Federal Court  Cour fédérale

Date: 20120808

Docket: T-831-12

Citation: 2012 FC 975

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, August 8, 2012

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

CANADIAN UNION OF POSTAL WORKERS

Appellant

and

CANADA POST CORPORATION

and

THE ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Canadian Union of Postal Workers (Union) has filed an application for judicial review of the decisions of the arbitrator for final offer selection, Guy Dufort, rendered April 17 and 30, 2012, not to recuse himself on the grounds of reasonable apprehension of bias.

I. STATEMENT OF FACTS

[2] On June 26, 2011, Parliament adopted the *Restoring Mail Delivery for Canadians Act*, S.C. 2011, c 17 (Special Act) because of the labour dispute between Canada Post Corporation (Canada Post) and the Union. In addition to ordering the resumption of postal services, this law extends the collective agreement until a new collective agreement comes into effect.

[3] It also calls for the appointment of an arbitrator who will choose between the final offers put forth by Canada Post and the Union; the selected final offer will be the collective agreement until December 31, 2015. The arbitrator's decision will be protected by a full privative clause.

[4] On July 22, 2011, the Honourable Lisa Raitt, Minister of Labour (the Minister) appointed the Honourable Coulter A. Osborne as arbitrator. The Union asked the Federal Court to cancel this appointment, as Arbitrator Osborne was not bilingual and had no experience in the field of labour relations. On October 20, 2011, the Union was granted a stay until the Federal Court was able to rule on the application for judicial review. On November 1, 2011, Arbitrator Osborne resigned.

[5] On January 24, 2012, the Federal Court granted the application for judicial review and cancelled Mr. Osborne's appointment as arbitrator. The Court ordered the Minister to "ensure that

the person selected have a certain degree of recognized labour relations experience and be bilingual."

[6] In November 2011, a representative from Human Resources and Skills Development Canada (HRSDC) asked both parties to submit a list of candidates in order to appoint a new arbitrator. The Union consulted with its legal advisors, including Mr. Nadeau, who recommended several people, including Guy Dufort. This list was approved by the Union's National Executive Board and was sent to HRSDC on November 18, 2011. Nevertheless, it seems Mr. Nadeau did not inform the Union that Mr. Dufort had represented Canada Post for several years and that he had been an influential member of the Conservative Party of Canada (Conservative Party). There is no evidence before the Court that Mr. Nadeau was aware of this information.

[7] On March 13, 2012, the Minister appointed Mr. Dufort as the new arbitrator. The next day, Arbitrator Dufort contacted both parties in order to set a date for a pre-hearing conference. On that same day, Arbitrator Dufort also sent his curriculum vitae to both parties and pointed out that he had been counsel for Canada Post in the pay equity dispute, and that he had also been active in the Conservative Party. Arbitrator Dufort asked the parties to contact him if this information was problematic.

[8] In 1992, an important pay equity dispute (pay equity dispute) between the Public Service Alliance of Canada (PSAC) and Canada Post was brought before the Canadian Human Rights Tribunal (Tribunal). The matter was brought before the Federal Court and the Federal Court of Appeal, and was concluded in November 2011 when the Supreme Court of Canada allowed PSAC's appeal.

[9] Arbitrator Dufort was a partner with the law firm Heenan Blaikie until 2009. This firm had represented Canada Post in the pay equity dispute, and Arbitrator Dufort was a member of the team of lawyers that represented Canada Post before the Tribunal from 1998 to 2003

[10] As for his political activities, Arbitrator Dufort was president of the Quebec wing of the Progressive Conservative Party from 1994 to 1999, as well as during the extraordinary meeting of the Progressive Conservative Party that led to the formation of the Conservative Party of Canada in 2003. He was also a three-time candidate for the Conservative Party and a member of the National Policy Committee from 2006 to 2010. The arbitrator said that he ceased all political activities in January 2010.

[11] On March 15, 2012, Union counsel sent an email requesting that Arbitrator Dufort recuse himself. On March 27, 2012, Arbitrator Dufort held a hearing to discuss the Union's request for his recusal. On April 17, 2012, Arbitrator Dufort rendered his decision and refused to recuse himself.

[12] A pre-hearing conference was held on April 30, 2012, at which the appellant's counsel again requested that the arbitrator recuse himself in light of new information. The first piece of information was a Facebook page in the arbitrator's name, in which the "activities and interests" category included links to the Westmount Ville-Marie Conservative Association and the page for Michelle Rempel, Conservative Member of Parliament for Calgary Centre-North. The page also contained a list of "friends", including Minister Raitt, who was responsible for appointing the

arbitrator, as well as Minister Steven Fletcher, the minister responsible for Canada Post. In May 2012, Arbitrator Dufort removed these links from his Facebook page.

[13] During this conference, the Union also presented Canada Post's financial report for the third quarter of 2011, which indicates that the decline seen in the third quarter of 2011 is mainly attributable to the pay equity decision.

[14] On May 11, 2012, Justice Lemieux of the Federal Court ordered the arbitration to be suspended until a ruling was made on this application for judicial review.

II. DECISIONS OF ARBITRATOR DUFORT

[15] In his written decision, the arbitrator set out his interpretation of the principles applicable with respect to recusal, relying on *Wewaykum Indian Band v Canada*, 2003 SCC 45, [2003] 2 SCR 259 (*Wewaykum*). *Inter alia*, he indicated that the burden of proving a reasonable apprehension of bias fell on the appellant.

[16] Arbitrator Dufort examined the two grounds invoked in support of the request for recusal. First, the arbitrator examined the issue of his role in the pay equity case. He maintained that a period of nine years had elapsed since this mandate ended, which is [TRANSLATION] "a significant period of time." As the Supreme Court of Canada stated in *Wewaykum*, the lapse of time is a material factor to consider in this type of application; the more time that has elapsed, the more difficult it is to argue a reasonable

apprehension of bias. Given the substantial period of time, he did not believe it would raise an apprehension of bias in a reasonable person.

[17] The arbitrator also maintained that this dispute differs in nature from the pay equity case and does not involve either the same facts or parties. Moreover, the issue of pay equity is not the subject of bargaining in this dispute. He therefore concluded that there was no reason for recusal on these grounds.

[18] The arbitrator also rejected the second reason that there is a reasonable apprehension of bias due to his political involvement with the Conservative Party. The vague suspicions regarding his participation in developing policy on the right to strike were solely speculation. Moreover, his involvement should not be considered, as he had ceased all political activity as of January 2010 and had made no public statement regarding the Special Act. Lastly, he believes that there is insufficient serious evidence of his political involvement and its impacts on this arbitration to raise an apprehension of bias.

III. QUESTIONS

[19] This application raises two issues in dispute:

(1) What standard of judicial review is applicable?

(2) Did the arbitrator err in dismissing the appellant's requests for recusal?

IV. STANDARD OF REVIEW

[20] In accordance with established case law, the Court agrees that the reasonable apprehension of bias raises a question of procedural fairness, and that the standard of review is therefore

correctness. According to the Federal Court of Appeal: "[w]hether a tribunal's decision was made in breach of the duty of procedural fairness, including the requirement of impartiality, is determined by a reviewing court on a standard of correctness." (*Kozak v Canada (Minister of Citizenship and Immigration*), 2006 FCA 124, [2006] 4 FCR 377, at paragraph 44). Also see *Gonzales v Canada (Minister of Citizenship and Immigration)*, 2012 FC 231 [2012] FCJ No 261, at paragraph 23).

[21] As the Supreme Court of Canada stated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paragraph 50, "When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct."

V. APPLICABLE PRINCIPLES

[22] The principles that should guide the Court are well known. They have been repeated countless times and can be summarized as follows:

- Our judicial system is based on the presumed impartiality of judges, an essential component that is "the core attribute of the judiciary." Impartiality is the idea that a judge must "approach the case to be adjudicated with an open mind" (*Wewaykum*, at paragraphs 58-59; *R v S(RD)*, [1997] 3 SCR 484, at paragraph 93 (*R v S(RD)*)).
- When a party alleges an apprehension of bias, these allegations must not be taken lightly, and must be based on substantial grounds, as they raise doubts about the

fundamental idea of judicial impartiality in our judicial system (*R v S(RD)*, at paragraph 113).

- The party alleging apprehension of bias therefore has the responsibility of rebutting this strong presumption and demonstrating that there exists sufficient justification for the judge to be disqualified (*Wewaykum*, at paragraph 59).
- Arbitrators are also presumed to be impartial (*West Region Child and Family Services Inc v North*, 2008 FC 85, [2008], FCJ No 99, at paragraph 14).
- Note that an actual bias is quite different from a reasonable apprehension of bias. The second concept is more concerned with the image of justice. The objective is not to determine if a judge is impartial, but rather if a reasonable person would perceive the judge as impartial. This is because "public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so." (*Wewaykum*, at paragraph 57, see also *R v S(RD)*, at paragraph 92).
- Reasonable apprehension of bias exists when there are reasons to believe that the decision maker would be predisposed "towards one side or another or a particular result." (*Wewaykum* at paragraph 58). The criteria to apply were set out in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 (*Committee for Justice and Liberty*), and were repeated in *Wewaykum*, at paragraph 60: "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?"

- A reasonable person need not have a "very sensitive or scrupulous conscience." (*Wewaykum*, at paragraph 76).
- This analysis depends on the context and facts of each case and there is no textbook formula or preconceived test that can be applied (*Wewaykum*, at paragraph 77; *R v S(RD)*, at paragraph 136).
- In many cases, judges may have recused themselves when it was, "strictly speaking, not legally necessary to do so," in order to respect the standard of reasonable apprehension of bias (*Wewaykum*, at paragraph 78).

[23] In short, the question the Court must answer is this: Would a reasonable, right-minded and informed person believe that Arbitrator Dufort, whether consciously or not, could be influenced in an inappropriate manner by his role as counsel for Canada Post or participation within the Conservative Party?

Context of labour relations and final offer selection arbitration

[24] Before discussing the two reasons alleged for recusal, it is important to take note of the context in which these requests were made.

[25] In *Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539 (*Canadian Union of Public Employees*), the Supreme Court of Canada assessed the nature of arbitration in labour relations and noted at paragraph 53:

> A distinction must be drawn between "grievance arbitration", where the arbitrator(s) are required to interpret a collective agreement

> previously arrived at, and "interest arbitration" in which the arbitrator(s) decide upon the terms of the collective agreement itself. The former is adjudicative; the latter is more or less legislative.

[26] And at paragraph 109:

> Labour arbitration as a dispute-resolution mechanism has traditionally and functionally rested on a consensual basis, with the arbitrator chosen by the parties or being acceptable to both parties. The intervener, National Academy of Arbitrators (Canadian Region), contended that…
>
> If arbitrators are, or are perceived to be, a surrogate of either party or of the government, or appointed to serve the interests of either party or the government, the system loses the trust and confidence of the parties, elements essential to industrial relations peace and stability ... A lack of confidence in arbitration would invite labour unrest and the disruption of services, the very problem impartial interest arbitration was designed to prevent. [Emphasis added.]

[27] In the decision on the recusal of the first arbitrator, Mr. Osborne, Justice Martineau repeated the Supreme Court's words, adding: "[t]he general principles outlined above by the Supreme Court of Canada apply with equal force in the case of a final offer arbitration process under the special Act." (*Canadian Union of Postal Workers v Canada Post Corporation*, 2012 FC 110, [2012] FCJ No 199, at paragraph 38 (*Canadian Union of Postal* Workers)).

[28] The context here is rather different from that of *Wewaykum*, as in that matter the decision in question had been decided collectively by the Supreme Court of Canada. In this case, the appointed arbitrator must choose between the positions of Canada Post and the Union, and no compromise can be made between the two. Furthermore, the decision will be protected by a full privative clause, and the offer selected will become the collective agreement until December 31, 2015. It is therefore

essential that this choice be perceived as being made impartially; otherwise, the labour relations climate between the two parties will suffer.

[29] Justice Martineau also discussed the type of arbitration applicable in this case at paragraphs 39 and 40:

> It should be pointed out that, in the context of the traditional interest arbitration process, compromise possibilities are not eliminated and the concept of equity is not completely excluded. However, final offer arbitration leads to one-sided law-making. As a result of the special Act, we are dealing with a judicialized labour dispute where the operation of the usual balance of power no longer guides the final offers that will be presented by both parties. It is the prevailing party, as designated by the final offer arbitrator, that will dictate to the unsuccessful party, for the next three years (and perhaps retroactively) the working conditions of postal workers and the limitations, if any, to the employer's management rights (subsection 11(4) and section 14 of the special Act). Therefore, the weight of responsibility is enormous. This is a high-wire act, probably more political than legal, because this case is concerned with legitimacy, and not legality.
>
> In the end, in the arbitrator's decision, which will immediately become binding, the final offer arbitrator will have to convince the unsuccessful party that the final offer presented by the prevailing party is ultimately more reasonable given the constraints and the criteria dictated to him or her by Parliament, in this case, section 11 of the special Act, political determinism oblige. Thus, it will be easy to turn the final offer arbitrator into a scapegoat. The rhetoric of labour relations will invariably link the prevailing party to its messenger. This can only be detrimental to the company, the workers and the government itself. In this case, if the arbitrator's appointment is deemed problematic for or unacceptable to the unsuccessful party right from the outset, this will completely undermine confidence in this extraordinary process for determining working conditions. Caution is required to avoid the deterioration of the labour relations environment for years to come. [Emphasis added.]

[30] It is therefore clear that the arbitrator had to take this particular context into account when analyzing the allegation of reasonable apprehension of bias, as the Court must now also do.

VI. POSITION OF THE PARTIES

A. The Union's position

[31] The Union's two reasons for Arbitrator Dufort's recusal are his role as counsel for Canada Post during the pay equity dispute and his involvement in the Conservative Party. These two items raise reasonable apprehension of bias in reasonable and right-minded people.

[32] Furthermore, the fact that the arbitrator himself disclosed this information to the parties and asked them to contact him if there was a problem is proof that the arbitrator himself believed that this information could create a reasonable apprehension of bias. A well-informed person knows the following:

Role as counsel for Canada Post

[33] The time that has elapsed since the end of Mr. Dufort's mandate, i.e. 9 years, is much shorter than the 15-year period that had elapsed for Justice Binnie in *Wewaykum*.

[34] Furthermore, this time must be considered in light of the fact that the dispute continued until 2011, reaching the Supreme Court of Canada. During his mandate, the arbitrator worked with Robert Grant, who represented Canada Post in appealing this case until it reached the Supreme Court. As senior partner at Heenan Blaikie until 2009, and residing in Ottawa since 1999, the arbitrator was put in a situation in which a reasonable and right-minded person having thought the

matter through would be justified in believing that he could be directly or indirectly consulted by other partners from the same firm who continued to handle the file until 2011.

[35] For the Union, it is important to consider the passage of time as it relates to the current financial effects of the pay equity dispute. As mentioned in Canada Post's financial report for the third quarter of 2011, one of the main reasons for the financial losses, Canada Post's first losses in 16 years, is the pay equity dispute. It is reasonable to believe that this financial fact could influence the arbitrator in his analysis.

[36] It is also reasonable to believe that, as partner, he profited financially from this case. According to Canada Post's counsel, Arbitrator Dufort also received a limited mandate regarding health and safety from Canada Post in 2003, and possibly other files until 2006.

[37] Arbitrator Dufort's role can be differentiated from Justice Binnie's in terms of the importance and scope of his role in this case. In fact, Mr. Dufort's participation in the Canada Post pay equity dispute is much larger than the "limited administrative and supervisory role" that Justice Binnie played in the case when he was Assistant Deputy Minister of Justice and supervised thousands of cases.

[38] Arbitrator Dufort was one of the key figures in this case, as a member of the counsel team before the Tribunal and as a senior partner in Heenan Blaikie.

[39] A reasonable person would have every reason to believe that the nine years that have elapsed would not have the mitigating effect that the arbitrator attributes to them.

[40] The Union argues that it is incorrect not to see any ties between the pay equity dispute and the current dispute. The pay equity dispute mainly dealt with the filing of expert reports that aimed to establish reparations for discrimination and required the Tribunal to carry out semi-legislative research on the level of pay appropriate for a category of workers. The arbitrator's work is similar, as he will have to, in a semi-legislative manner, establish labour conditions.

[41] Furthermore, in the pay equity dispute, experts had to examine collective agreements and evaluate jobs at Canada Post in terms of pay and other benefits. Finally, equal treatment is also involved in this case, as Canada Post wished to establish different labour conditions for different categories of employees, based on their hiring date.

[42] The fact that the dispute does not involve the same two parties is not decisive, as the appearance of bias does not require the adjudicator to stand before the same two parties. On the contrary, it is enough that the arbitrator has represented Canada Post in a very important dispute and the corporation is now before him for a similar case.

[43] Furthermore, unlike Justice Binnie in *Wewaykum*, the arbitrator acts as sole arbitrator, not as a member of a panel, as was the case with Justice Binnie, and moreover the arbitrator will have to choose between the final offers submitted by Canada Post and the Union. No compromise can be made, and this decision is protected by a full privative clause.

Involvement with the Conservative Party

[44] In the Union's eyes, a well-informed person who is aware of the arbitrator's partisan activities would have a reasonable apprehension of bias.

[45] The two years since he has ceased his partisan activities cannot be considered a reasonable period of time in terms of case law.

[46] Furthermore, until very recently, the arbitrator's Facebook page contained, under the "activities and interests" categories, links to two Conservative associations, and he had Ministers Raitt and Fletcher as "friends". These links were added in July and November of 2010, well after the date on which the arbitrator indicated having terminated his partisan activities.

[47] While the Union does not know the exact role the arbitrator played in the development of Conservative Party policy, the fact that the arbitrator has not clarified his role in the National Policy Committee adds to the reasonable apprehension of bias. The same goes for the various links on his Facebook page. He had the opportunity to reassure the Union about these activities, but he chose not to do so.

[48] The Special Act was sanctioned by Canadian Parliament, in which the Conservative Party forms the majority government. Furthermore, the government is the sole shareholder in Canada Post and therefore is concerned with its profitability.

[49] The *Canada Post Corporation Act*, RSC 1985, c C-10, also shows the ties between the government and Canada Post. In addition, according to sections 6 and 7 of this Act, the directors on the Board of Directors are appointed to hold office during pleasure by the Minister, with approval of the Governor in Council. Section 22 also stipulates that, in the exercise of its powers and duties, Canada Post must comply with the Minister's directives.

[50] Someone who is reasonable, well-informed and not over-scrupulous may believe that the long-standing personal and professional relations between Arbitrator Dufort and the Conservative Party, as well as with the representatives of Canada Post, did not automatically come to an end along with his official professional activities. It is also reasonable to believe that the arbitrator is still in touch with influential members of the Conservative Party and current federal government leaders, and that he could be influenced, even unknowingly.

[51] The Union therefore argues that, in the context of the Special Act, the arbitrator appointed cannot have been counsel for Canada Post, nor can he have associated with the Conservative Party, without raising a reasonable apprehension of bias.

B. Canada Post's position

[52] Canada Post argues that Arbitrator Dufort's work as a lawyer in the pay equity dispute and as a former active member of the Conservative Party are not sufficient grounds for a reasonable apprehension of bias.

[53] The Ontario Court of Appeal examined the criteria for apprehension of bias in *Ontario (Commissioner, Provincial Police)v MacDonald*, 2009 ONCA 805 3 Admin LR (5th) 278, at paragraph 42: "... first, the person considering the alleged bias must be reasonable; and second, the apprehension of bias itself must also be reasonable."

[54] According to Canada Post, simple speculation, assumptions or personal beliefs are insufficient to meet the high standard (*Committee for Justice and Liberty*, at page 395; *R v S(RD)*, at paragraphs 112 and 113). The same standard applies when the decision maker himself discloses the information behind the apprehension (*Children's Aid Society of the Regional Municipality of Waterloo v L-AB*, 2004 ONCJ 235, 134 ACWS (3d) 645, at paragraph 28, affirmed [2005] OJ No 2315, 139 ACWS (3d) 881 (ON SC)).

Role as counsel for Canada Post

[55] Canada Post takes note of the Union's admission that the arbitrator's professional antecedents as counsel for the employer with Heenan Blaikie were not a problem.

[56] According to the Canadian Judicial Council, in *Ethical Principles for Judges*, a period of more than five years is suggested as enough time for "cooling off" with respect to the judge's former law partners, associates and clients. There is a distance of nine years from the pay equity dispute, which is therefore a considerable time period that is more than reasonable.

[57] These ethical principles were cited with approval in the case *Syndicat des cols bleus regroupés de Montréal, section locale 301 c Pointe-Claire (Ville de)*, 2011 QCCA 1000, [2011] JQ no 6327 (*Syndicat des cols bleus*). In this case, the city's counsel believed that there was reasonable apprehension of bias because a member of its legal firm had filed a petition for a declaration of disqualification against the arbitrator 12 years prior, and the city's counsel believed that the arbitrator was still prejudiced against all lawyers in that firm. The majority of the Court of Appeal of Québec found that there was no reasonable apprehension of bias, given the time that had passed since the petition, as well as the fact that other lawyers from that firm had made arguments before the arbitrator without issue.

[58] Furthermore, in *Kowallsky v Public Service Alliance of Canada*, 2008 FCA 183, 168 ACWS (3d) 672 (*Kowallsky*), the Federal Court of Appeal rejected the plaintiff's argument that there was reasonable apprehension of bias due to the fact that the decision maker at the Commission had been employed by the Public Service Alliance of Canada eight years prior, and the Alliance was a party to the proceedings.

[59] Canada Post also argues that the cases are completely different. The pay equity dispute before the Tribunal was solely intended to analyze the wage gap between men and women for employees represented by a different union. In this case, the arbitrator must select a final offer from one of the two parties based solely on the criteria in the Special Act. Furthermore, these final offers will cover a multitude of topics affecting a different Union than the one involved in this dispute. These final offers will not affect wage increases for employees, as these increases were already defined by the Act.

[60] The issue of whether or not the arbitrator benefited financially from the pay equity dispute in the years following his involvement is not relevant and would mean disqualifying any former partner in a law firm from acting in any case involving parties that the firm represented at any time.

Involvement with the Conservative Party

[61] The arbitrator's political activities ceased in 2010. It is pure speculation to claim that the arbitrator is involved with current federal government leaders; even if that were the case, it would have no effect on this arbitration.

[62] Canada Post argues that it is neither unusual nor surprising for a judge or arbitrator to have previously participated in a political party; case law confirms that such participation does not equate bias.

[63] In *Samson Indian Nation and Band v Canada*, [1998] 3 FC 3, 141 FTR 109 (FCTD), at paragraphs 64 to 68 (*Samson Indian Nation and Band*), Justice Teitelbaum refused to find that there was reasonable apprehension of bias due to his previous political activities.

[64] In *Muscillo Transport Ltd v Ontario (Licence Suspension Appeal Board)*, 149 DLR (4th) 545, [1997] OJ No 3062, the Ontario Superior Court decided that a member of the Licence Suspension Appeal Board was not biased as a result of the fact that she had been the secretary of the Conservative association and the Conservative minister had made negative comments about the claimant before the Tribunal.

[65] A reasonable and well-informed person would recognize that a distinction must be made between the Conservative Party, the government, Conservative ministers and members of Parliament and Canada Post. The latter is an agent of the Crown, but operates independently and at arm's length from the government, according to the *Canada Post Corporation Act*.

[66] Finally, links on the arbitrator's Facebook page are insufficient grounds for a reasonable apprehension of bias (*Latronico v York Region District School Board*, 2012 HRTO 637 (Wright)). These links are not proof of personal friendship and do not show how well the two individuals know each other. In the same manner, links to professional or political associations do not in any way indicate active participation.

[67] Canada Post maintains that the Union's actions and request for recusal are incompatible, as it is difficult to understand why the Union did not carry out independent verification of Arbitrator Dufort when it had both the time and resources to do so, given how important the final offer selection arbitration is to it.

[68] Canada Post argues that the Union has shown a lack of diligence, even wilful blindness, and the Union is now barred from making a claim based on its own turpitude (*Fecteau v Gareau*, 121 ACWS (3d) 530, [2003] JQ no 39 (CAQ)).

C. The position of the Attorney General of Canada

[69] The two reasons for recusal invoked by the Union, taken alone or in combination, do not raise a reasonable apprehension of bias in a reasonable and well-informed person.

[70] Mr. Nadeau, who has worked for the Union since the early 1970s as consultant at the national level, was the one who suggested Arbitrator Dufort to the Union; however, he did not testify during the application for recusal. It is therefore not possible to know if Mr. Nadeau was aware of Arbitrator Dufort's previous dealings with Canada Post and yet still decided to submit Mr. Dufort's name to the Union. The evidence shows, however, that Mr. Nadeau was of the opinion that Arbitrator Dufort could do an honest job even though he had been counsel for the employer.

[71] Furthermore, it would have been advisable for the Union to have done this extensive research on Arbitrator Dufort before suggesting him as a candidate; in doing so, it could easily have discovered that the arbitrator had worked for Canada Post, as this is public information. Union members have also indicated that they were aware that the arbitrator had worked for Heenan Blaikie, a firm that had represented Canada Post in several files.

[72] The Attorney General of Canada notes that in *Committee for Justice and Liberty*, at paragraphs 76 to 78, the Supreme Court of Canada made three preliminary remarks that are very relevant to the proceeding the Union has brought before this Court:

- Firstly, an apprehension must be based on serious grounds and the examination must be done from the point of view of a reasonable person who is neither over-sensitive nor over-scrupulous, given the strong presumption of judicial impartiality the courts enjoy.

- Secondly, there is no textbook example of reasonable apprehension of bias, as this analysis depends largely on the facts and circumstances of the case.
- Thirdly, it is very likely that, in many cases in which judges recused themselves, this outcome is due to an abundance of caution, not because they were legally required to do so.

Role as counsel for Canada Post

[73] The Attorney General of Canada notes that, in the pay equity dispute, the primary issue was the wage gap between men and women. In this case, the arbitrator will not be determining salaries, and the only difference in treatment will be based on the hiring date for different employees.

[74] It was the same for the limited mandate that the arbitrator received from Canada Post in 2003. The arbitrator noted that he could have done other work from Canada Post until 2006, but he does not remember if this was the case. In *Wewaykum*, the Supreme Court of Canada indicated that a lack of recollection was relevant and supports a lack of reasonable apprehension of bias (at paragraph 90).

[75] In sum, the passage of time and the difference between the two mandates suggests that there is no reasonable apprehension of bias (*Syndicat des cols bleus*).

[76] In *Canada (Attorney General) v Khawaja*, 2007 FC 533, 311 FTR 157 (*Khawaja*), Justice Mosley was asked to recuse himself because he had participated in the drafting of Bill C-36 five

years before and he would have to apply that law to the case before him. The judge concluded that the nature of his role in coordinating the draft of Bill C-36 did not include writing, that the law had evolved since that bill was drafted, and the comments that Justice Mosley had made at the time were purely informative. The judge also consulted the *Ethical Principles for Judges* and concluded that the time that had passed and the nature of his previous work were not enough to establish reasonable apprehension of bias. He still recused himself from considering the constitutional issue for other reasons, but decided to hear the other part of the application.

[77] There are many decisions that support the idea that impartiality does not mean the adjudicators must "discount the life experiences that may so well qualify them to preside over disputes... true impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind." (*R v S(RD)*, at paragraph 119).

[78] In this case, Arbitrator Dufort was appointed for his experience in labour relations, and he therefore could put this professional experience to use and choose a final offer based on the requirements of the Special Act. The fact that he had previously represented Canada Post does not mean he is not free to entertain and act upon different points of view with an open mind.

Involvement with the Conservative Party

[79] The Attorney General rejects the relationship presented by the Union between the fact that the Conservative Party forms the majority government and the fact that the government is the sole

stakeholder in Canada Post. A distinction must be made between a political party and the State, and the Conservative Party has no direct or indirect interest in the arbitrator's decision in this case.

[80] Furthermore, case law is clear that prior political involvement does not constitute bias**.** The Attorney General refers to *Fogal v Canada (1999)*, 164 FTR 99, 85 ACWS (3d) 1058 (*Fogal*), in which Justice Dubé states at paragraph 10 in response to a motion for recusal because he had been a minister in Jean Chrétien's cabinet 25 years prior and would therefore be favourable to the government's position:

> Judges do not descend from heaven. They come from various fields of activities ... The variety of our individual careers is a rich source of knowledge and experience for the courts. Once we took our oath of office, we divorced ourselves from our past and dedicated ourselves to our new vocation. Our duty is to render justice without fear or favours.

[81] According to the Attorney General, the information found on the arbitrator's Facebook page does not prove that Arbitrator Dufort has not abstained from all activities that may give the impression that he is actively involved in politics.

[82] Furthermore, the arbitrator has Facebook "friends" from all political affiliations. A reasonable person would not believe that these "friends" would raise a reasonable apprehension of bias. Given that the Conservative Party is not a party to this dispute, there are no serious grounds for the arbitrator's recusal. The fact that the arbitrator has recently removed these links from his Facebook page does not indicate that he does not have the independence and impartiality required for his task.

VII. ANALYSIS

Introduction

[83] The analysis of an apprehension of bias is essentially based on the facts and context of each case. Especially in this case, the context of final offer selection arbitration provides a backdrop for the court's analysis.

[84] It is important not to lose sight of the fact that this is a labour relations context, which is a polarized field, and the arbitrator alone will have to choose one of the final offers put forth by the parties, without compromise. Furthermore, this decision will be protected by a full privative clause.

[85] As my colleague, Justice Martineau, so aptly reminded us, "final offer arbitration leads to one-sided law-making ... [t]his is a high-wire act, probably more political than legal, because this case is concerned with legitimacy, and not legality. (*Canadian Union of Postal* Workers, at paragraph 39).

(A) Role as counsel for Canada Post

1. Passage of time

[86] A well-informed person is aware that the passage of time is a "significant factor [that] stands out" (*Wewaykum*, at paragraph 85). I agree with the Union's claim that the nine-year period must be

examined from the perspective of the "continuity" of the pay equity dispute, which ended with the 2011 Supreme Court decision.

[87] Indeed, the evidence shows that this dispute had an impact on the Corporation's revenue. Canada Post's financial report for the third quarter of 2011 indicates that one of the main reasons for its financial loss, the first loss in 16 years, is the pay equity dispute. While the financial losses were not recurrent, a reasonable and right-minded person having thought the matter through may fear that this current fact could influence the arbitrator in his decision.

[88] Therefore, despite the nine years that have elapsed since Mr. Dufort ceased active participation in the pay equity dispute, I maintain that there has not been a "cooling off" resulting from the passage of time that would mitigate the nature and importance of his participation.

2. Role as decision-maker in the previous case

[89] The nine-year period must also, in my opinion, be analyzed in light of the importance of the mandate, which lasted nearly five years. While we do not know the exact details of Arbitrator Dufort's work, a reasonable person having thought the matter through, understanding the reality of legal firms, would be justified in believing that, as a member of a team of four, he played an important role in presenting evidence to the Tribunal, as well as in developing the litigation strategy with his client, Canada Post. Let us remember the scope of this litigation: 414 days of hearings and likely a similar number of days of preparation. A reasonable and well-informed person may believe

that the arbitrator had formed ties with various managers at Canada Post during this mandate, and could fear that these ties would influence the arbitrator, even unconsciously.

3. Similarities between the two cases

[90] In this case, it is true that the arbitrator will not be dealing with the same dispute. In the pay equity dispute, the proceedings before the Tribunal dealt only with the wage gap between men and women. Here, we have final offer arbitration where the arbitrator will have to choose one of the two offers, one that will cover a multitude of subjects. However, a person having thought the matter through will note that both cases deal with the relationship between employees and management at Canada Post. The arbitrator was Canada Post's counsel in a similar dispute that relied on evidence from experts, who were essentially mandated by the parties to examine several collective agreements binding Canada Post, evaluate the jobs and take salary adjustments and some benefits given to employees into consideration for the purpose of establishing remuneration.

[91] Furthermore, Union witnesses have stated that, in the current round of negotiations, Canada Post wants to establish different working conditions based, inter alia, on the hiring date of employees, as these distinctions are found in all comprehensive offers put forth by the employer.

[92] In sum, a well-informed person would note that Arbitrator Dufort acted for Canada Post in an important and long-lasting case comparable to the one with which he is now entrusted, possibly raising fears that, consciously or unconsciously, he could favour the position of Canada Post.

B. Political involvement

[93] Arbitrator Dufort's multiple roles and activities in the Conservative Party support the appellant's claim of reasonable apprehension of bias: the short two-year time period since the arbitrator claimed having ceased all activities and the fact that he still holds interests as well as ties with important members of this Party are sufficient grounds to meet the burden of proof on the Union.

[94] To this purpose, the Union submitted Arbitrator Dufort's Facebook page, where the "activities and interests" section shows, as of April 22, 2012, two Conservative associations, namely the Westmount–Ville-Marie Conservative Association and the page for Conservative MP Rempel for Calgary Centre-North.

[95] According to the admissions made before the arbitrator on April 30, 2012 and according to the Facebook pages of the Association and the MP, it is clear that they were respectively created in July and November 2010. Therefore, the arbitrator must have chosen to include the links to these pages after they were created, well after the time he claims to have stopped all political activities.

[96] Furthermore, the arbitrator's Facebook page, as examined on April 22, was clear: the arbitrator is Facebook "friends" with the Honourable Lisa Raitt, the Minister who, under the law, appoints the final offer arbitrator, and the Honourable Steven Fletcher, Minister responsible for Canada Post. Once again, the arbitrator chose to maintain ties with these people.

[97] A well-informed person would also note that, after Justice Lemieux granted a stay, the arbitrator found it advisable to remove these ministers from his list of friends. While in the reasons for his decision Arbitrator Dufort lists "friends" with other political affiliations, it is worrisome to see that he only chose to remove those two Conservative ministers from his list, and that he did not deem it necessary to explain these ties, which contradict Arbitrator Dufort's statements in his April 17, 2012, decision, in which he claimed to have ceased all political activities and associations in January 2010.

[98] When the Union raised concerns about the role he played in the National Policy Committee concerning the right to strike, Arbitrator Dufort falls back on the absence of proof by the Union, whose witnesses asserted that they did not know his exact role on the national committee. However, given the submitted proof of his participation in the policy committee, as well as proof of his ties to the Conservative Party (beyond the two-year period in which he had claimed having stopped all activities), Arbitrator Dufort had to respond to these concerns in order to reassure the Union. This is exactly what Justice Mosely did in *Khawaja*, where he thoroughly explained his involvement in the drafting of the bill in question. Justice Teitelbaum also disclosed details of his relationships with certain individuals, relationships that were the basis for the allegation of reasonable apprehension of bias (*Samson Indian Nation and Band*, at paragraphs 15-16, 67).

[99] The respondents argue that this is insufficient proof, and that a reasonable and well-informed person would have no reasonable apprehension of bias due to the fact that the appellant had been actively involved with the Conservative Party, as well as from his presumed contact with Conservative ministers. The principle of impartiality does not mean that adjudicators "discount the

life experiences that may so well qualify them to preside over disputes" (*R v S(RD)*, at paragraph 119). Furthermore, in *Fogal*, the appellant asked the judge to withdraw because he had been a minister in Jean Chrétien's cabinet 25 years before, and he would therefore be favourable to the government's position. The judge refused to recuse himself. First, note that, in *Fogal*, the time period was 25 years. The passage of time was such that a reasonable and right-minded person could not find any reasonable apprehension of bias.

[100] With respect, I must conclude that the case law cited by the respondents on tribunals that have examined allegations of apprehension of bias, with regard to an adjudicator's political involvement, has limited value as precedent because, in these cases, the time frame was so long that it was obvious that the passage of time was the most significant factor. That is not the case in this instance, as only two years have elapsed since Dufort halted his partisan activities and evidently maintained his interests and ties with members of the Conservative Party and the sitting government. A well-informed and not overly-scrupulous person may believe that he could be influenced by these people, even without knowing it.

[101] Furthermore, the respondents argue that the fact that the government is the sole shareholder in Canada Post does not matter. A well-informed person is able to distinguish between a Conservative MP or minister in the Conservative Party as a political entity and the government in and of itself. I do not agree with this claim.

[102] As the appellant's counsel has reminded us, the *Canada Post Corporation Act* stipulates that, under section 6, the directors of the Board are appointed to hold office during pleasure by the

Minister, with the approval of the Governor in Council for respective terms of at most four years. The Chairperson of the Board is appointed by the Governor in Council to hold office during pleasure for such term as the Governor in Council considers appropriate, under section 7. Finally, under section 8, the president of Canada Post is appointed by the Governor in Council to hold office during pleasure for such term as the Governor in Council considers appropriate. In addition, under section 22 of the Act, Canada Post must comply with the Minister's directives.

[103] There is therefore a close relationship between Canada Post and the government, which is a majority Conservative government. A well-informed person having thought the matter through may think that the appointed arbitrator, consciously or unconsciously, having recently been actively involved with the Conservative Party, would be predisposed to favour the position of Canada Post, which is required to follow the Minister's directives, and whose only shareholder is the government.

CONCLUSION

[104] The respondents attempted to depict the Union as an "overly scrupulous and over-zealous" party that had been insufficiently diligent since, at the beginning, the Union had included Mr. Dufort's name on the basis of information from their legal counsel and that it was extremely unusual for someone to ask that an adjudicator be recused when that party in fact suggested his appointment.

[105] I understand the respondents' frustration, as this case is a material one for all of the parties concerned, and any delay in appointing an arbitrator means a delay in resolving this dispute, which has already seen a number of setbacks.

[106] The fact remains that the uncontradicted evidence presented indicates that Mr. Dufort's candidacy became unacceptable to the Union when the facts about his involvement as Canada Post's counsel and active participation in the Conservative Party became known.

[107] Mr. Dufort himself considered the information important enough to disclose to the Union and request comments if it was a problem. This was also what he told the Toronto Star on March 15, 2012. What is the purpose of such an exercise if not to open the door to a request for recusal?

[108] If the Union had been an overly scrupulous party, it would not have accepted, as it did, a lawyer who had represented the employer earlier in his career. But from this to entrusting a mandate as critical as final offer arbitration to Mr. Dufort, given the information he deemed appropriate to communicate following his appointment, is a step the Union is not prepared to take, given the special circumstances of this dispute.

[109] In my opinion, the combined effect of the evidence submitted in this case supports the Union's position.

[110] In short, I think that a reasonable, sensible person who had thought the matter through can reasonably be concerned that an arbitrator who had not only been Canada Post's counsel for many years in a similar case that, in 2011, led to substantial financial losses for Canada Post and who had also, until recently, participated in a variety of party activities and maintained ties with the ministers concerned, may serve the interests of a party or the government, even unknowingly.

[111] I understand that the situation Mr. Dufort was in was a delicate one. It is clear that a request for recusal regarding Mr. Dufort would be difficult to rule on, given the double role of judge and party that a decision-maker must play. Nonetheless, this decision must always be guided by the fact that "those who adjudicate the law must always do so without bias or prejudice and must be perceived to do so" *(Wewaykum,* at paragraph 57).

[112] The Court notes with approval Fernand Morin's statements in his work *Lettre à un arbitre,* [letters to an arbitrator], quoted by Justice Wagner in *Syndicat des cols bleus,* at paragraph 124:

> [TRANSLATION]
> It is always difficult, and even delicate, to see clearly in one's own case when the arbitrator must in such situations be both a judge and a party. Should he not assess his own situation? In our opinion, as soon as we consider that it is possible for such a doubt to reasonably arise in one party's mind, the arbitrator must step down, first and foremost in the interests of both parties, as well as in the interests of justice.

[113] In short, as the Supreme Court of Canada stated in *Canadian Union of Public Employees,* at paragraph 109:

> ... If arbitrators are, or are perceived to be, a surrogate of either party or of the government, or appointed to serve the interests of either party or the government, the system loses the trust and confidence of the parties, elements essential to industrial relations

> peace and stability ... A lack of confidence in arbitration would invite labour unrest and the disruption of services, the very problem impartial interest arbitration was designed to prevent.

[114] In the extraordinary context of final offer arbitration under the Special Act, it is even more important to apply these principles, so as to protect confidence in arbitration and "avoid the deterioration of the labour relations environment for years to come" *(Canadian Union of Postal Workers,* at paragraph 40).

[115] For these reasons, it is the Court's opinion that Arbitrator Dufort must be recused.

JUDGMENT

THE COURT ORDERS THAT:

1. The application for judicial review is allowed.
2. The decisions to reject recusal rendered by Arbitrator Guy Dufort on April 17, 2012, and April 30, 2012, are vacated.
3. Arbitrator Guy Dufort is recused.
4. The Minister must appoint a new final offer arbitrator in the matter of the dispute between the Union and Canada Post.

With costs.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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