may pursue one set of interests to the detriment of another as long as its decision to do so is not actuated by any of the improper motives described above, and as long as it turns its mind to all the relevant considerations. The choice of one claim over another is not in and of itself objectionable. Rather, it is the underlying motivation and method used to make this choice that may be objectionable.*

[103] In his Written Closing Brief, Lapchuk described the duty of fair representation as follows:

> *A union does not necessarily have to carry out the wishes of every employee or place the interests of one member above the interests of another member. As long as a union has not made an arbitrary, discriminatory or bad faith decision, it will have met its duty under s. 6-59. If a union acts conscientiously and takes into account all relevant factors in making a decision, that decision is likely not arbitrary. A discriminatory decision is one which draws distinctions between union members on illegitimate grounds. A bad faith decision is one which is motivated by malice, hostility, favoritism or personal considerations. Unless a union's decision is arbitrary, discriminatory or in bad faith, the Board will not find a breach of the duty of fair representation, even if the Board does not agree with the decision that the union made.*[66]

[104] In this matter, Lapchuk argues, the Union breached the duty of fair representation that it owed to him by acting in a manner that was arbitrary, discriminatory based on his health and in bad faith.

[105] With respect to LRB 353-13, Lapchuk asked Hendriks to file a grievance when it was discovered that the March 24, 2004 letter had not been removed from Lapchuk's file by the Government until April 1, 2011. This was five years past the maximum allowed by the collective agreement. He argued that it triggered his involuntary and improper transfer from an office job to a field position. Lapchuk argued that he was transferred to the regional office because of the letter. He objected to the Union refusing to grieve his involuntary transfer in 2011 to a much more dangerous role.

[106] With respect to LRB 263-16, Lapchuk noted that Buchinski admitted that he did nothing to get Lapchuk's accommodations reinstated. Buchinski relied on the Government totally and did no investigations to retrieve Lapchuk's accommodations records. Buchinski took at face value the Government's assertion that it had no records of any previous accommodations, which on further

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[66] At page 2.

investigation by Lapchuk turned out to be incorrect. Buchinski did not even check whether the Union had records from its involvement with the issue.

[107] McCorriston did not properly address Lapchuk's concerns about Buchinski. He did not properly supervise the junior inexperienced LROs who were running the arbitration. He was dismissive and arbitrary to any concerns raised about his staff not properly representing Lapchuk.

[108] Lapchuk criticized the evidence the Union tabled at the arbitration. He noted that they did not call a use of force expert, video expert, or medical experts that were acceptable to the Arbitrator. They did not obtain reports or evidence respecting his PTSD diagnosis by an expert witness that the Arbitrator would accept. Hardy stated that Lapchuk was responsible for securing expert witnesses, even though the Union was responsible for running the arbitration. The Union said it was his responsibility to get experts and to schedule them. Both Hardy and Amor were without a valid reason when questioned as to why they did not subpoena medical records or witnesses. The Union stated that in other cases the employer agreed to the tendered medical records. Since the Government did not agree in this case, they did not know what to do. They did not have any plan how to get medical records admitted.

[109] Amor did not comply with the direction of the regional grievance committee to have a full panel arbitration. She admitted that when she received the Authorization/Revocation document she never brought it to Lapchuk's attention, never asked Lapchuk about it and never discussed it with Hardy. As the lead LRO she was responsible for the conduct of the arbitration. She provided no experts or expert reports and failed to provide the Arbitrator with any admissible medical evidence of PTSD. She was discriminatory toward his medical PTSD disability.

[110] Lapchuk claims that the Union did not properly investigate or tender evidence at the arbitration about the Fort Qu'Appelle incident because they chose to protect the actions of the other Union members who were present.[67] Amor acted in bad faith by showing favoritism to the other Union members involved in the Fort Qu'Appelle incident and by not attempting through her questioning of them or her arguments at the arbitration to show their fault for what occurred.

[111] An email of July 24, 2009 was entered as Exhibit A3. It is an inappropriate discussion of Lapchuk among Union staff, part of which refers to information provided by Hendriks. Lapchuk argues that this email planted the seed of overt medical discrimination against him by the Union.

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[67] Besides Heinemann, the other traffic officer present was Brendan Pylatuk. His father, Joe Pylatuk, is a LRO employed by the Union.

This type of medical discrimination stigmatizes mental health and those who suffer these invisible injuries and disabilities. Hendriks was never authorized to release his confidential medical information.

[112] Lapchuk argues that in the carriage of his grievances he experienced discrimination based on his health. Hardy and Amor's conduct made his PTSD worse. They showed no knowledge of or attempt to understand PTSD. They simply agreed with the Government.

Argument on behalf of Union:

Delay:

[113] The Union argued that the issues in LRB 353-13 that relate to events that occurred prior to 2011 should be dismissed on the basis of delay. The grievances Lapchuk referred to involved events that occurred between 2004 and 2009. LRB 353-13 was filed with the Board on August 23, 2011 and amended December 31, 2013 and indicates that the circumstances giving rise to the alleged contravention of the Act came to his attention on May 26 and 27, 2011.

[114] The Union relied on *Ajak v United Food and Commercial Workers, Local 1400*,[68] a duty of fair representation case:

> *. . . The primary test used to determine whether an application should be dismissed for delay is whether justice can be done despite the delay. In examining that question, the Board considers several factors, including whether the delay is inordinate, whether the inordinate delay is excusable, and whether the parties to the application are seriously prejudiced by the delay. . . .*

[115] The Union also referred to *Kinaschuk and Saskatchewan Insurance Office and Professional Employees Union, Local 397, Re* [69] to argue that since the delay here is extreme, the onus is on Lapchuk to provide a credible explanation for the delay and prove that there is no material prejudice to the Union, which he has not done. No reason was provided for the delay with respect to the matters arising during the period from 2004 to 2010. The delay is inordinate. In cases where delay in bringing an application is unreasonable, prejudice is presumed. Therefore, in this matter, prejudice to the Union is presumed.

Onus of Proof:

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[68] 2008 CanLII 87262 (SK LRB) at para 14.
[69] 1998 CarswellSask 971, [1998] Sask LRBR 528.

[116] The Union argues that Lapchuk bears the onus of proof in this matter.[70]

Duty of Fair Representation:

[117] In its description of the duty of fair representation, the Union referred the Board to 14 decisions that it submitted are relevant to the Board's determination of this matter. All were reviewed and considered in the determination of this matter.

[118] The Union relied on several findings by the Board in *Lucyshyn v Amalgamated Transit Union, Local 615* ["*Lucyshyn*"][71], beginning with the following statement:

> *The duty of fair representation requires the Union to act in a manner that does not demonstrate bad faith, arbitrary treatment or discrimination. The general requirements were set out by the Supreme Court of Canada in Canadian Merchant Services Guild v. Gagnon, [1984] 84 CLLC 12,181. In particular, the Court held that "the representation by the Union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employees."*

[119] It is not the function of the Board to determine if the Union was correct in its assessment of the merits of the grievances or to minutely assess or second guess every action taken by the Union. The Board must look at the Union's representation of Lapchuk in its entirety to determine if the Union acted arbitrarily.[72]

[120] In *Lucyshyn*, the Board held that the Board is to apply an objective standard to assessing the Union's processing of the grievances. This finding was confirmed in *Dickerson v United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179* [73], where the Board held that as long as the actions of a union are not discriminatory, arbitrary or in bad faith, the Board cannot interfere with the union's judgment.

[121] Lapchuk was of the view that the Union should have hired a lawyer to represent him in the arbitration. The Union argues that it is not the role of the Board to evaluate the quality of

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[70] *Lucyshyn v Amalgamated Transit Union, Local 615*, 2010 CanLII 15756 (SK LRB*); Petite v International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 555*, 2009 CanLII 27858 (SK LRB).
[71] *Ibid* at para 28.
[72] *Chabot v Canadian Union of Public Employees, Local 4777,* 2007 CanLII 68749 (SK LRB) at para 74.
[73] (October 20, 2010) LRB File No. 040-10 (SK LRB).

representation in the absence of exceptional circumstances.[74] Mere negligence will not suffice but rather gross negligence is the benchmark.[75]

[122] With respect to LRB 353-13, the Union argues that on May 25, 2011, the same date as Lapchuk's email, Hendriks investigated his complaint. After speaking with human resources for the Government, Hendriks was satisfied that filing a grievance was not warranted. Although the Government may have committed a technical breach of the collective agreement by failing to remove the disciplinary letter from Lapchuk's personnel file, the Government had since corrected the error by removing the letter and Lapchuk did not appear to have suffered any grievable harm from the lapse. The collective agreement also prevented the Government from using the letter against him. The Union acted honestly and free from personal animosity toward Lapchuk in considering his request for a grievance. There is no evidence that the Union treated Lapchuk in a discriminatory or perfunctory manner. The duty of fair representation is not breached if the Union decides not to process a questionable grievance, like the grievance Lapchuk requested when it was discovered that the Government had failed to remove the letter of reprimand from his file.[76]

[123] The Union argues that the Union representatives treated Lapchuk fairly, honestly, candidly, in good faith and with the appropriate standard of care throughout the grievance and arbitration process. Amor and Hardy spent considerable time preparing for the arbitration with Lapchuk and Lapchuk's father. Amor and Hardy turned their minds to the case, met with Lapchuk and sought his input, contacted and explored potential witnesses for the arbitration, received documentary disclosure from the Government, and provided binders of documents to Lapchuk to review. They sought and considered his input. They kept him updated and involved him in decision making. The Union agreed to include Lapchuk's father as a support person to Lapchuk throughout their preparation meetings. Simply because Lapchuk does not agree with the conclusions reached by the Union, that is insufficient to establish deficiency in representation. There needs to be evidence that the Union gave his concerns short shrift or acted dismissively toward him.[77]

[124] It is not the correct legal approach for the Board to conduct a microscopic analysis of the strategies and evidence the Union used at arbitration or to assess the grievances on their merits. The Board is not sitting on appeal of the Union's decisions as to how it conducted the arbitration,

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[74] *MacNeill v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2005 CanLII 63107 (SK LRB); *Elcombe v CUPW*, 1992 CarswellNat 905 (CLRB).
[75] *Hargrave v Canadian Union of Public Employees, Local 3833*, 2003 CanLII 62883 (SK LRB); *Petite v International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 555*, *supra* note 70; *Rousseau v BLE*, 1995 CarswellNat 1622 (CLRB); *Lucyshyn*, *supra* note 70.
[76] *Datchko v Deer Park Employees' Association*, 2006 CanLII 63025 (SK LRB).
[77] *Connell v Saskatchewan Government and General Employees' Union*, 2005 CanLII 63105 (SK LRB).

including what evidence should have been tendered and what arguments should have been advanced.[78] Lapchuk's arguments that certain witnesses should have been called or other evidence should have been produced go to the nature and manner in which the Union chose to present the case. Absent gross negligence or extraordinary circumstances in the handling of the case, the Board should not interfere in second guessing or micro-managing the Union's case.[79]

[125] With respect to the lack of proper medical evidence, the Union argues that they could not force Lapchuk to provide medical documents to them or force him to provide consent to obtain medical records. They requested information to support his case, and relied on the information provided by Lapchuk. In order for the LROs to obtain medical information and documentation, they required Lapchuk to either give them authorization to access that information or provide his medical documentation directly to them. Amor met with Petroski twice in person and received a report from him that was filed in the arbitration. Petroski testified at the arbitration. Hardy met with Dr. Cheshenchuk, who advised that she could not provide a diagnosis of PTSD. She advised Hardy she was treating Lapchuk for PTSD symptoms, anxiety and depression. They did not call Dr. Clarke because Lapchuk did not agree.

[126] With respect to Dr. Natarajan, they argued that since Lapchuk had signed the necessary authorization for his lawyer to obtain a copy of Dr. Natarajan's report from SGEU LTD, he knew what was required, and should have done the same for them. "Mr. Lapchuk had ample opportunity to provide the Dr. Natarajan report of December 24, 2014, prior to the closure of SGEU's case at arbitration if he viewed that it would assist his case"[80]. In the alternative the Union argues that in any event Dr. Natarajan could not provide relevant evidence. They argued that the importance of that report is a red herring, as it did not provide a PTSD diagnosis prior to October 2012. The Union argues that the significance of his report was minimal. They were looking for evidence of a diagnosis of PTSD prior to October 2012, and the report of Dr. Natarajan that Lapchuk provided to them in January 2016 indicated that the date of his assessment was December 17, 2014. The report would not have established that Lapchuk's conduct at the Fort Qu'Appelle incident was the result of pre-existing PTSD.

[127] They decided to proceed with the hearing on November 12, 2015 because Lapchuk "was not fully cooperative"[81].

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[78] *Taylor v Saskatchewan Government and General Employees' Union*, 2011 CanLII 27606 (SK LRB).
[79] *Owl v Saskatchewan Government and General Employees' Union*, 2014 CanLII 42401 (SK LRB) at para 64.
[80] Brief of Law and Argument on Behalf of SGEU, para 94.
[81] *Ibid*, para 93.

[128] The Union says they did their best with the evidence they had. Hindsight and perfection are not the tests to be applied by the Board.

[129] The Union also argued that Lapchuk's behaviour during the arbitration hearing contributed to the negative result. The Arbitrator commented:

> *196. Given the above, it is important to make a few general comments about credibility and reliability. Lapchuk wasn't a good witness. He was angry and unfocused throughout. He struggled to stay on point and went on tangents. Often the question had to be repeated to bring him back. I appreciate that arbitration proceedings can be stressful for a grievor and this no doubt contributed to some of Lapchuk's difficulties. However, it is still necessary to provide clear and cogent testimony.*
>
> *197. Lapchuk's anger was noticeable at the hearing even when he wasn't testifying. He was seemingly unable to stop himself from making comments and gestures as he sat through the testimony of others. He left the hearing room in an angry state more than once. On one occasion he encountered Davies who was sitting outside the hearing room waiting to be called as a witness. Davies testified that Lapchuk "gave him the finger" and then pointed his finger at Davies and shook his fist as he walked by. Lapchuk was particularly disruptive when Smith testified to the point where Smith complained about Lapchuk's gestures. Lapchuk walked out of the room muttering under this breath before I had a chance to intervene.*

[130] They also point to the Arbitrator's comment that if Lapchuk had shown remorse or taken any responsibility for the Fort Qu'Appelle incident, she "would most certainly have considered reducing the penalty"[82].

Contravention of section 36.1 of The Trade Union Act:

[131] Lapchuk alleges a contravention of section 36.1 of *The Trade Union Act* [83] on the basis that the Union violated his rights by insisting that he be represented by the Union in the grievance proceedings. This, he said, was a contravention of the principles of natural justice and procedural fairness. The Union rejects this argument, on the basis that section 36.1 is inapplicable in this matter. It only applies to disputes between a union and employee involving the constitution of a union and the employee's membership in a union or discipline under a union's constitution, none of which are at issue here.[84] The issues identified by Lapchuk have not identified any matters relating to the Union's constitution or his membership or discipline pursuant to the Union's constitution.

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[82] At para 243.
[83] Now section 6-58 of the Act.
[84] *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); *Teichreb v Canadian Union of Public Employees, Local 4777*, 2013 CanLII 34247 (SK LRB) (application for reconsideration dismissed at *Canadian Union Of Public Employees, Local 4777 v Teichreb*, 2013 CanLII 75209 (SK LRB)).

Argument on behalf of the Government:

[132] The Government led no evidence. It made no argument on the issue of whether the Union breached the duty of fair representation it owed to Lapchuk. It did, however, submit that, while the Board has broad remedial powers under the Act, it does not have the power to reinstate Lapchuk to his employment. Pursuant to clause 6-49(2)(a) of the Act, the decision of the Arbitrator on that issue is final:

> *6-49(2) The finding of an arbitrator or arbitration board:*
> *(a) is final and conclusive;*
> *(b) is binding on the parties with respect to all matters within the legislative jurisdiction of Saskatchewan; and*
> *(c) is enforceable in the same manner as a board order made pursuant to this Part.*

Analysis and Decision:

[133] The task for the Board in this matter is to determine whether the Union breached the duty of fair representation that it owed to Lapchuk. Did they act in a manner that was arbitrary, discriminatory and/or in bad faith?

[134] The Board has considered and described the duty of fair representation in numerous decisions, many of which were referred to in this matter. There is no dispute as to the test that the Board is to apply to the facts of this matter. There is no dispute that the onus of proof is on Lapchuk. The issues are whether the Union's conduct crossed the threshold from negligence to gross negligence or was otherwise arbitrary, whether they discriminated against him on the basis of his disabilities or otherwise and whether they acted in bad faith.

[135] Both Lapchuk and the Union referred to the five principles established by the Supreme Court of Canada in *Canadian Merchant Service Guild v Gagnon et al* [85] ["*Gagnon*"]:

> *1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*

[85] 1984 CanLII 18 (SCC), [1984] 1 SCR 509 at p. 527.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

[136] In *Datchko v Deer Park Employees' Association*,[86] the Board held:

[46] It is not for us to determine whether the Union was correct in deciding that the grievance would not be successful but rather to determine whether the Union arrived at that decision in a fair and reasonable manner, without gross negligence, taking into account all reasonably available information and relevant considerations. Mr. Leik, the Union's president, fairly investigated the matter, discussed it with the Employer's representative and, in consultation with his colleagues on the Union's executive, fairly arrived at the decision not to advance the grievance. As has been stated in numerous decisions of the Board, for example, in Hidlebaugh v. Saskatchewan Government and General Employees' Union and Saskatchewan Institute of Applied Science and Technology, [2003] Sask. L.R.B.R. 272, LRB File No. 097-02, it is not for the Board to minutely assess and second guess the actions of the Union in its conduct of the grievance procedure so long as it does not do so in violation of s. 25.1 of the Act.

. . .

[48] In Radke v. Canadian Paperworkers Union, Local 1120, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, the Board commented on what may reasonably be expected by an employee of a union at 64 and 65:

> *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interest of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.*

[137] It is not the function of the Board to determine if the Union was correct in its assessment of the merits of the grievances or to second guess every action taken by the Union. In *Chabot v Canadian Union of Public Employees, Local 4777*,[87] the Board stated:

The Board does not minutely examine each and every action by a union but looks at the whole course of conduct to see if the union failed in its duty of fair representation. Thus, it is not the duty of the Board to assess the performance of a union in each meeting, telephone conversation and correspondence undertaken in the course of representation of a member. The Board must look at the Union's representation of the Applicant in its entirety and determine if the Union acted arbitrarily in not filing a grievance with respect to the Applicant's complaints of harassment.

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[86] *Supra* note 76.
[87] *Supra* note 72, at para 74.

[138] In *Lucyshyn*, the Board held that the Board is to apply an objective standard to assessing the Union's processing of grievances:

> *[32] However, the Board's reluctance to interfere in decisions made by a trade union in the processing of grievances is based upon an objective standard. That is, the Board must be shown that the Union has taken steps to investigate a potential grievance and has taken a measured view of that grievance and made a reasoned decision in respect thereof.*

[139] This finding was confirmed in *Dickerson v United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179*[88], where the Board held that as long as the actions of a union are not discriminatory, arbitrary or in bad faith, the Board cannot interfere with the union's judgment.

[140] In *Owl v Saskatchewan Government and General Employees' Union* [89], the Board stated:

> *In this case, there was no evidence that there had been no investigation or improper investigation by the Union. The Applicant's arguments were that the Union had failed to interview what she considered to be supportive witnesses for her case. Again, these allegations go to the nature and manner in which the Union chose to present the case. Absent gross negligence or extraordinary circumstances in the handling of the case, the Board should not interfere in second guessing or micro-managing the Union's case.*

[141] In many decisions the Board has relied on the following explanation of the concepts, arbitrary, discriminatory and bad faith as reported in *Toronto Transit Commission* [90]:

> *. . . a complainant must demonstrate that the union's actions are:*
>
> *(1) "ARBITRARY" – that is, flagrant, capricious, totally unreasonable, or grossly negligent [citation omitted];*
>
> *(2) "DISCRIMINATORY" – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
>
> *(3) "in BAD FAITH" – that is, motivated by ill-will, malice, hostility or dishonesty.*
>
> *. . . The behaviour under review must fit into one of these three categories. It must be "arbitrary", "discriminatory", or undertaken "in bad faith". Mistakes or misjudgements are not illegal; moreover, the fact that an employee fails to understand his rights under a collective agreement or disagrees with the union's interpretation of those rights does not, in itself, establish that the union was wrong – let alone "arbitrary", "discriminatory" or acting in "bad faith".*[91]

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[88] *Supra* note 73.
[89] *Supra* note 79, at para 64.
[90] [1997] OLRD No. 3148, at paras 9 and 10.
[91] See, for example, *Petite v International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 555*, *supra* note 70 at para 73; *Lucyshyn*, *supra* note 70; *Hargrave v Canadian Union of Public Employees, Local 3833*, *supra* note 75; *Owl v Saskatchewan Government and General Employees' Union*, *supra* note 79.

[142] Much of the argument in this matter focused on whether the Union had engaged in arbitrary conduct. Honest mistakes, innocent misunderstandings, simple negligence or errors in judgment will not constitute arbitrary conduct. Arbitrariness is generally equated with perfunctory treatment and gross or major negligence. Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter. Superficial, cursory and non-caring are all terms that have also been used to describe arbitrary conduct. Gross negligence that reflects a complete disregard for critical consequences to an employee will be viewed as arbitrary.

[143] In *Lucyshyn*, the Board relied on the following description of the duty not to act in an arbitrary manner set out by the Canada Labour Relations Board in *Rousseau v International Brotherhood of Locomotive Engineers et al.*[92]:

> *Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.*
>
> *Negligence is distinguishable from arbitrary, discriminatory or bad faith behaviour. The concept of negligence can range from simple negligence to gross negligence. The damage to the complainant in itself is not the test. Simple negligence may result in serious damage. Negligence in any of its variations is characterized by conduct or inaction due to inadvertence, thoughtlessness or inattention. Motivation is not a characteristic of negligence. Negligence does not require a particular subjective stage of mind as does a finding of bad faith. There comes a point, however, when mere/simple negligence becomes gross/serious negligence, and we must assess when this point, in all circumstances, is reached.*

[144] In a number of decisions, including *Lucyshyn*, the Board has relied on the following passage in *North York General Hospital*,[93] where the Ontario Labour Relations Board described the relationship of negligence to arbitrariness:

> *A union is not required to be correct in every step it takes on behalf of an employee. Moreover, mere negligence on the part of a union official does not ordinarily constitute a breach of section 68. See Ford Motor Company of Canada Limited, [1973] OLRB Rep. Oct. 519; Walter Princesdomu and The Canadian Union of Public Employees, Local 1000, [1975] OLRB Rep. May 444. There comes a point, however, when "mere negligence" becomes "gross negligence" and when gross negligence reflects a complete disregard for*

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[92] *Supra* note 75.
[93] [1982] OLRB Rep Aug 1190 at 1194. This decision is also cited as *Wu v CUPE, Local 1692*, 1982 CarswellOnt 1131 (OLRB).

> *critical consequences to an employee then that action may be viewed as arbitrary for the purposes of section 68 of the Act. In Princesdomu, supra, the Board said at pp 464-465:*
>
> > *Accordingly at least flagrant errors in processing grievances--errors consistent with a "not caring" attitude--must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so, implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint.*

[145] The Board does not minutely examine each and every action by the Union but looks at the whole course of conduct to determine whether the Union failed in its duty of fair representation. It is not the duty of the Board to assess the performance of the Union in each meeting or email undertaken in the course of Lapchuk's representation. The Board must look at the Union's representation of Lapchuk in its entirety and determine if the Union breached its duty of fair representation.

LRB 353-13:

[146] With respect to this matter, the Union argued that it should be dismissed for delay. The Board does not agree. While there was certainly delay in having this matter adjudicated, the parties consented to that delay. In most delay cases, the delay being considered is delay in the filing of an application. The rationale for this is to ensure that the Union is not prejudiced by being unaware that its conduct is being called into question. The evidence before the Board established the following. Lapchuk contacted Hendriks on May 25, 2011; she responded the same day. Lapchuk wrote to Hendriks again the next day. Again, she explained that she would not be filing a grievance, and the rationale for her decision. The DFR Application was filed on August 23, 2011, less than three months later. There was no delay.

[147] The Board turns then to examine the actions complained of in LRB 353-13. The Board is satisfied that, with respect to those events, the Union satisfied its duty of fair representation. The evidence submitted by the Union satisfied the Board that Hendriks took the necessary steps to investigate the issues raised by Lapchuk. She reached a reasonable conclusion to not proceed with a grievance based on the evidence before her. While the Government had significantly delayed fulfilling its duty to remove the letter of reprimand from the file, at that point it had been removed. Lapchuk did not provide evidence that he suffered any harm caused by the lapse.

[148] The other issue raised in LRB 353-13 was a potential contravention of section 36.1 of *The Trade Union Act*. The Board agrees with the Union that Lapchuk has not proven a contravention. As the Union noted, that section only applies to disputes between employees and their unions "relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder". None of the issues raised in LRB 353-13 pertains to these kinds of disputes.

[149] As a result, LRB 353-13 is dismissed.

LRB 263-16:

[150] The evidence in this matter does not satisfy the Board that, in its representation of Lapchuk, the Union complied with section 6-59 of the Act, or with the principles established in *Gagnon*. Pursuant to the Act and the certification order granted to the Union, it was the sole bargaining agent for Lapchuk. As such, the Union had to be prepared to accept a significant degree of responsibility for him, especially when, as in this case, Lapchuk's employment depended on the termination grievance and the arbitration. After reviewing the Union's actions in their entirety, the Board has concluded that the Union contravened the duty of fair representation it owed to Lapchuk. There are many examples of the arbitrary, discriminatory and bad faith approach to the representation of Lapchuk that add up to this conclusion.

[151] The arbitrary, discriminatory conduct in this matter started with the accommodations issue. At the meeting on September 30, 2013 that was attended by Lapchuk, Buchinski and Moore, Buchinski's responsibility was to act as an advocate for Lapchuk. Based on all of the evidence received, the Board has determined that he did not fulfill that role.

[152] Buchinski admitted he did nothing to assist Lapchuk with the accommodations issue. Even though the Union had been involved in assisting Lapchuk in originally obtaining the accommodations, and Buchinski admitted that meant the Union would have a file, he did not look for it. McCorriston said Buchinski could have asked for Lapchuk's previous file to be retrieved when PSC said they could not find their file and that he should have looked for the file. McCorriston later suggested that under the Union's file retention policy, seven years after an issue is resolved, the file would be shredded. Lapchuk's previous file at the Union may no longer have existed – but no one made the effort to assist Lapchuk by even looking for it.

[153] Lapchuk told McCorriston that Buchinski was “dismissive” and “condescending” toward him at the meeting[94]. McCorriston did not engage with Lapchuk to investigate the cause for the breakdown of the meeting and of his relationship with Buchinski. He treated Lapchuk in an arbitrary, discriminatory manner by not investigating what happened or taking into account Lapchuk’s concerns or Lapchuk’s illness.

[154] The Union’s conduct respecting Lapchuk’s request for assistance with his accommodations issues reflected a complete disregard for the consequences to Lapchuk.

[155] The Board turns next to the preparation for and conduct of the arbitration. It is not for the Board to determine whether the Union was correct in deciding how to conduct the arbitration, and which witnesses to call. The Board will not microscopically review the Union’s conduct during the arbitration proceedings or minutely assess and second guess its actions. However, what the Board expects and needs to see in the Union’s evidence is that it arrived at its decisions in a fair and reasonable manner, without gross negligence, taking into account all reasonably available information and relevant considerations.

[156] It is not the role of the Board to second-guess the Union’s decisions in how it ran the arbitration. But the Union’s inability to explain the rationale for its decisions adds to the evidence that it was acting in an arbitrary manner. In some cases, it could not even advise the Board who had made important decisions. The Union was required to put its mind to the merits of the grievances and engage in a process of rational, reasoned decision making, based on all reasonably available information and relevant considerations. Here the Union acted with complete disregard for or indifference to the consequences of their decisions.

[157] The grievance committee recommended that the grievances be heard by an arbitration panel. The grievances were heard by a single Arbitrator. The Board is not satisfied that the Union met its duty to make a thoughtful decision about this choice because the Union provided no evidence that a thoughtful process was followed in making the decision. None of the Union’s witnesses could explain how or why that decision was made or even who made the decision. We will never know if this choice would have affected the outcome of the arbitration. What we do know is that the grievance arbitration provisions of the collective agreement assume a panel will

[94] Exhibit U14.

be used[95], and that the grievance committee believed it "may be advantageous for this case". According to the evidence before the Board, the Union did not make a rational, reasoned decision on this issue.

[158] The Board finds the Union's approach to the issue of medical evidence to be particularly arbitrary. While Amor and Hardy emphasized the importance of medical evidence to Lapchuk's case, the arbitration had to be adjourned because they showed up for the September dates with no medical evidence. During conference calls on November 4 and 6, 2015 the Arbitrator warned the Union that she shared the Government's concern that the medical evidence they were proposing to provide would be insufficient. The Arbitrator made it clear that the Union knew, before the hearing reconvened in November, what was required of them, but they chose not to provide appropriate evidence. They did not just act negligently or exercise poor judgment. They acted in blatant and reckless disregard for the consequences to Lapchuk. It is incomprehensible and inexcusable that they would choose to proceed with the November hearing dates, knowing their case would fail.

[159] The Union insisted that Lapchuk had not provided them with authorization to obtain his medical records, yet they met with both Petroski and Dr. Cheshenchuk and obtained medical reports from them. Lapchuk provided them with Dr. Amundson's report and consent to them contacting him. They had two reports from Dr. Clarke. Lapchuk asked them to look into the conflict of interest issues to determine whether Dr. Clarke and/or Dr. Natarajan could be called as witnesses. The Union argued that it was up to Lapchuk to provide medical reports to them. While it is true that they required his consent to access his medical information, the evidence indicates they had that consent.

[160] The LROs indicated that before the arbitration they had medical documents that were put in evidence, dating back to 2001, but no diagnosis of PTSD. The evidence in this matter indicates that this was not true. The Arbitrator had two reports by Dr. Clarke, that indicated she had diagnosed Lapchuk with PTSD. Hardy admitted that they did not look into the conflict of interest issues Lapchuk raised in the November 7, 2015 email, to determine whether there really were legal impediments to Dr. Clarke testifying. Dr. Natarajan also diagnosed Lapchuk with PTSD. When questioned as to why the Union did not tender Dr. Natarajan's report as an exhibit or call him as a witness at the arbitration, Hardy had a variety of answers: the Union had no knowledge

[95] The only reference to using a single arbitrator appears in the Letter of Understanding appended to the collective agreement as "Letter of Understanding, 98-2, Dispute Resolution Options". The last line of this seven page document states: "By mutual agreement, the parties may agree to a single Arbitrator."

of the report until January 26, 2016; Lapchuk did not give it to them; Lapchuk had the binders of documents that were to be tendered in the arbitration and he did not raise its absence as an issue; the Union did not have a copy of it; it would not have made a difference to the arbitration case; he did not ask the Union to put it into evidence until January 2016; she did not have permission to access the report. However, she agreed that in response to the November 7, 2015 email[96] she did not ask Lapchuk for permission to get the report. Hardy admitted that, after receipt of the November 7, 2015 email she did not do anything to follow up on Lapchuk's suggestion that the Union look into obtaining Dr. Natarajan's report and/or evidence.

[161] Hardy testified that in previous arbitrations she had conducted where medical evidence was submitted, she did not have to call a witness because the reports were accepted by the employer. She did not know what to do when the Government would not consent in this case and she did nothing to find out how to properly proceed.

[162] When gross negligence reflects a complete disregard for critical consequences to an employee then that action will be viewed as arbitrary. The Board may decide that a course of conduct is so implausible, so summary or so reckless as to be unworthy of protection. That is what happened here. In her testimony, Hardy admitted that she knew that if they proceeded without additional medical evidence, the arbitration would likely be unsuccessful. In Amor's email of November 5, 2015, she admitted they were failing in their duty of fair representation in choosing to proceed in that manner.[97] And yet, that is exactly what they chose to do. In LRB 263-16, referring to that email, Lapchuk stated:

> *Why would you request an indemnity Release if you were going to do the correct thing in the carriage of the grievance? To me this effectively confirmed effectively the carriage of my grievance was being done in Bad Faith*.[98]

[163] The Board agrees. We can never know whether additional medical evidence would have changed the outcome of the arbitration. What we do know is that the Union never took the necessary steps to put appropriate medical evidence before the Arbitrator. When the Government would not agree to their proposed medical evidence, the LROs did not know what to do. They provided no evidence of engaging in a thoughtful process to determine how to proceed. Every shortcoming in the evidence Amor and Hardy blamed on Lapchuk, when it was their responsibility to gather and tender the evidence. The grievance was of critical importance to Lapchuk, being a

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[96] Exhibit U54/A34.
[97] Exhibit U50, *supra* note 46.
[98] At page 5.

termination grievance. The LROs are not volunteers, but trained employees of the Union whose job description lists, as the first responsibility under Key Accountabilities and Primary Functions, "researching and presenting grievances, arbitrations and Labour Relations Board cases"[99]. It was gross negligence for Amor and Hardy, having learned that the Government was not consenting to the admission of the medical reports, to do nothing to find out what was required of them to get the reports admitted. It was gross negligence for them to proceed with the conclusion of the arbitration hearing on November 12th when they knew they did not have sufficient medical evidence to properly defend Lapchuk. This arbitrary, uncaring, reckless course of conduct was a serious breach of the duty of fair representation they owed to Lapchuk. Further, it was gross negligence for the Union to not ensure their LROs are educated on basic rules of evidence.

[164] The Union relied on the Authorization/Revocation document to justify the absence of sufficient medical evidence, and to attempt to shift the blame for its absence to Lapchuk. The Board does not accept that argument. Despite the Union being in possession of that document, the LROs obtained reports from and met with Petroski and Dr. Cheshenchuk. The Union provided no explanation of why they were willing and able to interact with those medical experts but not Dr. Clarke, Dr. Natarajan or Dr. Amundson. Twice[100] Lapchuk sent Dr. Amundson's report to them, the second time with the note "This would be very good expert witness as to an overview of PTSD".[101] Amor told Lapchuk she had been in contact with Dr. Amundson but provided no explanation in her testimony as to why he was not called as a witness at the arbitration. They had two medical reports from Dr. Clarke that they filed at the arbitration. On November 7, 2015, Lapchuk wrote to Hardy and asked her to determine whether Dr. Clarke was in a conflict of interest: "I am advising you she is probably in a conflict of interest for the already stated reasons. The union will have to determine that for themselves".[102] With respect to Dr. Natarajan, on the same date he stated: "Additionally it is foolish of me to suggest those witness's that are barred by the consent forms I signed to never be witnesses for me such as LTD psychiatrist. It would seem SGEU might access that psychiatric expert easily with SGEU LTD's permission. He is definitely qualified and you can work his issues out internally with SGEU to access his professional opinion".[103] The Union did not pursue either of these witnesses, who could potentially have given critical medical evidence, being doctors who had diagnosed Lapchuk's PTSD. Their attempt now to justify that arbitrary, bad faith action on the basis of the Authorization/Revocation document is

[99] Exhibit A42.
[100] April 29, 2015 and September 2, 2015.
[101] Exhibit A39.
[102] Exhibit U54/A34; emphasis added.
[103] Exhibit U54/A34; emphasis added.

rejected. Such an argument is particularly disingenuous coming from Hardy, when she testified at this hearing that the first time she saw or knew about this document was in the middle of this hearing, February 2019. If this document had the critical effect on their ability to obtain medical evidence that they suggest, the Board would have expected it to be the subject of considerable discussion. The fact that Amor never discussed it with Lapchuk or Hardy further belies this argument.

[165] Another issue that leads the Board to determine that the Union acted in an arbitrary manner and in bad faith was the length of time it took the Union to move the arbitration forward. The collective agreement that applied to Lapchuk contains provisions that indicate that the parties believe time is of the essence in the hearing of an arbitration of a termination grievance:

> *22.1 F) Termination arbitrations will be heard, and decisions rendered, within one hundred and twenty (120) calendar days, unless otherwise agreed to by the parties.*
>
> *22.2 A) …The Arbitration Board shall meet not later than seven (7) calendar days after it has been constituted, unless by consent of both parties the date is set back.*
>
> *22.2 I) The proceedings of an Arbitration Board shall be completed within one (1) year of the appointment of the Chair.*
>
> *22.3 D) The award of the Arbitration Board shall be rendered in writing within ninety (90) calendar days of the close of the hearing, unless otherwise agreed by the parties….*[104] [emphasis added]

[166] Lapchuk was terminated on October 28, 2013. The Union did not approve moving forward to arbitration until February 19, 2015, almost 16 months after his termination. The hearing did not commence until September 14, 2015, almost 23 months after his termination. Despite this excessive delay, they did not come to the arbitration prepared with the necessary evidence to prove Lapchuk's defence.

[167] The Arbitrator was appointed on March 24, 2015. Her Decision was rendered on August 31, 2016, 17 months after her appointment and 9 months after the close of the hearing.

[168] The Union provided no explanation of why it did not ensure that these provisions of the collective agreement were complied with. None of the Union witnesses could explain the reason for the delays. There was no evidence that a reasoned, rational decision was made to proceed in this manner.

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[104] Exhibit U26.

[169] Hardy and Amor testified that, in addition to the medical defence, the other theory of the case was that the Government failed to recognize that putting Lapchuk into the field without sufficient training caused risk, because he was in full uniform, in a law-enforcement-looking vehicle. Lapchuk also believed that the Fort Qu'Appelle incident was a setup by his co-workers. The Arbitrator noted[105] there were "many instances" where Lapchuk gave evidence that was potentially relevant to this defence, that was not put to the Government's witnesses. Hardy and Amor did not follow the proper approach to having it admitted. Therefore, the Arbitrator had no choice but to disregard this evidence. We can never know whether that evidence would have changed the outcome of the arbitration. It weighed heavily enough on the Arbitrator's mind that she referred to it in her Decision. What we do know is that Hardy and Amor were not trained and/or experienced enough to be able to submit it in an admissible manner. Again, it was gross negligence for the Union to not ensure their LROs are educated on basic rules of evidence.

[170] Based on all of these issues, the Board has determined that the Union did not meet its duty of fair representation, and acted toward Lapchuk in a manner that was arbitrary, discriminatory and in bad faith.

Remedy:

[171] When the Board is considering an appropriate remedy, its goal is to place Lapchuk as far as possible in the same position he would be in if the Union had not contravened its duty of fair representation. Remedies are to be compensatory, not punitive.

[172] In his Written Closing Brief, Lapchuk requested the following remedies:

> a) *All costs and benefits due to me to make me whole including pension, life insurance, LTD benefits retroactive to full period since 2016.*
>
> b) *The legal expenses of all employment related court action I had to pay for*
>
> c) *Damages for Mental distress and injury*
>
> d) *Punitive Damages for the conduct of SGEU etal.*
>
> e) *Special punitive damages for illegal actions of perjury, fraudulent misrepresentations, theft and this was done by LRO's representing me in these grievances.*[106]

[105] At paras 194 and 195.
[106] At pages 26-27.

[173] He refers to *Hartmier v Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955* [107] in support of his argument that the Board has authority to order the Union to pay for his legal expenses.

[174] In addition, he asks that he be reinstated to his position with the Government. He asks for additional remedies that the Board will not recite or comment on, other than to say they are all outside the Board's jurisdiction.

[175] The Union did not address the issue of remedy in its Brief of Law and Argument. In its final argument the Union submitted that the Board has no authority to order reimbursement of legal costs expended in this or other proceedings and no authority to award punitive damages.

[176] The Board has determined that it does not have sufficient evidence on which to make a determination as to an appropriate remedy. The only information before the Board on the issue of an appropriate quantum of damages are the Appendices to the Final Argument and Brief of Law submitted by the Union to the Arbitrator on January 17, 2016. This information is, obviously, more than six years old. It was accepted at that time by the Union as an appropriate calculation of the damages that the Government should pay to Lapchuk if the arbitration had been successful. Whether it is an appropriate calculation in this matter has not been argued before the Board. The Board has not been provided with any of the evidence that was used as the basis for those calculations. The Board has not been provided with any evidence that addresses the issue of whether there has been any mitigation of those damages.

[177] Accordingly, the Registrar will be instructed to convene a case management conference at which the Board will hear submissions from the parties on how best to proceed to put the necessary evidence and arguments before the Board to allow for a determination of remedy to be made.

Conclusion:

[178] Defending Lapchuk at the arbitration would have been very challenging. Lapchuk's PTSD makes it difficult to interact with him at times. He is prone to hyperbole in relaying information. The arbitration was a complicated, challenging case with a complicated, challenging grievor. But that does not mean that the Union was justified in abandoning him and giving up. They had a responsibility to put forward the best case possible in Lapchuk's defence, and they did not do that.

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[107] 2017 CanLII 20060 (SK LRB).

They had a responsibility to exercise the determination and patience needed to address Lapchuk's disabilities and fully comply with their duty of fair representation, and they did not do that.

[179] The conduct of the arbitration reflects an approach by the Union based on an inability or unwillingness to understand and accommodate persons suffering from a mental illness. The medical reports filed as Exhibits U47 and U80 indicate that what the Union describes as misconduct by Lapchuk are actually symptoms of his illness: irritability; angry outbursts; persistent anger; feelings of betrayal; intense psychological distress. Exhibit U80 includes the following statement:

> *Due to patient's medical condition, Mr. Lapchuk can have difficulties managing anger, stress, low self-esteem, can behave inappropriately for particular situations.* [emphasis added]

[180] The Board saw numerous examples of this during the hearing of this matter. Finding Lapchuk at fault for these actions would be to discriminate against him on the basis of his medical condition. The inability or unwillingness of the Union to understand and accommodate Lapchuk's illness was evident in the evidence but also in the Union's conduct of the hearing of this matter. This only provided more confirmation of the veracity of Lapchuk's allegations of being treated in a discriminatory manner by the Union.

[181] The Board thanks the parties for their written and oral submissions. All were considered in arriving at this decision. The Chairperson will remain seized with this matter to hear further submissions from the parties with respect to remedies.

DATED at Regina, Saskatchewan, this **23rd** day of **February, 2022.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson