Saskatchewan
Labour Relations Board

DARREN SROCHENSKI, Applicant v CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 21 and CITY OF REGINA, Respondents

LRB File Nos. 019-23 and 020-23; November 3, 2023
Chairperson, Michael J. Morris, K.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

The Applicant, Darren Srochenski:	Self-represented
Counsel for the Respondent, Canadian Union of Public Employees, Local 21:	Dawid Werminski and Andrew Restall
For the Respondent, City of Regina:	No one appearing

Employee-union dispute – s. 6-59 of *The Saskatchewan Employment Act* – Union refuses to file a grievance with respect to three day suspension – Board not satisfied that Union's conduct arbitrary, discriminatory or in bad faith – Application dismissed.

Employee-union dispute – Union sends email intended for member to another member – No evidence that misdirected email intentionally sent to other member – Union apologizes and takes remedial action – Board not satisfied that Union's conduct arbitrary, discriminatory or in bad faith – Application dismissed.

REASONS FOR DECISION

Background:

[1] **Michael J. Morris, K.C., Chairperson:** These are the Board's reasons following a hearing with respect to two employee-union disputes involving Darren Srochenski [Mr. Srochenski] and the Canadian Union of Public Employees, Local 21 [Union].

[2] Mr. Srochenski is employed by the City of Regina [Employer].

[3] In LRB File No. 019-23, Mr. Srochenski alleges that the Union breached its duty of fair representation to him by not grieving a three day suspension he received [Grievance Dispute], contrary to s. 6-59 of *The Saskatchewan Employment Act*[1] [Act]. Mr. Srochenski was given this suspension for entering a large pit in an unsafe manner, according to the Employer.

[1] *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [Act].

[4] In LRB File No. 020-23, Mr. Srochenski alleges that the Union breached its duty of fair representation to him when it disclosed some of his personal information to another employee [Privacy Dispute]. In its reply, the Union indicated that it was challenging the Board's jurisdiction to hear the Privacy Dispute. However, at the commencement of the hearing the Union advised that it was no longer doing so.

Evidence:

[5] Mr. Srochenski gave evidence on his own behalf. He also called Justin Banin [Mr. Banin] and Danen Mager [Mr. Mager] as witnesses. Like Mr. Srochenski, Mr. Banin and Mr. Mager are employed by the Employer at sites that require excavation work.

[6] The Union called its President, Laird Williamson [Mr. Williamson].

[7] The majority of the evidence pertained to the Grievance Dispute. The Board will discuss this evidence before turning to the evidence with respect to the Privacy Dispute.

[8] It is undisputed that on a certain day[2] in August of 2022 Mr. Srochenski was working at a site on Turner Crescent in Regina, Saskatchewan. A large pit was dug so that a water line could be accessed. Mr. Srochenski was the crew lead on-site, meaning that he was the on-site employee with the overall responsibility for the site.

[9] Once a pit reaches a certain depth, the risk of a cave-in increases. Accordingly, the Employer requires that the walls of the pit be sloped to a certain angle to mitigate the risk of a cave-in, or that a "cage" be used. A cage is an enclosure that is suspended from a backhoe and lowered into a pit, enabling employees to access the floor of the pit from the safety of the enclosure.

[10] Mr. Srochenski testified that it was safe to enter the pit without using a cage, and that he had consulted with Mr. Banin and Mr. Mager about this. Mr. Banin and Mr. Mager confirmed that they were consulted by Mr. Srochenski, and that they agreed with his assessment. Mr. Mager advised the Board that he has over 17 years of experience doing excavations. Mr. Banin advised that he serves as a crew lead (and was so serving at a different site that day), though Mr. Srochenski was in charge of the Turner Crescent site.

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[2] None of the witnesses gave evidence as to the specific date in August of 2022.

[11] There was conflict in the evidence with respect to the size of the pit. The Board understands that the pit needed to be a particular width for its sides to have a certain slope. More particularly, if the pit wasn't wide enough, its sides would be too steep for the pit to be safely entered without a cage.

[12] Mr. Srochenski testified that he estimated the pit to be 30 feet wide (and 60 feet long). Mr. Banin gave similar evidence during his examination-in-chief. In cross-examination, Mr. Banin agreed that the typical residential street in Regina, of which Turner Crescent is one, is approximately 30 feet wide.

[13] Mr. Williamson testified that he went to the site on Turner Crescent after it had been paved over, and that the pit couldn't have been 30 feet wide based on the extent of the paving that had been done. Mr. Williamson noted that 30 feet would have meant the entire width of the road had been excavated from curb to curb. The paving he observed was significantly less than this. He also referred to a photograph that the Employer provided to him, apparently taken on the day in question in August [Exhibit U-5]. The photograph appeared to show a five ton truck parked on the street beside the pit, meaning that the pit did not span curb to curb. It could not have done so, given the presence of the large truck. The photograph also depicted an employee in the pit, without a cage.

[14] The abovementioned photograph found its way to the Employer[3] and on October 19, 2022 Mr. Srochenski received a three day suspension for entering the pit in an unsafe manner. The Employer's position was that the pit did not have the requisite slope to be entered without using a cage. The Employer also noted that a portable expansion bridge could have been used to facilitate entering the cage prior to it being lowered into the pit.[4]

[15] Mr. Srochenski disagreed with the suspension he received. At least in part, his disagreement was based on his view that the soil involved was Type 2 soil rather than Type 4 soil, and that this reduced the risk of a cave-in. Accordingly, in his view the pit could be safely entered via a ramp. Mr. Srochenski also considered using a cage as less safe and/or unable to be executed. Though Mr. Srochenski's crew had used a cage earlier in the day at Turner Crescent, he considered the width of the pit, once it had been excavated further, to present an obstacle to safely entering the cage. He didn't think using an expansion bridge to facilitate entry into the cage would have worked, either.

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[3] There was no evidence with respect to who took the photograph.
[4] Exhibit U-4.

[16] On October 19, 2022, Mr. Srochenski emailed Mr. Williamson, requesting that his suspension be grieved.[5]

[17] Mr. Williamson investigated the matter, which resulted in him being given the abovementioned photograph (Exhibit U-5) by the Employer, as well as information regarding the expansion bridge. The Employer also highlighted the applicable safety protocols. As mentioned earlier, Mr. Williamson investigated the site at Turner Crescent, which had since been paved over, to get a sense of the size of the pit. He reviewed Mr. Srochenski's disciplinary history, noting that he had received a one day suspension in October of 2021 for a safety violation. He also contacted the Ministry of Labour Relations and Workplace Safety's Occupational Health and Safety Branch [OHS]. The representative from OHS told Mr. Williamson that if he shared the photograph of the site (Exhibit U-5) with OHS, OHS would need to issue a notice of contravention. Mr. Williamson recalled the representative also advising him that any soil within the City of Regina is automatically treated as Type 4 soil for the purposes of *The Occupational Health and Safety Regulations, 2020*, because the soil has been disturbed at some point.

[18] On October 26th, Mr. Williamson emailed Mr. Srochenski stating, amongst other things:

> *… given the photo, your previous discipline, and the elevated obligations of the position you held during this incident (crew lead) can you help me understand what specifically you see as the issue with the discipline you were issued.*
>
> *is your position:*
>
> *a) that no infraction took place and as such no discipline is warranted, or*
>
> *b) that an infraction did occur and some discipline was warranted but that three days was excessive given the circumstance*
>
> *the answer to the above questions will be taken into consideration when I make a recommendation to the Executive on whether or not there are grounds to pursue a Grievance.*[6]

[19] Having received no response to his October 26th email, Mr. Williamson followed up on October 31st, requesting a response from Mr. Srochenski.

[20] Having received no response to his October 31st email, Mr. Williamson sent another email on November 3rd:

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[5] Exhibit U-3.
[6] Exhibit U-3.

> *good morning,*
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> *i am writing to advise that I am still waiting for your response to my Oct 26 email and to notify that i will be making a recommendation at our next Executive meeting(Nov 7) to not advance a Grievance on this issue on the basis that a cage was necessary given the circumstance.*
>
> *Should you provide responses to my previous email prior to then, I will take that into consideration.*
>
> *i will advise you of the outcome of the vote and appeal steps should you express a desire to do so.*
>
> *thanks,*[7]

[21] Mr. Srochenski spoke with Mr. Williamson at some point after receiving the abovementioned email. Mr. Srochenski admitted that he was in the pit, but said that the cage was not a realistic option, and that he chose the safest option.

[22] Mr. Williamson testified that his recommendation to not pursue a grievance was based on a practice he has consistently employed in investigating hundreds of potential grievances on behalf of members. This practice involves posing and answering three questions.

[23] The first question is "Did it occur?" Here, the answer was "yes"; what the Employer alleged had occurred. Mr. Srochenski entered the pit without using a cage.

[24] The second question is "Does it violate practice or law and warrant correction?" Here, the answer was also "yes". Mr. Williamson noted that he had spoken with representatives of the Employer and OHS. From these conversations, he was aware that the expected practice was to use the cage, and that the pit's sides were too steep for it to have been entered without additional safety devices.[8]

[25] The third question is "Does the punishment fit the violation?". Mr. Williamson answered this with "yes". He was aware of Mr. Srochenski's one day suspension in 2021 for a safety violation, and of the Employer's progressive discipline policy, which meant that a three day suspension was the next level of punishment. He considered Mr. Srochenski's long service to the Employer as mitigating, but noted that Mr. Srochenski expressed no remorse for the violation and

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[7] Exhibit U-3.

[8] In correspondence to Mr. Williamson (Exhibit U-4) the Employer referred to s. 17-4 of *The Occupational Health and Safety Regulations, 2020*, RRS c S-15.1 Reg 10. Based on the Board's review of s. 17-4(2)(c), it appears that a pit in Type 4 soil must have a 3 to 1 slope (i.e., 3 horizontal feet per vertical foot).

was serving as a crew lead at the site. He noted that the five ton truck being parked near the pit created a heightened safety risk at the scene, given the truck's weight and proximity to the pit.

[26] Mr. Williamson recommended that a grievance not be advanced, and the Union's Executive Committee accepted his recommendation on November 7th. Thereafter, Mr. Williamson advised Mr. Srochenski of the Executive Committee's decision, and Mr. Srochenski's right to appeal it.[9] Mr. Srochenski indicated that he intended to appeal.[10]

[27] Mr. Srochenski's appeal was heard by the Union's Appeal Committee in December. The Appeal Committee was composed of members who had not participated in the Executive Committee's decision on November 7th. Both Mr. Srochenski and Mr. Williamson presented to the Appeal Committee, which ultimately upheld the Executive Committee's decision. Mr. Williamson communicated this to Mr. Srochenski on December 19, 2022.[11]

[28] During his cross-examination of Mr. Williamson, Mr. Srochenski repeatedly suggested that he did the only thing that was reasonable at the site on Turner Crescent, and that the job was done without anyone getting hurt. Mr. Srochenski suggested using the cage, suspended from a backhoe, would be unsafe, and that the expansion bridge wouldn't have assisted getting into the cage because of the width of the pit. Mr. Williamson repeatedly replied that if neither the cage nor a sufficiently sloped pit were viable options it was open to those at the site to exercise their right to refuse to do the work, i.e., their right pursuant to s. 3-31 of the Act.

[29] During cross-examination, Mr. Srochenski pointed out that Mr. Mager had been disciplined for not wearing a hard hat at the Turner Crescent site at some point,[12] and that the Union had chosen to grieve that discipline. Mr. Williamson testified that the Union looked at the specific circumstances in Mr. Mager's case and decided that pursuing a grievance was appropriate. Simply put, the circumstances were different than those with respect to Mr. Srochenski.

[30] The evidence with respect to the Privacy Dispute was fairly limited.

[31] In September of 2022 the Union was considering whether to pursue a grievance on Mr. Srochenski's behalf. To be clear, this potential grievance was unrelated to what occurred at the site on Turner Crescent.

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[9] Exhibit U-6.
[10] Exhibit U-6.
[11] Exhibit U-7.
[12] Mr. Srochenski characterized the alleged safety violation as briefly taking off a hard hat to wipe a brow.

[32] Mr. Hutchinson, one of the Union's Grievance Chairs, sent an email that was intended to be received by Mr. Srochenski to another Union member. The email explained Mr. Hutchinson's rationale for recommending that the Union not proceed with the grievance.

[33] Upon discovering that Mr. Hutchinson's email had been misdirected, the Union asked the member who had received it to delete it. The Union also told Mr. Srochenski about what had happened, and the steps it had taken to contain the privacy breach.[13]

[34] The misdirected email did not contain any financial information or contact information for Mr. Srochenski, other than his email address. Mr. Srochenski wanted to know who had received the email intended for him. The Union, based on advice from Ms. Edwards, its National Servicing Representative, determined that this could cause conflict amongst its membership. It also determined that it would be wise to have someone other than Mr. Hutchinson address future grievance requests from Mr. Srochenski. This is why Mr. Williamson addressed the request with respect to the Grievance Dispute.

[35] Mr. Srochenski did not suggest that the Privacy Dispute involved any intentional misconduct on the part of Mr. Hutchinson or the Union, nor did the Board hear any evidence suggesting this. Mr. Srochenski did advise that he is dealing with identity theft, that he has reported this to the police, and that he is concerned that the misdirected email may have facilitated the identity theft. For his part, Mr. Williamson testified that the police came to speak with him, and that the Union has cooperated with the police investigation. He also apologized on behalf of the Union for the misdirected email.

Argument on behalf of Mr. Srochenski:

[36] With respect to the Grievance Dispute, Mr. Srochenski argues that he made the right call at the site on Turner Crescent. The cage was not a viable option, and there was no reason to refuse to do the work. He got the job done safely, and he'd do the same thing again. Mr. Srochenski points to both Mr. Banin and Mr. Mager having agreed with the course of action taken at the site. Mr. Srochenski is disappointed that he is in a dispute with the Union. In his view, the Union should be supporting him by grieving his suspension.

[13] Exhibit U-2.

[37] With respect to the Privacy Dispute, Mr. Srochenski says he finds it ironic that a day or two after he was notified of the misdirected email someone gained access to his investment account. He also says that he wouldn't wish identity theft on anyone; it has been troubling for him.

Argument on behalf of the Union:

[38] The Union notes that the onus is on Mr. Srochenski to prove the Union breached its duty of fair representation to him on a balance of probabilities.

[39] With respect to the Grievance Dispute, the Union submits that a union may refuse a member's request to pursue a grievance, provided it does not act in an arbitrary, discriminatory or bad faith manner. Unions are not held to a standard of perfection. When considering whether to pursue a grievance, a union must conduct a proper investigation into the full details of the grievance, turn its mind to the merits of the grievance, make a reasoned judgment about its success or failure, and provide clear reasons if refusing to proceed with the grievance.[14] The Union submits that it did what was required.

[40] With respect to the Privacy Dispute, the Union submits that the evidence does not suggest that the email in question was intentionally misdirected. Once the error became known the Union took appropriate steps to contain the breach, notify Mr. Srochenski, and investigate the breach with a view to preventing future breaches. It views its conduct as conforming with the expectations of the Information and Privacy Commissioner.[15] There is no evidence that the Union breached s. 6-59 in relation to the Privacy Dispute.

Statutory Provisions:

[41] Section 6-59 is relevant:

> ***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.*

[14] *Jason G. Rattray v Unifor National*, 2020 CanLII 6405 (SK LRB) [*Rattray*], at para 90.
[15] *Saskatchewan Health Authority (Re)*, 2022 CanLII 89312 (SK IPC), at para 23.

Analysis and Decision:

[42] Section 6-59 concerns the Union's duty of fair representation in its representational role pursuant to a collective agreement or Part VI of the Act.[16] In *Gagnon*, the Supreme Court explained that "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."[17]

[43] In fulfilling its role, a union cannot act in an arbitrary, discriminatory or bad faith manner with respect to an employee.

[44] In *Ward*, the Board described the meaning to attribute to the terms "arbitrary", "discriminatory" and "in bad faith", in the context of s. 25.1 of *The Trade Union Act* [*TUA*]:

> *Section 25.1 of The Trade Union Act obligates the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favoritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do. So long as it does so, it will not violate section 25.1 by making an honest mistake or an error in judgment.*[18]

[45] These descriptions from *Ward* have been routinely applied in proceedings alleging a breach of s. 6-59, which is the successor provision to s. 25.1 of the *TUA*.[19]

[46] The Board also routinely relies on the following descriptions established by the Ontario Labour Relations Board:

> *. . . a complainant must demonstrate that the union's actions are:*
>
> *(1) "ARBITRARY" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
>
> *(2) "DISCRIMINATORY" – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*

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[16] *Czernick v Regina Police Association Inc. and Regina Police Service*, 2023 CanLII 99838 (SK LRB), at para 107.
[17] *Canadian Merchant Service Guild v Gagnon et al*., 1984 CanLII 18 (SCC), [1984] 1 SCR 509 [*Gagnon*], at p 527.
[18] *Glynna Ward v Saskatchewan Union of Nurses*, [1988] Winter Sask Labour Rep 44 [*Ward*], at p 47.
[19] See, for example, *Tammy Kurtenbach v Canadian Union of Public Employees,* 2019 CanLII 10586 (SK LRB) [*Kurtenbach*], at para 15, and *Saskatchewan Government and General Employees' Union v Rodney Wilchuck*, 2023 CanLII 50900 (SK LRB), at para 39.

> *(3) "in BAD FAITH" – that is, motivated by ill-will, malice, hostility or dishonesty.*[20]

[47] As is clear from the above descriptions, a union is not held to a standard of perfection.[21] Nor are unions required to pursue a grievance at a member's request. The Board has acknowledged that unions must make difficult decisions about how to allocate limited resources.[22] One of the primary factors a union will need to consider is a grievance's likelihood of success.

[48] When asked to pursue a grievance, a union is expected to fulfill four basic criteria, as summarized in *Rattray*:

> *[90] Hartmier set out four criteria that a union must fulfill to meet its duty of fair representation:*
>
> - *conduct a proper investigation into the full details of the grievance;*
> - *clearly turn its mind to the merits of the grievance;*
> - *make a reasoned judgment about its success or failure; and*
> - *if it decides not to proceed with the member's grievance, provide clear reasons for its decision.*[23]

[49] The onus is on Mr. Srochenski to satisfy the Board, based on clear, convincing and cogent evidence, that the Union has breached its duty of fair representation with respect to either the Grievance Dispute or the Privacy Dispute. This must be established on the civil standard, being the balance of probabilities.

[50] The Board will address the Grievance Dispute first.

[51] The Board is satisfied that Mr. Williamson conducted a proper investigation into the details of Mr. Srochenski's requested grievance. He made appropriate inquiries of the Employer, OHS and Mr. Srochenski, and also attended to the site on Turner Crescent. He confirmed that Mr. Srochenski entered the pit on Turner Crescent contrary to the Employer's safety protocols, and apparently contrary to regulatory requirements under *The Occupational Health and Safety Regulations, 2020*. Mr. Williamson also familiarized himself with Mr. Srochenski's employment and disciplinary history.

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[20] *Kurtenbach*, at para 16.
[21] *Elizabeth Emeka-Okere v Canadian Union of Public Employees*, 2021 CanLII 89513 (SK LRB) [*Emeka-Okere*], at para 57.
[22] *Emeka-Okere*, at para 55.
[23] *Rattray*, at para 90.

