SASKATCHEWAN PUBLIC SAFETY AGENCY, Applicant v BRYAN FRASER, Respondent

LRB File Nos. 022-23, 013-23 and 205-22; August 21, 2023
Vice-Chairperson, Barbara Mysko; Board Members: Shawna Colpitts and Gary Mearns

Counsel for the Applicant, Saskatchewan Public Safety Agency: Kyle McCreary

The Respondent, Bryan Fraser: Self-Represented

Application for Summary Dismissal – Clauses 6-111(1)(o) and (p) of *The Saskatchewan Employment Act* – Underlying Unfair Labour Practice Applications – Section 6-62 of the Act.

Allegations – Board Without Jurisdiction – Exclusive Jurisdiction of Arbitrator – Meaning, Application, or Alleged Contravention of Collective Agreement.

Allegations – Underlying Application Relies on Privileged Evidence – Settlement Privilege – Privileged Evidence to be Excluded – Lack of Evidence to Support Application.

Disposition of Jurisdictional Issue – Dismissal of Application for Summary Dismissal – Discussion of Part VI Regime – Board has Jurisdiction to Determine Dispute.

Disposition of Privilege Issue – No Compelling Public Interest to Admit Evidence – Application for Summary Dismissal Granted in Part.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an application for summary dismissal filed by the Saskatchewan Public Safety Agency [Employer] pursuant to clauses 6-111(1)(o) and (p) of *The Saskatchewan Employment Act* [Act]. The application seeks summary dismissal of two unfair labour practice applications filed by Bryan Fraser [Fraser]. The first is LRB File No. 205-22, filed on December 21, 2022. The Employer asks that this application be dismissed on the basis that it is not within the jurisdiction of the Board. The second is LRB File No. 013-23, filed on January 24, 2023. The Employer seeks summary dismissal of this application due to a lack of evidence.

[2] The Employer has asked that the present application be decided by written submissions. Both the Employer and Fraser have provided written submissions which the Board has reviewed and considered.

Analysis and Decision:

General:

[3] It is well established that the Board has authority to summarily dismiss an application. The source of this authority is found in clauses 6-111(1)(o) and (p) of the Act:

> ***6-111****(1) With respect to any matter before it, the board has the power:*
>
> > *(o) to summarily refuse to hear a matter that is not within the jurisdiction of the board;*
> >
> > *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;*

[4] Furthermore, pursuant to clause 6-111(1)(q), the Board may decide any matter before it without holding an oral hearing.

[5] With respect to LRB File No. 205-22, the applicable statutory provision is clause 6-111(1)(o).

[6] With respect LRB File No. 013-23, the Employer seeks summary dismissal pursuant to clause 6-111(1)(p), due to a lack of evidence.

LRB File No. 205-22:

[7] This application was filed on December 21, 2022. In it, Fraser alleges that the Employer breached clauses 6-62(1)(a), (g), and (l) of the Act, which state as follows:

> ***6-62****(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
>
> > *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this part;*
> >
> > *. . .*
> >
> > *(g) to discriminate with respect to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including termination or suspension or threat of termination or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding pursuant to this Part;*

> . . .
>
> *(l) to declare or cause a lockout or to make or threaten any change in wages, hours, conditions or tenure of employment, benefits or privileges while any matter is pending before a labour relations officer, special mediator or conciliation board appointed pursuant to this Part;*

[8] He states that, at the time of filing the application, five other matters were pending before the Board. He alleges that, between October 24 and December 13, 2022, the Employer breached the foregoing provisions by changing his conditions of work, and specifically, by relocating his office and work space; replacing his schedule and transferring him to a different supervisor. He does not allege a breach of the collective agreement.

[9] In his reply to the application for summary dismissal, Fraser provides greater detail. There, he states that from October to December, 2022, the Employer relocated his workspace and assigned him to an open cubicle with exposure to constant noise and increased risk of harm contrary to the position rating; ignored a remote work application; and, assigned a new hours of work schedule with inconsistent explanations, all concurrent with his participation in proceedings before the Board, close in time to specific, related events that occurred in relation to those proceedings, and departing from his status quo working conditions (which had been in place for a period of three years). He states, further, that the new location was not imposed on other similarly situated staff members. In summary, he claims that these actions constituted interference and were discriminatory and retaliatory.

[10] A question arises as to whether the Board can consider the allegations in the reply in determining whether to grant the application for summary dismissal. The Board has previously considered a reply as equivalent to particulars with respect to an underlying application.[1] In line with past cases, the Board finds that it is appropriate to do so in this matter. The parties have had a further opportunity to file submissions. As such, there is no unfairness in considering Fraser's allegations as set out in his reply in this manner.

[11] As alluded to in this application, Fraser had previously filed one duty of fair representation and four unfair labour practice applications alleging various breaches of the Act. In the unfair labour practice applications, his allegations were that the Employer retaliated against him in a disciplinary manner for filing a duty of fair representation ("DFR") application, questioned him as

---

[1] *Saskatchewan Government and General Employees' Union v Rodney Wilchuck*, 2023 CanLII 50900 (SK LRB), at para 33-4.

to whether he had been exercising his rights pursuant to Part VI, engaged in questioning that intimidated him just prior to the hearing, and then imposed a suspension as a way of intimidating him from participating in the proceeding.

[12] In relation to those matters, the Employer sought deferral/adjournment of the unfair labour practice applications to grievance arbitration, arguing that the underlying applications were based on issues that were addressed in the applicable collective agreement. Its argument, as described by the Board at paragraph 13 of the decision, was similar to that which is currently before the Board. There, the Board declined to consider the Employer's argument in full. The Board did find, however, that Fraser was not asking the Board to interpret the collective agreement but to determine whether the Employer committed unfair labour practices.[2]

[13] In support of its jurisdictional argument, the Employer relies primarily on the Supreme Court of Canada's decision in *Northern Regional Health Authority v Horrocks*, 2021 SCC 42 (CanLII) [*Horrocks*]. In *Horrocks*, an employee had entered into a last chance agreement and after she breached that agreement was terminated. She claimed that the employer had failed to adequately accommodate her disability. The Court considered whether a labour arbitrator's jurisdiction over disputes that arise, in their essential character, from the interpretation, application, or alleged violation of the collective agreement was exclusive of the Manitoba Human Rights Commission.

[14] The majority of the Court found that, given the applicable statutory framework, where such a dispute includes an allegation of a human rights violation, a labour arbitrator has exclusive jurisdiction over the entire dispute. The majority concluded that the essential character of the dispute was whether the employer had exercised its management rights in a way that was inconsistent with their express and implicit limits.[3] The statutory rights that were raised were found to be too closely intertwined with collectively bargained rights to be separated and could not be meaningfully adjudicated "except as part of a public/private package that only a labour arbitrator can deal with".[4]

[15] In coming to this conclusion, the majority confirmed the line of case law finding that a labour arbitrator's jurisdiction precludes recourse to the courts in disputes that arise from

---

[2] *Fraser v Saskatchewan Public Safety Agency*, 2022 CanLII 121639 (SK LRB), at paras 14, 16. [*Fraser No. 1*]. The Board also both found that the employer contravened the Act when it suspended Fraser and, at paragraph 73, found that "whether the suspensions were properly imposed is an issue to be resolved through the grievance process".
[3] *Horrocks*, at para 50.
[4] *Ibid*, at para 50, citing E. Shilton, "Labour Arbitration and Public Rights Claims: Forcing Square Pegs into Round Holes" (2016), 41 Queen's LJ 275, at 309.

collective agreements, even where those disputes give rise to common law or statutory claims: *St. Anne Nackawic Pulp & Paper Co. v Canadian Paper Workers Union, Local 219*, 1986 CanLII 71 (SCC), [1986] 1 SCR 704, at 721; *Weber v Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929, at para 54; *New Brunswick v O'Leary*, 1995 CanLII 109 (SCC). This limitation is, of course, subject to a residual discretionary jurisdiction in courts of inherent jurisdiction to grant relief not available under the statute.

[16] The Employer also relies on *Livingston v Saskatchewan Human Rights Commission*, 2022 SKCA 127 (CanLII), *Gavlas v Foliojumpline Publishing Inc*., 2021 SKQB 284 (CanLII) [*Gavlas*], and *Lapchuk v Saskatchewan (Highways)*, 2017 SKCA 68 (CanLII). Each of these decisions considers the relative spheres of jurisdiction as between a labour arbitrator and the courts.

[17] Of course, the central issue in *Horrocks* was not the relationship between the "respective spheres of jurisdiction" held by labour arbitrators and the courts but rather the "respective spheres of jurisdiction held by labour arbitrators and statutory tribunals".[5] Prior to *Horrocks*, the Supreme Court had considered this issue in two cases: *Regina Police Assn. Inc. v Regina (City) Board of Police Commissioners*, 2000 SCC 14 (CanLII), [2000] 1 SCR 360 [*Regina Police*] and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (Attorney General)*, 2004 SCC 39 (CanLII), [2004] 2 SCR 185 [*Morin*].

[18] The question in *Regina Police* was whether the dispute was governed by the collective agreement or by *The Police Act, 1990* and associated *Regulations*. The Court found that the legislation was a complete code for the resolution of disciplinary matters within the police service; therefore, the police board had exclusive responsibility to resolve disciplinary matters. The essential character of the dispute was a disciplinary matter and therefore the arbitrator had no jurisdiction. The Court confirmed, however, that only an arbitrator would have the power to entertain a matter that arose from the interpretation, application, administration or violation of the collective agreement.

[19] In *Morin*, the Court considered the competing jurisdictional claims held by an arbitrator and a human rights tribunal. The majority of the Court acknowledged that the human rights tribunal, in that case, had generous but not exclusive jurisdiction over human rights violations; by extension, it could have concurrent jurisdiction with other adjudicative bodies.[6] Similarly, the majority confirmed, what is now an obvious point, that arbitrators do not always have exclusive

[5] *Ibid*, at para 24.
[6] *Morin*, at para 19.

jurisdiction over employer-union disputes, and that other tribunals may possess "overlapping jurisdiction, concurrent jurisdiction, or […] exclusive jurisdiction". In the result, the statute granted an arbitrator exclusive jurisdiction over disputes arising from the operation of a collective agreement but, because the dispute arose from the negotiation (and not the operation) of the collective agreement, it fell within the mandate of the human rights tribunal.

[20] *Horrocks* confirmed the two-step process for resolving jurisdictional contests between labour arbitrators and other statutory tribunals:

> *[39] To summarize, resolving jurisdictional contests between labour arbitrators and competing statutory tribunals entails a two-step analysis. First, the relevant legislation must be examined to determine whether it grants the arbitrator exclusive jurisdiction and, if so, over what matters (Morin, at para. 15). Where the legislation includes a mandatory dispute resolution clause, an arbitrator empowered under that clause has the exclusive jurisdiction to decide all disputes arising from the collective agreement, subject to clearly expressed legislative intent to the contrary.*
>
> *[40] If at the first step it is determined that the legislation grants the labour arbitrator exclusive jurisdiction, the next step is to determine whether the dispute falls within the scope of that jurisdiction (Morin, at paras. 15 and 20; Regina Police, at para. 27). The scope of an arbitrator's exclusive jurisdiction will depend on the precise language of the statute but, in general, it will extend to all disputes that arise, in their essential character, from the interpretation, application, or alleged violation of the collective agreement. This requires analysing the ambit of the collective agreement and accounting for the factual circumstances underpinning the dispute (Weber, at para. 51). The relevant inquiry is into the facts alleged, not the legal characterization of the matter (Weber, at para. 43; Regina Police, at para. 25; Quebec (Attorney General) v. Quebec (Human Rights Tribunal), 2004 SCC 40, [2004] 2 S.C.R. 223 ("Charette"), at para. 23).*
>
> *[41] Where two tribunals have concurrent jurisdiction over a dispute, the decision-maker must consider whether to exercise its jurisdiction in the circumstances of a particular case.*
>
> *[…]*

[21] The main provision considered in *Horrocks* is similar to section 6-45 of the Act:

> ***6-45****(1) Subject to subsections (2) and (3), all disputes between the parties to a collective agreement or persons bound by the collective agreement or on whose behalf the collective agreement was entered into respecting its meaning, application or alleged contravention, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective agreement.*
>
> *(2) Subsection (1) does not prevent the director of employment standards as defined in Part II or the director of occupational health and safety as defined in Part III from exercising that director's powers pursuant to this Act.*
>
> *(3) Without restricting the generality of subsection (2), the director of employment standards may issue wage assessments, issue hearing notices, take action to collect outstanding wages or take any other action authorized pursuant to Part II that the director*

> *of employment standards considers appropriate to enforce the claim of an employee who is bound by a collective agreement.*

[22] In *Horrocks*, the Court found that the provision, a mandatory dispute resolution clause, gave an arbitrator empowered under that clause the exclusive jurisdiction to decide all disputes arising from the collective agreement, subject to clearly expressed legislative intent to the contrary. The Court found that there was no such clearly expressed legislative intent.

[23] The Court explained that while the mere existence of a tribunal does not disclose the required intent, the statutory scheme may do so:

> *[33] What Morin indicates, however, is that the mere existence of a competing tribunal is insufficient to displace labour arbitration as the sole forum for disputes arising from a collective agreement. Consequently, some positive expression of the legislature's will is necessary to achieve that effect. Ideally, where a legislature intends concurrent jurisdiction, it will specifically so state in the tribunal's enabling statute. But even absent specific language, the statutory scheme may disclose that intention. For example, some statutes specifically empower a decision maker to defer consideration of a complaint if it is capable of being dealt with through the grievance process (see, e.g., Human Rights Code, R.S.B.C. 1996, c. 210, s. 25; Canada Labour Code, ss. 16(l.1) and 98(3); Canadian Human Rights Act, R.S.C. 1985, c. H 6, ss. 41 and 42). Such provisions necessarily imply that the tribunal has concurrent jurisdiction over disputes that are also subject to the grievance process. In other cases, the provisions of a statute may be more ambiguous, but the legislative history will plainly show that the legislature contemplated concurrency (see, e.g., Canpar Industries v. I.U.O.E., Local 115, 2003 BCCA 609, 20 B.C.L.R. (4th) 301). In these circumstances, applying an exclusive arbitral jurisdiction model would defeat, not achieve, the legislative intent.*

[24] In the present case, the Employer argues that the Board has no jurisdiction over the dispute. The Employer relies on the dispute resolution clause (section 6-45) which it says confers exclusive jurisdiction on an arbitrator in disputes arising, whether expressly or inferentially, from the collective agreement and argues, in line with *Horrocks*, that there is no clearly expressed legislative intent to the contrary. It suggests that the allegations relate to the operation of the management rights clause in the collective agreement. The Employer suggests that section 6-45 ousts the Board's jurisdiction over unfair labour practice applications if their essential character is found to be a dispute arising from the collective agreement.

[25] In the Board's view, live issues of jurisdiction should be resolved based on the facts in a given dispute. For this reason, there are limits to what value can be gained by making general and theoretical statements about the Board's jurisdiction. However, to the extent that the Employer infers that the existence of a management rights clause in a collective agreement removes the Board's jurisdiction to supervise the collective bargaining relationship, it should be

addressed. Such reasoning overgeneralizes the respective spheres of jurisdiction of the Board and an arbitrator appointed pursuant to section 6-45.

[26] For this reason, the Board finds it necessary to, first, provide an overview of the relevant legislative regime and, second, determine the jurisdictional question that has come before the Board in the present case.

[27] The Board will consider the legislation in accordance with the modern principle of statutory interpretation. Section 2-10 of *The Legislation Act* states:

> ***2-10****(1) The words of an Act and regulations authorized pursuant to an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.*
>
> *(2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.*

[28] First, the Employer argues that subsections 6-45(2) and (3) militate against the presence of clearly expressed legislative intent to the contrary in relation to the Board's jurisdiction. It says that the former Act did not provide carve outs for specific competing tribunals and therefore allowed for an interpretation of "implied concurrent jurisdiction". To now imply concurrent jurisdiction fails to give effect to the clear wording of subsections (2) and (3), which grant concurrent jurisdiction to specific tribunals.

[29] The Board does not attach the same significance to the addition of subsections (2) and (3). These provisions were introduced with the Act when the Legislature merged all the employment-related statutes into one piece of legislation. Prior to the Act coming into force, the directors of employment standards and occupational health and safety exercised their powers pursuant to their respective statutes. The addition of these provisions (albeit not included in the previous statutes) facilitates the interpretation of the respective spheres of jurisdiction of the administrative actors coming under the umbrella of the consolidated legislation.

[30] By contrast, the jurisdiction of the Board has long been described in labour relations statutes alongside that of an arbitrator. In the present Act, the roles and responsibilities of both the Board and an arbitrator are described in Part VI. A detailed review of the relevant provisions discloses an, at times, complex and interrelated relationship between the Board and an arbitrator acting pursuant to a collective agreement. It also reveals that, in order for the Board to fulfill its statutory role, it may be called upon to determine whether a party is bound by a collective

agreement, to determine whether a collective agreement is applicable, and in appropriate circumstances, to interpret a collective agreement that is in force.

[31] Furthermore, Part VI of the Act grants the Board jurisdiction over matters that relate to the working conditions of employees. The Board will explain. The objective of collective bargaining is to improve employees' working conditions. Those rights are realized through the tripartite relationship among employees, unions, and employers. Conversely, they are eroded through the breakdown of those relationships, including when a person fails to meet one's statutory obligations or interferes with another's statutory rights. The Board is charged pursuant to Part VI with the task of adjudicating disputes involving the relationships between employees, unions, and employers in unionized workplaces with the objective of facilitating rights and obligations in relation to collective bargaining.

[32] In comparison, an arbitrator has jurisdiction to adjudicate disputes arising from the interpretation, application and alleged contravention of collective agreements.[7]

[33] The structure of Part VI confirms that the Board's mandate is to supervise the collective bargaining relationship. Part VI roughly follows the progression of the collective bargaining relationship, including the establishment and termination of the relationship, the process of collective bargaining, strikes and lockouts, collective agreements, technological changes, and the relationships between unions and their members. Flanking these general provisions, at Division 12, is a lengthy recitation of the many actions, primarily but not exclusively by employers and unions, that may be found to be unfair labour practices.

[34] Although most of the Divisions in Part VI relate indirectly to collective agreements, Division 9 deals with collective agreements directly. It includes provisions outlining the requirements for the ratification and length of collective agreements (permitting the Board to vary an expiry date in certain circumstances), provisions outlining the binding effect of collective agreements (establishing a contravention of Part VI), requirements for the contents of collective agreements (establishing certain unfair labour practices), and provisions relating to the resolution of collective agreement disputes (jurisdiction and procedure of arbitrators).

[35] Throughout Part VI, some provisions expressly or impliedly require the Board to determine whether a party is bound by a collective agreement in assessing the relevant right or obligation

[7] See also, section 6-48 which provides a narrow and specific jurisdiction to adjudicate disputes in the absence of a collective agreement.

(for example, sections 6-30, 6-41). Sections 6-19, 6-20, and 6-79 permit the Board to find that a collective agreement binds an employer. Section 6-18 permits the Board to amend the description of a bargaining unit contained in a collective agreement and give any directions the Board considers necessary or advisable as to the application of the agreement. Other provisions expressly or impliedly permit or require the Board to interpret a collective agreement (for example, sections 6-18, 6-54, 6-57).

[36] Clause 6-111(1)(r) permits the Board to decide any question that may arise in a proceeding, including whether a collective agreement has been entered into or is in operation or any person is a party to or bound by a collective agreement.

[37] Even section 6-59, which sets out a union's duty of fair representation, permits and often requires the Board to consider and interpret the provisions of the applicable collective agreement. Most persuasive in this respect is the fact that the duty arises only with respect to an employee's (or former employee's) rights pursuant to a collective agreement or Part VI. If there is no such right (which stands to be determined) then there is no duty. At the outset of an application, it is not always clear whether such a determination will be a straightforward exercise.

[38] Pursuant to section 6-25, the Board has jurisdiction to facilitate the provision to parties of assistance in relation to a first collective agreement. Pursuant to subsection 6-25(7), either the Board or a single arbitrator may conclude any term or terms of a collective agreement. Pursuant to section 6-40, the Board has authority to vary the term of a collective agreement in certain circumstances. Pursuant to section 6-59, the Board may extend the time for the taking of any step in a grievance procedure under a collective agreement.

[39] Finally, sections 6-41, 6-62, 6-63, and 6-104, together, grant jurisdiction to the Board to determine whether a person has failed to meet their obligations pursuant to a collective agreement. Sections 6-41, 6-62(1)(r), and 6-63(1)(h) state as follows:

> ***6-41****(1) A collective agreement is binding on:*
>
> *(a) a union that:*
>
> *(i) has entered into it; or*
>
> *(ii) becomes subject to it in accordance with this Part;*
>
> *(b) every employee of an employer mentioned in clause (c) who is included in or affected by it; and*
>
> *(c) an employer who has entered into it.*

(2) A person bound by a collective agreement, whether entered into before or after the coming into force of this Part, must, in accordance with the provisions of the collective agreement:

(a) do everything the person is required to do; and

(b) refrain from doing anything the person is required to refrain from doing.

(3) A failure to meet a requirement of subsection (2) is a contravention of this Part.

(4) If an agreement is reached as the result of collective bargaining, both parties shall execute it.

(5) Nothing in this section requires or authorizes a person to do anything that conflicts with a requirement of this Part.

(6) If there is any conflict between a provision of a collective agreement and a requirement of this Part, the requirement of this Part prevails.

[…]

6-62*(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*

…

(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.

[…]

6-63*(1) It is an unfair labour practice for an employee, union or any other person to do any of the following:*

…

(h) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to a union or an employee.

[40] There was no equivalent provision to section 6-41 in *The Trade Union Act*. Just as subsections 6-45(2) and (3) are new to the Act, so is section 6-41.

[41] Pursuant to subsection 6-41(2), a person bound by a collective agreement must do everything that person is required to do and refrain from doing anything the person is required to refrain from doing. A failure to meet a requirement of subsection (2) is a contravention of Part VI. Pursuant to clauses 6-62(1)(r) and 6-63(1)(h), it is an unfair labour practice to contravene an obligation, prohibition, or other provision of Part VI. In the event of a conflict with a collective agreement, Part VI is to be given precedence.

[42] Pursuant to clause 6-104(2)(b), the Board has explicit power to make orders determining whether an unfair labour practice or a contravention of Part VI is being or has been engaged in. Pursuant to clause 6-104(2)(c), the Board has power to make an order rectifying a contravention of Part VI. The language of clause 6-104(2)(c) closely tracks the language of section 6-41:

> *(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:*
>
> *…*
>
> *(c) requiring any person to do any of the following:*
>
> *(i) to refrain from contravening this Part, the regulations made pursuant to this Part or an order or decision of the board or from engaging in any unfair labour practice;*
>
> *(ii) to do any thing for the purpose of rectifying a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board;*

[43] In summary, what is to be taken from the foregoing is that the Board has a role with respect to collective bargaining agreements which arises from its jurisdiction to supervise collective bargaining relationships.

[44] The Employer also argues that the Legislature expressed its intention to remove any concurrent jurisdiction that may have existed under *The Trade Union Act* by changing the language pertaining to the Board's jurisdiction to defer. In support of this argument, the Employer points to the previous provision of *The Trade Union Act*:

> *(I) to defer deciding any matter if the board considers that the matter could be resolved by arbitration or an alternative method of resolution;*

[45] The Employer contrasts the foregoing language with the language of the current provision:

> ***6-111****(1) With respect to any matter before it, the board has the power:*
>
> *…*
>
> *(I) to defer deciding any matter if the board considers that the matter could be resolved by mediation, conciliation or an alternative method of resolution.*

[46] The Employer argues that clause 6-111(1)(I) pertains to alternative methods of resolution which do not include adjudicative mechanisms. The Employer also compares clause 6-111(1)(I) to section 2-76 of the Act and section 30 of *The Saskatchewan Human Rights Code*, highlighting

that the former refers to an “alternative method of resolution” while the latter two refer to “a grievance under a collective agreement”.

[47] Unlike “proceeding” at section 2-76,[8] “alternative method of resolution” is not defined in the Act or the Part, whether exhaustively or non-exhaustively. “Method” is a general term. It is not a term of art. The plain meaning of the term includes “procedure” or “process”.

[48] The meaning of “alternative method of resolution” is to be determined based on the intended sense of the phrase given the “grammatical, conventional and logical relations between the disputed words and the rest of the legislative text”.[9] Given that section 6-111 pertains to the Board’s general procedural powers with respect to “any matter before it", the “rest of the legislative text” consists of both the full language in clause 6-111(1)(l) and the provisions of Part VI as a whole.

[49] Under Part VI, each of mediation, conciliation, and arbitration, as well as the grievance-arbitration process, are potential alternative methods of resolving disputes that come before the Board. Depending on the matter, these methods may be combined into one or in relation to one matter. They may be conducted on a continuum, for example, through mediation-arbitration. A grievance process generally includes features of both. Given the interrelated conventions around the resolution of labour relations disputes, the adjudicative features of arbitration are not sufficient to exclude it from the associated class of methods contemplated by clause 6-111(1)(l).

[50] Applications to defer to arbitration are not uncommon before the Board. Since clause 6-111(1)(l) has been in force, the Board has repeatedly treated “alternative methods of resolution” as including the grievance-arbitration process (although the argument currently being made may not have been squarely before the Board).[10] The Board has, at times, relied on its deferral power in relation to grievance-arbitration because, while arbitrators have jurisdiction pursuant to section 6-45, arbitrators and the Board do not operate from the same remedial menu. If there is potential to resolve a matter through the grievance-arbitration process, the Board may reserve its jurisdiction to permit consideration of remedies, such as declarations of an unfair labour practice, that are not available to an arbitrator.

---

[8] And, section 30 of *The Saskatchewan Human Rights Code*.
[9] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014), at 227.
[10] For example: *International Brotherhood Of Electrical Workers, Local 2038 v PCL Intracon Power Inc*., 2017 CanLII 68787 (SK LRB); *United Food and Commercial Workers, Local 649 v Federated Co-operatives Limited*, 2018 CanLII 68445 (SK LRB); *Unifor Canada Local 594 v Consumers' Co-operative Refineries Limited*, 2022 CanLII 95885 (SK LRB).

[51] Furthermore, the Employer's argument, taking into account the maxim of consistent expression, could be taken to mean that an arbitrator is not contemplated as an "alternative method" of resolving the seniority of employees even if that matter arose as a collective bargaining agreement issue resulting from an order pursuant to section 6-128.

[52] In the Board's view, the language of clause 6-111(1)(l) is an orderly and modern arrangement of concepts, prioritizing non-adjudicative mechanisms, perhaps, but not precluding adjudicative mechanisms.

[53] The Employer also argues that the limitations on the Board's jurisdiction are confirmed by section 6-48 of the Act, which states:

> ***6-48****(1) Whether there is just cause for the termination or suspension of an employee may be determined by arbitration if:*
>
> *(a) no collective agreement is in force;*
>
> *(b) the board has issued a certification order;*
>
> *(c) the employee is terminated or suspended for a cause other than shortage of work; and*
>
> *(d) the termination or suspension is not, and has not been, the subject of an application to the board respecting a matter mentioned in clause 6-62(1)(g).*
>
> *(2) If an arbitration is conducted pursuant to subjection (1), it is to be conducted in accordance with section 6-46.*
>
> *(3) The arbitrator shall determine any dispute respecting the application of this section.*

[54] According to the Employer, the Board has exclusive jurisdiction pursuant to section 6-48 only if an application has been filed pursuant to clause 6-62(1)(g). The Employer says that this provision does not apply in the present matter because there is a collective agreement in existence. Therefore, an arbitrator has exclusive jurisdiction over this dispute.

[55] In the Board's view, this provision does not have the significance that the Employer attaches to it. Clearly, if there is no collective agreement in force then the jurisdiction of the arbitrator needs to be explicitly stated in the legislation. Section 6-48 does this. It explicitly describes the conditions precedent for the arbitrator to have jurisdiction over a dispute over which the arbitrator would not normally have jurisdiction due to the absence of an applicable collective agreement. The section makes clear, however, that an arbitrator does not have jurisdiction if the termination or suspension is the subject of an application to the Board respecting a matter

mentioned in clause 6-62(1)(g). In that case, the Board has exclusive jurisdiction over the dispute. This provision confirms the limited scope of an arbitrator's jurisdiction in the absence of a collective agreement.

[56] Moreover, clause 6-62(1)(g) gives the Board jurisdiction to consider whether there has been discrimination, coercion, or intimidation with respect to a condition of employment with a view to encouraging or discouraging union activity or participation in a proceeding. In some cases, unless the parties have agreed on the interpretation to be given to the applicable provisions, this provision necessitates a review and consideration of the applicable collective agreement. To find otherwise would permit one party to hold out on an agreement as to the interpretation of a provision only to oust the jurisdiction of the Board to make a determination on an unfair labour practice.

[57] Clause 6-62(1)(g) is situated among a suite of unfair labour practice provisions, all of which are within the jurisdiction of the Board. Many of these provisions have some connection with the terms and conditions of a collective bargaining agreement that is in force, for example, clause 6-62(1)(f) (deduct negotiating time from wages); 6-62(1)(l) (change conditions of work while matter is pending); 6-62(1)(m) (deny a benefit plan). Each of these provisions permit or require, depending on the circumstances, the Board to consider the collective agreement to determine, for example, the appropriate wages owing, the existing conditions of work, and the nature of the existing benefit plan.

[58] Clause 6-62(1)(g) makes it an unfair labour practice not only to discriminate with respect to conditions of employment but also to use coercion or intimidation of any kind, including by threatening termination or suspension. Clauses 6-62(1)(l) and 6-62(1)(m) make it an unfair labour practice not only to change conditions of employment, but to threaten changes to existing conditions of employment. From a practical standpoint, there is no utility or logic in finding that the Board has no jurisdiction, depending on the wording in a collective agreement, for matters that allege changed conditions as opposed to threatened changes when either of those factual circumstances could ground an unfair labour practice.

[59] Finally, a foundational provision, situated among the general "rights, duties, obligations and prohibitions", prohibits a person from discriminating against an employee with respect to a term or condition of employment because the employee has participated in a proceeding:

> ***6-6****(1) No person shall do any of the things mentioned in subsection (2) against another person:*

> *(a) because of a belief that the other person may testify in a proceeding pursuant to this Part;*
>
> *(b) because the person has made or is about to make a disclosure that may be required of the person in a proceeding pursuant to this Part;*
>
> *(c) because the person has made an application, filed a complaint or otherwise exercised a right conferred pursuant to this Part; or*
>
> *(d) because the person has participated or is about to participate in a proceeding pursuant to this Part.*
>
> *(2) In the circumstances mentioned in subsection (1), no person shall do any of the following:*
>
> *(a) refuse to employ or refuse to continue to employ a person;*
>
> *(b) threaten termination of employment or otherwise threaten a person;*
>
> *(c) discriminate against or threaten to discriminate against a person with respect to employment or a term or condition of employment or membership in a union;*
>
> *(d) intimidate or coerce or impose a pecuniary or other penalty on a person.*

[60] In summary, the foregoing provisions make clear that, in order for the Board to fulfill its statutory role to supervise the collective bargaining relationship, it may be called upon to determine whether a party is bound by a collective agreement, determine whether a collective agreement is applicable, and in some circumstances where appropriate, interpret a collective agreement that is in force.

[61] In the present case, the Employer states that it has the right to manage the workplace subject to the collective agreement, and this includes a right to modify a term or condition of employment. Whether it may do so arises directly from the relevant collective bargaining relationships. The Employer relies for its argument on *Canadian Broadcasting Corp. v C.E.P.*, 2002 CarswellNat 3270, [2002] CLAD No 449:

> *28 The parties do not disagree about the general principles governing this grievance. They have been ably and fairly summarized in the Long Manufacturing case (pages 43 and following) and therefore shall not be repeated here. An individual's control over his/her terms or conditions of employment is determined by the collective agreement. Basically, the only ability of an individual to bargain or alter terms or conditions of employment is what, if anything, is allowed specifically in a collective agreement. Further, an employer cannot unilaterally change terms and conditions of employment or act contrary to the collective agreement. However, residual management rights do allow employers to act unilaterally on matters that are not covered by a collective agreement. See Long Manufacturing, and Consumers Glass, supra[.]*

[62] That decision goes on to state:

> *29 The application of these principles is a little more problematic. The question then becomes one of definition and focus. Does the Policy cover or deal with matters that fall within the collective agreement or not? Put alternatively, does the collective agreement "occupy the field" of the treatment of accrued vacation entitlement? If it does, then the payment could be held to violate the collective agreement and/or the Union's exclusive authority to represent the employees.*

[63] The Employer also relies on the description of the management rights clause that was before the Court and considered in *Horrocks*:

> *[49] The collective agreement includes a management rights clause, which entitles the employer to maintain quality patient care; to discipline, suspend, or discharge employees for just cause; and to make, alter, and enforce rules and regulations in a manner that is fair and consistent with the terms of the agreement (art. 301). These rights are expressly limited by a prohibition on discrimination under art. 6 of the collective agreement. They are also implicitly limited by the terms of employment-related statutes (Parry Sound, at para. 26; McLeod v. Egan, 1974 CanLII 12 (SCC), [1975] 1 S.C.R. 517, at p. 523), including the prohibition on discrimination under s. 7 of The Labour Relations Act.*

[64] In *Fraser No. 1*, the Board found that a grievance arbitrator has no jurisdiction to determine whether an employer contravened sections 6-6 or 6-62 of the Act or to provide a remedy for such a contravention.[11] That conclusion follows a line of case law finding that the Board has exclusive jurisdiction to determine whether a person has committed an unfair labour practice: *Tholl and Mundell, on their own behalf and on behalf of all other members of Saskatchewan United Food and Commercial Workers Local 1400 v Saskatchewan Co-operative Association Ltd.*, 1983 CanLII 2262 (SK KB); *Burkart et al. v Dairy Producers Co-operative Ltd*., 1990 CanLII 7774 (SK CA); *Canadian Union of Public Employees, Local 59 v Saskatoon (City)*, 2011 SKCA 148 (CanLII).

[65] In *Saskatchewan Crop Insurance Corporation v Saskatchewan Government and General Employees' Union,* 2017 CanLII 68785 (SK LRB) [*Sask Crop Insurance*], the Board found:

> *[31] The Board's authority with respect to unfair labour practices is a unique jurisdiction granted to the Board to oversee the collective bargaining relationship between the parties. This is not a jurisdiction that can be assumed or resolved through the grievance process. Assuming the matter eventually found its way to an arbitrator appointed under the collective agreement, that arbitrator would not have the authority granted to this Board to uphold and support the collective bargaining process. For this reason, the grievance process cannot resolve the dispute as framed by SGEU.*
>
> *…*
>
> *[32] In short, the answer to this question is no. The grievance process, even if it proceeds to arbitration cannot supervise the collective bargaining relationship between the parties. An arbitrator's jurisdiction is limited to interpretation of the collective agreement and its*

[11] *Fraser No.1*, at para 16.

> *provisions. He or she would not, acting as an arbitrator, be permitted to superintend the party's behavior in collective bargaining between the parties, nor supervise and maintain that relationship. An arbitrator could certainly look at the discipline to determine if it was warranted or not, or if it was in compliance with the collective agreement, but he/she would not be able to provide a suitable remedy to mend the relationship between the parties or to restore the balance of bargaining power as between them.*

[66] It has also long been recognized that arbitrators can apply legislation, such as human rights and employment-related statutes, to disputes arising from a collective agreement.[12] In this vein, arbitrators review the limits of a management rights clause in light of the non-discrimination provisions contained in the collective agreement and the implied limits arising from the applicable statute. Relatedly, arbitrators have been known to consider the implied limits arising from the applicable labour relations statute when interpreting the limits of a management rights clause.[13]

[67] Assuming without deciding that an arbitrator may apply the unfair labour practice provisions by inference when interpreting a management rights clause, this, however, does not oust the Board's jurisdiction to supervise the collective bargaining relationship. As the foregoing legislative review should disclose, the temptation to simply transplant the relative scope applicable to a specific tribunal into the complex and integrated Part VI regime should be resisted. The scope of the Board's jurisdiction (relative to that of an arbitrator) must be considered in light of its governing statute. Discrimination with respect to working conditions, for example, may engage an employer's management rights; however, the Board has jurisdiction to supervise the collective bargaining relationship, including by supervising the rights of employees to participate in union activity and proceedings pursuant to Part VI.

[68] The foregoing might imply concurrent jurisdiction as between an arbitrator and the Board in some circumstances. Whether concurrency exists under the Act, however, is not necessary to decide if, factually, the essential character of the present dispute does not arise from the collective agreement but instead from the collective bargaining relationships.

[69] In assessing the essential character of the dispute, the Board is to account for "the factual circumstances underpinning the dispute".[14] In other words, the Board is to inquire into the facts alleged, rather than the legal characterization of the matter.[15] The Board is also to consider the "ambit of the collective agreement".

---

[12] Donald J. M. Brown and David M. Beatty, *Canadian Labour Arbitration*, looseleaf, 5th ed. (Toronto: Thomson Reuters, 2017) [*Brown and Beatty*] at 2:41.
[13] See, *Complex Services Inc. (2006)*, 152 LAC (4th) 315 (MacDowell) [*Complex Services*]. See, in particular, para 43.
[14] *Horrocks*, at para 40.
[15] *Ibid*, at para 40.

[70] Here, the collective agreement is not before the Board. Therefore, it can consider its ambit only in general terms not specific to the agreement in question.

[71] In his reply to the application for summary dismissal, Fraser explains that he intends to prove that the Employer interfered with the exercise of his rights and discriminated against him with respect to the conditions of his employment. He states that he is not claiming that the affected working conditions are matters within the collective agreement. Instead, he is asking the Board to decide whether the Employer committed unfair labour practices.

[72] To support his claim, he points to the timing of the Employer's actions in relation to his own activity in Board proceedings in the wake of what he describes as a three-year period of status quo working conditions. He also suggests that the Employer has provided inconsistent explanations and has retaliated against him.

[73] More specifically, Fraser states that for approximately three years he had been working pursuant to a flexible work schedule. In proceedings before the Board in November 2022, Fraser testified that the Employer had permitted a field employee work pattern and had approved his personal time off during the day 66 times. In December 13, 2022, the Employer advised him in writing that he was being assigned a new schedule consisting of hours from 8:00 to 5:00. He claims that the Employer's initial justification for this change was that there was no program need for the original schedule, and therefore the Employer's justification was of no effect except to imply culpability on Fraser's part for working flexible hours. He states that the Employer later provided another justification for this change, which was inconsistent with the first one. He claims that other employees were still offered flexible work arrangements.

[74] He does not claim that his flexible work pattern is protected by a specific provision in the collective agreement, or that the Employer, by imposing a regular work schedule, breached a specific provision in the collective agreement. (To be sure, he does state that, as a field employee, he is not designated standard hours of work or normal working days.) Nor does the Employer claim that a specific provision of the collective agreement, other than the management rights clause, would determine the issue. The letter describing Fraser's new schedule describes it as a "'5-5-4' as in Article 9.3.5." Neither Fraser nor the Employer have suggested that this provision protects either of them; nor has that provision been put before the Board.

[75] Fraser also complains about the change in his work location. He claims that his reclassification aligns with the relevant job evaluation factors for in-scope employees, and that his

inability to remove himself from the prevailing noise condition is contrary to the job evaluation factors. He also says that this new work location comes with an increased risk of harm in comparison to his private office assignment. He alleges that the change was not imposed on anyone else in his position, was made with his remote work application pending and not acknowledged and was suspiciously close in time to various events in relation to his participation in proceedings before the Board.

[76] In its reply, the Employer lists a number of operational issues which it says were the reasons for the change in work location.

[77] Finally, Fraser states that on December 13, 2022 the Employer transferred his supervision from the Director, Policy and Legislation, who would normally supervise a Senior Policy Analyst, to the Executive Director, Corporate Planning. Fraser includes with his application an organization chart, dated October 1, 2022, showing the employees who report directly to the Director, Policy and Legislation. The Employer states that Fraser does not have a right to report to a specific supervisor and that there were operational reasons for the transfer, specifically, Fraser's work on a special project. The Employer argues that it is allowed to change Fraser's supervision pursuant to its management rights. The letter describing the transfer explains that it is temporary and does not affect Fraser's classification or job description. Neither Fraser nor the Employer rely on a specific collective agreement provision, other than the management rights clause.[16] The Board notes that reporting relationships are generally not grievable matters.

[78] Fraser states that the Employer's actions were retaliatory, discriminatory, and intentional intimidation.

[79] Fraser alleges multiple changes in his working conditions relative to the status quo, a pattern of conduct which includes a shift in his reporting structure, inconsistent explanations on the part of the Employer, and concurrent, or from Fraser's perspective, suspicious timing. Fraser alleges that, in all of these ways, he is being treated differently from other similarly situated employees.

[80] The submissions from both parties suggest that there are some points of connection between the allegations and the collective agreement; however, there are no allegations that any provision of the collective agreement has been breached, except perhaps, indirectly in relation to the job evaluation factors. Furthermore, none of the provisions of the collective agreement are

[16] Which the Employer relies upon.

before the Board,[17] and there is no information before the Board about the provisions of the collective agreement relied upon by the Employer, other than an oblique reference to Article 9, which apparently relates to hours of work, and the bare reference to a management rights clause.

[81] It is also unclear what provision of the collective agreement would ground a grievance or grievances in relation to the issues that have been raised by Fraser. The union in *Horrocks*, presumably, would have brought a grievance pursuant to both the discharge and discrimination provisions, or just the discharge provision.[18] The Employer has not indicated under what provision of the collective agreement a grievance or grievances could theoretically be filed. Instead, the Employer refers in general to "hours of work, location of work, and supervision" and then points to the limits on "management rights". The Employer has not even put before the Board any applicable discrimination provision and there is no information as to whether the ambit of any such provision would purport to cover proceedings pursuant to Part VI.

[82] In the Board's view, the central concern of the largely circumstantial allegations is not how Fraser was treated in reference to the collective agreement, but how Fraser was treated relative to his status quo working conditions concurrent with his participation in Board proceedings. The timing of these changes, which is not related to any specific collective agreement provision, is central to establishing the purpose for which they were imposed.

[83] This dispute, considering its essential character, raises issues about the treatment of employees when they seek to enforce their rights under the Act, and in particular, when they seek to enforce their rights in proceedings before this Board. All of the allegations, including those that were considered in LRB File No. 083-22 stem, directly or indirectly, from Fraser's initial DFR application. Fraser alleges a continued pattern of related conduct. A DFR application is an employee's attempt to hold a union to account for what the employee believes are the union's obligations within the collective bargaining relationship. The Board has exclusive jurisdiction over DFR applications. Given its nature, a DFR application can have consequences for the union-employer and employee-employer relationships.

---

[17] The Board notes that in *Gavlas*, the Court considered the content of the collective agreement in deciding the arbitrator's scope of jurisdiction, at paras 23, 34. In *Horrocks*, the Court considered the scope of the management rights clause, at para 49.

[18] To be clear, no grievance was filed in relation to the subsequent discharge: *Northern Regional Health Authority v Manitoba Human Rights Commission and Linda Horrocks*, 2016 MBQB 89 (CanLII), at paras 26-8. In *Complex Services*, the grievance put in issue the specific discrimination clause. There was also a clause in the collective agreement related to shift supervisors which was reviewed by the arbitrator.

[84] The Employer suggests that *Fraser No. 1* is distinguishable on the basis that the prior case involved activity with the Union, whereas the present case does not. The Board is not persuaded by this argument. While it is true that the prior case involved activity with the Union, it also involved communications and interactions with Fraser related to his participation in a proceeding. Moreover, clause 6-62(1)(a) protects the exercise of any right conferred by Part VI, not just activity in a union; clause 6-62(1)(g) protects "participation of any kind in a proceeding pursuant to" Part VI in addition to "membership in or activity in or for or selection of a labour organization".

[85] The essential character of the dispute arises not from the collective agreement but from the collective bargaining relationships. The Board has jurisdiction over the dispute. The Employer's application, as it relates to LRB File No. 205-22, is dismissed.

[86] To be abundantly clear, the Board in these Reasons has described Fraser's allegations, not the Board's findings. What the Board will make of the allegations is up to the Board at a substantive hearing further to the presentation of all of the evidence. Nothing in these Reasons should be taken as commenting on the strength of the merits of the allegations that have been made.

LRB File No. 013-23:

[87] The next issue is whether the Board should dismiss LRB File No. 013-23 for a lack of evidence, pursuant to clause 6-111(1)(p).

[88] The Employer has the onus on the application for summary dismissal. The Employer must demonstrate that there is a lack of evidence and that, on this basis, the application should be summarily dismissed. Therefore, it is up to the Employer to show that the evidence falls within the privilege it has claimed. If it falls within the privilege, it is *prima facie* inadmissible, and then it is up to Fraser to demonstrate that it comes within an exception to the privilege.

[89] In the underlying unfair labour practice application, Fraser alleges that the Employer's proposed settlement agreement, and related communications, constitute interference pursuant to clause 6-62(1)(a).

[90] In a particular case, three conditions must be present for settlement privilege to be recognized:[19]

> *(1) A litigious dispute must be in existence or within contemplation.*
>
> *(2) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed.*
>
> *(3) The purpose of the communication must be to attempt to effect a settlement.*

[91] In determining whether the privilege applies, it is necessary to consider why the privilege exists. The purpose of the privilege was explained in *Union Carbide Canada Inc. v Bombardier Inc*., 2014 SCC 35 at para 34, [2004] 1 SCR 800 [*Union Carbide*]:

> *[31] Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation. This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement: "In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming" (A.W. Bryant, S.N. Lederman and M. K. Fuerst, The Law of Evidence in Canada (3rd ed. 2009), at para. 14.315).*
>
> *[32] Encouraging settlements has been recognized as a priority in our overcrowded justice system, and settlement privilege has been adopted for that purpose. As Abella J. wrote in Sable Offshore, at para. 12, "[s]ettlement privilege promotes settlements." She explained this as follows, at para. 13:*
>
> *Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible (see David Vaver, "'Without Prejudice' Communications – Their Admissibility and Effect" (1974), 9 U.B.C. L. Rev. 85, at p. 88). The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. As Oliver L.J. of the English Court of Appeal explained in Cutts v. Head, [1984] 1 All E.R. 597, at p. 605:*
>
> *[P]arties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations … may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in Scott Paper Co v. Drayton Paper Works Ltd (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.*
>
> *What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.*

---

[19] Sidney N. Lederman, Alan W. Bryant, Michelle K. Fuerst, *Sopinka, Lederman, & Bryant: The Law of Evidence in Canada*, 5th ed (LexisNexis Canada Inc., 2018), at 14.348 [*Sopinka*].

[92] Ultimately, what matters is the intention of the parties. Any negotiations undertaken with the purpose of settling the action, whether marked as "without prejudice" or not, are inadmissible.[20] The intention to settle may be implicit in the circumstances.[21] Negotiations for settlement, even if they do not result in an agreement, are not admissible in subsequent actions even if not related to the disputes that were subject to the negotiations.[22]

[93] In the present case, Fraser argues that the privilege has been waived by the Employer's disclosure to a "third party", the Union. In the alternative, Fraser argues that the Board should find an exception to the privilege in the circumstances of this case. He relies for this alternative argument on *United Steel v Premier Horticulture Ltd*., 2019 CanLII 10580 (SK LRB).

[94] As for the first and third preconditions, Fraser has not disputed their presence, and reasonably so. With respect to the first condition, a litigious dispute (or disputes) was in existence or within contemplation at the time of the communications. With respect to the third condition, the communications, even as they have been described by Fraser, were made in an attempt to effect a settlement. Fraser suggests that the Employer, through the draft settlement agreement, intended to place the Union in a conflict of interest in respect of the advice it would give about the settlement offer. Even here, where Fraser asserts an ulterior motive on behalf of the Employer, the alleged ulterior motive was to effect a settlement.

[95] Fraser disputes the presence of the second precondition on the basis that the Employer waived privilege by disclosing the draft agreement to a "third party". There is no validity to this argument. The "third party" was the Union - a party to the draft agreement and a party to the collective bargaining relationship.[23] Delivering a proposed settlement agreement to a party to the agreement does not constitute waiver of the contents of the agreement. Moreover, the privilege belongs to all parties to the negotiations and cannot be waived by only one party or even two.[24] As for the allegation that it was wrongful for the Employer to include the Union in the agreement, this argument is relevant not to whether the Employer waived privilege but rather to whether there is an exception to settlement privilege on these facts.

