CHERYL JEFFRIES, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES UNION, Respondent

LRB File No. 162-16; November 15, 2016

Kenneth G. Love, Q.C., Chairperson (sitting alone pursuant to Section 6-95(3) of *The Saskatchewan Employment Act*)

For the Applicant: Mr. Trevor Putz
For the Respondent: Ms. Jana Stettner

Section 6-58 of *The Saskatchewan Employment Act* **–** Employee challenges Union's handling of Long Term Disability Appeal.

Jurisdiction of Board – Board determines that unique circumstances where Union operates Long Term Disability Plan makes provisions of Section 6-58 of *The Saskatchewan Employment Act* applicable.

Right to be heard – Board finds that appeal heard by improperly constituted committee who claims authority to deal with complaint as the delegate of the appropriate appellate body.

Bias – Board finds that participation of person who made preliminary determination on appeal body raises issue of bias.

Decision without reasons – Board reviews jurisprudence with respect to the giving of reasons for a decision – Board suggests that reasons for decisions would prove helpful to the parties and reviewing tribunals or courts.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: Cheryl Jeffries (the "Applicant") applied to the Board under section 6-58 of *The Saskatchewan Employment Act*, S.S. 2013, c.S-15.1 (the *"SEA")* in respect of a dispute between herself and the Saskatchewan Government and General Employees Union ("SGEU") regarding the administration of a long term disability plan

(the "Plan") operated by the SGEU on behalf of its members. For the reasons which follow, the application is granted and the Union will be ordered to reconvene a hearing of the Supervisory Committee to deal with the Appeal.

Facts:

[2] SGEU operates the Plan on behalf of its members. The Plan is governed by the Plan Text which is approved by the membership of SGEU at its annual convention. The Plan provides long term disability benefits (income replacement) for SGEU members who become disabled while members of SGEU. The Plan Text under consideration in this matter was approved at the Annual Convention of SGEU in April, 2015[1].

[3] The Applicant was employed at Northlands College. As an employee of Northlands College, she was an SGEU member and was covered by the Plan. She became disabled in July of 2013 and received benefits from the plan in respect of that disability. She was able to return to work full time as at February 10, 2015.

[4] On February 8, 2016, the Applicant returned to her doctor, complaining of further issues. She was diagnosed as having a hernia related to her previous disability. Her doctor advised that she required further medical testing and surgery to repair the hernia.

[5] There was a delay between the time of her diagnosis and the date on which she was able to obtain an appointment with a specialist for a surgical consultation in March of 2016. After that surgical consultation, the Applicant contacted Lois Burch, who is the Claimant Advocate in relation to the Plan.

[6] The Applicant took the position that this surgery constituted a recurrence of her disability which had occurred within one year of the date of her initial return to work. Article 10.1 of the Plan provides as follows:

> ***10.1 Time Period*** *A member with a total disability as defined in Article* ***– Same Disability*** *2.1 and:*
>
> *a) Recovers and accepts any remunerative employment; and*

[1] Exhibit U-13

> *b) Has a recurrence of the same disability within one year of return to work shall be entitled to receive entitlements at the same level as defined in Article 8 and at the same level as was previously paid plus applicable COLA; and*
>
> *c) The elimination period shall be waived.*

[7] There was no issue between the parties that the new surgery was a recurrence of the same disability. The issue was whether or not the recurrence had occurred within one (1) year of the return to work from the previous disability (February 10, 2015). If so, there would be a waiver of any elimination period (a 119 day period) provided for in the plan for entitlement to benefits.

[8] Lois Burch kept notes of her discussions with both the Applicant and her representative, Trevor Putz. According to her notes on March 14, 2016, the Applicant left a telephone message, which she responded to. The notes reveal that she discussed the new surgery and the recurrence issue with the Applicant. Her notes read, in part, as follows:

> *"wanting to come back on a recurrence/checked and seems that she is still working and likely will until surgery date, which is April 20 something/explained she was outside recurrence tis/she thought that was "unfair" and "could I appeal"/ advised CA unaware of any recurrence outside tis being appealed, but would ask/she apparently plans to ask at Union meeting tonight in La Ronge/ explained DOD/ last day of work would be well after the year I not til end of April.*

[9] Trevor Putz sent a letter dated March 15, 2016, to the Plan appealing the denial of the "recurrence" benefit on behalf of the Applicant. In that letter, he again asserted the Applicant's claim.