[52] The Board is satisfied that Mr. Williamson turned his mind to the merits of the requested grievance and its likelihood of success. He reviewed and considered the information he obtained as a result of his investigation. Mr. Williamson took into account that there appeared to be a violation of both the Employer's safety protocols and the applicable regulations. He noted the proximity of the five ton truck to the open pit on Turner Crescent as an apparent danger, and took into account the employees' right to refuse unusually dangerous work. Further, Mr. Williamson's assessment that a three day suspension was not unreasonable was rational, particularly in light of the Employer's progressive discipline policy and Mr. Srochenski's previous one day suspension for a safety violation.

[53] The Union's Executive Committee heard and considered Mr. Williamson's recommendation in accordance with its established process. This included ensuring that certain members of the Executive Committee did not hear Mr. Williamson's submissions at this juncture, so that they could sit on an Appeal Committee, if required. Further, Mr. Williamson had no vote with respect to the matter.

[54] The Board is satisfied that the process before the Executive Committee did not breach the Union's duty of fair representation. Mr. Williamson presented Mr. Srochenski's position, in addition to his own recommendation. Further, the Executive Committee's decision remained subject to an appeal in which Mr. Srochenski could make submissions. Ultimately, the Executive Committee agreed with Mr. Williamson's recommendation to not pursue a grievance. This was a rational decision on the part of the Executive Committee, based on the information it had before it.

[55] The Executive Committee's decision was appropriately conveyed by Mr. Wiliamson to Mr. Srochenski, and Mr. Srochenski exercised his right to make submissions to the Appeal Committee. The Board is satisfied that the Appeal Committee considered Mr. Srochenski's submissions, but ultimately concluded that refusing to file a grievance was appropriate. Mr. Srochenski was advised of the Appeal Committee's decision without undue delay.

[56] Taking into account the foregoing, the Board is not satisfied that the Union breached its duty of fair representation to Mr. Srochenski with respect to the Grievance Dispute. Whether the Union ultimately came to the correct decision about pursuing a grievance is not the issue. Generally, a union can make an error in judgment without breaching s. 6-59, provided it has not acted in an arbitrary, discriminatory or bad faith manner. The onus is on Mr. Srochenski to

persuade the Board that the Union has acted in such a manner, and he has not discharged this onus.

[57] The Board will now turn to the Privacy Dispute.

[58] The Board has no evidence before it to suggest that the Union or its agent(s) deliberately sent the email with respect to Mr. Srochenski to the unidentified individual who received it.

[59] The evidence before the Board is that the Union promptly told this individual that they should delete the email, and promptly notified Mr. Srochenski about the matter. The Union also decided that Mr. Srochenski should deal with Mr. Williamson with respect to grievance requests on a go-forward basis, given the potential loss of trust in Mr. Hutchinson. All of this was appropriate.

[60] The correctness of the Union's decision to not disclose the identity of the recipient of the email to Mr. Srochenski could be reasonably debated by reasonable people. The Board accepts that the Union acted on the advice of its National Servicing Representative, Ms. Edwards. Effectively, the Board understands the advice to have been that disclosing the recipient's identity to Mr. Srochenski was not necessary and could cause conflict in the workplace. The Board accepts that the Union relied on this advice and, in the circumstances, the Board does not find that the advice was unreasonable. The email did not contain any information which could obviously be used to Mr. Srochenski's detriment. Further, the Union cooperated with the police investigation initiated following Mr. Srochenski's report of identity theft. Disclosing the identity of the email's recipient to Mr. Srochenski may have unjustifiably raised a cloud of suspicion around one of the Union's members.

[61] On the basis of the foregoing, Mr. Srochenski has not persuaded the Board that the Union breached s. 6-59 with respect to the Privacy Dispute.

[62] Both of Mr. Srochenski's applications are dismissed. Appropriate orders will be issued.

DATED at Regina, Saskatchewan, this **3rd** day of **November, 2023.**

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson