Shaw Cable Systems v. International Brotherhood of Electrical Workers, Local 213 (Overtime Grievance)

Canada Labour Arbitration Decisions

Canada

Labour Arbitration

Vancouver

Panel: John L. McConchie (Arbitrator)

Heard: February 26 and 28, 2019.

Written submission: August 9 and 14, 2019.

Award: September 11, 2019.

Arbitration Decision No. C-010/19

[2019] C.L.A.D. No. 185

IN THE MATTER OF an Arbitration Between Shaw Cablesystems, Employer, and International Brotherhood of Electrical Workers, local 213, Union (Overtime Grievance - Preliminary Application)

(369 paras.)

Case Summary

Labour arbitration — Arbitrators — Bias.

Labour arbitration — Process and procedure — Arbitration — Preliminary objections.

The union for employees of a major telecommunications company filed an overtime grievance, which was to be heard by a three-member panel. The employer filed a preliminary objection to the appointment of one of the panellists on the grounds that her appointment gave rise to a "reasonable apprehension of bias". The parties agreed that the Chairperson sitting alone would rule on this application. The panellist in question was the union's nominee, who was an Assistant Business Manager of the union. However, her responsibilities were with a different bargaining unit of the union and she did not have any history or involvement in the current dispute. The employer argued that the panellist, being an employee of the employer, was ineligible to sit as an arbitrator because a person cannot be a judge in his or her own case. The employer said that this would be a violation of natural justice and procedural fairness. The union argued that the "labour relations approach" was flexible to the realities of the employer-union dynamic. The union said that parties to a collective agreement were free to set their own standards of partiality or bias as they saw fit. This was a simple matter, which the parties were free to address in their collective agreement and indeed had done so in Article 9. The union argued that Article 9 permitted the parties to appoint their own employees to act as nominees on three-person boards. Specifically, there was nothing in the Article that even indirectly sought to restrict the actions of the parties in selecting their nominees.
HELD: Application dismissed.

The employer and union were free to structure their three-person boards as they wished through an agreement in their collective agreement such as Article 9. They were free to expressly or implicitly either restrict the entitlement of employees of a party from attending as nominees on the board or to permit exactly that. The mutual intention of the parties was demonstrated by their extremely lengthy and consistent past practice: namely, that the appointment of one their employees was not prohibited by Article 9 but was permitted. Here, the employment connection between the panellist and the union did not give the employer a reasonable apprehension of bias. The single most significant

factor in this case, which acted to defeat the employer's application, was the long history of decisions in which employees of the union participated and in which it could not be said that there was any evidence that these nominees were likely to decide a case unfairly.

Statutes, Regulations and Rules Cited:

Canada Labour Code, s. 3(1)

Labour Relations Code, R.S.A. 2000, c. L-1,

Labour Relations Code (British Columbia),

Appearances

Counsel for the Employer: Howard Levitt.

Counsel for the Union: ***Brandon Quinn***.

AWARD

I. INTRODUCTION

1 I am appointed as chair of a three-person arbitration board along with Christina Brock, nominee of the Union and Greg Heywood, nominee of the Employer, to resolve a grievance brought by the Union with respect to overtime pay.

2 The appointments of the members of this Arbitration Board were made pursuant to Article 9 of the Collective Agreement which, in its material part, reads as follows:

> 9.01 Arbitration Board
>
> When a grievance is referred to arbitration pursuant to the provision of the grievance procedure contained in this Agreement, the Employer and the Union shall, within three (3) working days, each appoint one (1) arbitrator who shall be a member of the Arbitration Board.
>
> ...
>
> 9.02 Chairman
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> The board members so appointed shall, within five (3) working days of their appointment endeavour to agree upon and appoint an impartial Arbitrator who shall be a third (3rd) member and the chairman of the Arbitration Board. In the event that the two (2) board members failed to agree upon the selection of such an impartial
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> Arbitrator, then the parties shall mutually request an appointment be made by the Federal Minister of Labour.
>
> ...
>
> 9.04 Arbitration Decision
>
> The decision of a majority of the Arbitration Board shall be final and binding on both parties, and where there is no majority decision, the decision of the Chairman shall be the binding decision of the Arbitration Board.

3 Although the grievance itself concerns overtime pay, this Award will not deal with that subject but will be limited to resolving a preliminary objection made by the Employer to the appointment of Ms. Brock by the Union. The

Employer's preliminary objection is that Ms. Brock's appointment to the arbitration board gives rise to a "reasonable apprehension of bias", namely, an apprehension on the Employer's part that Ms. Brock will likely not be able to decide the substantive case before the board fairly. The Employer observes that this is not a requirement that it prove that Ms. Brock is actually biased in fact but only that its perception that she will be biased is based and supported on the facts. In view of the nature of the preliminary application, the parties agreed that I would hear the application and rule on it as Chairperson of the Arbitration Board sitting alone for this purpose.

4 In view of the issues to which this Award will be directed, I will add a few details now that are normally not related at the outset, if at all.

5 First, although the parties here are both situated in British Columbia, their collective bargaining relationship is governed by the Canada Labour Code as the Employer is in the telecommunications industry. Secondly, the Employer's nominee, Greg Heywood, is a labour lawyer with a Vancouver law firm emphasizing labour and employment law. Thirdly, Christina Brock, the Union's nominee, is an Assistant Business Manager ("ABM") of the Union, which is an employment position with the Union. Her responsibilities as ABM are with a different bargaining unit of the Union and she does not have any history or involvement in the current dispute.

6 I will begin with an overview of the positions taken by the parties. The onus is on the Employer to establish that it has a reasonable apprehension of bias because of the presence on the Arbitration Board of Ms. Brock. I will not try to cover the entirety of the parties' submissions here. There will be more time and a better place to deal with some of the submissions later as and if they arise for assessment.

Employer Position

7 The Employer says that Ms. Brock, being an employee of the Employer, is ineligible to sit as an arbitrator on this three-person Arbitration Board. It says that the law which governs the relationship between Employer and Union has long since rejected the idea that a person can be a judge in his or her own case, another way of saying that a judge cannot fairly judge the very party which employs him or her.

8 The Employer says that Ms. Brock cannot thus sit on this arbitration board because that would be a violation of natural justice and procedural fairness. A fundamental concern of Canadian law, says the Employer, is the preservation of public confidence in the impartiality and independence of adjudicators. Here, an employee of one of the two parties to a dispute is nominated to sit in judgment of her employer and its disputant. It is well understood as a matter of law, says the Employer, that employees owe a duty to fidelity to their employers. This duty, says the Employer, consciously or unconsciously -- it doesn't matter which - compels the loyalty of the employee to the employer and its interests and makes it more likely than not that she would not decide the matters at hand fairly.

9 A clear statement of the problem from the Employer's point of view is that described in *Re Canadian Shipbuilding & Engineering Ltd. and United Steelworkers of America* (1973), 36 D.L.R. (3d) 374 (Ont. H.C), where the court observed:

> "A person who is employed in the regular course by one of the parties to an arbitration is not qualified to act as an impartial arbitrator. The basic reason behind this is that the person so appointed has an important and dominant duty as employee to his employer that may interfere with his duty as a member of the board of arbitration."

10 Moreover, says the Employer, Ms. Brock has also signed an oath by which she has promised the Union that she will bear allegiance to it and not sacrifice its interest in any manner. (Employer's emphasis). In the Employer's view, Ms. Brock is thus bound to serve the interests of the Union, and this makes it impossible to expect that she would be able to exercise her free will in making judgments on the evidence if those judgments did not serve the interests of the Union.

11 The Employer submits that it is not necessary for the objecting party to prove that the nominee in question is *actually* unable to assess the case before the panel fairly. It is sufficient if in the context of the case a reasonable

person in possession of the relevant facts would find that it is *probable* that this will be the result. For this reason, the Employer makes no attack on Ms. Brock's personal integrity. It is not Ms. Brock in her capacity as a unique human being who is the focus of the disqualification effort; it is Ms. Brock in her capacity as employee of a party to the proceeding who must be disqualified

12 In the circumstances of the current case, in sum, the Employer says that where a party chooses to name a person from its own staff as its nominee, it is appointing a person who is, by the law of Canada, ineligible to sit on the board, except in certain select circumstances not present here.

13 The Employer further explained that although there is a division between what are called the "judicial school" and "labour relations school" in dealing with the specific context of labour arbitration, the fact is that the judicial school has prevailed, the law is clear, and this is not a matter on which I as Chair have a discretion to choose the "labour relations school" if I find it more to my own inclinations. I digress to add that the highest courts in Canada have been in the course of constructing and clarifying a legal test for reasonable apprehension of bias for over 70 years, and the Employer tracked these cases from the still influential decision in *Szilard v Szasz*, [1955] SCR 3 to the recent decision of the BCCA in *Hunt v Strata Plan LMS 2556*, 2018 BCCA 159, which, said the Employer, anchors British Columbia law in the Supreme Court of Canada approved test for reasonable apprehension of bias in such cases as *Yukon Francophone School Board, Education Area # 23 v Yukon (Attorney General)*, [2015] 2 SCR 282 (upon which *Hunt* directly relied), *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 (upon which *Yukon Francophone School Board* relied, and *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484.

14 In the course of the application of the evolving test through the many levels of court and other adjudicative bodies, a debate formed between those who support a flexible approach (the so-called "labour relations school of thought) and those who view the pursuit of justice as requiring strict standards (the so-called "judicial school of thought").

15 To put it in a minimalist way, labour relations theory is looked on as being more flexible on the subject of whether and when the fact that a nominee on a three person board is an employee of one of the parties gives rise to a reasonable apprehension of bias, recognizing that party-employees are partial adjudicators and reducing or redefining what procedural fairness looks like in this circumstance. By contrast, the "judicial model" presents a more strict framework within which reasonable apprehension of bias is measured and tends to a conclusion that nominees of parties to quasi-judicial proceedings such as labour arbitrations must be subject to the same or substantially similar standards of impartiality and independence as judges in the court system.

16 The Employer notes that in the absence of any limitations or guidance in the Canada Labour Code or any definitive decision purporting to establish a policy basis for a different approach to bias under federal labour law, the Canada-wide common law is binding on me and I must apply it. (I will be reviewing the common law principles in due course)

17 The Employer submits that an arbitration which were to go ahead in these circumstances over the meritorious objection of a party is void, a nullity. This is because impartiality and independence are foundational elements of justice and a court, panel or board in which a biased member participates violates procedural fairness and natural justice. See *Hunt v Strata Plan.*

18 In short, the Employer submits that foundational law in Canada, right up to the most recent applications of the now-universally accepted test for reasonable apprehension of bias, holds that an employee of one of the parties cannot meet the necessary standards for impartiality and independence and hence Ms. Brock's appointment is, at its root, a classic example of what justifies disqualification.

19 During the course of the hearing, the Employer also referred to the following decisions: *0896022 BC Ltd (cob Fuji Japan (Re)*, [2016] BCESTD No 116; Murphy v Newfoundland (Minister of Municipal Affairs), [1984] 50 Nfld & PEIR 307; *36 Silver Arrow Investments Ltd (Re)*, [2016] BCESTD No 134; *Yorkton Professional Fire Fighters Assn., Local 1527 v. Yorkton (City)*, 2001 SKCA 128; S.A. de Smith, *Judicial Review of Administrative Action*, (1959), cited

in *RE PHILLIPS CABLES LTD AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 625*, [1975] 10 LAC (2d) 377; *Alberta Union of Provincial Employees, Branch 63 v Olds College*, [1982] 1 SCR 923; *Eamor v Air Canada Ltd,* [1999] BCJ No 2186; *Canada Post Corp v Canadian Union of Postal Workers (CUPW)*, [1991] SJ No 628; Wen v Canadian Airlines International Ltd, [1995] BCJ No 733; *Algonquin College v Ontario Public Service Employees Union, Local 415 (FSL Grievance)*, [2012] 100 LAC (4th) 234;*Re Ontario Power Generation and Society of Energy Professional (Health Statement Grievance)* (2004), 137 L.A.C. (4th) 44*; Humber College v Ontario Public Service Employees Union (Salary Grid Placement Grievance)*, [2014] OLAA No 368; Brown and Beatty, *Canadian Labour Arbitration* (1977), para. 3:1100; *Labour Arbitrations and All That*, Fourth Edition, John P. Sanderson, Q.C; *Ghirardosi v British Columbia (Minister of Highways)*, [1966] SCR 367; *Saskatoon Chemical*s Ltd v Board of Arbitration, [1988] SJ No 305; *Local 115 v Foothills Provincial General Hospital Board* (Alta CA), [1986] AJ No 307; *Refrigeration Workers Union, Local 516 v. Labour Relations Board of British Columbia et al* (1986), 2 B.C.L.R. (2d) 1 (B.C.C.A.)

Union Position

20 The Union defends its appointment of Ms. Brock on two bases.

21 First, it says that at the common law governing the meaning of "reasonable apprehension of bias", the mere fact that Ms. Brock is an employee of the Union is not conclusive of her ineligibility to serve as a member of the Arbitration Board. It submits that the common law is much more nuanced than that. It presents its own case authorities to this effect, which it says compete with certain of the Employer's case authorities, at least in part, on the basis of whether they adopt the "judicial" school of thought regarding adjudicator bias or the "labour relations" school of thought on the subject.

22 The Union describes the "labour relations approach" as being more flexible and alive to the realities of the employer-union dynamic. This approach to adjudication, it says, takes into account the value that nominees connected with the parties can have for informed industrial relations dispute resolution. The other approach, the "judicial school" appears concerned with upholding rigorous requirements to ensure public confidence in justice. The Union submits that while no one argues with the notion that adjudicative boards must do justice, inflexibility in terms of proscribing arbitrator appointments of employees by the parties is not necessary to achieve that end and may be counter-productive.

23 The Union's second point is that this Arbitration Board must look beyond the common law in answering the issue before it. That is because the common law is subject to being modified by both statute law and by the parties themselves, either on an ad hoc basis, or, more importantly here, in their Collective Agreement.

24 In short, says the Union, parties to a collective agreement are free to set their own standards of partiality or bias as they see fit. Here, the dispute is over whether the Union is entitled to appoint an employee to a three person board. That is a very simple matter which the parties are free to address in their collective agreement, and indeed have done so.

25 It is the Union' s position that Article 9, properly construed, is clear in permitting the parties to appoint their own employees to act as nominees on three person boards. Specifically, there is nothing in the Article that even indirectly or implicitly seeks to restrict the actions of the parties in selecting their nominees. In short, if a party wishes to appoint one of its employees to the Arbitration Board, it is free to do so.

26 If it is then said that this is impermissible because the employee may be partial to the Union's or Employer's cause, then Article 9.6 shows the way the parties have dealt with this, namely, by specifically requiring the nominees to appoint an "impartial chairman". The nominees are not described in the Article as being impartial, and the use of the additional term directed to the role of the Chair cannot be ignored as if it has no meaning or consequence.

27 Finally, the Union submits that if it is necessary to resort to extrinsic evidence because the Arbitration Board

concludes that there is an ambiguity, patent or latent, or that extrinsic evidence may expose such an ambiguity, then the Union is able to establish a more than *30+ year* consistent past practice which unambiguously establishes its entitlement to appoint its own employees to three person boards. This extremely lengthy practice, it says, serves to clarify any ambiguity and proves a consensus regarding the meaning of Article 9, namely, there is nothing in the Article that prevents the parties from naming their own employees to three person arbitration boards, and, to be clear, nothing that would give the other party the right to apply for the disqualification of such a person based on their employee status and the natural features of that status (duty of fidelity, oaths of allegiance, etc.).

