IN THE MATTER OF:

AN APPEAL OF DECISION PURSUANT TO SECTION 3-53 OF *THE SASKATCHEWAN EMPLOYMENT ACT*, S.S. 2013, c. S-15.1, AS AMENDED, (THE "SEA") AND A HEARING PURSUANT TO SECTION 3-54 OF THE SEA

BETWEEN:

Darren Strohan,

APPELLANT,

- and -

Kontzamanis Graumann Smith MacMillan Inc.,

RESPONDENT.

APPEARANCES:

Appellant, Darren Strohan:	Self-Represented
For the Respondent, Kontzamanis Graumann Smith MacMillan Inc.:	Robert Frost-Hinz

BEFORE:

T. F. (Ted) Koskie, B.Sc., J.D., Adjudicator

DECISION DATE:

October 16, 2024

INTERIM DECISION

I. INTRODUCTION

[1] Darren Strohan ("Strohan" or the "Appellant") lodged a complaint pursuant to section 3-36 of the *SEA* alleging that Kontzamanis Graumann Smith MacMillan Inc. ("KGSMI" or the "Respondent") had taken discriminatory action against him for a reason mentioned in section 3-35 of the SEA.

[2] On February 12, 2024, an Occupational Health and Safety ("OHS") officer determined that

Strohan's termination was not an unlawful discriminatory action contrary to section 3-35 of the SEA (the "Decision").

[3] On March 5, 2024, Strohan appealed the Decision (the "Appeal").

[4] On June 14, 2024, the Saskatchewan Labour Relations Board ("SLRB") appointed me as the adjudicator to hear and determine the Appeal.

II. FACTS

[5] During a conference call with the parties on June 25, 2024:

a) I scheduled the hearing of the Appeal for October 7 to 11, 2024;

b) I advised that I would distribute to the parties a copy of the OHS file forwarded to me;

c) when discussing exchange of witness lists:

i) Strohan advised that he expected to call between nine (9) and thirteen (13) witnesses; and

ii) counsel for KGSMI advised that, in light of the number of witnesses Strohan intended to call, he did not expect KGSMI would have any witnesses to call that did not appear on Strohan's list, but wanted to first see Strohan's witness list before so confirming[1]; and

d) I directed that:

i) Strohan provide his witness list within three (3) weeks of his receipt of the OHS

[1]Strohan did not voice any objection to KGSMI's suggested approach

previously referred to; and

ii) KGSMI provide its response witness list within three (3) weeks of its receipt of Strohan's witness list.

[6] By letters dated July 9, 2024, I forwarded copies of the OHS file to the parties.

[7] By e-mail dated July 29, 2024, Strohan provided his witness list–it contained the names of sixteen (16) individuals.

[8] By letter dated August 19, 2024, KGSMI advised:

a) it does not have any additional witnesses to add to Strohan's list; and

b) until it is aware of the full extent of Strohan's case, it is unable to finally determine which specific witnesses it intended to call of those identified on Strohan's list.

[9] On August 20, 2024, Strohan asked that I "order . . . [KGSMI] to produce the witness list in accordance with . . . [my] instruction of June 25, 2024." On August 30, 2024, I responded to Strohan saying:

a) my view is that KGSMI has not reneged on my order;

b) KGSMI has simply indicated it does not intend to call any witnesses that are not on Stdrohan's list and:

i) during the June 25, 2024, hearing, KGSMI alluded that might well be the case; and

ii) KGSMI's communication confirmed that.

[10] By letter dated September 6, 2024, Strohan referenced my communication of August 30,

2024, and said "I disagree with you and am seeking your recusal from my matter." He goes on to state:

> . . . I believe this issue is a Denial of Natural Justice based upon Apprehension of Bias for the following reasons:
>
> 1. On June 25, 2024, in pre-hearing meeting you ordered the parties to produce their respective witness lists.
>
> 2. On June 28, 2024, in email transmission Mr. Frost-Hinz indicated your order, and his specific duty, without caveat, to provide the list in accordance with your order:
>
>> "Mr. Strohan was to provide his witness list within 3 weeks of receiving the OHS disclosure and the Employer was to provide a response list within 3 weeks of receipt of Mr. Strohan's list."
>
> 3. On July 29, 2024, having received the disclosure from your office, I complied with your order and produced my witness list to the Parties.
>
> 4. On August 19, 2024, Mr. Frost-Hinz did renege on his duty, because he described exactly what that was on June 28, without caveat.
>
> 5. I am concerned with the "view" of your decision that expresses that Mr. Frost-Hinz "has simply indicated that he does not intend to call any witnesses that are not on your list." because:
>
>> i. it is a revision without notice and without reasons, to your June 25 order that he produce the respondent's witness list; and/or
>>
>> ii. does not consider that the non-production is without prior consent and/or without prior application, and it deviates from the record he made of your order to the parties on June 28; and/or
>>
>> iii. obtained you blessing without any consideration from me, the appellant: and/or
>>
>> iv. came a full ten days after I requested you reconsider your authority to order his production; and/or
>>
>> v. the list is a document or thing that I require and that is relevant to my matter.
>
> 6. I rely upon you, as adjudicator, to provide a transparent, consistent, and equitable environment to which respondent and I present our case. Your decision that revises your original order is a procedural unfairness that deprives me of my rights, per *The Saskatchewan Employment Act*, to be provided a thing that is relevant to the matter before you. Your view that Mr. Frost-Hinz "does not intend to call any witnesses that are not on your list" is not a reason that illustrates why Mr. Frost-Hinz should be excused from his duty. Rather, it is a change to the duty that has been prescribed to him. Mr. Frost-Hinz does not identify who it is he intends to call at all.
>
> 7. The *audi alteram partem* rule is a fundamental principal that allows me to articulate my case, and answer to the respondent's allegations. I want and need Mr. Frost-Hinz's witness list so that I may structure and prepare my case with an understanding of who it is, in hearing, that I must confront. The list that was ordered 'pre-hearing' would have provided

me the time that I need to gather and prepare my information for the individuals that only Mr. Frost-Hinz, or the respondent are refusing to identify. I am not a mind reader, and I do not agree with any 'ad-hoc' opinion of another party does, or "does not intend" for the hearing that remains a month or so away. Mr. Frost-Hinz may have indicated that his witnesses will not be any of those not already identified on my list, but it remains that he has not complied with your order that he produce his list. It is not acceptable that I 'find out' who these witnesses are, or are not, short of a fully assembled case. It is helpful to me to be provided with the respondent's witness list and other than for the duty imposed on Mr. Frost-Hinz, I have no other way of identifying who his witnesses will be.

8. As I noted to you on July 29, my subpoena requests depend upon the duty imposed upon Mr. Frost-Hinz. The costs associated with subpoena for potentially all witness builds-in a financial prejudice and burden I am unable to sustain.

9. I expect that your original order on June 25 for the witness lists was made for good reason as they are relevant to my matter.

10. I fear the "view" expressed in your decision is arbitrary in nature, discriminates against my case, and will have a prejudicial consequence that I am unable to predict. I am not a lawyer, but I understand the importance and necessity for the production of a witness list prior to hearing.

11. I hereby declare my Apprehension of Bias for which I am asking you to recuse yourself as adjudicator. Please note that I am not accusing you of Bias, but merely my apprehension of it.

12. Failing the above, I intend to appeal both issues to the Saskatchewan Labour Relations Board for further direction, if necessary.

[11] By e-mail dated September 12, 2024, Strohan asked that I convene a hearing to allow him to fully argue his application for my recusal.

[12] On September 13, 2024, Strohan served me with a Notice of Appeal (the "Appeal") to the SLRB:

a) showing himself as Applicant and KGS Group as Respondent;

b) saying the Appeal concerns "a decision or hearing pursuant to Part III of the *Act* - Occupational Health and Safety";

c) referencing my communication of August 30, 2024, as the subject adjudicator's decision;

d) saying the decision and/or order being appealed is "Respondent is not req'd to produce its

witness list as was previously ordered";

e) saying the error of law in the decision and/or order of the adjudicator is as follows:

> On June 25, 2024, in preliminary conference, the parties were ordered to produce their witness lists as part of hearing process that was explained. On June 28, 2024, the respondent's council reiterated the parties' duty to produce their respective witness list. On July 29, 2024, I complied with the duty. In a procedural unfairness on August 30, 2024, without either prior consent or application, the adjudicator communicated his "view" that the respondent's refusal to produce its witness list is not in contravention of his previously stated order. The adjudicator essentially revised his order to suit the respondent's refusal.
>
> This change in the process that removes the respondent's witness list was without notice and without reason and is a denial of natural justice in violation of the *audi alteram partem* rule. It impairs my ability to assemble and structure my evidence; I do not know who it is I can expect to confront concerning serious allegations made by the respondent.
>
> Absent the witness list my only alternative is a prohibitively expensive subpoena for every potential I witness I can think of. This August 30, 2024 decision that took the adjudicator an unreasonable 10 days to produce is is arbitrary nature & it discriminates against me, the appellant.

f) requesting a stay of the decision/order; and

g) stating the following as to why he believes the decision/order should be suspended pending the results of his appeal:

> The hearing is set to convene on October 7, 2024, and I have not yet been provided with the respondent's witness list that was previously ordered on June 25, 2024. I need this advance document or thing to prepare my case. I appealed to the adjudicator in letter on August 20, 2024 and he did not respond to the parties until August 30, 2024, after I asked him a second time for his decision on Aug. 29.
>
> As a result of the events leading to his decision of August 30, 2024 I have an Apprehension of Bias that I stated in email on September 6, 2024, to the adjudicator. On September 12, I tendered the fees for the Notary Public condition as set by the appeal rules. The adjudicator's actions, that includes his delays in responding to my concerns have been unreasonable and they are disruptive to my ability to assemble and structure my case.
>
> On September 6 I have set before the adjudicator an application that asks he recuse himself. On September 12 upon the Adjudicator's invitation, respondent council has emailed the parties he will "seek instructions from my client". No date was given or ordered for this instruction. This injects more uncertainty and delay with regard to the witness list, and for the 15 day time limit rule for appeal.
>
> I do not know when, or even if I will be furnished with the witness list as was ordered on June 25. This is an important document that I require for the presentation of my case but

> I fear the aforesaid actions frustrate my ability to construct my case & confront the respondent's accusations.
>
> I would like opportunity to present my case and oral / written pleas / argument in hearing in Saskatoon, at the earliest possible opportunity. I request the proceedings be stayed pending decision of this appeal.

[13] On September 15, 2024, Strohan asked for my decision concerning his motion for recusal "without delay."

[14] In response to Strohan's Application for Recusal, KGSMI provided its following version of the facts:

a) on July 29, 2024, Strohan provided his witness list–it includes sixteen (16) individuals, including many current (and some past) employees of KGSMI;

b) in that email, Strohan noted he expected there would be collaboration between himself and KGSMI in order to "finalize this list";

c) on July 28, 2024, I responded to Strohan's email indicating that, while a conversation might be had regarding a potential agreed statement of facts, "it is up to the parties to determine whom they wish to call as witnesses";

d) on August 19, 2024,KGSMI provided its witness list to the effect that:

> Please be advised that the Respondent, Kontzamanis Graumann Smith MacMillan Inc. (the "Respondent") does not have any additional witnesses to add to the extensive list prepared by the Appellant. Of course, until the Respondent is aware of the full-extent of the Appellant's case, we are unable to finally determine which specific witnesses we would be intending to call of those identified on the Appellant's list.

e) on August 20, 2024, the Appellant submitted an "Application for order of Witness List," alleging that the Respondent's August 19, 2024 witness list was insufficient or otherwise not in compliance with Mr. Chairman's June 25, 2024 order;

f) on August 30, 2024, I responded to Strohan indicating that the information provided by KGSMI in response to my June 25, 2024 witness list order was both sufficient and not surprising;

g) on September 6, 2024, Strohan submitted an "Application for Recusal" alleging that I ought recuse myself from the file on the basis of a reasonable apprehension of bias–Strohan also noted an intention to pursue appeals of both the "witness list issue" and the "bias issue" with the SLRB; and

h) on September 13, 2024, Strohan filed a second Notice of Appeal with the SLRB (the "Interlocutory Appeal") purporting to appeal my August 30, 2024 decision and also raising the bias issues as identified in his September 6, 2024 "Application for Recusal."

[15] KGSMI argues:

a) Strohan has a fundamental misapprehension of the appeal processes arising out of Part IV of the *SEA*;

b) Strohan does not know what his obligations are, as Appellant, within that process;

c) the onus in these proceedings lies solely and completely upon Strohan to demonstrate the merits of his claim on the balance of probabilities;

d) KGSMI has no obligation to prove anything whatsoever–if Strohan fails to establish his case, his appeal must be dismissed;

e) one of the options available to KGSMI in this appeal proceeding is the option to request a non-suit following the close of Strohan's case and, in that scenario, KGSMI would not call any witnesses whatsoever and the matter would be determined solely upon the evidence adduced by Strohan in support of his case;

f) KGSMI has no intention of waiving its ability to request a non-suit in these proceeding and therefore is not willing to undertake to call any witnesses at all, let alone identify who those witnesses will be of those already identified by Strohan;

g) this process is adversarial:

i) while the parties may prepare a joint summary of agreed-upon facts, they do not prepare a joint witness list, nor do they prepare their cases in tandem or in conjunction with one another;

ii) to the contrary, Strohan must prepare his case as best as his abilities allow, present that case as effectively as he can, and then close his case when it is finished;

iii) only then will KGSMI be required to make a final determination of whether or not to call any further evidence or what witnesses to call and in what order to call them;

h) the information provided by KGSMI with respect to its intentions for witnesses falls solidly within what might be expected of a responding party and was provided in full and complete fulfilment of my June 25, 2024 order;

i) with respect to Strohan's September 6, 2024 "Application for Recusal," Strohan has not identified a factual basis for any reasonable perception of bias;

j) being unsuccessful with respect to an application does not demonstrate the existence of bias toward the unsuccessful party;

k) Strohan's unreasonable and irrational apprehension of bias is not sufficient to justify recusal;

l) Strohan's September 6, 2024 Application for Recusal further reveals his fundamental misapprehension of the appeal process, including such comments as:

1. "Mr. Frost-Hinz does not identify who it is he intends to call at all"

2. "I want and need Mr. Frost-Hinz's witness list so that I may structure and prepare my case with an understanding of who it is, in hearing, that I must confront"

3. "I need to gather and prepare my information for the individuals that only Mr. Frost-Hinz, or the respondent are refusing to identify"

4. "It is not acceptable that I 'find out' who these witnesses are, or are not, short of a fully assembled case"

5. "It is helpful to me to be provided with the respondent's witness list and other than for the duty imposed on Mr. Frost-Hinz, I have no other way of identifying who his witnesses will be"

6. "[M]y subpoena requests depend upon the duty imposed upon Mr. Frost-Hinz. The costs associated with subpoena for potentially all witnesses builds-in a financial prejudice and burden I am unable to sustain"

m) KGSMI's witness list:

i) avoids surprise by confirming that no one not listed by Strohan is intended to be tendered as a witness; and

ii) has no actual effect on Strohan's duty to call the witnesses he perceives are required to establish his case;

n) it is not KGSMI's duty or responsibility to alleviate the need to subpoena witnesses Strohan might want to call as part of his case; and

o) with respect to Strohan's allegations regarding a reasonable apprehension of bias:

i) the test for a reasonable apprehension of bias is: "what would an informed person, viewing the matter realistically and practically–and having thought the matter through–conclude";

ii) it is generally accepted that a "reasonable person" within the context of this analysis is generally aware of the applicable process and the context;

iii) in order to establish a reasonable apprehension of bias, the party putting forward such an allegation must adduce evidence sufficient to meet the common law burden;

iv) in these proceedings, Strohan has not provided any rationale, let alone evidence, that there is a reasonable apprehension of bias–baldly stating it to be so does not satisfy the test;

v) there is no basis that a reasonable person, who is informed of the process, could conclude that my rulings to date are anything other than completely correct and in line with the reasonable expectations that parties might have in similar proceedings; and

vi) on this basis, KGSMI requests that Strohan's Recusal Application be dismissed.

[16] On September 16, 2024, Strohan "re-iterated" his previous request "for a live hearing" so that he is "able to fully respond" to KGSMI's position.

[17] I scheduled the morning of Friday, September 20, 2024, to hear Strohan's recusal application.

[18] During his argument during the hearing of September 20, 2024, Strohan broadened his concerns beyond that which I have referred to above. Strohan additionally argued that he "perceive[s] there to be a bias" on the part of the Government of Saskatchewan. His argument stems from his concerns with both the OHS officer that rendered the Decision and the SLRB Registrar.

[19] Strohan:

a) submits the OHS officer has a conflict of interest;[2]

b) complains about a "delay" in my appointment as adjudicator;

[2]It appears this flows from Strohan's belief he should have characterized his draft as an actual decision.

c) complains about a "delay" in supplying OHS disclosure and the substance of same;

d) complains about an initial SLRB error[3] in describing the date of the Decision; and

e) raises his suspicion that discussions were "perceived" to be taking place between OHS, the SLRB Registrar, counsel for the Respondent and myself.

He characterizes this all as "a consequential and accumulated measure of bias."

[20] In addition to reiterating its principal argument, the Respondent responds that the Applicant's:

a) appeal[4] is a hearing *de novo* and, therefore the focus is on what happened in the context of his complaint; and

b) application seeks that I recuse myself–what may or may not have been done by OHS and the SLRB is not at issue.

III. ISSUE

[21] The issue herein is whether I should recuse myself.

IV. DECISION

[22] I find that an informed person–viewing the matter realistically and practically and having thought the matter through–would not conclude there is a reasonable apprehension of bias on my part.

[23] I dismiss Strohan's application for recusal.

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[3]Which the SLRB Registrar corrected

[4]Herein, not the SLRB Appeal

V. REASONS

A. LEGISLATION

[24] The relevant provisions of the *SEA* are as follows:

PART III
Occupational Health and Safety

DIVISION 1
Preliminary Matters for Part

Interpretation of Part
3-1(1) In this Part and in Part IV:

...

(i) "discriminatory action" means any action or threat of action by an employer that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes termination, layoff, suspension, demotion or transfer of a worker, discontinuation or elimination of a job, change of a job location, reduction in wages, change in hours of work, reprimand, coercion, intimidation or the imposition of any discipline or other penalty, but does not include:

(i) the temporary assignment of a worker to alternative work, pursuant to section 3-44, without loss of pay to the worker; or

(ii) the temporary assignment of a worker to alternative work, without loss of pay to the worker, while:

(A) steps are being taken for the purposes of clause 3-31(a) to satisfy the worker that any particular act or series of acts that the worker refused to perform pursuant to that clause is not unusually dangerous to the health or safety of the worker or any other person at the place of employment;

(B) the occupational health committee is conducting an investigation pursuant to clause 3-31(b) in relation to the worker's refusal to perform any particular act or series of acts; or

(C) an occupational health officer is conducting an investigation requested by a worker or an employer pursuant to clause 3-32(a);

(j) "employer" means, subject to section 3-29, a person, firm, association or body that has, in connection with the operation of a place of employment, one or more workers in the service of the person, firm, association or body;

...

(m) "notice of contravention" means a notice of contravention served pursuant to section 3-38;

...

(gg) "worker" means, subject to subsection (6):

(i) an individual, including a supervisor, who is engaged in the service of an employer;

(ii) a member of a prescribed category of individuals;

but does not include an inmate, as defined in *The Correctional Services Act, 2012*, of a correctional facility as defined in that Act who is participating in a work project or rehabilitation program within the correctional facility;

DIVISION 5
Right to Refuse Dangerous Work; Discriminatory Action

...

Discriminatory action prohibited
3-35 No employer shall take discriminatory action against a worker because the worker:

(a) acts or has acted in compliance with:

(i) this Part or the regulations made pursuant to this Part;

(ii) Part V or the regulations made pursuant to that Part;

(iii) a code of practice issued pursuant to section 3-84; or

(iv) a notice of contravention or a requirement or prohibition contained in a notice of contravention;

(b) seeks or has sought the enforcement of:

(i) this Part or the regulations made pursuant to this Part; or

(ii) Part V or the regulations made pursuant to that Part;

(c) assists or has assisted with the activities of an occupational health committee or occupational health and safety representative;

(d) seeks or has sought the establishment of an occupational health committee or the designation of an occupational health and safety representative;

(e) performs or has performed the function of an occupational health committee member or occupational health and safety representative;

(f) refuses or has refused to perform an act or series of acts pursuant to section 3-31;

(g) is about to testify or has testified in any proceeding or inquiry pursuant to:

(i) this Part or the regulations made pursuant to this Part; or

(ii) Part V or the regulations made pursuant to that Part;

(h) gives or has given information to an occupational health committee, an occupational health and safety representative, an occupational health officer or other person responsible for the administration of this Part or the regulations made pursuant to this Part with respect to the health and safety of workers at a place of employment;

(i) gives or has given information to a radiation health officer within the meaning of Part V or to any other person responsible for the administration of that Part or the regulations made pursuant to that Part;

(j) is or has been prevented from working because a notice of contravention with respect to the worker's work has been served on the employer; or

(k) has been prevented from working because an order has been served pursuant to Part V or the regulations made pursuant to that Part on an owner, vendor or operator within the meaning of that Part.

Referral to occupational health officer
3-36(1) A worker who, on reasonable grounds, believes that the employer has taken discriminatory action against him or her for a reason mentioned in section 3-35 may refer the matter to an occupational health officer.

(2) If an occupational health officer decides that an employer has taken discriminatory action against a worker for a reason mentioned in section 3-35, the occupational health officer shall serve a notice of contravention requiring the employer to:

(a) cease the discriminatory action;

(b) reinstate the worker to his or her former employment on the same terms and conditions under which the worker was formerly employed;

(c) subject to subsection (5), pay to the worker any wages that the worker would have earned if the worker had not been wrongfully discriminated against; and

(d) remove any reprimand or other reference to the matter from any employment records maintained by the employer with respect to that worker.

(3) If an occupational health officer decides that no discriminatory action has been taken against a worker for any of the reasons set out in section 3-35, the occupational health officer shall advise the worker of the reasons for that decision in writing.

...

DIVISION 8
Appeals

3-52(1) In this Division:

(a) "adjudicator" means an adjudicator appointed pursuant to Part IV;

(b) "decision" includes:

(i) a decision to grant an exemption;

(ii) a decision to issue, affirm, amend or cancel a notice of contravention or to not issue a notice of contravention; and

(iii) any other determination or action of an occupational health officer that is authorized by this Part.

(2) In this Division and in Part IV, "person who is directly affected by a decision" means any of the following persons to whom a decision of an occupational health officer is directed and who is directly affected by that decision:

(a) a worker;

(b) an employer;

(c) a self-employed person;

(d) a contractor;

(e) a prime contractor;

(f) an owner;

(g) a supplier;

(h) any other prescribed person or member of a category of prescribed persons; but does not include any prescribed person or category of prescribed persons.

Appeal of occupational health officer decision
3-53(1) A person who is directly affected by a decision of an occupational health officer may appeal the decision.

(2) An appeal pursuant to subsection (1) must be commenced by filing a written notice of appeal with the director of occupational health and safety within 15 business days after the date of service of the decision being appealed.

(3) The written notice of appeal must:

(a) set out the names of all persons who are directly affected by the decision that is being appealed;

(b) identify and state the decision being appealed;

(c) set out the grounds of the appeal; and

(d) set out the relief requested, including any request for the suspension of all or any portion of the decision being appealed.

...

(10) Instead of hearing an appeal pursuant to this section, the director of occupational health and safety may refer the appeal to an adjudicator by forwarding to the adjudicator:

(a) the notice of appeal;

(b) all information in the director's possession that is related to the appeal; and

(c) a list of all persons who are directly affected by the decision.

...

Appeals re harassment or discriminatory action
3-54(1) An appeal mentioned in subsection 3-53(1) with respect to any matter involving harassment or discriminatory action is to be heard by an adjudicator in accordance with Part IV.

(2) The director of occupational health and safety shall provide notice of the appeal mentioned in subsection (1) to persons who are directly affected by the decision.

Providing appeal material to adjudicator
3-55 In the case of an appeal mentioned in subsection 3-53(10) or section 3-54 that is to be heard by an adjudicator, the director of occupational health and safety shall forward to the adjudicator:

(a) the notice of appeal mentioned in subsection 3-53(2};

(b) all information in the director's possession that is related to the appeal; and (c) a list of all persons who have been provided notice of the appeal pursuant to clause 3-53(5)(a) or subsection 3-54(2).

Appeal of director's decision to adjudicator
3-56(1) A person who is directly affected by a decision of the director of occupational health and safety made pursuant to subsection 3-53(8) may appeal the decision to an adjudicator in accordance with subsection (2) within 15 business days after the date of service of the decision.

(2) An appeal pursuant to subsection (1) is to be commenced by filing a written notice of appeal with the director of occupational health and safety that:

(a) sets out the names of all persons who are directly affected by the decision being appealed;

(b) identifies and states the decision being appealed;

(c) sets out the grounds of the appeal; and

(d) sets out the relief requested, including any request for the suspension of all or any portion of the decision being appealed.

...

PART IV
Appeals and Hearings re Parts II, Ill and V

...

Adjudicator's duties
4-2 An adjudicator shall:

(a) hear and decide appeals pursuant to Part II and conduct hearings pursuant to Division 5 of Part II;

(b) hear and decide appeals pursuant to Division 8 of Part Ill;

(c) hear and decide any appeals pursuant to Division 6 of Part V; and

(d) carry out any other prescribed duties.

Selection of adjudicator
4-3(1) In this section and sections 4-4 and 4-7, "registrar" means an employee of the ministry who is designated as the registrar by the chairperson of the board.

(2) The director of employment standards and the director of occupational health and safety shall inform the board of an appeal or hearing to be heard by an adjudicator.

(3) On being informed of an appeal or hearing pursuant to subsection (2) and in accordance with any regulations made pursuant to this Part, the registrar shall select an adjudicator.

Procedures on appeals
4-4(1) After selecting an adjudicator pursuant to section 4-3and in accordance with any regulations made pursuant to this Part, the registrar shall:

(a) in consultation with the adjudicator and the parties, seta time, day andplace for the hearing of the appeal or the hearing; and

(b) give written notice of the time, day and place for the appeal or the hearing to:

(i) in the case of an appeal or hearing pursuant to Part II:

(A) the director of employment standards;

(B) the employer;

(C) each employee listed in the wage assessment or hearing notice; and

(D) if a claim is made against any corporate directors, those corporate directors;

(ii) in the case of an appeal or hearing pursuant to Part Ill:

(A) the director of occupational health and safety; and

(B) all persons who are directly affected by the decision being appealed; and

(iii) in the case of an appeal or hearing pursuant to Part V:

(A) the director of occupational health and safety; and

(B) all persons who are directly affected by the decision being appealed.

(2) Subject to the regulations, an adjudicator may determine the procedures by which the appeal or hearing is to be conducted.

(3) An adjudicator is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considers appropriate.

(4) An adjudicator may determine any question of fact that is necessary to the adjudicator's jurisdiction.

(5) A technical irregularity does not invalidate a proceeding before or by an adjudicator.

(6) Notwithstanding that a person who is directly affected by an appeal or a hearing is neither present nor represented, if notice of the appeal or hearing has been given to the person pursuant to subsection (1), the adjudicator may proceed with the appeal or the hearing and make any decision as if that person were present.

(7) *The Arbitration Act, 1992* does not apply to adjudications conducted pursuant to this Part.

Powers of adjudicator

4-5(1) In conducting an appeal or a hearing pursuant to this Part, an adjudicator has the following powers:

(a) to require any party to provide particulars before or during an appeal or a hearing;

(b) to require any party to produce documents or things that may be relevant to a matter before the adjudicator and to do so before or during an appeal or a hearing;

(c) to do all or any of the following to the same extent as those powers are vested in the Court of King's Bench for the trial of civil actions:

(i) to summon and enforce the attendance of witnesses;

(ii) to compel witnesses to give evidence on oath or otherwise;

(iii) to compel witnesses to produce documents or things;

(d) to administer oaths and affirmations;

(e) to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the adjudicator considers appropriate, whether admissible in a court of law or not;

(f) to conduct any appeal or hearing using a means of telecommunications that permits the parties and the adjudicator to communicate with each other simultaneously;

(g) to adjourn or postpone the appeal or hearing.

(2) With respect to an appeal pursuant to section 3-54 respecting a matter involving harassment or a discriminatory action, the adjudicator:

(a) shall make every effort that the adjudicator considers reasonable to meet with the parties affected by the decision of the occupational health officer that is being appealed with a view to encouraging a settlement of the matter that is the subject of the occupational health officer's decision; and

(b) with the agreement of the parties, may use mediation or other procedures to encourage a settlement of the matter mentioned in clause (a) at any time before or during a hearing pursuant to this section.

Decision of adjudicator

4-6(1) Subject to subsections (4) and (5), the adjudicator shall:

(a) do one of the following:

(i) dismiss the appeal;

(ii) allow the appeal;

(iii) vary the decision being appealed; and

(b) provide written reasons for the decision to the board, the director of employment standards or the director of occupational health and safety, as the case may be, and any other party to the appeal.

...

B. SHOULD I RECUSE MYSELF

[25] In *Agrium Vanscoy Potash Operations* v *United Steel Workers Local 7552*,[5] the Saskatchewan Court of Appeal said:

a) Generally, it is clear that a decision should be set aside if there is a reasonable apprehension that the decision-maker was biased in relation to the decision. That principle grows from the rules of natural justice and, as stated by Lord Hewart in *R.* v. *Sussex Justices; Ex parte McCarthy*,[6] "justice should not only be done, but should manifestly and undoubtedly be seen to be done."[7]

b) In *Sask. U.F.C.W., Loc. 1400-F6* v. *Shelly Western*,[8] Justice Gerwing writes as follows at page 310:

> [...] There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The judge was biased."[9]

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[5]2014 SKCA 79

[6][1924] 1 K.B. 256

[7]*Supra*, footnote 1 at para. 31

[8]1986 CanLII 2918 (SK CA)

[9]*Supra*, footnote 1 at para. 33

c) It is wise to establish the proper approach in determining whether a reasonable apprehension of bias exists. A good place to start is *Committee for Justice and Liberty* v. *National Energy Board*[10] at page 394:

> [...] the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."[11]

d) This formulation of the test has been endorsed by the Supreme Court of Canada, and is clearly authoritative.[12]

e) At paragraph 40:

> Accordingly the test for reasonable apprehension of bias in this appeal is whether reasonable and right-minded people, apprised of the relevant information and viewing the matter realistically and practically, would think it more likely than not that the arbitrator would not fairly decide the remedies issue remitted to her.[13]

f) There are several things to be mindful of:

i) The question of bias is contextual and will depend, among other things, on the nature of the decision-maker.[14]

ii) A mere suspicion of bias, or a mere concern about bias, is not enough to satisfy the test. Bias must be "more likely than not," and there must be "a real likelihood or

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[10][1978] 1 S.C.R. 369

[11]*Supra*, footnote 1 at para. 38 - 39

[12]*Ibid* at para. 40

[13]*Ibid* at para. 40

[14]*Supra*, footnote 6

probability of bias."[15]

iii) The "reasonable person" contemplated by the test is an informed person, with knowledge of all of the relevant circumstances, including relevant traditions of integrity and impartiality.[16]

[26] In *Elaine Germain* v. *Saskatchewan Government Insurance*,[17] the Saskatchewan Court of Appeal said that "there must be serious grounds upon which to base a conclusion of bias, given that there is a strong presumption of judicial impartiality." A mere suspicion of bias is insufficient.

[27] In *International Brotherhood of Electrical Workers, Local 2038* v *Stuart Olson Industrial Contractors Inc.*,[18] the Saskatchewan Court of Appeal referenced, with approval, the following reasoning of the SLRB:

> Whether there is a reasonable apprehension of bias is a question of fact, and it is necessary to examine the circumstances in context. The test is an objective one and the threshold for finding real or perceived bias is high. Mere suspicion, surmise or conjecture is not enough . . . .

[28] I am satisfied the foregoing authorities set forth how I should address the argument of whether I have a reasonable apprehension of bias and am incapable of deciding this Appeal impartially.

[29] I must start by saying discovery in this appeal process is generally designed to be minimal and informal. It is far less extensive than discovery under traditional litigation. It is my view discovery in an appeal such as this is:

a) limited because the object of the resolution scheme is to foster a final disposition of appeals

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[15] *Ibid* at page 394

[16] *R.* v. *S. (R.D.)*, [1997] 3 SCR 484, at para 48 & 111; *Supra*, footnote 1 at para. 42

[17] 2015 SKCA 84 at para. 11

[18] 2023 SKCA 115

in an easier, faster and more economical manner than what we see in tradition litigation; and

b) premised on the theory that discovery generally is unnecessary for a fair adjudication of the issues and inevitably causes increased costs, delay and complexity.

[30] In an effort to assist the parties, it is my usual practice to provide them with a copy of the material that was relied upon by OHS. I did that in this instance.

[31] It is also my usual practice to encourage parties to exchange witness lists. That encouragement took place at the pre-hearing conference of June 25, 2024. Strohan agreed to produce his list first. KGSMI agreed to provide its response witness list after review of Strohan's list. KGSMI suggested this approach because:

a) Strohan indicated he would have a significant number of witnesses–nine (9) to thirteen (13)–on his list; and

b) it did not expect it would need to identify any further individuals beyond that which Strohan had identified.

[32] Since the parties agreed to the exchange, I directed that it occur.

[33] Strohan subsequently submitted a witness list of sixteen (16) people. KGSMI responded it does not have any witnesses that did not appear on Strohan's list.

[34] Strohan objected to KGSMI's response, saying it contravened my "order." He asked that I direct KGSMI to produce a distinct list of its witnesses. KGSMI's response was that it did what it said it would do. It further argued that it was not in a position to refine its potential witness list beyond that which was provided by Strohan until it saw and understood the case Strohan had made out against it.

[35] I took the view KGSMI had not defaulted upon the agreed upon direction and therefore

declined to make the order Strohan sought. In response, Strohan said:

> I disagree with you and am seeking your recusal from my matter. I believe this . . . is a Denial of Natural Justice based upon Apprehension of Bias . . . .
>
> . . .
>
> I hereby declare my Apprehension of Bias for which I am asking you to recuse yourself as adjudicator. Please note that I am not accusing you of Bias, but merely my apprehension of it. [Underlining is Strohan's]

[36] The following is the initial gist of Strohan's reasoning for his "request" that I recuse myself:

a) my direction emanating from the June 25, 2024 conference required KGSMI to produce a separate witness list and I allowed KGSMI to "renege" on its duty thereunder;

b) my expressed view that KGSMI complied with the direction amounted to an order revising an order without reasons and without giving Strohan an opportunity to address same ahead of time;

c) he had no other way of identifying who . . . [KGSMI's] witnesses will be;

d) he required a specific witness list from KGSMI so that he "could structure and prepare . . . [his] case"; and

e) my expressed view "is arbitrary in nature, discriminates against . . . [his] case, and will have a prejudicial consequence that . . . [he is] unable to predict."

[37] Strohan added to his reasoning in the manner I summarized under the factual heading above.

[38] For the reasons that follow, Strohan misunderstands this appeal process.

[39] I will start with the June 25, 2024 conference call. The point of encouraging an exchange of witness lists was to attempt to lessen the surprise of an opposing party as to whom a party was

calling. While the expectation is that one will not, without risk of an adjournment, call people that are not on the list, there is in no way an obligation that everyone on the list must testify. That becomes a judgment call of each party as the matter proceeds. Strohan cannot claim the risk of KGSMI calling a witness that he is unaware of as KGSMI does not intend to call anyone that is not on his own list.

[40] Strohan argues strenuously that he needs KGSMI's witness list to enable him to prepare for the hearing. My view is this is a specious argument. In essence, KGSMI's list is Strohan's list. Neither party is required to call all of the witnesses that are on their list. They pick from the list those that each believes are necessary to testify. That may well be a fluid matter as the hearing proceeds.

[41] KGSMI has described the process accurately when it says:

a) this process is adversarial;

b) the parties do not prepare their cases in tandem or in conjunction with one another;

c) Strohan must prepare his case as best as his abilities allow, present that case as effectively as he can, and then close his case when it is finished;

d) KGSMI is then required to make a final determination of whether or not to seek a non-suit and not call any evidence or alternatively call its witnesses.

[42] KGSMI is correct when it argues that:

a) its witness list has no actual effect on Strohan's duty to call the witnesses he perceives are required to establish his case;

b) it is not KGSMI's duty or responsibility to alleviate the need to subpoena witnesses Strohan might want to call as part of his case.

[43] The test for reasonable apprehension of bias is what an informed person, viewing the matter realistically and practically, having thought the matter through, would conclude, whether he or she would think it more likely that the decision-maker, consciously or unconsciously, would decide fairly.

[44] Decision-makers in quasi-judicial settings are qualified such that they are strongly presumed to be impartial. That is essential to the entirety of the justice system. The onus is on the party alleging that there is a reasonable apprehension of bias. There must be serious grounds on which to base a conclusion that a decision-maker is biased.

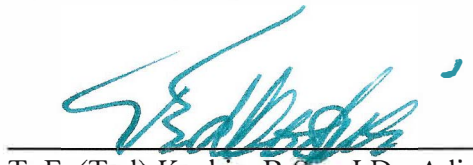
[45] Strohan has expressed disagreement with my decision and an unsubstantiated belief of bias on the part of the Government of Saskatchewan. He has related perceived consequences from my decision that flows from a misunderstanding of the parties' obligation on appeal and the process that preceded it and is not only unfolding, but yet to unfold. Using his own words, he does not accuse me of bias. He simply alleges his apprehension of it. The question is not Strohan's statement that he apprehends bias. There must be a reasonable apprehension of bias.

[46] KGSMI argues that a reasonable person, who is informed of the process, would conclude that my rulings to date are correct and in line with the reasonable expectations that parties might have in similar proceedings. With all humility, I agree.

[47] I am satisfied there is no reasonable apprehension that I am biased.

[48] Because of the above, I dismiss the application.

Dated at Saskatoon, Saskatchewan, on October 16, 2024.



T. F. (Ted) Koskie, B.Sc., J.D., Adjudicator