[10] On March 29, 2016, Lois Burch sent an email to the Applicant which stated in part:

> *If you choose to submit only a physician's initial claim report form and request "recurrence", you will be denied and referred to me to appeal…*

[11] The Applicant submitted her claim on the basis of a recurrence. On May 9, 2016, Lois Burch emailed other members of the Plan Staff in respect of the claim. In her emails she says in part:

> *I have given this PIR to Angie to send back to Cheryl advising her that she is outside the timelines to apply for recurrence…*
>
> …

> *In her letter to Cheryl, returning her PIR form, Angie will include, as always, a referral to me and I will re-explain a timeliness appeal as an avenue that she can access, if she requests it…lois.*

[12] On May 10, 2016, Mr. Shane Osberg, Director, Disability Management Services, for the Plan, wrote to the Applicant. In that letter, he denied the Applicant's claim for "recurrence" benefits and noted:

> *Should you wish to appeal this decision to the Table Officers of the SGEU LTD Supervisory Committee, you must notify the SGEU LTD Plan, in writing (by postal mail, email or by fax at 306-775-5775), within thirty (30) days of the date of this letter, of your intent to appeal that decision.*

[13] By email dated May 19, 2016, Trevor Putz, on behalf of the Applicant, advised that the Applicant wished to appeal the decision denying her "recurrence" benefits. Mr. Putz followed that email up with a letter directed to the Plan dated that same date.

[14] On May 25, 2016, a group established as the LTD Table Officers comprised of Wendy Simonson, Diane Ralph, Mary Ann Harrison, Steve LaVallee and Shane Osberg considered the appeal from the Applicant. At that meeting, a motion was carried as follows:

> *"M/S Harrison/LaVallee to deny request that Claim #2013-181 be allowed access to recurrence". The Applicant was made aware of this decision by letter dated May 26, 2016, again from Shane Osberg."*

[15] Trevor Putz raised the possibility of Arbitration in respect of the entitlements that the Applicant might receive. Mr. Osberg followed up his letter with an email of June 1, 2016 which was addressed to, *inter alia,* the Applicant and Trevor Putz. In his email, he referenced Article 4.3 of the Plan Text which provides that Supervisory Committee decisions in respect of **timelines**[2] are final and binding and are not subject to arbitration.

[16] The Applicant then launched this application on July 7, 2016.

Relevant statutory provision:

[17] Relevant statutory provisions are as follows:

[2] Emphasis added

Internal union affairs

6-58*(1) Every employee who is a member of a union has a right to the application of the principles of natural justice with respect to all disputes between the employee and the union that is his or her bargaining agent relating to:*

(a) matters in the constitution of the union;

(b) the employee's membership in the union; or

(c) the employee's discipline by the union.

(2) A union shall not expel, suspend or impose a penalty on a member or refuse membership in the union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the union if:

(a) in doing so the union acts in a discriminatory manner; or

(b) the grounds the union proposes to act on are that the member or person has refused or failed to participate in activity prohibited by this Act.

Applicant's arguments:

[18] The Applicant argued that the Union had misinterpreted the Plan Text so as to require that a claimant make an application for recurrence benefits within the one (1) year time frame. The Applicant argued that the time for a claim should start when the disability is diagnosed, not when surgery prevents the claimant from being available for work. The Applicant argued that the LTD Table Officers failed to follow the Plan Text in considering the Applicant's appeal.

[19] The Applicant also argued that there was bias present in that the appeal decision was made by the same person who initially denied the claim.

Union's arguments:

[20] The Union argued that the Board had jurisdiction to hear and determine this matter under section 6-58. In support the Union cited the Board's decision in *McRae v. SGEU*[3]. The Union also argued that the Union had provided the Applicant with natural justice and fairness in considering her claim.

[3] [2002] CanLII 52887 SKLRB

[21] The Union argued that there was no bias present as the appeal decision was taken by the LTD Plan Table Officers and not by the staff of the Plan (Lois Burch).

[22] Furthermore, the Union argued that there was no basis to appoint an arbitrator because the Plan Text makes it clear that a decision on "timelines" is not referable to arbitration.

Analysis:

The Jurisdiction of the Board?

[23] No issue has been raised with respect to the Board's jurisdiction to hear and determine this matter. The Union concedes that the Board has jurisdiction, citing our previous decision in *McRae.* That case dealt with what was section 36.1 of *The Trade Union Act*[4]. That section is virtually identical to the provisions of section 6-58 of the *SEA*.

[24] In *McRae*, the Board did not provide any detailed rationale for its determination that matters of dispute between a member of the Union and the Union concerning disability plans would qualify for adjudication, notwithstanding the Board's recognition in *McRae* of the caution expressed by the Board in *Stantiec v. United Steelworkers of America, Local 5917*[5] that "the provision is not intended to constitute the Board as a body for the routine review of every decision no matter how picayune made by a union pursuant to its constitutional structure and procedures".

[25] This case is somewhat unique in that the Plan is operated by the Union. The genesis of the creation of the Plan is found in the Union's constitution at Article 16. Article 16 provides for member participation in the Plan, the creation of, and, amendment of the Plan Text at annual general meeting, as well as for the creation of the LTD Supervisory Committee. The Constitution also provides direction for the handling of funds of the Plan by the Union.

[26] This unique inclusion of the Disability Plan within the Union's constitution would bring the issue of disputes under the rubric of section 6-58(1)(a) of the *SEA*. However, other disability plans which operate for the benefit of members of other unions, which are not provided for by the union's constitution would not necessarily be subject to the terms of section 6-58(1)(a).

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[4] R.S.S. 1978 c. T-17 (repealed)
[5] [2001] Sask. L.R.B.R. 405, LRB File No. 205-00

Did the Union conform to the Principles of Natural Justice?

[27] Section 6-58(1)(a) of the *SEA* requires the Union to apply the rules of natural justice with respect to "all disputes between the employee and the Union that is his or her bargaining agent". For the reasons which follow, I am of the opinion that the Union has failed to conform to the rules of natural justice in respect of the dispute between the Applicant and the Union related to the interpretation of the Plan Text and the appeal taken by the Applicant in respect of the interpretation of the Plan Text by the Administration of the Plan.

[28] In the textbook, *Principles of Administrative Law*[6], the authors give this brief overview of what constitutes natural justice. At page 179 they say:

> *"Natural Justice" connotes the requirements that administrative tribunal, when reaching a decision, must do so with procedural fairness. If they err, the superior courts will step in to quash the decision by certiorari or prevent the error being made by prohibition. Such an error is jurisdictional in nature and renders the decision void.*

[29] The intuitiveness of the principles of natural justice are easy to understand, yet an all-encompassing definition of natural justice is difficult to achieve. Large legal tomes have been written to describe the aspects of what constitutes natural justice.

Notice of the hearing of the LTD Table Officers

[30] One component of the duty to be fair or Natural Justice[7] is the requirement for a hearing, which is often referred to as the *Audi Alteram Partem* principle. Interwoven with the requirement for a hearing are other related concepts such as evidentiary fairness, the right to be notified of the hearing, the right to know the case that is to be met, the open court principle and others. It is described in *Principles of Administrative Justice* in the following terms, at page 230:

> *At the very least, the rule requires that the parties affected be given adequate notice of the case to be met, the right to bring evidence and to make argument.*

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[6] Carswell, 2nd Ed., Jones and de Villars

[7] I have used these two terms somewhat interchangeably, however, the term duty to be fair is probably more consistent with the analysis suggested by Jones and de Villars in their 2nd edition of Principles of Administrative Justice.

[31] In this case, the appeal of the denial of benefits based upon the Appellant's claim that she should be entitled to a "recurrence" benefit, i.e.: not be required to serve another elimination period before being entitled to benefits, was available to the Applicant. She took advantage of this appeal by the letter of May 19, 2016.

[32] Following that letter of appeal, Lois Burch proceeded to prepare a memorandum to the LTD Table Officers outlining the history of the claim and including the submissions from Mr. Putz. That appeal was then submitted to the LTD Table Officers on the basis that it was a "timelines" appeal. No notice was given to the Applicant or Mr. Putz of the hearing by the LTD Table Officers. Nor were they provided with any copies of the submissions purportedly made on their behalf.

Jurisdiction to conduct the hearing

[33] Another fundamental consideration is that the person who conducts the hearing must have jurisdiction to make the decision. That person was not the LTD Table Officers who purported to hear the appeal.

[34] The establishment of the LTD Table Officers is done through a policy statement number A1017[8]. It purports to delegate to the LTD Table Officers the ability to make "decisions on requests to waive timelines pertaining to appeals and other requests".

[35] This purported delegation is expressly forbidden in the Plan Text. The Appeal process is provided for in Article 4 of the Plan Text. That appeal is to be made to the Supervisory Committee, which Committee is established and described in Article 3.5 of the Plan Text.

[36] Both the Plan Text in Article 15.1 and the Union's Constitution in Article 16.3.1 interdict the amendment of the Plan Text other than at the annual convention of the Union. The Policy statement referenced as the authority of the LTD Committee cannot, therefore, delegate the authority given to the Supervisory Committee. The Plan Text is clear that appeals are to be heard by the Supervisory Committee, not a group of five (5) individuals established by a policy that is not sanctioned by either the Plan Text or the Constitution.

[8] Exhibit U-11

[37] There is also a maxim in Administrative Law that is applicable here. It is *delegate potestas non potest delegari.* Roughly translated from the latin, it means that someone to whom a power (such as the power to make a decision) cannot themselves further delegate that power. Based upon that maxim, the Supervisory Committee, to whom the power to decide had been delegated by the general membership in the Plan Text, could not further delegate that power to the LTD Table Officers.

[38] Additionally, the whole of the appeal has been taken on the basis that it was merely a timelines issue, rather than an issue concerning the proper interpretation of the Plan Text. That is, when did the timelines for the recurrence benefit begin? Was it the date of the diagnosis of the recurrent injury or was it the date of treatment of that injury (and subsequent absence from work)? How should the Plan Text be interpreted? While it may be that the Plan administration and Lois Burch are correct that the issue is whether or not the time for the recurrence benefit should be enlarged, but there is an equally valid argument that the Plan Text should be interpreted so that the time for a recurrence claim begins when the recurrence is diagnosed, not when it is treated, which was the position taken by the Applicant.

[39] From the outset, the plan administration and the Claimant Advocate, Ms. Burch took the view that benefits were determined from the date of the treatment that governed the situation. That may have been the case, but they failed to provide any rationale for the view that they adopted. No arbitration award where the text had been interpreted, no legal opinions regarding the issue -- they automatically assumed that everyone should know that that was how the text was to be interpreted. As a Claimant Advocate, Ms. Burch's position was extremely inflexible. It should have been her, not Mr. Putz who was taking the lead to advocate for the Applicant. Instead, she seemed determined, as noted by her early email[9] to predetermine the outcome of the application and the appeal.

[40] If the matter was not simply a timeliness issue, then, in any event, it should have been heard by the supervisory committee rather than the Table Officers since the LTD Table Officers were, by their delegation, only permitted to deal with timeliness appeals. This is, of course, presuming that that delegation was a proper one.

[9] March 29, 2016

[41] I do not, of course, take any position with respect to which of these two possible interpretations is correct, but wish to make it clear that there are definitely two different possible interpretations of the Plan Text.

Bias

[42] There is also the issue of bias. The Board outlined its understanding of this concept in its decision in *S.C. v. Mamawetan Churchill River Regional Health Authority & Government of Saskatchewan*[10] at paragraph 17:

> **[17]** The Board also dealt with issues of bias in *Koskie*. In *Koskie,* the allegations of bias were different from the allegations of bias in this case, but the legal principles behind the concept of bias are applicable. At paragraphs [40] - [42] of *Koskie*, the Board set out the applicable test for allegations of bias as follows:
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> > *[40] The Appellant argues that there was a reasonable apprehension of bias on the part of the Adjudicator resultant from the fact that the Appellant made an application to the Court of Queen's Bench to compel the Adjudicator to issue her decision. The Appellant cited Justice De Grandpre's dissent in Committee for Justice and Liberty v. Canada (National Energy Board), where he said:*
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> > > *… 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. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.'*
> > >
> > > *[Emphasis added]*
> >
> > *[41] The Appellant suggests that the Appellant had a reasonable apprehension of bias because of the timing of the adjudicator's decision, that is, shortly after being served with an application to the Court of Queen's Bench to compel her to provide her decision. With respect, I cannot agree that the Court application and the summary issuance of the decision prior to the return date of the motion would lead any informed person, viewing the matter realistically and practically—and having thought the matter through would conclude that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.*
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> > *[42] In Agrium Vanscoy Potash Operations v. United Steel Workers Local 7552 and Francine Chad Smith, the Court of Appeal, after confirming that the test for bias was as set out above by Mr. Justice de*

[10] [2015] CanLII 90508 SKLRB – Leave to appeal to the Court of Appeal denied [2016] SKCA 89 (CanLII)

Grandpre, the Court went on to consider three other points which emerge from the case law. At paragraph [42], the Court said:

> *[42] In making that assessment, it is necessary to bear in mind three other points which emerge from the case law. The first point is that, as is typical in the administrative law field, the question of bias is contextual and will depend, among other things, on the nature of the decision-maker. See: Committee for Justice and Liberty v. National Energy Board, supra at p. 395; Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623 at pp. 638-639. Second, a mere suspicion of bias, or a mere concern about bias, is not enough to satisfy the test. Bias must be "more likely than not" (Committee for Justice and Liberty v. National Energy Board, supra at p. 394). There must be "a real likelihood or probability of bias" (R. v. S. (R.D.), supra at para. 112). Third, the "reasonable person" contemplated by the test is an informed person, with knowledge of all of the relevant circumstances, including relevant traditions of integrity and impartiality. See: R. v. S. (R.D.), supra at paras. 48 and 111.*

[43] In her submissions, the Applicant argued that the position taken by Lois Burch in her email of March 29, 2016, that if she appealed, the appeal decision would be made by Ms. Burch. That argument is not supported by the evidence. However, there is a concern with respect to the participation in the hearing process by the Director of Disability Management Services who initially rejected the Applicant's claim.

[44] Even if we presume that the appeal to the LTD Table Officers was a proper jurisdictional venue, the presence of Mr. Shane Osberg, as a member of the LTD Table Officers, raises concern. Mr. Osberg is the Director of Disability Management Services and was the author of the initial denial letter to the Applicant on May 10, 2016. He then also communicated the denial of the appeal by the LTD Table Officers on May 26, 2016.

[45] Mr. Osberg being present and participating in the appeal hearing as a member of the LTD Table Officers clearly raises a concern of bias. No explanation was given as to why Mr. Osberg participated in the decision, his position on the issue was already made known to the parties and he had thereby pre-judged the issue. The minutes of the meeting do not show that he recused himself and absented himself from the room when the issue was being discussed. Nor do we know the results of the vote on the issue (if there was one) and whether

or not Mr. Osberg's vote was the deciding vote. All of this, in my view, leads to a reasonable apprehension of bias. If nothing more, Mr. Osberg could have had influence on the decision by the very nature of his position with the Plan.

The Decision

[46] There is also an issue with respect to a lack of reasons having been given by the LTD Table Officers for their decision. The Plan Text, in Article 4, requires that the Supervisory Committee shall "render it's decision on the appeal in writing within 14 days of the appeal". There is no absolute rule that requires that reasons be given for every administrative decision. However, there is evolving jurisprudence which suggests that the giving of reasons is often prudent. In *R. v. R.E.M.*[11], Chief Justice McLachlin says at paragraphs 8-10

> *[8] The common law historically recognized no legal duty upon a tribunal to disclose its reasons for a decision or to identify what evidence has been believed and what disbelieved: see e.g. R. v. Inhabitants of Audly (1699), 2 Salk. 526, 91 E.R. 448; Swinburne v. David Syme & Co., [1909] V.L.R. 550 (S.C.), aff'd on other grounds, [1910] V.L.R. 539 (H.C. Aust.); Macdonald v. The Queen, 1976 CanLII 140 (SCC), [1977] 2 S.C.R. 665. In the words of a former Chief Justice of this Court, Laskin C.J.:*
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> > *A recurring question [in] non-jury trials and at the appellate level is whether reasons should be given. There is no legal requirement of this kind, and it is quite unnecessary in a great many cases that come to trial before a Judge alone, and equally unnecessary in a great many cases where the appellate Court's judgment affirms the trial Judge.*
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> > *(B. Laskin, "A Judge and His Constituencies" (1976), 7 Man. L.J. 1, at pp. 3-4)*
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> *[9] Judicial reasons of the 19th and early 20th century, when given, tended to be cryptic. One searches in vain for early jurisprudence on the duty to give reasons, for the simple reason, one suspects, that such reasons were not viewed as required unless a statute so provided. This absence of such a duty is undoubtedly related to the long-standing common law principle that an appeal is based on the judgment of the court, not on the reasons the court provides to explain or justify that judgment: see e.g. Glennie v. McD. & C. Holdings Ltd., 1935 CanLII 32 (SCC), [1935] S.C.R. 257, at p. 268.*
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> *[10] The law, however, has evolved. There is no absolute rule that adjudicators must in all circumstances give reasons. In some adjudicative contexts, however, reasons are desirable, and in a few, mandatory. As this Court stated in R. v. Sheppard, [2002] 1 S.C.R. 869, 2002 SCC 26 (CanLII), at para. 18,*

[11] [2008] 3 S.C.R. 3, SCC 51 (CanLII)

> *quoting from Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 43 (in the administrative law context), "it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision". A criminal trial, where the accused's innocence is at stake, is one such circumstance.*

[47] Reasons, when given serve 3 principle functions. Firstly, they advise the parties why the decision was made. The reasons provide proof that the decision maker has heard and considered the evidence and arguments made to her. Secondly, reasons provide public accountability of the judicial decision, ie: that justice is not only done, but it is seen to be done. Thirdly, reasons permit effective appellate review.

[48] Had reasons been given in this case, presumably the first two functions may have been met.

Conclusions and Decision:

[49] The Application is granted. Based upon the above, I am of the opinion that this matter must be remitted back to the Supervisory Committee for adjudication in accordance with the Plan Text. A hearing into the question of entitlement of the Applicant for the recurrence benefit shall be held as follows:

1. The Supervisory Committee shall establish an appeal date in accordance with the provisions of the Plan Text.

2. The Supervisory Committee shall provide not less than 10 business days notice to the Applicant of her right to be heard by the Committee.

3. The Appellant and her advocate, representative, agent or attorney shall be provided travel expenses to attend the hearing in accordance with Article 4.2 of the Plan Text.

4. At the hearing, the Appellant and her advocate, representative, agent or attorney shall be entitled to call evidence and to cross examine witnesses and make argument to the Committee.

5. The Supervisory Committee shall make a determination of the Appellant's benefit entitlement and shall provide a decision within the time period provided for in the Plan Text.

6. If Mr. Osberg is a member of the Supervisory Committee, he shall not participate in or be present at the hearing of the Supervisory Committee.

DATED at Regina, Saskatchewan, this **15th** day of **November, 2016.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson