Labour Relations Board
Saskatchewan

TIMOTHY JOHN LALONDE, Applicant v. UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, Respondent

LRB File No. 222-02; September 10, 2003
Vice-Chairperson, James Seibel; Members: Pat Gallagher and Leo Lancaster

The Applicant, Timothy John Lalonde
For the Respondent: Drew Plaxton

Practice and procedure – Natural justice – Reasonable apprehension of bias – Board panel advised applicant of internal union process that might resolve applicant's dispute with union – Applicant alleges that Board Vice-Chairperson coerced him into accessing internal union process and seeks Board Vice-Chairperson's recusal - No evidence that Board Vice-Chairperson acted in manner that would raise apprehension of bias in reasonably well-informed, right-minded person viewing matter realistically and practically, with understanding of complex and contextual issues and having thought matter through – Board Vice-Chairperson declines to disqualify himself from hearing case.

REASONS FOR DECISION

[1] These Reasons for Decision are in respect of an application by the Applicant, Timothy John Lalonde, made August 27, 2003, that the chair of the panel, Vice-Chairperson Seibel recuse himself from continuing to hear Mr. Lalonde's application filed as LRB File No. 222-02.

Background and Facts:

[2] Mr. Lalonde filed application LRB File No. 222-02 with the Board on November 6, 2002. The application alleges that the United Brotherhood of Carpenters and Joiners of America, Local 1985 (the "Union") committed an unfair labour practice or practices in violation of ss. 11(2), 36 and 36.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), in that the Union had threatened to revoke Mr. Lalonde's membership for the ostensible reason that he also held membership in a different union commonly engaged in organizing workers in the construction sector. Subsequent to the filing of the

application, the Union did revoke Mr. Lalonde's membership in the Union on that professed basis.

[3] In its reply to the application, the Union alleges that its executive committee duly revoked Mr. Lalonde's membership in accordance with a provision of the Union's constitution prohibiting its members from becoming members of any other organization whose jurisdictional claim overlaps or infringes that of the Union.

[4] The hearing of the application commenced on March 27, 2003 before a panel of the Board composed of Vice-Chairperson James Seibel, and Board members Pat Gallagher and Leo Lancaster. On that date, the Board panel heard the evidence of Mr. Lalonde himself. Near the conclusion of Mr. Lalonde's evidence, in response to a question by Board member Lancaster, Mr. Lalonde indicated that he was not aware of a provision in the Union's constitution allowing for an appeal of the decision of the Union's executive committee. Mr. Plaxton, counsel for the Union, advised that the Union intended to argue that the application ought to be dismissed on the grounds that Mr. Lalonde had not exhausted his internal remedies under the Union's constitution. However, Mr. Plaxton indicated that, as the hearing of Mr. Lalonde's application would have to be adjourned to a further date to continue in any event, he wished to consult briefly with his client as to whether it might be willing to consider an internal appeal of the decision of its executive committee. Following a brief adjournment during which Mr. Plaxton and Mr. Lalonde apparently discussed the matter, Mr. Lalonde indicated his desire to avail himself of the Union's constitutional appeal procedure.

[5] The hearing was then adjourned *sine die* to secure further dates to continue the hearing. The hearing was subsequently scheduled to continue on August 6 and 7, 2003.

[6] On August 6, 2003, Mr. Lalonde advised Vice-Chairperson Seibel that he wished to make application that Vice-Chairperson Seibel recuse himself from continuing to hear the case on the ground of bias or reasonable apprehension of bias allegedly as disclosed at the first day of hearing on March 27, 2003 during the discussion of the Union's internal appeal procedure referred to above. Mr. Lalonde advised that he wished to rely upon the transcript of evidence from March 27, 2003 in support of his

recusal application. No transcript of the proceedings of March 27, 2003 having as of then been requested to be prepared, the application for recusal was adjourned with the agreement of the parties to be heard by the full panel of the Board on August 27, 2003. The transcript was prepared and forwarded to the parties in advance of the August 27, 2003 hearing.

[7] For the purposes of the recusal application, Mr. Lalonde specifically referred to and relied upon only p. 106, ll. 6 to 26, inclusive and p. 107, ll. 1-17, inclusive of the transcript of the proceedings of March 27, 2003, which reads as follows:

> *THE CHAIR: Right. What I am considering do (sic) is – and I will just bring this out for you to consider, is depending on what the discussion results in right now as to what you want to propose to Mr. Lalonde, is that at that time we would perhaps ask Mr. Suderman or Ms. (inaudible[1]) to sit in while you are making that proposal so that they could explain perhaps to Mr. Lalonde what it means in the context of these proceedings, so that he can rest assured that he is not (inaudible) prejudiced in any way, but something might come up in that procedure. Give that some thought.*
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> *MR. LALONDE: Mr. Seibel, I don't believe that an appeal process with the same members and the same executive are going to benefit me in any way, shape or form.*
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> *THE CHAIR: Stranger things have happened Mr. Lalonde.*
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> *MR. LALONDE: Well, I happen—I've actually totally been a member of the carpenters for 15 years and I believe I know Mr. Todd very well, and I believe it would be more of a lynching than a fair hearing or appeal process.*
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> *THE CHAIR: Well, Mr. Lalonde, regardless of how you feel, that was then, this is now and I can tell you that it has been demonstrated numerous times that no matter how antagonistic parties may be, a lot of times just the fact that they can sit down together and perhaps have someone with some independence, facilitates discussion and take things a long way. Again, we don't need for you to decide whether that is something you want to explore or not. Nobody is forcing you to do that, but I think that it might be – Mr. Plaxton wants to see if he can make some proposals to you in that regard. If he does get those instructions, then what I am proposing is we have one of our administrative*

[1] Mr. Suderman was then the Acting Registrar of the Board. The reference to "Ms. (inaudible)" was to Ms. Aina Kagis, then Acting Investigating Officer of the Board.

> *officers sit in when you have that discussion so that if have any questions that you might need answered about how it might affect this proceeding, they can answer that for you.*

Arguments:

The Applicant

[8] Mr. Lalonde argued that he felt "pressured and intimidated" by Vice-Chairperson Seibel on March 27, 2003 with respect to the submissions by counsel for the Union regarding the possibility of an appeal of the decision by the Union's executive committee to revoke his membership. He asserted that the Board's function was to uphold the *Act*, not the Union's constitution. Mr. Lalonde expressed his dissatisfaction with the length of time that he has waited for a decision on the appeal and felt the Union was stalling. The appeal decision was not forthcoming before the continuation of the hearing of Mr. Lalonde's application to the Board.

[9] Mr. Lalonde argued that the excerpt from the transcript of the proceedings of March 27, 2003, *supra*, clearly indicates that he did not want anything to do with the Union's internal appeal process and that he was "coerced" by Vice-Chairperson Seibel into agreeing to participate, and that that is evidence that the Vice-Chairperson is biased in favour of the Union.

The Union

[10] On behalf of the Union, Mr. Plaxton argued that the application for recusal had no merit and ought to be dismissed. He asserted that the transcript of proceedings demonstrated that Mr. Lalonde was not "badgered" into anything, but willingly agreed to make an internal appeal to the Union of the decision of its executive committee. Counsel further argued that the Board ought not to allow Mr. Lalonde to continue to represent himself on his application.

Analysis and Decision:

[11] Applications for recusal of members of the Board are uncommon, but must be treated with utmost seriousness. The duty to act fairly is an overarching requirement of administrative law, applying to the procedure the tribunal follows in arriving at its decision. The obligation that the decision-maker be unbiased is

fundamental to the right to procedural fairness. In the present case, it must be determined whether there is actual bias or a reasonable apprehension of bias on the part of the Vice-Chairperson as alleged by the Applicant.

[12] The Supreme Court of Canada decision in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, confirmed that a quasi-judicial administrative tribunal such as the Board is held to a high standard with respect to absence of bias in its decision-making – essentially that applicable to the courts. Cory J., stated, at 638, as follows:

> *It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision.*

[13] In *Re Emerald Transport* (2001), 70 C.L.R.B.R. 304 (C.I.R.B.) (which decision provides a concise overview of the principles in this area applicable to labour relations tribunals) the Canada Industrial Relations Board described the nature of "bias" in this context, and the reason for the strict standard required, as follows at 310:

> *Bias is a predisposition or lack of impartiality on the part of the decision-maker regarding the matter to be decided. The rule against bias is intended to ensure that tribunals are not improperly influenced when they make their decisions and that they make their decisions on the basis of the evidence presented.*

[14] While there is precedent where an allegation of bias is made against one member of a panel for the issue to be decided by that member alone, we have adopted the recent practice of the British Columbia Labour Relations Board in having the issue determined by the entire panel: *See*, *Re Visionwall Inc*., [2003] BCLRBD No. 222; *Re KFCC/Pepsico Holdings Ltd*., [2000] BCLRBD No. 106.

[15] The accepted modern test as to whether there is a reasonable apprehension of bias was enunciated by de Grandpre, J. in his dissenting opinion in *Committee for Justice and Liberty, et al. v. National Energy Board, et al*., [1978] 1 S.C.R. 369 (S.C.R.), at 394:

> *. . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. . . ."*

[16] This test was confirmed by the Supreme Court of Canada in *Newfoundland Telephone Co., supra*, and *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484. In the former case Justice Cory speaking for a unanimous court stated, at 363, as follows:

> *To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.*

[17] And, in *R. v. S. (R.D.)*, *supra*, L'Heureux-Dube, J. and McLachlin, J. (as she then was), in joint reasons on behalf of the plurality, at 502, specifically endorsed the articulation of the test by de Grandpre, J., as did Cory, J. in separate reasons, at 531, as follows:

> *This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. . . .Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. . . .*

[18] L'Heureux-Dube and McLachlin, JJ. further stated, at 505, as follows:

> *The presence or absence of an apprehension of bias is evaluated through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail (Committee for Justice and Liberty, supra.) The person postulated is not a "very sensitive or scrupulous" person, but rather a right-minded person familiar with the circumstances of the case.*

[19] The last sentence in this excerpt is confirmation of the statement by de Grandpre, J. in *Committee for Justice and Liberty, supra*, at 395, that whether there is a

reasonable apprehension of bias is a question of fact, requiring an examination of all the circumstances and their specific context, not through the eyes of the party making the allegation, but as if through the eyes of a reasonable, informed, realistic, practical and right-minded person:

> *The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".*

[20] Accordingly, the test is an objective one and the threshold for finding real or perceived bias is high. Mere suspicion, surmise or conjecture is not enough: *Adams v. British Columbia (Workers' Compensation Board)* (1989), 42 B.C.L.R. (2d) 228 (B.C.C.A.), at 231, per Gibbs, J.A.

[21] The Chairperson, Vice-Chairpersons and members of the Board each take an oath of office as prescribed by s. 4(10) of the *Act*, as follows

> *I, _____, do swear that I will faithfully and impartially, to the best of my judgment, skill and ability, execute and perform the office of member of the Labour Relations Board. So help me God.*

[22] The British Columbia Labour Relations Board in *Re Visionwall Inc., supra*, at paras. 35 and 36, stated that:

> *35. The oath [of office] is an important mechanism in the transition to neutral adjudication. It creates a presumption of impartiality that can only be displaced by "'cogent evidence": Pacific Opera, supra, para. 20, R.D.S., paras. 116 and 117.*
>
> *36. Absent such a presumption and expectation of impartiality "the functioning of the Board as an expert but neutral arbiter of labour disputes would be poisoned by cynicism and mistrust": Pacific Opera, para. 24.* [2]

[23] In the decision of the Supreme Court of Canada in *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851, at 852, Bastarache, J. referred to the

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[2] The statement is supported by the observation in *R. v. S. (R.D.), supra*, at 503, that "The presumption of impartiality carries considerable weight. … [R]eviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect."

importance of the presumption of impartiality to the test for apprehension of bias, stating that, “The test for apprehension of bias takes into account the presumption of impartiality.” Bastarache, J. further explained that the test mandates that the inquiry into the perception of an apprehension of bias presumes that the requisite reasonable person be one with a detailed understanding of the issues and dynamics of the situation:

> *I find nothing in the material submitted by the applicant that would cause a reasonable person who understands the complex and contextual issues to believe that I would not entertain the various points of view with an open mind.*

[24] In *Re Emerald Transport*, *supra*, at 312-13, the Canada Industrial Relations Board enunciated three principles regarding the requisite reasonable person on an inquiry into an allegation of apprehension of bias, as follows:

> *1. a well-informed person has knowledge of all the relevant circumstances;*
>
> *2. a person expects judges to carry out an open-minded, carefully considered, and dispassionately deliberate investigation of the complicated reality of each case before them;*
>
> *3. a person deals with the question of whether there is a reasonable apprehension of bias with a complex and contextualized understanding of the issues of the case.*

[25] The position of the Applicant in the present case as to the basis for his allegation of actual bias or a reasonable apprehension of bias on the part of the Vice-Chairperson is not particularly clear. The Applicant asserts that he felt “coerced” by the Vice-Chairperson to agree to engage in an internal Union appeal process of its decision to revoke his membership. He further asserts that this state of affairs (assuming the allegation to be true) demonstrates some sort of attitudinal bias on the part of the Vice-Chairperson in favour of the Union (or against the Applicant) that would prevent the Vice-Chairperson from making an impartial decision in the application proper.

[26] As the cases cited above demonstrate, whether there is a reasonable apprehension of bias is a question of fact, and it is necessary to examine the circumstances and events in the context in which they took place.

[27] In the present case, Board member Lancaster brought the fact of the existence of an internal Union appeal procedure to the attention of the Applicant. Counsel for the Union candidly disclosed that he intended to argue that the fact that the Applicant had not exhausted internal remedies before filing his application to the Board ought to result in the dismissal of the application. Notwithstanding that such an argument would not necessarily pertain to the application proper in the present case, there is precedent for the general principle in the context of duty of fair representation cases.[3]

[28] The Vice-Chairperson attempted to explain the nature of the issue to the Applicant and to assure him that, while the internal Union appeal process may or may not result in a resolution of his dispute with the Union that is the subject of his application to the Board, it would not prejudice him or hinder or delay the Board process. While the excerpts from the transcript of the proceedings of March 27, 2003, relied upon by the Applicant on this application for recusal show that he was skeptical that the appeal process would be conducted fairly or obtain a result in his favour, the entire context of the discussion discloses a motivation on the part of Board member Lancaster and the Vice-Chairperson to ensure that the Applicant understood the issue and could make an informed decision about whether to participate and to allay any fear that it could prejudice the Applicant's position in his application to the Board.

[29] Vice-Chairperson Seibel summarized Mr. Plaxton's submission as follows, at p. 104, ll. 10-18 inclusive:

> *. . . so if I understand what you are saying, essentially because it looks like we are not going to be completed today. We don't know when we are going to be reconvening and we don't know what date that will be, but there is the possibility that in the interim if Mr. Lalonde decided that he wanted to avail himself of the appeal procedure, that could be done. And depending on what happened there, it could be that this matter might be taken care of.*
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> (Emphasis added).

[3] See, for example, *Basaraba v. Saskatchewan Government Employees' Union*, [1994] 3rd Quarter Sask. Labour Rep. 216, LRB File No. 086-94.

[30] Vice-Chairperson Seibel also paraphrased Mr. Plaxton's proposal specifically for Mr. Lalonde as follows, at p.105, ll. 4-18 inclusive:

> *THE CHAIR: . . .Mr. Lalonde, I think what Mr. Plaxton is saying is, as you said, that you didn't seem to be aware of an appeal procedure for whatever reason, but you weren't aware of it.*
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> *MR. LALONDE: No.*
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> *THE CHAIR: So you haven't availed yourself of it. Mr. Plaxton and his clients don't know if you would have any interest in that anyway, but I think what he is saying is that because there may be some kind of a time period between when we end today and when we would reconvene, that it might be possible, if you wanted to, to see what happened in an appeal procedure. Now, that wouldn't necessarily preclude you from continuing with this hearing if there is no resolution reached of that by that. . .*
>
> (Emphasis added).

[31] These two excerpts demonstrate that the decision to engage the internal appeal process was for the Applicant to make. Indeed, the excerpt relied upon by the Applicant in this application makes clear, at p. 107, ll. 8-12 inclusive, that no force was exerted to strongarm the Applicant into the procedure:

> *THE CHAIR: . . .Again, we don't need for you to decide whether that is something you want to explore or not. Nobody is forcing you to do that, but I think that it might be – Mr. Plaxton wants to see if he can make some proposals to you in that regard. . . .*
>
> (Emphasis added).

[32] There was then a short adjournment for Union counsel to confer with his client with respect to making a proposal to the Applicant regarding an appeal and the parties apparently reached an agreement on the whole matter. When the panel returned, it was informed that Mr. Lalonde agreed to try the appeal procedure and he indeed thanked Board member Lancaster for bringing the provision to his attention: See, transcript of proceedings, pp. 108-9.

[33] The *Act* requires the Board to protect the rights of employees to choose to be represented by a trade union and bargain collectively through same. In this regard it is mandated, *inter alia*, to ensure that employees are not unlawfully restrained, intimidated, threatened or coerced in the exercise of rights under the *Act*, that trade unions adhere to certain principles in relations with their members. While unrepresented persons frequently make applications to the Board and conduct hearings on their own behalf, it is often less than an ideal situation for such applicants, for counsel representing the party opposite and for the Board. In such circumstances, the Board often feels compelled to attempt to level the playing field for the unrepresented party, by explaining hearing procedures in detail, assisting the party to articulate its position, explaining statutory provisions, the burden and standard of proof, and certain rules of evidence. It also often requires the Board, as in the present case, to attempt to articulate legal concepts and procedures unique to labour relations, and the opportunities and consequences of certain decisions to persons not skilled in the law. Indeed, in such circumstances, one would expect that it would most often be the party opposite, represented by counsel, that might acquire some perception of imbalance in the conduct of proceedings. However, experience before the Board and a detailed understanding of the interests of the parties and the mandate of the Board ensures that such objections are rare.

[34] It is not startling to anyone involved in or witness to proceedings before the Board to say that such proceedings are most often adversarial and that relationships between parties are not infrequently acrimonious and sometimes bitter. The Applicant has made it clear that he does not personally like or trust the Union's business agent. His dispute with the Union is clearly deeply personal and emotional for him. The present proceedings have seen a fair share of sniping and sometimes intemperate remarks by the parties. In such circumstances, tempers may be sorely tried, patience may wear thin and exasperation may begin to show – in the parties, their representatives and even in members of the panel. But impatience in and of itself is not evidence of bias. If it were, recusal applications would likely be a common occurrence.

[35] In *Middelkamp v. Fraser Valley Real Estate Board*, [1993] B.C.J. No. 2965 (B.C.S.C.), affirmed (1993), 83 B.C.L.R. (2d) 257 (B.C.C.A.), Southin, J.A., on behalf of the British Columbia Court of Appeal referred to the fact that stern comments

by a decision-maker in the course of a hearing, or even a lack of civility or respect for one party or counsel, does not in itself demonstrate bias, stating at 261:

> *As to the question of bias, Mr. Rankin pointed to in his opening and has reiterated in his reply many remarks which have been made by the learned trial judge over the course of these 60 days which some might think were rather sharper than they ought to have been. That is a matter of perhaps one would say taste. Some judges by nature are silent; some of us talk perhaps more than we should. Whether some one or all of these remarks might better not have been said I do not propose to discuss. Every experienced counsel has from time to time felt herself unfairly treated by receiving a lashing from the sharp edge of the tongue of a judge. I remember the feeling myself.*
>
> *As I believe the Chief Justice of this Court has said on more than one occasion, a trial is not a tea party. But bias does not mean that the judge is less than unfailingly polite or less than unfailingly considerate. Bias means a partiality to one side of the cause or the other. It does not mean an opinion as to the case founded on the evidence nor does it mean a partiality or preference or even a displayed special respect for one counsel or another, nor does it mean an obvious lack of respect for another counsel, if that counsel displays in the judge's mind a lack of professionalism.*

[36] Indeed, while outright animosity between a decision-maker and a party to a proceeding may raise a reasonable apprehension of bias, it will not necessarily do so. In *R. v. Lin*, (1995) B.C.J. No. 982[4], the British Columbia Supreme Court heard an application that a provincial court judge ought to recuse himself from a criminal trial as a result of what counsel making the application characterized as a "history of discord" between the judge and counsel for the accused in the matter before the judge. In dismissing the application, the court stated, at paragraph 43, that while previous animosity between a judge and a party may be grounds for disqualification, "it is the degree and kind of animosity, and not the mere fact of animosity which will be determinative."

[37] As part of its specific authority to determine disputes under the *Act* and of its broader mandate to facilitate resolution of industrial disputes, the Board often brings to the attention of parties any opportunities that might exist to resolve their differences without engaging in the adversarial process, either under or outside of the *Act*: for

example, advising of the dispute resolution services offered by Labour Relations and Mediation Division of Saskatchewan and even offering to facilitate the parties' access to such services, or to provide assistance through its administrative staff to facilitate the negotiation of the settlement of disputes before the Board. In the context of the present application, the Board simply explained to the Applicant the nature of an extra-judicial procedure that might resolve, in whole or in part, his dispute with the Union, and to assure him that it would not prejudice his application to the Board in the event he was not satisfied with the outcome of that process. And the Applicant thanked the Board for the information.

[38] Although it may be somewhat telling that the Applicant made no complaint that he had an apprehension of bias on the part of the Vice-Chairperson as a result of the matters referred to above until some months later, we have decided not to determine this case on any principle of undue delay, but rather, in the interests of transparency, will determine the application on the merits.

[39] In our opinion, applying the test in *Committee for Justice and Liberty*, *R. v. S. (R.D.)* and *Cameron-Arsenault*, all *supra*, there is no evidence, and certainly no cogent evidence, that the Vice-Chairperson acted in a manner or made any statements that would raise an apprehension of bias in a reasonably well-informed, right-minded person viewing the matter realistically and practically, with an understanding of the complex and contextual issues, and having thought the matter through. Rather, in our opinion, the application to have the Vice-Chairperson disqualify himself is likely based in the Applicant's disgruntlement with the Union, his acrimonious relationship with the Union's business agent, and what he perceives to be stalling on its part in rendering a decision on his internal appeal.

[40] The record shows that the Vice-Chairperson made it abundantly clear to the Applicant that his participation in the Union's internal appeal process was entirely voluntary, offering the assistance of the then Acting Registrar of the Board, Mr. Suderman, or the then Acting Investigating Officer of the Board, Ms. Kagis, to answer any questions he might have in the course of making his decision whether to participate. (According to the representations made by Mr. Plaxton at p. 108, ll. 11-20 inclusive, Ms.

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[4] Cited with approval in *R. v. S. (R.D.)*, *supra*, per Cory, J., at 531.

Kagis was present when the matter of an internal appeal was discussed with Mr. Lalonde.) It was further made clear that the internal Union process was separate from the Board process and that the hearing of Mr. Lalonde's application to the Board would not be delayed pending the outcome of the internal appeal (and indeed it has not).

[41] In our opinion, the application abjectly fails to meet the standard of proof required. As stated by Southin J.A. in *Middelkamp, supra*, at 261 - 262:

> *In the course of his reply Mr. Rankin submitted that these remarks that have been made [by the trial judge] gave rise to an apprehension of bias. Let me say, as I see the matter at the present, that it is never enough to disqualify a judge that someone not knowing all the facts or understanding the court process might have an apprehension of bias. There must be an evidentiary foundation for the conclusion that the judge was indeed biased. I see nothing in all the material which has been put before us to show any foundation for a conclusion that the learned trail judge has a partiality for the defendants' case rather than the plaintiffs' case. There is nothing that I have been shown that shows any comment by her on the merits of this litigation which could in any way be taken as untoward.*

[42] We view the present application in a similar light. While we have some doubt that Mr. Lalonde has a full appreciation of the Board process and function, the complex and contextual issues raised by his application proper, or the ability to view his own case with an objective and dispassionate eye (which may sometimes be said even of counsel trained in the law appearing before the Board), it does not follow that the Vice-Chairperson or any of the other panel members is partial to the Union's case and not to Mr. Lalonde's case. Likewise, stern comments or tough questions directed by the panel to Mr. Lalonde regarding his position on issues raised in the case, his manner or comportment, or the conduct of his case do not mean that the member or panel is not impartial.

[43] The potential serious consequence to the decision-making process under the *Act* of patently unfounded allegations of bias lies in the fact that just the making of the allegations could cause an impartial decision-maker to nevertheless step aside because of the pall that is cast upon the process. This situation was addressed by Boyd, J. in *Middelkamp, supra*, at paragraphs 24 - 25:

> *Finally, Mr. Rankin has submitted that even if there are no grounds for disqualification I ought, nevertheless, to disqualify myself since it will now be impossible for me as the trial judge to hear the plaintiffs' case with fairness and impartiality. Mr. Rankin asks: "…could the reasonable observer expect the judge to remain impartial and independent while the person who uncovered this information is a litigant in a case before her?" This is what Mr. Cadman has called the Catch 22 argument.*
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> *I cannot accede to such an argument since to do so, in my view, would establish a very dangerous precedent in these courts. In effect, I would be inviting disgruntled, unhappy litigants or their counsel to make whatever allegations they wished, in support of an application for the judge to disqualify himself or herself. If the allegations failed to provide a proper foundation for a finding of bias or a reasonable apprehension of bias, the litigant could nevertheless take comfort in the knowledge that the mere making of the allegations would, by their very nature, taint the process and force the disqualification of the judge. This danger was recognized by Chief Justice McEachern, C.J.B.C., in G.W.L. Properties Limited v. W.R. Grace & Company of Canada Ltd. (1992), 74 B.C.L.R. (2d) 283 (B.C.C.A.) where he said:*
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> > *A reasonable apprehension of bias will not usually arise unless there are legal grounds upon which a judge should be disqualified. It is not quite as simple as that because care must always be taken to insure that there is no appearance of unfairness. That, however, does not permit the court to yield to every angry objection that is voiced about the conduct of litigation. We hear so much angry objection these days that we must be careful to ensure that important rights are not sacrificed merely to satisfy the anxiety of those who seek to have their own way at any cost or at any price …*

[44] Similar concerns were raised by the British Columbia Court of Appeal in *Adams v. British Columbia (Workers' Compensation Board)*, *supra*, at 231 - 232:

> *This case is an exemplification of what appears to have become general and common practice, that of accusing persons vested with the authority to decide rights of parties of bias or reasonable apprehension of it without any extrinsic evidence to support the allegation. It is a practice which, in my opinion, is to be discouraged. An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about the integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but*

> *impossible to refute except by a general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause. As I have said earlier, and on other occasions, suspicion is not enough.*

[45] For these Reasons, the Vice-Chairperson declines to disqualify himself from hearing the case. The application for recusal is dismissed.

DATED at Regina, Saskatchewan, this **10th** day of **September, 2003.**

LABOUR RELATIONS BOARD

James Seibel,
Acting Chairperson