28 Noting again that some of the Union's cases will come up for discussion later, the Union relied on the following decisions in presenting its argument: *Evidence and Procedure in Canadian Labour Arbitration ("**Gorsky**") at 6-5 to 6-6* ;*Szilard v. Szasz*, [1955] 1 D.L.R. 370, [1955] S.C.R. 3.; *Regina v. Ontario Labour Relations Board*; Ex parte Hall (1963), 39 D.L.R. (2d) 113; *Canadian Shipbuilding & Engineering Ltd. and United Steelworkers of America* (1973), 36 D.L.R. (3d) 374; *Corp. of City of Windsor and C.U.P.E.,* Local 543 (1973), 6 L.A.C. (2d) 98; *Phillips Cables Ltd. and International Brotherhood of Electrical Workers, Local 625* 10 L.A.C. (2d) 376; *Tomko v Nova Scotia (Labour Relations Board),* [1974] NSJ No 20, 9 NSR (2d) 277; *Gainers Ltd. and Local 319, United Packinghouse Workers of America* (1964), 47 W.W.R. 544 at pp. 549-50; *Bushnell v Teamsters Local Union No 351*, 83 CLLC para 16,032, [1983] BCLRBD No 15; *Refrigeration Workers Union, Local 516 v. Labour Relations Board of British Columbia*, [1986] 4 W.W.R. 223, 27 D.L.R. (4th) 676, (B.C.C.A.); *Health Employers' Assn v British Columbia Nurses' Union*, [1999] BCCAAA No 313, 83 LAC (4th) 183; *West Coast General Hospital* (Re), [2001] BCLRBD No 188, BCLRB Decision No B188X2001; *Bethany Care Centre v. UNA* (1983, 29 Alta. L.R. (2d) 3 (C.A.),;*METRO-CALGARY AND RURAL GENERAL HOSPITAL, DISTRICT NO 93 AND UNITED NURSES OF ALBERTA*, [1985] AGAA No 3, 20 LAC (3d) 54; *Grande Spirit Foundation and CUPE, Loc 2158*, Re, [1991] AGAA No 6, 19 LAC (4th) 349; *Fredericton (City) v International Assn of Fire Fighters, Local 1053* (Collective Agreement Grievance), [2008] NBLAA No 17, 169 LAC (4th) 278; *Grand Erie District School Board v. Ontario Secondary School Teachers' Federation (Supervision Duties Grievance),* [2018 O.L.A.A. No. 73; *Abitibi-Price Inc., Stephenville Division and CPU., Loc. 1093* (1985), 18 L.A.C. (3d) 143 (Sullivan).; *Kwantlen College v. Douglas & Kwantlen Faculty Assn.* L.A.C.(3d)215; *Abitibi-Price Inc., Stephenville Division and CPU., Loc. 1093* (1985), 18 L.A.C. (3d) 143 (Sullivan); *Saskatoon Chemicals Ltd v Board of Arbitration*, [1988] SJ No 304; *Collective Agreement Arbitration in Canada, Second Edition, Palmer; Sherwood Co-operative Assn Ltd and RWDSU, Loc 539,* Re, [1989] SLAA No 1, 10 LAC (4th) 111 ; *Ontario Hydro and Ontario Hydro Employees Union,* Re, [1990] OLAA No 156, 17 LAC (4th) 212 (P.C. Picher);*Vancouver (City) Vancouver Board of Parks and Recreation v Canadian Union of Public Employees, Local 15, [2004] BCCAAA No 238 (D.R. Munroe); Overwaitea Food Group v United Food and Commercial Workers Union Local 1518*, [2006] BCCAAA No 171

Employer Reply

29 In reply specifically to the Union's claims regarding the Collective Agreement, the Employer submits that the language of Article 9 is clearly in its favour as -- for one thing -- it would require express language to permit the nomination of employees as nominees given that it would be extraordinary at law for an employee of a party being permitted to take part in a case involving the employee's own employer. There is nothing in the Collective Agreement that expressly or by necessary implication provides for that. The more realistic expectation about Article 9, it says, is that in applying it, the parties will be held to be structuring their agreement so as to comply with the foundational law of Canada regarding fair hearings. That requires that the nominee not be an employee of one of the parties to the proceeding.

30 Therefore, says the Employer, the language is clear and in its favour.

31 As for the Union's past practice argument, while the Employer did not challenge the Union's documentary and oral evidence as to the nature and extent of its practice, the fact is, says the Employer, that it was not aware of the practice until sometime in late 2016, at which time it raised the matter and ended any possible acquiescence in the practice. It is noteworthy, says the Employer, that the Union brought no evidence to link knowledge of the practice to any person within the Employer who has or had real authority for the Collective Agreement. The Employer says

that without proving the requisite knowledge of the practice on the part of the Employer's representatives, the Union has not established a valid past practice under the required tests.

32 When it learned about the practice and challenged it in 2016, this had the effect of clearly ending any acquiescence in the practice, says the Employer. Proceedings under the three-person board will thus be void going forward should the proceedings include an employee of a party as a nominee. Even if it could be said that the Employer had waived its rights to complain about the absence of procedural fairness in the cases on which the Union employees sat as nominees, the Employer cannot be held to have waived its right to object for all time. The instant case is a new instance of an appointment which breaches natural justice and raises a reasonable apprehension of bias at the instance of the Employer. Its past acquiescence cannot be used to justify permitting the appointment of Ms. Brock and the resulting procedural unfairness that the Employer must thereafter bear.

33 The collective agreement language does not support the Union's case on its own, says the Employer. Therefore, the consequence of the Union's failure to establish its past practice and the consensus it sought to demonstrate, is that the Union's selection of Ms. Brock as a nominee panel gives rise to a "reasonable apprehension of bias" and Ms. Brock must be disqualified.

34 I will obviously be returning again to these issues when I embark on my analysis of the case. It was my intention here to set out the parties' basic arguments so as to set the stage for a recital of the key evidence (which is largely concerned with the practice) and ultimately my findings and conclusions regarding the motion to disqualify Ms. Brock.

II. THE STRUCTURE OF THIS AWARD

35 I will shortly provide the relevant background and evidence in the case.

36 However, before doing so, I am going to set out some of my conclusions with respect to the legal framework for this case. I believe this is desirable for two reasons: first, so that I can properly identify the issues that I must resolve in order to answer the Employer's preliminary application, and, second, to provide a useful scaffold for the analysis, where there might be several different, less manageable, ways to provide my reasons for the conclusions I will reach in this Award.

37 To get to this point, I will say that I have read every case presented to me by counsel and several more which I asked counsel to comment on during my deliberations and as to which I received their helpful submissions.

Test

38 My first conclusion is that in resolving the Employer's claim, I must identify and apply the test which is now universally recognized in Canada as the appropriate test for determining whether an applicant/complainant has or has not proved that the applicant has a "reasonable apprehension of bias" with respect to a judge or other adjudicator.

39 I will identify the components of the test when I arrive at my analysis in this Award. It is a test which applies to all judicial and quasi-judicial tribunals in Canada, the latter being the kind of tribunal we are dealing with in the instant case. As will be seen from what I say later, its application may be drastically abbreviated in certain circumstances, but as a general matter it provides an adjudicator with a convenient and correct legal wrapper for most if not all of the substantive issues that may foreseeably arise in an application dealing with the "reasonable apprehension of bias".

40 This will be the first issue I address in my analysis, where it should become apparent how this test addresses the debate between the parties involving the labour relations and judicial schools of thought.

The Standards for determining Bias

41 The second important conclusion that should be stated at this stage of the Award is that the standards to be applied to the concept of "bias" are not immutable. Given the Union's reliance on Article 9 of the Collective Agreement, this conclusion paves the legal way for this kind of proceeding -- namely, one which will pay most of its attention to the wording of a collective agreement and the details of an alleged consistent past practice.

42 To digress, the Employer has made the point in these proceedings -- which I wholly accept --that natural justice and procedural fairness are foundational elements of the Canadian system of justice, both criminal and civil. A key element of natural justice and procedural fairness is the ability of litigants to have confidence that those who sit in judgment over them or their affairs will judge their cases fairly. It has long been said in the case authorities that this requires judges and quasi-judicial adjudicators to be impartial and independent in their approach to the cases that come before them.

43 Having said this, it has also been long recognized that natural justice standards are inherently changeable. Sopinka J. in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission), [1989] 2 S.C.R. 879 at pp. 895-96*, cited with approval in Pearlman v. Manitoba Law Society Judicial Committee, [1991] S.C.J. No. 66, [1991] 2 S.C.R. 869 (S.C.C.). explained the phenomenon of the variability of the standards noting:

> "Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided."

44 On a similar note, L'Heureux-Dubé J. noted in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at para. 46 quoted in *Pearlman*:

> "Like the principles of natural justice, the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case."

45 The ability to vary a natural justice standard in appropriate circumstances is not one limited to judges adjudicating bias or other fairness cases.

46 The two most common means outside the courts whereby the principles of natural justice and procedural fairness are modified to fit the differing needs, wishes and/or special circumstances of parties to adjudicative proceedings are (1) by legislatures passing laws which alter the foundational principles or rules in some way in a given context, and (2) by two or more parties making an agreement as to how the rules will operate for them and their particular needs, either for a single piece of litigation or for an ongoing process, such as a dispute resolution process in a collective agreement.

47 As perhaps the clearest example of the legislative approach, the Labour Relations Code of Alberta, R.S.A. 2000, c. L-1, expressly establishes a test that provides that

> "[e]xcept in the case of a chair, no person shall be disqualified from acting as a member of an arbitration board . . . unless that member is directly affected by the difference or has been involved in an attempt to negotiate or settle the difference."

48 Whatever else that language does, it appears to clearly remove the appointment of a party's employee from the ranks of those who can be disqualified from acting as a member of an arbitration board, provided, of course, that the employee is not directly affected by the difference and has not been involved in an attempt to negotiate or settle the difference

49 I will also bring the BC Labour Relations Board practice respecting nominees under the umbrella of the "legislative change" example. That Board has superintendency of an appeal process that, among other things, addresses complaints from parties to arbitrations that they have not received a "fair hearing." As such, the definition of what constitutes a fair hearing is within the Board's jurisdiction. Over time, they have made decisions which have provided parties to arbitration decisions with considerable flexibility in who they appoint as nominees to arbitration boards, including but not limited to party employees. The policy decisions have been intended to foster the kind of

labour environment the Board believes is in the interests of the parties in the provincial jurisdiction and, in its view as expressed in the decisions, reflects their wishes. See *West Coast General Hospital and B.C.N.U. (1999)*, 83 L.A.C. (4th) 183 (Larson), affirmed [2001] B.C.L.R.B.D. No. 188 (QL) (B.C.L.R.B.).,

50 The Employer counsel in the instant case colourfully referred to the BC Board as an "outlier" among tribunals, while Union counsel would, if he had commented on this characterization, have likely characterized it as representing a model for the ages.

51 Turning to the ability of parties to agree to modify the foundational standards to suit their own needs, it is clear that the parties are lawfully entitled to do that.

52 The way for this in the federal jurisdiction occupied by the parties is paved by the Canada Labour Code, which provides:

> 3.(1) In this Part,
>
> "arbitration board" means an arbitration board constituted by or pursuant to a collective agreement or by agreement between the parties to a collective agreement and includes an arbitration board the chairperson of which is appointed by the Minister under this Part;

53 The Canada Labour Code says nothing in its terms about the substance of our own preliminary objection, presumably leaving the parties to construct their own idealized arbitration board configuration if this is their choice.

54 The textual and case authorities make it clear that the Employer and Union can largely do what they feel is in their best interests in terms of how they structure their arbitration proceedings (they must do so without offending statutes).

55 Starting with the textual materials, in *Evidence and Procedure in Canadian Labour Arbitration* ("Gorsky") at 6-5 to 6-6, the learned arbitrator and author said:

> "An arbitrator may be disqualified from acting if the circumstances are such that there is a reasonable apprehension that he or she will be predisposed to favour one side or the other without regard to the actual merits of the case that is presented ... It should also be noted that, as in all cases, close regard must be had to the collective agreement. Thus, if the parties themselves have chosen to create an arbitration procedure that violates these principles, it should be respected unless such a provision would violate the statute law of the jurisdiction. (my emphasis)

56 In *Collective Agreement Arbitration in Canada, Second Edition, Palmer*, the author noted:

> "Finally, it should be noted that in all cases, the issue of "bias" may be overcome by mutual agreement. For example it is common for parties to agree that the union may name one of its members to the board..." (Approved in *Vancouver Wharves Ltd and International Longshoremen and Warehousemen's Union, Local 514*, [1995] C.L.A.D. No 302 (Thompson).(my emphasis)

57 Not everyone is enraptured with the freedom that may come from the right to set up two parties' "natural justice and procedural standards" principles as they see fit. What comes with the ability of parties to modify fairness standards for admission to seats on an adjudicative tribunal is the specter of a labour arbitration board populated with arbitrators who have the full confidence of the parties to the particular proceeding while causing more traditional jurists to look on with flushed faces.

58 Reading between some judicial lines, I conclude this likely was the situation in a series of cases in the mid to late 1980s in Alberta which preceded the most recent language of the statute (reproduced earlier). At that time, the Alberta Court of Appeal was called on to deal with questions which included the right of the parties to make their own agreements. In the face of his reasons for decision in the cases, Stevenson J.A. gave indications that he did not see the obvious merit of the practice of using "biased nominees", as he described it in one of the cases. However, while the question of a party's agreement was not specifically in issue in the case, the Judge did

acknowledge that the question of whether the parties could change the agreement was up to the parties and, essentially, good luck to them (note the hint of what might be judicial sarcasm in the first line):

> "I remain unconvinced that bias is an essential part of labour adjudication. If it is, the remedy lies with the parties, subject only to the statutory prohibition found in s.122 of the Labour Relations Act, R.S.A. 1980 c.L-1.1. They may accept each other's partial, indeed, biased nominees...".

59 I will mention one more example. In *Sherwood Co-operative Assn Ltd and RWDSU, Loc 539, Re*, [1989] SLAA No 1, 10 LAC (4th) 111, an arbitration decision which sets out a useful summary of the 'labour relations school of thought' and -- as the arbitrator put it -- the "more strict 'judicial school of thought'", the arbitration board said the following about the developing controversy over the malleability of the rules of natural justice:

> 26 It seems to us that the clear weight of judicial authority at this time favours the more strict "judicial school of thought". In the words of Madam Justice Gerwing in the Shelly Western v. U.F.C.W. decision, supra, it is clear that an arbitrator may be challenged if indeed his conduct is such that a reasonable person might apprehend a bias.
>
> 27 It is equally clear, however, that bias may be overcome by mutual agreement. In other words, the parties may by the terms of the collective agreement set some of their own rules in terms of who might or who might not be entitled to be appointed as a side person to a labour arbitration board. (my emphasis)

60 I conclude as follows. The Employer and Union here were and are free to structure their three person boards as they wish through an agreement in their Collective Agreement such as Article 9. They are free to expressly or implicitly either restrict the entitlement of employees of a party from attending as nominees on the board or to permit exactly that. Or something in-between.

61 The issue that I will therefore turn to once I have fully discussed the "test" mentioned earlier is whether the Union has established that the parties made an agreement that permits employees of those same parties to attend as members of the arbitration board, regardless of their duty of loyalty to their Employer and any other incidents of their employment.

62 The interpretation of Article 9 is likely the single most important issue in this case. If the Union is successful in establishing what they say about the agreement, they will succeed in the case. In terms of the application of the test for reasonable apprehension of bias, the issue of whether the parties have agreed to permit the appointment of employees of a party employer is a vital question of fact and part of the essential context of the case.

63 Accordingly, I will now turn to my Analysis and firstly proceed to answer the question: What is the test for adjudicating a complaint that a party has a "reasonable apprehension of bias" arising from the appointment of a nominee?

64 Once I have identified and explained the test, I will answer the question: What is the outcome of the Board's review of the evidence and law regarding the contractual issue, namely, the interpretation and application of Article 9 of the Collective Agreement? This will require the setting out of the large body of evidence that is relevant to this question. It is the largest single part of this Award.

65 Finally, I will turn to any remaining matters that require my attention, and then conclude the Award.

III. ANALYSIS ORGANIZATION

66 I turn now to my analysis of the application by the Employer for a determination that Christina Brock, by virtue of her employment relationship with the Union, and the incidentals of that relationship, has given the Employer a reasonable apprehension of bias and requires that Ms. Brock be disqualified from sitting as a member of this Arbitration Board. As mentioned earlier, the parties have agreed that I should make this determination as the Chairperson of this Arbitration Board sitting alone.

67 I will first review the test that I have concluded Canadian law requires that I apply to the Employer's application. As will be seen, the test for reasonable apprehension of bias stresses the importance of addressing the inquiry in a contextual and fact-driven way. One of the single most important contextual factors in this case is the existence or non-existence of an agreement between the parties that Ms. Brock and others in her same position are not disqualified from sitting as nominees on three person boards under Article 9 of the Collective Agreement. After introducing and discussing the test, I will turn to the question of the alleged agreement and resolve it. I will conclude this Award with any further analysis that may be required after resolving the contract interpretation issue.

IV. THE TEST

68 In *Taylor Ventures Ltd (Trustee ofi v Taylor*, [2005] BCJ No 1380, 2005 BCCA 350, the BCCA dealt with an appeal from a litigant who alleged that the trial judge below ought to have recused himself from taking conduct of a trial in which the litigant was a party. This required the application by the BC

69 Court of Appeal of the test applied under Canadian law to determine the merits of a claim of "reasonable apprehension of bias".

70 Mr. Justice Donald, for the Court, said the following about the appropriate test:

> 7 The leading case on recusal is Wewaykum Indian Band v. Canada, [2003] 2 S.C.R. 259. Counsel for the respondent correctly identified the principles governing the reasonable apprehension of bias concept as discussed in Wewaykum and I quote from his factum:
>
> 7. These principles are:
>
> (i) a judge's impartiality is presumed;
>
> (ii) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;
>
> (iii) the criterion of disqualification is the reasonable apprehension of bias;
>
> (iv) the question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;
>
> (v) the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly;
>
> (vi) the test requires demonstration of serious grounds on which to base the apprehension;
>
> (vii) each case must be examined contextually and the inquiry is fact-specific. [Emphasis in original.]

71 The above, as the context explains, is a compilation of the principles that make up the test for reasonable apprehension of bias, not a list per se which has been copied verbatim from any other source. I am satisfied that this list of principles represents the current state of the law on this subject and applies at the least to all judicial and quasi-judicial tribunals.

72 The scope of the test's application and the results thereof in a given case will depend on the precise circumstances of that case, including the existence of relevant legislation and agreements between the parties, among other items of context. The fact that *Wewaykum* is a recusal-type case (the parties argued after the case was completed that the judge in question ought to have recused himself) makes its logic very accessible in our case, as the conflict over eligibility to sit was, as here, based on something existing prior to the hearing (as was Ms. Brock's employment status), rather than conduct engaged in by the decision-maker during the hearing.

73 A review of the major principles before turning to the contract question will, I hope, be helpful in understanding

the test and perhaps why the "judicial school" and "labour relations school" debate may take on less importance as time goes on.

Origins of the Test

74 The issue in cases alleging bias and unfairness has always been of the highest importance in law. It has been mentioned several times in this Award that the principles requiring fair treatment in the courts are foundational legal principles. For this reason, the Supreme Court of Canada and the superior courts in the provinces have always taken a keen interest in ensuring that the law was on an appropriate track.

75 During this hearing, I was -- to use the word again but in a different context -- "schooled" by counsel who took me through a lengthy history of the development of the law, intended to cover every province and demonstrating how various levels of the courts and administrative bodies had dealt with issues involving a reasonable apprehension of bias.

76 My rendering of the history will be more modest out of the necessity of keeping the length of this Award within some bounds. (I did find the case reviews presented at the hearing remarkably helpful.) The three cases which I have concluded have been most influential in informing the law and therefore the *Wewaykum* "list" are these:

Szilard v Szasz, [1955] SCR 3

77 The leading early case on the subject was *Szilard*. This Supreme Court of Canada case has been often cited as an authority and its following passages set out in full in later cases:

> It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication at its threshold. Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.
>
> The arbitrators are to exercise their function not as the advocates of the parties nominating them, and a fortiori of one party when they are agreed upon by all, but with as free, independent and impartial minds as the circumstances permit. In particular they must be untrammelled by such influences as to a fair minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to. (at p. 4)

78 *Szilard* was a commercial arbitration case, a fact that was considered a distinguishing feature by some later adjudicators who favoured a more flexible approach to the permissible mind-set of nominees than might be possible under the seemingly unforgiving standard of the "free, independent and impartial" mind mentioned in this leading case.

79 ***Committee for Justice and Liberty v. National Energy Board, [1978] 1 SCR 369 (dissenting reasons of de Grandpré J at page 394)***

80 In this case, the dissenting reasons became, over time, the accepted reasons. The main message was:

[T]he 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..." (p. 394). The grounds for this apprehension must, however, be substantial and not limited to the "very sensitive or scrupulous conscience".

R. v. S. (R.D.), [1997] 3 S.C.R. 484

81 If the Committee for Justice and Liberty case was the originator of the objective "reasonable person" element of the test, then *R. v. S.*, a criminal law case, was responsible for important clarifications to the test and its fleshing out

as a major tool for adjudicators. To go through them all here would be to virtually repeat the current list of principles, something that I can instead turn back to now

Listing the Principles of the Test

82 The component parts of the Wewaykum test, set out individually, are below:

1) A judge's impartiality is presumed;

83 This principle appears to be a powerful recognition that public confidence in justice can be lost in two ways (undoubtedly among others): First, public confidence can be lost if the parties come away from a proceeding convinced that their decision-maker was biased; something that has caused the judiciary to take pains to ensure the integrity of the decision making process. Second, a flurry of "reasonable apprehension of bias" applications which are unmeritorious or frivolous could have the effect of calling judicial integrity into question, an outcome which has also caused the judiciary to take steps to ensure that persons making such allegations realize how seriously they are taken by the courts and the burden of proving such allegations before decision-makers.

84 To the mind of Cory J., who wrote the highly informative reasons in *R.v.S.*:

> 113 Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See [R. v. Stark, [1994] O.J. No. 406 (C.J. (Gen. Div.))], supra, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly. (my emphasis)

85 One way to ensure that counsel with grounds for complaint do not undertake a challenge without committed good reason is to ensure that they are aware that the onus in the case is squarely on them and that it is a high onus.

86 In short, the presumption of impartiality lets litigants know that if they feel convinced about the bias of their decision-maker, they must be prepared to climb a hard road if they are to succeed.

87 The court in Wewaykum itself noted that the presumption was a "strong presumption of judicial impartiality" (at 76), which rested on "serious grounds.". (my emphasis) Cory, J. in R.v.S. said that "A high standard must be met before a finding of reasonable apprehension of bias can be made" (at para. 158) and further noted that the onus was to provide "the cogent evidence needed to impugn the impartiality of the decision-maker in focus in the case on which he sat.

88 In short, an application to disqualify a decision-maker, including any judicial or quasi-judicial member of a panel or board, must proceed with serious grounds, establish what it alleges by cogent evidence and meet a high standard of proof.

2) A party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;

89 In *Wewaykum*, the Court adopted a passage from the reasons of judgment of L'Heureux-Dubé J. and McLachlin J. (as she then was) in *R.v.S.* where, at para. 32, those judges noted that the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.

90 Although it will take further cases before the individual importance of this principle is fully assessed, it does seem to me that the point here is perhaps a reminder that not only will the applicant be under an onus of proof but it will be up to the applicant to lead evidence of the circumstances that it says justify the disqualification of the decision-maker.

3) The criterion of disqualification is the reasonable apprehension of bias;

91 As has long been recognized, it is not necessary for an applicant to show actual bias to succeed As was explained by Cory, J. in *R.v.S.*:

> It is not necessary to show actual bias to disqualify the decision-maker. There is only a need to demonstrate a reasonable apprehension of bias. This is so because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind.

4) The question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude?

5) The test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly;

92 I list Principles 4 and 5 together because they are the meat of the test for reasonable apprehension of bias.

93 The Principles, read sequentially and in light of the decisions, in particular, *R.v.S.* and the decisions that have come after it, including *Wewaykum*, establish the following:

> This test ... 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. (R.v.S. at para. 111).

94 That same reasonable person must be an informed person, with knowledge of all the relevant circumstances," ((R.v.S. at para. 111). (my emphasis)

95 The test requires that this same person must be "right-minded". Although I am not aware of any judicial interpretation of "right-minded", I would tend to interpret a "right-minded" person as including an honest person with sound views and principles.

96 I also do not know whether the terms "realistically" and "practically" have been judicially construed but it seems to me that they are characteristics of reasonable and informed people and continue the impetus in the test towards an informed, reasonable outcome to the inquiry. Interestingly, these words appear also to be the characteristics our law looks for in "credible" people who tell stories that are worthy of trust. The similarity becomes apparent when considering the contextual *Faryna v. Chorney* [, [1952] 2 D.L.R. 354] test used in credibility cases, which provides:

> "In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." (my emphasis)

97 In *R.v.S.*, Cory J. noted that (and I paraphrase) that all adjudicative tribunals and administrative bodies owe a duty of fairness to the parties who must appear before them and the scope of the duty and the rigour with which it is applied will vary with the nature of the tribunal in question. (at para. 192).

98 It seems clear that the reasonable person, assessing the situation "realistically" and "practically", will have to have due regard for the nature of the tribunal he or she is before and what is realistic and practical in the particular setting. This is made even more clear by the fact that the last Principle in the test emphasizes the importance of context and specific facts.

99 Needless to say, a reasonable person is one who "thinks the matter through." There are cases in the jurisdiction in which the judges being asked to recuse themselves have commented on the sparse thought that has gone into the materials before the court by the allegedly aggrieved party. Counsel for an applicant for disqualification of a decision-maker who is alleged to be biased (and, remember, it was the meritorious and not slipshod claims that led to the development of this law) will know that they will be required to explain and defend their observations and submissions and demonstrate that the matter has been "thought through".

100 Turning to Principle 5, there are three things of note.

101 First, the standard bearer is still the "informed, reasonable and right-minded person" who is obligated in Principle 4 to think things through and reach a conclusion. There, the question is at least theoretically left open: *what conclusion?*

102 Second, the burden of proof is identified as being on a balance of probabilities. The reasonable person must think it is "more likely than not" that the judge would not decide fairly.

103 And before I come back to the burden of proof, I will mention my third point which is that the acid test is whether or not the decision-maker "would not decide fairly". For all the discussion over time about the various possible elements of a fair decision, the court has used what is perhaps the broadest and most flexible term to describe the objective: not "unbiased", not "impartial", not "open-minded", not "prejudged" -- all of which can fit themselves within the concepts of fair or unfair --but "fairness" itself.

104 Returning to the question of the burden of proof, although I do not recall anywhere in the case authorities in which this development has been mentioned, I have concluded that the burden of proof has changed over time to the rather demonstrative "real likelihood" that it is now from something less specific. Recall that in *Szilard*, the SCC said that:

> It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication at its threshold. (my emphasis)

105 Cory, J. in *R.v.S.* clarifies the standard when, assessing whether a "mere suspicion" is sufficient to ground a claim, he said:

> ... [T]he English and Canadian case law does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough. (at para. 112) (my emphasis)

106 Returning once again to *Szilard*, it will be recalled that this early, leading case noted, speaking of decision-makers:

> In particular they must be untrammelled by such influences as to a fair minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled. (my emphasis)

107 I have emphasized the words "a reasonable doubt" in *Szilard.* As well understood as the concept of "beyond a reasonable doubt" might be, the concept of a "reasonable doubt" is not so well understood. It is clear that the test is based on a balance of probabilities which, as the Supreme Court of Canada explained in *F.H. v. McDougall*, [2008] 3 S.C.R. 41, results in a judgment that if a matter is probable, then the answer to the question of whether the answer to the question is "true" is "yes" and if a matter is not probable, the answer to the question being asked is "No.". It is a binary equation. If the probability test is not an upgrade to the "reasonable doubt" standard, then it is at least a necessary clarification.

108 The final concept to concern me in respect of Principles 4 and 5 is the concept of "fairness." The issue is what is the standard that a reasonable person will require to be established on a balance of probabilities when assessing whether a particular decision-maker "would not decide fairly."

109 It is possible to say a great deal about this particular aspect of the test and, in particular, how the word "fairly" might be interpreted in the test. The definition of "fairly" would almost certainly be one which would be influenced by the nature of the tribunal under scrutiny and the role(s) of the decision-maker(s) who are alleged to be likely not to decide fairly. It is this factor, coupled with the emphasis on "context" in the test, that would provide a focus for the debate between those who advocate for the "labour relations school" and those who favour the "judicial school".

110 In view of the significance of context in assessing the meaning of "fairly", I will leave this part of the discussion until it is needed to answer a question in the instant case.

6) [TJhe test requires demonstration of serious grounds on which to base the apprehension;

111 This Principle follows on others which make it plain that disqualifying a decision-maker is a serious matter. The test requires the demonstration of "serious grounds" on which to base a reasonable apprehension of bias.

112 As the factor to which I turn now implies, whether an applicant has demonstrated "serious grounds" will be determined solely on the facts and in the context of the individual case.

7) [EJach case must be examined contextually and the inquiry is fact-specific.

113 To those general familiar with either Supreme Court decisions or decisions of labour arbitrators, Principle 7 might appear to read more like a well-worn judicial mantra than the crucial element of the "reasonable apprehension of bias" test that it really is.

114 It would be overstating the case to say that the law has always favoured a contextual and fact-based approach in dealing with alleged bias. Before there was anything resembling a "test", there were instead "rules". The English case of Kemp v. Rose, 1 Giff., 258 was influential for the court in *Szilard,* and was also quoted a decade later in the decision of the Supreme Court of Canada in *Ghirardosi v British Columbia (Minister of Highways),* [1966] SCR 367. In the latter case, the Court said:

> The rule is well expressed in Kemp v. Rose, 1 Giff., 258; 'a perfectly even and unbiased mind', said the Vice-Chancellor, 'is essential to the validity of every judicial proceeding.' (my emphasis)

115 The key requirements of procedural fairness have invariably been identified as the need for impartiality and independence in our decision-makers. But the meaning of those terms in a given context have become, if anything, somewhat less obvious as adjudicators have experienced a growing number of applications based on alleged bias. By 1978, the dissenting judgment of de Grandpre, J in *Committee for Justice and Liberty* had adopted an objective "reasonable person" test, and by the time Cory J. reasons were published in 1997 in *R.v.S.*, the Court's emphasis also included a sharp focus on the specific facts of the matter before it, even to the point of rejecting the idea that previous similar cases could be of much help in guiding judges to the right result. Said Cory, J in that decision:

> 136 Allegations of reasonable apprehension of bias are entirely fact-specific. It follows that other cases in which courts have dealt with similar allegations are of very limited precedential value. It is simply not possible to look at an individual case and conclude that the determination of the presence or absence of bias in that case must apply to the case at bar. Nonetheless, it is helpful to review some selected cases in which similar allegations have been made if only to observe the benchmarks against which the allegations were measured. (my emphasis)

116 In applying this approach, the Wewaykum case first noted that under a contextual and fact-based focus there could be no more "peremptory rules", no "textbook instances" and "no shortcuts":

> "77 ... [T]his is an inquiry that remains highly fact-specific. In Man O'War Station Ltd. v. Auckland City Council (Judgment No. 1), [2002] 3 N.Z.L.R. 577, [2002] UKPC 28, at par. 11, Lord Steyn stated that "This is a corner of the law in which the context, and the particular circumstances, are of supreme importance." As a result, it cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or

> personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts. (paraphrase; at para. 77) (my emphasis)

117 It will be seen from one of the emphasized areas that the Court included in the list of facts possibly affected by its focus of "present or past link with a party." It is noteworthy that what may have been something of a "given" at one time (i.e., employees are disqualified from sitting on their employer's cases) must now be addressed carefully in light of the entire context.

118 In *Wewaykum*, the Court dealt with motions brought by two Indian bands seeking to have the Court set aside a unanimous judgment of the Supreme Court itself which had dismissed the bands' claims. The motions were filed on the ground that Binnie, J., who crafted the impugned reasons for decision for the Supreme Court had given the bands a reasonable apprehension of bias. It was not the conduct of the

119 Judge during the proceeding before the Supreme Court nor was it anything said in the reasons for decision that were at the root of the motions. Instead, it was established by the applicants that Binnie, J., in his capacity as the then federal Associate Deputy Minister of Justice during the years 1982-1986, had received some information concerning one band's claim and had attended a meeting where the claim was discussed. Both bands agreed that actual bias was not at issue and accepted Binnie J.'s statement that he had no recollection of personal involvement in the case. Despite this, the bands continued to assert that Binnie, J was disqualified from sitting on their case on account of the principle that no judge should sit in a case in which he or she acted as counsel at any stage of the proceeding.

120 The panel of the Supreme Court hearing the motions equated this with an argument for "automatic" disqualification, a concept that appeared to hold sway in British jurisprudence. It had the following to say about the approach that that the Supreme Court would adopt:

> "Whatever the case in Britain, the idea of a rule of automatic disqualification takes a different shade in Canada, in light of our insistence that disqualification rest either on actual bias or on the reasonable apprehension of bias, both of which, as we have said, require a consideration of the judge's state of mind, either as a matter of fact or as imagined by the reasonable person. (at para. 72)

121 For now, I will leave discussion of the test there.

122 The looming issue of context is whether the two parties to this arbitration have already agreed that employees in the position of Ms. Brock are eligible to sit on three person boards under Article 9.

123 I turn to that question now.

V. CRITICAL CONTEXT: THE ALLEGED AGREEMENT

124 As a reminder of the main points of the arguments, the Union says that since around 1983 and possibly earlier, it has had a Collective Agreement with the Employer that contained an article that is now numbered Article 9. This provision was reproduced earlier in this Award. The Union says that the Article is clear on its face that only the Chairperson must be impartial and that the parties may appoint non-partial employees of their own to serve as their nominees on the three person arbitration board constituted under Article 9. The Union says that if this Arbitration Board does not agree that the language is clear, then the past practice will assist in making it clear. This is practice that goes back to 1983 and demonstrates that it had prevailed year in and year out until late 2016 before it was challenged by the Employer. The consistent practice was that of appointing ABMs as the Union's nominee to three person boards for some thirty-three (33) years.

125 The Union's evidence was presented in both documentary and oral form. In its opening statement, the Union presented a brief with 17 print-outs of decisions between the Employer (including predecessors) and the Union. These decisions were completed Awards from three person boards. The Union presented the documents as being

genuine and represented that each of the Union nominees named on the 17 Awards were ABMs from the Union office. Although both parties were advised that they could challenge the documents and facts derived therefrom during the hearing despite their admission during Opening Statements, there was no challenge then, during the evidentiary part of the hearing, or in the argument from the Employer about the genuinity of the Awards and the identification of the Union nominees as being ABMs. Later, when the Union led evidence from Mr. Nedila, it elicited from him in direct examination a hearsay statement to the effect that the Employer had always appointed ABMs from its own office to act as its nominees on three-person boards. The Employer did not challenge or cross-examine on this point.

126 I therefore have taken the Union's past practice to have been proven in fact, through the documents and what they were represented by Union counsel to demonstrate regarding the Union's appointment of ABMs as nominees, coupled with the hearsay evidence of Mr. Nedila, which I am entitled to accept under the Canada Labour Code. Mr. Nedila was also a conduit for the Employer's introduction of a the "oath of allegiance" reproduced earlier, and accepted the suggestion that Ms. Brock must have signed it and have remained bound by it. (The Union did not seek to argue that this was not sufficiently proven in the case).

127 For its part, the Employer took the view that the Collective Agreement was indeed clear but clear in favour of the proposition that there was nothing in Article 9 to suggest that the parties had agreed to permit their own employees to be appointed as arbitrators. In its submission, the authorities on which it relied made it plain that engaging an employee of a party was an extraordinary event which only succeeded for the appointing party (and not always even then) when the decision-maker hearing the reasonable apprehension of bias application was an adherent of the "labour relations school". Since the language was clear and in its favour, said the Employer, the practice did nothing for the Union's case before this Arbitration Board.

128 The Employer was content to lead evidence from two current human resources personnel, Ms. Paisley and Ms. Meighan, who testified as to their belief that Ms. Brock as an employee of the Union could not adjudicate a case in an impartial and independent way due to the implications of and incidentals attendant on the employment relationship. The Employer had earlier made it clear that its objection was to the fact that the nominee was an employee of the Union, not that the nominee was Ms. Brock per se. It also led evidence from its two witnesses that they were unaware of the Employer's practice and had no responsibility for knowing about it. It was through an assertion by Employer counsel rather than evidence that the Employer stated its position, fundamental to its argument, that there was no Employer individual with some real responsibility for the Collective Agreement who was aware of the Union's practice; hence, the John Bertram test would fail and the Collective Agreement language would win out. The Employer noted, correctly, that the Union had not led any evidence to establish that the Employer was aware of its practice.

129 The Union did not quarrel with the Employer's proposition that it had not called a witness to prove that the Employer was aware of the practice but said it was prepared to rely on the probabilities given that there was an unchallenged 33 year practice.

130 Those are the main skeletal points of the argument.

131 I turn now to the crucial questions in this case and begin with a more full-bodied description of the evidence.

Evidence in the Case

132 The Employer led its evidence first in this proceeding but for convenience only, I will set out the documentary evidence of the Union in detail before addressing the viva voce evidence. It will be convenient for both myself as the drafter and for the reader because some of the documentation was put to the witnesses and will be easier to follow if the documents are made known first.

133 I said earlier that the Union had introduced seventeen (17) completed three-person board arbitration awards dating from 1983. I will put these into the record now.

Table of Employer -- Union Awards

134 The following is a Table of the cases which I prepared from the Exhibits before me. It is a chronological summary of the Awards and some of their salient aspects.

135 The cases themselves are not appended to this Award but can undoubtedly be secured online through the usual means.

136 Note that the "Outcome" is derived from my own reading of the case and is thus somewhat subject to interpretation. Note also "Vote" indicates whether the Award was unanimous or, instead, an award with one or more dissents.

137 Although it is possible under Article 9 for the Chair to be the dissenting vote, this did not occur.

Date	Parties	Panel	Outcome	Vote
August 24, 1983	Premier Cable Systems Ltd v International Brotherhood of Electrical Workers, Local 213, [1983] CLAD No 1	B.H. McColl, D. Jordan and H. Pritchard	Employer application upheld	Unanimous

February 14, 1984	Premier Cable Systems Ltd v International Brotherhood of Electrical Workers, Local 213, [1984] CLAD No 25	B.H. McColl, D. Jordan and H. Pritchard	Union grievance for exclusive jurisdiction dismissed with declaration of boundaries	Unanimous
Jun 27, 1984	Premier Cable Systems Ltd v International Brotherhood of Electrical Workers, Local 213, [1984] CLAD No 25	R. B. Bird, B. Gallagher and H. Prichard	Union grievance upheld in part; reinstatement without back pay	Unanimous
April 24, 1985	Rogers Cable TV - Vancouver, a division of Rogers Cable TV British Columbia Ltd v International Brotherhood of Electrical Workers, Local 213 (Mussatto Grievance), [1985] CLAD No 21	S. Kelleher, G.B. Gallagher and G. Dyck	Union grievance dismissed.	Unanimous
December 3, 1985	Shaw Cablesystems (BC) Ltd v International Brotherhood of Electrical Workers, Local 213 (Bolton Grievance), [1985] CLAD No 53	V.L. Ready, B. Gallagher and H. Pritchard	Union grievance succeeds on contract language issue	Gallagher dissent

April 18, 1986	Rogers Cable T.V. - Fraser v. International Brotherhood of Electrical Workers, Local 213, [1986] C.L.A.D. No. 15	H.A. Hope, G.B. Gallagher and R. Dowling	Union grievance over work jurisdiction issue dismissed	Unanimous
December 21, 1987	Rogers Cable TV - Vancouver v International Brotherhood of Electrical Workers, Local 213 (Kit Grievance), [1987] CLAD No 40, 32 LAC (3d) 158	H.A. Hope, P.A. Csiszar and R. Dowling	Union grievance on bargaining unit work is sustained	Csiszar dissent in part
January 4, 1993	Rogers Cable TV Ltd v International Brotherhood of Electrical Workers, Local 213, [1993] CLAD No 1172	S. Kelleher, Chairman; R. Elke, Nominee of the Employer and M. Randall, Nominee of the Union	Union grievance over exclusive jurisdiction dismissed	Unanimous
February 17, 1993	Shaw Cablesystems (BC) Ltd v Local Union 213 of the International Brotherhood of Electrical Workers, [1993] CLAD No 1173	S. Kelleher, Chair; G.B. Gallagher, Nominee of the Employer and M. Randall, Nominee of the Union	Union grievance over contracting out dismissed	Randall dissent
July 26, 1995	Rogers Cable TV Ltd v International Brotherhood of Electrical Workers,	D.C. McPhillips, G.B. Gallagher and M. Randall	Union grievance over production of documents successful in part	Unanimous

	Local 213, [1995] CLAD No 1169			
September 10, 1997	Rogers Cablesystems Ltd and International Brotherhood of Electrical Workers, Local 213, [1997] CLAD No 499	M. Jackson, R. Elke and M. Randall	Union grievance over contract interpretation succeeds	Elke dissent
April 14, 1998	Rogers Cablesystems Ltd - Fraser Division and International Brotherhood of Electrical Workers, Local 213, [1998] CLAD No 178	J. Kinzie, R. Kaardal and M. Randall Arbitrators	Union grievance over contract interpretation issue dismissed	Randall dissent
April 18, 2006	Shaw Cablesystems Ltd (Fraser Division) v International Brotherhood of Electrical Workers, Local 213 (Rykes Grievance), [2006] CLAD No 136, 85 CLAS 119	J. Hall (Chair), C. Gibson (Employer Nominee) and R. Ghuman (Union Nominee)	Union grievance in dismissal case dismissed	Ghuman partial dissent
June 24, 2010	Shaw Cablesystems GP (North Shore) v International Brotherhood of Electrical Workers, Local 213 (Dass Grievance), [2010] BCCAAA No 93	Panel: John Kinzie (Chairman); Carol Gibson (Employer Nominee); Mike Flynn (Union	Union grievance in dismissal case dismissed	Unanimous

June 9, 2014	Shaw Cablesystems GP v International Brotherhood of Electrical Workers, Local 213 (Campbell Grievance), [2014] CLAD No 147	Panel: John B. Hall (Chair); Carol Gibson (Employer Nominee); Rav Ghuman (Union Nominee)	Union grievance in dismissal case dismissed	Unanimous
January 21, 2015	Shaw Cablesystems GP (White Rock) v International Brotherhood of Electrical Workers, Local 213 (Service Calls to Abbotsford Grievance), [2015] CLAD No 101, 122 CLAS 228, 2015 CarswellNat 578	Panel: John B. Hall (Chair); Tom Hobley (Employer Nominee); Christina Brock (Union Nominee)	Union grievance alleging violation of Collective Agreement by Employer dismissed	Unanimous
August 15, 2018	Shaw Cablesystems v International Brotherhood of Electrical Workers Local 213 (Vehicle take home program Grievances), [2018] CLAD 142	Panel: Duncan M. MacPhail (Chair); Mike Kilgallin (Employer Nominee); Josh Towsley (Union Nominee)	Union grievance regarding breach of Collective Agreement by Employer upheld in part.	Unanimous

138 Not surprisingly, up until 2010, the Awards represented the sole surrounding "paper" tendered in respect of each of the disputes that they resolved. The first documentation connected with one of these disputes which is not an Award is dated in 2010, and was the first of several tranches or batches of documents related to the setup of individual three-person board arbitrations in the decade leading to the instant case. I will get to this documentation shortly.

139 In his argument, the Union counsel observed that by his assessment the arbitration decisions demonstrated a lack of perceptible bias on the part of the Union nominees, and that I ought to make note of this when considering whether a reasonable apprehension of bias was raised.

140 In preparing this Award, I did review each of the above-mentioned Awards. As mentioned, there were in total 17 decisions covered by the Awards. Eleven (11) of the decisions were in favour of the Employer, four (4) were in favour of the Union and two (2) appeared to be cases of divided success or where I found it hard to tell which party would consider itself successful. It is also possible that some of the "wins" were less than the winning party expected for their efforts and some of the "losses" achieved more than the losing party had expected, but I am not going to attempt to measure the outcomes of these decisions with that level of precision. Of the 17 decisions, eleven (11) were unanimous decisions, namely, where the Chairperson, Employer nominee and Union nominee all signed the Award and there were no dissents even in part. Three (3) of the decisions were not unanimous because there was a dissent from the Union nominee and, equally, three (3) of the decisions were not unanimous because there was a dissent from the Employer nominee.

Other Documentation

141 Moving to a discussion about a different type of documentation, it can be seen that there is a gap of nearly four years in the Table between a case published on June 24, 2010 and the next case published June 9, 2014. It is of course a fact that not all disputes go through a hearing and result in an Award. The Union introduced into evidence a number of batches of correspondence which appear to address cases that progressed to a certain stage of litigation and then -- in the main -- were resolved short of a hearing.

142 The letters addressed grievance matters and were bundled under individual matters and comprised of references to Step 3 grievance meetings, letters between lawyers regarding appointment of nominees and proposing selection of arbitrators and various consequential letters (such as withdrawals of grievances or changes of nominees, etc.)

143 These individual correspondence batches were obviously of the "template" variety and appear to have been routinely used between the parties for the purposes mentioned above.

144 These batches were presented by the Union with a view to demonstrating what it submits was its transparency regarding its practice of appointing Union employees to sit as nominees on the three person boards.

Batch 1 - SY dismissal

145 The first of the cases is an "Unjust Dismissal" case brought by the Union on behalf of an employee whose initials are SY (there is no point using employee names as the true name has no significance in the narrative and the employee is not a participant in the instant case).

146 The document that involves SY is correspondence dated December 16, 2010. The correspondence is on the letterhead of the Union under the signature of "M. Varga, Assistant Business Manager". The letter's header includes the Union's logo, return address, fax and telephone numbers, email and website url. The main telephone number of the Union disclosed in the header is listed as "604-571-6500". The url of the Union's website is listed as www.ibew213.org.

147 The letter is addressed to "Ms. Helen Meighan, Technical Operations Manager, Shaw Cablesystems, Port Coquitlam BC V4V 1S5." It says in bold print that it is sent by Mail and Facsimile.

148 Below the subject caption which names SY, the letter goes on to request that Ms. Meighan accept the correspondence as Step 3 of the Grievance Procedure under the current Port Coquitlam Collective Agreement.

149 It then has the following line:

> "The Union's nominee is Mr. Rav Ghuman of this office. Mr. Ghuman can be contacted at 604-571-6513".

150 Mr. Varga, the author, then invites contact at his own telephone number on the line below, stating that he can be reached at "604-571-6507".

151 Mr. Ghuman is cc'd on the correspondence.

152 The second of several pieces of correspondence about SY's case is dated May 2, 2011. This time, the letter's author was ***Brandon Quinn*** of Hastings Labour Law Office, who is the Union's counsel in the instant case. The letter was to the attention once again of Ms. Meighan. The stated purpose of the letter was for Mr. ***Quinn*** to introduce himself as Union counsel and propose the name of an arbitrator for the SY case. He said in the letter that "[w]e understand that you are representing Shaw", while noting the possibility that Shaw might yet be engaging (outside) counsel. To close his letter, Mr. ***Quinn*** said:

> "Also, please advise who Shaw's nominee will be. The IBEW's nominee is Mr. Rav Ghuman."

153 The letter is cc'd to "IBEW/ M. Varga".

154 I move from that correspondence to a third item of correspondence which was exchanged to clear up a minor glitch. The Employer did in fact secure experienced outside legal counsel, Peter Sheen, to conduct its case and the parties agreed on a Chairperson, John Kinzie. Mr. ***Quinn*** wrote to the Chair but forgot to include the names of the nominees. Employer counsel wrote to the Chair with the email address for the Employer nominee, Carol Gibson, and Union counsel wrote to the Chair with the email address for Rav Ghuman. The address given to the arbitrator for Mr. Ghuman's email was rghuman@ibew213.org. Mr. ***Quinn***'s email bearing this information was copied to a list of others, including the Employer counsel and the Employer's nominee.

155 The constituting of the Arbitration Board comprising Mr. Kinzie, Chair, Mr. Ghuman, Union nominee, and Ms. Gibson, Employer nominee was then complete and the hearing was set for the following January.

156 Shortly before the hearing date, the Union wrote to cancel the hearing date and apply to adjourn generally. The letter recorded the Employer's counsel's consent to the arrangement. Ms. ***Quinn***'s letter to Mr. Kinzie with this information informed him that: "The parties are advising their respective nominees." And that was the end of that particular referral to arbitration, the first of several batches of similar documents.

Batch 2 -- PW Suspension

157 The second batch of documents involves a suspension grievance by an employee, PW. The documentation is essentially the same templated sequence of correspondence as was seen in Batch 1, with, first, correspondence from the local ABM dated December 5, 2011 which, among other things, seeks acceptance of the correspondence as Step 3 of the grievance procedure and identifies the Union nominee and contact number (Ghuman at 604-571-6513); secondly, correspondence from Union counsel (***Quinn***) to a Shaw Operations Manager (Randy Harder) seeking information and once again identifying the Union nominee by name (Ghuman); thirdly, Union counsel (***Quinn***) corresponding with the proposed arbitrator (David McPhillips) and, avoiding the minor mishap in the SY case, identifying the counsel and nominees with full addresses. In this letter, the Union nominee is identified as follows:

Rav Ghuman
1424 Broadway Street
Port Coquitlam, BC V3C 5W2
Telephone: (604) 571-6500
Email: rghuman@ibew213.org

158 The "cc" lines on this last piece of correspondence read as follows:

cc. Heenan Blaikie /Peter Sheen
IBEW 213 /Rav Ghuman

159 That is as far as the matter went. Correspondence from the Arbitrator to the two counsel confirmed that the matter had been settled. The letter was not addressed to or copied to the nominees.

- ***Batch 3 -- TC suspension/dismissal***

160 The third batch of correspondence, which commences with a letter from Mr. Varga dated December 5, 2011, addresses a suspension grievance involving an employee, TC. The documentation contained in this batch is to all intents and purposes identical to that in the earlier batches. One small difference is that in the letter to the Arbitrator providing details regarding the counsel and the nominees, Mr. ***Quinn*** has made sure that the Arbitrator knows he is going to have company at the head of the table. The letter says:

161 "Also be advised that the parties have appointed wingers for this arbitration."

162 This time, however, the dispute did go to hearing, resulting in what on the face of the Award dated June 9, 2014 was a hearing now dealing with both a suspension and a dismissal (the parties consolidated the suspension and dismissal hearings by consent -- see correspondence dated September 20, 2013 from Mr. ***Quinn*** to Mr. Sheen).

163 The hearing is stated on the face of the Award to have commenced December 11, 2013 and consumed 8 days of hearing.

164 The Award was unanimous (Hall, Gibson, Ghuman). The suspension and dismissal grievances were both dismissed.

Batch 4 -- Jurisdiction/Service Calls

165 The fourth batch of correspondence is commenced by a letter dated March 1, 2013 directed to Ms. Helen Meighan, Operations Manager, South Shore. Minor and/or irrelevant items aside, the batch is a virtual copy of the first three batches described above.

166 There are three pages in this batch. The first is the Step 3 announcement by Mr. Varga regarding a dispute captioned "Jurisdiction / Service Calls". The second is Mr. ***Quinn***'s letter advising of his appointment as counsel and Mr. Ghuman's appointment as nominee (which, as it always had, been already announced in Mr. Varga's letter). The "cc" on Mr. ***Quinn***'s letter in the fourth batch is slightly different from previous such "cc" lines, this time stating:

cc. IBEW / M. Varga and R. Ghuman.

167 The batch ends with a letter to the two counsel (Sheen and ***Quinn***) from the appointed Arbitrator, John Hall, confirming the time and place of hearing and copying the nominees.

168 It is not clear from the record what happened to this dispute. It is possible that the issue in this grievance proceeding (about which the documentation tells us very little) was wrapped in with other disputes and adjudicated by Mr. Hall in a decision issued later. Since there is other correspondence that leads to that particular arbitration, I will leave it until later.

Batch 5 -- CD -- Unwarranted (DTA)

169 Batch 5 comprises 4 pages of correspondence regarding a dispute captioned (initials only) "CD -- Unwarranted (Duty to Accommodate)"

170 It is commenced by a letter dated July 9, 2013 directed once again from Mr. Varga, to Ms. Helen Meighan, Operations Manager, South Shore. As it has always done in the previously discussed batches, it identifies Mr. Ghuman "of this office" as the Union's nominee.

171 The usual letter from Mr. ***Quinn*** which follows is not identical in its material aspects to his usual letters, but is substantially similar because it includes four disputes in the captioned section and briefly discusses the various routes to arbitration that might be taken with respect to each. It is dated September 22, 2016, which was several years after the original CD Step 3 announcement. This is likely because the letter deals with four disputes left over from collective bargaining, and no doubt the disputes were of variable ages.

172 Of note, the "cc" in this much later letter than the Step 3 letter recognizes that Ms. Brock is now taking nominee appointments previously been given to Mr. Ghuman, reflected at the bottom of the page in the "cc" line:

cc. IBEW / R. Nedila and C. Brock

173 Finally, page 4 of this batch constitutes a letter dated December 22, 2016 from Robin Nedila, Assistant Business Manager to the Employer confirming the settlement of the matter.

Batch 6 -- BM & LT dismissals

174 Batch 6 is commenced by a letter dated July 9, 2013 from Mr. Varga to Helen Meighan, Operations Manager, South Shore and addresses an "Unjust Dismissal" regarding employee, "BM". Mr. ***Quinn***'s letter which follows is written directly to Mr. Sheen and adds another dismissal to the list, this time to an employee named "DL". Mr. Ghuman "of this office" is as usual named as nominee in both letters. The third page in the list is a letter from Mr. ***Quinn*** to John Hall, arbitrator, withdrawing the grievance in connection with BM.

Batch 7 -- LT dismissal

175 Batch 7 deals with LT, mentioned in Batch 6, and in terms of the correspondence is the virtual twin of Batch 6, even to the point of being written on the same date. The final page is an email thread in which, first, Arbitrator John Hall attaches a former Hearing Notice for the LT hearing (it is not in the materials) and Mr. ***Quinn*** emails Mr. Hall to advise him and Employer counsel that the LT grievance has been resolved and the hearing will not be needed.

176 The ***Quinn*** email dated February 27, 2015 is copied to (among others) Carol Gibson and Christina Brock. Brock's email address is noted as being cbrock@ibew213.org.

Batch 8 - DM dismissal

177 Batch 8 deals with an Unjust Dismissal involving DM. Mr. Varga's initial Step 3 letter of February 21, 2014 is once again sent to an Operations Manager, this time being Randy Harder, Technical Operations Manager Shaw Cablesystems (Port Coquitlam). It announces that Mr. Rav Ghuman "of this office" will be nominee and provides his telephone number. The letter has a "cc" section which lists the following persons: "Barbara Markille (email:[barbaram@shaw.ca), Chris Morrison, Shop Steward, Doug Sedgewick - Regional Manager [and] ***Brandon*** Dyck - Shop Steward."

178 As it turned out, the Union changed nominees twice in the correspondence leading to its ultimate withdrawal of the grievance on September 3, 2015. First, by letter of February 27, 2014 from Mr. ***Quinn*** to Mr. Sheen, counsel for the Employer, the Union announced that Gord Van Dyck was taking over as nominee. Subsequently, on September

22, 2014, Mr. ***Quinn*** wrote again to Mr. Sheen, this time to advise that: "Christina Brock will be replacing Mr. Van Dyck as the IBEW's winger."

179 In the concluding letter in the batch, Mr. ***Quinn*** writes to Mr. Sheen to advise that the Union is withdrawing the grievance.

Batch 9 - Service Calls to Abbotsford

180 Batch 9 begins as usual with a Step 3 letter dated August 26, 2014, on IBEW 213 letter-head and once again under the signature of Mr. Varga, Assistant Business Manager. The letter deals with "Service Calls to Abbotsford" and is addressed once again to "Helen Meighan Operations Manager, South Shore, Shaw Communications Inc."

181 The second of the three paragraphs in the Step 3 letter reads:

> The Union's nominee is Ms. Christina Brock of this office (my emphasis). Ms. Brock can be contacted at (604) 571-6516.

182 The letter has a "c.c." section which lists the following persons: "Doug Sedgwick, Regional Operations Manager, Robin Nedila, Shop Steward, ***Brandon*** Dyck - Shop Steward [and] Christina Brock, IBEW 213 (my emphasis)."

183 As with the previous matters, there was subsequent correspondence regarding the above grievance between counsel for the parties. On September 12, 2014, Mr. Sheen wrote to Mr. ***Quinn*** to advise that Mr. Tom Hobley was the Employer's nominee. He also advised he would be following up with the arbitrator who the parties (whether through counsel or otherwise, the letter did not say) had selected previously to act as chairperson on the case.

184 Finally, Batch 9 concludes with the Notice of Hearing from Arbitrator Hall, which was addressed to the counsel (***Quinn*** and Sheen) and copied to the two nominees (Hobley and Brock).

185 The Batch 9 proceedings went to hearing and resulted in an Award by Arbitrator Hall pronounced January 21, 2015. The case involved a contracting out grievance by the Union. The Employer had used employees dispatched from Abbotsford instead of dispatching bargaining unit employees in White Rock to a job. The Employer had the right to do so under the Collective Agreement if it established "operating necessity", which was of course a question of fact. The case also turned on the language of the Collective Agreement and the persuasiveness of extrinsic evidence led by the parties in favour of their respective interpretations of the Agreement. The Arbitrator board found in favour of the Employer's evidence and interpretation and dismissed the Union's grievance. The decision of the Arbitration Board was a unanimous judgment in favour of dismissal of the Union grievance and was published to the parties under the signatures of Chair John Hall, Employer Nominee Tom Hobley, and Union Nominee Christina Brock.

Batch 10 -- Policy Grievance -- Journeyman Status

186 This batch of documents is very brief, comprising only the Step 3 letter, and Mr. ***Quinn***'s follow-up letter to an Employer manager, in this case Marco Aiello, Operations Manager. The matter of interest here is that Ms. Brock is named as the Union Nominee from the outset and the announcement of her particulars is worded as it always had been:

> The Union's nominee is Ms. Christina Brock of this office. Ms. Brock can be contacted at (604) 571-6516.

187 Ms. Brock is also under the "cc" line as "Christina Brock, IBEW 213", in line with two shop stewards and the Employer's Regional Operations Manager, Doug Sedgwick.

188 Mr. ***Quinn***'s letter to Mr. Aiello is unremarkable, with the possible exception of the sole "cc" reference to:

cc: IBEW / M. Varga and C. Brock

Batch 11 - WM -- Unjust Dismissal Grievance

189 Batch 11 is an Unjust Dismissal dispute dealing with WM. The correspondence uses the usual templates but there are several changes in personnel in respect of this dispute, making it an appropriate dispute to describe at some length.

190 First, the Step 3 letter dated April 16, 2015 is sent under the signature of Robin Nedila, Assistant Business Manager to Doug Sedgwick, Manager, Regional Ops, Vancouver. The evidence of Mr. Nedila, which will be reviewed later, explains the change from Mr. Varga as the author of the Step 3 letter. The balance of the body of the letter is identical to that which was just described in Batch 10, namely, the usual introduction of the nominee who is once again "Christina Brock of this office", along with her usual telephone number. She is also noted in the "c.c." line-up as "Christina Brock (by Email -- cbrock@ibew213.org).

191 Mr. ***Quinn***'s templated second letter, once again to Mr. Sedgwick, announces Christina Brock as the Union's nominee as it has announced the variety of Union nominees over the years, and concludes with a "cc" line comprising three Union ABMs, namely:

> "IBEW / R. Nedila, M. Varga and C. Brock."

192 The third item of correspondence is a lengthy letter from Mr. ***Quinn*** to the selected Arbitrator, Ken Saunders. This letter has some new people to introduce to Arbitrator Saunders and so I will set out the main parts of the body of the letter in its entirety:

193 The first announcement is that of a new counsel for the Employer:

Counsel for the Employer is:
Levitt & Grosman LLP
480 University Ave. Suite 1600
Toronto, ON M5G 1V2
Attention: Howard Levitt
Telephone (416) 594-3900
Facsimile (416) 597-3396

194 In this matter, under the Collective Agreement, each party has a winger.

Winger for the Employer is:
Harris & Company L.L.P 14th
Floor, 550 Burrard St.
Vancouver, BC V6C 2B5
Attention: Israel Chafetz, Q.C.
Telephone (604) 890-2232
Facsimile: (604) 684-6632

Winger for the Union is:
IBEW, Local 213
Richard Dowling Centre
1424 Broadway Street
Port Coquitlam, BC V3C 5W2

Attention: Christina Brock
Telephone: (604) 571-6500
Facsimile: (604) 571-6502

The "cc" lines on this piece of correspondence read as follows:

cc. Levitt & Grosman / Howard Levitt
Harris & Co / Israel Chafetz IBEW
213 / Christina Brock

195 A fourth item of correspondence dated August 30, 2015 is from Ken Saunders, the Arbitrator. The letter sets out the hearing details. He addresses the letter to the two counsel, and copies it to the nominees as follows:

cc. Harris & Co / Israel Chafetz, Q.C.
IBEW, Local 213 / Christina Brock

Batch 12 - Shaw Gateway DHPVR XGI

196 Batch 12 is commenced with a Step 3 letter dated October 30, 2015 directed by Mr. Nedila to "Kathryn Hearder" of Shaw. Ms. Hearder's title was not included. The subject of the case is "Shaw Gateway DHPVR XGI [etc.]". The middle passage of the letter identifies that the Union's nominee as Christina Brock (missing the usual "of this office"), adding that "Ms. Brock can be contacted at 604.571.6516 or by email at cbrock@ibew213.org <mailto:cbrock@ibew213.org>." With this letter, the "cc" portion is limited to "Shop Stewards".

197 Mr. ***Quinn***'s letter dated November 30, 2015 follows with the same relative content as his previous letters. Once again, he confirms Ms. Brock's appointment as nominee. The letter is directed to Ms. Hearder.

198 There is an additional letter related to this grievance, this one from Mr. ***Quinn*** to the selected arbitrator Mr. Sims dated February 9, 2018 (it obviously took some time to move this grievance along). In the letter he advises the arbitrator that the parties have agreed to his appointment as chair. He sets out the full contact details of counsel for the Employer, who is again Mr. Levitt. Certain of Mr. Levitt's particulars have changed and so I will set out the changed particulars here as they appear in the correspondence:

199 Counsel for the Employer is:

Levitt LLP
130 Adelaide Street West-Suite
130 Toronto, ON M5H 3P5

200 Carrying on with Mr. ***Quinn***'s letter, he advises that this will be a "three-person board" and that Mr. Greg Haywood is the Employer's nominee and Christina Brock is the IBEW's nominee.

201 His "cc" listing read as follows:

cc. IBEW 213 / R. Nedila and C. Brock
Levitt LLP / H. Levitt
Roper Greyell LP / G. Heywood

202 The last correspondence in the Batch is a letter from Arbitrator Sims dated April 18, 2018 setting down the matter for hearing. It is not clear from the record what happened to this grievance dispute from there.

Batch 13 - KP -- License Suspension

203 Batch 13 begins with a Step 3 letter dated June 3, 2016 from Mr. Nedila to Ryan Sabiniano, Operations Manager, Port Coquitlam & Abbotsford, and dealing with "KP -- License Suspension -- Wage and Written

Reprimand Grievance". The only part of this template letter that is relevant here is the introduction of the Union's nominee:

> The Union's nominee for arbitration is Ms. Christina Brock of this office. Ms. Brock can be contacted at (604) 571-6516.

204 And the "cc:" line, which included:

> Christina Brock (cbrock@ibew213.org)

205 The follow-up letter from Mr. ***Quinn*** in this Batch dated September 22, 2016 is the same letter that appears in Batch 5 discussed earlier. It referenced four unresolved grievances coming out of the most recent collective bargaining.

206 I turn now to the viva voce evidence in the case. ***Viva Voce Evidence***

207 The Employer called two witnesses.

208 The first, Rachel Paisley, is an HR advisor with the Employer and has been employed with it for some nine years. She has been involved in union - management issues since mid-2014.

209 The second, Heather Meighan, is the Employer's Director of Human Resources and has held that position since June 2018. Previously, from January of 2016 until her recent promotion, she was a Human Resources Manager for the company. Prior to that, she was an Operations Manager for the Employer from January 2007 as appears from the Step 3 letters sent to her by the Union over the years.

Evidence of Rachel Paisley

210 As mentioned above, Rachel Paisley is an HR advisor with the Employer.

211 It was Paisley's evidence that she only recently became aware of the fact that the nominees of the Union on arbitration boards were employees of the Union. This was during a mediation session when the labour arbitrator in attendance spoke to her and asked her if she knew that the Union nominee on the Board of that case worked for the Union.

212 Various of the batches of correspondence mentioned above were placed in evidence by the Union in which the nominee was identified as being from the Union office; Ms. Paisley testified in her direct examination that "we don't pay any attention to that sort of stuff". (I took from her answer that the "we" to which she referred were the employees, including herself, in the human resources office of the Employer.)

213 It was her further testimony that when she learned about the employment relationship between the Union's nominee and the Union itself, she wrote to the Employer's legal counsel (by email dated February 15, 2019) because she was concerned about what she had heard from the labour arbitrator. The legal counsel, Mr. Levitt, was unavailable and so she received no response at that point; however, she testified, she later became aware that Mr. Levitt did not know about the employment relationship between the Union nominees and the Union. Asked by Mr. Levitt in direct whether he gave her any indication that he was aware of the relationship, and she said he did not.

214 Ms. Paisley was asked in direct examination whether she would expect the Union nominee (being an employee of the Union) to be fair and objective in the decision-making process, and she said she would not. Asked if she expected that the Union-employed nominees would be less fair than an outsider, she said that every employee had a duty of fidelity to his or her employer and it was obvious to the witness that the nominee-employee could not be unbiased.

215 In cross-examination, Ms. Paisley was presented with various of the batched disputes mentioned earlier.

216 Union counsel presented to the witness the documentation from Batch 8 described above. She was taken through the correspondence in part, in which it was pointed out to her the location of the identification of the Union nominee, the reference to the Union nominee as being "of this office" (the IBEW office identified by the header and Mr. Varga), and the nominee's other contact information.

217 It will be recalled that this was the dispute in which the nominee was substituted three times before the matter finally was withdrawn before hearing.

218 Ms. Paisley was asked if she was aware of the practice of the Union appointing its own employees prior to June of 2014, and she said she was not. It was her testimony that she had no role to play in respect of letters of the above-described type.

219 Ms. Paisley was presented with another batch of letters of the same kind, this time dated August 26, 2014, on IBEW 213 letterhead and once again under the signature of Mr. Varga, Assistant Business Manager. This is Batch 9 discussed above.

220 Again, Ms. Paisley was taken through the documentation in Batch 9.

221 It was Ms. Paisley's testimony that she believed that she was present at the hearing that is referred to in the above correspondence, but she did not see the correspondence beforehand. She recalled that it was a hearing at which Ms. Brock was the Union nominee. She was not aware at that point, she said, that the IBEW appointed Assistant Business Managers to sit as nominees.

222 A third batch of correspondence of a similar kind was put to the witness in cross-examination, this time the documents described as Batch 10 above.

223 Questioned about the correspondence, Ms. Paisley testified that she was aware of the grievance but had never seen the correspondence itself.

224 Union counsel then showed the witness Batch 11, whose Step 3 letter is dated April 16, 2015.

225 After reviewing the documentation, it was Ms. Paisley's evidence that she had no dealings with this termination matter and did not attend the hearing.

226 Subsequently, Ms. Paisley was shown the documentation which makes up Batch 12 described earlier. It was Ms. Paisley's evidence that she did not receive this correspondence.

227 It was Ms. Paisley's testimony that she was not active in dealing with the grievance, as that was not her role. It was her job "mainly to just track the information". "I might compile that information", she said, "and I try to help out where I can."

228 Ms. Paisley agreed that she does, however, go to the grievance meetings on an infrequent basis, sometimes when a grievance meeting is "thrown in" with another kind of meeting. She is there, she testified, mainly to take notes. She does not run the meeting. Her sole role at an arbitration is dealing with information needed by the Employer.

229 When asked if she attended hearings, she said that she had attended two hearings: the hearing in the instant case in which she was testifying and the hearing in which the arbitrator spoke to her about Ms. Brock's employee status with the Union. Asked if she had attended any hearings involving the IBEW prior to the hearing in which she discussed Ms. Brock with the arbitrator, she said she had -- it was the "vehicle one". (I took this to be the "License Suspension" grievance described in the June 3, 2016 letter of Batch 13).

230 Ms. Paisley was asked in cross-examination whether she had any role like collecting information for the "Vehicle" arbitration and she said that she "may have picked up where someone left off." Asked if she had been apprised of who was on the panel, she replied: "I will see a ton of paper in front of me and not scrutinize it or think about challenging it. I had no reason to believe it was not legally compliant."

Evidence of Heather Meighan

231 Ms. Meighan agreed in her direct examination that her Operations Manager position was the same level position as held by Marco Alello and Ryan Sabiniano, who were also addressees in the Stage 3 correspondence mentioned earlier.

232 Counsel put the following question to Ms. Meighan in her direct examination: "Are you at the point of the hierarchy of the collective agreement where you have real responsibility for the interpretation of the Collective Agreement?" The witness answered:" No, not as Human Resources Manager."

233 Ms. Meighan testified in direct examination that it was not until some two weeks before the current hearing date that she became aware that there might be a union official sitting as a nominee in a three person arbitration proceeding involving her own Company. This was "not something we turn our attention to", she said, "It is not something in the [grievance] letter that I would focus on or notice." Further, she said, she had not seen her counsel's letter of protest a couple of years before. "This was just not an area of my concern", she summed up.

234 Finally, asked by Employer counsel whether she would expect Ms. Brock to decide fairly and objectively [if she were on the Arbitration Board), she answered: "I don't know how. As an employee, you are concerned about how your manager is thinking of you. So I don't know how."

235 In cross-examination, Ms. Meighan testified that as an operations manager up until 2016, it was not her role to keep track of who was being appointed to three-person arbitration panels. At the time, she left it up to her lawyer and to an employee, "Mr. Kuchera", who was "our labour relations specialist". Ms. Meighan hastened to add that keeping track of appointments to three-person panels was not her job now (I took this to mean that she had not inherited the task from Mr. Kuchera, who presumably has left his former job).

236 One of the decisions tabled by the Union from the Westlaw database was Shaw Cablesystems GP (North Shore) v International Brotherhood of Electrical Workers, Local 213 (Dass Grievance), [2010] BCCAAA No 93 (Panel: John Kinzie (Chairman); Carol Gibson (Employer Nominee); Mike Flynn (Union Nominee)). Asked about this case in cross-examination, the witness said she was aware of it. She was asked whether Mr. Kuchera was in his job at the time and she said she did not know. She did not know whose role it was at that time to make an appropriate decision about the [constituency of the panel], but it was not her responsibility, she said. When asked if she expected her counsel and whoever was doing Mr. Kuchera's job to know who was being appointed as a nominee by the Union, Ms. Meighan said she did not know whose role it was but it was not her own.

237 Counsel for the Union presented the witness with another decision from his Book of Documents, this time a decision pronounced in 2015: *Shaw Cablesystems GP (White Rock) v International Brotherhood of Electrical Workers, Local 213 (Service Calls to Abbotsford Grievance),* [2015] C.L.A.D. No 101, 122 CLAS 228, 2015 CarswellNat 578 (Panel: John B. Hall (Chair); Tom Hobley (Employer Nominee); Christina Brock (Union Nominee)). Again, Ms. Meighan was asked if she was an operations manager at the time of the decision, and she agreed she was. She agreed she was aware of the case. Ms. Meighan testified that she was not involved in deciding any issues regarding the appropriateness of the panel (which as can be seen included Ms. Brock, the Union nominee on this Board).

238 Counsel produced for Ms. Meighan a group of documents dating from April 15, 2015 constituting the referral to arbitration and appointment of arbitrators in a case whose subject was: "Re: Wayne Noble - Unjust Dismissal Grievance". Ms. Meighan advised that she had no role in appointing the arbitration panel in the proceeding. She

also had no knowledge of who did. Again, the correspondence identified that Christina Brock of the Union office was appointed as Union nominee in the case.

239 Counsel then produced for Ms. Meighan a group of documents described earlier as Batch 12, dating from October 30, 2015. It was pointed out to the witness that in correspondence directed from Union counsel to the Arbitrator in that case that the IBEW's nominee was to be Christina Brock, with Mr. Levitt, Employer counsel copied on the correspondence. The Notice of Hearing from the Arbitrator was directed to the counsel and the Nominees with Ms. Brock being described in the following terms:

Ms. Christina Brock
IBEW Local 213
1424 Broadway Street
Port Coquitlam, BC V3C 5W2

240 Ms. Meighan said she did recall the case as she remembered the two grievors, although she did not recall her legal counsel opposing Ms. Brock's appointment a while later in 2016 during the proceedings. She testified that she had never put her mind to the question of Ms. Brock's relationship with the IBEW previously. In fact, she did not put her mind to who were the nominees in the case.

241 Finally, Union counsel showed Ms. Meighan a group of documents involving the subject of "Shaw Vehicle Take Home Program" (call this a new Batch 14).

242 The first of the documents was the usual Step 3 letter from Mr. Nedila to Mr. McLaughlin dated April 24, 2017. In the letter Mr. Nedila announces that the Union's nominee for arbitration "will be Christina Brock of this office. Ms. Brock can be contacted at 604-571-6516."

243 It was Ms. Meighan's testimony that she "had no thoughts on Ms. Brock's initial appointment." A later document shows that Ms. Brock was substituted out because of unavailability, with "John Towsley Assistant Business Manager International Operating Engineers, Local 115" being substituted. It was Ms. Meighan's evidence that she did not recall that Mr. Towsley had taken over for Ms. Brock.

Robin Nedila

244 Robin Nedila is an ABM with the Union and has occupied that position since 2015. He worked for the Employer before becoming an ABM, having joined Shaw in 2004. Mirko Varga was the ADM who he succeeded.

245 In his direct examination, Mr. Nedila testified about his responsibilities as an ABM. The ABM, he said, is appointed by the Union's Business Manager, who is essentially the "boss" with responsibilities for financial affairs and "everything". The ABM is responsible for administering collective agreements that are assigned to the ABM by the Business Manager. The ABM's are responsible for the several Shaw Collective Agreements. As part of his job, he files grievances and makes assessments about which grievances ought to go to arbitration.

246 Mr. Nedila was asked in direct examination for his understanding about the Union's practice of using ABM's as nominees on three-person arbitration boards. It was Mr. Nedila's evidence that this was "the way it has always been." This is also something that he was told by his predecessor Mr. Varga when he took over the role of ABM in 2015. The practice, he said, was that the Union used ABM's to sit as nominees on three person boards.

247 Mr. Nedila was asked about a grievance in 2016 involving a matter described as "TFR Classification/Layoff Out of Order" (call this a new Batch 15).

248 The initial document of the group of documents put to Mr. Nedila was a letter from him to Ms. Meighan dated November 25, 2016. Mr. Nedila's letter submitted the grievance for consideration at Step 3 and, among others, identified the Union 's nominee for arbitration as "Christina Brock of this office", concluding with the usual contact

number for her. The package of documentation contains an email from Howard Levitt, counsel for the Employer, dated November 28, 2016, directed to Mr. Nedila and copied to "Geoff Kuchera". Mr. Levitt's email message was succinct:

> I act for the employer in this matter. We obviously object to your usage of Christina Brock as your nominee.

249 Mr. Nedila replied by email dated November 29, 2016 with equal brevity:

> Despite the employer objection, Christina Brock is the Union's nominee according to article 9.01 of the collective agreement. Thanks.

250 After some further back and forth, Mr. Nedila agreed to change nominees on a "without prejudice" basis, writing:

> "Our position remains that Christina is an acceptable winger. However in order to simplify things, without prejudice to our position on the language in the collective agreement, we will remove our proposal of Ms. Brock and instead propose Lee Loftus. He can be reached at the email address above. Please have Mr. Heywood [the Employer's nominee] contact him to discuss choosing a chairperson." (my emphasis)

251 Asked in direct examination why he agreed to change nominees, Mr. Nedila said that the grievance in question was the Union's grievance, it was a very important grievance, and the Union did not want to delay it going forward to arbitration.

252 The evidence disclosed that at or around the same time as the "TFR Classification/Layoff Out of Order" grievance was being forwarded by the Union, the Employer had launched its own grievance under the subject of "Illegal strike". The grievance sought monetary and other damages. The Employer once again objected to the appointment of Ms. Brock as the Union Nominee. However, this time it was the Employer that reversed its stand and agreed that Ms. Brock could sit as the Nominee on the particular case at hand.

253 This, it appears, was motivated by the same concerns that moved the Union to replace Ms. Brock in the previous arbitration, albeit on a without prejudice basis as well. Accordingly, Ms. Brock acted together with the Employer nominee to appoint the impartial Chairperson and then sat as the Nominee on the case on an arbitration panel made up of herself as Union nominee, lawyer Israel Chafetz as Nominee for the Employer, and Arbitrator Ken Saunders as the Chairperson.

254 It was Mr. Nedila's evidence that as it was an Employer grievance that led to this result, and, moreover, as it was a grievance that the Employer wished to get to arbitration without delay, the tables were turned and the Employer withdrew its opposition to Ms. Brock's participation. As it was, the hearing morphed into a mediation at some point and the parties were able to settle their differences without having the matter go to decision.

255 Asked what happened to the earlier "TFR Classification/Layoff Out of Order" grievance which the Union had been so keen to advance that it had substituted another nominee for Ms. Brock, Mr. Nedila testified that it settled as well, somewhere around the same time as the case described above where the Employer withdrew its opposition to Ms. Brock so that the parties could get on with their arbitration.

256 Mr. Nedila was finally referred in direct examination to documentation respecting an arbitration proceeding which was initiated in early 2018 under the subject "Jurisdiction/Non-Union". It was his testimony that this was a case which went to hearing with Ms. Brock sitting as nominee for the Union without objection. The case ended when the Union withdrew the grievance.

257 Returning finally to a much earlier case that ended up at a formal arbitration which also ultimately resulted in a mediated settlement, the "Unjust dismissal" case in 2015, Mr. Nedila testified that Mr. Chafetz and Ms. Brock were the nominees for the parties and he was personally aware that Ms. Brock participated as the Union nominee without protest from the Employer.

258 Ms. Nedila was asked a number of questions about Ms. Brock's role within the Union. It was his evidence that

Ms. Brock has not administered and does not now administer any of the Shaw Collective Agreements. Additionally, she has never assisted with bargaining for any of the Shaw Collective Agreements.

259 In cross-examination, Mr. Nedila was asked if Ms. Brock spoke to or dealt with the Employer in any way during the mediation proceeding. It was Mr. Nedila's evidence that he did not know if that was the case. Ms. Brock reported back information to the Union during the session and communicated with it. Asked if the Employer would know about that, Mr. Nedila said the Employer probably would not.

260 Employer counsel suggested to Mr. Nedila that "as of 2016, the Employer no longer acquiesced [in the appointments of ABMs]? Mr. Nedila confirmed that he had received an objection in the email to that effect in 2016.

261 Mr. Nedila was then asked about his membership in the Union. He testified that he had been a member of the Union before becoming an ABM. He was not sure of whether Ms. Brock was a member but he believed she had been. He agreed that a member is first sworn in when he or she becomes a member. He had sworn the oath and signed it at the time. He had never revoked the oath of allegiance, which he acknowledged was the document put in evidence by the Employer in this case and in which the signer agrees to bear allegiance to the Union "and not sacrifice its interest in any manner". (my emphasis)

262 It was put to Mr. Nedila that if the Union were to win the underlying case in the instant grievance, the Union would win more dues, and Mr. Nedila agreed that was so. Certainly, the local Union had gained memberships as of late. It had not reduced the number of ABMs in BC in the local although he could not speak to that issue in respect of anything other than the local.

263 The question I turn to now is whether they have made an agreement in Article 9 one way or another.

Collective Agreement Interpretation

Methodology

Construing the Language

264 The correct arbitral approach to an "ordinary issue of interpretation" is well-explained by Arbitrator Kinzie in *Brewers' Distributor Ltd. v. Brewery, Winery and Distillery Workers Union, Local 300 (Jackson Grievance)*, [2010] B.C.C.A.A.A. No. 16 (Kinzie) where he explained:

> 43 In searching for the parties' intentions, arbitrators look first of all to the words they have used in their collective agreement to express those intentions. They are presumed to have intended what they have said. Further, those words are to be read in the context of the collective agreement as a whole, giving them their normal and ordinary meaning unless to do so would lead to an absurdity or to an inconsistency with the rest of the collective agreement. Harmony amongst the provisions in the agreement is desired and conflict and inconsistency are to be avoided. Finally, headings for provisions of the agreement can be used to assist in explaining their content and the parties' intentions concerning same. These interpretive principles are usefully summarized in Brown and Beatty, Canadian Labour Arbitration (4th ed.) para. 4:2100 and its various subparagraphs.
>
> 44 Extrinsic evidence concerning the parties' negotiations and past practice can be of assistance in resolving bona fide doubts as to the meaning of provisions in the collective agreement. However, such evidence is only useful if it discloses the mutual intent of the parties and not the unilateral subjective intentions of only one of those parties. Of course, if the parties did not turn their minds to a particular matter during their negotiations, extrinsic evidence will be of little use. In those circumstances, the arbitrator is thrown back to deciphering their intentions from the words they have used in the collective agreement considered as a whole.

265 Arbitrator Bird in *Pacific Press Pacific Press and Graphic Communications International Union - Local 25-C*,

[1995] B.C.C.A.A.A. No. 637, Nov 14, 1995 provides a list which has served the needs of many parties. There, while cautioning that the list was not an exhaustive one, the learned arbitrator set out the following considerations in interpreting collective agreement language:

266 The object of interpretation is to discover the mutual intention of the parties.

1. The primary resource for an interpretation is the collective agreement.
2. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
3. Extrinsic evidence may clarify but not contradict a collective agreement.
4. A very important promise is likely to be clearly and unequivocally expressed.
5. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
6. All clauses and words in a collective agreement should be given meaning, if possible.
7. Where an agreement uses different words one presumes that the parties intended different meanings.
8. Ordinarily words in a collective agreement should be given their plain meaning.
9. 10.Parties are presumed to know about relevant jurisprudence.

Extrinsic Evidence

267 The purpose and the limitations of past practice evidence are set out in seminal case of *John Bertram & Sons Co.,* 18 L.A.C. 36 (Weiler):

> .. If a provision in an agreement, as applied to a labour relations problem is ambiguous in its requirements, the arbitrator may utilize the conduct of the parties as an aid to clarifying the ambiguity. The theory requires that there be conduct of either one of the parties, which explicitly involves the interpretation of the agreement according to one meaning, and that this conduct (and, inferentially, this interpretation) be acquiesced in by the other party. If these facts obtain, the arbitrator is justified in attributing this particular meaning to the ambiguous provision. The principal reason for this is that the best evidence of the meaning most consistent with the agreement is that mutually accepted by the parties. Such a doctrine, while useful, should be quite carefully employed.
>
> ...
>
> Hence it would seem preferable to place strict limitations on the use of past practice in our second sense of the term. I would suggest that there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice.

268 The basic rationale for the admission of past practice evidence was well set out by Arbitrator Lanyon in *Howe Sound Pulp and Paper Ltd v Communications, Energy and Paperworkers Union of Canada, Local 1119 (De Boer Grievance),* [2011] BCCAAA No 19 where he said:

> 53 The basic rationale for the admission of extrinsic evidence -- negotiation history and past practice - is that the parties may reveal an understanding of their mutual intentions through their conduct in the administration of the collective agreement. Thus an arbitrator is able to approach the interpretive task with a full understanding of all of the circumstances that are relevant to the language in the collective agreement.

269 The consequences of establishing a past practice depend on the circumstances. This is explained by the authors of *Leading Cases on Labour Arbitration Online* (Mitchnick, Etherington and Bohuslawsky):

> The differences between the use of past practice as an aid to interpretation of an ambiguous collective agreement provision, and its use to found an estoppel, were concisely stated by Arbitrator Richard Brown in *Catholic District School Board of Eastern Ontario and O.E.C.T.A.,* 2015 CanLII 23819, 250 L.A.C. (4th) 293. In particular, the arbitrator explained why, in contrast to the doctrine of estoppel, the effect of a party's acquiescence in a past practice cannot be terminated merely by giving notice to the other party that it now intends to advance a different interpretation of the provision at issue. Whereas estoppel operates to limit - typically, for the duration of the collective agreement - the acquiescing party's rights under clear contractual language, past practice as an aid to interpretation provides the "best evidence of the parties' shared understanding of an unclear term". Thus, the only way in which to change contractual rights which have been clarified through a longstanding, mutually accepted practice is to amend the collective agreement.

Arguments of the Parties

270 The employer says the review of the key collective agreement language demonstrates that the parties had a clear intention not to permit employees of the parties to be subject to appointment as nominees. This is not because of the inclusion of limiting words or phrases but because of the absence of any language purporting to expand the eligibility of employees who, under the common law, are simply too close to one of the parties to do anything but raise a reasonable apprehension of bias. The exception for employees of the parties would be extraordinary in light of the jurisprudence and it would not simply slip in without being spelled out in clear, unequivocal language. As it is, the absence of any such affirmation for employees is "clear" in intent. The parties did not accredit them.

271 Addressing the same concepts, the Union disagrees emphatically. It may well be that in the superior courts employees of the parties rarely if ever made it past a reasonable apprehension of bias objection, but that did not mean that the inclusion of employees on arbitration boards was an extraordinary thing. It was the root concept of the "judicial school of thought" that adjudicative tribunals put in place through agreement between parties in the labour relations field were different than commercial arbitrations or transactional court cases. In fact, says the Union, it was commonplace to have nominees who were partial, whether or not they were employees or merely persons with a history that steered them to one side of the management -- labour fulcrum or the other. It is the Union's view that the absence of any restrictions on the identity of the nominees in Article 9 makes it clear that employees of the parties are not excluded from serving as nominees on three-person boards.

> Article 9.02 is another provision that the Union suggests strongly supports its case. In that sub-article, the freshly appointed nominees are referred to as "board members" and required to endeavour to appoint an "impartial" arbitrator. The point here is that in no place of article 9, including 9.01, is there any reference to the two members of the board other than the chair being "impartial". Words should be given meaning, says the union, and the use of the word "impartial" before only the chair reflects the parties intentions that that same quality is not going to be required of the other board members.

272 The Employer disagrees stating that it is commonplace to refer to a Chair of a board as a "neutral" or "impartial" person because that is what they are. This does not logically lead to the conclusion that anyone not called "impartial" is entitled to be partial or biased. This would stretch the concept of giving words meaning too far.

Analysis: Construing the Collective Agreement

273 The evidence does not disclose whether the terms "labour relations school of thought" and "Judicial School of Thought" had any meaning for the negotiators of Article 9, but it will assist in explaining some of my conclusions about Article 9 to set out a description of those two approaches here. In West Coast, Vice-Chair, Professor Hickling said the following:

> 1. THE TWO SCHOOLS OF THOUGHT 1.The Judicial Approach

> **44** One school of thought cleaves to the approach of Rand, J. in Szilard, supra. In setting aside a commercial arbitration award he declared:
>
> From its inception arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact. The arbitrators are to exercise their function, not as advocates of the parties nominating them, and a fortiori of one party when they are agreed upon by all, but with as free, independent and impartial minds as the circumstances permit. In particular they must be untrammelled by such influences as to a fair-minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to. This principle has found expression in innumerable cases... . (p. 371)
>
> That does not preclude the nomination of an employee of one of the parties provided that both parties were aware of his interest at the time.
>
> 2. The Labour Relations Approach
>
> **45** The alternative approach recognizes that the nominees to a labour arbitration panel are expected to fulfil a different role than that of nominees in a commercial context. The usual practice is for the parties to nominate representatives and in turn select a chairperson. While the latter is expected to be neutral, the former are not. Commonly a union will appoint a business representative from a different local of the same parent union, or an employee of the provincial office. Similarly, the employer will nominate, if not one of his own employees, then a member of the employer's organization of which it is a member, a management consultant or a labour lawyer with whom the employer has an ongoing relationship.

274 I would add to Professor Hickling's review of the Judicial approach the clarification, if it is required, that the usual consequence of the application of the Judicial approach in a given circumstance was that employees were disqualified from sitting as nominee (absent agreement or informed acquiescence). See the judgment of the court in *Canadian Shipbuilding*:

> 5 Although the argument has ranged before us over the long length of a dividing line, if any, between consensual boards of arbitration in commercial matters and labour boards of arbitration, we intend to limit our comments and decisions to the simple issue with which we are faced. We are of opinion that a person who is employed in the regular course by one of the parties to an arbitration is not qualified to act as an impartial arbitrator.
>
> 6 The basic reason behind this is that the person so appointed has an important and dominant duty as employee to his employer that may interfere with his duty as a member of the board of arbitration ...

275 Out of an abundance of caution, I will say here that the choice of which, if either, system is to prevail is that of the parties. Employer counsel observed that it was not within my jurisdiction to select the approach of my choosing; instead, I must select the approach which is required under law, which, in the Employer's view, would involve application of the current test for reasonable apprehension of bias. I agree entirely that my jurisdiction is limited to ascertaining the law, applying it and construing the Collective Agreement. It is not my role to select the appropriate approach for the parties.

276 What have the parties selected for themselves? I will state from the outset that, in my opinion, the Union's interpretation of Article 9 is to be favoured over that of the Employer on construction of the format and wording of Article 9. However, I do not find that there is a "clear preponderance in favour of one meaning" which might avoid the need for reviewing the past practice evidence.

277 The reasons for my "bona fide doubt" are as follows. Article 9.01 is reproduced here for ease of reference:

> 9.01 When a grievance is referred to arbitration pursuant to the provision of the grievance procedure contained in this Agreement, the Employer and the Union shall, within three (3) working days, each appoint one (1) arbitrator who shall be a member of the Arbitration Board.

278 What is apparent about this provision is that it provides for the appointment of arbitrators by the parties but places no limitations on the selection. Had the parties wished to exclude or otherwise limit the selection of employees of the parties, they could have done so in a sentence.

279 On the other hand, the Collective Agreement in question is not a Collective Agreement under the BC Labour Relations Code or the Alberta Labour Relations Act. It does not attract the presumptions that might obtain under those Acts. Under the judicial approach, particularly as it was interpreted in the early 1980's, it might be just as often expected that the permitting of an employee to sit as a nominee would have to be reflected in an express agreement, or as the necessary implication of less express contract language.

280 Obviously, although Article 9.01 is not ambiguous in its specific language, it is ambiguous in respect of its application to Employee-Nominees.

281 Article 9.02 reads as follows (in the part I consider material to this discussion):

9.02 Chairman

> The board members so appointed shall, within five (3) working days of their appointment endeavour to agree upon and appoint an impartial Arbitrator who shall be a third (3rd) member and the chairman of the Arbitration Board.

282 The Union pointed out the notable absence of any reference to an "impartial" board member. To the Union, to give the word any meaning in view of its to describe the third member chairman, the sentence must be read as not requiring the nominees to be "impartial". This is consistent with the appointment of employees, goes the argument, because employees are likely to be "partial" to their nominator's overall cause although partial is not the equivalent of biased.

283 I agree that that structure and language of Article 9.02 is consistent with the Union's suggested interpretation, but consistency with a given interpretation is not the goal at this stage of the interpretative exercise. Clarity -- finding that interpretation to be clearly correct - is the goal. The concept of a "partial" nominee does not of necessity include an employee of a party. There are many other kinds of "partial" persons who could be engaged for this purpose without admitting employees to sit on the boards. Article 9.02 presents, in my view, a latent ambiguity regarding whether the "partial nominee" which results from a construction of the clause was intended to include an employee of the parties as an eligible nominee.

284 This is an ambiguity which, if the evidence meets the *John Bertram* tests, can be classically cleared up by reviewing the past practice of the parties and determining whether it clarifies the ambiguity and reveals the mutual intentions of the parties regarding the application of Article 9.

285 I turn now to a consideration of the past practice evidence.

Assessing and Applying the Past Practice Evidence

The four components of the John Bertram test are the following:

(1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context;

(2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision;

(3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection;

(4) evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice.

286 I will proceed through each component in its turn.

No Clear Preponderance

287 I have found no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context.

The Past Practice Conduct

288 The past practice which makes up the "conduct by one party" (here, the Union) under the *John Bertram* test does meet the requirement that it is unambiguously based on one meaning attributed to the relevant provision. That *one meaning* is that employees of the parties are not by reason of that status ineligible to be named as arbitrators by their nominators under Article 9. It is important as well to note that the past practice was consistent in the requirement that where an employee was named to sit as an arbitrator, it was an employee whose assistant business agent responsibilities were carried out by him or her at a bargaining unit other than the one with the dispute and the employee had had no prior involvement with the dispute. The conduct was unchallenged until late November 2016 and the evidence of the practice between 1983 through to that date was not objected to by the Employer for 33 years after the first evidence of the practice is disclosed in an Award in 1983.

Acquiescence

289 There was acquiescence in the conduct which can be inferred from the continuance of the practice for a long period without objection, namely 33 years of consistent practice.

Knowledge of management hierarchy with real responsibility for meaning of Collective Agreement

290 This is the critical issue in respect of the past practice. If management personnel with some real responsibility for the meaning of the Collective Agreement were aware of the practice at the material times, then the past practice can be used to resolve the ambiguity or ambiguities in Article 9. If not, then the past practice is to be of no avail in interpreting the Collective Agreement.

291 The question, therefore, is: Is it more probable than not that a person or persons with some real responsibility for the meaning of the Collective Agreement within the Employer were aware that the Union was consistently nominating its own employees to sit as arbitrators on three person boards without objection from the Employer?

292 The evidence in the current case covers the period from 1983 to 2018. The evidence consists largely of documentary evidence only (insofar as the "real responsibility" issue is concerned). We know that the Union consistently appointed its ABMs as nominees because they appear as members of the three person boards which issued decisions from 1983 on. The fact and details of the practice are not challenged by the Employer in this proceeding; what it challenges is the suggestion it knew anything about the practice (until its objection in November 2016).

293 There are two separable periods, each lengthy in its own right. It is an artificial separation because it is based on the type of documentation available for the two periods, but it provides a useful separation for analysis.

294 First, there is the period from 1983 to 2010 when all we have by way of documentation are decisions, although I do not mean to diminish the importance of having them. From 2010 on, there is a much richer body of documentation which includes documents starting at and following the Step 3 Notices. These contain much more identifying information than do the on-line decisions and challenge the ability of a person who has read the documentation, or any of it, to say that he or she was unaware that the Union used its employees as Nominees in three person boards. I am referring to the "Batches" of documentation set out earlier in this Award.

295 The absence of what I will call "Step 3" documentation for the earlier periods is not unusual. Arbitrator Munroe's observations in *Vancouver (City) Vancouver Board of Parks and Recreation v Canadian Union of Public*

Employees, Local 15, [2004] B.C.C.A.A.A No 238 spoke of a problem that will be present in many cases in which the asserted past practice is very long standing.

> 40 I begin by commenting that the witness who testified to the 1990 circumstances (as just recounted) was the only witness called by either party. With that one exception, the hearing was conducted entirely by counsel speaking to documents that were put into evidence by consent, coupled with acknowledgements as to certain facts. That certainly is not a criticism. Some of the documents go back a decade or more, including the first introduction into the collective agreement of what is now Schedule "E", para. 3.1. It is not unusual that with the passage of time, and with practices enduring through successive collective agreements, any additional extrinsic evidence of the actual intention of the parties at particular points in time, if such ever existed, has simply dissipated ... In my deliberations, I have carefully reviewed the documents adduced in evidence, and their evolution, seeking in that process to achieve a sure sense of mutuality concerning the issue in dispute ... (my emphasis)

296 I thus propose to evaluate the question of the Employer's awareness of the practice in two lots. I will first review the period from 1983 to 2010. I will next review the period from 2010 to the present when the Step 3 Notices first found their way into the evidence.

297 My analysis must fundamentally assess credibility. Not credibility in a contest between two persons saying different things, but the credibility of the Employer's claim that it was unaware of the practice during its 33 year duration and the Union's assertion that the Employer must have been aware of the practice. The credibility of the Union's claim with respect to the existence and consistency of the practice itself is not in issue but, like the Employer, it has not led any evidence from a witness to support its claim that the Employer was aware of the practice.

298 I return to the paradigm case of our Court of Appeal in *Faryna v. Chorney*, which provides the time-tested version of what an assessment of credibility would entail. In discussing how a "story" and particularly competing stories may best be assessed (remember, we have here competing assertions, which are stories that must be assessed on documentary and not eye-witness evidence) the court said that:

> "The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. (my emphasis)

299 I turn now to review the period from 1983 through to 2010.

1983 to mid-2010)

300 During this period, the parties were involved in 14 published awards. Four further awards were to come in the mid-point of 2010 and afterwards and I have left them for later as they arrived after the first Step 3 notice..

301 Is it plausible that no person at the Employer with some real responsibility for the meaning of the collective agreement knew during the period of 1983 to 2010 that the Union was appointing its own employees as nominees to three person boards?

302 As mentioned, the denial by the Employer that this was so was not supported by evidence of any person who was with the Employer prior to 2007 when Ms. Meighan was employed in Operations. No witness who had real responsibility for the meaning of the Collective Agreement was called as a witness nor was any documentation supporting the Employer's assertion introduced into evidence.

303 After a careful review of the evidence consisting of the digital awards and the unchallenged evidence of the positions (ABMs) of the Union nominees that appear in the digital awards, and long thoughts, I am satisfied beyond any reasonable doubt that a person or persons with some real responsibility for the meaning of the collective

agreement were aware during this period that the Union was consistently appointing its own employees to the three person boards. I also think it is highly likely that the

304 Employer was also aware that the nominees were all of a single class of Union staff member, namely, ABMs with responsibilities at a different bargaining unit.

305 I cannot presume to know at what precise point the Employer became aware of the practice but it never objected to it until its current legal counsel made his objection in late 2016.

306 My reasoning is this.

307 First, it was always the job of the two parties to name arbitrators/nominees whose initial purpose was to select a Chair. There is no documentary or other evidence to prove this responsibility was actually met, but it can be surmised that it was met since there was a Chair on each of the panels reflected in the 14 decisions. In that place and in those conditions (to quote *Faryna*), it must be expected that names would have to be exchanged, whether in writing, by telephone, or some other means of communication.

308 Although it is possible that one nominee could receive the name of the other without enquiring and learning more about them, I would expect that any such indifference to the basic details of the counterpart's identity would be short-lived. Once the Chair was selected, he or she would be either told or would undoubtedly ask for some further information as to who the nominees were (if he or she did not already known them from other cases or have already received documentation on the question). It is beyond plausibility to think that a three person board could sit together on a case and, at latest by the end of the first day, not know the most basic things about each other. Among the most basic information people in a business setting commonly exchange almost immediately is their occupation and place of work. A basic item of information about the typical Employer nominee would be that he or she was a lawyer or consultant with his or her own practice in sole practice or in a firm. Similarly, a basic thing about the Union nominee would be that he or she was an employee of the Union in the position of ABM from another bargaining unit. Common experience would lead me to expect that this is the kind of basic information that every member of a three person board would soon have about each other.

309 It is my assessment of what was probable at the times in question, namely, 1983 and on, that the fact that the Union Nominee was an employee of the Union would be unremarkable to the Chair and the Employer nominee. This, of course, cuts both ways. The fact that there was nothing unusual about the origins of the Union nominee is not as likely to cause the fact the nominee is an employee to stick in anyone's mind, particularly if this occurred only on a one-time basis. On the other hand, it would also be obvious that from the Union nominee's perspective, no thought need to be given to down-playing the employment relationship. I do not expect that any nominee would even consider obscuring or hiding their identity with the risks to their professional credibility that would arise from that.

310 Given that the labour practitioners would work in both the provincial and federal sectors, and that the provincial sector was much the larger one, it is my expectation of the times that all of the members of the three person boards would be well familiar with Union employees sitting on three person boards. Nevertheless, the identity and sometimes history of every counterpart on a three person board would be expected to be known by both the Chair, who must lead the threesome in the case, and the counterpart Nominee who needs to know what he or she may be up against.

311 In fact, as a review of the previous table of the Decisions reveals, many of the nominees from both sides of the arbitration dispute sat several times in the cases, and not infrequently even with the same nominee counterpart. For instance, Mr. Gallagher sat six times as the Employer nominee and, during this streak of appearances, sat twice with the Union Nominee, Randall and twice with the Union nominee, Pritchard. Mr. Gallagher also sat twice with Chair Kelleher, although with different Union nominees present on each (Randall and Dyck). You can review the various patterns of attendance yourself by reviewing the table.

312 My point here is that if it is possible that the three arbitrators on the boards could come away from an arbitration proceeding taken all the way to the drafting and publishing of an Award and still not know the most basic information about the nominees, then this possibility diminishes with each exposure. It diminishes to a point of extreme improbability.

313 We should not leave out the parties' lawyers. It must be expected that they would know the composition of their board. It would be shocking if they did not know the basic details about the nominees, both their nominee and, more to the point, the other side's nominee. It would be expected that the lawyers would advise their instructing clients of all the information that might bear on the result of the case, which certainly would be expected to require some exchange of information about the composition of the three person board. It would be expected that at least some of the Employer's instructing clients at the arbitrations, and perhaps others who joined them from the Human Resources Department or line authority, would be persons with some real responsibility for the meaning of the Collective Agreement. It is difficult to fathom how these people could escape the hearing room without having come to learn about the composition of the Board that was going to make a binding decision about a matter of importance to the Employer.

314 I must conclude that a story about a labour relations community in which a sophisticated Employer could litigate a dispute through a hearing and on to judgment 14 times over a period of 27 years without ever learning the basic details about the Union nominees, including that the nominees worked for the Union as employees, could only be a work of fiction. To quote Arbitrator Munroe in *Vancouver (City) Vancouver Board of Parks and Recreation v Canadian Union of Public Employees, Local 15,* [2004] BCCAAA No 238 when the shoe was on the other foot: "it strains credulity to think that responsible union officials were unaware of the practice."*(at para. 37)*

315 If anything, the case for the Union from 2010 to the first date of objection is even stronger. I turn now to an examination of that period.

2010- present

316 If it was the interactions between the arbitrators, counsel and others participating in the three person board arbitrations prior to 2010 that are the most apparent means by which the information about the

317 Union's nominee employees was ultimately conveyed to persons in the Employer with some real responsibility for the meaning of the Collective Agreement, it was the Step 3 batches of documents that would play that predominant role from 2010 on.

318 The Step 3 batches contained the necessary information to take a dispute to Step 3 and, if necessary, beyond. Among the information set out in the batches was transparent information about the identity of the parties' nominees. A review of the documentation set out earlier in individual batches discloses that in most cases the Company opted to engage lawyers or other professionals as nominees. The Union always engaged persons from their own office as nominees.

319 How was this revealed? In the batches of correspondence, the identity and affiliation of the Nominee was set out in numerous places.

320 First, it was set out in the body of each Step 3 letter like the following example from Batch 9:

> The Union's nominee is Ms. Christina Brock of this office (my emphasis). Ms. Brock can be contacted at (604) 571-6516.

321 There could be no question of what constituted "this office". Each Step 3 letter was written on the letterhead of the Union. The letter's header included the following details about the office:

> - the Union's return address of 4220 Norland Avenue, Burnaby, BC, V5G 3X2 (changed in 2011 to 1424 Broadway Street, Port Coquitlam, V3C 5W2)

- the Union's fax address of (604) 294-1538 (changed in 2011 to (604) 571-6502)

- The Union's main telephone system number of (604) 294-1538 (changed in 2011 to (604) 571 6500)

- The Union's general email address of ibew213@ibew213.org - and the Union's website url, being www.ibew213.org.

322 Continuing to use Ms. Brock as an example, when her telephone number was listed in the documentation, it was listed as being at (604) 571-6516 (I will use the new address as of 2011 but the same pattern was present under the old address in place until then), which is transparently part of the office telephone system, or simply (604) 571-6500, which is the IBEW 213 main line number.

323 When Ms. Brock's email was listed, it was listed as cbrock@ibew213.org, again transparently part of the Union's email system.

324 Ms. Brock's fax number, when listed, was (604) 571-6502, which is the IBEW213 main fax line; and

325 The pattern for listing Nominees on the list of copied persons invariably took the form "IBEW / Christina Brock" i.e. "Christina Brock, IBEW 213".

326 On occasion, she was listed in a group with the IBEW 213 ABM responsible for the local bargaining unit - see Batch 10 above where the copy line read "cc: IBEW / M. Varga and C. Brock"

327 Occasionally, there would be the need to set out the full addresses of the arbitrators and counsel, usually to introduce these people to the selected arbitrator.

328 In that case, Ms. Brock's listing would look like this: (see Batch 11)

IBEW, Local 213
Richard Dowling Centre
1424 Broadway Street
Port Coquitlam, BC V3C 5W2
Attention: Christina Brock
Telephone: (604) 571-6500
Facsimile: (604) 571-6502

329 The "cc" lines on this piece of correspondence read as follows:

cc. Levitt & Grosman / Howard Levitt
Harris & Co / Israel Chafetz IBEW
213 / Christina Brock

330 It might be useful to compare the foregoing listing to that for the Employer nominee in that case (the writer of the letter advised the Chair that Ms. Brock and Mr. Chafetz were the parties' *wingers*, a term commonly used to refer to a nominee).

Harris & Company L.L.P 14th
Floor, 550 Burrard St.
Vancouver, BC V6C 2B5
Attention: Israel Chafetz, Q.C.
Telephone (604) 890-2232
Facsimile: (604) 684-6632

331 People reading this correspondence with an interest in what it said would know that Ms. Brock was the Union nominee or winger, and that you could fax, email, phone or write her at the Union office.

332 One could do a similar thing to contact the Employer's nominee Mr. Chafetz at Harris & Company, his law firm.

333 I think that it is fair to say that any person in the employment of the Employer who had an interest in who the Union nominees were would have no difficulty ascertaining this from the documentation. If they required confirmation for some reason, it does not seem possible that any of the Nominees could deny their connection to the IBEW 213, nor was there any evidence to suggest they would have a reason to do that.

334 The Employer called two witnesses, Ms. Paisley and Ms. Meighan, who said they did not know that the Union Nominees were employed by the Union. Even though Mr. Levitt challenged Ms. Brock's appointment in late November, 2016, Ms. Paisley knew nothing about this until hearing an arbitrator talk about Ms. Brock being a Union employee in an arbitration in January 2019 and thinking that this was a revelation which she promptly reported to Mr. Levitt, who had of course made a challenge to the practice over two years before. For her part, Ms. Meighan testified she did not know about the Brock Union employment connection until about two weeks before the beginning of this preliminary objection; this being so even though she had been the Director of Human Resources for the Employer since the summer of the previous year, 2018. .

335 The fact that the two labour relations witnesses knew nothing about Ms. Brock's connections with the Union until 2019 despite the initial November 2016 challenge means, quite simply, they were out of the loop. This is wholly consistent with their evidence generally. They testified that they did not have responsibilities which would lead them to know who Ms. Brock was. As I see it, any person who was the least bit interested in finding out who Ms. Brock was could answer that question quickly by looking at the documentation that flowed into the Employer's offices with every Step 3 letter (and in a myriad of other ways), but a person who was wholly disinterested in the subject might be understandably oblivious to any clues or outright statements of fact about the Union nominees disclosed in the batches of Step 3 correspondence.

336 I accept the testimony of both Ms. Paisley and Ms. Meighan that they had no responsibility for knowing anything about Ms. Brock and so they did not know that she was a Union employee.

337 What this means is that the two witnesses from the Employer side could not help this arbitration board because it was not part of their roles to know the relevant information. They testified that if there were others who were responsible to know who the nominees were, they did not know who they were. They therefore were in no position to provide any assistance to this board about the knowledge of the Employer about the Union nominees. On Ms. Meighan's evidence, this extended even to when she was addressed in the Step 3 letters in her role as an Operations Manager. Again, she testified she had no role to play with nominees and so she just did not know anything about the facts.

338 I accept that testimony. I accept that the two witnesses were good and honest professionals in the Department of Human Resources. But they were obviously not people who could take the stand and provide any valuable information about the Employer's knowledge or lack of knowledge because their own lack of knowledge about the nominee matter was complete.

339 However, that does not mean that there was no person with some real responsibility for the meaning of the Collective Agreement in the Employer's ranks who knew that Ms. Brock was an employee of the Union (and I of course do not count Employer counsel as being among their number; Mr. Levitt was not involved at the material times prior to November 2016 and the hearsay evidence he introduced from one of his witnesses that he had been unaware of the Union's practice was accepted without any need for further testimony).

340 The Employer is a large, sophisticated entity with a professional human resources department and its choice of top lawyers and professionals. I again resort to the "the preponderance of the probabilities which a practical and

informed person would readily recognize as reasonable in that place and in those conditions" (*Faryna*). The preponderance of probabilities that the practical and informed person would readily recognize as reasonable under the circumstances I have described them is that there were people in the ranks of the Employer with some real responsibility for the meaning of the Collective Agreement who well knew that Ms. Brock was an employee of the Union.

341 The question of why they did not raise their voices on the issue during the duration of the practice likely derives from a belief that there was nothing wrong with Ms. Brock being a Union employee and that, frankly, this is the way it had always been done. The Union had always appointed Union employees as nominees. Nothing changed about that from at least 1983 until late 2016. This is the state of affairs that characterizes a true past practice, described by Arbitrator Adams in Re Dominion-Consolidated Truck Lines and Teamsters Union Local 141 [1980] O.L.A.A. No. 124, 28 L.A.C. (2d) 45 as follows:

> "Regardless of how it is initiated, with all binding past practices, the course of conduct must occur with sufficient regularity, and continue long enough to be accepted by both parties as the normal way of operating presently and in the future."

342 I conclude that the use by the Union of employees as its nominees was, from 1983 to November, 2016, "accepted by both parties as the normal way of operating ...". We did not hear from any witness who could credibly provide any information that would cast a scintilla of doubt on this fact (as mentioned earlier, Mr. Nedila, the Union witness, gave hearsay evidence that the Union had always used ABMs as its nominees, and this evidence was not challenged.).

343 In the absence of any witnesses who were in a position to know the truth of the matter, the Employer's statement that it was unaware of the connection between the Nominees and the Union is a mere assertion; it is not evidence.

344 To borrow from the language of Arbitrator Darby in*Re Hermes Electronics Ltd. and International Brotherhood of Electrical Workers, Local 1651* (1990), 14 L.A.C. (4th) 289, relied on by Arbitrator Hall in *Insurance Corp British Columbia v Office & Professional Employees' International Union, Local 378*, [2002] BCCAAA No 109, 106 LAC (4th) 97, I conclude that the Employer "either knew, in fact, or must taken as a matter of law (and common sense) to have known of the content of the past practice." This conclusion is about the period of 2010 on. I had earlier already reviewed the 1983 to 2010 period and found conclusively that the Employer was or must have been aware of the practice.

345 Accordingly, I find that the past practice does clarify the ambiguities in Article 9. The mutual intention of the parties, as demonstrated by their extremely lengthy and consistent past practice, was that the appointment by a party to the Collective Agreement of one of its own employees is not prohibited by Article 9 but is permitted. Put differently, and to answer the question that began this preliminary application, the employment connection between Ms. Brock as Nominee and the Union as Nominator did not give the Employer a reasonable apprehension of bias.

VI. APPLICATION OF THE TEST

346 The conclusion which I have reached about the meaning of the parties' Collective Agreement is sufficient to result in the dismissal of the preliminary application.

347 In case I am wrong about that, I believe it will be helpful for me to apply the judicial test for "reasonable apprehension of bias" to determine what would be the outcome if the Collective Agreement did not provide the parties with the right to appoint their own employees.

348 The evidentiary base on which this assessment is to be made has already been fully set out and will provide the "specific facts" and "context" required by the Test.

349 On reviewing the Test, the extensive arguments of the parties and the evidence, I have concluded that the

application of the Test has the same result, namely, the parties to the Collective Agreement are free to employ their own employees as nominees on their three person boards.

350 Since I have already reviewed the evidence and arguments earlier, I will set out the reasons for my conclusion without going over old ground. They are as follows:

351 The Employer's case relied on the proposition that no person should be a judge in his or her own case, something which would be seen to occur if a party appointed its own employee to an adjudicative body. The proposition that having an employee of one party on the adjudicative panel gave the other party a reasonable apprehension of bias did appear at one time in the development of this area of law to be an absolute rule. The Employer counsel relied on the following passage from *Canadian Shipping* as support for the proposition that the issue could be decided without much elaboration if the impugned nominee was an employee of a party. It is worth reproducing it again here for ready reference:

> "A person who is employed in the regular course by one of the parties to an arbitration is not qualified to act as an impartial arbitrator. The basic reason behind this is that the person so appointed has an important and dominant duty as employee to his employer that may interfere with his duty as a member of the board of arbitration."

352 There is no question that absent an agreement that parties may nominate employees or legislation that permits it, the question of whether the appointment of an employee in a given context results in a reasonable apprehension of bias is a reasonable one. However, as the Test described earlier indicates, the forcefulness of the *Canadian Shipping* proposition is diminished by the following developments:

- Since the test for a reasonable apprehension of bias is contextual and fact specific, a statement which does not account for this will likely lack precedential value. In fact, as seen in the earlier passage from *R. v. S.*, previous cases will not likely have much if any precedential value apart from the judicial wisdom that can be gained from reviewing the benchmarks used in the test.
- The first sentence of the *Canadian Shipping* quote sounds like a "rule"; the second sounds like the reason for the rule. The Test is not geared to the acceptance of rules of this kind. It rejects the concept of "peremptory rules", "shortcuts", "textbook" instances, and "automatic" disqualifying facts or events. An adjudicator reviewing a situation involving the appointment of an employee would not be dismissive of the fact of the employment; it is a serious fact. But it is not conclusive in and of itself, and it may or may not generate a reasonable apprehension of bias in the specific context in which it is tested.
- *Canadian Shipping* noted that the reason for concern about the employment relationship is that it may interfere with the employee's duty as a member of the board of arbitration. The current test requires that the reasonable person conclude that it is "more likely than not" that the decision-maker would not decide fairly, not that the decision-maker "might not" decide fairly. Therefore, the employee in *Canadian Shipping* would not have been disqualified unless his appointment meant that he would likely have failed to do his duty to the arbitration board.

353 The single most significant factor in the instant case which acts to defeat the application is the long history of decisions in which employees of the Union participated and in which it could not be said that, either individually or as a whole, there was any real evidence that these nominees (or, for that matter, the Employer nominees) were likely to decide a case unfairly. Despite the admonition in *R. v. S.* against reliance on similar cases, I would have been sorely tempted to review any case authority which had a history which to any degree resembled that in the instant case. However, there are, to my knowledge, no such other cases.

354 I digress. The instant case was one in which a party sought to disqualify a decision-maker before the case got underway. This is a common fact pattern as far as it goes. This distinguishes the situation in the instant case from one in which the decision-maker had conducted himself or herself during the proceeding in a manner which allegedly raised an apprehension of bias in one of the parties. This is also a common fact pattern in the

jurisprudence. In the first kind of case, there is a degree of necessary speculation; the employee sitting on a case involving his or her own Union will -- the argument goes - be partial and lack independence, or perhaps not.

355 To repeat, what we have in the instant case is, I believe, unique in the jurisprudence. The Employer seeks to disqualify Ms. Brock not because of any history of allegedly biased decision-making but on the sole basis of her employment relationship with the Union and the incidents of that relationship such as the legal obligation of loyalty and the oath of allegiance. Not to be forgotten is that Ms. Brock is essentially a proxy for a kind of appointee, namely, an employee of the Union. There is nothing she has done or not done that is alleged to have been done or not done by other Union employee nominees in the past. She has been employed by the Union, works as an ABM, and has been appointed to boards of arbitration. Hence, unlike the many other cases in which reasonable people attempted to understand the risks presented by a decision-maker's duty to his or her own employer, whether at the common law or in another form (such as an oath of allegiance), the instant case gives us 33 years of data about how Union ABMs conduct themselves when they act as decision-makers on three person arbitration boards.

356 Before presenting the questions at what I have called Principles 4 and 5 of the Test, there is one more matter to be determined. If we are to look at the evidence in this case in the form of the Awards in which the Union nominees participated, what standard of conduct are we looking for? The short answer is conduct which would indicate whether the nominee was likely to decide a matter "unfairly". But what does that mean in this context?

357 In the leading cases discussing and clarifying the reasonable apprehension of bias Test, it was a matter of agreement that decision-makers will have their own beliefs, opinions and even biases but that this does not mean that the decision-maker cannot make a fair decision. In fact, a person's experience and background is often a positive in the adjudication context. It enhances the likelihood that decisions will be based in common sense and reality. It only normally becomes a concern in the circumstances described by Cory J in *R. v. S.* when he quoted from *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.) as follows

> "In demonstrating partiality, it is therefore not enough to show that a particular juror has certain beliefs, opinions or even biases. It must be demonstrated that those beliefs, opinions or biases prevent the juror (or, I would add, any other decision-maker) from setting aside any preconceptions and coming to a decision on the basis of the evidence." (my emphasis)

358 Similarly, the court in *Wewaykum* reaffirmed the importance of impartiality and described:

> 57 ...[P]ublic confidence in our legal system is rooted in the fundamental belief that those who adjudicate [page288] in law must always do so without bias or prejudice and must be perceived to do so.
>
> **58** ... The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind...

359 The decision of the Supreme Court in *Yukon Francophone School Board* struck a similar chord:

> 36 Impartiality thus demands not that a judge discount or disregard his or her life experiences or identity, but that he or she approach each case with an open mind, free from inappropriate and undue assumptions. (my emphasis)

360 *Bethany Care Centre v. United Nurses of Alberta, Local 91* was a decision of the Alberta Court of Appeal which coincidentally was published in 1983, the same year in which the first of the Employer Union three person board decisions were issued. *Bethany* was a labour case and the issue was whether employees of a party could be nominated to serve on a board. The Judges decided that absent an agreement between the parties, the answer was "No". In the course of the court's reasons, the court posed and answered the question of "what is expected of a labour arbitrator." The Court posed three questions which concerned themselves with both impartiality and independence in the employee context:

361 In *Bethany*, the court said:

> I return then to consider what is expected of a labour arbitrator:
>
> > Is he to stand by the side who nominated him come what may?

Is he free to sign a unanimous report against the party nominating him?

Is he expected - at least - to form an honest conclusion regardless of his sympathies or loyalties?

362 "The answer to that last question must be yes", wrote the court.

363 In a case in which the conduct of the decision-maker requires a close and nuanced judgment, I would be tempted to go further into the subject of the likely meaning of "unfairly" in the context of the reasonable apprehension of bias Test.

364 I need not do so here because there is, in the final analysis, no argument that the Union nominees, the ABMs, have not met each and every one of these above-mentioned requirements. I do not say that it is impossible to read a case incorrectly and miss an example of partiality amounting to a violation of the duty of impartiality or independence. However, there is nothing in the cases put into evidence which provides an apparent example of that, and nothing presented by the Employer as such an example. Indeed, there was no evidence that there had ever been a complaint about partiality by any person connected with the arbitrations, whether management or union side.

365 I am mindful that the two Employer witnesses both expressed their opinions that Ms. Brock could not be expected to decide cases fairly in view of her employment relationship. It remains to be said that the Test is a purely objective two-prong test which does not provide a useful role for these opinions in the decision-making process.

366 I am also mindful that the Employer placed importance on Ms. Brock's oath of office, suggesting that it would compel Ms. Brock to comply with the Union's interests and thus leave her without the requisite independence. My simple answer to this contention is that the oath of allegiance has presumably been in place for some time and, if Ms. Brock was required to take it, this fairly implies that the other ABMs would be in the same position. This oath has not affected the conduct of ABMs as it appears on the record. Moreover, recalling the concerns of our Supreme Court for the incidence of both bias and bias applications impairing the integrity of the court, I cannot think of circumstances in which a trade union or any other party seeking to enforce an oath would do so at the expense of the integrity of the oath taker, or that the oath taker would spend his or her integrity in this way.

367 The question can now be asked: On the evidentiary record before me, would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude that it is more likely than not that Ms. Brock, whether consciously or unconsciously, would not decide fairly?

368 I answer the question: No, this person would not conclude that Ms. Brock would not decide fairly. Accordingly, the preliminary application is dismissed.

369 I will be in touch with the parties about future proceedings.

DATED AT North Vancouver, British Columbia, this 11th day of September, 2019.

John L. McConchie, Arbitrator

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