CHAU HA, Applicant v SASKATCHEWAN POLYTECHNIC FACULTY ASSOCIATION and SASKATCHEWAN POLYTECHNIC, Respondents

LRB File Nos. 002-23, 096-23, 124-23 and 125-23; October 13, 2023
Chairperson, Michael J. Morris, K.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act*)

For Chau Ha:	Self-represented
Counsel for Saskatchewan Polytechnic Faculty Association:	Gordon D. Hamilton
Counsel for Saskatchewan Polytechnic:	Kit McGuinness

Applications for pre-hearing production of documents in duty of fair representation disputes – Subsection 6-111(1)(b) of *The Saskatchewan Employment Act* – *Air Canada* principles applied – *Clarke Transport* discussed – First production application dismissed – Second production application granted in part.

Evidence – Solicitor-client privilege – Union entitled to a sphere of confidentiality with its counsel – No basis for privileged advice given to Union by its counsel to be produced to applicant – Board refuses to order production.

Evidence – Propensity evidence – Documents sought intended to be tendered for a prohibited purpose – *Lumberjack* considered – Board refuses to order production.

REASONS FOR DECISION

Background:

[1] Michael J. Morris, K.C., Chairperson: Chau Ha [Ms. Ha] has two disputes before the Board in which she alleges breaches of the duty of fair representation[1] by her union, the Saskatchewan Polytechnic Faculty Association [Union].[2] These disputes are set to be heard by the Board during the week of December 11, 2023. In the meantime, Ms. Ha has applied for the Board to compel production of certain documents in advance of December 11th.[3] These are the Board's reasons with respect to Ms. Ha's pre-hearing production applications.

[1] Contrary to s. 6-59 of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [Act].
[2] LRB File No. 002-23 and LRB File No. 096-23.
[3] LRB File No. 124-23 and LRB File No. 125-23.

[2] As a preliminary matter, the Board notes that Ms. Ha's pre-hearing production applications do not conform with the Board's expectations with respect to such applications. First, although Ms. Ha has two disputes set for hearing in December, her Form 19 applications do not specify which dispute(s) the documents she seeks relate to. Second, Ms. Ha's applications do not evidence her having first requested documents from the respondents, or their replies to any such requests. As such, they do not accord with clause 21(2)(a) of *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021* [Regulations] (emphasis added):

> *(2) An employer, union or other person that intends to apply to the board for an order for pre-hearing production of particulars or documents or things pursuant to section 6-111 of the Act shall:*
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> > *(a) file an application in Form 19 (Application for Pre-hearing Production of Particulars or Documents or Things), including evidence that the applicant has served the respondent with a sufficiently particularized request for production and that the respondent has failed, refused or objected to comply with that request.*

[3] The requirements to identify to which application(s) an application for pre-hearing production relates and to file the evidence described in clause 21(2)(a) of the Regulations assist the parties and the Board in understanding which documents are in issue, and why. The Board's expectation is that these requirements will be followed.

[4] Before discussing Ms. Ha's applications for production, it will be helpful to briefly outline the underlying applications which have prompted them.

[5] In LRB File No. 002-23 [First DFR], Ms. Ha alleges that the Union failed to ensure she was accorded procedural fairness in three investigative meetings with her employer, Saskatchewan Polytechnic [Employer]. According to Ms. Ha, this resulted in her being issued two reprimands, though the first in time was withdrawn shortly before it was to be arbitrated [First Reprimand]. The second reprimand was removed from her personnel file due to the passage of time, in accordance with the collective agreement [Second Reprimand]. Before that, Ms. Ha had requested that it be grieved. Her request was initially denied, but ultimately the Union's Executive Council [EC] agreed that she may have been denied natural justice by the Employer before it issued the Second Reprimand. Around the same time, in April of 2022, several Faculty Relations Officers [FROs], who are employed by the Union to assist and represent employees with respect to the Employer, complained to the EC that Ms. Ha had been harassing them for a prolonged period. In Ms. Ha's view, their allegations of harassment were baseless and indicative that the Union was unfairly biased against her.

[6] The Union applied to summarily dismiss the First DFR. Its application was allowed in part, and the Board's conclusions were as follows:

> ***[34]*** *In the Board's view, it is not plain and obvious that these allegations regarding the Union's conduct with respect to the First Investigative Meeting and First Reprimand could not be characterized as arbitrary. Ms. Ha effectively alleges that the Union did absolutely nothing to assist her with respect to the First Investigative Meeting, and that she received the First Reprimand as a result. The Board notes that article 23.1.1 contemplates an employee's right to Union "representation" at an investigative meeting. This of course does not mean that Ms. Ha will ultimately prevail with respect to these allegations, only that the Board is unable to dismiss them at this time on the basis that they are "patently defective".[26]*
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> ***[35]*** *The allegations relating to and following the Second Reprimand are far more detailed than those with respect to the First Reprimand. In particular, Ms. Ha alleges that the FROs were biased against her prior to and following the Second Reprimand, and improperly continued to represent her in spite of this bias. According to Ms. Ha, their bias and bad faith influenced their February 10, 2021 and January 14, 2022 decisions to deny her grievance requests following the Second Reprimand. Ms. Ha also alleges that the EC failed to keep her apprised of the status of her grievance request following the EC's spring 2022 decision to overturn the FRO's January 14, 2022 decision denying it, and failed to reasonably advance her grievance.*
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> ***[36]*** *It is not plain and obvious that the allegations relating to and following the Second Reprimand could not amount to a breach of s. 6-59, if proven. Accordingly, the Union's application with respect to these allegations cannot succeed.*
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> ***[37]*** *The net result of these reasons is that the Union's summary dismissal application has been partially successful. The portion of Ms. Ha's application purporting to advance claims for breaches of other employees' rights will be summarily dismissed. …*[4]

[7] In LRB File No. 096-23 [Second DFR], Ms. Ha notes that she was not able to self-nominate to be considered as a program head for librarians. In her view, the Union breached its duty of fair representation in failing to grieve her inability to do so as a purported violation of the collective agreement. Ms. Ha's position is that the collective agreement does not require a candidate to be nominated by their peers.

[8] Having set out the background for the First DFR and Second DFR, the Board will now outline Ms. Ha's applications for production.

[9] In LRB File No. 124-23 [First Production Application], Ms. Ha seeks "all documents (evidence) that [her manager] has for putting [her] on a performance improvement plan (PIP)" and "[a] list of coaching provided by [her manager] to [her]".[5] Ms. Ha explains that these documents

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[4] *Saskatchewan Polytechnic Faculty Association v Ha*, 2023 CanLII 30423 (SK LRB) [Summary Dismissal Decision], paras 34-37.
[5] First Production Application: Ms. Ha's application, paras 3(1) and 3(2).

will prove that her manager made an arbitrary decision to place her on a performance improvement plan, and that she did not receive any coaching while on the plan. According to Ms. Ha, this disproves the Union's explanation for why it refused to grieve the Second Reprimand, i.e., that she had received "extensive coaching" prior to it, and "will prove the [Union] has a history of failing to represent [her] by acting in an arbitrary, discriminatory, and bad faith manner.[6] Notably, the First Production Application is seemingly directed to Ms. Ha's manager, who is not a party to any of the proceedings before the Board, rather than the Employer. That said, the Employer has filed a reply and written submissions opposing it.

[10] In LRB File No. 125-23 [Second Production Application], Ms. Ha seeks the following from the Union:

> 1. *All evidence (recordings, emails, texts, reports, documents, meeting notes etc.):*
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>   a) *Amongst the Executive Council*
>   b) *Amongst the faculty relations officers*
>   c) *Amongst the Executive Council AND faculty relations officers*
>
>   *about Chau Ha's complaints against various members of [the Union], complaints about the employer, grievance requests, LRB applications, and how to respond to Chau Ha when she contacts [the Union].*
>
> 2. *Written letter from [the Union's] lawyer Gordon Hamilton on what he said to [the Union's] Executive Council regarding proceeding to arbitration with Chau Ha's grievance request about the program head CBA article (096-23).*
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> 3. *Job description of the Lead Faculty Relations Officer, President, Vice Presidents and Privacy Officer.*
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> 4. *Regarding former union member Mr. CE, the emails that Lead FRO Adam Farrion wrote to the Executive Council about him when Chau Ha was VP of Saskatoon and Chau Ha's formal complaints to the Executive Council that he had violated [the Union's] Code of Conduct.*[7]

[11] The Board understands that production of the job descriptions is no longer in issue.

[12] Otherwise, the Union resists the Second Production Application in its entirety.

[13] The parties' arguments with respect to the two production applications are discussed in more detail, below.

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[6] First Production Application: Ms. Ha's application, para 3(2).
[7] Second Production Application: Ms. Ha's application, paras 3(1)-(4).

First Production Application: Argument on behalf of Ms. Ha

[14] With respect to the First Production Application, Ms. Ha argues:

a. Her manager did not have sufficient evidence to put her on a performance improvement plan.

b. She has reviewed meeting notes taken by the Employer's and Union's representatives when her performance improvement plan was discussed with her and her manager, and in her view there is no evidence that her manager provided any coaching to her.[8] According to Ms. Ha, "[h]alf our coaching meetings were me asking to clarify the problems [her manager] listed on the PIP because I had no idea what she is referring to so they were not coaching meetings[.]"[9]

c. The Union had no basis to refuse to grieve the Second Reprimand for the reason it gave, i.e., that Ms. Ha had received extensive coaching by her manager. Its explanation is part of a pattern of making arbitrary, discriminatory, and bad faith decisions with respect to her. This pattern is relevant to both the First DFR and the Second DFR.

d. Her request for the Employer to produce documents "is reasonable because the employer should have the documentation to prove that their actions are justified, that it is not arbitrary, discriminatory, or done in bad faith."[10]

First Production Application: Argument on behalf of the Employer

[15] For its part, the Employer argues:

a. Ms. Ha was placed on a performance improvement plan by her manager and received extensive coaching.

b. Ms. Ha has a significant history of making formal and informal complaints about the Union, and the primary focus of the First Production Application appears to be allegations from a withdrawn application, LRB File No. 146-21. In that matter, Ms. Ha alleged that the Union failed to represent her in relation to the performance improvement plan.

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[8] Ms. Ha indicates that she has these meeting notes in her possession.
[9] Ms. Ha's written submissions in support of the First Production Application, p 3.
[10] Ms. Ha's written submissions in support of the First Production Application, p 3.

c. Consideration of the *Air Canada* principles[11] militates against ordering the production requested.

d. The requested documents are not arguably relevant to the issues to be decided in either the First DFR or the Second DFR, which focus on the Union's conduct. Ms. Ha is seeking the documents to put the Employer's decision to put her on a performance improvement plan (in 2018) on trial. This is improper.

e. The application is not sufficiently particularized. The Board does not grant broad-spectrum, non-specific or infinite production orders. "All documents (evidence)" that her manager had for putting her on a performance improvement plan is an extremely broad request, which could involve a high number of responsive documents potentially leading back to the start of her employment. Ms. Ha has not provided a basis for the Employer to search for and assemble all of these documents.

f. Ms. Ha already has the documents from the Employer's human resources representative and the FROs who attended her coaching meetings, suggesting that her request is a classic "fishing expedition".

g. The probative value of any of the documents sought, if any, is outweighed by the prejudicial effect of requiring the Employer to search for and produce them in response to Ms. Ha's broad-based request.

h. The Board should not cure the defects in the application by ordering a narrowed set of documents to be produced, because doing so encourages applicants to seek broad-spectrum production of documents in the expectation that the Board will do their work for them.

Second Production Application: Argument on behalf of Ms. Ha

[16] With respect to the Second Production Application, which is directed at the Union, Ms. Ha argues:

a. The purpose of her production request is "to seek evidence that will prove the depth and extent of the [Union's] pattern of arbitrary, discriminatory, and hostility (ADH) against me that has occurred behind closed doors, proving beyond doubt, that they have failed to

[11] *ALPA v Air Canada*, [1999] CIRBD No. 3 [*Air Canada*].

represent me on all matters up to and including my applications." Further, "[i]f they have failed to represent me concerning past grievance requests, then it's highly probable they have failed to represent me regarding these two applications before the LRB."[12]

b. Her request is sufficiently particularized for the Union to know what is being sought. This includes information in the Union's possession relating to: (1) her complaint about her manager placing her on a performance improvement plan; (2) her complaint about library managers allowing library technicians to conduct literature searches without proper training and qualifications; (3) her requests to grieve reprimands she has received; (4) her requests to grieve the Employer's compliance with the natural justice required when investigating an employee; (5) her request to grieve the prohibition against her self-nominating as a potential program head; (6) her applications before the Board, both past and present; (7) Her Code of Conduct, Code of Ethics, privacy and harassment complaints against various FROs and members of the EC, "from the first complaint to the last complaint."[13]

c. The Union has a large operating budget and sufficient staff to enable it to produce what she requires, and "[t]he fact that they don't have basic, standard record keeping and record management policies, procedures, and practices is not my problem."[14]

d. Any opinion the Union's lawyer provided about the viability of her requested grievance regarding her not being able to self-nominate for the program head position is not privileged. According to Ms. Ha, "In this distinct and narrow instance, Mr. GH works for me" since he gave an opinion to the Union about the proposed grievance's likelihood of success and the Union mentioned his opinion to Ms. Ha.[15]

e. Insofar as requesting documents related to a third party, particularly "Lead FRO AF's harassment of former union member CE, sanctioned by President BG[,] [i]f they have done this to CE, then there is a high probability they have done it to me, hidden behind doors."[16] "How [the Union] has treated CE, hidden behind closed doors, is similar to how they overtly treat me, hence there is a high probability that they have also committed hidden acts of ADH towards me."[17]

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[12] Ms. Ha's written submissions in support of the Second Production Application, p 1.
[13] Ms. Ha's written submissions in support of the Second Production Application, pp 5-6.
[14] Ms. Ha's written submissions in support of the Second Production Application, p 6.
[15] Ms. Ha's written submissions in support of the Second Production Application, p 7.
[16] Ms. Ha's written submissions in support of the Second Production Application, p 1.
[17] Ms. Ha's written submissions in support of the Second Production Application, p 10.

Second Production Application: Argument on behalf of the Union

[17] For its part, the Union argues:

a. The onus is on Ms. Ha to establish that production should be ordered, in accordance with the *Air Canada* principles.

b. The Board must examine Ms. Ha's pleadings in the First DFR and Second DFR for the purposes of determining whether the production sought is arguably relevant to the allegations therein.

c. Ms. Ha's very broad-based requests are founded upon one principal assumption, which is consistently stated throughout her written submissions: "… it is highly probable that the [Union] have committed hidden acts of ADH toward me behind closed doors…". This is a fishing expedition, not a request for specific documents which are arguably relevant to the specific allegations in the First DFR and Second DFR.

d. Ms. Ha is attempting to expand the scope of inquiry into the First DFR and Second DFR to include her entire history of disputes with the Union, including with respect to previous applications before the Board that she has withdrawn.

e. Ms. Ha misunderstands the principles of solicitor-client privilege. The Union is its lawyer's client; Ms. Ha is not.

f. In the Summary Dismissal Decision the Board determined that Ms. Ha had no standing to advance complaints on behalf of other employees. In attempting to obtain documents about another employee's interactions with the Union, on the assumption that it will help her show a "pattern of conduct" that can be inferred to apply to her, Ms. Ha is embarking on a circuitous attempt to accomplish what the Board forbade her to do.

