Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Canadian Imperial Bank of Commerce,

applicant,

and

Jordan Rooley,

respondent,

and

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers),

respondent.

Board File: 30352-C

Jordan Rooley,

applicant,

and

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers),

respondent,

and

Canadian Imperial Bank of Commerce,

employer.

Board File: 30358-C
Neutral Citation: 2015 CIRB **759**
January 29, 2015

The Canada Industrial Relations Board (Board or CIRB) was composed of Mr. Graham J. Clarke, Ms. Judith MacPherson, Q.C., and Mr. Patric F. Whyte, Vice-Chairpersons.

Section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (*Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine these two reconsideration applications without an oral hearing.

Counsel of Record

Mr. Kenneth M. Dolinsky, for Mr. Jordan Rooley;
Mr. Simon Mortimer, for the Canadian Imperial Bank of Commerce;
Mr. Robert Champagne, for the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers).

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

I. Introduction[1] [2]

[1] Two reconsideration applications have obliged the Board to examine certain policy issues relating to "employee wishes", including: i) the importance of an application's filing date and

[1] During the drafting of this decision, certain legislative changes occurred. The *Administrative Tribunals Support Service of Canada Act*, S.C. 2014, c. 20, s. 376 came into effect on November 1, 2014 and created the Administrative Tribunals Support Service of Canada (ATSSC). Because the ATSSC now employs those employees who formerly worked for the Board itself, certain changes to the *Code* and the *Canada Industrial Relations Board Regulations, 2012* (*Regulations*) took place. For example, section 35 of the *Regulations* regarding the confidentiality of membership evidence has been updated to reflect the fact that ATSSC employees also have obligations regarding confidentiality. This decision has examined the provisions as they existed at the time the parties filed their pleadings since nothing turns on the amended wording.

[2] The *Employees' Voting Rights Act*, 2nd sess, 41st Parl, 2013 (Bill C-525) received Royal Assent on December 16, 2014. Bill C-525 will require the Board to hold mandatory representation votes as of June 16, 2015. On the date this decision was issued, the Board could still certify bargaining agents on the basis of the membership cards they submitted. As of June 16, 2015, this decision should be read with those legislative changes in mind.

ii) what duty, if any, exists on employees to advise an applicant bringing a revocation application of a change in their original expression of support (hereinafter "employee wishes").

[2] In order to examine these issues, the Board has summarized some of its longstanding policies, including its automatic and confidential process which reviews evidence of employee wishes.

II. The Reconsideration Applications

[3] The Board received two reconsideration applications contesting its decision in *Rooley*, 2014 CIRB 712 (*Rooley 712*). Mr. Jordan Rooley worked at the Canadian Imperial Bank of Commerce (CIBC) in a bargaining unit represented by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Steelworkers).

[4] In *Rooley 712*, the Board determined that Mr. Rooley's revocation application did not have majority support as of December 18, 2013, the date of its filing. In analyzing majority support, *Rooley 712* relied on forms on Steelworkers' letterhead which certain bargaining unit members had signed. The Steelworkers attached these forms to its January 2, 2014 written response.

[5] The signed forms were dated prior to December 18, 2013, which was the filing date of Mr. Rooley's revocation application.

[6] Mr. Rooley's March 7, 2014 reconsideration application (Board file no. 30358-C) raised several issues. He argued that the Board erred fundamentally in relying on information which arrived after the filing of his December 18, 2013 revocation application.

[7] Mr. Rooley further suggested that any employee who changed his/her support for the revocation application had a legal obligation to inform him in his capacity as their agent. A failure to advise him of the change voided any purported withdrawal.

[8] Mr. Rooley also suggested that the Board's reasons in *Rooley 712* gave rise to a reasonable apprehension of bias.

[9] A few days earlier, on March 5, 2014, CIBC had also filed a reconsideration application (Board file no. 30352-C). That application suggested the Board had failed to respect procedural fairness and natural justice in its handling and consideration of the Steelworkers' evidence regarding employee wishes.

[10] The Steelworkers argued that forms signed before the application's December 18, 2013 filing date could be used to measure support as of that date, even if the Board did not physically receive them until 15 days later. They further argued any employee could advise the Board of a change of heart without first having to advise Mr. Rooley.

[11] At least one issue in this case is novel. This Board had not previously analyzed, and then decided, a case where membership evidence was dated prior to the application date, but only filed subsequent to that date. The Board in *Rooley 712* did not exercise the discretion the *Code* provides to select another appropriate date for the evaluation of employee wishes.

[12] The reconsideration panel has concluded that relying on evidence of employee wishes which had not been filed prior to the application's filing date, even if such evidence was dated prior to the application date, runs counter to the *Code*'s wording, and this Board's longstanding policy.

[13] The reconsideration panel does agree with the original panel, but for different reasons, that employees who change their support for a revocation application are not legally obliged to advise the applicant of this change. In a revocation application, employees may always write to the Board directly and confidentially of a change in their support, provided this notification occurs prior to the application's filing date.

[14] If the Board forced an employee to advise a revocation applicant of his/her change in wishes, then this would undermine the policy behind section 35 of the *Canada Industrial Relations Board Regulations, 2012* (*Regulations*) which ensures employee wishes remain confidential. This case does not need to decide if different considerations might apply for certification applications.

[15] Before examining the specific issues in this case, the Board will first comment on its reconsideration process, its policies pertaining to employee wishes and the importance of the application's filing date in bargaining rights matters.

III. The Reconsideration Process

[16] In *Buckmire*, 2013 CIRB 700 (*Buckmire 700*), the Board summarized the longstanding principles which apply to its reconsideration process, in part due to the repeal on December 18, 2012 of section 44 of the *Regulations*: see *Buckmire 700*, *supra*, at

paragraphs 32-35. Section 44 of the *Regulations* had formerly set out the main grounds for the reconsideration of a Board decision.

[17] The Board in *Buckmire 700* noted that the repeal of section 44 had not changed the main grounds for reconsideration:

> [36] The main grounds for reconsideration, and the applicant's obligations when pleading an application for reconsideration, remain as described below. Decisions of the Registrar under section 3 of the *Regulations* similarly remain subject to reconsideration.
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> **1. New Facts**
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> [37] This ground involves new facts which the applicant did not put before the Board when originally pleading its case. It is not an opportunity for the applicant to add facts it had omitted to plead.
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> [38] As summarized in *Kies 413*, *supra*, an application for reconsideration will include, at a minimum, the following information about the alleged new facts:
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> 1. What the new facts are;
> 2. Why the applicant could not have put them before the Board panel originally;
>
> and
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> 3. How those new facts would have changed the Board's decision under review.
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> [39] Generally, the original panel will consider applications raising this ground, given its advantageous position to decide whether "new facts" exist and their impact, if any, on its previous decision.
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> **2. Error of Law or Policy**
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> [40] Any alleged error of law or policy must cast serious doubt on the Board's interpretation of the *Code*. This creates a two-pronged test. A mere difference of opinion about the legal or policy interpretation will not justify reconsideration.
>
> [41] A party must also have raised the point of law or policy issue in question before the original panel.
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> [42] The minimum pleading requirements for an allegation raising an error of law or policy remain as set out in *Kies 413*, *supra*:
>
> 1. A description of the law or policy in issue;
> 2. The precise error the original panel made in applying that law or policy; and
> 3. How that alleged error cast serious doubt on the original panel's interpretation of the *Code* or policy.

3. Natural Justice and Procedural Fairness

[43] Reconsideration may raise allegations that the original panel failed to respect the principles of natural justice or those related to procedural fairness.

[44] As described in *Kies 413*, *supra*, a party's minimum pleading requirements would address the following issues:

> 1. An identification of the particular principle of natural justice or procedural fairness in issue; and
>
> 2. A description of how the original panel allegedly failed to respect that principle.

E. Summary of Main Grounds for Reconsideration

[45] In summary, the main grounds for reconsideration may be described as follows:

> (*a*) New facts that the applicant could not have brought to the attention of the original panel and which would likely have caused the Board to arrive at a different conclusion;
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> (*b*) Any error of law or policy that casts serious doubt on the interpretation of the *Code* or policy;
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> (*c*) A failure of the Board to respect a principle of natural justice or procedural fairness; and
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> (*d*) A decision made by a Registrar under section 3 of the *Regulations*.

[46] It is with the above principles in mind that the Board will address Mr. Buckmire's application.

[18] The two reconsideration applications before the Board raise the grounds of an error of law or policy, as well as natural justice/procedural fairness.

IV. Employee Wishes

[19] Both Mr. Rooley and CIBC suggested in their pleadings that the Board in *Rooley 712* did not investigate the evidence of employee wishes. For example, Mr. Rooley's March 7, 2014 reconsideration application at page 3 stated:

> The Board did not direct an official of the Board to investigate the documents, the circumstances of their drafting and signing which means that they are merely information; they are not evidence properly before the Board as a basis for findings.

[20] CIBC's March 5, 2014 reconsideration application at page 7 expressed concerns the Board had uncritically accepted evidence of employee wishes:

> Likewise natural justice and procedural fairness are reflected in the rule in *Browne* v. *Dunn*. According to the rule, if a person intends to impeach the credibility of a witness through contradictory evidence, this evidence must be put to the witness directly. The Board's acceptance of what it believes is an employee's later signature as an impeachment of the same employee's earlier signature constitutes a breach of such a rule. **Whether by ordering a vote (which would be the "cure all") or by requiring that the latter record be supported by affidavit or by using its own investigatory powers, the Board had ways to provide justice.**
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> (emphasis added)

[21] CIBC reiterated its concerns at page 3 of its May 1, 2014 reply:

> The Board most certainly determined the validity, credibility, intent and relative weight for those "cross-over cards" which it accepted as both ongoing support for the Union and also as successfully nullifying signed agency agreements providing Jordan Rooley with the authority to act. And the Board most certainly did so without ever disclosing or seeking the input of any party on the wording of the cross-over card or their impact. It did so without using its powers to ensure the trustworthiness or veracity of this completely unregulated evidence. It do so [*sic*] in a manner which, to any party or onlooker, appears to have the Board accepting and interpreting documents at face value even where these documents are not disclosed to the other parties. **It is respectfully submitted that the Board has been given powers and authorities which it may and must use to ensure that justice is done and seen to be done. When the Board is going to make a determination based on "secret" or "confidential" material it should make clear and public the steps it has taken.**
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> (emphasis added)

[22] In every application involving employee wishes, the Board follows a confidential process to evaluate that evidence, as described below.

A. Statutory Provisions

[23] Employees exercise their basic freedoms in section 8 of the *Code* by expressing their wishes in writing:

> Basic Freedoms
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> 8. (1) Every employee is free to join the trade union of their choice and to participate in its lawful activities.

[24] A fundamental principle of Canadian labour relations is that labour boards keep employee wishes confidential. The *Code* has tasked the Board with the vital function of investigating employee wishes, while keeping them confidential.

[25] Sections 15(*m*) and 15(*o*) of the *Code* allow the Board to make regulations concerning the evidence and confidentiality of employee wishes:

> 15. The Board may make regulations of general application respecting
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> ...
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> (*m*) the determination of the form in which and the period during which evidence as to
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> (i) the membership of any employees in a trade union,
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> (ii) any objection by employees to the certification of a trade union, or
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> (iii) any signification by employees that they no longer wish to be represented by a trade union
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> shall be presented to the Board on an application made to it pursuant to this Part;
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> …
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> (*o*) the circumstances in which evidence referred to in paragraph (*m*) may be received by the Board as evidence that any employees wish or do not wish to have a particular trade union represent them as their bargaining agent, **including the circumstances in which the evidence so received by the Board may not be made public by the Board.**
>
> (emphasis added)

[26] The Board has exercised its regulation making authority in these areas, such as at section 35 of the *Regulations*:

> 35. The Board shall not disclose to anyone evidence that could reveal membership in a trade union, opposition to the certification of a trade union or the wish of any employee to be represented by or not to be represented by a trade union, unless the disclosure would be in furtherance of the objectives of the *Code*. [3]

[3] Section 35 was modified effective November 1, 2014 to read: The Board, or an employee of the Administrative Tribunals Support Service of Canada who is authorized to act on behalf of the Board, must not disclose evidence that could reveal membership in a trade union, opposition to the certification of a trade union or the wish of any employee to be represented, or not to be represented, by a trade union, unless the disclosure would further the objectives of the *Code*.

[27] Section 35 does not apply solely to employee wishes in certification applications, though those matters outnumber revocation and displacement (raid) applications. Rather, section 35 applies to all *Code* applications which require employees to express their wishes freely.

B. Reasons for Confidentiality

[28] The *Code*'s unfair labour practices in both sections 94 and 95, as well as myriad Board decisions, demonstrate that employees sometimes have legitimate concerns that the free exercise of their basic freedoms under the *Code* may result in unlawful reprisals.

[29] For example, in *Transpro Freight Systems Ltd*., 2008 CIRB 422 (*Transpro 422*), the Board issued interim relief when an employer's representatives indicated it would fire union organizers and close the business if the trade union's campaign succeeded:

> [50] In the instant case, the Teamsters have persuaded the Board that some interim relief is appropriate.
>
> [51] While the extent and degree of Transpro's comments and actions remain to be determined when hearing the unfair labour practice complaint on the merits, Transpro does not deny that its owners expressed views to key employee organizers and Teamsters representatives which would cause a reasonable person to believe their employment was in jeopardy and that the business would be closed if they continued on their organizing path.
>
> [52] While Transpro appears to have benefitted from the advice of experienced labour law counsel, and took some steps to modify its actions, the bell cannot be unrung. Even if Mr. Mohammed was not fired *de jure* once legal counsel had been consulted, the reality is that Mr. Mohammed was told he was fired by the owners of the company. The August 15, 2008 letter to employees about their rights goes beyond merely summarizing the employee's rights under the *Code*. That does not mean, however, that the Board has found that it violates the *Code*.
>
> [53] The purpose of an interim order is to ensure "the fulfillment of the objectives" of Part I of the *Code*. The Teamsters have persuaded the Board that it is appropriate to issue interim relief which ensures that Transpro's employees know of their freedoms under the *Code* and that they can explore these basic freedoms without fear of reprisal.

[30] Competition between trade unions may also give rise to reprisals if employees support a rival trade union in a displacement (raid) application. In *Teamsters, Local Union 847*, 2011 CIRB 605, the Board concluded a *Code* violation occurred when a trade union charged and disciplined three members for supporting a rival trade union's certification bid:

> [23] Applying the law to the facts of this case, which are not disputed, it is clear that the three employees were charged internally and disciplined for exercising their fundamental right under the *Code* to change unions. None of the three members held a position within the Guild. It was undisputed that the three members supported the Teamsters and campaigned on their behalf during the period leading up to the representation vote. **The three**

> **individuals had a fundamental right to participate in a proceeding under the *Code*, in this case a raid (displacement) application. The Guild cannot penalize them for exercising their rights of association under section 8 of the *Code*. Clearly, the charges were a form of reprisal against the three individuals for their activities on behalf of the applicant.** The Board finds that the charges are a clear violation of section 95(*i*)(i) of the *Code*. Given this finding, there is no need for the Board to determine whether the Guild breached sections 95(*f*) or 95(*g*), or section 96 of the *Code*.
>
> (emphasis added)

[31] The Federal Court of Appeal in *Canadian Merchant Service Guild* v. *Teamsters, Local Union 847*, 2012 FCA 210 accepted the Board's reasoning and its reliance on earlier similar decisions in the area:

> [16] Sub-paragraph 95(*i*)(i) of the *Code* prohibits a trade union from imposing "a financial or other penalty on a person, because that person…has…participated…in a proceeding under" Part I of the *Code*. Since the Guild acknowledged at the hearing before this Court that the Teamsters' application for certification was a proceeding under the *Code*, and that the three concerned individuals were fined or suspended by the Guild for participating in this proceeding, I fail to understand how the Board misinterpreted or misapplied sub-paragraph 95(*i*)(i). The fact that the Board applied the reasoning in its decisions of *Paul Horsley et al*, above, and of *Nathalie Beaudet-Fortin*, above, is not a reviewable error, since that reasoning is fully compatible with the terms of sub-paragraph 95(*i*)(i). **These decisions recognize the basic right of individuals to belong to the trade union of their choice, the right of union members to attempt to change their bargaining agent from time to time in the manner and in accordance with the timelines provided for in the *Code*, and the right of such individuals not to be disciplined or penalized for exercising such rights.**
>
> (emphasis added)

[32] The above cases are but recent examples demonstrating why employees may be fearful about exercising their *Code* rights. Both employers and trade unions have the means with which to retaliate against them when their vested interests are at stake.

[33] An employee's free exercise of his/her *Code* rights is directly impacted by the Board's ability to keep wishes confidential. The Board is disinterested in the way employees exercise their *Code* rights; its sole concern is to ensure that the exercise is done freely.

[34] For decades, the courts have accepted this essential labour relations policy and upheld the Board's practice, even though the Board is conducting an otherwise adversarial administrative law process.

[35] In *Maritime Ontario Freight Lines Ltd.* v. *Teamsters Local Union 938*, 2001 FCA 252, the Federal Court of Appeal, in analyzing the public policy reasons which require confidentiality,

upheld the Board's objection to producing confidential membership evidence for a judicial review proceeding:

> [9] The Tribunal objected to the applicant's request for material under Rule 318 (2) and gave its reasons for the objection.
>
> [10] The Tribunal relied on section 25 of the *Canadian Industrial Relations Board Regulations, 1992,* SOR/91-622 (*Regulations*), which provides as follows:
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> | | |
> |---|---|
> | 25. The Board shall not disclose to anyone evidence that could, in the Board's opinion, reveal membership in a trade union, opposition to the certification of a trade union or the wish of any employee to be represented by or not to be represented by a trade union, unless the Board considers that such disclosure would be in furtherance of the objectives of the Act. | 25. Le Conseil ne peut divulguer à qui que ce soit des éléments de preuve qui, à son avis, pourraient révéler l'adhésion à un syndicat, l'opposition à l'accréditation d'un syndicat ou la volonté de tout employé d'être ou de ne pas être représenté par un syndicat, à moins qu'il n'estime qu'une telle divulgation contribuerait à la réalisation des objectifs de la Loi. |
>
> [11] The Tribunal went on to state that under the ***Canada Labour Code*, R.S.C. 1985, L-2, (*Code*)**, and in accordance with well established labour relations principles and policies, it is for the Board alone to use those documents to determine whether, in a given case, the applicant trade union represents a majority of the employees in a bargaining unit that the Board deems to be appropriate for purposes of collective bargaining.
>
> [12] The applicant's request under Rule 317 must be considered against the background of the scope of the Tribunal's privative clause and the public policy concerning the confidentiality of membership information in labour relations matters.
>
> [13] George Adams notes in *Canadian Labour Law*, 2nd ed. (Aurora: Canada Law Book,1993) at ¶ 5.380,
>
> > It has long been recognized that confidentiality of membership evidence is an essential guarantee which labour relations boards must offer if they wish to encourage workers to avail themselves of a board's certification procedures.
>
> [14] In *Canada (Labour Relations Board)* v. *Transair Ltd.,* **1976 CanLII 170 (SCC)**, [1977] 1 S.C.R. 722 at 741-742, *(Transair)*, the Supreme Court of Canada had the opportunity to consider the disclosure of information protected by a similar provision of the *Regulations*. Chief Justice Laskin stated that,
>
> > The Board was entitled to act on his report without disclosing it in this respect, having regard to s. 29(4) of the *Regulations*, once it was clear that [the Board's investigator] had made the required investigation. Of that there was no doubt in the present case...
> >
> > In my opinion, the Federal Court erred in its view as to the obligation of the Board to permit cross-examination as to numbers and, certainly, as to any further inquiries which could only involve identity. Section 29(4) of the *Regulations*, declaring that evidence submitted to the Board with respect to employee membership in the union was for the confidential use of the Board, is

> a reinforcement of the policy of the Act with respect to the authority of the Board in the determination of a union's membership position.
>
> While the factual context of the *Transair* decision differs slightly from the case at hand, it is clear that the confidential information sought in both cases is not to be transmitted to the employer except in very rare circumstances.

[36] Given the importance of keeping wishes confidential, the Board has developed a process which both protects and analyzes evidence of employee wishes.

C. Board Investigation of Employee Wishes

[37] Ensuring confidentiality for employee wishes, while also investigating them, places a significant responsibility on the Board. Evidently, an employer's legal obligations may be impacted by that confidential process. But so can a trade union's existing legal rights in cases involving revocation or displacement (raid) applications. Employees' rights are similarly in issue, since the particular application may impact whether the *Code* will apply, or continue to apply, to their employment.

[38] The Board must constantly remind itself of the impact of its public policy role on the parties and employees, given that the examination of employee wishes is an exception to the otherwise regular adversarial process.

[39] The Board's investigation takes place in different stages.

[40] First, in cases involving employee wishes, the Board's Industrial Relations Officers (IRO) provide the Board with a confidential report.

[41] Second, the panel assigned to the matter has the additional and ultimate obligation to ensure that it is satisfied with the IRO's report. A panel may ask an IRO to take further steps until it has satisfied itself that the evidence of employee wishes allows it to exercise its statutory powers under the *Code*.

[42] In *TD Canada Trust in the City of Greater Sudbury*, Ontario, 2006 CIRB 363 (*TD 363*), upheld by the Federal Court of Appeal in *TD Canada Trust* v. *United Steel,* 2007 FCA 285, the Board summarized its practice:

> [89] The Board's general practice in circumstances where questions arise as to the validity of the membership evidence or the manner in which it is obtained, is for the Board's investigating officer to conduct an investigation of the specific allegations. The officer may also contact a random sample of other employees to test the voluntary nature of the remainder of the membership evidence. This investigation is done on a confidential basis,

usually by way of interviews with individual employees, and the results are reported to the Board by way of a confidential report, in accordance with the Board's *Regulations* (see *IMS Marine Surveyors Ltd.*, *supra*).

[90] The level or extent of the investigating officer's investigation is discretionary and may vary depending upon the circumstances. It will depend on a variety of factors, such as the nature and extent of the allegations, the size of the proposed bargaining unit and the availability and willingness of employees to be interviewed. Ultimately, it rests with the panel seized with the matter to determine whether further investigation is required and, if it is satisfied that the membership evidence is reliable, such evidence may be used to determine the true wishes of the employees.

[43] In *Genesee & Wyoming Inc., cob as Huron Central Railway HCRY*, 2007 CIRB 388 (*Genesee 388*), the Board described an IRO's investigation after concerns arose about membership cards:

[4] The signed Certificate of Accuracy further confirmed "that the amounts shown as having been paid as union dues and/or initiation fees were actually paid by the employees concerned on their own behalf and on the dates indicated."

[5] The applicant also acknowledged, by signing the Certificate of Accuracy, "that the investigating officer has the authority to investigate and verify all documents and statements made by the parties to this application."

[6] During the course of the Board's investigation, the investigating officer had concerns whether certain employees, whose names appeared on the submitted membership cards, had in fact signed those cards and paid the requisite $5 fee.

[7] By letter dated April 18, 2007, the applicant, through legal counsel, indicated it wished to withdraw three of the cards it had originally filed with its certification application.

[8] By letter dated May 2, 2007, the investigating officer asked the applicant, after leaving several messages, to provide contact information for the applicant's card collectors including their first and last name, address and home telephone numbers.

[9] The Applicant did not respond to the investigating officer's request.

[10] The investigating officer sent a further letter to the applicant, dated May 18, 2007, requesting both a reply to the May 2, 2007 letter concerning the contact information for the card collectors as well as an explanation regarding the three membership cards that the applicant had asked the Board to withdraw.

[11] The investigating officer advised the applicant that his confidential investigation suggested that the signatures on the cards did not match those obtained by the officer. The individuals also appeared not to have paid the required $5 fee.

[12] The applicant did not respond to the second request for information from the investigating officer.

[44] The Board in *Genesee 388* commented on the privilege the *Code* creates in a card-based certification regime and the responsibilities which attach to that privilege:

> [14] The certification process in the *Code* extends certain important privileges to applicants. Not only will the Board usually determine majority support for the bargaining agent as of the date of filing of the application for certification, but it is exceptional for the Board to order a representation vote if an applicant has filed a majority of signed membership cards in its favour.
>
> [15] These privileges impose an obligation on every applicant, and on the Board, to ensure the accuracy of the membership evidence submitted.
>
> [16] The Board, through its labour relations officers, conducts a confidential examination to ensure that an applicant's membership evidence is accurate and clearly reflects the wishes of the members of the proposed bargaining unit. The Board can only grant the significant benefits offered by the *Code* to those who satisfy the clear legislative requirements.
>
> [17] Membership evidence is not only confidential but it is also extremely sensitive. The investigating officer will produce a confidential report for the Board's eyes only concerning the accuracy of that evidence. The courts have consistently protected this public interest function of the Board and the need to keep it confidential from the parties (see *Maritime-Ontario Freight Lines Ltd.* v. *Teamsters Local Union 938* (2001), 278 N.R. 142 (F.C.A., no. A-574-00)).
>
> [18] In this case, the investigating officer's investigation showed that some of the membership cards had not been signed by those named on the card. The Board is satisfied that this conclusion is accurate.

[45] Given the significant irregularities with the membership evidence in *Genesee 388*, the Board dismissed the application:

> [27] In this case, the Board is of the same view that the filing of irregular membership evidence by the applicant requires that this application for certification be dismissed. Under section 38 of the *Canada Industrial Relations Board Regulations, 2001*, such a dismissal will impose a six month statutory bar before the applicant can file another application for certification.

D. Only Employee Wishes are Treated as Confidential

[46] The Board has also commented on what information is subject to its confidential process and which information falls outside of it. The distinction is crucial.

[47] IROs and the Board must ensure that that confidential process applies solely to employee wishes. Section 35 does not entitle employees to file what are in essence substantive pleadings and have them remain secret under the Board's confidential process.

[48] In *TD 363*, a reconsideration panel of the Board resolved a situation where a panel had mistakenly treated an intervention request as employee wishes under the confidential process. The Board described its procedural concerns:

> [14] TD argues that the *audi alteram partem* principle, or what is commonly known as the right of a party to be heard, compels the Board to inform parties of all relevant information considered in the process of determining an application so that the parties may have an opportunity to properly consider all issues and to make appropriate submissions prior to any decisions being issued. **TD takes the position that the original panel violated this principle of natural justice when it failed to notify and disclose to all parties that interventions had been filed by employees and that all of the employees of at least one of the branches affected, the Lively Branch, objected to the union's application.** It is TD's contention that the interventions of the Lively employees were not properly considered by the original panel.
>
> (emphasis added)

[49] The reconsideration panel distinguished between wishes and pleadings, then cured the procedural defect from the original decision:

> [73] **Because the interventions filed addressed the wishes of the employees, in keeping with section 35 of the *Regulations*, the Board did not disclose the employees' letters to the union or the employer. The confidentiality extended to the wishes of employees or their membership in a trade union is primarily intended to prevent harassment or reprisals.** There are also other well-established labour relations reasons for not revealing such information. For example, the knowledge of only borderline majority support for a trade union could have detrimental effects on collective bargaining, particularly in the context of a first collective agreement. Consequently, the Board has consistently denied requests to provide evidence of union membership (see *Maritime-Ontario Freight Lines Limited* v. *Teamsters Local Union 938,* no. A-574-00, November 2, 2001 (F.C.A.); *Réseau de Télévision Quatre Saisons Inc.* (1990), 79 di 195; and 90 CLLC 16,047 (CLRB no. 779); and K.D. *Marine Transport Ltd.* (1982), 51 di 130; and 83 CLLC 16,009 (CLRB no. 400)).
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> …
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> [76] In *TD Canada Trust in the City of Greater Sudbury, Ontario* (LD 1282), *supra*, the Board recognized the issue presently being raised and granted the Lively Branch employees status in the reconsideration application filed by the employer. It gave the intervenors the opportunity to make further submissions and the union and employer the chance to respond:
>
> > As regards the application for intervenor status, the reconsideration panel finds that the Lively employees, despite their contention to the contrary, had not been granted intervenor status in Board file no. 24751-C. **The reconsideration panel, however, also finds that although the original submissions of the Lively employees were, in part, expressions of their wishes about wanting or not wanting to be represented by the union, there was also a significant component which went to the issues in dispute. Whereas, employee wishes are deemed to be confidential and not shared with the parties, representations addressing the substantive issues under consideration**

> **are to be transmitted to the parties and an opportunity given to respond to the points raised.** However, as this opportunity was not granted to the parties in file 24751-C, the Board finds it appropriate to grant intervenor status to the Lively employees in the reconsideration application filed by the employer. Accordingly, if the Lively employees wish to make further submissions to the Board with respect to the reconsideration application, they must do so on or before July 5, 2005. The employer and union shall have until July 12, 2005, to file their responses.
>
> (pages 2-3)

> [77] **The Lively Branch employees have been granted intervenor status in the present application and all parties have had the opportunity to make further submissions within the present reconsideration applications. In the reconsideration panel's view, this alleviates any concerns about the initial panel not disclosing relevant information.** All parties have now had an opportunity to make submissions which have been considered by the reconsideration panel within the process of the present application.
>
> (emphasis added)

[50] The problem examined in *TD 363* did not arise in the instant case. Nonetheless, IROs and Board panels must remain vigilant that only employee wishes, including allegations about their *bona fides* as occurred in *Genesee 388*, fall within the confidential process. For obvious reasons, employee submissions which, for example, comment on the merits of the particular case, or include disparaging allegations about a party, could not be treated in confidence.

[51] Before the Board even starts its confidential process, however, it must first decide the appropriate cut-off date for the receipt of evidence of employee wishes. That cut-off date determines which wishes will be considered and, more importantly, which wishes will not. Both the *Code* itself, and the Board's longstanding policy, emphasize the crucial importance of the application's filing date.

V. The Importance of the Date of the Filing of the Application

[52] The *Code* makes it clear that support for an application involving employee wishes is evaluated as of the date of the application's **filing**, unless the Board exercises its statutory discretion to choose another appropriate date. Section 17 of the *Code* applies to revocation and other applications, while section 28(*c*) applies to certification applications:

Section 17	Section 28[4]
Where the Board is required, in connection with any application made under this Part, to determine the wishes of the majority of the employees in a unit, **it shall determine those wishes as of the date of the filing of the application or as of such other date as the Board considers appropriate.**	Where the Board (*a*) has received from a trade union an application for certification as the bargaining agent for a unit, (*b*) has determined the unit that constitutes a unit appropriate for collective bargaining, and (*c*) **is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent,** **the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit.**

(emphasis added)

[53] The *Code*'s statutory preference, and the Board's longstanding policy, uses the application's filing date as the cut-off date for the receipt of evidence about employee wishes. Only in exceptional situations will the Board exercise its statutory discretion to choose another appropriate date.

[54] While there was a brief period in the 1970s, following a decision from the Federal Court of Appeal, where the Board was obliged to examine employee support as of the date of its actual decision, a later amendment to the *Code* reinstated the pre-existing policy and confirmed the importance of the application's filing date.

[55] The Board in *Coastal Shipping Limited*, 2005 CIRB 309 examined its focus on the application's filing date:

[4] The phrase "as of the date of the filing of the application" remains in the amended section 28(*c*) when Bill C-525 comes into force on June 16, 2015.

[31] The final requirement to be satisfied under section 28 is the representative character of the applicant. The Board's general rule is to determine the wishes of employees as of the date of the union's application. The Board explained the rationale for this policy in the CLRB's seminal decision in *Swan River - The Pas Transfer Ltd.* (1974), 4 di 10; [1974] 1 Can LRBR 254; and 74 CLLC 16,105 (CLRB no. 8):

> ... It seems to this Board, therefore, that the Legislator established a clear-cut distinction between the circumstances when at the date of the application the union holds a majority status and the situation where at the same date it does not have majority status.
>
> In the first instance the Board must certify and in the second circumstance the Board must order a vote. In both cases the Board must satisfy itself of the wish of the employees. **In the first instance without a vote; in the second circumstance by a vote. This is the general rule.** The Legislator has left exceptional circumstance to the discretion of the Board and one of them is that even if a union has the majority status at the time of the filing of an application there may be serious reasons for the Board to order a vote in order to make sure that the wish as expressed at the time of the application was regularly, legally and freely arrived at. Upon evidence to the contrary the Board may order a vote.
>
> (pages 20; 266; and 887; emphasis added)

[32] ***The Board departed from its practice of determining employees' wishes at the date of application for a short period after the Federal Court of Appeal issued its decision in CKOY Limited v. Ottawa Newspaper Guild, Local 205, [1977] 2 F.C. 412. In that case, the court concluded that, as a matter of statutory interpretation, the operative date for ascertaining employees' wishes was the date when the Board handed down its decision. Subsequently, Parliament amended the Code negating the effects of this court decision. The June 1, 1978 amendments to the Code implementing what are currently sections 28(c) and 17 now make the date of application the principal focus for determining employees' wishes and give the Board the authority to choose another date at its discretion.*** As a result of these amendments, the Board has returned to its practice of determining employee wishes as of the date of application in accordance with the principles and rationale for the promotion of industrial peace it had enunciated in *Swan River - The Pas Transfer Ltd.*, *supra*. The Board exercises its discretionary power to choose a different date for assessing employee wishes in only the most exceptional circumstances (*Rogers Cablesystems Limited*, [1999] CIRB no. 32; and 2000 CLLC 220-017; and *Canadian National Railway Company* (2004), as yet unreported CIRB decision no. 282).

[33] There are countless Board decisions explaining the statutory preference under the *Code* for **the date of the filing of the application** as principal date for the assessment of employee wishes. Most recently, the Board extensively examined the interpretation and legislative history of section 28(c) in *Atomic Energy of Canada Limited*, [2004] CIRB no. 269; and 115 CLRBR (2d) 210 (see in particular paragraphs 24 to 38, inclusive), where it concluded that:

> [38] The application date remains the principal date for assessing employee wishes whether the union's representative character is measured by membership evidence or by a representation vote in all but exceptional circumstances. Given the legislative preference for the application date and the Board's considerable and time-honoured jurisprudence originating in its 1974 *Swan River - The Pas Transfer Ltd.*, decision, *supra*, parties should expect the

> consistency of this Board practice (see *Rogers Cablesystems Limited*, [1999] CIRB no. 32; and 2000 CLLC 220-017) ...
>
> (page 13)

(bold in original; bold italics added)

[56] The Board commented in *FedEx Ground Package System, Ltd.*, 2010 CIRB 522 (*FedEx 522*) on the importance of evaluating membership support as of the application's filing date. In *FedEx 522*, the Board did not allow a trade union to withdraw one of two certification applications it had filed, the second of which sought to add supplemental membership evidence:

> [28] **The Board has granted trade unions leave to withdraw in situations where the bargaining agent misjudged the size or proper scope of the bargaining unit. In *Greyhound*, *supra*, the raiding union justified its withdrawal request by the fact it had been misled about the status of certain persons. It advised the Board it wanted to solicit support within this group which had not been included in its initial application. The Board granted the withdrawal.**
>
> [29] **In this case, the Teamsters' two certification applications seek to represent the identical bargaining unit. The Teamsters have asked the Board to transfer the membership evidence from the first application and add it to the membership evidence included in its second certification application.**
>
> [30] The Board has decided not to grant leave to withdraw in the specific circumstances of this case.
>
> [31] Section 28(*c*) of the *Code* establishes the importance of the application date for any certification application:
>
> > 28. Where the Board
> >
> > (*a*) has received from a trade union an application for certification as the bargaining agent for a unit,
> >
> > (*b*) has determined the unit that constitutes a unit appropriate for collective bargaining, and
> >
> > (*c*) is satisfied that, **as of the date of the filing of the application or of such other date as the Board considers appropriate**, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent, the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit.
>
> (emphasis added)

> [32] **The Board has placed great emphasis on the date of a certification application. The *Code* was amended in order to adopt explicitly the Board's policy of using the application date when evaluating a trade union's membership support.** If a trade union has over 50% support as of the application date, the Board must certify it. If membership support exceeds 35% but is less than 50%, then the Board must order a representation vote (section 29(2)).
>
> [33] **One of the corollaries arising from the Board's policy about the importance of the application date is that the Board will generally not accept evidence, whether by petition or otherwise, from employees who attempt to withdraw their support for the applicant trade union. Such evidence must be received prior to the application date.**
>
> [34] **In order to avoid a multitude of labour relations problems which could arise following the public filing of a certification application, the Board relies heavily on the application date when it analyzes membership support.**
>
> [35] **In the Board's view, fairness dictates that membership evidence neither be subtracted from, nor added to, after the application date.** The Board can occasionally choose another date to examine membership evidence. No arguments were presented in this case suggesting the Board should use another date to evaluate support.
>
> (emphasis added)

[57] In *FedEx 522*, the parties had an opportunity to comment on the issue of additional membership evidence. The employees' identity and wishes remained confidential. But the legal issue arising from a second certification application seeking to add additional membership evidence was one on which the parties had the right to comment.

[58] The Legislator used similar statutory language in section 17 of the *Code* in favour of the application date, as it did for certification applications (section 28). The *Code*'s clear statutory preference is that the application's filing date determines the relevant evidence of employee wishes.

[59] If the Board believes another date is more appropriate to consider wishes, then it has the discretion to choose one. For example, in a displacement (raid) application involving seasonal employees, the Board chose another appropriate date: *Algoma Central Marine, a Division of Algoma Central Corporation*, 2009 CIRB 469.

[60] The application's filing date determines what evidence of employee wishes the Board may take into account. Once that evidence has been identified, the Board may then conduct its confidential process into that support.

VI. Measuring Employee Support

[61] If an applicant has majority support for its certification application, the Board will almost always certify without a vote. But majority support for a revocation application, as well as for a displacement (raid) application, will almost always lead to a representation vote.

[62] While this difference in policy might initially appear contradictory, an analysis of both the *Code*'s language, and/or the differences between these types of applications, explains any difference. We will examine all three types of applications.

A. Certification Applications

[63] Section 28(*c*) of the *Code* expressly states, *inter alia*, that where the Board is satisfied of majority support, it "shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit".

[64] While the Board always has the discretion to order a representation vote under section 29(1), section 28 contains a clear statutory preference for certification without a vote. That is the essence of a card-based certification regime.

[65] The nature of a certification application similarly explains why the Board does not hold a representation vote if an applicant has demonstrated majority support. In the usual certification application, there is only one entity, the applicant trade union, seeking to represent a bargaining unit.

[66] There is no other competing entity arguing that it too has majority employee support.

[67] This differs from the situation in revocation and displacement (raid) applications. For those applications, there is an incumbent trade union, which previously demonstrated majority support. There is also a competing entity claiming to have majority employee support, be it another trade union or a group of employees asking the Board to remove the incumbent trade union's certification.

B. Revocation Applications

[68] The *Code* at sections 38 and 39 establishes the revocation process. Unlike the *Code*'s wording in section 28 for situations where an applicant demonstrates majority support, section 39(1) explicitly mentions the holding of a representation vote as a method to ascertain employee wishes in a revocation application:

> 39. (1) Where, on receipt of an application for an order made under subsection 38(1) or (3) in respect of a bargaining agent for a bargaining unit, **and after such inquiry by way of a representation vote or otherwise as the Board considers appropriate in the circumstances**, the Board is satisfied that a majority of the employees in the bargaining unit no longer wish to have the bargaining agent represent them, the Board shall, subject to subsection (2), by order.
>
> (emphasis added)

[69] The Board has established two main policies for revocation applications. Firstly, the application will be dismissed if there is evidence of employer interference: *Robinson*, 2003 CIRB 209 (*Robinson 209*).

[70] Secondly, the Board will usually order a representation vote, even if a majority of employees have seemingly supported the revocation application. This reflects the wording of section 39(1).

[71] In Claude H. Foisy et al., *Canada Labour Relations Board Policies and Procedures* (Toronto: Butterworths, 1986) (*Foisy*), the authors, at page 123, described the approach to revocation applications of this Board's predecessor, the Canada Labour Relations Board (CLRB):

> An application made under s. 137 is a means to provide employees with the opportunity to revoke the certificate of their bargaining agent, and its determination rests on the evidence that a majority of the employees in the bargaining unit wishes the bargaining agent to be removed. The wishes of the employees may be ascertained by a representation vote or by other means. **The Board has indicated that, as a rule, it will favour a determination of employee wishes by a representation vote, but where the wishes of the employees are not in doubt, no vote will be ordered. Where the wishes of the employees are rendered doubtful because of employer interference, a previous order calling for a representation vote may be cancelled and the question decided by other means, or the application may simply be dismissed.**
>
> (emphasis added)

[72] The CIRB routinely orders representation votes for revocation applications if no employer interference exists and the application has the support of a majority of employees: *Bourgeois*, 2013 CIRB 695. A vote allows the Board to deal with the competing evidence regarding employee wishes. The incumbent trade union originally received sufficient support in order for the Board to certify it. The revocation application calls into question that majority support.

C. Displacement (Raid) Applications

[73] The Board follows the same representation vote policy when it receives a displacement (raid) application from a competing union. In *Foisy*, *supra*, at pages 103 and 104, the authors described the CLRB's policy:

> **In the case of raids, the raiding union as a rule must, to qualify, show a majority support at the time of application. If the trade union initially has majority support, the Board has stated that, as a matter of policy, it will then order a vote in order to clear the air by giving the employees a choice between the incumbent and the raiding union.** However, if the raiding union can show an overwhelming support and if it appears that the holding of a vote will be a waste of time, the Board will not order a vote. In *Les Moulins Maple Leaf Ltée* the Board did not order a vote where all the employees in the unit had signed membership cards with the raiding union. In numerous unreported cases, the Board has certified a raiding union without a vote where the union had a majority support of approximately 75 percent or more, or where the incumbent union had not filed an opposition to the application.
>
> (emphasis added)

[74] The CLRB in *CJMS Radio Montréal (Québec) Limitée* (1978), 33 di 393; and [1980] 1 Can LRBR 270 (CLRB no. 151) explained this policy:

> **It is therefore clear that the Board has the power to order that a vote be taken at any time. Moreover, where a union that already has a majority at the time of the application for certification attempts to remove another union, the Board has a policy of always ordering a vote that will enable the employees in the bargaining unit to express their wishes.** The exception to this rule arises when a great majority of the employees of the unit that is already certified has resigned from the incumbent union and signed membership cards of the new union (e.g. *Maple Leaf Flour Mill*, 23 di 114 and *Syndicat des employés de production du Québec and Canadian Broadcasting Corporation and Canadian Union of Public Employees*, 19 di 166: [1977] 2 Can LRBR 481).
>
> (page 397; emphasis added)

[75] The CIRB follows the same representation vote policy, as it described in *Consolidated Fastfrate Inc.*, 2005 CIRB 333, overturned on constitutional jurisdiction grounds in *Consolidated Fastfrate Inc.* v. *Western Canada Council of Teamsters and Consolidated Fastfrate Transport Employees' Association*, A-483-05, February 25, 2010 (F.C.A.):

> [39] **The employer is correct in stating that the Board's general policy is that a representation vote will be held where a certification application is in the nature of a raid.** In *Tank Truck Transport Inc.et al.*, [1999] CIRB no. 27, the Board stated, however, that there is an exception to this practice where the raided bargaining agent does not oppose the raid application. Moreover, there is also another exception, that is, where support for the raiding union is so overwhelming that the raided union has little chance of obtaining support were a representation vote held.

(emphasis added)

D. Summary

[76] No real contradiction exists in the Board's practice regarding the holding of representation votes to determine employee wishes.

[77] In certification applications, an applicant will almost always be certified if it demonstrates majority support. That respects the statutory preference in section 28 of the *Code*. The Board analyzes that support as of the application's filing date, unless exceptional circumstances exist.

[78] In revocation and displacement (raid) applications, however, if an applicant appears to have majority support, the Board's policy is to hold a vote. As *Foisy* observed, a vote helps "clear the air" when two competing entities ostensibly claim to represent a majority of employees in the bargaining unit.

[79] Exceptionally, however, if the incumbent trade union does not contest a revocation application, or if the vote would be a foregone conclusion, then the Board may proceed without a vote.

VII. Facts

[80] The facts underlying these two reconsideration applications are straightforward:

- In July 2005, the Board certified the Steelworkers for the bargaining unit in question.
- On the morning of December 18, 2013, Mr. Rooley filed his revocation application.
- Mr. Rooley provided confidential evidence which he alleged demonstrated a majority of bargaining unit members supported his application.
- Later that same day, the Steelworkers and CIBC concluded a new collective agreement. *Rooley 712* concluded that Mr. Rooley's application, filed a few hours earlier, was nonetheless timely (paragraph 20). That conclusion has not been contested.
- The Steelworkers responded to Mr. Rooley's revocation application on January 2, 2014.
- The Steelworkers' response included forms on their letterhead which certain bargaining unit members had signed to support its collective bargaining efforts and to "revoke and deny any support for any attempt to decertify our Union, the United Steelworkers".

- The Steelworkers' signed forms were dated prior to December 18, 2013.
- Four employees who had supported Mr. Rooley's application had also signed the Steelworkers' form.

[81] The original panel in *Rooley 712* concluded that Mr. Rooley did not have majority support for his revocation application:

> [24] The applicant collected support for his revocation application between November 19 and December 17, 2013. As it was known that there are 51 employees in the bargaining unit, the applicant believed that he had majority support and filed the application on December 18, 2013. However, unknown to the applicant, between December 2 and 10, 2013, a number of employees signed forms revoking their support for any attempt to decertify the union and reaffirming their desire to continue to be represented by the USW. As a result of these withdrawals of support for the revocation application, the applicant did not in fact have majority support at the time he filed the revocation application on December 18, 2013.
>
> …
>
> [31] Accordingly, taking into account the wishes of the employees who had changed their minds prior to the date on which the revocation application was filed, the Board finds that the applicant did not have majority support as of that date. Accordingly, the presumption that the union continues to have majority support among the members of the bargaining unit has not been displaced.

[82] Mr. Rooley had argued that any employees who changed their support for his revocation application had an obligation to inform him. The original panel rejected this argument:

> [28] An employee who wishes to withdraw his support for a union certification application must inform the union of this change of heart before the application for certification is filed for that wish to prevail. Receiving notification of a change in the employee's support ensures that the union does not file a certification application with less than majority support. As the consequence of an unsuccessful application for certification is the automatic imposition of a six-month time bar for a second application (see section 38 of the *Regulations*), it is critical that an applicant for certification know whether or not it has sufficient support at the time it makes the application. Advance notice that an employee has resiled from union membership provides the union with time to continue seeking support from other employees and/or to make a considered decision as to whether it has sufficient support to file an application at all.
>
> [29] The circumstances with respect to revocation applications are somewhat different. In such cases, there is no obligation on the employee to make a payment to the applicant as evidence of support, as is the case in certification applications. This absence of a financial stake in the outcome of the application can result in peer pressure to sign a revocation application, and makes it more likely that employees will have a change of heart once all of the facts become known to them, as was the case here. In view of the regulatory requirement for confidentiality and the potential for undue pressure, the Board finds that there is no obligation on the part of employees to notify the applicant that they no longer support a revocation application. Imposing such a requirement would deny the employees in question the benefit of the policy behind section 35 of the *Regulations*.

[83] Due to the original panel's conclusion that Mr. Rooley did not have majority support, *Rooley 712* did not deal with other issues raised in the original pleadings alleging: i) CIBC interference; ii) Mr. Rooley and a fellow employee's eligibility to vote and; iii) the status of a bargaining unit employee on a temporary management assignment (paragraphs 34 and 35).

VIII. Issues

[84] The following issues require resolution:

A. Did the original panel commit an error of law or policy when it accepted the Steelworkers' signed forms, despite their being filed 15 days after the application's filing date?
B. Did the original panel commit an error of law or policy when it concluded that employees had no obligation to inform Mr. Rooley of their change in support for his revocation application?
C. Did *Rooley 712* give rise to a reasonable apprehension of bias?

IX. Analysis and Decision

A. Did the original panel commit an error of law or policy when it accepted the Steelworkers' signed forms, despite their being filed 15 days after the application's filing date?

[85] The Steelworkers at page 8 of their response argued that the original panel correctly applied the *Code* and this Board's policy involving the application's filing date:

> 35. The Union submits that, in accepting the Union's evidence of employees' wishes – made and expressed before the filing date of the revocation application, but filed with the Board only after the date of filing of the revocation application – the Board in the Decision reasonably determined that a majority of employees did not support the revocation application as of the date of filing of the application.
>
> 36. In the instant matter, the Union submitted to the Board expressions of employees' wishes which were made prior to the filling of the revocation application. This is not a case where the Board is being asked to consider the effect of expressions of employees' wishes that were made after the filing of a revocation application. **In the instant matter, the expressions of employees' wishes made prior to the filing of the revocation application can be used to assess employees' wishes as of the date of the filing of the revocation application.** The Union submits that the language of section 17 bears this interpretation and that the Board reasonably adopted this interpretation.
>
> (emphasis added)

[86] The Steelworkers' argument suggests that for certification, revocation and displacement (raid) applications, the Board should accept evidence of employee wishes filed after the application date, as long as the signing occurred prior to that filing date.

[87] We disagree and have concluded that the original panel's use of, and reliance on, evidence of employee wishes which the Steelworkers filed after the application's filing date constituted an error of law and policy.

1. The Moberg case

[88] In *Moberg,* 2008 CIRB LD 2014 (*Moberg 2014*), a case to which all parties referred, Vice-Chair Sims faced a similar, though not identical, issue on a revocation application. In *Moberg 2014*, four employees changed their support for a revocation application. Two of them personally notified the Board prior to the date the application was filed.

[89] The other two employees, however, while signing their revocation of support letters prior to the application date, did not file their letters with the Board until after the application date:

> The Board's investigation officer examined the number of employees within the unit at the date of the application. A majority of these employees signed authorizations in support of Mr. Moberg's application. However, two of these employees wrote to the Board to revoke their authorization and support prior to the date the application was filed (revocation of support letters). An additional two employees signed revocation of support letters prior to the date the application was filed, but did not file those letters with the Board until after that application was filed.
>
> (page 2)

[90] Vice-Chair Sims described the precise issue before him:

> **The question the Board must decide is, when an employee signs a document in support of such an application, if, when, and how the employee may revoke that support. In this case, the support of four employees is important. None of the four apparently advised Mr. Moberg that they had signed letters revoking their support**. **All four signed their revocation of support letters before Mr. Moberg filed his application with the Board.** Two of the employees notified the Board that their support was revoked before Mr. Moberg filed his application and two of them notified the Board of that fact after the revocation.
>
> (page 3; emphasis added)

[91] Vice-Chair Sims indicated that support for a revocation application was not irrevocable and contrasted the process leading to membership in a trade union with the expression of support for a revocation application:

> Nothing in the *Code* makes an employee's decision to sign an expression of support for a revocation application and to grant the applicant petitioner the right to represent them in such proceedings irrevocable. **Indeed, there are strong policy reasons why such status should remain within the employee's discretion and control. Unlike applications for membership in a trade union, there is no payment to emphasize the importance of the act and no contractual aspect to the representational or agency right granted.** There is always the potential that such matters might be signed as a result of perceived pressure.
>
> (page 4; emphasis added)

[92] We will comment further, *infra*, on this suggestion of a distinction in the area of employee wishes between certification and revocation applications.

[93] Ultimately, Vice-Chair Sims was not obliged to decide how to treat an employee's revocation of support which was signed prior to the application date, but only filed afterwards:

> In the case at hand, the Board finds no reason to depart from the date of application. The applicant, while claiming majority support, in fact lacked that support. If one excludes only the two who filed their revocation of support letters with the Board prior to the date of filing, the applicant had 50% support, which is not a majority. If one excludes those actually revoked by that date, there is obviously less than 50%. Either way the applicant lacks the necessary threshold level of support on the date the Board finds appropriate to test that support. **The Board leaves for another day, whether signed but unfiled revocations undermine majority support.**
>
> (page 5; emphasis added)

[94] The question of "signed but unfiled revocations" which the facts in *Moberg 2014* allowed Vice-Chair Sims to leave "for another day" must be analyzed and answered in the instant case.

2. The evidentiary gate closes on the application's filing date

[95] Both sections 17 and 28 make it clear that the Board's analysis of majority support takes place as of the application's filing date. The *Code*'s language does not focus on when that evidence was signed. Reliance on evidence received after the application date constitutes an error of law and policy.

[96] For ease of reference, section 17 reads:

> 17. Where the Board is required, in connection with any application made under this Part, to determine the wishes of the majority of the employees in a unit, **it shall determine those wishes as of the date of the filing of the application** or as of such other date as the Board considers appropriate.
>
> (emphasis added)

[97] In *Conseil des Innus de Pessamit*, 2010 CIRB 524, the Board described its use of the application date and noted the importance of what it actually had in its possession as of that date:

> [12] **In this case, the application for certification was filed on October 21, 2008, and the Board considered only the evidence of employee wishes that was on record as of that date. Just as the Board does not consider additional membership evidence filed by a union after the date of its application, it does not take into account resignations after this date.** To do otherwise would open the door to undue pressure on employees to join or retract their membership, resulting in a multiplicity of unfair labour practice complaints and ultimately making it impossible for the Board to determine the true wishes of the employees.
>
> (emphasis added)

[98] While the *Code* does provide the Board with discretion to choose another appropriate date, the exercise of that power is not in issue in these applications. The original panel acted expressly on the basis of the application's filing date.

[99] The *Code* directs the Board to focus on the evidence in its possession as of the application's filing date. As the Board's earlier jurisprudential review noted, wishes provided after the filing date are routinely excluded. In this case, the Steelworkers' evidence only arrived after Mr. Rooley had filed his revocation application.

3. A focus on the signing date, rather than the filing date, similarly constitutes an error of law and policy

[100] The use of the filing date makes evidence more reliable; any document received prior to the filing date must also have been signed prior to that date.

[101] A focus on the signing date, rather than the *Code*'s filing date, would establish a new policy for this Board. It could also lead to significant practical challenges.

[102] For example, while signatures can be readily compared, it is significantly more difficult to determine whether a document was actually signed on the date indicated. Therefore, if the Board in applications involving employee wishes routinely started considering evidence filed after the filing date, but allegedly dated before the filing date, then significant mischief might take place.

[103] The Board's decades long policy of using the filing date avoids any such issues. And it reflects the clear wording of the *Code*.

B. Did the original panel commit an error of law or policy when it concluded that employees had no obligation to inform Mr. Rooley of their change in support for his revocation application?

[104] We agree with the original panel's conclusion that employees did not have an obligation to inform Mr. Rooley of their change of support, but for these specific reasons only.

1. Employee wishes are confidential

[105] As explained earlier, the *Code* allows the Board to adopt regulations protecting the confidentiality of employee wishes. This protection is fundamental to ensuring that employees exercise their basic freedoms freely under the *Code*.

[106] As noted earlier, section 35 of the *Regulations* protects this confidentiality in various Board proceedings; it is explicitly not limited to certification matters.

2. Revocation applications

[107] In *Bowman, Rowberry, Schmeltz*, 2007 CIRB 380 (*Bowman 380*), the Board confirmed that the same confidentiality protection applies for both certification and revocation applications. The Board expressed its concern in *Bowman 380* that the applicant had repeatedly divulged the names of those employees who supported the revocation application. The Board noted that employees have the right to "express their wishes with impunity from interference or influence":

> [61] One final irregularity worth noting is the confidentiality of the petitioners' names. In matters concerning employee wishes, the Board is ever mindful of the need to ensure confidentiality with respect to union membership. To this end, membership evidence is not given to the employer except in very rare circumstances (see *Maritime-Ontario Freight Lines Ltd.* v. *Teamsters Union, Local 938* (2001), 278 N.R. 142 (F.C.A.)). Section 35 of the *Regulations* confirms that:
>
> [citation omitted]

> [62] **The rationale behind the approach is to prevent unfair practices on the part of an employer and, in the case of a revocation application, to ensure that the employees are able to express their wishes with impunity from interference or influence.** Moreover, evidence of reduced or minimal support for the bargaining agent could have a bearing on collective bargaining (see *K.D. Marine Transport Ltd.* (1982), 51 di 130; and 83 CLLC 16,009 (CLRB no. 400)).
>
> [63] Unfortunately, the Board's confidentiality requirements were not respected on at least two occasions. **As noted in the investigating officer's confidentiality report to the Board, at the time of filing, counsel for the applicant sent a complete copy of the revocation application to both the employer and the union. As indicated in the report, the officer contacted counsel and made him aware of the Board's confidentiality requirements. The confidentiality of the employees' wishes was violated a second time when, in response to the Board's inquiries about the employment status of certain employees as of the date of the application, counsel for the applicant copied the union and employer in his letter of December 5, 2006, which contained the names of the employees in question.**
>
> [64] The Board cannot, in light of what has transpired, undo what has been done, but it does remind the parties that such occurrences may make it difficult for the Board to monitor and enforce the parties' respective rights and obligations in subsequent matters in which confidentiality of union membership or employee wishes may be a factor that requires the Board's consideration.
>
> (emphasis added)

[108] Employees may write to the Board with regard to their wishes, as long as their letters arrive before the application's filing date. In *Moberg 2014*, the applicant failed to demonstrate majority support, directly as a result of two employees' personal letters to the Board.

[109] If the Board insisted that employees advise an applicant of a change in their support, what possible benefit would remain for them in section 35 of the *Regulations*? The Board's direction would force employees to give up the very confidentiality which section 35 is designed to protect. More likely, any such policy would restrict employees' free exercise of their fundamental *Code* freedoms.

[110] Employees do not lose their entitlement to confidentiality merely because they initially agreed to support an applicant's revocation application, but then experienced a change of heart.

3. Certification applications

[111] Mr. Rooley took issue with the suggestion in paragraphs 28 and 29 in *Rooley 712* that an employee has an obligation to inform a trade union of a change in support for a certification application, but did not have a comparable obligation for a revocation application.

[112] Mr. Rooley seemly assumed that a clear distinction exists at the Board in the treatment of employee wishes between certification and revocation cases. We are not aware of any certification case which has analyzed this issue, though the obiter comments in *Moberg 2014* may have given rise to Mr. Rooley's argument.

[113] *Rooley 712* was a revocation case dealing with change of heart evidence. The Board does not have to decide whether different obligations might exist for change of heart evidence in a certification application. The Board will leave that issue for a full analysis in an appropriate certification case.

[114] *Moberg 2014* made a quick reference to membership in a trade union and noted the fact that a payment took place and created a contractual relationship. But there was no discussion of whether these distinctions should cause the Board to carve out an exception to the underlying confidentiality policy explicit in section 35 of the *Regulations*. It was not necessary to decide that issue in a revocation case like *Moberg 2014*.

[115] Mr. Rooley originally referenced the Board's decision in *Canadian National Railway Company*, 2004 CIRB 282 (*CN 282*) as authority for imposing an obligation on an employee to notify an applicant of a change of heart in a certification matter:

> [12] The principal reason for this policy is to avoid giving the employer the opportunity to interfere with employees' freedom to select a bargaining agent. The application date as the standard allows for some finality in all but the most unusual circumstances, and therefore sets down the policy for considering revocations of membership. In *Provincial Bank of Canada, Roberval* (1978), 34 di 633 (CLRB no. 171), the Board held that the wishes of employees, including resignations, are assessed as of the date of application for certification.
>
> [13] Neither union has argued that **this policy** should not apply to the circumstances of this case. **Accordingly**, **where employees signed membership cards, resignations of membership prior to the date of application that have been communicated to the union have the effect of reducing majority support.** Any revocation after the date of application is of no effect in reducing a union's support. Therefore, membership cards are to be counted on this basis.
>
> (emphasis added)

[116] The reference to "this policy" in paragraph 13 in *CN 282* concerns the importance of an application's filing date. In this regard, *CN 282* referred to an earlier CLRB decision in *Provincial Bank of Canada, Roberval* (1978), 34 di 633 (CLRB no. 171) (*Provincial Bank*).

[117] The decision in *Provincial Bank* did not comment on a requirement for employees to alert an applicant in a certification case of a change in their support. The decision in *Provincial Bank* instead analyzed the importance of the application's filing date.

[118] That was the sole "policy" to which reference is made in paragraph 13 of *CN 282*.

[119] However, *Provincial Bank* did summarize the facts before it. Those facts included a decision by certain employees to write to the applicant trade union, as well as to the Board, withdrawing their support for an already filed certification application. The Board reproduced their letters and decided that such evidence, since it arrived after the application's filing date, would not be considered.

[120] The Board in *Provincial Bank* did not suggest that employees had an obligation to advise the applicant trade union in a certification case of a change in their expressed wishes.

[121] Nonetheless, this concept is not unheard of in the labour relations world.

[122] A few decisions from other jurisdictions have commented on the impact of an employee's change of heart in a certification application. Those comments reflect different legislative regimes, such as those relating to the use of a "terminal date". The comments also reflect a statutory distinction between membership evidence and petition evidence.

[123] When Ontario followed a "terminal date" regime prior to 1995, the Ontario Labour Relations Board (OLRB) distinguished between membership and petition evidence. At that time, following the filing of a certification application, the OLRB established a "terminal date". Prior to the expiry of the terminal date, employees could file a "statement of desire" in opposition to the certification application.

[124] In *Baltimore Air Coil Interamerican Corp.* v. *Group of Employees*, [1982] O.L.R.B. Rep. 1387, the OLRB described why petition evidence alone could not revoke the membership evidence being used to support a certification application. But it might convince the Board to hold a representation vote, rather than issue a certification based solely on the membership cards, as the OLRB was entitled to do at that time:

> 36 We are satisfied, having regard to the initial evidence of membership filed by the applicant, that more than 55% of the employees in the bargaining unit were members of the applicant trade union as of October 23rd, 1980, the date set by the Board pursuant to section 103(2)(*j*) for determining evidence of membership in a trade union. However, even where the Board is satisfied that more than 55% of the employees in the bargaining unit are members of an applicant trade union the Board may direct that a representation vote be

> taken pursuant to section 7(2). It is in the exercise of this discretion that the Board considers "evidence of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union", filed with the Board in compliance with Rule 73 of the Board's Rules of Procedure. **Stated another way, evidence of objection by employees to certification or of signification by employees that they no longer wish to be represented by a trade union is not, having regard to the scheme of the Act, evidence relating to membership in a trade union for the purposes of an application for certification and for this reason a statement of desire, no matter what the actual wording, does not cancel out or revoke membership evidence submitted by an applicant trade union in the form prescribed by section 1 (1)(1) of the *Labour Relations Act.*** See *Caldwell Linen Mills Limited*, [1967] OLRB Rep. March 948 at paragraph 10; *Diebold Company of Canada Limited*, [1976] OLRB Rep. May 237 at paragraph 10; and *Re Royal Canadian Yacht Club and Hotel, Restaurant and Cafeteria Employees' Union, Local 75 et al.* (1981), 129 D.L.R. (3d) 554 at 558. Rather, relevant "overlapping" evidence of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union, filed not later than the terminal date for the application, and where accepted by the Board as a voluntary expression of the wishes of the employee signatories, will generally cast a doubt on the evidence of membership filed by an applicant (to use the words of the explanatory note found in Form 6) such as to cause the Board to exercise its discretion under section 7(2) and direct the taking of a representation vote. **It would be somewhat anomalous if evidence of membership, which must withstand the requirements laid down in the Act together with its related rules and forms, could be "revoked" by a much less formal and essentially unregulated course of conduct which usually follows on the heels of an employee having joined a trade union. By making a representation vote the maximum effect of an opposing petition the legislation both accommodates the resiling nature of petition evidence and recognizes that trade union organizing campaigns often require considerable investment of time and monies. Once an employee has signed a membership application form and submitted to the cautionary test of the payment of $1.00, a trade union is entitled to rely on that commitment for the purposes of an application for certification to the extent that it is assured its application will not be dismissed on the basis of insufficient threshold membership support (i.e. 45 percent) by the mere filing of a "second thoughts" prior to the terminal date. If this was not the approach taken, a trade union would never know when to cease organizing.** It is this relationship between membership and petition evidence which constitutes part of the policy behind permitting this board to direct a representation vote even when the trade union files membership evidence on behalf of more than 55 per cent in the bargaining unit. It is also the reason why the statute distinguishes between an application date and a terminal date.
>
> (emphasis added)

[125] In Alberta, the applicable legislation appears to distinguish between the use of membership evidence and petition evidence in support of a certification application. A mandatory representation vote takes place for any certification application, regardless of the type of evidence used.

[126] In *Waste Services (CA) Inc*., [2009] Alta. L.R.B.R. 486 (*Waste Services*), a case which involved a raid, the Teamsters applied for certification for a bargaining unit already represented by the CAW. The Alberta Labour Relations Board (ALRB) explicitly referred to an employee's

obligation to disclose any change of heart to the applicant, i.e., the Teamsters, even though that action would disclose the employee's confidential wishes.

[127] The ALRB held it was not enough merely to sign a statement of opposition in order to revoke membership in the Teamsters, given its contractual nature.

[128] The ALRB examined the Teamsters' and the CAW's competing arguments about an employee's obligation to divulge a change in his/her support for the Teamsters' raid application:

> 36 There is a decision of this Board supporting the view that a counter-petition will not without more undermine supporting evidence under section 33(*a*). In *Certain Employees of Select Foods Ltd.* v. *United Food and Commercial Workers Union, Local 401*, [1990] Alta. L.R.B.R. 342, the Board considered the effect of a counter-petition to remove previously indicated support for a revocation application. The Board said (at p. 346):
>
> > We agree that the last voluntary statement by an employee before the date of application is the one that should be considered, when examining whether the applicant has the necessary 40% support on the date of application. The Board heard evidence from Mr. Lanneville about the process and the discussion between he and the 8 persons whom he witnessed voluntarily signing the counter-petition. Further, there was no suggestion by anyone that any employee was coerced in any way into signing the letters or the counter petition.
> >
> > We find that, on the date of application for the revocation of the Union's certification, less than the required 40% of employees in the unit were in support of the application. The application for revocation is refused.
> >
> > In making this decision, we were dealing with petitions and counter petitions. We were not dealing with union memberships or applications for membership followed by a petition. **A petition in opposition to a trade union seeking certification does not, of itself, cancel evidence of trade union membership or applicants for membership filed under s. 31(*a*) of the *Code*.**
> >
> > [Emphasis in original]
>
> 37 We agree with these comments. **To be clear, we are not suggesting that an applicant for union membership or a union member can do nothing to indicate their opposition to a union's certification application. They can vote against the applicant union in any representation vote that might be ordered. In addition, an applicant for union membership who does not want a union to use their name as support in a certification application can send the union (and copy the Board with) a statement revoking their application for membership. A member can cancel their membership with the union if they so choose and copy the Board with the relevant documents.** But, the cancellation of membership or revocation of membership application must be done prior to the time the union files its certification application with the Board. **We recognize this would require the disclosure of the individual's lack of continued support to the applicant union. But, the disclosure to the applicant union of an individual's lack of support does not raise the same kinds of policy concerns that might be raised by the disclosure of support or lack of support in other cases.**

> 38 **In the case before us, the CAW filed declarations with the Board purporting to show that certain individuals wanted to revoke or cancel their membership in the Teamsters Union that might be used for a certification application. We view the declarations as statements in opposition to the Teamsters Union's certification application. But, for the reasons set out above, such statements alone do not have the effect of undermining evidence under subsection 33(*a*). There must be a proper revocation of the applications for membership prior to the time the certification application is filed with the Board. Here, there was no proper revocation at the relevant time. The revocations were not communicated to the Teamsters Union prior to the time the certification application was filed with the Board.** We do not accept the CAW's argument that the contractual approach advanced by the Teamsters Union is too technical an approach to the revocation of applications for union membership. In our view, that approach flows from the Supreme Court of Canada's decision in *Berry* v. *Pulley*, *supra*. Consequently, we will not take into account the declarations filed by the CAW.
>
> (emphasis added)

[129] The ALRB drew a distinction between membership evidence in a certification application, including that involved in a raid, as compared with employee wishes in a revocation application. In *Waste Services*, the ALRB noted that employees who changed their minds could simply vote against the Teamsters in a later mandatory representation vote, rather than publicly disclose their change of heart.

[130] But if they wanted to withdraw their membership, which the Teamsters used to support their raid application, then they would have to inform the Teamsters, even if this meant disclosing a change in their wishes.

[131] This Board has yet to address employees' obligations if they have a change of heart for their support of a certification application. That is an issue best left for an appropriate case. But even if the Board had had such a policy or practice as Mr. Rooley suggested, it certainly would not constitute a novel labour relations concept.

[132] This Board may one day have to decide, under the wording at the time of the *Code* and the Board's *Regulations*, whether an exception exists in certification cases to the policy underlying section 35 of the *Regulations*. But that issue did not have to be decided in order to decide Mr. Rooley's revocation application.

[133] *Rooley 712* concluded that employees did not have to inform Mr. Rooley of a change of heart. Any such requirement would undermine the policy of confidentiality in section 35 of the *Regulations*. The Board is satisfied this conclusion in *Rooley 712* did not constitute an error of law, for the specific reasons given herein.

C. Did *Rooley 712* give rise to a reasonable apprehension of bias?

[134] The Supreme Court of Canada described the test for a reasonable apprehension of bias in R. v. S. (R.D.) [1997] 3 SCR 484:

> 31 The test for reasonable apprehension of bias is that set out by de Grandpré J. in *Committee for Justice and Liberty* v. *National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369. Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades: see, for example, *Valente* v. *The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673; *R.* v. *Lippé*,1990 CanLII 18 (SCC), [1991] 2 S.C.R. 114; *Ruffo* v. *Conseil de la magistrature*,1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267. De Grandpré J. stated, at pp. 394-95:
>
> > ...the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.... **[T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."**
> >
> > The grounds for this apprehension must, however, be substantial and I ... refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".
>
> (emphasis added; page 502)

[135] The Ontario Court of Appeal in *Marchand* v. *The Public General Hospital Society of Chatham*, 2000 CanLII 16946 (ON CA) commented further on some of the applicable principles:

> [131] Before considering this ground of appeal, we will briefly review the principles that apply to a claim of judicial bias. These principles, now well established, have recently been summarized by the Supreme Court of Canada in R. v. S. (R.D.), [1997] 3 S.C.R. 484, 118 C.C.C. (3d) 353. They are as follows:
>
> 1. All adjudicative tribunals owe a duty of fairness to the parties who appear before them. The scope of the duty and the rigour with which the duty is applied vary with the nature of the tribunal. Courts, however, should be held to the highest standards of impartiality.
>
> 2. Impartiality reflects a state of mind in which the judge is disinterested in the outcome and is open to persuasion by the evidence and submissions. In contrast, bias reflects a state of mind that is closed or predisposed to a particular result on material issues.
>
> 3. "Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. If the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer, this will render the trial unfair." (at p. 524 S.C.R.)
>
> …

5. The party alleging bias has the onus of proving it on the balance of probabilities.

6. Prejudgment of the merits, prejudgment of credibility, excessive and one-sided interventions with counsel or in the examination of witnesses and the reasons themselves may show bias. The court must decide whether the relevant considerations taken together give rise to a reasonable apprehension of bias.

7. The threshold for a finding of actual or apprehended bias is high. Courts presume that judges will carry out their oath of office. Thus, to make out an allegation of judicial bias requires cogent evidence. Suspicion is not enough. The threshold is high because a finding of bias calls into question not just the personal integrity of the judge but the integrity of the entire administration of justice.

8. Nonetheless, if the judge's words or conduct give rise to a reasonable apprehension of bias, it colours the entire trial and cannot be cured by the correctness of the subsequent decision. Therefore, on appeal, a finding of actual or apprehended bias will ordinarily result in a new trial.

[136] The instant case does not involve tribunal conduct since the Board exercised its discretion not to hold an oral hearing (*Code*, section 16.1). Mr. Rooley's allegations rely on the Board's reasons themselves as support for a finding of a reasonable apprehension of bias.

[137] Mr. Rooley's application described why he felt *Rooley 712* gave rise to a reasonable apprehension of bias:

The excerpt from paragraph 29 of the Decision below suggests that an employee's decision to support revocation would likely to be the result of pressure, and that knowledge of the "facts" would lead the employee to withdraw support.

> This absence of a financial stake in the outcome of the application can result in peer pressure to sign a revocation application, and makes it more likely that employees will have a change of heart once all of the facts become known to them, as was the case here.

Those statements in the Decision denote a preference for union representation, by suggesting that employees would continue to support a union instead of supporting revocation if they knew "all of the facts". The "facts" are not articulated in the Decision, but obvious interpretation of the passage is that it is objectively preferable for employees to be represented by a bargaining agent instead of supporting a revocation application. This wording in the decision and its context indicate an interest in the outcome, resulting in a reasonable apprehension of bias.

(page 26)

The choice by employees whether or not to be represented by a union is a fundamental principle of the *Code*. Where the Board appears to have an interest in that choice, there is a substantial and reasonable ground for the apprehension.

In the circumstances, it would be appropriate for the Panel issuing the decision to recuse itself, and that another panel of the Board decide on the reconsideration application.

(page 27)

[138] Given the conclusion, *supra*, that the Board should not have accepted the Steelworkers' evidence regarding wishes, the issue of bias may initially appear academic. However, since the original file contains issues which the original panel still needs to address, it is necessary to address Mr. Rooley's concerns that *Rooley 712* gives rise to a reasonable apprehension of bias.

[139] Mr. Rooley initially argued paragraphs 28 and 29 in *Rooley 712* gave rise to a reasonable apprehension of bias. He later commented in his reply that the "overall context" of the decision demonstrated that the original panel would not decide the matter fairly.

[140] We will deal with these arguments in reverse order.

1. Does the "overall context" of *Rooley 712* give rise to an appearance of bias?

[141] Errors in law or policy may occasionally occur at the Board. The reconsideration process has existed for decades as an exceptional safeguard against such occurrences.

[142] Errors, particularly in novel or previously unexamined areas, differ from bias.

[143] *Rooley 712* erred when it considered the Steelworkers' contested evidence. *Rooley 712* did not analyze, despite its clear significance, the novel legal issue of wishes signed before the application's filing date, but only sent to the Board 15 days after that date.

[144] The reconsideration panel further decided, *supra*, that *Rooley 712* concluded correctly that employees did not need to advise Mr. Rooley if they changed their support. Employees may write to the Board about a change of heart. The Board will treat this evidence in confidence, in accordance with the policy underlying section 35 of the *Regulations*.

[145] Mr. Rooley has not persuaded us that the "overall context" in *Rooley 712* would convince a realistic, practical and informed person, which we take to mean someone who has a good knowledge of labour relations, that the original panel would not decide his case fairly.

2. Paragraph 28 in *Rooley 712*

[146] Mr. Rooley took specific exception to paragraphs 28 and 29 in *Rooley 712*. Paragraph 28 reads:

> [28] An employee who wishes to withdraw his support for a union certification application must inform the union of this change of heart before the application for certification is filed for

> that wish to prevail. Receiving notification of a change in the employee's support ensures that the union does not file a certification application with less than majority support. As the consequence of an unsuccessful application for certification is the automatic imposition of a six-month time bar for a second application (see section 38 of the *Regulations*), it is critical that an applicant for certification know whether or not it has sufficient support at the time it makes the application. Advance notice that an employee has resiled from union membership provides the union with time to continue seeking support from other employees and/or to make a considered decision as to whether it has sufficient support to file an application at all.

[147] Mr. Rooley had argued *inter alia* that employees who had originally supported his revocation application had an obligation to advise him of any change of heart. That argument was premised, in part, on a presumed similar obligation for certification applications at this Board.

[148] As noted earlier, the ALRB, within the context of its own labour law regime, has commented on changes of heart after an employee has completed a trade union's membership process. The suggestion that a change of heart might be treated differently in a certification case is not unheard of, though this Board has never analyzed it in depth.

[149] A panel may refer in *obiter* to the possibility that different considerations for change of heart evidence may apply in a certification application, especially since Mr. Rooley's pleading raised that presumed distinction. But the only relevant issue in *Rooley 712* was whether employees had an obligation to inform Mr. Rooley of a change of heart for his revocation application. We fail to see how a conclusion that they had no such obligation, from the perspective of someone familiar with labour relations, could give rise to a reasonable apprehension of bias.

3. Paragraph 29 in *Rooley 712*

[150] Paragraph 29 reads:

> [29] The circumstances with respect to revocation applications are somewhat different. In such cases, there is no obligation on the employee to make a payment to the applicant as evidence of support, as is the case in certification applications. This absence of a financial stake in the outcome of the application can result in peer pressure to sign a revocation application, and makes it more likely that employees will have a change of heart once all of the facts become known to them, as was the case here. In view of the regulatory requirement for confidentiality and the potential for undue pressure, the Board finds that there is no obligation on the part of employees to notify the applicant that they no longer support a revocation application. Imposing such a requirement would deny the employees in question the benefit of the policy behind section 35 of the *Regulations*.

[151] *Rooley 712* identified the concern, as has this decision, that obliging an employee to disclose his/her change of heart to the applicant in a revocation application would render the

later confidentiality protection in section 35 of the *Regulations* essentially illusory. With respect, we fail to see how a reference to the policy underlying section 35 may give rise to an apprehension of bias.

[152] *Rooley 712* also referenced the payment of $5.00 in a certification case. Some certification cases have highlighted the importance of the $5.00 payment which the Board's *Regulations* require, an amount which has remained unchanged since the 1970s. The Board has not adopted any similar payment requirement for revocation applications, presumably given that a representation vote is usually held.

[153] The comments in paragraph 29 in *Rooley 712* address that presumed difference in the treatment of employee wishes between certification and revocation applications, a situation addressed earlier in these reasons.

[154] Mr. Rooley took particular exception to this sentence from paragraph 29 in *Rooley 712*: "This absence of a financial stake in the outcome of the application can result in peer pressure to sign a revocation application, and makes it more likely that employees will have a change of heart once all the facts become known to them, as was the case here".

[155] The comments about peer pressure and a change of heart reflect the types of concerns the Board has in any revocation case. The Board must be satisfied that employees have exercised their rights freely under the *Code*. The Board will dismiss any revocation application if it finds evidence of employer interference, as explained earlier.

[156] A change of heart can occur after someone is asked to sign a document. Whether an employee has a change of heart is personal to him or her; there is no presumption that any such change will occur. An employee who wants to change his/her support may do so by writing personally and confidentially to the Board, as long as that notification arrives prior to the revocation application's filing date. The Board's confidential process will then examine that submission.

[157] Mr. Rooley may believe the Board is wrong in coming to this conclusion about an employee's obligations following a change of heart. But his argument has not convinced the reconsideration panel that a labour board which arrives at that conclusion would cause an informed person in the labour relations area to conclude that a reasonable apprehension of bias therefore existed.

[158] CIBC had argued in its application that the Board violated natural justice by failing to analyze the Steelworkers' evidence of employee wishes. Given the legal analysis in this decision, including the Board's finding that *Rooley 712* ought not to have considered the Steelworkers' evidence, the Board does not need to address this argument any further.

X. Remedy

[159] The Board has found that *Rooley 712* contained errors of law and policy which met the high threshold requiring a reconsideration panel to intervene. The Board must therefore consider the appropriate remedy.

[160] When Mr. Rooley filed his application on December 18, 2013, he may have had majority support. Unresolved issues remained in the original file. It is not the role of a reconsideration panel to start deciding outstanding issues from the original case.

[161] *Rooley 712* erred when it considered evidence of employee wishes which accompanied the Steelworkers' January 2, 2014 response. The fact the forms were signed by certain bargaining unit members prior to the application's filing date did not cause this evidence to exist in the Board's record as of the December 18, 2013 cut-off date.

[162] This well-known Board requirement for the filing of employee wishes has existed for decades.

[163] Employees themselves can file with the Board a personal and confidential letter about their change of support for a revocation application: *Moberg 2014*. The Board has always allowed employees to do this in their personal capacity and with the assurance of confidentiality. Whether there is any distinction to be made if a trade union files this evidence can be examined in an appropriate case.

[164] A revocation applicant like Mr. Rooley has to be aware of the possibility of a change in support and strategize accordingly. The Board does not need to decide in this case whether different considerations might apply for change of heart evidence in a certification matter.

[165] Mr. Rooley did not persuade the Board that *Rooley 712* gave rise to an apprehension of bias. While errors occurred, particularly on a novel legal issue, there is a fundamental difference between errors and bias.

[166] The original panel expressly did not decide certain issues before it, since its findings on majority support had seemingly rendered them moot. The appropriate remedy therefore is to return this matter to the original panel for adjudication of Mr. Rooley's application, in accordance with the reasoning in this decision.

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

_____
Graham J. Clarke
Vice-Chairperson

_____
Judith MacPherson, Q.C.
Vice-Chairperson

_____
Patric F. Whyte
Vice-Chairperson