

Cited as:

The Ontario Realty Corp. (ORC)

**Service Employees International Union, Local 204, Applicant
v. The Ontario Realty Corporation (ORC), David Johnson, Frank
Raposo and Signature Building Maintenance Systems, Responding
Parties**

**Service Employees International Union, Local 204, Applicant
v. David Johnson, Responding Party v. Ontario Federation of
Labour, Ontario Public Service Employees Union, Ontario Liquor
Board Employees Union, United Steelworkers of America and
Amalgamated Transit Union Local, Local 1587, Intervenors**

[1996] OLRB Rep. November/December 998

[1996] O.L.R.D. No. 4189

File Nos. 0656-96-U, 2259-96-U

Ontario Labour Relations Board

BEFORE: Kevin Whitaker, Vice-Chair

November 27, 1996

Contempt -- Natural Justice -- Practice and Procedure -- Unfair Labour Practice -- Union asking Board to state case for contempt against Chair of Management Board as result of press accounts of certain comments attributed to him regarding Labour Relations Board -- Union also alleging that Board lacking requisite structural independence and reasonably perceived to be partial as result of government's recent removal of vice-chairs prior to expiry of terms of appointment, government's role in selection of the vice-chairs removed, recent re-appointment "at pleasure" of two vice-chairs, certain comments attributed to Chair of Management Board, and allegations regarding control of Chair of Management Board over Ministry of Labour's list of approved arbitrators -- Vice-Chair presiding at hearing disclosing that he and all other vice-chairs possess information concerning process of selection of vice-chairs for removal, but declining to reveal content of that information -- Board accepting respondents' submission that disclosure raising reasonable apprehension of bias -- Board staying proceedings.

APPEARANCES: L.A. Richmond, U. Payne and A. Ferens for the applicant; Frank Raposo for ORC; Allen Craig for Signature

Building Maintenance Systems; David Strang, Dennis Brown and Marylee Farrugia for the other responding parties; Brian Shell for the United Steelworkers of America; Ian Fellows for Amalgamated Transit Union, Local 1587; Bernard Fishbein and Peter **Shklanka** for Ontario Liquor Board Employees Union; Gavin Leeb for Ontario Public Service Employees Union; James Hayes for Ontario Federation of Labour.

DECISION OF THE BOARD

I

BRIEF OVERVIEW

1 For the first time in its 50 year history, the Board has been asked to find a Minister of the Crown to be in contempt. The applicant also challenges the perception of the Board as impartial and independent.

2 These claims are met by the almost equally rare response that the Board is unable to hear this request because of an apprehension of bias. The apprehension of bias is raised as a result of disclosures made by the Board about its knowledge of certain facts in dispute between the parties.

3 For reasons which comprise the balance of this decision, I find that, because of a reasonable apprehension of bias, the application in Board File No. 2259-96-U dealing with the issues of contempt, independence and impartiality, cannot proceed before the Board.

CIRCUMSTANCES OF THE CASE

4 This matter consists of two applications made pursuant to section 96 of the LABOUR RELATIONS ACT, 1995 (the "Act"). Both are brought by the Service Employees International Union, Local 204. David Johnson, M.P.P., Minister of the Crown and Chair of the Management Board of Cabinet for the Crown in Right of Ontario is a respondent in both applications. The Ontario Realty Corporation, Frank Raposo and Signature Building Maintenance Services Ltd. are respondents in the application in Board File 0656-96-U.

5 The Ontario Federation of Labour, Ontario Public Service Employees Union, United Steelworkers of America, Ontario Liquor Board Employees Union and the Amalgamated Transit Union, Local 1587 have all sought to intervene. On consent, these parties have participated fully in the preliminary proceedings involving both applications. The respondents object to the participation of these parties in any capacity if the matter proceeds on the merits.

6 The application in Board File No. 0656-96-U was filed on May 29, 1996. Various unfair labour practices are alleged to have been committed by the respondents. The thrust of the complaint is that the respondents gerrymandered the bidding process for commercial cleaning contracts at the Queen's Park Complex, to defeat bargaining rights either held or sought by the applicant.

7 The respondents deny that any breach of the Act has occurred. They took the position that the application was untimely.

8 In a decision of the Board dated October 22, 1996, I dismissed the timeliness objection and ordered the respondents to proceed first with their evidence if any is to be called. This application was set to reconvene for three days beginning on November 12, 1996.

9 On October 31, 1996, the application in Board File No. 2259-96-U was filed. The substance of the application is threefold. Firstly, that the Board is reasonably perceived to be impartial and therefore unable to proceed with either of the applications in Board Files Nos. 0656-96-U or 2259-96-U. Secondly, that the Board is reasonably perceived to lack the requisite structural independence for the exercise of its quasi-judicial function and cannot proceed with the two applications for that reason. Thirdly, that the Board should, pursuant to section 13 of the Statutory Powers Procedure Act R.S.O. 1990 c. S.22 as amended, state a case of contempt to the Divisional Court as against David Johnson. Finally, the applicant takes the position that the applications in both files cannot be heard by the Board. It requests that the Board appoint, on the advice of a Judge of the General Division, a Chair or Vice-Chair of a Labour Relations Board outside of the Province of Ontario to hear the matters.

10 The application in Board File No. 2259-96-U asserts that the Board appears to be biased because of the conduct of David Johnson and the Government of Ontario. There are four principal allegations in support of this claim. Although particularized in greater detail in the application, the allegations are as follows:

- i) in October 1996, four Vice-Chairs of the Board were removed from office before the expiry of their terms of appointment. It is alleged that David Johnson and the Government of Ontario selected or influenced the selection of the four Vice-Chairs to be removed from office;
- ii) two Vice-Chairs of the Board were reappointed to new terms of office in October 1996. For the first time in the history of the Board, the form of the Orders in Council used for purposes of reappointment were explicitly "at pleasure";
- iii) in October 1996, David Johnson commented to the press on the fact that the Toronto Transit Commission (the "TTC") was unable to operate during the "Day of Protest" in Toronto. It is alleged that, in the context of these remarks, David Johnson suggested to the press that he may review the membership of the Board for the way in which it had dealt with an illegal strike application by the TTC prior to the "Day of Protest";
- iv) upon retiring from the Board, it is common for Vice-Chairs to practice as labour arbitrators. It is alleged that David Johnson has the power to determine the career prospects of Vice-Chairs by controlling their access to the Ministry of Labour's appointment list for labour arbitrators.

11 The respondents deny that any breach of the Act or contempt has occurred. Many of the applicant's allegations are denied. Perhaps most importantly for purposes of this decision, the respondent David Johnson denies that he or the Government of Ontario either directly or indirectly influenced the choice of which four Vice-Chairs would be removed from office. David Johnson alleges that the selection was done by the Chair of the Board.

12 In light of the pending hearing dates in the application in Board File No. 0656-96-U and the applicant's request that neither application proceed before the Board, the parties were invited to

make submissions on how the matters should proceed. The applicant agreed to proceed before the Board in the absence of the Board granting its request to appoint an adjudicator outside of Ontario to hear the matter. The applicant reserved its right to object to the process at a later date on this basis. With this reservation, all parties agreed that the two applications should be heard together, with the application in Board File No. 2259-96-U being dealt with first. By decision of November 8, 1996, I directed the two applications to proceed in this manner.

13 At the outset of the hearing of both applications on November 13, 1996, counsel for the respondents proposed that the issue of the perceived independence of the Board could be separated from the other issues raised in this matter and, one way or the other, brought quickly before the Divisional Court for determination. Although the applicant and all of the intervenors candidly agreed that this matter would inevitably end up before the Divisional Court, the applicant and some of the intervenors opposed the respondents' proposal. The applicant asserted that all of the allegations pled were relevant to the three issues of independence, impartiality and contempt. The applicant argued that it should not be precluded from presenting its case in this fashion.

14 During the hearing on November 13, 1996, I indicated that, as a Vice-Chair of the Board, I was privy to information provided to all Vice-Chairs concerning the process used to select the four Vice-Chairs whose Orders in Council were revoked in October 1996. The applicant, the respondents and some of the intervenors addressed the significance of this advice and whether it would have a bearing on the process of the litigation. At the time of this discussion, I had yet to review the response by David Johnson. It had been filed with the Board but not placed before me.

15 At the beginning of the second day of hearing on November 14, 1996, I provided the parties with an oral ruling confirmed in writing later that day. Two issues were dealt with in this decision. Firstly, it was decided that evidence on all three issues of impartiality, independence and contempt should be heard together. Secondly, certain disclosures were made to the parties.

16 The disclosures contained in the decision of November 14, 1996 and their circumstances are found in the following paragraphs of that decision:

...

13. I have now had an opportunity to review the application and the response together. In paragraph 8 of the application, it is alleged that the Government of Ontario, its Cabinet and the respondent Johnson chose or directly or indirectly influenced the choice of the particular Vice-Chairs of the Board who would have their Orders in Council revoked in October 1996. Paragraph 4 of the response read together with sub-paragraph 6(I) and paragraphs 4 and 5 of Schedule "A" to the response, suggest that the respondent Johnson, the Government of Ontario and its cabinet played no role in the choice of which Vice-Chairs of the Board would have their Orders in Council revoked.
14. Given this dispute of fact and arguably, the conclusions of law which may flow from any findings which may need to be made in this regard, I feel obliged at this point in the proceeding to make the following disclosures.
15. All Vice-Chairs of the Board meet regularly with the Chair and the Alternate Chair in what is referred to as the Vice-Chair Group. Part-time Vice-

Chairs are entitled to attend these meetings but do so infrequently. The purpose of these meetings is to discuss issues of general law and policy as well as administrative matters within the Board. During the course of a meeting of the Vice-Chair Group in September or October of 1996, Vice-Chairs were provided with information concerning the selection process used to choose which Vice-Chairs would have their Orders in Council revoked. The information which was provided at the meeting in question would be in the possession of the Chair, the Alternate Chair or any Vice-Chair of the Board, regardless of whether they actually attended the meeting in question. Finally, it is important to note that I was not a participant in the decision making process which led to the decision concerning the four Vice-Chairs, nor do I have any first hand knowledge of the process except for what I have disclosed. Finally, the information provided to Vice-Chairs at this meeting is inconsistent with the pleadings in either one or both of the application and response in this regard.

16. Matters discussed at meetings of the Vice-Chair group are considered by the participants to be done within the confines of the oath of office prescribed in section 110(8) of the Act. The oath which has been taken by myself and all other members of the Board, obliges a deponent to keep certain information obtained as a member of the Board, confidential. Aside from the disclosures contained in paragraph 15 above, I consider any other particulars of the discussions within the Vice-Chair Group as falling within the confines of the oath of office. For that reason, I will disclose nothing further concerning these conversations.
17. I am not unmindful of the concerns that may be raised by parties in light of my disclosures. Some of these concerns were touched upon during the hearing on November 13, 1996. They include my eligibility as a potential witness as well as my ability to impartially assess any evidence that may be brought before me dealing with the manner in which Vice-Chairs of the Board were selected for the revocation of Orders in Council. It is also the case that, in this regard, I am situated in the same position as the Chair, the Alternate Chair and all other Vice-Chairs of the Board.

...

17 Following the oral ruling on November 14, 1996, the respondents moved that as a result of the information disclosed in paragraph 15 of that decision (the "disclosures"), neither I, nor the Chair, Alternate Chair or any other Vice-Chair of the Board could proceed with this matter. In the respondents' view, the disclosures raised a reasonable apprehension of bias on the part of any adjudicator of the Board.

18 The applicant and intervenors argued that the disclosures did not raise an apprehension of bias and that the matter should proceed.

II

SUBMISSIONS OF THE RESPONDENTS

19 The respondents suggested that there were two issues that had to be determined to dispose of their motion. Firstly, what is the standard to which the Board should be held on an apprehension of bias? Secondly, having determined what the standard is, what exactly is the test to be applied within that standard?

20 On the first issue, the respondents argued that the Board should be held to the same strict standards that apply to the courts. Relying on the decision of the Supreme Court of Canada in *Newfoundland Telephone Company Limited v. The Board of Commissioners of Public Utilities*, [1992] 1 S.C.R. 623, the respondents observed that the standard to which any administrative tribunal will be held will vary with the nature of its statutory obligations and powers. Where, as in the Board's case, much of the tribunal's role is adjudicative rather than administrative, natural justice "expectations" will be high. The respondent also proposed that the nature of a tribunal's "subject matter" may also have a bearing on the standard which may be required.

21 In dealing specifically with the "subject matter", the respondent referred the Board to the provisions of section 2 of the Act, entitled "Purposes and Application of Act". Those provisions are as follows:

2. The following are the purposes of the Act:
 1. to facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.
 2. to recognize the importance of workplace parties adapting to change.
 3. to promote flexibility, productivity and employee involvement in the workplace.
 4. to encourage communication between employers and employees in the workplace.
 5. to recognize the importance of economic growth as the foundation for mutually beneficial relations amongst employers, employees and trade unions.
 6. to encourage co-operative participation of employers and trade unions in resolving workplace issues.
 7. to promote the expeditious resolution of workplace disputes.

22 Having regard to these provisions of the Act, the respondents emphasized the significant authority exercised by the Board over both individual and collective rights. The respondents pointed to the Board's responsibilities in governing labour relations in the province, the extent of its remedial powers and the protection of a privative clause. In these circumstances, it was suggested that the Board had to be held to the highest standard of natural justice on issues of bias.

23 On the specific test to be applied to determine whether there was a reasonable apprehension of bias, the respondents also relied on *NEWFOUNDLAND TELEPHONE COMPANY LIMITED*, supra. In their submission, the test to be applied was whether a reasonable, well-informed bystander would in all the circumstances, perceive bias on the part of an adjudicator.

24 The respondents relied on the following facts as ones which would raise an apprehension of bias:

- (i) uncertainty about the content of the information provided to Vice-Chairs;

- (ii) the information was likely to be highly relevant to one of the key factual disputes between the parties and inconsistent with either one or both of the pleadings;
- (iii) given the circumstances in which the information was provided, it is very likely to be perceived by Vice-Chairs as extremely reliable and probative with respect to the factual disputes between the parties;
- (iv) as the information concerned every Vice-Chair as a potential candidate to be removed from office, Vice-Chairs would be perceived to have a direct interest in how this information is characterized here and elsewhere.

25 Having regard to these observations, the respondents argued that a reasonable bystander would apprehend bias on the part of any adjudicator at the Board, in dealing with this matter.

26 The respondents submitted that, even if they consented to have the matter proceed in these circumstances, which they do not, the doctrine of waiver would have no application. It was suggested that a party could not waive bias where information disclosed by an adjudicator was uncertain or ambiguous.

27 The respondents submitted that an apprehension of bias renders any further decision void. Referring again to NEWFOUNDLAND TELEPHONE COMPANY LIMITED, supra, the respondents argued that an apprehension of bias could not be cured by any subsequent decision of the tribunal.

28 The respondents conceded that if the Board did not hear the matter, there was some degree of uncertainty as to whether the courts would be able to adjudicate these applications in their entirety.

SUBMISSIONS OF THE APPLICANT AND INTERVENORS

29 The applicant and intervenors took no position on either the standard to which the Board should be held, or the test to be applied. Their submissions focused on the particular facts of the disclosure by the Board.

30 In the view of the applicant and intervenors, the following observations would lead to a conclusion that there should be no apprehension of bias:

- (i) Vice-Chairs were not involved in the decision making process which led to the removal of Vice-Chairs;
- (ii) what actually occurred may in fact be different from the information provided to Vice-Chairs;
- (iii) nothing in the information disclosed indicated that anything had been pre-judged;
- (iv) "collegial discussions" amongst Vice-Chairs of the Board have been accepted by the courts as appropriate and valuable in the Board's process (see CONSOLIDATED BATHURST PACKAGING LTD. AND INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 2-69 ET AL. (1990), 68 D.L.R. (4th) 524, (S.C.C.)).

31 The applicant and intervenors relied on the case of *CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) v. TOBIASS*, (unreported) July 4, 1996 (Federal Court of Canada) (Trial Division) Court Files Nos. T-569-95, T-866-95, T-938-95. In this case, a Judge of the Federal Court Trial Division determined that the conduct of the Chief Justice of the Federal Court, led in part to a reasonable apprehension of bias which required the proceedings to be stayed. It was argued that this case stood for the proposition that there is nothing inappropriate about an adjudicator judging the conduct of his or her colleagues.

32 Finally, the applicant and intervenors suggested that if the case could not proceed before the Board, then there was no certainty that issues of tremendous importance to the labour relations community raised by this matter would be resolved. Although no jurisprudence was relied upon for this proposition, the argument was that a strict application of procedural rights (natural justice concerns) might defeat the applicant's substantive rights under the Act.

III

33 The four issues that must be determined are the following:

- (i) What is the standard of natural justice that should be applied to the Board in determining whether a reasonable apprehension of bias exists?
- (ii) Having answered the first question, what, precisely, is the formulation of the test?

(iii) Having regard to the answers in questions (i) and (ii) above, is there a reasonable apprehension of bias in this matter as a result of the Board's disclosures of November 14, 1996?

- (iv) If the answer to question (iii) above is in the affirmative, should the Board proceed in any event, if the applicant has no other forum in which to raise the issues framed in this matter?

WHAT IS THE STANDARD OF NATURAL JUSTICE TO BE APPLIED?

34 There is no doubt that the principles of natural justice apply to the Board and must govern its process. In *CONSOLIDATED BATHURST*, supra, Gonthier J. speaking for the majority of the Court at page 553 observed that there are two important and distinct rules of natural justice. Firstly, that an adjudicator be disinterested and unbiased (*nemo iudex in causa sua*). Secondly, that parties be given adequate notice and opportunity to be heard by the person who decides (*audi alteram partem*). In *CONSOLIDATED BATHURST*, supra, the Court ultimately decided that the core issue turned on an application of the second of the two rules. At page 567, Gonthier J. found that the "full Board" meeting process did not run afoul of the *audi alteram partem* rule. Here the issue falls squarely within the first of the two rules.

35 In applying the rules of natural justice, it has been recognized that allowances must be made for the institutional constraints placed upon tribunals. In *KANE v. BOARD OF GOVERNORS OF THE UNIVERSITY OF BRITISH COLUMBIA* (1980), 110 D.L.R. (3d) 311 (S.C.C.) at p. 322, Dickson J. (as he then was) described the way in which natural justice principles should be applied to administrative tribunals:

In any particular case, the requirements of natural justice will depend on "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter being dealt with, and so forth": per Tucker, L. J. in *RUSSEL v. DUKE OF NORFOLK ET AL.*, [1949] 1 All E. R. 109 at 118. To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument. ...

36 The Court's formulation in *KANE*, supra, has been consistently relied upon and applied through to the present (see *CONSOLIDATED BATHURST*, supra, *MATSQUI INDIAN BAND v. CANADIAN PACIFIC LTD.* (1995) 122 D.L.R. (4th) 129, (S.C.C), and most recently *THE ATTORNEY GENERAL OF QUEBEC AND LA REGIE DES ALCOOLS, DES COURSES ET DES JEUX v. 2747-3174 QUEBEC INC.* unreported decision (S.C.C. File No. 24309), Judgement rendered November 21, 1996).

37 In *CONSOLIDATED BATHURST*, supra, at page 558, the Court posed the following question in determining the "natural justice standard" against which a particular practice (in that case the "full Board" meeting) should be measured:

The question before this court is whether the disadvantages involved in this practice are sufficiently important to warrant a holding that it constitutes a breach of the rules of natural justice ...

In that case, the question was answered by weighing the advantages of the practice against the disadvantages.

38 In my view, the same type of analysis which requires a weighing of the respective advantages and disadvantages of the process should be applied here.

39 The respondents suggest that the highest standard of natural justice must apply to the Board on issues of bias. In support of this proposition, they rely on the "Purposes and Application" provisions of section 2 of the Act. In so relying, the respondents invite an analysis of the Board's statutory responsibilities and the extent to which they are dependent upon an absence of perceived bias.

40 As the respondents point out, the Board is charged with the responsibility of supervising labour relations in the province. This requires the Board to make decisions with significant consequences for commercial, individual and collective rights. The Board's decisions are protected by a privative clause. Judicial deference to the Board's particular expertise is well entrenched in the jurisprudence. For most purposes, the Board's decision of an issue is the final one. These factors alone in my view would require a strict standard against which to measure perceptions of bias.

41 There is also a very real sense in which the nature of the Board's subject matter demands that parties are able to hold the Board to a high standard of neutrality. The statutory scheme set out in the Act assumes that, on one level, the interests of management and labour are explicitly in conflict. This assumption lies at the heart of notions of inclusion or exclusion, whether a person is an employee for purposes of the Act, or alternatively, excluded from collective bargaining because his or her interests lie with management. The scheme of the Act anticipates that these parties whose interests are in conflict, will live with each other in long term relationships.

42 The legislation provides necessarily for a neutral third party in the person of the Board or, in some cases, as arbitrators. The neutral's job is to enforce and supervise the long term "management

and labour" relationships that are inherently characterized by a degree of unavoidable conflict. The job cannot be done if one or both parties apprehend that the neutral is partial, or "interested" in the way in which the relationship is managed or supervised. Without the parties' trust in its "lack of bias", the neutral will fail in its responsibilities. If this happens, the statutory scheme will not work. Parties may in this case, look beyond the statute for other means by which to influence and pressure each other.

43 On this analysis, the advantages of holding the Board to a high standard, as the respondents suggest, are obvious. What of the disadvantages? The immediately apparent one is that the application of this standard requires a declaration of potential conflicts between adjudicators and parties on a broad scale. The circle of proscribed knowledge or relationships, is drawn larger rather than smaller. It is unlikely, however, that this apparent disadvantage has in the past, or will in the future, prevent the Board from doing its job.

44 Having regard to these considerations, I accept the respondents' submission that, on issues of bias and its perception, the Board should be held to a high standard.

WHAT IS THE TEST FOR APPREHENSION OF BIAS?

45 The respondents rely on the formulation of this test as described in *NEWFOUNDLAND TELEPHONE COMPANY LIMITED*, supra. The test was restated in *MATSQUI*, supra, at page 158 as follows:

The classic test for a reasonable apprehension of bias is that stated by de Grandpré J. in *COMMITTEE FOR JUSTICE AND LIBERTY v. CANADA (NATIONAL ENERGY BOARD)* (1976), 68 D.L.R. (3d) 716 at p. 735, [1978] 1 S.C.R. 369, 9 N.R. 115:

... 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 [at p. 667], 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 Mr. Crowe whether consciously or unconsciously, would not decide fairly?"

De Grandpré J. further held that the grounds for the apprehension must be "substantial".

46 The test proposed by the respondent is consistent with the well developed jurisprudence on this point. I would apply it in this case.

IS THERE A REASONABLE APPREHENSION OF BIAS?

47 Having determined the standard of natural justice which should apply in the facts of this case, and the formulation of the question to be posed in deciding the issue of an apprehension of bias, I now turn to what I view as the salient facts.

48 One of the factual issues hotly contested by the parties is the role of the Chair of the Board in deciding which four of the Board's Vice-Chairs would be subject to removal from office. The par-

ties have been told that information regarding the selection process was provided to Vice-Chairs at a confidential meeting where the Chair was in attendance. The parties have not been told who reported the information, what its content was or how reliable it was perceived to be by the group of Vice-Chairs. All potential adjudicators at the Board would be in possession of this information. The parties have been told that the information is inconsistent with either one or both of the pleadings.

49 The applicant and intervenors suggest that on these facts it would be reasonable to conclude that the information in the possession of Vice-Chairs is no different from what might be gleaned from a newspaper. I cannot agree. It is clear that, although Vice-Chairs were not involved in the decision making process, they were given information concerning the process in the presence of one of the persons who is alleged to have made the decisions. It is reasonable to assume in these circumstances, whether or not it is in fact true, that the information provided would be understood by Vice-Chairs to be reliable and probative to the issues in dispute in this matter.

50 The degree of uncertainty as to the content of the information coupled with the knowledge that it is inconsistent with one or both pleadings, also leads in my view to a reasonable apprehension of bias. These considerations, in tandem with a perception that Vice-Chairs may have a direct and personal interest in the way in which the provided information may be characterized after the fact, leads me to the conclusion that there is undoubtedly a reasonable basis for an apprehension of bias.

51 To summarize, I would find the following facts to be determinative of this issue:

- (i) the provided information is relevant to one of the key factual disputes between the parties and inconsistent with one or both pleadings;
- (ii) The information is reasonably perceived to be understood by Vice-Chairs as highly probative;

(iii) the content and source of the information is undisclosed;

- (iv) all Board adjudicators may reasonably be perceived as having an interest in the characterization of the information provided.

52 In my view, having regard to these findings, a reasonable person, well informed and after appropriate consideration, would have a reasonable apprehension of the Board's bias, because of the disclosures of November 14, 1996.

SHOULD THE BOARD PROCEED IN ANY EVENT?

53 The applicant has asserted that if the Board does not proceed, then it may not get a hearing of its issues anywhere. No proposition of law or authority was relied upon for the assertion that the Board could proceed in the face of a reasonable apprehension of bias.

54 I am aware of the decision of the Divisional Court in *E.A. MANNING LIMITED ET AL., AND ONTARIO SECURITIES COMMISSION* (1994), 18 O.R. (3d) 97, where the Court dealt with the application of the "doctrine of necessity". Arguably, this doctrine may bear some similarity to the applicant's request on this point. In any event, even if it were to have been argued, in my view it would not be applicable in the circumstances of this case. There is no certainty that the issues raised by the applicant may not be dealt with in another forum (see, for example, section 16 of the

PUBLIC OFFICERS ACT R.S.O. 1990, c. P. 45 as amended, and which was discussed at the hearing on November 14, 1996).

IV

55 The parties have in various ways, suggested that if the matter cannot proceed any further before the Board, then it may be possible to compile some form of record upon which judicial proceedings may be based. The concern here is that there be a base of historical or institutional fact and comment which will provide a context for the handling of any further litigation in the courts. The parties have indicated a willingness to permit the Board to do this, but reserve their rights to challenge such a narrative.

56 In circumstances where I have found that there exists a reasonable apprehension of bias, it would not be appropriate for the Board to continue on and make observations of fact or draw conclusions of law.

57 Accordingly, I declare that a reasonable apprehension of bias exists in this matter as a result of the disclosures made by the Board in its decision of November 14, 1996. The proceedings before the Board in Board File No. 2259-96-U are hereby stayed.

58 The parties did not address the issue of how the application in Board File No. 0656-96-U should proceed if the application in Board File No. 2259-96-U was to be stayed. Given the tangible labour relations issues that require adjudication in Board File No. 0656-96-U, I would invite the parties to make written submissions on how that matter should proceed. The parties are directed to file their submissions with each other and the Board within ten days of the date of this decision.

cp/d/das/qlmxxp

---- End of Request ----

Print Request: Current Document: 49

Time Of Request: Friday, October 02, 2009 00:35:01