

BRITISH COLUMBIA LABOUR RELATIONS BOARD

W.G. ENTERPRISES LTD. (WILLY'S WHOLESALE AND
DISTRIBUTION OF FOODS)

(the "Employer")

-and-

TEAMSTERS UNION LOCAL NO. 31

(the "Union")

PANEL:	Stan Lanyon, Chair Brent Mullin, Vice-Chair Robert Pekeles, Vice-Chair
COUNSEL:	Peter Gall and Lindsay Lyster, for the Employer Don Davies, for the Union
CASE NO.:	28087
DATE OF HEARING:	January 23, 1996
DATE OF DECISION:	September 16, 1996

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 The Employer applies under Section 141 of the *Labour Relations Code* seeking for reconsideration and reconsideration of BCLRB No. B334/95 (the "Original Decision"). The Union had applied for certification and the only issue in the case relates to the Union's membership evidence and its compliance with Section 3 of the Labour Relations Regulation ("Regulation 3"). After satisfying itself that the membership evidence complied with Regulation 3, the Panel (the "Original Panel") granted the union's application for automatic certification.

II. THE FACTS

2 The Union applied for certification under Section 18(1) of the Code. In the course of the certification proceedings, a question arose as to whether the Union's membership evidence was signed and dated at the time of signature as required by Regulation 3(a). The Original Panel ordered an Industrial Relations Officer ("IRO") to conduct a further investigation. The IRO investigated and reported as follows (the "IRO's Report"):

At approximately 10:30 a.m. August 21, 1995 blank membership cards were picked up from the Teamsters Local 31 office in Prince George. A meeting was called for 3 p.m. that same day. (one shift at W.G. Enterprises ends at 2:30 p.m.) The person who signed as witness on all the membership cards filled in the date and company name on three cards at the beginning of the meeting. Membership cards were completed and witnessed by all those present, with the same person that dated the three cards at the beginning of the meeting dating the remaining cards during the meeting. The meeting ended at approximately 3:45 p.m. The cards were delivered directly to the union office. One additional card was duly completed that evening. An application for certification was completed and faxed to the Labour Relations Board. The application was dated and time stamped at 8:30 a.m. August 22, 1995.

On the basis of my investigation, I am satisfied that the membership cards were signed and dated at the time of signature in accordance with Regulation 3(a).

3 Only the Employer made submissions on the IRO's Report. The Employer submitted that:

Contrary to what the officer says, it is clear from the officer's report that the membership cards were not signed and dated at the time of signature as required under Regulation 3. The officer states that the dates were filled in both some time prior to

and some time after the employees signed the cards. This is contrary to Regulation 3, which states that "a membership card must be signed and dated at the time of signature." It is unclear from the report when the witness's signature was affixed to the cards, but it would appear that it was at the same time as the dates were put on. If so, and that seems to be the case, then there is no compliance in this respect either.

The officer says that, in her view, there has been compliance with Regulation 3. She does not, however, provide any reasons for that conclusion. It may be she reached this conclusion because the dates, and presumably the witness signatures, were filled in at the same meeting in which the employees signed the cards. That is not sufficient to be valid. A membership card must be signed by the witness and dated at the same time of the signature of the employee, meaning right after the card is signed by the employee, which did not occur here.

4 The Employer then referred to the Board's policy of strict compliance with Regulation 3, arguing that there had not been strict compliance in this case. The Employer submitted that the Union's application for certification must be dismissed because of a failure to apply with minimum membership requirements. In a later submission, the Employer clarified that the cards must be signed and dated at the same time, which the Employer said meant "one following right after the other". The Employer submitted that there could not be any gap in time between the signing and dating, as occurred in this case, "where some blank cards were dated at the start of the meeting, and other signed cards then had the dates put on afterwards."

III. THE ORIGINAL DECISION

5 The Original Panel held that it was satisfied that the membership cards met the requirement in Regulation 3(a) that they be "signed and dated at the time of signature". The Original Panel held that:

In my view, the mischief addressed by Regulation 3(a) is the avoidance of the 90 day time limit for the use of membership cards (Regulation 3(c)) through a practice of signing membership cards, leaving them undated, and at some later date affixing dates to the cards which will enable cards gathered over a lengthy period to be used to support an application for certification. The statutory language in Regulation 3(a) should be interpreted with a view to this purpose.

Applying this approach, I am satisfied that membership cards which are signed (in this case by both the members and the witness) and dated with that day's date during a 45 minute organizing meeting meet the requirement of Regulation 3(a) to be "signed and dated at the time of signature". I conclude that it is not fatal to the validity of the cards that some were dated just prior to

or just after the signatures were affixed. The cards were both signed and dated during the 45 minute meeting and in view of the purpose of and language used in Regulation 3(a) the procedure used to sign these cards satisfies the statutory requirements.

6 The Original Panel found that the Union had enough support for automatic certification and the certification was granted.

IV. ISSUES

7 (a) What does Regulation 3(a) mean by "signed and dated at the time of signature"?

8 (b) In what circumstances will the Board hold a hearing into membership evidence?

V. ARGUMENT

(A) Compliance with Regulation 3(a)

9 The Employer submits that the Original Decision is inconsistent with the principles expressed or implied in the Code because the Original Panel accepted the Union's membership evidence despite the fact that it did not strictly comply with Regulation 3(a).

10 The Employer argues Regulation 3 establishes the minimum criteria which must be met in order for the Board to accept the membership cards as valid evidence of membership in good standing in a trade union. The Employer says that the Board has consistently held that it requires strict compliance with Regulation 3 and that non-compliance is fatal: *Dencan Restaurants Inc.*, BCLRB No. B255/93 (Leave for Reconsideration of decision dated March 31, 1993), (1993), 20 CLRBR (2d) 94, 94 CLLC ¶16,005; *Buffalo Head Forest Products*, BCLRB No. B211/94; and *Elkview Coal Corporation*, BCLRB No. B288/93 (Leave for Reconsideration denied, BCLRB No. B335/93). The Employer says that the membership evidence in this case did not meet the Board's high standard of strict compliance with Regulation 3. The Employer further says that to accept the approach taken by the Original Panel would be to open the door to ever more flexible interpretations of Regulation 3(a), which would result in uncertainty and would inevitably lead to an ensuing increase in adjudication before the Board: *M3 Steel (Kamloops) Ltd.*, BCLRB No. B394/93.

11 The Employer argues that contrary to the Original Decision, the requirement of contemporaneous signing and dating of membership cards is not solely for the purpose of determining the length of time for which any given membership card is valid. As stated in *M3 Steel (Kamloops) Ltd.*, *supra*, that is but one of the purposes of the date requirement. The primary purpose of the date requirement is that the signature and date be given at the same time. The Employer argues that the reason for that requirement is to ensure that the date is placed upon the card in the presence of the person applying for

membership, at the time at which he or she signed the card. The requirement for consecutive signing and dating is imposed to ensure the integrity and propriety of the process of applying for membership in a trade union and of a trade union applying for certification. An employee signing a card which is not dated in his or her presence as part of a single transaction with his or her signature, is not assured of the propriety of that process, and in particular, is not assured that the date ultimately affixed on the card, whether it be affixed minutes, hours, or days before or after, accurately reflects the date upon which he or she in fact signed the card.

12 The Employer submits that in *Dencan Restaurants Inc., supra*, the Board described the dating requirements imposed by Regulation 3 as two interrelated, yet distinct, dating conditions: (1) membership cards must be signed and dated at the time of signature; and (2) membership cards are valid for 90 days from the date of signing (p. 5). The Employer says that the former criterion, while it must be present in order for the latter to be ascertained, is not subsumed within the latter. Therefore, the Regulation requires both that the cards be signed and dated at the same time, and that they be dated so as to permit the Board to judge with certainty, and without the aid of extrinsic evidence, whether they were executed within 90 days of the date of application for certification.

13 The Employer submits that the Code's and the Board's reliance on a membership card-based certification system is a compromise motivated by a desire to protect employee membership confidentiality and to provide a disincentive to employer unfair labour practices. The Employer argues that the acceptability of this compromise can only be maintained if unions relying on membership cards are, as the Board's jurisprudence has required, held to the highest standards of compliance with the statute's requirements. If one element of this complex bargain is disturbed, the entire edifice may crumble. The Employer submits that the Original Panel ignored both the jurisprudence of the Board and these weighty policy considerations in attempting to relieve against what it believed was the minor defect of a 45 minute gap. The Employer says that while it may be argued that a 45 minute lapse between dating and signing is a minor defect and should not invalidate the cards so executed, such an argument should not be accepted for the sound reasons of law and policy which have always motivated the Board to require strict compliance with criteria for valid membership evidence. The Employer says that, simply put, any deviation would only lead to uncertainty and ensuing litigation as parties sought to test the limits of acceptable sign up practices. Such uncertainty and increased litigation would compromise the Board's policy of maintaining the confidentiality of membership evidence, lengthen the certification process, and thereby put an unnecessary strain on the Board's already limited resources. The Employer argues that the IRO's Report alone mandated the dismissal of the Union's application for certification.

14 The Union argues that the Original Decision to accept the validity of the membership evidence as complying with Regulation 3 was correct and in full conformity with the Code's provisions, principles, and jurisprudence.

15 The Union takes issue with the Employer's characterization of the gap between signing and dating as being a 45 minute gap. The Union says the "gap" between

signing and dating was only a few minutes. Further the Union says there was no union officer or employee present at the meeting.

16 The Union argues that there is no evidence that the cards were not signed and dated in a manner which could seriously be called "at the same time". The Union says that Regulation 3(a) cannot be read literally because a person cannot physically sign and date at the same time. Therefore, some "gap" between signing and dating of a membership card is unavoidable. The Union argues that the Employer's logic cannot justify why a gap of a few seconds is any more in compliance with the Regulation than a gap of a few minutes, which was the case here.

17 The Union argues that none of the cases cited by the Employer addresses the real question before the Board: how much of a gap is permitted by Regulation 3(a) such that it can be said that the dating of the card occurred "at the time of signature". The Union says that a gap of a few minutes is sufficient to maintain conformity with both the meaning and intent of the Regulation.

18 The Union argues that a careful reading of *M3 Steel (Kamloops) Ltd., supra* clarifies that the "two criteria" analysis in that decision was referring to both Regulation 3(a) and (c). In that case, the Union says, the impugned card did not have the year specified, a deficiency which simultaneously offended both Regulation 3(a) and (c). In this case, Regulation 3(c) is not at issue.

19 Finally, the high degree of integrity and precision in membership cards as required in *Dencan Restaurants Inc., supra*, is not a stratospheric degree. Moreover, in that decision the Panel also stated that "... if after investigation... the Panel is satisfied that the improprieties are not made out or are so insignificant as to not cast doubt on the true wishes of the employees, the Panel is still free to grant automatic certification." (p. 9)

20 In reply, the Employer agreed that while "at the same time" cannot mean contemporaneously, it does mean right after. A few minutes is not right after. The Employer further argues that some cards were witnessed in advance, which clearly does not comply with the Regulation. In any event, the Employer argues that the Board does not know, and cannot know, that there was only a gap of a few minutes. All the Board has before it is the unsubstantiated hearsay of some of the employees.

(B) Natural Justice

21 The Employer submits that it was denied a fair hearing because it was not given an opportunity to test the validity of the Union's membership evidence through cross-examination or otherwise. Although the Employer's primary position is that the IRO's Report alone ought to have been sufficient to dismiss the Union's application, it argues that if the Original Panel chose not to dismiss, at a minimum it should have ordered a hearing. The Employer submits that the Original Panel erred by failing to order a hearing to permit a full exploration of the true circumstances in which the cards were signed and dated: *Dencan Restaurants Inc., supra*.

22 The Employer submits that it is one thing to accept that membership cards which strictly comply with the Code's requirements are admissible hearsay evidence of the employees' desire to join a trade union as required by the Code; it is quite another, however, to accept without question the hearsay evidence of an IRO, passing on information apparently given to her by an unidentified individual(s) with respect to the conduct and circumstances surrounding the signing and dating of such cards. The Employer submits that whatever concerns led the Original Panel to order the investigation in the first place could not have been conclusively resolved by the information contained in the IRO's Report. Even if the Original Panel accepted that a 45 minute gap was acceptable, it did not have before it reliable evidence of the length of the gap between the signing and dating. That is because of the lack of crucial information contained in the IRO's Report and the frailties inherent in a hearsay document of this nature.

23 The Employer acknowledges that as a general rule, membership evidence is confidential and not subjected to cross-examination: Section 124(4). The Employer submits that it is the confidentiality of membership evidence which is the reason and basis for the Board's requirement of strict compliance with Regulation 3. However, the Employer argues that neither Section 124(4) of the Code nor the Board's confidentiality policy is absolute.

24 The Employer argues that while disclosing the membership evidence will necessarily breach the confidentiality of the employees' wishes, the larger purposes of the Code, Section 2(1)(a) ("to encourage the practice and procedure of collective bargaining between employers and trade unions as the freely chosen representatives of employees"), requires no less. The Employer submits that where doubt is cast on the validity of membership evidence those doubts must be resolved because as long as such doubt is permitted to exist, the Board cannot be confident that the trade unions to whom it grants certifications are, in fact, the freely chosen representatives of the employees. The Employer further argues that where unions are certified over the legitimate concerns of an employer or employees with regard to the sign up process, collective bargaining will be difficult, with both the employer and employees wondering whether the trade union truly enjoys the support of the employees within the bargaining unit.

25 Finally, the Employer argues that the purposes of the Code cannot and will not be furthered by certification procedures which violate the principles of natural justice and procedural fairness. Denying a hearing where such concerns exist, with the possible result of a certification being imposed without the statutorily required support of a majority of the employees in the bargaining unit, could not help but violate those fundamental principles. The Employer argues that the very integrity of the card-based certification system is at stake. At a minimum, once a problem has been raised the Board should convene an oral hearing so everyone can be assured that the cards were signed and witnessed at the same time, as required under Regulation 3.

26 In response, the Union first submits that the Employer never requested a hearing and therefore cannot now complain that it was denied a hearing.

27 Second, the Union submits that a hearing in a case such as this is a discretionary decision: *Dencan Restaurants Inc., supra*. Here, the Original Panel chose to order an investigation and the results of that investigation satisfied the Original Panel that the "improprieties" were insufficient to constitute non-compliance with Regulation 3 or to cast doubt on the true wishes of the employees.

28 Third, the Union argues that, as acknowledged by the Employer, membership evidence is not disclosed to employers and is not subjected to cross-examination: *Dencan Restaurants Inc., supra*.

29 Fourth, the Union argues that if the Employer has evidence that the dates on the cards are wrong, it should present it. The Union argues that the Employer has no evidence that justifies its position and instead it seeks a hearing hoping to discover some improprieties.

30 Finally, the Union also refers to Section 2(1)(a) of the Code and says that the Employer's position does violence to that fundamental purpose. The employees clearly want to engage in collective bargaining and have complied with all substantive provisions of the Code. To trample this wish because a few minutes elapsed between signing and dating can only offend this fundamental purpose.

31 The Employer replies that the reason it did not request a hearing initially was that it seemed clear that on the basis of the IRO's Report that the cards were defective and the application should have been summarily dismissed. If, as was clearly the case, the Original Panel did not view the IRO's Report in the same light, then the only possible course of action open was to order that a hearing be held. However, once the Original Panel held that there was no significant gap in time, even though three cards were signed in advance, and the Original Panel could not really say when the others were witnessed, let alone whether they were even witnessed in the presence of the person executing them, it became clear that a hearing should have been held. Where there is a legitimate concern about the validity of the cards, a hearing is required, unless the Board can conclusively resolve that concern without a hearing. That cannot be done in a situation where the Board must rely entirely on the self-interested and unsubstantiated assertions of the Union or its supporters.

32 The Employer requests that its application for reconsideration be granted and that the Board, on the basis of the material currently before it, set aside the decision of the Original Panel and dismiss the application for certification. Alternatively, the Employer requests that the Board set aside the Original Panel's decision and order a new hearing in which all parties would be given the opportunity to explore fully the facts and circumstances surrounding the signing and dating of the membership cards at issue in this proceeding.

VI. DECISION AND ANALYSIS

(A) The Statutory Framework

Labour Relations Code

18. (1) If a collective agreement is not in force and a trade union is not certified as bargaining agent for a unit appropriate for collective bargaining, a trade union claiming to have as members in good standing not less than 45% of the employees in that unit may at any time, subject to the regulations, apply to the board to be certified for the unit.

22. (1) When a trade union applies for certification as the bargaining agent for a unit, the board shall determine if the unit is appropriate for collective bargaining and may, before certification, include additional employees in or exclude employees from the unit.

(2) The board shall make or cause to be made the examination of records and other inquiries including the holding of hearings it considers necessary to determine the merits of an application for certification, and shall specify the nature of the evidence the applicant must furnish in support of the application and the manner of application.

(3) Membership in good standing in a trade union must be determined on the basis of membership requirements prescribed in the regulations.

23. (1) If the board is satisfied that on the date it receives an application for certification not less than 55% of the employees in the unit are members in good standing of the trade union and that the unit is appropriate for collective bargaining, the board shall certify the trade union as bargaining agent for the employees in the unit.

(2) In deciding whether a person is a member in good standing of a trade union, the board may decide the question without regard to the constitution and bylaws of the trade union.

24. (1) The board, to determine whether the employees in an appropriate bargaining unit wish to have a particular trade union represent them as their bargaining agent, may order that a representation vote be taken, in accordance with the regulations, among the employees in the unit.

(2) If, on an application under section 18, 19 or 21, the board is satisfied not less than 45% and not more than 55% of the

employees in a unit are members in good standing of the trade union, it shall direct that a representation vote be taken.

(3) The board shall order that a representation vote be conducted within 10 days of the date of the application under section 18, 19 or 21 or, if the vote is conducted by mail, within a longer period the board orders.

(4) The board may direct that another representation vote be taken if

- (a) a representation vote is taken, and
- (b) less than 55% of eligible employees cast ballots.

124. (1) The board may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it considers proper, whether or not the evidence is admissible in a court of law.

(2) The board may request and receive a report from a person it appoints to investigate an application or to investigate and attempt to settle a dispute under this Code, a collective agreement or the regulations, and, despite section 146 (3), the board shall disclose the report to the parties.

(3) Information relating to membership or any record that may disclose whether a person is or is not a member of a trade union produced in a proceeding before the board is for the exclusive use of the board and its representatives.

(4) No person shall, except with the consent of the board, disclose whether a person is or is not a member of a trade union.

126. (1) The board shall determine its own practice and procedure, but shall give full opportunity to the parties to a proceeding to present evidence and make submissions.

(2) The board, subject to the minister's approval, may make rules governing its practice and procedure and the exercise of its powers and establish forms it considers advisable.

Labour Relations Regulation

Criteria for Membership

3. For the purpose of establishing membership in good standing in a trade union where that trade union is making an application for certification, the following minimum criteria apply:

- (a) a membership card must be signed and dated at the time of signature;
- (b) a membership card signed on or after January 18, 1993 must contain the following statement:

In applying for membership I understand that the union intends to apply to be certified as my exclusive bargaining agent and to represent me in collective bargaining.;

- (c) within 90 days of the application for certification,
 - (i) the membership card must have been signed,
or
 - (ii) active membership must have been maintained by dues payments.

(B) The Certification Process

33 Prior to making an application for certification, a union normally organizes employees at the worksite in an effort to sign up not less than 45 percent of the employees in the proposed bargaining unit in order to obtain a representation vote under Section 24(2), or not less than 55 percent of the employees in the proposed bargaining unit in order to qualify for automatic certification under Section 23(1).

34 Pursuant to Section 22(3), union membership cards must comply with Regulation 3: that is, they must be signed and dated at the time of signature (Regulation 3(a)); they must contain the prescribed wording (Regulation 3(b)); and they must be signed within 90 days of the union's application for certification (Regulation 3(c)(i)); or, the union may instead choose to provide evidence of the employees' active membership through the payment of membership dues within 90 days of the union's application for certification (Regulation 3(c)(ii)). However, if the union pursues this latter option, there must still be an original membership card: *Bradford Building Services Co. Ltd.*, BCLRB No. B352/95, *Highway Constructors Ltd.*, BCLRB No. B185/96.

35 Having obtained its requisite support through employees signing membership cards, the union then applies to the Board for certification. Upon receiving a properly completed application for certification, the Board notifies the employer, employees, and any trade union which may have a collective bargaining relationship with the employer (Labour Relations Board Rules, Section 24); and the Board will then set a hearing date, usually seven or eight days from the date of receipt.

36 Within two or three days of the Board's receipt of the union's certification application, an IRO will contact the union to arrange to review the membership cards.

The union's membership evidence is for the exclusive use of the Board and its representatives and may not be disclosed, except with the consent of the Board: Section 124(3),(4). The union is required under current practice to bring its original membership evidence and one set of photocopies of that evidence to the IRO for inspection. The IRO then reviews that evidence with particular attention to the following questions:

- (a) is the trade union name the same as the name on the certification application?
- (b) if there is a local union number, is it included on the membership application?
- (c) is the statement required by Regulation 3 included on the card (if the card was signed on or after January 18, 1993)?
- (d) does it appear that the signature and date were signed at the same time?
- (e) if the union is relying on dues payments, have the dues been paid within 90 days of the application for certification and have the original cards been reviewed?

37 The IRO also reviews the employer's records which may be faxed to the IRO or the IRO will attend at the employer's premises. The IRO reviews these documents to determine the employee list from which the union's percentage of employee support is calculated.

38 The IRO forwards his or her investigation report to the Board, including a confidential portion detailing the membership evidence and the photocopied membership cards. The complete IRO report, except for confidential membership information, is sent to both the union and the employer prior to the hearing, pursuant to Section 124(2). An Administrative Assistant in the Board's Registry then reviews the membership evidence once again focusing on the five questions referred to above. If the IRO's report raises concerns, or if the Administrative Assistant has concerns about the membership evidence independent of the IRO's report, those concerns are noted on the file.

39 The Vice-Chair assigned to the file will review the file, will conduct the third inspection of the membership evidence for compliance with Regulation 3, and will review any concerns raised by the IRO or Administrative Assistant. The Board's policy is to strictly enforce the Regulation 3 requirements: *Dencan Restaurants Inc., supra*; *Buffalo Head Forest Products, supra*; and *M3 Steel (Kamloops) Ltd., supra*. If the Vice-Chair has concerns about the membership evidence, whether independent of the IRO report or Administrative Assistant notes, or flowing from their comments, the Vice-Chair has several options, which can be exercised even prior to the certification hearing: (a) to request that an IRO, or a Special Investigating Officer ("SIO"), do a supplementary investigation; (b) to request submissions from the parties on the issue; (c) to call a

hearing into the matter; or (d) where the cards clearly fail to comply with Regulation 3, to dismiss those defective cards or the application on the basis of the Board's strict compliance with Regulation 3. The form of action taken by the Board is a discretionary matter: *Dencan Restaurants, Inc., supra*, p. 8. Further, prior to the hearing, the Board may invite the parties to meet in an informal session with one of SIOs in an effort to settle or narrow some or all of the outstanding issues.

40 If the Vice-Chair orders a supplementary investigation, the form of the investigation will depend on the nature of the defect or allegation, but may include re-reviewing the original cards, comparing card signatures with payroll records, and/or interviewing the employees, a specific group, or a random group of employees. The IRO's supplementary report, except any confidential membership information, is again disclosed to the parties pursuant to Section 124(2) of the Code and the parties will have an opportunity to make submissions on the report. In some cases, the IRO supplementary report will be dispositive of the issue. For example, if the date does not appear on the photocopied membership cards, the Vice-Chair may order the IRO to review the original cards. The original cards may have the date on them, but the date had been cut off in photocopying. The IRO can then report that the cards do, in fact, comply with Regulation 3. In other cases, the IRO's report will not be dispositive or will raise sufficient concern to warrant the parties' submissions on the matter. In the submission process, the names of members whose cards are at issue are not disclosed to the employer.

41 If the Vice-Chair decides that the membership evidence issue was not resolved by the IRO's report(s) s/he considers whether the matter should be pursued to a hearing. In considering whether to pursue these matters to a hearing which may reveal confidential membership information, the Vice-Chair will weigh the interests of natural justice against the policy interest in maintaining the confidential nature of the membership evidence.

42 In addition to adjudicating Regulation 3 issues, the Board may dismiss cards and/or the certification application where the cards do not express the true wishes of the employees concerned. The employees true wishes may not be disclosed where the Board has concluded that there have been fraudulent organizing tactics, the signature(s) were obtained by coercion or intimidation, or misrepresentations were made which render the membership card(s) conditional or equivocal.

43 If there are no concerns about the membership evidence, the matter proceeds to a hearing where objections to the application for certification will be heard. Other matters, such as unfair labour practice allegations may be consolidated with the certification hearing. At the hearing, the employer or objecting employees may challenge the membership evidence, bargaining unit appropriateness, whether particular employees should be included in or excluded from the bargaining unit, or objections to the trade union's status. However, the employer must present more than bald complaints or mere assertions in order for the Board to order an investigation or vote: *Canadian Chopstick Manufacturing Co. Ltd.*, BCLRB No. B295/94; *Stay N' Save Motor Inn Inc.*, BCLRB No. B324/94, B344/94 (upheld on reconsideration on B418/94).

44 If, given the nature of the objections, there is a question as to whether, at the end of the day, the union would have the requisite support for an automatic certification, the Board will order a representation vote. If the Board orders a representation vote, it must be conducted within 10 days of the date of application, or if conducted by mail, within a longer period ordered by the Board: Section 24(3). In some cases, outstanding issues may not have been conclusively determined within the 10 day period, in which case the Vice-Chair orders that the vote be held and sealed pending resolution of the outstanding issues. Any challenged ballots will be double-sealed pending determination as to the validity of that ballot. The vote will be counted if, after the objections have been resolved, the union has not less than 45 percent support but it does not have the threshold 55 percent support required for an automatic certification. The vote will not be counted if, after the objections have been resolved, the union has 55 percent support as required for an automatic certification. If the employer has no objections, the union will be automatically certified or the vote will be counted, depending on the union's level of support. If the union is ultimately successful, the Board will issue a formal Certification Order.

45 The Board's certification process is as much as possible an administrative process for a number of reasons. First, aside from unfair labour practice complaints, certification applications account for the most frequent type of application to the Board. In 1995, the Board received 607 applications for certification. There were 648 applications for certification in 1994. Second, the entire certification process is expedited and, as noted above, if a vote is ordered, the Code requires that it must be held within ten days of the certification application unless a vote by mail is ordered (Section 24(3)). Lastly, the policy basis for the legislated card-based system and the ten day time frame for a vote is an attempt to minimize the possibility of improper employer influence or delay in the certification process. Either can lead to a serious undermining of the real availability and practical efficacy of the basic franchise in the Code.

46 The Legislature has directed that where a union obtains not less than 55 percent support of the proposed bargaining unit, the Board must certify the union: Section 23(1). Therefore, the Board's governing statute itself mandates that in most cases certification is a card-based, administrative procedure. As just noted, part of the reason for the administrative, card-based certification system is to prevent employer interference with the certification process. Another reason for the administrative, card-based system is the statutory provision ensuring the confidentiality of membership evidence (Section 124(3),(4)). The result is the Board's general policy of administratively determining a union's membership support and thus not entering into oral hearings to do so: *White Spot Ltd.*, BCLRB No. B201/85. Although the Board retains a discretion to order a representation vote in any case, even where the union obtains the requisite 55 percent support (Section 24(1)), the Board's discretion under Section 24 is exercised narrowly, consistent with the statutory policy reflected in the Code: *Stay 'N Save Motor Inn Inc.*, *supra*; *Elkview Coal Corp.*, *supra*; and *Canadian Chopstick Manufacturing Co. Ltd.*, *supra*.

47 In summary, given the number of certification applications, the speed at which certification applications must be processed, the intent in the legislation to minimize the possibility of employer interference and delay in the certification process, the confidentiality of membership evidence, and the Legislature's choice of a membership card-based certification system, the certification process is necessarily and primarily an administrative process.

(C) The Regulation 3 Requirements - Signing and Dating

48 Pursuant to Section 22(3), membership in good standing in a trade union must be determined on the basis of the requirements in Regulation 3. In *Dencan Restaurants, Inc., supra*, the Board held that:

The recent amendments to the Code have meant that once again, the Board will, in most circumstances, rely on the membership cards produced by a union as the only evidence of the members' wishes. As noted above, these membership cards are, pursuant to s. 124(3) of the Code, not disclosed to the employer or any other persons opposing the application and are not subject to cross-examination. They are, in fact, an admissible form of hearsay evidence. Because membership evidence cannot be subjected to the same scrutiny as other evidence presented to the Board, it is important that the Board exercise additional caution in relying on membership cards as evidence. The Board must insist on a high degree of integrity and precision in the cards presented to it as evidence of membership in a union. (p. 8)

49 In that decision, the Board held that non-compliance with Regulation 3 will be fatal to membership in good standing in a trade union (p. 4). Since *Dencan Restaurants Inc., supra*, the Board has consistently required "strict compliance" with Regulation 3 in order to meet the threshold requirements of the Code: *Buffalo Head Forest Products, supra*; *Elkview Coal Corp., supra*. Moreover, Board decisions have held that Regulation 3 is a mandatory and substantive provision: *M3 Steel (Kamloops) Ltd., supra*; *Elkview Coal Corporation, supra*. In *M3 Steel (Kamloops) Ltd., supra*, the Board held that:

The requirements are expressly written in the statute and unions now clearly know what is required. The Board has articulated in *Elkview Coal* and *Dencan Restaurants* the high standard it will expect of the membership evidence proffered by a union. For the Board to deviate from strict compliance with Section 3 would only put an unfair burden on investigating officers to determine what is a material defect and would also foist more adjudication on the Board when no clear rules on what constitutes a material error are enunciated.

As long as the membership evidence complies with the Section, the Board has indicated that it will not go behind the membership evidence lightly. Permitting more flexible interpretations of the Regulation is contrary to the express intention of the statute and the need of the labour relations community to understand the rules governing certification. In *White Spot Limited, supra*, when considering minimum requirements under the Code, the Board said:

... evidentiary hearings to determine majority support are not feasible due to both the length of time involved in such process and the threat to confidentiality....(p. 9) (p. 5)

50 The Board has had a few cases before it which touched on the issue of dating generally and in the context of the Regulation 3(a) requirement. In *Buffalo Head Forest Products Ltd., supra*, the panel refused to accept membership cards that had not been dated and signed at the same time. In that case, the date on the card was the date the member had originally joined the Association and not the date they had actually signed the card. In *M3 Steel (Kamloops) Ltd., supra*, the panel rejected a card that was dated but had no year attached to the date. In that case, the panel held:

The Applicant says that the date is only meant to show that the card was signed 90 days prior to the application for certification. I disagree. The Regulation states the card must be signed and dated at the time of signature. The date and signature must be given at the same time. That is one criterion. The date also serves to determine the length of time for which it is valid. That is a second criterion. The incomplete date of "October 19" meets neither criteria in this case. I accept Black's Law Dictionary's definition of date and find that the date required in Section 3 is one of substance and not form under Section 28(2) of the *Interpretation Act* as submitted by the Applicant. Section 156 gives the Board the discretion to relieve against defects or irregularities. For matters where there is a "defect in form, a technical irregularity or an error of procedure...". However, Section 3 is a substantive provision - it sets out minimum statutory requirements to achieve membership support. These cannot be "relieved" against. (pp. 4-5)

51 In *National Real Estate Service, ("NRS")*, BCLRB Nos. B184/95, and B209/95 (reconsideration of this last decision on the scope of the supplemental investigation dismissed: BCLRB No. B92/96), the union's practice was to return undated cards on the day they were signed to the organizer for dating. The union advised the Board that this had occurred with respect to the card at issue. The panel held that at least this one card was not signed and dated at the time of signature and ordered an investigation to determine whether some of the other membership cards were also dated after signature. The supplemental IRO report disclosed that all but four of the cards were dated by the employee at the time of signature. One of those cards was the card that

gave rise to the investigation and the union chose not to rely on that card. Two of those cards were cards where the employees witnessed the third party's dating. The panel found that there was no requirement in Regulation 3(a) that the card be signed and dated by the same person and accepted those two cards as complying with Regulation 3. The fourth employee did not recall whether the third party filled in the date or not. The panel held that even with the exclusion of the two cards at issue, the union still had sufficient support for an automatic certification, which the panel granted.

52 Finally, in *Opus Framing Ltd.*, BCLRB No. B176/96, an IRO supplementary investigation revealed that there was some question as to whether at least two membership cards were signed and dated at the same time. The panel held:

Union membership evidence must comply with Regulation 3. Regulation 3(a) provides that "A membership card must be signed and dated at the time of signature". The reason for this Regulation is to ensure that cards are collected within the 90-day time limit for the use of membership cards under Regulation 3(c).

The [IRO's] summary noted above casts doubt as to whether the cards were "signed and dated at the time of signature". Regulation 3 does not state that the cards must be signed and dated by the same person (i.e. the new member). If a witness signs and dates a card after it has been signed by a new member there will be an acceptable time lag between signing and dating the card within the strict compliance of Regulation 3. (p. 2)

53 After reviewing the Original Panel's decision in *W.G. Enterprises Ltd.*, the panel in *Opus Framing Ltd.* noted that the time lag at issue was unclear because the union failed to respond to the Board's request for submissions. Accordingly, the union failed to meet its onus to prove the membership evidence complied with the requirements under Regulation 3.

54 In the case before us, we agree with the Original Panel that one of the purposes of Regulation 3(a) is to ensure that a union does not avoid the 90 day time limit in Regulation 3(c) through a practice of signing membership cards, leaving them undated, and at some later date affixing dates to the cards which will enable cards gathered over a lengthy period to be used to support an application for certification. Thus, one of the purposes of the signing and dating requirement, though in a separate subsection (as acknowledged in *M3 Steel (Kamloops) Ltd., supra*), is to ensure compliance with Regulation 3(c). (See also *Opus Framing Ltd., supra*.) Regulation 3(a) and (c) therefore work together to ensure that each card falls within the 90 day time limit.

55 Another basic purpose of Regulation 3(a), however, is to provide an assurance of the integrity of the card to both the individual signing the card and the system as a whole. After all, as noted above, once the card is signed by the individual it is from that point normally subjected only to administrative review. There should thus be meaningful requirements and assurances that the card was properly signed and dated, both for the individual(s) signing and the system as a whole.

56 We thus affirm the Board's policy that there must be strict compliance with Regulation 3. However, within that standard of strict compliance, there is also a requirement of reasonableness; i.e., such that the requirements, while strict, will be meaningful and not artificially technical. Having considered the requirement from that perspective, we find that while "at the time of signature" in Regulation 3(a) may not mean hours later as stated in *NRS, supra*, it does mean within the time frame of a conversation, a meeting, or another such single event or interaction. To find otherwise would invalidate a card, for instance, that was signed, but a discussion arose prior to the dating that may have lasted for several minutes. In our view, neither the Regulation nor the Code would require such a card to be dismissed. However, while the Board will not dismiss cards which are signed and dated within a reasonable period of time, such as in a "single event or interaction", it will not allow cards that are dated outside the space of the single event or interaction.

57 We add that had the Legislature intended that the purpose of Regulation 3(a) was to ensure that the employee signing the card also witness the dating, as argued by the Employer, we believe it would have so stipulated, or required that the employee affix the date himself or herself. There is no such stipulation or requirement: *NRS, supra, Opus Framing Ltd., supra*. As a result, as long as the dating of the card was within the single event or interaction and is accurate, it need not be done in the presence of the individual signing the card.

58 Even where cards are signed by inexperienced employees or organizers, the union will be responsible for the integrity of the membership evidence. The union must ensure that its membership evidence strictly complies with Regulation 3. In assessing its membership evidence, unions thus must be cognizant of this high standard which helps maintain the integrity of the certification process and ensures the Board will not normally inquire into confidential membership issues. However, concomitant with this high standard, the Board will not be unreasonable in its assessment of the standards with which a union's evidence must comply. While unions are aware of the high level of scrutiny upon which its membership evidence will be assessed, it will be a meaningful, and not an insurmountably high, standard. We add that engaging in an inquiry as to the exact timing of when all cards were signed and dated would stretch the Board's resources beyond that which we are prepared to require.

59 When considering what is reasonable, the Panel turns to the purposes of the Regulation and the Code. As noted above, the purpose of Regulation 3(a) is to ensure that the 90 day time limit is not manipulated and to provide assurance of the integrity of each individual membership card. In turn, those purposes must be placed within "the fundamental premise" of the Code, which is to ensure that employees are permitted access to collective bargaining when they so choose: *Forano Limited., BCLRB No. B2/74, [1974] 1 Can LRBR 13 at p. 17*.

60 In this case, the cards were all signed within the space of the meeting (the single event or interaction), and there was no attempt to manipulate the 90 day requirement. The date on the cards is the date they were signed. The application for certification was made on the day after the meeting in question. We find that the cards comply with

the explicit requirements of the Regulation, as well as the objects and purposes of both the Regulation and the Code. We thus conclude that signing and dating within the space of the 45 minute meeting meets the objectives of the statute and Regulation as evidence of membership in good standing. We therefore uphold the Original Panel's decision. Under these circumstances, the Panel did not need to conduct a further investigation or convene a hearing into the circumstances of the signing and dating.

(D) The Intersection of Confidentiality and Natural Justice

61 Given our determination upholding the Original Panel's decision, it is not strictly necessary to consider the circumstances in which the Board will order a hearing into membership evidence. However, in order to provide some guidance to the community, we will take this opportunity to articulate some of the policy considerations which will guide the Board's determinations as to whether to order hearings into membership evidence.

62 In *Kane v. Board of Governors of University of British Columbia*, (1980), B.C.L.R. 124, the Supreme Court of Canada set out a number of administrative principles. Relevant to this case are:

2. As a constituent of the autonomy it enjoys, the tribunal must observe natural justice which, ... is only "fair play in action." In any particular case, the requirements of natural justice will depend on "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth".... To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.

* * *

4. The tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity "for correcting or contradicting any relevant statement prejudicial to their views"... (p. 135, cites omitted)

The Supreme Court of Canada has also held that the rules of natural justice must take into account the institutional constraints faced by an administrative tribunal, such as the need for the efficient administration of justice in the face of heavy caseloads: *Re Consolidated-Bathurst Packaging Ltd. and IWA, Local 2-69 et al.*, (1990) 68 D.L.R. (4th) 524 at p. 554.

63 The Board must be attentive to its obligation to provide a fair hearing to the parties in order to comply with the principles of natural justice. Section 126(1) of the Code reflects this most basic administrative law principle that, while the Board may determine its own practice and procedure, it must "give full opportunity to the parties to a proceeding to present evidence and make submissions". Therefore, the Board's power to determine its own practice and procedure is subject to the right that the parties

essentially be "heard" in compliance with the principles of natural justice. In *North Shore Home Support Services Society*, BCLRB No. B366/95 (Leave for Reconsideration of BCLRB No. B307/95), upheld on judicial review, unreported, February 23, 1996, Vancouver Registry No. A953484/A953031, B.C.S.C., the Board commented on its power to decline to hold oral hearings in a particular case. The reconsideration panel held:

The Board has on many occasions stated that an oral hearing will not be held in each and every application received. The courts have generally upheld the ability of administrative tribunals to structure their own procedures including the power to determine whether an oral hearing is required. In *Board of Education of Indian Head School Division No. 19 of Saskatchewan v. Knight*, (1990) 69 D.L.R. (4th) 489, the Supreme Court of Canada adopted at page 512 the following passage from Wade, *Administrative Law*, at p. 482-3:

A "hearing" will normally be an oral hearing. But it has been held that a statutory board, acting in an administrative capacity, may decide for itself whether to deal with applications by oral hearing or merely on written evidence and arguments, *provided that it does in substance "hear" them...* (emphasis added by the Supreme Court of Canada)

This Board uses a combination of decision making procedures; some involve more formal and extensive oral hearings; some involve expedited or summary hearings; and some are decisions made "off the file" based on written submissions of both fact and law. Further, and with the support of the community, the Board is adopting various alternative dispute resolution (ADR) mechanisms in order to expand its decision making repertoire. But in all cases the parties are in substance heard. This case is no different. (p. 4)

64 Competing against this fundamental administrative principle, is an equally fundamental principle in the context of labour relations, that evidence of an employee's membership, or non-membership, in a union is confidential. Sections 124(3) and (4) of the Code provide that membership evidence that may disclose whether or not a person is a union member is confidential and for the exclusive use of the Board, and that no person shall disclose that information without the consent of the Board. In this way, the Legislature has both ensured the continued confidentiality of membership evidence, but endowed the Board with the discretion to disclose the evidence, where natural justice so requires. In these two subsections, together with Section 126, it is apparent that the Legislature has expressly opted to limit the parties' right to have an oral hearing where to do so would disclose confidential membership information, unless the Board finds it is in the interests of natural justice to hold such a hearing.

65 Before reviewing the jurisprudence that has developed around membership evidence confidentiality as it intersects with the requirements of natural justice, it is useful to review a line of court decisions that deal with whether particular documents should be treated as confidential, outside the membership evidence and labour law context. In *Bergwitz v. Fast*, (1980), 18 B.C.L.R. 368 (B.C.C.A.), a patient made a complaint against her dentist to the College of Dental Surgeons and sued the dentist for negligence. The College prepared a report in that regard but refused to disclose it to the complainant, relying on their policy to keep such reports confidential. In one of the three concurring judgments, Craig, J.A. referred to four fundamental conditions for communications to be rendered confidential set out by J.H. Wigmore in *Evidence in Trials at Common Law*, 3rd ed. (McNaughton Revision, 1961) and adopted by the Supreme Court of Canada in *Slavutych v. Baker*, [1976] 1 S.C.R. 254, [1975] 4 W.W.R. 620, 38 C.R.N.S. 306, 75 C.L.L.C., 55 D.L.R. (3d) 224:

- (1) The communications must originate in confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

66 The Court concluded that while the Wigmore criteria were useful guides when considering whether a claim of privilege ought to be acceded to, they ought not dominate a judges' consideration of that request. Rather, the judge should consider "whether the public interest in the proper administration of justice outweighs in importance any public interests that might be protected by upholding the claim for privilege." (p. 369). The Court ordered disclosure of the report.

67 In *Merrill Lynch v. Granove*, [1985] 5 W.W.R. 589, the Manitoba Court of Appeal was asked to determine whether employee statements taken in the course of a Securities Commission investigation must be disclosed. Again, there was no statutory authority for refusing to disclose these documents. The Court of Appeal adopted the test in *Bergwitz v. Fast*, *supra* and held that the Supreme Court of Canada in *Slavutych v. Baker*, *supra* did not intend that the Wigmore conditions were to be applied as a formula or as if the conditions were definitions to be applied mechanically (p. 594). The Court concluded:

... In my view, refusing production would not be in accordance with the public interest in the proper administration of justice. The trend in Canada is to keep open the truth-finding function of the judicial process *unless the maintenance of confidentiality is deemed*

desirable for reasons of public policy. (pp. 595-96, cites omitted, emphasis added)

68 Finally, in *Brand v. British Columbia (Workers' Compensation Board)*, (1993), 32 Admin. L.R. (2d) 89 (B.C.S.C.), two employees objected to the Workers' Compensation Board's disclosure of the contents of their files, in particular their medical records, to a consultant retained by the employer. Section 95 of the *Workers' Compensation Act*, R.S.B.C. 1979, c. 437, was headed "Secrecy" and provided in part:

(1) Officers of the board and persons authorized to make examination or inquiries under this Part shall not divulge or allow to be divulged, except in the performance of their duties or under the authority of the board, information obtained by them or which has come to their knowledge in making or in connection with an examination or inquiry under this Part....

(3) The workers' advisers, the employers' advisers and their staff shall have access at any reasonable time to the complete claims files of the board and any other material pertaining to the claim of an injured or disabled worker; but the information contained in those files shall be treated as confidential to the same extent as it is so treated by the Board.

69 The Court held that in undertaking to balance the two competing interests of confidentiality, or privacy, and natural justice, it was useful to consider the application of Wigmore's four criteria. After reviewing the first three criteria in the context of the case, the court found that the fourth question involved a balancing of interests and was in fact a restatement of the larger issue that lay at the heart of the case -- whether a worker's interest in confidentiality of his own medical information is outweighed by the employer's interest in having full disclosure. The Court concluded:

...[Counsel for the workers] has not cited one case in which an individual's interest in the privacy of his medical records has been held to outweigh the dictates of natural justice when a direct conflict has occurred. In my view, that is because as stated in *Bergwitz v. Fast* (1980), 18 B.C.L.R. 368 (C.A.), "the public interest in the proper administration of justice outweighs in importance any public interests that might be protected" by upholding the petitioners' claims. This is not to say they do not have a legitimate interest in or expectation of privacy, but that that interest and expectation must in these circumstances give way to the larger public interest. (p. 106)

70 In that case, it may be that the statute specifically permitted the type of disclosure the employees sought to prevent (s. 95(3)). However, the Court's balancing of the competing interests is useful to our analysis. It is clear that while the four Wigmore conditions remain "useful guides", they have largely been superseded by the reformulation of the fourth condition which is: "whether the public interest in the proper administration of justice outweighs in importance any public interests that might be

protected by upholding the claim for privilege". It is important that this test was formulated largely in the context of where a body had only a *policy* to prevent disclosure, or in the case of *Brand v. British Columbia (W.C.B.)*, supra, there appeared to be express statutory permission for the disclosure in question. However, in this case, the legislature has already determined that the documents in question are confidential, essentially answering Wigmore's first three criteria. In our view, the courts' test of "whether the public interest in the proper administration of justice outweighs in importance any public interests that might be protected by upholding the claim for privilege", in essence, states the central issue in this case and does not assist us in resolving the problem of when the Board should exercise its discretion to disclose confidential membership. The considerations in that test would necessarily inform any panel's judgment when deciding whether to disclose the confidential membership information. Moreover, what is different in our circumstances from the cases referred to above is that in the labour relations context, there are public policy reasons as well as the statutory direction against disclosure in most cases.

71 The Board is aware of the concerns from both the employer and the union community as to the Board's reluctance to enter into hearings that deal with membership evidence. Both sides of the community have, in varying circumstances, requested an oral hearing in order to either challenge or substantiate membership evidence, or otherwise open membership issues to adjudication. The present case is an example of such an employer request. Equally, in *Re-Con Building Products Inc.*, BCLRB No. B378/95, the Board dismissed the union's application for reconsideration where the original panel had refused to order an investigation or permit *viva voce* evidence by the union organizer to substantiate the dates on the membership cards (reconsideration dismissed, BCLRB No. B35/96, with reasons to follow; ultimately, the panel did not issue reasons as the matter had become academic, see unnumbered letter decision dated June 21, 1996).

72 The Code directs that the Board maintain the confidentiality of membership evidence in most cases. The reason for the confidentiality requirement is that secrecy with respect to trade union membership is essential if the true wishes of the employees are to be determined. If membership evidence was not confidential, the lack of anonymity may have a significant chilling effect upon both the exercise by the employees of their rights under the Code and the legitimate activities of trade unions. Due to the economic power an employer holds over its employees, employees may fear that once their employer learned they had joined a union, the fact of their membership could have repercussions for their continuing employment. That fear alone, even without any active attempt by an employer to influence the employees, may have a significant chilling effect on the union's ability to organize a group of employees. Moreover, the Board's experience is that some employers do, in fact, attempt to influence employees to refuse to become union members, or to revoke their membership having already joined (we do not suggest that this Employer has engaged in such an unfair labour practice). It is undoubted that such unfair labour practices may undermine the employees' previously held desire to join a union. We again note that the employees' franchise is "the fundamental premise" of the Code: *Forano Limited, supra*. It is a fundamental purpose of the Code "to encourage the practice and

procedure of collective bargaining between employers and trade unions as the freely chosen representatives of employees" (Section 2(1)(a)). Were the Board to routinely disclose confidential membership evidence, the chilling effect of the release of such information may significantly inhibit access to collective bargaining.

73 Moreover, we must have regard to the express language of Section 124(3) and (4) which provides that membership information is for the exclusive use of the Board and its representatives and "[n]o person shall, except with the consent of the board, disclose whether a person is or is not a member of a trade union." By virtue of these provisions and the overall administrative, card-based certification system, we believe that the Legislature has chosen to set the parameters of natural justice short of inquiries into membership evidence in most cases.

74 In following this direction to generally protect the confidentiality of membership evidence, the Board has also attempted to be attentive to the concerns leading to the employers' natural justice assertions to the extent possible without systematically compromising membership evidence confidentiality. For instance, one of the reasons the Board has adopted a policy of strict compliance with Regulation 3 is in recognition of the Board's obligation to keep membership evidence confidential in most cases. In *Dencan Restaurants Inc.*, *supra*, the Board held that:

...Because membership evidence cannot be subjected to the same scrutiny as other evidence presented to the Board, it is important that the Board exercise additional caution in relying on membership cards as evidence. The Board must insist on a high degree of integrity and precision in the cards presented to it as evidence of membership in a union. (p. 8)

In this respect, we note that the Board undertakes three reviews of the membership evidence in order to ensure compliance with Regulation 3.

75 The tension between the confidentiality of membership evidence and the need to ensure fair hearings has been the subject of academic comment. In *Canadian Labour Law* (2nd ed., Canada Law Book Inc., Ontario), G.W. Adams refers to the seminal passage in *Bd. of Education v. Rice*, [1911] A.C. 179 (H.L.) that quasi-judicial administrative agencies "...must act in good faith and listen fairly to both sides... They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view." (p. 182). Adams then says:

... This observation has, unsurprisingly, evolved into a doctrine of procedural fairness -- the courts having relied on their procedural expertise to establish broad procedural guidelines. But as wise and straightforward as these general pronouncements appear, their application to administrative agencies in a labour relations environment is not always a simple matter. Labour relations agencies are structured and motivated to decide matters expeditiously and in a relatively inexpensive manner. "Justice

delayed is justice denied" is particularly relevant to labour relations and the obtainment of industrial peace. There is also the necessary secrecy that surrounds trade union membership. Without measures to ensure that membership evidence remains confidential, employees will be discouraged from engaging in collective bargaining. There has been therefore considerable tension between the twin needs for expedition and confidentiality and the requirement that people be treated fairly in a procedural sense....

* * *

This requirement of natural justice [the duty of full disclosure] was expressed by Lord Loreburn L.C. in *Bd. of Education v. Rice* as amounting to a "fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view". The principal difficulty with this principle in a labour relations context relates to the policy underlying the membership secrecy provisions enshrined in most labour relation [sic] statutes. The administration of labour relations legislation must take account of the fears of employees that if their employer suspects they are members of a trade union they may be discriminated against in their employment. There are, of course, remedies provided for such misconduct in all labour relations statutes but "the fact remains that some employers do from time to time engage in discrimination in so subtle fashion that it is difficult, if not impossible to obtain and present proof of it to the Board in a manner that will enable the Board to act on it." Full disclosure in these circumstances would render nugatory the freedom guaranteed by labour legislation to employees to join trade unions of their choice. It is with this concern that all labour relations legislation in Canada contains provisions requiring that membership evidence not be revealed to parties opposed in interest to the trade union. But to those steeped in the traditions of the common law, the provisions of the Acts relating to secrecy of union membership and the related administrative practices of labour boards may appear to be a negation of the basic principles of natural justice. Unsurprisingly, therefore, many of the early judicial decisions in this area reflect considerable disagreement or misunderstanding with respect to this aspect of labour relations legislation. In fact, these early cases prompted legislatures to enact provisions codifying the administrative procedures that have been devised to maintain the secrecy of trade union membership. (pp. 4-43, 4-46, footnotes omitted)

76 The early cases Adams refers to as prompting legislatures to statutorily enshrine membership confidentiality are a line of decisions including *Re Toronto Newspaper Guild, Local 87 and Globe Printing Co.*, [1951] O.R. 435 (H.C.J.), aff'd [1952] O.R. 345 (C.A.), aff'd [1953] 3 D.L.R. 561 (S.C.C.). That case determined that a union official could be cross-examined on statements he made as to the membership evidence.

More recently, in *Re Tandy Electronic Ltd and U.S.W.A.*, (1979), 26 O.R. (2d) 68, the Ontario High Court of Justice reviewed the Ontario Board's refusal to permit cross-examination of a paid union organizer on matters pertinent to membership documents. The Court concluded that the Ontario Board's refusal did not constitute a denial of natural justice and commented that:

The concept of natural justice is an elastic one, that can and should defy precise definition. The application of the principle must vary with the circumstances. How much or how little is encompassed by the term will depend on many factors; to name a few, the nature of the hearing, the nature of the tribunal presiding, the scope and effect of the ruling made.

In some instances the denial of a right to cross-examine may well, in itself, constitute a denial of natural justice. In other situations a restricting or limiting of cross-examination on some aspect or topic could never offend the innate considerations of fairness which comprise the "natural justice" concept.

The decision in the *Globe Printing* case, *supra*, turned upon the Board's refusal to make an inquiry that was essential to the determination of the issue of membership. Subsequent to that decision the Act was amended to provide for the confidentiality of union records. It is easy to appreciate the sensitivity of employees to the disclosure to their employers of their interest in union membership.

Apart from the changes in the Act since the *Globe* decision, a denial of natural justice cannot be established in every case simply by demonstrating a refusal to permit cross-examination of a witness on one aspect of his testimony. (p. 74)

77 In *Roytec Vinyl Co.*, [1990] OLRB Rep. June 727, the Ontario Board refused to permit the employer's handwriting analyst to review membership documents. In doing so, the Ontario Board commented on the importance of the confidentiality of membership evidence:

... In the Board's experience, employees are often concerned that they may be subject to such reprisals by their employer for union activity. The Board's jurisprudence is replete with examples of employees who were discharged or penalized in some way, at least in part, because of their support for unionization. For an employee who fears that joining a union will lead to a discharge or other penalty, the result he or she contemplates can be a loss of economic security, the loss of the social milieu of the workplace, a concomitant loss of self-esteem, identity or social standing, the uncertainty of finding another job and the possibility of a slide onto social benefits. Of course, in most cases such a bleak picture will not come to pass; nevertheless, the mere possibility of any of these consequences may exert a powerful influence on an

employee contemplating collective bargaining, a regime frequently not welcomed by employers. And those opposing the union may be concerned that if it is ultimately certified to represent employees, their working conditions or job security may be adversely affected because of their views. As a result, section 111(1) provides a critical component in the process of union organization contemplated by the *Labour Relations Act*. (p. 737)

78 Although pursuant to Section 124(4) membership evidence is confidential, the Legislature has endowed the Board with the ability to waive the confidentiality in certain cases. In *Grand & Toy Ltd.*, [1986] OLRB Rep. Sept. 1223, the Ontario Board commented on the discretion that the Legislature provided to the Ontario Board: "The legislation does entrust the Board with the discretion to disclose such records, but given the primacy of the secrecy of such [membership] evidence, that discretion must be exercised only for compelling reasons in circumstances where such disclosure would further the purposes of the Act." (p. 1228, see also p. 1230). In *Shaftebury Brewing Company Ltd.*, BCLRB No. B220/96, this Board noted that "[t]he confidentiality policy, while pursued by the Board as far as it can be, is not perfect nor absolute. Indeed, the Code provides that the Board may waive confidentiality in cases where it deems appropriate. ..." (p. 9).

79 The issue for this Panel is what are the circumstances in which the Board will exercise its discretion to permit such a hearing. We adopt the passage from *Grand & Toy, supra*, that the Board's discretion to disclose confidential membership information will only be exercised in exceptional circumstances (p. 1230) where there are compelling reasons and where such disclosure would further the purposes of the Code (p. 1228). Such compelling reasons could be, for example, where there is evidence that a union's membership evidence was obtained by fraudulent means and the failure to inquire further would permit the union to perpetrate a fraud on the Board; or, by way of further example, where an IRO's report fails to resolve an issue to the satisfaction of the panel hearing the matter. However, in every case, the panel, in its discretion, may utilize any of the Board's pre-hearing devices such as submissions, supplementary investigations, and settlement conferences, prior to ordering such disclosure and/or hearing.

80 Two final matters must be addressed. First, the Employer's arguments seem to assume that there is some requirement in the Regulation that the membership cards be witnessed. Although we believe witnessing is a wise procedure (among other things, if a hearing was ordered the parties could avoid putting an employee on the stand in favour of the witness), there is no statutory requirement that a witness sign a membership card.

81 Finally, the Employer takes issue with the Original Panel's reliance on the IRO Report, due to its hearsay nature. However, if the Employer had specific facts or information why the IRO Report in this case should not have been factually relied upon, it was obliged to say so before the Original Panel. That is consistent with the Board's approach to the use of IRO Reports: *NRS*, BCLRB No. B92/96 (Leave for

Reconsideration of BCLRB No. B209/95); *Ledcor Industries Ltd.*, BCLRB No. B230/96. In turn, the Board's policy is consistent with the longstanding approach by which tribunals such as the Board "can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for *correcting or contradicting* any relevant statement prejudicial to their view": *Adams, supra*, p. 4-43, quoting, *Bd. of Education v. Rice (H.L.)*, *supra*, see para. 74 above. We note that such submissions were not made to the Original Panel. Rather, the Employer argued that it was clear from the Report that the cards were not signed and dated at the time of signature as required by Regulation 3. Based on this argument, the Employer submitted that the Union's application for certification should be dismissed because of a failure to comply with minimum membership requirements. As a result, the Employer did not argue before the Original Panel that the Report was factually unreliable due to its hearsay nature. We affirm the Board's consistent policy that generally a party cannot argue on reconsideration matters that should have been argued before the Original Panel.

82 In the result, we dismiss the Employer's application for reconsideration and uphold the Original Panel's decision.

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