Applicable statutory provisions:

[18] The following provisions of the Act are relevant:

> ***Fair representation***
>
> ***6-59****(1) An employee who is or a former employee who was a member of the union has a right to be fairly represented by the union that is or was the employee's or former employee's bargaining agent with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part.*

(2) Without restricting the generality of subsection (1), a union shall not act in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee.

. . .

Powers re hearings and proceedings

6-111(*1) With respect to any matter before it, the board has the power:*

…

(b) to require any party to produce documents or things that may be relevant to a matter before it and to do so before or during a hearing or proceeding;

Analysis and Decision:

[19] The Board has considered applications for the pre-hearing production of documents on numerous occasions and has consistently applied the *Air Canada* principles in considering whether to exercise its discretion to compel production.

[20] The *Air Canada* principles are quoted in *SAHO*, a 2012 decision of the Board:

1. *Requests for production are not automatic and must be assessed in each case.*

2. *The information requested must be arguably relevant to the issue to be decided.*

3. *The request must be sufficiently particularized so that the person on whom it is served can readily determine the nature of the request, the documents sought, the relevant time-frame and the content.*

4. *The production must not be in the nature of a fishing expedition; that is, the production must assist a complainant in uncovering something to support its existing case.*

5. *The applicant must demonstrate a probative nexus between its positions in the dispute and the material being requested.*

6. *The prejudicial aspect of introducing the evidence must not outweigh the probative value of the evidence itself, regardless of any possible "confidential" aspect of the document.*[18]

[21] Apart from identifying the above principles, the Board also noted that "it has not been the practice of the Board to grant broad-spectrum, non-specific or infinite production Orders to in essence, compel the kind of pre-hearing discovery of documents that occurs in civil courts."[19]

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[18] *Service Employees International Union (West) v Saskatchewan Association of Health Organizations*, 2012 CanLII 18139 (SK LRB) [*SAHO*], at para 45.
[19] *SAHO*, at para 37.

[22] Further, the Board noted that "the greater the number of documents sought, the stronger the probative nexus expected by the Board, particularly if considerable expense, time and effort is required to locate and produce the desired documents."[20] Notably, this assessment is analogous to the proportionality principle currently employed by the Court of King's Bench when considering parties' disclosure obligations. In *Clarke Transport*, a 2013 decision, Mr. Justice Scherman described this as follows (emphasis added):

> *[19] … Rule 1-3 … expressly provides that the purpose of the rules is to provide a means by which claims can be justly resolved in a court process in a timely and cost effective manner and that the rules are intended to be used to identify the real issues in dispute, to facilitate the quickest means of resolving a claim at the least expense and to provide an effective, efficient and credible system of remedies and sanctions to enforce the rules. Proportionality and striking an appropriate balance are now essential considerations in all aspects of the Rules.*
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> …
>
> *[25] If a matter is of only debatable, potential or marginal materiality or relevance then it is appropriate for the court, in making its decision and exercising its discretion, to do a cost/benefit analysis taking into account the considerations outlined in the foundational rules. Where the materiality or relevance is uncertain, the cost imposed in time, expense or burden is significant or the benefit limited or unknown then proportionality considerations may well be the deciding factors.*[21]

[23] The considerations which underlie the proportionality principle employed by the Court of King's Bench are equally relevant to proceedings before the Board. Proceedings before the Board should be timely and cost-effective, and be focused on the real issues in dispute. These considerations are able to be taken into account under the *Air Canada* framework.

[24] The first and second *Air Canada* principles confirm that the starting point in considering any application for production is a review of the pleadings. The pleadings define the issues to be decided.[22]

[25] The Board conducted a review of Ms. Ha's pleadings in the First DFR in the Summary Dismissal Decision. Ultimately, the Board concluded that Ms. Ha had pled an arguable case[23] for the purposes of s. 6-59 with respect to the Union: (1) failing to ensure she was accorded procedural fairness in her investigative meetings with the Employer; (2) not objectively and reasonably considering her grievance requests with respect to the Second Reprimand; (3) failing

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[20] *SAHO*, at para 44.
[21] *Canadian National Railway Company v Clarke Transport*, 2013 SKQB 394 [*Clarke Transport*], at paras 19, 25.
[22] *Saskatchewan Building Trades Council v Woodland Constructors Ltd.*, 2023 CanLII 82026 (SK LRB), at para 15.
[23] The "arguable case" standard is forgiving. It only requires that it not be plain and obvious that an application will fail, assuming that everything that is pled by the applicant is proven.

to keep her apprised of the status of her grievance request following the EC's spring 2022 decision to overturn the FRO's January 14, 2022 decision to not grieve the Second Reprimand; and (4) failing to reasonably advance a grievance with respect to the Second Reprimand following the EC's spring 2022 decision.

[26] For the First DFR, the Board anticipates needing to consider what process was followed before and during the investigative meetings which resulted in the First and Second Reprimand. It may also be required to consider the process involved in the third investigative meeting, which did not result in a reprimand. The Board will need to understand the chronology of events respecting the grievance requests and appeals to the EC related to the Second Reprimand, including what occurred after the EC's spring 2022 decision.

[27] The reasons for some of the Union's conduct alleged in the First DFR will be relevant, particularly its decisions related to grieving or not advancing a grievance related to the Second Reprimand. Ms. Ha will be required to present clear, convincing and cogent evidence to sustain her allegations that the relevant decisions were made in a manner contrary to s. 6-59.

[28] The Second DFR puts in issue whether the Union acted contrary to s. 6-59 in failing to file a grievance with respect to Ms. Ha not being able to self-nominate as a program head for consideration by the Employer. In sum, Ms. Ha takes issue with how the relevant provisions of the collective agreement have been interpreted by the Union and the Employer, and suggests that her interpretation (which would allow her to self-nominate) should form the basis of a grievance. Quoting from the Second DFR, "I want to self-nominate and the CBA does not forbid it but my manager and [the Union] said I am not allowed to self-nominate…".[24]

[29] Ms. Ha will be required to present clear, convincing and cogent evidence that the Union's refusal to grieve the self-nomination issue contravened s. 6-59 of the Act. The basis for the Union's refusal will be the primary issue for determination in the Second DFR.

[30] Having set out the pleadings and issues with respect to the First DFR and Second DFR, the Board will proceed to assess the First Production Application and the Second Production Application. It will begin with the First Production Application, and then turn to the Second Production Application.

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[24] Ms. Ha's application in the Second DFR, para 1(3).

[31] The Board agrees with the Employer that consideration of the *Air Canada* principles militates against awarding the relief sought in the First Production Application.

[32] Recall that what is sought is all the evidence Ms. Ha's manager had for putting her on a performance improvement plan and a list of the coaching that her manager provided to her. The Second Reprimand was issued for Ms. Ha violating the Employer's Code of Conduct in spite of having received coaching in the context of a performance improvement plan.[25]

[33] Further, recall that Ms. Ha already *has* the notes made by both Employer and Union representatives who were present at her coaching meetings. There is no dispute that such meetings occurred, or that notes were taken. Ms. Ha disagrees that they evidence any "real" coaching. Ms. Ha suggests that the Employer should be required to produce all the evidence she requests "because the [Employer] should have the documentation to prove that their actions are justified, that it is not arbitrary, discriminatory, or done in bad faith."[26]

[34] Respectfully, Ms. Ha has not made a persuasive case for the Board to order production from the Employer.

[35] In the First DFR, the focus will be on the information *the Union* had when it conducted its deliberations and made its decisions with respect to the Second Reprimand, not on what information the Employer had.

[36] Moreover, whether the Employer acted in an arbitrary, discriminatory or bad faith manner in placing Ms. Ha on a performance improvement plan, beginning in 2018, is not an issue which must be decided in the First DFR. It is *the Union's conduct* with respect to failing to grieve the Second Reprimand that is in issue, and which must be assessed against s. 6-59 of the Act.

[37] To use the language from *Clarke Transport*, the production sought from the Employer is not relevant to "the real issues in dispute" in either the First DFR or the Second DFR. The argument that the production is relevant to the Second DFR is even weaker than that with respect to the First DFR, given the Second DFR centers on a proposed grievance with respect to Ms. Ha's inability to self-nominate for a program head position, not the Second Reprimand.

[38] Further, ordering the production sought in the First Production Application would unnecessarily burden the Employer, especially given its potentially broad scope.

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[25] Ms. Ha's application in the First DFR, para 6(2).
[26] Ms. Ha's written submissions in support of the First Production Application, p 3.

[39] In sum, Ms. Ha has not persuaded the Board that it is appropriate for it to exercise its discretion to order the production she seeks in the First Production Application. Accordingly, this application will be dismissed.

[40] For ease of reference, the Board reproduces what remains in issue in the Second Production Application, below:

> *1. All evidence (recordings, emails, texts, reports, documents, meeting notes etc.):*
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> *a) Amongst the Executive Council*
> *b) Amongst the faculty relations officers*
> *c) Amongst the Executive Council AND faculty relations officers*
>
> *about Chau Ha's complaints against various members of [the Union], complaints about the employer, grievance requests, LRB applications, and how to respond to Chau Ha when she contacts [the Union].*
>
> *2. Written letter from [the Union's] lawyer Gordon Hamilton on what he said to [the Union's] Executive Council regarding proceeding to arbitration with Chau Ha's grievance request about the program head CBA article (096-23).*
> *…*
>
> *4. Regarding former union member Mr. CE, the emails that Lead FRO Adam Farrion wrote to the Executive Council about him when Chau Ha was VP of Saskatoon and Chau Ha's formal complaints to the Executive Council that he had violated [the Union's] Code of Conduct.*[27]

[41] The Board will address item 2, above, first.

[42] The Board refuses to order production of any legal advice the Union's counsel may have given it with respect to Ms. Ha's request to grieve her inability to self-nominate for consideration as a program head. Such advice, if any, is solicitor-client privileged. The nature of this privilege has been described by the Court of Appeal as follows:

> *[29] Solicitor-client privilege is essential to the proper functioning of our legal system. It ensures that individuals seeking assistance from lawyers can speak candidly and freely and thereby obtain effective advice. Absent the assurance of the confidentiality offered by the privilege, the ability of the citizenry to navigate through the shoals of the law would be severely compromised. See: Canada (Privacy Commissioner) v Blood Tribe Department of Health, 2008 SCC 44 at para 9, [2008] 2 SCR 574 [Blood Tribe]; Alberta (Information and Privacy Commissioner) v University of Calgary, 2016 SCC 53 at para 34, [2016] 2 SCR 555 [University of Calgary]. As a result, solicitor-client privilege must offer a strong assurance of confidentiality. As stated in R v McClure, 2001 SCC 14 at para 35, [2001] 1 SCR 445 [McClure]:*

[27] Second Production Application : Ms. Ha's application, para 3.

> *... [S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.*[28]

[43] Ms. Ha's suggestion that the Union's counsel was acting as "her" counsel if advising it on the merits of her proposed grievance fails to appreciate that it is the Union that decides whether to proceed with a grievance, and that it is entitled to a sphere of confidentiality with its counsel in making that decision. In short, Ms. Ha has provided no basis for the Board to consider abrogating any solicitor-client privilege enjoyed by the Union. Further, the Board notes that the Union has not pled reliance on legal advice as a basis for its refusal to grieve Ms. Ha's inability to self-nominate as a potential program head.[29]

[44] With respect to Ms. Ha's request for documents related to "CE", a stranger to the proceedings before the Board, the Union quite properly notes that the Summary Dismissal Decision determined that Ms. Ha cannot advance complaints on behalf of employees other than herself. Accordingly, no production can be ordered on that basis.

[45] For her part, however, Ms. Ha submits that the documents related to "CE" are not being requested to advance a complaint on CE's behalf, but rather to attempt to establish that CE has been subjected to arbitrary, discriminatory and hostile behaviour by the Union. In Ms. Ha's view, if the Union has treated CE wrongfully, "there is a high probability that they have also committed hidden acts of ADH towards me."[30]

[46] In legal terminology, what Ms. Ha would like to do with documents which might be produced with respect to "CE" is to attempt to tender propensity evidence.

[47] In *Handy*, the Supreme Court explained the prohibition on tendering evidence to show a litigant's general propensity to commit discreditable conduct (emphasis added):

> *B. The General Exclusionary Rule*
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> *31 The respondent is clearly correct in saying that evidence of misconduct beyond what is alleged in the indictment which does no more than blacken his character is inadmissible. Nobody is charged with having a "general" disposition or propensity for theft or violence or whatever. <u>The exclusion thus generally prohibits character evidence to be used as circumstantial proof of conduct, i.e., to allow an inference from the "similar facts"</u>*

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[28] *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34, at para 29.
[29] In some circumstances a party may be found to have implicitly waived solicitor-client privilege if pleading reliance on same in defence to a claim. See, for example, *Roynat Capital Inc. v Repeatseat Ltd.*, 2015 ONSC 1108 (Ont Div Ct).
[30] Ms. Ha's written submissions in support of the Second Production Application, p 10.

> *that the accused has the propensity or disposition to do the type of acts charged and is therefore guilty of the offence. …*
> …
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> *36 The exclusion of evidence of general propensity or disposition has been repeatedly affirmed in this Court and is not controversial. …*
> …
>
> *37 The policy basis for the exclusion is that while in some cases propensity inferred from similar facts may be relevant, it may also capture the attention of the trier of fact to an unwarranted degree. Its potential for prejudice, distraction and time consumption is very great and these disadvantages will almost always outweigh its probative value. It ought, in general, to form no part of the case which the accused is called on to answer. It is excluded notwithstanding the general rule that all relevant evidence is admissible…*[31]

[48] The prohibition applies in both criminal and civil proceedings. In *Racette*, the Court of Appeal confirmed this (emphasis added):

> *[23] As a starting point, character evidence – good or bad – is generally inadmissible in a civil action: Deep v Wood (1983), 143 DLR (3d) 246 (Ont CA) at 250 [Deep]. Evidence of bad character is anything that tends to place someone's character in a bad light: R v Woods, 2019 SKCA 84 at para 96, 379 CCC (3d) 356. While such evidence may often be relevant, it is presumptively inadmissible because of the "potential for prejudice, distraction and time consumption" that such evidence attracts: R v Handy, 2002 SCC 56 at para 37, [2002] 2 SCR 908 [Handy].*[32]

[49] This is not to say that there are no circumstances in which evidence of "similar facts" may be admitted. As the Court noted in *Racette*, citing *Handy*, the evidence must be relevant to some issue beyond showing general propensity, and its probative value must outweigh its prejudicial effect:

> *[28] In Handy, the Supreme Court said that bad character evidence must do more than show a general disposition or propensity to act in a certain manner:*
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> > *[71] This Court has frequently gone out of its way to emphasize that the general disposition of the accused does not qualify as "an issue in question". As stated, the similar fact evidence may be admissible if, but only if, it goes beyond showing general propensity (moral prejudice) and is more probative than prejudicial in relation to an issue in the crime now charged. I accept as correct the dictum of Lord Goddard C.J. in R. v Sims, [1946] 1 All E.R. 697 (C.C.A.), at p. 700, that "[e]vidence is not to be excluded merely because it tends to show the accused to be of a bad disposition, but only if it shows nothing more", provided the "something more" is taken to refer to an excess of probative value over prejudice. Thus, for example, in B. (F.F.), supra, the accused was charged with the sexual abuse of a young girl in his care. Similar fact evidence was led from the complainant's brothers about physical abuse and the violent domination by the accused of the household. Iacobucci J., for the majority, stated, at p. 731:*

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[31] *R v Handy*, 2002 SCC 56 [*Handy*], at paras 31, 36, 37.
[32] *Saskatchewan v Racette*, 2020 SKCA 2 [*Racette*], at para 23.

> *... evidence which tends to show bad character or a criminal disposition on the part of the accused is admissible if (1) relevant to some other issue beyond disposition or character, and (2) the probative value outweighs the prejudicial effect. [Emphasis added.]*
>
> *[72] Proof of general disposition is a prohibited purpose. Bad character is not an offence known to the law. Discreditable disposition or character evidence, at large, creates nothing but "moral prejudice" and the Crown is not entitled to ease its burden by stigmatizing the accused as a bad person. The defence of "innocent association" in B.(F.F.) was simply another way of expressing the denial by an accused of an element of the offence. The evidence of his prior discreditable conduct of a distinctive and particular nature, was considered to be strongly probative of specific issues in the case. Thus read, B.(F.F.) is quite consistent with B. (C.R., and should not be interpreted as a rival "two-step" variant of the test.*
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> *[73] The requirement to identify the material issue "in question" (i.e., the purpose for which the similar fact evidence is proffered) does not detract from the probative value/prejudice balance, but is in fact essential to it. Probative value cannot be assessed in the abstract. The utility of the evidence lies precisely in its ability to advance or refute a live issue pending before the trier of fact.*
>
> *(All emphasis in original)*[33]

[50] With respect to civil proceedings, specifically, the Court stated the following in *Racette*:

> *[27] Although the similar fact evidence rule generally applies in the civil context, its application is less rigid than in criminal matters. In Lumberjack, Cameron J.A. characterized the application of the rule as follows:*
>
> > *[39] Similar fact evidence is presumptively inadmissible, and the onus on a party seeking its admission is to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its admission: R. v. Handy, 2002 SCC 56 (CanLII), [2002] 2 S.C.R. 908. In principle, this is so in a civil action as well as in a criminal prosecution, though depending on the nature of the issue and the character of the evidence, it may not apply with the same vigour in a civil case. Even so, pre-trial discovery in relation to similar fact evidence is not easy to come by when it entails allegations of discreditable conduct external to the cause of action, a point that finds illustration in such cases as Thorpe v. Chief Constable of the Greater Manchester Police, [1989] 2 All E.R. 827 (C.A.); K.N. v. The Queen in Right of Alberta et al. (1999),1999 ABQB 270 (CanLII), 174 D.L.R. (4th) 366 (Alta Q.B., per Wachowich A.C.J.Q.B.) and J.L.B v. Beaton (1998), 76 O.T.C. 67 (Ont. Div. Ct. per Rosenberg J.).*[34]

[51] Notably, in *Lumberjack*, cited above, the Court of Appeal was considering an application for pre-trial discovery in relation to allegations of discreditable conduct external to the cause of action, with the Court noting that such orders are "not easy to come by".[35] In *Lumberjack*, the

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[33] *Racette*, at para 28.
[34] *Racette*, at para 27.
[35] *L. (G.) v Canada (Attorney General)*, 2004 SKCA 137 [*Lumberjack*], at para 39.

Court overturned an order, made after the matter had been set down for trial, which would have "pave[d] the way for the plaintiff to contact [the other plaintiffs who alleged abuse by Sister LaFlamme] with a view to determining if they might furnish "similar fact evidence" in relation to the allegations of sexual abuse against this person."[36] While the timing of the order clearly played a role in the Court's decision, in the circumstances before the Board Ms. Ha's underlying applications have similarly been set down for hearing, and respectfully, the gravity of the matters to be adjudicated does not compare to allegations of sexual abuse.

[52] In considering the *Air Canada* principles with respect to the "CE" documents, the Board places considerable weight on the fact that the documents are being sought to be tendered for a prohibited purpose, i.e., to establish the Union's general propensity to act in a discreditable manner.

[53] The Board places some weight on the timeliness of the request for relief, having been made after both the First DFR and Second DFR were set down for hearing. In its reply to the Second Production Application, the Union correctly notes that Ms. Ha indicated that she was prepared to proceed to a hearing prior to hearing dates being set, and further, that in her correspondence to the Registrar on August 2, 2023 - in the context of her requesting the Board cancel a scheduled case management conference - she indicated that she was prepared to proceed directly to a hearing.[37]

[54] In the Board's view, ordering production of the "CE" documents could easily cause potential prejudice, distraction and undue time consumption in the First DFR and Second DFR.

[55] Ultimately, Ms. Ha's request for the "CE" documents can be characterized as a late-stage fishing expedition for documents intended to be tendered for a prohibited purpose. The Board refuses to order their production.

[56] This leaves the final category of documents sought in the Second Production Application:

> *1. All evidence (recordings, emails, texts, reports, documents, meeting notes etc.):*
>
> *a) Amongst the Executive Council*
> *b) Amongst the faculty relations officers*
> *c) Amongst the Executive Council AND faculty relations officers*

[36] *Lumberjack*, at para 2.
[37] Second Production Application: Union's reply, para 2.3(c)(iv).

> *about Chau Ha's complaints against various members of [the Union], complaints about the employer, grievance requests, LRB applications, and how to respond to Chau Ha when she contacts [the Union].*[38]

[57] While Ms. Ha claims that this request is sufficiently particularized, it is really an attempt to capture all documents the Union may have that in any way relate to her complaints about the Employer or the Union. In the Board's view, it is a very wide-ranging request.

[58] The Board expects that a large quantity of documents could be captured in this category, merely based on the number of applications that Ms. Ha has filed with the Board. Since November of 2021 (i.e., in slightly under two years), Ms. Ha has filed 12 applications with the Board arising from her disputes with the Union, four of which are discussed in these reasons.[39] Of the other eight, seven have been withdrawn[40] and one has been summarily dismissed.[41] Notably, Ms. Ha did not apply for production of documents in those eight applications while they were active, yet now applies for documents related to them.

[59] Compiling all of the documents in this category could be a massive undertaking for the Union. Ms. Ha seemingly acknowledges this, but suggests that this may be due to the Union's record management practices, which she says are "not [her] problem".[42] Respectfully, the Board disagrees. The onus is on Ms. Ha to establish that the relief she seeks should be ordered. And as the Board has stated previously, "the greater the number of documents sought, the stronger the probative nexus expected by the Board, particularly if considerable expense, time and effort is required to locate and produce the desired documents."[43] In these respects, the scope of Ms. Ha's request and the associated burden in fulfilling it are things that she must justify.

[60] The Board agrees with the Union's submission that these documents are being requested based on one principal assumption, being that it is "highly probable" that the Union has "committed hidden acts of ADH"[44] towards Ms. Ha "behind closed doors".

[61] Further, the Board takes note of Ms. Ha's own explanation of the requested documents' proposed relevance: "If they have failed to represent me concerning past grievance requests,

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[38] Second Production Application: Ms. Ha's application, para 3.
[39] Those being the First DFR, Second DFR, First Production Application and Second Production Application.
[40] LRB File Nos. 146-21, 023-22, 062-22, 069-22, 082-22, 084-22, 086-22.
[41] LRB File No. 111-22. See *Saskatchewan Polytechnic Faculty Association v Chau Ha*, 2022 CanLII 75556 (SK LRB).
[42] Ms. Ha's written submissions in support of the Second Production Application, p 6.
[43] *SAHO*, at para 44.
[44] This is Ms. Ha's shorthand for arbitrary, discriminatory or harassing behaviour.

then it's highly probable they have failed to represent me regarding these two applications before the LRB."[45]

[62] In the Board's view, ordering the broad-based production requested by Ms. Ha would threaten to expand the First DFR and Second DFR well beyond the scope of what is pled in each application. This could cause potential prejudice, distraction and undue time consumption.

[63] Generally, for the same reasons as the request for documents relating to "CE", the broad-based request for the documents described at paragraph 56, above, may be characterized as a late-stage fishing expedition for documents intended to be tendered for a prohibited purpose (i.e., as evidence of general propensity to commit discreditable conduct). The fact that the documents sought relate to Ms. Ha rather than "CE" does not suffice to allow them to be used for a prohibited purpose.[46]

[64] Based on the foregoing the Board declines to order the broad-based production described in paragraph 56, above.

[65] That said, the Board has considered whether it is appropriate to order production of certain documents which may be interpreted to fall within the scope of the Second Production Application.

[66] Taking into account the pleadings in the First DFR and the Second DFR and the issues that are raised therein, there are certain documents that the Board has determined should be produced, based on the *Air Canada* principles.

[67] The documents that should be produced are those that evidence the Union's deliberations and decisions regarding: (1) whether to advance a grievance regarding the Second Reprimand; and (2) whether to grieve the inability of Ms. Ha to self-nominate for consideration as a program head.

[68] Such documents are clearly relevant to the issues raised by Ms. Ha's pleadings in the First DFR and Second DFR, respectively. Further, they should be able to be identified with relative ease.

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[45] Ms. Ha's written submissions in support of the Second Production Application, p 1.
[46] See *R v L.V.*, 2016 SKCA 74, at para 33: "I accept the notion that the contents of the diary, certainly insofar as they describe L.V.'s sexual touching of the complainant, engaged the similar fact rule. The diary entries were evidence of criminal acts falling outside of the time frame of the charges faced by L.V. and were tendered for the purpose of establishing his guilt. As such, the evidence was presumptively inadmissible and the onus was on the prosecutor to rebut that presumption."

[69] The Board is aware that there may be claims of privilege with respect to some of the documents. Accordingly, the Board's order will include a provision permitting documents over which any form of privilege is claimed to be withheld until the applicability of the claimed privilege is determined by the Board.

[70] For her part, Ms. Ha should be aware that documents voluntarily disclosed to her or ordered to be produced to her within the context of the First DFR or Second DFR may only be used for the purposes of those proceedings.[47]

[71] The Board will not, at this time, order a specific time by which the documents described in paragraph 67 must be produced. A case management conference is scheduled for October 27th. If production is not complete as of that date the Board anticipates setting one or more deadlines at the case management conference, after hearing from the parties.

[72] The result of these reasons is that the First Production Application is dismissed, and the Second Production Application is granted, in part.

[73] Appropriate orders will accompany these reasons.

DATED at Regina, Saskatchewan, this **13th** day of **October, 2023.**

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson

[47] *Saskatoon Co-operative Association Limited v United Food and Commercial Workers*, 2019 CanLII 76933 (SK LRB), at para 26.