[96] In addition, the presence of the second condition can be inferred from the circumstances.[25] What matters is the intent of the parties to settle - "[a]ny negotiations undertaken with this purpose

---

[20] *Ibid*, at 14.351.
[21] *Ibid*, at 14.351.
[22] *Ibid*, at 14.360-14.362.
[23] Section 6-7 of *The Saskatchewan Employment Act*.
[24] *Ibid*, at 14.364; *3058354 Nova Scotia Company v On*Site Equipment Ltd*., 2011 ABCA 168 (CanLII), at para 50.
[25] *Excelsior Life Insurance Co. v Saskatchewan (1987)*, 63 Sask R 35 (Sask. Q.B.).

are inadmissible."[26] Here, it is apparent from the circumstances that the parties were engaged in negotiations for the sake of "buying peace or to effect a compromise".[27] There was an intention to avoid litigation. The second precondition is met.

[97] There are, however, exceptions to the rule that evidence of such communications may never be admitted. The Employer concedes this point, relying on the following passage from *Sable Offshore Energy Inc. v Ameron International Corp*., 2013 SCC 37 (CanLII), [2013] 2 SCR 623 [*Sable*]:

> *[19] There are, inevitably, exceptions to the privilege. To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" (Dos Santos Estate v. Sun Life Assurance Co. of Canada, 2005 BCCA 4, 207 B.C.A.C. 54, at para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (Unilever plc v. Procter & Gamble Co., [2001] 1 All E.R. 783 (C.A. Civ. Div.), Underwood v. Cox (1912), 1912 CanLII 582 (ON SCDC), 26 O.L.R. 303 (Div. Ct.)), and preventing a plaintiff from being overcompensated (Dos Santos).*

[98] The Employer says that the "undue influence" exception is the closest to what Fraser is arguing but asserts that this "is not made out".

[99] It is important to note that the exceptions set out in *Sable* are not exhaustive. The question in any case is whether a competing public interest outweighs the public interest in encouraging settlement.

[100] To qualify as an exception, the admission of the evidence must be necessary to address a "compelling or overriding interest of justice".[28]

[101] For example, an exception may arise where communications during negotiations include unlawful threats which are designed to intimidate - however, to be exempt from the privilege the threat must be egregious.[29]

[102] Furthermore, an overriding public interest may be found in cases alleging prosecutorial misconduct, such as in *R. v Delchev*, 2015 ONCA 381 (CanLII) [*Delchev*]. In *Delchev*, the Ontario

---

[26] *Sable Offshore Energy Inc. v Ameron International Corp.,* 2013 SCC 37 (CanLII), [2013] 2 SCR 623 [*Sable*], at para 14.
[27] *Sopinka*, at 14.354.
[28] *Ibid*, at 14.383.
[29] *Ibid,* at 14.369.

Court of Appeal found, in that context, that it was in the interests of justice "for a person who has been wronged to be able to present evidence of the alleged wrongdoing before the court".[30]

[103] Theoretically, there may be a relevant and useful analogy to be drawn between cases alleging threats or misconduct and cases alleging a breach of a provision of the Act – in the context of negotiations.

[104] However, the Board must be careful not to permit exceptions beyond what is necessary to address a compelling or overriding interest of justice. It should not be sufficient for a litigant to simply state that, in negotiating a settlement, another party contravened the Act and that, therefore, the facts establish an exception to settlement privilege. There should be, at least, a *prima facie* case of a contravention.

[105] In the present matter, there is no such case.

[106] Fraser puts in issue the actions of the Employer. He argues that the Employer has interfered with Fraser in the exercise of a right conferred by Part VI, contrary to clause 6-62(1)(a). He contends that the structure of the proposed agreement and the Employer's communications with the Union put the Union in a conflict of interest and negatively impacted the Union's advice-giving role.

[107] Fraser suggests that "improper conduct" is sufficient to establish a breach of clause 6-62(1)(a), and relies for this argument on the following excerpt from *Amenity Health Care L.P. v Workers United Canada Council, Tanya Parkman and Gwen April Britton*, 2018 CanLII 68441 (SK LRB) [*Amenity Health Care*]:

> *[92] In Re: Western Automotive Rebuilders Ltd., the Board considered the meaning of the word "interfere" as used in then section 11((2)(a) of the Trade Union Act. At page 5 of that decision, former Chairperson Bilson says:*
>
> > *It is our conclusion that the concept of "interference in section 11(2)(a) must be broad enough to include conduct on the part of a trade union which, while not coercive or intimidating, is improper in some other way. Willful misrepresentation which is not coercive would, in our view, constitute an illustration of this….The next phrase in Section 11(2)(a) – "with a view to encouraging or discouraging membership" – indicates that the intention of the section is to prohibit conduct which is undertaken with a conscious purpose, and does not catch conduct which is innocent of such calculation.*
>
> *[footnotes removed]*

[30] *R. v Delchev*, 2015 ONCA 381 (CanLII) [*Delchev*], at para 34.

[108] The Board in *Amenity Health Care* was considering section 11(2)(a) of *The Trade Union Act*, which as is clear from the decision, included an element of intention. It may be that lesser conduct qualified to satisfy the test due the requirement that such conduct had to be accompanied by "a view to encouraging or discouraging" activity.

[109] By contrast, the prevailing test to establish a contravention of clause 6-62(1)(a) was outlined in *Fraser No. 1*:

> *[61] In other words, the Board must review the context surrounding the Employer's communications to determine whether their likely effect would have been to interfere with, restrain, intimidate, threaten or coerce an employee possessed of reasonable intelligence, resilience and fortitude in the exercise of protected rights.*

[110] Evidence of "improper" conduct is not sufficient to establish a breach of clause 6-62(1)(a). The question is whether the likely effect of the Employer's actions would have been to interfere with an employee of reasonable intelligence, resilience and fortitude in the exercise of protected rights.

[111] Furthermore, the premise of Fraser's argument is inherently flawed. It presupposes that the Union is not an independent actor capable of assessing potential or actual conflicts of interest and responding accordingly. It suggests that the Employer indirectly interfered with Fraser's rights by placing the Union in a position that the Union representatives could not manage. Furthermore, in adjudicating disputes under the Act the Board seeks to promote and facilitate collective bargaining relationships. Central to healthy collective bargaining relationships is the development of capacity internal to the negotiating parties. Even accepting that the Employer could or should have approached this matter differently, it would not advance the Board's objectives to micromanage settlement negotiations to the extent demanded by Fraser in this case.

[112] In conclusion, the Board finds no compelling public interest to admit the evidence of the proposed settlement agreement, and related communications, that outweighs the public interest in encouraging settlement. Fraser's entire application rests on the admission of said evidence. In the absence of this evidence, there is no evidence to sustain a claim.

[113] For the foregoing reasons, the unfair labour practice application brought in LRB File No. 013-23 shall be dismissed.

[114] An appropriate Order will accompany these Reasons.

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

DATED at Regina, Saskatchewan, this 21st day of August, 2023.

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson