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May 9, 2011

Ontario Energy Board
2300 Yonge Street
P.O. Box 2319
Suite 2700
Toronto ON M4P 1E4

Attention: Ms Kirsten Walli
Board Secretary

Dear Ms. Walli:

Re: **IN THE MATTER OF** the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, (Schedule B);

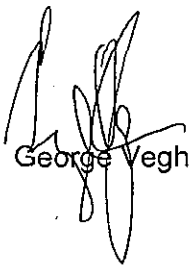
AND IN THE MATTER OF an application by ACH Limited Partnership for a licence amendment pursuant to section 74 of the Ontario Energy Board Act, 1998;

AND IN THE MATTER OF an application by AbiBow Canada Inc. for a licence amendment pursuant to section 74 of the Ontario Energy Board Act, 1998.

Board Files: EB-2011-0065 and EB-2011-0068

Attached please find the Applicants' Responding Submissions and Additional Materials in the above-noted matters.

Sincerely,



George Vegh

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c: Douglas Keshen
Jim Gartshore, Vice-President Energy & General Manager, ACH Limited Partnership
Alice Minville, Senior Counsel, AbitibiBowater Inc.
All Applicants/Participants on file

EB-2011-0065
EB-2011-0068

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an application by ACH Limited Partnership for a licence amendment pursuant to section 74 of the Ontario Energy Board Act, 1998;

AND IN THE MATTER OF an application by AbiBow Canada Inc. for a licence amendment pursuant to section 74 of the Ontario Energy Board Act, 1998.

Response Submissions of AbiBow Canada Inc. ("AbiBow") and ACH Limited Partnership ("ACH") on the Intervention Motion of the First Nations Group

1. Introduction and Summary of Applicants' Position

1. The issues in these proceedings are whether the Board should (i) amend the generator licence of ACH so that it can operate the facilities it is already licenced to own, and (ii) amend the generator licence of AbiBow to remove its authority to operate the same facilities. Authorizing these administrative changes has no adverse effects on any of the First Nations comprising the group seeking intervenor status (collectively, the "First Nations Group") and therefore, no duty to consult is triggered. The Applicants therefore submit that the First Nations Group should be denied intervenor status because it has not demonstrated that it has an interest in these proceedings.

2. Factual Background to the Applications

1. The Applicants AbiBow and ACH are both generators under s. 57 of the *Ontario Energy Board Act, 1998* (the "*Act*").

2. AbiBow (through its predecessor in interest Abitibi Consolidated Company of Canada) has been a licensed generator since the introduction of the Ontario Energy Board's (the "Board") licencing regime with the enactment of the *Act* in 1998.

3. ACH is an affiliate of AbiBow. It was created to own the generation facilities which were transferred to it by AbiBow in 2007. ACH was granted a generation licence by a

Decision and Order of the Board dated March 5, 2007.[1] In granting the licence, the Board stated:[2]

> The Board's concern in relation to the licensing of new generators is in respect to the qualifications of the Applicant to act as a generator and to participate in a reasonable manner in the Ontario electricity market. I have determined that the information provided by ACH regarding its finances, *as well as the technical capability of its officers*, is satisfactory. **(Emphasis added)**

4. By Application dated March 3, 2011, ACH applied to amend its status as owner of eight electrical generating facilities from "owner" to "owner and operator". The only change to the generator licence resulting from this amendment is to add the word "operator" to schedule 1 of ACH's existing licence. There is no change to the obligations of ACH under its licence. Also, the key individuals responsible for and possessed of the technical capability related to the operation of the facilities will not change following the licence amendment, if granted. As a result, all of the considerations addressed by the OEB in approving ACH's licence will remain unchanged.

5. By Application dated March 7, 2011, AbiBow applied to amend its licence by removing the same eight electrical generating facilities from Schedule 1 of its licence. The only change resulting from this is that AbiBow will no longer be licenced to operate the facilities. As the Board has observed, "The Board's generation licence does not obligate a person to generate electricity from the facilities for which the person is licenced."[3]

3. The Issues in this Intervention Motion

6. The issue in this Intervention Motion is whether the First Nations Group has a "substantial interest" in the outcome of these proceedings in order to qualify as intervenors pursuant to Rule 23.02 of the Board's Rules of Practice and Procedure. As the Board noted in establishing this proceeding, "the First Nations Group interests revolve largely around issues with respect to the duty to consult."[4]

7. Before addressing the legal content of the Crown's duty to consult aboriginal peoples, it is important to clarify what issues arise in this proceeding. This is necessary because, as the courts have noted, determining whether a party has an interest in a proceeding "necessitates an inquiry as to what is the subject-matter of the action in which the applicant wishes to intervene."[5] As Macaulay & Sprague put it: "An intervenor should not be given leave to speak to questions which are not raised by the underlying proceeding."[6]

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[1] EB-2006-0175, EB-2006-0124, and EB-2006-0128.

[2] At p. 7.

[3] EB-2006-0175, EB-2006-0124, and EB-2006-0128, at p. 8.

[4] Procedural Order No. 1, herein, p. 3.

[5] *Anderson* v. *Co-Operative Fire & Casualty Co.* (1983), 149 D.L.R. 103 at 106 (N.S.S.C.).

[6] Macaulay & Sprague, *Practice and Procedure Before Administrative Tribunals* (Carswell, 2004), p. 12.4.

8. The Board summarized the issues in these proceedings as follows:[7]

> First, the only change being sought through the current applications is to amend the licenses to make ACH both the owner and operator of the Facilities, whereas currently it is only the owner. This change is an administrative change to the license. It has no inherent or necessary implications for the operation of the facilities, let alone the expansion of them. The First Nations group have expressed concern over possible expansion of the facilities, but there is nothing in these applications that touches on that possibility. These applications deal with the identity of the owner and operator, and not any aspect of the operation or expansion of the facilities.
>
> The apparent ultimate intent of the shareholders of ACH is to then sell the corporation (i.e. ACH) to the Purchasers. That transaction, however, is not a part of the current application before the Board. These proceedings are neither approving nor considering any potential future purchase of either the companies involved or the specific facilities. Any enquiry into those potential eventualities is beyond the scope of these proceedings.
>
> In any event, such a sale would have no impact on the licenses or the rights and obligations associated with them. The Purchasers of ACH would have to abide by the terms of the current licenses. To the extent that the Purchasers wished to expand operations, they would have to do so within the limitations of the licenses and any other legal or regulatory restraints. In other words, the Purchasers would have exactly the same rights and obligations as the current owners.

9. The Board's statement of the issues in this case is consistent with the Board's statement of the issues that it considered in granting the generation licence to ACH in the first place. In that proceeding, the Board stated:[8]

> Any person who obtains a generation licence is under the same obligations regardless of the way in which their business is structured. The submissions by certain parties that there will be environmental consequences as a result of poor maintenance are also unsubstantiated and speculative.
>
> In any event, such submissions are not in my view relevant to the question of whether the Applicant is eligible to hold a generation licence. Section 57(c) of the Act provides that a licence is required to generate electricity or provide ancillary services for sale through the IESO-administered markets or directly to another person. The standard to be applied is whether it is reasonable to assume the Applicant can be relied upon to meet the commitments it undertakes in participating in the electricity generation market.

10. It is in light of this scope of issues that the duty to consult and the allegations of the First Nations Group should be considered. This issue is addressed in Part 3.

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[7] Procedural Order No. 1, herein, p. 5.

[8] EB-2006-0175, EB-2006-0124, and EB-2006-0128, at p. 8.

11. The First Nations Group also alleges that the Board has created a reasonable apprehension of bias. This allegation is addressed in Part 4 of these submissions.

3. The Duty to Consult and the Allegations of the First Nations

12. The First Nations Group cites the Supreme Court of Canada's *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*,[9] as confirming that the Crown's duty to consult may be triggered by "high-level management decisions or structural changes to the resource's management".[10] The First Nations Group appears to submit that the effect of a decision by the Board on the applications presently before it constitute "strategic, higher level decisions or structural changes to the resource's management" that might have an adverse effect on the First Nations Group's aboriginal claims and rights and, therefore, trigger the Crown's duty to consult.

13. The First Nations Group contends that the current applications before the Board to amend the licenses to licence ACH as both the owner and operator of the Facilities (presently it is only the owner) triggers the Crown's duty to consult. The First Nations Group incorrectly describes the applications before the Board as a "Crown approval of a transfer or change in control of the licence needed to generate hydro power."[11]

14. At page 15 of its Response, the First Nations Group refers to the matter before the Board as resulting in "a transfer to a different corporate entity with a different controlling mind and a different set of corporate objectives" thereby triggering the duty to consult. In the context of the applications presently before the Board, such a description is patently wrong.

15. The Applicants submit that the applications presently before the Board do not trigger the Crown's duty to consult aboriginal peoples and cannot fairly be described as "strategic, higher level decisions or structural changes to the resource's management". There is no causal connection between the adding of ACH as the operator with any adverse effects on the First Nations Group and therefore, no duty to consult is triggered. There is even less of a possibility of a causal connection between removing AbiBow as operator of the Facilities and an effect on a First Nation.

16. As noted above at paragraph 8, the only change being sought through the current applications is to amend the licenses to license ACH as both the owner ***and operator*** of the facilities, whereas presently it is only the owner. This is not a change of control or a transfer of a licence, but simply an administrative change to the licence. Even if the issue of transfer of licence or change of control was before the Board, which neither is, adding ACH as the operator has no material effect on the decisions made in respect of the facilities given that it is already the owner of the facilities and nothing in the present applications changes this fact.

17. There is nothing express or inherent within the applications presently before the Board that could be described as a "strategic, higher level decisions or structural changes to the resource's management." The facilities' water levels and flow are the focal point of

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[9] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, ("*Rio Tinto Alcan*").

[10] *Ibid.*, para. 47.

[11] First Nations Group "Response to the Applicants' Objection to the First Nations' Requests for Combined Intervenor Status", May 6, 2011, ("First Nations Response"), at pp. 6 and 15.

the First Nations Group's submissions. The present operator of the facilities has very little discretion with respect to the water levels or flows associated with the operation of the facilities. Indeed, no operator of the facilities has any more or less discretion with respect to the water levels than any other operator.

18. The water levels and flows of the three facilities expressly named by the First Nations Group at p. 14 of its Response, Kenora generating station, Norman generating station and Fort Frances generating station, are regulated by the Lake of the Woods Control Board ("LWCB"), the International Rainy Lake Control Board ("IRLCB") and by the International Joint Commission ("IJC"), and ***not*** by the owner or the operator of the facilities.

19. Unlike the Supreme Court of Canada decision in *Haida Nation v. British Columbia*,[12] which the First Nations Group cites at p. 4 of their Response where the transfer of a tree farm licence from one entity to another in British Columbia could have the effect of adversely affecting forestry resources utilized by the Haida on Crown land because of the discretion on ***how*** it would harvest timber held by the tree farm licence holder, ***no*** such discretion or scope of discretion exists in the operation and ownership of the facilities in respect of water levels and flow and no such transfer is before the Board. These are matters governed by the LWCB, the IRLCB, IJC and other governmental authorities and ***do not rest with the owner or the operator of the Facilities***. The water bodies on which the facilities are located are regulated by either provincial, federal or international authorities and all of ACH's operational decisions must fall within the parameters set by these regulatory bodies and regimes. ACH is, and will continue to be, required to manage its facilities in a manner that complies with the water levels and flow stipulated by the applicable regulatory authorities or water management plans.

20. The First Nations Group submits that the Board's decision in the present applications provide an opportunity for the Crown to accommodate the First Nations Group's asserted aboriginal and treaty right to harvest wild rice.

21. Should ACH want to modify any of the facilities in the future in a way that could impact water levels and flows, any future modifications would be subject to regulatory review by the appropriate provincial, federal, and/or international (in the case of the IJC) agencies at that time, and the Crown's duty to consult could be triggered in the future in such a case.

22. The asserted inability of the First Nations Group to harvest wild rice is an historical issue and not an issue dealing with potential future impacts except to the extent that they are a continuation of the original alleged historical infringement. Any alleged impact that may have occurred on the ability of the First Nations Group to harvest wild rice occurred when the flooding originated and would be, assuming it was deemed to be an impact or infringement at law, a continuing or historical impact or breach which does not give rise to a fresh duty to consult in the present case. Additionally, the Board has no jurisdiction to address these matters regarding wild rice, even if it were inclined to do so given the nature of the applications presently before it.

23. The assertions relating to the harvesting of wild rice and any potential accommodation is not a matter within the jurisdiction of the Board and is not associated in any way with the

[12] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 ("*Haida Nation*").

applications presently before the Board. If the First Nations Group seeks the ability to cultivate wild rice in areas adjacent to the waterways that relate to ACH's facilities - and neither Applicant has ever been notified that this is the case - these are matters for which an appropriate forum already exist and to which the First Nations Group may seek, and could have previously sought, their desired remedies. To seek an accommodation on an alleged infringement of an aboriginal or treaty right to harvest wild rice in respect of an application to add the private non-Crown owner of the existing facilities as the operator is entirely inappropriate and exceeds the jurisdiction and scope of the Board and the applications presently before it.

24. In *Rio Tinto Alcan*, the Supreme Court of Canada expressly considered the issue of such alleged or asserted underlying breaches or infringements:

> ***An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult.*** The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway: *Haida Nation*, at para. 33. The duty arises when the Crown has *knowledge*, real or constructive, of the potential or actual existence of the Aboriginal right or title "and contemplates conduct that might adversely affect it": *Haida Nation*, at para. 35 (emphasis added). This test was confirmed by the Court in *Mikisew Cree* in the context of treaty rights, at paras. 33-34.
>
> The question is whether there is a claim or right that potentially may be adversely impacted by the current government conduct or decision in question. ***Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right.*** This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated Crown action must put current claims and rights in jeopardy.[13] [Emphasis added]

25. The First Nations Group submits that it is appropriate for the Board to consider matters beyond its mandate, such as accommodating for the alleged historical infringements of its asserted aboriginal and treaty right to harvest wild rice – which has nothing to do with, and no relationship to, the present applications before the Board and is, in any event, a matter beyond the jurisdiction or legislative authority of the Board.

26. The Supreme Court of Canada has imposed a clear requirement on First Nations asserting that their alleged rights may be affected by a Crown action or decision by

[13] *Rio Tinto Alcan*, paras. 48, 49, see also para. 54.

requiring such First Nations to show "a causal relationship between the proposed governmental conduct or decision and a potential for adverse impacts":[14] The Supreme Court of Canada stated: ***"The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice."***[15] [Emphasis added]

27. The First Nations have made no link between the applications presently before the Board and their concerns relating to the harvesting of wild rice. The Crown's duty to consult is not a duty "at-large". It must attach to specific Crown actions or decisions that have the potential of adversely affecting an aboriginal interest. The First Nations Group has failed to show how, in any way, the mere naming of ACH (the present owner of the facilities) as the "operator" results in a potential adverse effect on them or their aboriginal interests. As such, the First Nations Group has failed to identify how any of their interests could possibly be adversely affected by a decision of the Board regarding the applications.

28. The Supreme Court of Canada also expressly noted the following regarding the limitations on a regulatory tribunal's ability to conduct consultation and order remedies:

> The decisions below and the arguments before us at times appear to merge the different duties of consultation and its review. In particular, it is suggested that every tribunal with jurisdiction to consider questions of law has a constitutional duty to consider whether adequate consultation has taken place and, if not, to itself fulfill the requirement regardless of whether its constituent statute so provides. The reasoning seems to be that this power flows automatically from the power of the tribunal to consider legal and hence constitutional questions. Lack of consultation amounts to a constitutional vice that vitiates the tribunal's jurisdiction and, in the case before us, makes it inconsistent with the public interest. In order to perform its duty, it must rectify the vice by itself engaging in the missing consultation.
>
> ***This argument cannot be accepted***, in my view. ***A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so.*** The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the

[14] *Rio Tinto Alcan*, para. 45.

[15] *Ibid.*

> consultation. ***The remedial powers of a tribunal will depend on that tribunal's enabling statute, and will require discerning the legislative intent***: *Conway*, at para. 82.[16]
>
> [Emphasis added]

29. In addition, the Board in its September 15, 2008 decision regarding the Bruce to Milton Transmission Project (EB-2007-0050) noted that it is restricted to its legislative mandate in respect of all matters coming before it, including aboriginal and related consultation issues:

> There is only one Crown. The requirement is that the Crown ensure that Aboriginal consultation takes place for all aspects of the project. ***It is not necessary that each Crown actor that is involved with an approval for the project take on the responsibility to ensure that consultation for the entire project has been completed; such an approach would be unworkable. It would lead to confusion and uncertainty and the potential for duplication and inconsistency. It would also potentially lead to a circular situation in which each Crown actor finds itself unable to render a final finding on consultation because it is awaiting the completion of other processes.*** The *Paul* case directly addresses this practicality issue:
>
> Practical considerations will generally not suffice to rebut the presumption that arises from authority to decide questions of law. This is not to say, however, that practical considerations cannot be taken into consideration in determining what is the most appropriate way of handling a particular dispute where more than one option is available.
>
> The *Paul* case predates the *Haida* case; however in the Board's view this principle applies equally in the consultation context. As a practical matter it is unworkable to have to separate Crown actors considering identical Aboriginal consultation issues for the same project. In fulfilling its responsibility to assess the adequacy of consultation, ***the Board must necessarily take responsibility for the aspects of the consultation that relate to the matter before it,*** but should do so with a recognition of any other forum in which consultation issues related to the project are being addressed as well.[17]
>
> [Emphasis added]

30. The First Nations Group submits that the Crown's duty to consult was delegated by the Crown to the Supplier (as defined by the Hydroelectric Contract Initiative of the Ontario Power Authority). The First Nations Group correctly states that the requirement to determine what, if any, duty to consult exists is only in respect of "upgrades". However, contrary to the argument of the First Nations Group, the issue of potential, future upgrades has nothing to do with the applications presently before the Board.

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[16] *Rio Tinto Alcan*, paras. 59, 60.

[17] Ontario Energy Board, Decision and Order - Bruce to Milton Transmission Project, September 15, 2008, EB-2007-0050, pp. 68,69.

31. The Applicants submit that the consultation requirement set out in section 1.3(b) of the Hydroelectric Contract Initiative Standard Form of Contract (noted by the First Nations Group at p. 20 of the Response) is simply an administrative and contractual obligation on the Supplier to carry out consultation with First Nations as the Ministry of Energy and Infrastructure (now the Ministry of Energy) may deem necessary. There is nothing in section 1.3 that states or implies that the entirety of the Crown's duty to consult is delegated to the Supplier. The imposition of only the administrative requirements of consultation on proponents by the Crown is very common in all jurisdictions of Canada, including Ontario, and across all sectors. This is not a "delegation" of the Crown's duty to consult to a private party.

32. Finally in this regard, the First Nations Group discusses the May 7, 2009 Ministerial Directive to the OPA in considerable detail but fails to identify how the Board's decision in this case is relevant to the alleged concerns with that Directive or the procurement resulting from that Directive.

33. First, at p. 17 of its submissions, the First Nations Group speculates on the motivations of AbiBow and ACH and asserts that they are "significantly different." There is no basis for this assertion and, even if it were true, it is irrelevant. A party's motivations are not relevant to the Board's regulatory mandate. If it were, the Board would have to constantly re-evaluate its approvals if it suspects that a party's motivations have changed.

34. Second, at p. 20 of its submissions, the First Nations Group argues that the Board has "important adjudicative and administrative powers" over procurement contracts because of its authority to approve OPA procurement processes under s. 25.31 of the *Electricity Act, 1998* (the "*EA*"). However, the procurement in this case was made in response to a Minister's directive, not a Board approved procurement process (as a matter of fact, the Board has not yet even heard an application regarding a procurement process under s.25.31 of the *EA*). The Board has no role with respect to the Ministerial procurement directions, and it has no role respecting the procurement under the Hydroelectric Contract Initiative.

4. The Allegation of Bias

35. The First Nations Group alleges that the Board is demonstrating a reasonable apprehension of bias because, in the Procedural Order establishing this Intervention Motion, the Board states that it "is not yet convinced that the Application has the potential to adversely impact Aboriginal rights or title."

36. This is, of course, a serious allegation, and the standard for demonstrating this is commensurately a high one. According to the Ontario Court of Appeal:[18]

> The threshold for a finding of real or perceived bias is high. Mere suspicion is insufficient to support an allegation of bias. Rather, a real likelihood or probability of bias must be demonstrated: S.(R.D.), at paras. 111-14. As stated in *Wewaykum* at para. 76, citing de Grandpré J. in *Committee for Justice and*

[18] *Canadian College of Business and Computers Inc. v. Ontario (Private Career Colleges)*, Decision of the Ontario Court of Appeal, December 16, 2010, Docket: C51474

Liberty at p. 395, the grounds for the alleged apprehension of bias must be "substantial".

37. The Board's Procedural Order was issued after the Board received a letter of comment and written submissions in support of its intervention request by the First Nations Group. The Procedural Order confirmed the issues in this proceeding and indicated that the materials provided to date by the First Nations Group did not convince the Board that it had met its onus of establishing that it had an interest in the proceeding. The Procedural Order then provided the First Nations Group with the opportunity to provide "a more detailed description of the precise nature of the interest of the First Nations Group in this application."

38. It is difficult to conceive of how the Board could have been more accommodating of the First Nations Group's ability to make its case for intervenor standing. It certainly goes beyond the Board's legal obligations and comes nowhere near demonstrating a reasonable apprehension of bias.

39. A demonstration of bias requires more than showing that a decision maker finds a party's initial submissions unpersuasive. A decision maker can provide a preliminary opinion provided that it is based upon appropriate considerations. Cory J. of the Supreme Court of Canada put it as follows in *R. v. S.*:[19]

> "...bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. A helpful explanation of this concept was provided by Scalia J. in *Liteky v. U.S.*, 114 S.Ct. 1147 (1994), at p. 1155:
>
> > The words [bias or prejudice] connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts)." [Emphasis in original.]

40. Thus, a decision maker is biased if its views are based upon an inappropriate stereotype or inadmissible evidence. It is not biased for questioning whether a party has made its case. Thus, in *R. v. Parker*, the Court of Appeal stated:[20]

> "...we do not consider that it is inappropriate, at the conclusion of the case for the Crown, for the trial judge to canvas with defence counsel the defence which the accused intends to present and to express his, or her, tentative views concerning the viability of the defence..."

41. There are, of course, limits to how far a decision maker can go in this regard. Thus, in *R. v. Parker* the Court of Appeal found that the decision maker "made it clear that he

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[19] *R. v. S. (D)*, [1997] 3 S.C.R. 484 at para. 105.

[20] *R. v. Parker*, Endorsement by the Ontario Court of Appeal, Feb. 2, 1998 (Docket No. C26792)

saw no merit in the proposed defence." This, and other instances where a decision maker creates the impression that he or she was not at all interested in hearing the party's position, makes it is possible to demonstrate bias.

42. However, this is not even remotely the case here. To the contrary, the impugned Procedural Order stated what the issues are in this proceeding (which as indicated in paragraph 8 above is consistent with previous Board decisions) and *then provided the First Nations Group with the opportunity to make its submissions.* It is inconceivable that this can be interpreted as demonstrating that the Board was not interested in hearing those submissions.

Conclusion

43. The issues in these Applications are whether the Board should (i) amend the generator licence of ACH so that it can operate the facilities it is already licenced to own, and (ii) amend the generator licence of AbiBow to remove its authority to operate the same facilities. Authorizing these administrative changes cannot cause any adverse effects on the First Nations Group and therefore, no duty to consult is triggered. The Applicants therefore submit that the First Nations Group should be denied intervenor status because it has not demonstrated that it has an interest in this proceeding.

All of Which Respectfully Submitted

Dated: May 9, 2011

George Vegh Thomas Isaac **McCarthy Tétrault LLP** Telephone: 416-601-7709 Email: gvegh@mccarthy.ca Counsel for AbiBow Canada Inc.	Sharon Wong **Blake, Cassels & Graydon LLP** Tel: 416.863.4178 E-mail: sharon.wong@blakes.com Counsel for ACH Limited Partnership

To:

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4

To:

All Parties

EB-2011-0065
EB-2011-0068

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an application by ACH Limited Partnership for a licence amendment pursuant to section 74 of the Ontario Energy Board Act, 1998;

AND IN THE MATTER OF an application by AbiBow Canada Inc. for a licence amendment pursuant to section 74 of the Ontario Energy Board Act, 1998.

Additional Materials referred to in Applicants' Response Submissions

Table of Contents

TAB 1

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2006-0175
EB-2006-0124
EB-2006-0128

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O.1998, c.15, Schedule B;

AND IN THE MATTER OF an application by Abitibi-Consolidated Company of Canada for a licence amendment pursuant to section 74 of the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF an application by ACH Limited Partnership for an electricity generation licence pursuant to section 60 of the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF an application by ACH Limited Partnership for an electricity retailer licence pursuant to section 60 of the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF a request by ACH Limited Partnership to deem certain distribution assets to be part of a transmission system pursuant to section 84(b) of the *Ontario Energy Board Act, 1998.*

By delegation, before: Mark C. Garner

DECISION AND ORDER

The Ontario Energy Board (the "Board") received three licence applications as a result of a proposed commercial transaction involving eight hydroelectric generating facilities in the vicinities of Kenora, Fort Frances and Iroquois Falls. A licence amendment application was filed by Abitibi-Consolidated Company of Canada ("Abitibi") and two

new licence applications, one for an electricity generation licence and one for an electricity retailer licence, were filed by ACH Limited Partnership ("ACH").

I find that it is in the public interest to grant the requested licence amendment and to issue the electricity generation and retailer licences under Part V of the *Ontario Energy Board Act, 1998* (the "Act") subject to the following conditions:

- the ACH generation licence and the Abitibi licence amendment will not be effective until the commercial transaction closes;
- in order for the ACH generation licence and the Abitibi licence amendment to become effective, the commercial transaction must close on or before December 31, 2007;
- Abitibi and ACH (collectively, the "Applicants") must inform the Board when the commercial transaction closes; and
- until such time as the new generation licence and the licence amendment become effective, the Applicants must inform the Board of any material changes to the information submitted as part of the licence and licence amendment applications.

Within the context of the generation licence application, I have also determined that the 7 km twinned distribution line that links the Twin Falls Generating Station to the Iroquois Falls mill complex is a transmission system or part of a transmission system.

THE PROCEEDING

Abitibi filed an application with the Board on June 2, 2006 for an amendment to Schedule 1 of its electricity generation licence (EG-2003-0204). The Board assigned the application file number EB-2006-0175. The amendment is to change Abitibi's status as owner and operator of the subject facilities to operator only.

By way of a commercial transaction, Abitibi intends to transfer ownership of eight hydroelectric generating stations in the vicinities of Kenora, Fort Frances and Iroquois Falls and associated transmission and distribution lines to a new affiliate. Abitibi will continue to operate and maintain the subject facilities under agreements with the affiliate. Abitibi will also hold a majority interest in the affiliate.

The new affiliate was originally named Orion Limited Partnership ("Orion"). Orion filed applications for an electricity generation licence (as owner of the subject facilities) and an electricity retailer licence with the Board on June 2, 2006. The Board assigned these applications file numbers EB-2006-0124 and EB-2006-0128 respectively.

On June 30, 2006, the Board issued a Notice of Application and Notice of Written Hearing (the "June 30 Notice") for the applications made by Orion. No responses were received.

No notice was issued in respect to the application by Abitibi to amend its licence. The licence amendment had been filed in confidence and at that time no determination had yet been made in respect to the confidentiality request.

On October 16, 2006, and after publication of the June 30 Notice, Orion informed the Board that it had changed its name to ACH Limited Partnership and that the name of its general partner had changed from 4349440 Canada Inc. to Abitibi-Consolidated Hydro Inc. It was at this time that ACH requested that the Board determine, under section 84(b) of the Act, that a 7 km twinned distribution line connecting the Twin Falls Generating Station to the Iroquois Falls mill complex is a transmission system or part of a transmission system.

A second Notice of Application and Notice of Written Hearing was issued on November 2, 2006 (the "November 2 Notice") for the three subject applications (EB-2006-0175, EB-2006-0124 and EB-2006-0128). There were numerous reasons for requiring the additional notice including, but not limited to, the reasons set out below.

One reason was that the name of one of the Applicants had changed from Orion to ACH and the name of its parent changed from 4349440 Canada Inc. to Abitibi-Consolidated Hydro Inc. Another reason was due to confusion regarding the nature of the transaction and the relationship between the Applicants. Three parties had become aware of the Abitibi licence amendment through other communications in their communities and submitted letters to the Board regarding Abitibi's licence amendment application (EB-2006-0175). However, these parties were unaware of the related applications by Orion/ACH, or the fact that Orion was an affiliate of Abitibi. A review of these letters made it clear that the views of the parties were more properly placed in the applications of Orion/ACH. A new notice was necessary in order to ensure that all parties could understand the interrelationship between the three applications. Lastly, a new notice was necessary in order to ensure that four affected parties who receive electricity directly from Abitibi were aware of the applications.

The November 2 Notice was published by the Applicants on November 8, 2006, in Fort Frances and Kenora and on November 9, 2006, in Iroquois Falls. In addition, the Applicants served the November 2 Notice to the four parties who receive electricity

directly from Abitibi and to the three parties who had previously submitted letters of interest in relation to the Abitibi licence amendment.

In response to the November 2 Notice, the Board received four submissions objecting to written hearings. The submissions expressed concerns in respect to economic consequences to the affected communities. On December 6, 2006, Procedural Order No. 1 was issued in respect to the three applications and it was determined that an oral hearing was not necessary. The procedural order noted the limited mandate of the Board in relation to licensing matters and allowed for additional written submissions.

POSITION OF THE PARTIES

The Board received written submissions in response to Procedural Order No. 1 from the Communications, Energy and Paperworkers Union of Canada ("CEP") and Mr. Ben Lefebvre of Iroquois Falls.

CEP submitted that the Board must consider:

- the impact of the proposed new income trust structure on the generation assets and the potential for distribution of income to unit holders instead of investment in the generation assets;
- the adequacy and reliability of the generation facilities (namely, CEP noted that the subject hydroelectric dams are upwards of 100 years old and that dam safety is a critical factor to consider in adjudicating the applications);
- that the public interest includes environmental impacts on the communities should the hydro-electric facilities receive inadequate investment ; and
- whether the applications have the potential to breach the "1905 Agreement" with the Town of Fort Frances.

In his submission, Mr. Lefebvre expressed concerns about:

- the financial instability of Abitibi and the possibility that Abitibi would default on its commitments to its employees and shareholders;
- the lack of third party agreements to ensure low cost electricity to the Iroquois Falls mill; and
- the issuance of Board licences prior to the Ontario Municipal Board hearing regarding Abitibi's application to sever its property in Iroquois Falls.

None of the submissions addressed ACH's request to deem the subject distribution lines as a transmission system or part of a transmission system.

In their December 27, 2006, response, the Applicants submitted that:

- there is no statutory requirement that the Applicants obtain approval of the Board for the transfer of the generation facilities;
- as an electricity generator, an income trust is under the same obligations as any other owner of generation with respect to the operation and maintenance of its generation facilities;
- there is no evidence to suggest that Abitibi has not met its obligations to the Board or other agencies with respect to operation and maintenance of the facilities;
- there is no basis to suggest that, following the transaction, the facilities will not be operated and maintained at the required standards and in compliance with the same obligations as those currently in place;
- the submission of certain parties related to possible environmental impacts of possible improper maintenance of the facilities is highly speculative and baseless;
- the supply of electricity to the Town of Fort Frances pursuant to the "1905 Agreement" will be dealt with by transferring the obligations under the agreement to ACH upon completion of the transaction;
- the operations of Abitibi's mills and the commercial relationship between Abitibi and ACH are not matters within the Board's jurisdiction;
- ACH is capable of owning the Iroquois Falls facilities in the absence of completion of the Ontario Municipal Board proceedings; and
- the Applicants have established, from an operational and financial perspective, that they are competent to carry on the activities for which they will be licensed.

SUPPLEMENTAL INFORMATION AND SUBMISSIONS

On January 29, 2007, the Applicants advised the Board of the following two announcements:

- that Abitibi had entered into a binding letter of intent with the Caisse de dépôt de placement du Québec (the "Caisse") to create a joint venture for the subject facilities (i.e., the Caisse will acquire the interest in ACH that Abitibi had initially intended to offer through an income trust structure); and

- that there will be an all-stock merger between Abitibi-Consolidated Inc., the parent company of Abitibi and Bowater Inc. that will result in 48% of AbitibiBowater being owned by former Abitibi-Consolidated Inc. shareholders and 52% of the new entity being owned by former Bowater shareholders.

On January 30, 2007 and February 2, 2007, CEP submitted that the announcements fundamentally alter the nature of the applications before the Board. CEP stated that the structure of ownership of the subject facilities is fundamentally altered to the extent that the applications before the Board with regard to transferor and transferee are no longer current and accurate. CEP argued that the Board should examine changes in ownership and shareholder structure in determining whether the Applicants are sufficiently capable to act as a generator.

The Applicants responded to the CEP submissions on February 1, 2007 and February 6, 2007. The Applicants stated that it is currently expected that Abitibi will continue to be owned by Abitibi-Consolidated Inc. and that Abitibi will continue to be the majority owner of ACH, as was originally intended before the joint venture and merger announcements. The Applicants stated that the announcements have not changed their identities and that there are no changes at this time to the key individuals identified in the applications. The Applicants submitted that the announcements do not create material changes in the Applicants' circumstances that adversely affect or are likely to adversely affect the business, operations or assets of the Applicants.

REASONS

Pursuant to subsection 6(1) of the Act, I have been delegated the power and duties of the Board with respect to the determination of applications made under section 60 and section 74 of the Act. For the purposes of determining these applications, I have been further delegated those powers and duties that the Board would have in determining such applications. Although I have considered the full record of the proceeding, I have summarized the record only to the extent necessary to provide context for my findings.

I will address these applications in the following order: ACH's application for an electricity generation licence and its request for deeming certain distribution assets to be part of a transmission system (EB-2006-0124); ACH's application for an electricity retailer licence (EB-2006-0128); and Abitibi's application for an amendment to its electricity generation licence (EB-2006-0175).

First, however, I will address the recent Abitibi and Abitibi Consolidated Inc. announcements. I note that certain parties submitted that the subject licence applications are altered by the recent joint venture and merger announcements. The Applicants have replied that Abitibi will continue to be owned by the same parent, that Abitibi will continue to be majority owner of ACH, and that there are no changes to key individuals at this time. I accept the Applicants' arguments that the new information submitted does not fundamentally change the relevant matters in these applications.

However, since the time of the original filing the Applicants have reported numerous changes to the details of the transaction. This has led to delays in the processing of the applications. As of the time of the issuance of this Decision, the transaction has yet to be completed. As a condition of this Decision, the Applicants shall notify the Board of any material changes to the business, operations or assets of the Applicants that may occur in the future including, but not limited to, changes resulting from the recent announcements.

ACH's Application for an Electricity Generation Licence (EB-2006-0124)

ACH has applied for an electricity generation licence as owner of eight hydroelectric generating stations currently owned by Abitibi. ACH submitted all the information required in the Board's electricity generation licence application form.

Abitibi and ACH have chosen to restructure and to enter into a commercial transaction. As documented in the Board's December 6, 2006 Procedural Order, the Board's mandate in the context of licensing does not include a review of the propriety of any aspect of a commercial transaction.

The submissions of the parties relating to the commercial transaction and the relationship of Abitibi with its employees and shareholders are outside the scope of what I believe needs to be considered in a licence application. The Board's concern in relation to the licensing of new generators is in respect to the qualifications of the Applicant to act as a generator and to participate in a reasonable manner in the Ontario electricity market. I have determined that the information provided by ACH regarding its finances, as well as the technical capability and conduct of its officers, is satisfactory. The key individuals involved in ACH are also involved with Abitibi. Furthermore, no evidence was presented that would lead me to conclude that ACH is not capable of participating in the Ontario market as an owner of generation facilities.

While I understand and appreciate the concerns expressed by some parties, their submissions that ACH will not provide adequate funding to maintain the generation facilities are unsubstantiated. Any person who obtains a generation licence is under the same obligations regardless of the way in which their business is structured. The submissions by certain parties that there will be environmental consequences as a result of poor maintenance are also unsubstantiated and speculative.

In any event, such submissions are not in my view relevant to the question of whether the Applicant is eligible to hold a generation licence. Section 57(c) of the Act provides that a licence is required to generate electricity or provide ancillary services for sale through the IESO-administered markets or directly to another person. The standard to be applied is whether it is reasonable to assume the Applicant can be relied upon to meet the commitments it undertakes in participating in the electricity generation market. The Board's generation licence does not obligate a person to generate electricity from the facilities for which the person is licensed.

Overall, I find that ACH has met the Board's requirements for the issuance of a new generation licence.

ACH has not applied for a transmission or distribution licence as it believes it is exempt from licensing requirements in accordance with Ontario Regulation 161/99—*Definitions and Exemptions* (made under the Act). ACH's assertion that it is exempt from distribution licensing requirements is premised on ACH obtaining the Board's determination, under section 84(b) of the Act, that the 7 km of twinned distribution line that links the Twin Falls Generating Station to the Iroquois Falls mill complex is a transmission system or part of a transmission system.

ACH will only distribute electricity to Abitibi and three other consumers. A fourth consumer will continue to be served by Abitibi. ACH has stated that it will not be in the "business" of distributing electricity but will simply be distributing electricity to a limited number of historically connected consumers for a price no greater than that required to recover all reasonable costs. Given the limited distribution activity that ACH will undertake and the fact that the subject lines essentially perform a transmission function (albeit at low voltage), I find that it is appropriate to deem the 7 km of twinned distribution line that links the Twin Falls Generating Station to the Iroquois Falls mill complex to be a transmission system or part of a transmission system.

I note that in order to make a proper determination of whether or not a person needs to be licensed as a distributor or transmitter, far more detailed information would be

required than was provided in the applications. I will say that based on the information provided, I do not expect ACH to apply for a distribution licence or a transmission licence at this time. However, this expectation is based solely on the information filed as part of the applications. Should any of that information change over time or should new information be discovered, the Applicant may be required to file an application for a distribution or transmission licence.

ACH's Application for an Electricity Retailer Licence (EB-2006-0128)

ACH has applied for an electricity retailer licence in order to retail to small and large volume consumers. ACH has stated that it has applied for retail licence qualification to enable it to sell electricity to the Abitibi mills and three consumers currently served by Abitibi. ACH submitted all the information required in the Board's electricity retailer licence application form.

The Board's concern in relation to the licensing of new retailers is in relation to the qualifications of the person applying for a retailer licence, namely their capability to act as a retailer.

The four consumers who receive electricity directly from Abitibi were served with the November 2 Notice by the Applicants. Upon completion of the commercial transaction, three of the consumers will receive electricity from ACH and the fourth will continue to receive electricity from Abitibi. I note that none of these consumers intervened in the subject proceedings or objected to the applications in any way. In their December 27, 2006 response to submissions, the Applicants stated that ACH, as a licensed retailer, will be selling electricity to the consumers on the same terms as those upon which Abitibi is currently selling them electricity.

I have determined that the information provided by ACH regarding its finances, as well as the experience and conduct of its officers, is satisfactory. Overall, I find that ACH has met the Board's requirements for the issuance of a new retailer licence.

Abitibi's Application for a Licence Amendment EG-2003-0204

Abitibi filed an application to amend its electricity generation licence so as to remove its status as owner of the eight hydroelectric generating stations. It sought to maintain its licence as an operator.

The Board may amend a licence if the Board considers the amendment to be in the public interest having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998.*

Nothing precludes Abitibi from deciding to no longer own the generation facilities in question. The change in ownership does not, in and of itself, detract from the ability of Abitibi to operate the generation facilities. Abitibi will continue to be the licensed operator of the generation facilities. No submission was presented which would cause me to question the ability of Abitibi to continue to operate the facilities in a reasonable fashion.

I find that it is in the public interest to grant the licence amendment.

PROCESS TIME

With respect to the process, I provide the following comments for the benefit of all parties. I note that the Applicants have stated on numerous occasions that the time taken by the Board to decide these applications has been much longer than usual. This is true. Normally applications of this nature should take approximately 90 to 115 days to complete. These applications took in excess of 275 days to complete.

These applications were unique and complex when compared to the standard generator and retailer applications that the Board normally reviews. Although the applications were based on the standard criteria used to test the eligibility of potential generators and retailers, the unique considerations of the commercial transaction as communicated by the Applicants led to the emergence of many issues over the course of the proceeding. As a result of these issues, this proceeding was lengthier than what is normally required for most licence applications.

The process surrounding these proceedings was extended on a number of occasions due to a number of factors, including, but not limited to, the filing of confidential material beyond the normal practice in licence applications, numerous changes to the information originally filed, and the level of intervenor interest.

The Applicants were diligent in updating their applications on a regular basis. The Board received new information on several occasions following the original filings on June 2, 2006 including as recently as February 6, 2007. While I appreciate that the Applicants have kept the Board apprised of new developments over the course of these proceedings, the fact remains that all new information must be considered in order to

determine the effect of the new information on the applications. The Applicants could have compressed the process time considerably had they simply filed when they had certainty as to the final nature of the transaction. The Applicants should also have been aware as to the unique considerations of this transaction and anticipated the additional notice requirements that would result.

Finally, based on the number of individual and media inquiries received by the Board via letters, email, and telephone calls, the Applicants in my view did not make sufficient efforts to inform the communities in the areas of Kenora, Fort Frances and Iroquois Falls as to the nature of the transaction. Had the Applicants engaged the local communities better, they might have assisted themselves by providing those concerned with an understanding of the regulatory process. The confidentiality request shrouding the applications, the change of name for one of the Applicants, and the confusion among the parties as to the interrelationship between the applications all resulted in further delays as the Board had to determine how to best discharge its responsibilities in an open and transparent proceeding.

CONDITIONS

These applications were driven by the pending commercial transaction between Abitibi and ACH. As stated by the Applicants in their original filings, the commercial transaction was to be completed by the fall of 2006. On January 29, 2007, the Applicants advised that the commercial transaction is expected to close in the first half of 2007.

The approvals herein are subject to the following conditions:

- the ACH generation licence and the Abitibi licence amendment will not be effective until the commercial transaction closes;
- in order for the ACH generation licence and the Abitibi licence amendment to become effective, the commercial transaction must close on or before December 31, 2007;
- the Applicants must inform the Board when the commercial transaction closes; and
- until such time as the new generation licence and the licence amendment become effective, the Applicants must inform the Board of any material changes to the information submitted as part of the licence and licence amendment applications.

IT IS THEREFORE ORDERED THAT:

1. Abitibi-Consolidated Company of Canada's Electricity Generation Licence EG-2003-0204 is amended in accordance with the attached licence.

2. The application for an electricity generation licence by ACH Limited Partnership is granted, on such conditions as are contained in the attached licence.

3. The application for an electricity retailer licence, small and large volume, by ACH Limited Partnership is granted, on such conditions as are contained in the attached licence.

4. The 7 km of twinned distribution line that links the Twin Falls Generating Station to the Iroquois Falls mill complex is deemed to be a transmission system or part of a transmission system under section 84(b) of the *Ontario Energy Board Act, 1998*.

5. Abitibi-Consolidated Company of Canada and ACH Limited Partnership shall advise the Board of the date of the completion of the commercial transaction regarding the eight hydroelectric generating stations listed in Schedule 1 of the attached generation licence for ACH Limited Partnership.

6. Until such time as the new generation licence and the licence amendment become effective, Abitibi-Consolidated Company of Canada and ACH Limited Partnership shall advise the Board of any material changes to the information submitted as part of the licence applications and licence amendment application including, but not limited to, any changes to the key individuals and any changes to the financial information.

Under section 7(1) of the *Ontario Energy Board Act, 1998*, this decision may be appealed to the Board within 15 days.

ONTARIO ENERGY BOARD

Original signed by

Mark C. Garner
Managing Director, Market Operations

Dated at Toronto March 5, 2007

Ontario

Electricity Generation Licence

EG-2003-0204

Abitibi-Consolidated Company of Canada

Valid Until

October 28, 2023

Original signed by

Mark C. Garner
Managing Director, Market Operations
Ontario Energy Board
Date of Issuance: October 29, 2003
Date of First Amendment: January 26, 2006
Date of Second Amendment: March 5, 2007
Effective Date of Second Amendment: Date the Commercial Transaction Closes (as defined in section 1 of this licence)

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
27th. Floor
Toronto, ON M4P 1E4

Commission de l'Énergie de l'Ontario
C.P. 2319
2300, rue Yonge
27e étage
Toronto ON M4P 1E4

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1 Definitions

In this Licence:

"**Act**" means the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B;

"**commercial transaction**" means the transfer of ownership of eight hydroelectric generating stations with total capacity of 136 MW in the vicinities of Kenora, Fort Frances and Iroquois Falls, and associated transmission and distribution lines from Abitibi-Consolidated Company of Canada to ACH Limited Partnership;

"**Electricity Act**" means the *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A;

"**generation facility**" means a facility for generating electricity or providing ancillary services, other than ancillary services provided by a transmitter or distributor through the operation of a transmission or distribution system and includes any structures, equipment or other things used for that purpose;

"**Licensee**" means Abitibi-Consolidated Company of Canada;

"**regulation**" means a regulation made under the Act or the Electricity Act;

2 Interpretation

2.1 In this Licence words and phrases shall have the meaning ascribed to them in the Act or the Electricity Act. Words or phrases importing the singular shall include the plural and vice versa. Headings are for convenience only and shall not affect the interpretation of this Licence. Any reference to a document or a provision of a document includes an amendment or supplement to, or a replacement of, that document or that provision of that document. In the computation of time under this Licence where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens. Where the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday.

3 Authorization

3.1 The Licensee is authorized, under Part V of the Act and subject to the terms and conditions set out in this licence:

a) to generate electricity or provide ancillary services for sale through the IESO-administered markets or directly to another person subject to the conditions set out in this Licence. This Licence authorizes the Licensee only in respect of those facilities set out in Schedule 1;

b) to purchase electricity or ancillary services in the IESO-administered markets or directly from a generator subject to the conditions set out in this Licence; and

c) to sell electricity or ancillary services through the IESO-administered markets or directly to another person, other than a consumer, subject to the conditions set out in this Licence.

4 Obligation to Comply with Legislation, Regulations and Market Rules

4.1 The Licensee shall comply with all applicable provisions of the Act and the Electricity Act, and regulations under these acts, except where the Licensee has been exempted from such compliance by regulation.

4.2 The Licensee shall comply with all applicable Market Rules.

5 Obligation to Maintain System Integrity

5.1 Where the IESO has identified, pursuant to the conditions of its licence and the Market Rules, that it is necessary for purposes of maintaining the reliability and security of the IESO-controlled grid, for the Licensee to provide energy or ancillary services, the IESO may require the Licensee to enter into an agreement for the supply of energy or such services.

5.2 Where an agreement is entered into in accordance with paragraph 5.1, it shall comply with the applicable provisions of the Market Rules or such other conditions as the Board may consider reasonable. The agreement shall be subject to approval by the Board prior to its implementation. Unresolved disputes relating to the terms of the Agreement, the interpretation of the Agreement, or amendment of the Agreement, may be determined by the Board.

6 Restrictions on Certain Business Activities

6.1 Neither the Licensee, nor an affiliate of the Licensee shall acquire an interest in a transmission or distribution system in Ontario, construct a transmission or distribution system in Ontario or purchase shares of a corporation that owns a transmission or distribution system in Ontario except in accordance with section 81 of the Act.

7 Provision of Information to the Board

7.1 The Licensee shall maintain records of and provide, in the manner and form determined by the Board, such information as the Board may require from time to time.

7.2 Without limiting the generality of paragraph 7.1 the Licensee shall notify the Board of any material change in circumstances that adversely affects or is likely to adversely affect the business, operations or assets of the Licensee, as soon as practicable, but in any event no more than twenty (20) days past the date upon which such change occurs.

8 Term of Licence

8.1 This Licence shall take effect on October 29, 2003 and expire on October 28, 2023. The term of this Licence may be extended by the Board.

9 Fees and Assessments

9.1 The Licensee shall pay all fees charged and amounts assessed by the Board.

10 Communication

10.1 The Licensee shall designate a person that will act as a primary contact with the Board on matters related to this Licence. The Licensee shall notify the Board promptly should the contact details change.

10.2 All official communication relating to this Licence shall be in writing.

10.3 All written communication is to be regarded as having been given by the sender and received by the addressee:

a) when delivered in person to the addressee by hand, by registered mail or by courier;

b) ten (10) business days after the date of posting if the communication is sent by regular mail; or

c) when received by facsimile transmission by the addressee, according to the sender's transmission report.

11 Copies of the Licence

11.1 The Licensee shall:

a) make a copy of this Licence available for inspection by members of the public at its head office and regional offices during normal business hours; and

b) provide a copy of this Licence to any person who requests it. The Licensee may impose a fair and reasonable charge for the cost of providing copies.

SCHEDULE 1 LIST OF LICENSED GENERATION FACILITIES

SCHEDULE 1 - PART A (to remain in effect until the date the commercial transaction closes in accordance with Part B)

The Licence authorizes the Licensee only in respect to the following:

1. Westcoast Power Holdings Cogen Plant Generating Station, owned and operated by the Licensee at Town of Fort Frances, District of Rainy River, Ontario.

2. Iroquois Falls Generating Station, owned and operated by the Licensee at Iroquois Falls, Ontario.

3. Twin Falls Generating Station, owned and operated by the Licensee at Teefy Township, Cochrane District, Ontario.

4. Island Falls Generating Station, owned and operated by the Licensee at Menapiat Tolmie Township, Cochrane District, Ontario.

5. Calm Lake Generating Station, owned and operated by the Licensee at Bennet Township, District of Rainy River, Ontario.

6. Sturgeon Falls Generating Station, owned and operated by the Licensee at Bennet Township, District of Rainy River, Ontario.

7. Fort Frances Generating Station, owned and operated by the Licensee at Town of Fort Frances, District of Rainy River, Ontario.

8. Kenora Generating Station, owned and operated by the Licensee at Town of Kenora, District of Kenora, Ontario.

9. Norman Generating Station, owned and operated by the Licensee at Township of Kenora, District of Kenora, Ontario.

SCHEDULE 1 - PART B (to take effect the date the commercial transaction closes provided that the commercial transaction closes on or before December 31, 2007)

In order for this Part B to take effect, the commercial transaction must close on or before December 31, 2007. Subject to the condition in the above sentence, as of the date the commercial transaction closes, the Licence authorizes the Licensee only in respect to the following:

1. Westcoast Power Holdings Cogen Plant Generating Station, owned and operated by the Licensee at Town of Fort Frances, District of Rainy River, Ontario.

2. Iroquois Falls Generating Station, operated by the Licensee at Iroquois Falls, Ontario.

3. Twin Falls Generating Station, operated by the Licensee at Teefy Township, Cochrane District, Ontario.

4. Island Falls Generating Station, operated by the Licensee at Menapiat Tolmie Township, Cochrane District, Ontario.

5. Calm Lake Generating Station, operated by the Licensee at Bennet Township, District of Rainy River, Ontario.

6. Sturgeon Falls Generating Station, operated by the Licensee at Bennet Township, District of Rainy River, Ontario.

7. Fort Frances Generating Station, operated by the Licensee at Town of Fort Frances, District of Rainy River, Ontario.

8. Kenora Generating Station, operated by the Licensee at Town of Kenora, District of Kenora, Ontario.

9. Norman Generating Station, operated by the Licensee at Township of Kenora, District of Kenora, Ontario.

TAB 2

> "before the passing of the *Judicature Acts*, a right to contribution or indemnity, arising otherwise than by special agreement, was only enforceable at law by a person who could prove that he had already sustained a loss. But in equity it was very reasonably held, that even in the absence of any special agreement, a person who was entitled to contribution or indemnity from another could enforce his right before he had sustained actual loss, provided loss was imminent; and this principle will now prevail in all divisions of the High Court. Therefore a person who is entitled to be thus indemnified against loss is not obliged to wait until he has suffered, and perhaps been ruined, before having recourse to judicial aid."

As I have previously observed, and as Chief Justice Campbell's explanation expresses more clearly, the essential characteristic of third party procedure is that it makes it possible for a defendant to assert a claim, the success of which is entirely dependent on the subsequent vindication of the interests involved in the plaintiff's claim. It should therefore be no answer to a third party notice that the defendant's right of recovery against the third party must await the defendant's satisfaction of the plaintiff's claim. This case, in my mind, is the very kind of case for which the third party procedure was intended.

It is my conclusion that the learned master gave too narrow an application to the words of Rule 167(1) and should have dismissed the third party's motion to set aside the third party notice and the defendant's statement of claim. The appeal is therefore allowed, the order of Master Sedgwick is set aside and in its place there will be an order dismissing the third party's motion with costs of the appeal and of the motion before the master to the defendant in the cause as against the third party.

Appeal allowed.

ANDERSON et al. v. CO-OPERATIVE FIRE & CASUALTY CO.

Nova Scotia Supreme Court, Trial Division, Hallett J. in Chambers.
June 17, 1983.

Practice — Parties — Intervention — Application to extend limitation period — Whether solicitor responsible for failure to commence action within period entitled to intervene — Civil Procedure Rules (N.S.), Rule 8.01.

The Civil Procedure Rules, Rule 8.01, entitles a party who has an "interest in the subject matter" of litigation to intervene. A solicitor who fails to commence an action within the appropriate limitation period is an interested party in an application to extend the time within which the action may be commenced as the solicitor is potentially liable to the plaintiff should the application fail. The intervention would not unduly delay or prejudice the adjudication of the rights between the plaintiff and defendant.

Halifax Flying Club v. Maritime Builders Ltd. (1973), 5 N.S.R. (2d) 364, **folld**

Limitation of actions — Extension — Insurance — Plaintiff failing to commence action on fire insurance policy within limitation period — Plaintiff charged with and acquitted of arson — Whether limitation defence should be disallowed — Statute of Limitations, R.S.N.S. 1967, c. 168, s. 2A.

The *Statute of Limitations*, R.S.N.S. 1967, c. 168, s. 2A, in certain circumstances where it is equitable to do so, permits the court to disallow a limitation defence. In determining this issue, the court should not give much weight to the fact that the plaintiff's solicitor is potentially liable should the plaintiff fail. Neither should the court give much weight to the argument that the loss of the defence *per se* amounts to prejudice to the defendant. Where an action on a fire insurance policy is commenced three months after the expiry of the limitation period after the plaintiff has been charged with and acquitted of arson in relation to the fire, no prejudice being shown to the defendant, and the defendant having failed to supply a copy of the policy as requested by the plaintiff, it is appropriate to disallow the limitation defence. The purpose of limitation periods is to see that matters are brought expeditiously to trial and not to defeat *bona fide* claims through technical failures. In enacting this section, the Legislature intended that some relief shall be given to sleepy or negligent litigants subject to certain safeguards relating to prejudice to the defendant.

Statutes referred to

Insurance Act, R.S.N.S. 1967, c. 148, s. 12(1), stat. con. 14
Statute of Limitations, R.S.N.S. 1967, c. 168, ss. 2(1)(*d*) (am. 1982, c. 33, s. 1); 2A (enacted *idem*, s. 2)

Rules and regulations referred to

Civil Procedure Rules (N.S.), Rule 8.01

APPLICATION for leave to intervene; APPLICATION for an order disallowing a limitation defence.

H. E. Wrathall, Q.C., for applicant, Ben Y. S. Prossin.
Clarence A. Beckett, for defendant.

HALLETT J.:—These applications involve the interpretation of amendments to the *Statute of Limitations*, R.S.N.S. 1967, c. 168, which came into force on June 26, 1982. The amendments provide a mechanism whereby the court may disallow a defence based on time limitation if it is equitable to do so having regard to certain matters set out in the amendments.

The facts giving rise to these applications can be briefly stated. The plaintiffs owned a home which was insured under a general fire policy issued by the defendant. On September 14, 1981, the home was destroyed by fire, as well as were the contents. Proofs of loss were filed and were rejected by the defendant. The plaintiff, Mr. Anderson, along with two others, was charged with arson under the *Criminal Code*. Mr. Anderson retained a lawyer, Mr. Ben Y. S. Prossin, on October 28, 1981, to defend the criminal

charges and to pursue the claim under the fire insurance policy. The accused persons elected to be tried by judge and jury. The preliminary hearing dragged on through 1982 with the provincial court judge eventually finding there was insufficient evidence to commit the other two accused to trial but the plaintiff, Mr. Anderson, was committed to stand trial. On November 24, 1982, following a three-day trial, he was acquitted. The plaintiffs' lawyer had not directed his attention to the time limitation issue until November 22, 1982, when the Crown prosecutor, during the trial, mentioned it to him. By then, of course, the one-year period in which to commence the action on the fire insurance policy had already expired.

Mr. Prossin has filed two affidavits in support of the applications to intervene in the proceedings and for an order disallowing the defence of time limitation. In his affidavit, he states that at the material time he was preoccupied with the defence of the criminal charges and had not directed his attention to the civil matter.

The statement of claim was issued on December 14, 1982, some 15 months after the fire. The defence was filed on December 30, 1982, in which a number of defences were raised, including time limitation as stated in para. 6 as follows:

> 6. The Defendant says that the Plaintiffs have no claim against the Defendant as this action was not commenced within one year next after the loss or damage was alleged to have occurred, as set forth in the policy of insurance and the provisions (including Statutory provisions) of the Insurance Act of Nova Scotia.

There are two issues. First, is Mr. Prossin, who is potentially liable to the plaintiffs for failing to have commenced the action within the one-year limitation period, entitled to intervene in the proceedings pursuant to Civil Procedure Rule 8 and, second, should the defence of time limitation be disallowed pursuant to the amendments to the *Statute of Limitations*?

It is necessary to first deal with the intervention issue. Civil Procedure Rule 8.01 states:

> 8.01(1) Any person may, with leave of the court, intervene in a proceeding and become a party thereto where,
>
> (*a*) he claims an interest in the subject matter of the proceeding, including any property seized or attached in the proceeding, whether as an incident to the relief claimed, enforcement of the judgment therein, or otherwise;
>
> (*b*) his claim or defence and the proceeding have a question of law or fact in common;
>
> (*c*) he has a right to intervene under an enactment or rule.
>
> (2) The application for leave to intervene shall be supported by an affidavit

> containing the grounds thereof and shall have attached thereto, when practical, a pleading setting forth the claim or defence for which intervention is sought.
>
> (3) On the application, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the parties to the proceeding and it may grant such order as it thinks just.

It was argued on behalf of the defendant that Mr. Prossin should not be granted leave to intervene as the cause of action between the plaintiffs and Mr. Prossin relating to his failure to commence the action in time is a distinctly different issue than the issue raised in the proceedings between the plaintiffs and the defendant on the fire insurance policy. The only reported Nova Scotia decision that is relevant to this application is that of Mr. Justice Gillis in *Halifax Flying Club v. Maritime Builders Ltd.* (1973), 5 N.S.R. (2d) 364. The action in those proceedings involved a claim for damages for breach of contract by the plaintiff, Halifax Flying Club, against the defendant, Maritime Builders Ltd., arising out of the fact that the roof of the plaintiff's building blew off during a windstorm at a time when the parties were still subject to the provisions of the building contract between them. The application to intervene was by the liability insurer of Maritime Builders Ltd.

Mr. Justice Gillis granted leave to the defendant's insurer to intervene [at p. 368]:

> Because the applicant may be called upon to indemnify Maritime, if there is found a contract between these two, applicant can, in my opinion, and properly may claim an interest in both of the issues joined in the immediate proceeding and may, in the discretion of the Court, be allowed to intervene.

Mr. Justice Gillis concluded that Civil Procedure Rule 8 should be given a liberal interpretation. At p. 369 he stated:

> I am of opinion that, in discussion of Nova Scotia Civil Procedure Rule 8, one is not drawn, as in England, to assessment or application of any common law rule which would allow intervention only if the proprietary rights or legal interest of the intervenor are directly affected by the proceedings. That is the situation, I think, in the cases cited and the authorities referred to in them. Rule 8 is much more expansive of meaning, than is the English Rule, in my impression.

I agree with Mr. Justice Gillis' reasoning.

The key question on an application for leave to intervene is clearly to determine if the intervenor has "an interest in the subject matter". That, of course, necessitates an inquiry as to what is the subject-matter of the action in which the applicant wishes to intervene. In this case, the subject-matter of the action is a claim under a fire insurance policy in which the defence of

time limitation has been raised by the insurer. Does the lawyer who has made this application to intervene have an interest in this subject-matter? Clearly the answer is yes. The lawyer will be affected by the outcome of the action and has an interest, both with respect to the merits of the plaintiffs' claim and the time limitation defence because he is potentially liable to the plaintiffs just as was the insurer in the *Halifax Flying Club* case. In that case, the applicant was granted leave to intervene because of the potential liability based on the indemnification provided to the defendant pursuant to the liability insurance contract between the defendant and the insurer. Similarly, if the applicant lawyer is potentially liable to the plaintiffs if the defence of time limitation succeeds, he likewise has an interest in the subject-matter. There is no reason to give a restrictive interpretation to the words as contained in Rule 8.01.

Pursuant to subrule (3) of Rule 8.01, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the parties to the proceedings. I am satisfied that the intervention will not because the only purpose of the intervention is to make this application. If successful, that ends Mr. Prossin's interest and he should withdraw from the proceedings. If not successful, Mr. Prossin's joinder as a party would add little time to the trial of the issues between the plaintiffs and the defendant in which he has a real interest. It is impractical under the circumstances to require Mr. Prossin to attach to his affidavit the pleading setting forth the claim and defence for which the intervention is sought.

In summary, I am satisfied that Mr. Prossin has an interest in the subject-matter of the proceedings, that his intervention will not unduly delay or prejudice the adjudication of the rights between the plaintiffs and the defendant and that it would be just to grant leave to him to intervene. The order is accordingly granted.

As indicated, the application to disallow the defence based on time limitation involves the interpretation of the amendments to the *Statute of Limitations* assented to on June 26, 1982 [1982, c. 33, ss. 1, 2]. The amendments provide:

> 1. Clause (d) of subsection (1) of Section 2 of Chapter 168 of the Revised Statutes, 1967, The Statute of Limitations, is amended by striking out the words "one year" in the third last line thereof and substituting therefor the words "two years".
>
> 2. Said Chapter 168 is further amended by adding immediately following Section 2 thereof the following Section:
>
> "2A(1) In this Section,

(a) 'action' means an action of a type mentioned in subsection (1) of Section 2;

(b) 'notice' means a notice which is required before the commencement of an action;

(c) 'time limitation' means a limitation for either commencing an action or giving a notice pursuant to

(i) the provisions of Section 2,

(ii) the provisions of any enactment other than this Act,

(iii) the provisions of an agreement or contract.

"(2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which

(a) the time limitation prejudices the plaintiff or any person whom he represents; and

(b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person.

"(3) Where a time limitation has expired, a party who wishes to invoke the time limitation, on giving at least thirty days notice to any person who may have a cause of action, may apply to the court for an order terminating the right of the person to whom such notice was given from commencing the action and the court may issue such order or may authorize the commencement of an action only if it is commenced on or before a day determined by the court.

"(4) In making a determination pursuant to subsection (2), the court shall have regard to all the circumstances of the case and in particular to

(a) the length of and the reasons for the delay on the part of the plaintiff;

(b) any information or notice given by the defendant to the plaintiff respecting the time limitation;

(c) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought or notice had been given within the time limitation;

(d) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(e) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(f) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(*g*) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

"(5) The provisions of this Section shall have effect in relation to causes of action arising

(*a*) before the coming into force of this Section if the time limitation has not expired before the coming into force of this Section;

(*b*) after the coming into force of this Section.

"(6) A court shall not exercise the jurisdiction conferred by this Section where the action is commenced or notice given more than four years after the time limitation therefor expired.

"(7) This Section does not apply to an action where

(*a*) the time limitation is ten years or more; or

(*b*) the time limitation is contained in the Mechanics' Lien Act."

It is clear from s. 2A(1)(*c*) that the amendment applies to time limitations for commencing an action as contained in the *Insurance Act*, R.S.N.S. 1967, c. 148, s. 121(1) and stat. con. 14. The issue before the court on this application is whether it is equitable to disallow the time limitation defence, having regard to the degree to which (1) the time limitation prejudices the plaintiff or any person whom he represents and (2) any decision to disallow the time limitation pursuant to this amendment would prejudice the defendant or any other person. In determining the issue, the Court must have regard to all the circumstances of the case and, in particular, the seven matters referred to in cls. (*a*) to (*g*) of s. 2A(4).

In any case, there is great prejudice to a plaintiff if a time limitation defence succeeds as the plaintiff loses his cause of action. On the other hand, there is great prejudice to the defendant who loses a perfect defence if the order is granted. The Legislature in enacting this amendment must have recognized that there was prejudice to each party when the word "degree" was used in s. 2A(2). The court has been directed to consider not simply whether there is prejudice but to weigh the degree of prejudice to the parties. The intention of the Legislature as expressed is to give the court the authority to disallow a defence based on time limitation considering the criteria set forth in s-ss. (2) and (4) of s. 2A.

The degree of prejudice to a plaintiff caused by a valid time limitation defence could not be greater as the cause of action is lost. It is to be noted that there is no mention in the specific matters the court is to consider as enumerated in s-s. (4) that the court is to consider what claim the plaintiff may have against a third party. In many cases the claim would be, as it is here,

against the plaintiffs' solicitor for failure to carry out his duty to his client to commence the action within the time period required by the relevant statute. Counsel for the defendant urged the court to consider this in determining the respective degrees of prejudice to the plaintiffs and the defendant. The fact that a plaintiff whose action is out of time may have a cause of action against his solicitor is a matter the court should possibly consider in assessing the degree of prejudice to the parties but it must be remembered that the plaintiff might not be successful. In my opinion, the fact that the solicitor may be potentially liable to the plaintiff should not be given much weight by the court in assessing the degree of prejudice to the parties as required on these applications. Counsel for the defendant posed the question whether the amendment to the *Statute of Limitations* was passed for the protection of lawyers. It is irrelevant that the result of granting relief pursuant to the amendment may benefit a lawyer who might otherwise be liable to his client.

What the Legislature must have meant when it authorized the court to disallow the defence if it appeared equitable to do so, having regard to the degree to which any such decision would prejudice the defendant, was whether the defendant was prejudiced in the defence of the action on its merits because of the failure of the plaintiff to have proceeded in time. The Legislature could not have intended that the court consider the fact that the defendant loses a perfectly good defence in assessing the degree of prejudice to the defendant if the order were granted, as, otherwise, it would be somewhat pointless for the Legislature to have enacted the amendment. There would be virtually no basis upon which to weigh the degree of prejudice to the parties as if the relief is refused, the plaintiff is totally prejudiced in the case and to allow the relief, the defendant is totally prejudiced. In summary on this point, in determining the degree of prejudice that would be suffered by the defendant if a decision were made to disallow the time limitation defence, the court should not give much weight to the fact that the defendant loses its defence.

The court has two considerations in determining if it would be equitable to disallow the time limitation defence. Those two considerations are the prejudice to the plaintiff and to the defendant or any other person as provided for in s-s. (2). In making the determination, the court shall have regard to all the circumstances of the case and, in particular, to the matters enumerated in cls. (*a*) to (*g*) of s-s. (4) which, as far as the defendant is concerned, must be reviewed by the court in the

context of the prejudice to the defendant in defending the plaintiff's case on the merits if the relief requested is granted.

To deal now with the seven particular matters enumerated in s-s. (4) to which the court shall have regard in determining the issue raised on the application. First, the length of the delay in starting the action is only three months. The reason for the delay, while maybe not excusable, is at least understandable in view of the serious criminal charges that were outstanding against Mr. Anderson at the time the limitation period expired. The length of the delay clearly does not prejudice the defendant. The reason for the delay was not the fault of the plaintiffs.

Secondly, with regard to any information or notice given by the defendant to the plaintiffs respecting the time limitation. Had the plaintiffs or their counsel been alerted to the fact that there was a time limitation period, this would tell against granting the relief requested. Here there was no information or notice given by the defendant to the plaintiffs respecting the time limitation. In fact, requests by the plaintiffs' counsel for a copy of the insurance policy went unanswered by the defendant. The defendant's position is not prejudiced on this account.

Thirdly, the court must consider the degree of prejudice to the parties "having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought or notice had been given within the time limitation". Clearly, there is no prejudice whatever to the defendant in this regard as the defendant has had an adjuster on the case since shortly after the loss. It would seem to me that this particular provision is one under which an application for disallowance of a defence might very well be refused as with the passage of time, evidence can be difficult to assemble; however, that would not appear to be a problem in this case.

Fourthly, the court must have regard to the conduct of the defendant after the cause of action arose, including the extent, if any, to which it responded to requests reasonably made by the plaintiffs for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiffs' cause of action against the defendant. It is clear from Mr. Prossin's affidavit that requests for a copy of the policy went unanswered. Having regard to this factor, while the conduct of the defendant is not open to serious censure, the defendant did fail to supply a copy of the policy as requested. The plaintiffs did not have a policy from which they could have ascertained that there were time limitations. This does not favour the defendant.

Fifth, in making the determination whether to disallow the defence, the court shall have regard to the duration of any disability of the plaintiffs arising after the date of the accrual of the cause of action. The plaintiffs were not under any disability.

Sixth, the court shall consider "the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages". This factor does not weigh against the plaintiffs in that the plaintiffs did act promptly and engaged counsel shortly after the fire. They did not dither with the matter; they engaged counsel when the proofs of loss were rejected.

Seventh, the court shall have particular regard, in making the determination whether to grant the relief, to "the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received". I find that the plaintiffs took the necessary steps to engage legal counsel and the plaintiffs are not subject to censure for failing to adhere to advice.

Considering all the circumstances of the case and, in particular, the matters referred to in cls. 4(*a*) to (*g*) inclusive, and having regard to the degree to which the time limitation defence prejudices the plaintiffs, and having regard to the degree a decision of this court under this section to disallow the defence of time limitation would prejudice the defendant, I am satisfied that it would be equitable to disallow the defence based on time limitation as the degree of prejudice to the plaintiffs is far greater than the degree of prejudice to the defendant. To take an overview of this amendment to the *Statute of Limitations* which enabled the plaintiffs to make this application, it is reasonable to infer from the words used that the Legislature intended to empower the court to allow relief in cases such as this. An order shall issue disallowing the defence of time limitation raised by the defendant.

It should be noted that pursuant to s-s. 2A(3), where a time limitation has expired, a party who wishes to invoke the time limitation may, on giving notice to any person who may have a cause of action, apply to the court for an order terminating the right of the person to commence the action and, on such application, the court may issue such an order or the court may authorize the commencement of the action on or before a date determined by the court. It would appear that the Legislature intended that any party who wishes to invoke a time limitation

defence should apply to the court to have it terminated if it does not wish to run the risk of the party, upon awakening to the problem, commencing an application under the amendment to have a time limitation defence disallowed. The purpose of time limitations within which to bring actions is to see that matters are brought on expeditiously within reasonable time frames considering the nature of the claim. The purpose is not to defeat *bona fide* claims through a technical failure to have commenced action within a specific time period. The Legislature has obviously intended to grant some relief to sleepy or negligent litigants subject to certain safeguards, the chief of which relates to any prejudice to the defendant caused by the delay in defending the case on its merits, taking into consideration the conduct of the plaintiff. The Legislature apparently perceived there were inequities arising out of the defence of time limitation and has provided a mechanism to resolve such inequities. In this case, the delay was very short; the defendant is not prejudiced in defending the case on its merits; this is the type of case in which equitable relief is required. The fact that the lawyer involved may collaterally benefit from the granting of the relief requested is not a reason to refuse the application.

The applications are granted and I shall hear the parties on costs if requested.

Order accordingly.

RE DALE CORPORATION AND RENT REVIEW COMMISSION et al.

Nova Scotia Supreme Court, Appeal Division, Macdonald, Hart and Jones JJ.A. June 27, 1983.

Landlord and tenant — Residential tenancies — Rent review — Rent Review Commission distributing guidelines to staff — Whether regulations — Whether binding — Regulations Act, 1973 (N.S.), c. 15, s. 2(g) — Rent Review Act, 1975 (N.S.), c. 56, ss. 20, 39.

Guidelines prepared for and distributed by the Rent Review Commission to its staff which deal with substantive matters are not regulations, and because they are not made in the exercise of a legislative power as provided by s. 2(*g*) of the *Regulations Act*, 1973 (N.S.), c. 15, and because they are not restricted solely to the commission's procedure, in which case the commission would have power to make them and they would be regarded as regulations under s. 20 of the *Rent Review Act*, 1975 (N.S.), c. 56, and because they concern matters in respect of which only the Governor in Council has power to make regulations under s. 39 of the latter Act.

Re Pacific Investments Ltd. and Rent Review Com'n et al. (1977), 81 D.L.R.

TAB 3

PRACTICE AND PROCEDURE

BEFORE

Administrative Tribunals

VOLUME 2

by

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and

JAMES L.H. SPRAGUE, B.A., LL.B.

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that matter is delayed or stretched unreasonably. The agency must, as well, avoid the impression of attempting to build the case for one party or another.

12.4 INTERVENTIONS

Intervenors are generally individuals or groups who do not meet the criteria to be a party but who still have a sufficient interest, or some expertise or view which the agency feels will benefit the proceeding to have represented. As the Supreme Court of Canada commented in the *Canadian Council of Churches v. Canada*[162] "[T]he views of the public litigant who cannot obtain standing need not be lost. Public interest organizations are, as they should be, frequently granted intervenor status. *The views and submissions of intervenors on issues of public importance frequently provide great assistance to the courts.*" [emphasis added.]

A statute may expressly give an agency the authority to grant intervener status to a person or group.[162.1] Otherwise an agency's authority to grant intervener status flows implicitly from the power to conduct a hearing or to hold an inquiry.[163] It appears that, at least in the case of a public officer, in order for an agency to grant such status the person seeking intervenor status must have the ability himself to receive the grant.[164]

There is no common law *right* to be an intervenor. Statute may, of course, grant such a right but in the absence of such a statutory provision, intervenors are added at the discretion of the agency. Furthermore, unlike a party, who is given certain rights by natural justice and fairness, the extent of an intervenor's participation is fixed by the agency (subject to statutory direction, of course). The

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162 (1992), 132 N.R. 241 (S.C.C.).

162.1 See, for example, section 33 of British Columbia's *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

163 *Nfld. Telephone Co. v. TAS Communications Systems Ltd.* (1987), 45 D.L.R. (4th) 570 (S.C.C.).

164 In *Nfld. Telephone Co. v. TAS Communications Systems Ltd.* (1987), 45 D.L.R. (4th) 570 (S.C.C.) the Supreme Court held that the Newfoundland Board of Commissioners of Public Utilities could not grant intervenor standing to the federal Director of Investigation and Research as the federal government had not given that officer the mandate to appear before provincial agencies. The Court held that "Whatever scope may be reasonably assigned to the implied power or discretion of the board to permit intervention, it cannot have been intended that the board should have authority to permit intervention by a public officer in his official capacity if the officer has been denied the necessary authority to intervene by his governing statute. . . . To permit intervention where a public officer is shown to lack the necessary authority to intervene would be to permit him to exceed his authority and thus would be contrary to a fundamental principle of public law." The Court had earlier held that the official required some statutory authority to intervene in the capacity of his office as that intervention would amount to "an assertion, in an adjudicative context, of the authority and expertise of a public official. In such a case, a public officer puts the weight of his opinion and knowledge acquired in the exercise of his official duties, on the adjudicative scales. He extends, on his own initiative, the effective reach and influence of his office and authority with potential direct legal effect." For a similar decision see *City of Edmonton v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 358 (C.A.).

degree of participation will be determined by the extent the agency feels the intervenor's participation will assist it in its mandate.[165] Sometimes two or more individuals or groups may bring before the agency essentially the same expertise or views. In that case the agency may require that they pool their resources and appear through a single spokesman.[165.1] However, it must be remembered that an intervenor is there to bring a view or an expertise before the agency which will be useful in determining the matter which is before the agency. If the person seeking intervenor status is not bringing anything of potential use to the agency, or is simply repeating which will already be brought or could be brought to the agency by the other parties, the agency should not grant intervenor status out of concerns respecting the public (and the parties') interest in efficient and expeditious proceedings.[165.2] An intervenor should not be given leave to speak to ques-

165 See for example, the description of the role of intervenors before the National Energy Board in c. 5.5(d)(iv) and the Ontario Energy Board in c. 5.4.

165.1 Of relevance to this point is the caution sounded by Lord Hoffman in the British House of Lords decision in *In Re E (a child)*, [2008] UKHL 66 (H.L.) respecting interventions in proceedings before the House of Lords. Those comments are also applicable to proceedings before Canadian agencies.

> It may however be of some assistance in future cases if I comment on the intervention by the Northern Ireland Human Rights Commission. In recent years the House has frequently been assisted by the submissions of statutory bodies and non-governmental organizations on questions of general public importance. Leave is given to such bodies to intervene and make submissions, usually in writing but sometimes orally from the bar, in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain. The House is grateful to such bodies for their help.
>
> An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention. I am bound to say that in this appeal the oral submissions on behalf of the NIHRC only repeated in rather more emphatic terms the points which had already been quite adequately argued by counsel for the appellant. In future, I hope that interveners will avoid unnecessarily taking up the time of the House in this way.

165.2 In *Canada (Prime Minister) v. Khadr*, 2009 CarswellNat 1637, 2009 FCA 191 (Fed. C.A.) (which dealt with efforts to repatriate Omar Khadr from Guantanamo Bay and the American military process) Amnesty International sought, and was refused intervenor status before the Federal Court of Appeal. The Court applied the test set out in *C.U.P.E. v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220 (Fed. C.A.). That test set out the following factors for consideration:

> 1) Is the proposed intervener directly affected by the outcome?
>
> 2) Does there exist a justiciable issue and a veritable public interest?
>
> 3) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?
>
> 4) Is the position of the proposed intervener adequately defended by one of the parties to the

tions which are not raised by the underlying proceeding.[166]

Once notice has been given of the hearing, those who want to take part will give notice of their wish to participate in the hearing by filing with the tribunal a notice of intervention: see Appendix 12.4.

The notice of intervention should be precise and should set out:

(1) the style of cause (to allow the agency to identify the proceeding in question);

(2) a description of the intervenor (to allow the agency to know who is seeking the intervention and what he can bring to the proceeding);

(3) a description of how the intervenor can be impacted or affected by the matters before the agency;

(4) a brief description of the positions being taken by the intervenor for or against; and

(5) the address for service upon the intervenor.

Few agencies have a procedure to strike out a notice of intervention if it fails to disclose any substantial interest of the intervenor. I believe that most agencies should allow standing to most intervenors.[167] In the end, the agency will have to decide what weight should be given to the submissions. This practice is in the public interest.

---

case?

5) Are the interests of justice better served by the intervention of the proposed third party?

6) Can the Court hear and decide the case on its merits without the proposed intervener?

Of those, the Court of Appeal stated that it considered particularly whether:

- the position of the proposed intervener is adequately defended by one of the parties to the case;
- the interests of justice are better served by the intervention of the proposed third party;
- the Court can hear and decide the cause on its merits without the proposed intervener.

Amnesty had stated that it had expertise on the issue of human rights and, while it supported the position of the respondent it sought to make supplemental argument. In denying the application the Court stated that:

> at its highest, AI's interest is jurisprudential in nature. It is well-established that this kind of interest alone cannot justify an application to intervene.

166 *Rudolph v. Canada (Minister of Employment & Immigration)* (1992), 139 N.R. 233 (Fed. C.A.).

167 For an interesting limitation on the authority of an agency to grant intervenor status see *Director of Investigations and Research Under the Combines Investigation Act v. Nfld. Telephone Co.*, [1987] 2 S.C.R. 466, 68 Nfld. & P.E.I.R. 1, 209 A.P.R. 1, where the Supreme Court of Canada held that an provincial agency could not grant a federal official intervenor status in its proceedings when Parliament had not given that office the mandate to intervene. The agency's provincially based power could not alter the mandate of the federal official.

Where an agency has no requirement for the filing of any supporting material in advance by the applicant, there will obviously be no requirement that material be filed with a notice of intervention. Many agencies have no requirement that an intervenor file any material. He only has to appear the day the hearing commences, having given notice of his intent to intervene. Many agencies do not even require a notice of intervention to intervene. Most agencies fall somewhere between the extremes of substantial pre-filings and no filings at all.[167a]

12.5 INTERROGATORIES

Once a notice calling a hearing has been given and the notices of intervention have been received, the tribunal may issue a procedural order advising all parties of the procedure, in terms of interrogatories and other preliminary matters.

Interrogatories are written questions directed by parties to each other, copies of which are filed with the tribunal and sent to or served on all other parties. Usually the procedural order, where interrogatories are part of a tribunal's practice, will described how a party may intervene and put interrogatories to opposing parties. Such a procedural order is attached as Appendix 12.5.

Interrogatories were introduced many years ago by some agencies such as the NEB and the OEB as a substitute for examination-for-discovery. Most boards can authorize (order) discovery, but it is not common to do so. The concept of interrogatories is that if a party does not understand material that has been filed, it may address questions in writing to another party. The interrogatories shall be answered by the other party in writing on or before a certain date, unless a motion is brought before the tribunal dispensing with a duty to answer the question. The practice, where there are interrogatories, is that the question and answers are numbered so that they can be easily associated with the party asking the question and the subject matter.

Needless to say, an interrogatory process, although common with regulatory tribunals is not common with other kinds of agencies. This is, perhaps, because the issues coming before regulatory boards are unusually complex. They involve, as a rule, a large volume of paper and statistics.

It is not possible to lay down any rule as to how, if at all, agencies should make use of the interrogatory process. However, there is something to be said for the use of more, rather than less, pre-filed material so that parties have a clearer advance knowledge of how parties' interests are affected or could be affected by the hearing. In addition, the parties can more usefully participate on behalf of the public interest and assist a tribunal if it knows more rather then less about the issues in advance. The pre-filed material becomes part of the record as soon as it is identified by the witness. The material is not read into the record. The tribunal must have read and understood the material, as filed, before the hearing com-

167a Inventions are also discussed briefly earlier in chapter 9 under the heading "9.7(b) Intervening in Agency Proceedings".

mences. Thus, a traditional panel carries into a regulatory hearing a very substantial appreciation of the application, which comes to a large extent from the interrogatory process and the pre-filings, as well as the accumulated expertise and experience of the tribunal. A sample of an interrogatory with the answer is contained in Appendix 12.6.

12.6 PRE-HEARING DISCLOSURE OR FILING OF INFORMATION

12.6(a) Authority to Require

As a creature of statute, if an agency is to have the authority to require the pre-hearing exchange of information between participants or pre-hearing filing of evidence with the agency, it must have been given it by Parliament or a Legislature, either expressly or impliedly.[167.1]

For an example of an express (if indirect) grant see *Pasquale v. Vaughan (Township)*[168] the Ontario Court of Appeal held that the Ontario Municipal Board was granted the authority to order production and inspection of documents by virtue of the wide grant of authority found in section 37 of the Ontario Municipal Board Act, R.S.O. 1960, c. 274. This section provided that the Board "for the due exercise of its jurisdiction and power and other wise for carrying into effect the provisions of this or any other general or special Act, has all such powers . . . as are vested in the Supreme Court with respect to the amendment of proceedings, [other matters mentioned in the section] and all other matters necessary or proper

(*Continued on page 12–66.5*)

167.1 *Ontario (Human Rights Commission) v. Dofasco Inc.*, 2001 CarswellOnt 4049, [2001] O.J. No. 4420 (Ont. C.A.).

168 [1967] 1 O.R. 417 (C.A.).

TAB 4

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2007-0050

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Schedule B) (the "Act");

AND IN THE MATTER OF an Application by Hydro One Networks Inc. pursuant to section 92 of the Act, for an Order or Orders granting leave to construct a transmission reinforcement project between the Bruce Nuclear Generating Station and Milton Switching Station, all in the Province of Ontario.

BEFORE: Pamela Nowina
Presiding Member and Vice-Chair

Cynthia Chaplin
Member

Ken Quesnelle
Member

DECISION AND ORDER
September 15, 2008

7. ABORIGINAL CONSULTATION

7.1 Background

Issue 6.1 of the Issues List deals with Aboriginal consultation:

> Have all Aboriginal Peoples whose existing or asserted Aboriginal or treaty rights are affected by this project been identified, have appropriate consultations been conducted with these groups and if necessary, have appropriate accommodations been made with these groups?

The Board also provided the following direction to parties on the final day of the oral of the hearing:

> *[R]egarding argument, the Board is requesting specific input in the argument on issue 6, which is in regard to Aboriginal consultation and accommodation. We ask parties to address the following questions in their argument: What Crown consultation and accommodation is required for the purposes of approving a section 92 leave-to-construct application; and what, if any, consultation and accommodation issues are within the Board's jurisdiction in this case; and has the required consultation and possibly accommodation been done.*[46]

Hydro One filed evidence relating to its Aboriginal consultation activities, including information detailing which Aboriginal groups were contacted, how they were selected, and an overview of the results of the consultations as of that time. All parties agreed that Aboriginal consultation for the project as a whole is ongoing and has not been completed.

No other party called evidence on Aboriginal consultation issues. MNO filed a series of documents relating generally to the Métis People and consultation for the project, which its counsel reviewed with the Hydro One witness panel.

[46] Transcript, volume 14, pp. 2-3.

7.2 The Issues

The Duty to Consult

Although there is disagreement amongst the parties regarding the Board's specific role, there appears to be broad agreement regarding the overall nature of the duty to consult.

The duty to consult flows from s. 35 of the *Constitution Act, 1982*:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> *(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection* (1) are guaranteed equally to male and female persons.

All parties made reference to the three Supreme Court cases that originally described the duty to consult.[47] These cases make it clear that the Crown has a duty to consult with Aboriginal groups prior to taking any action which may have an adverse impact on an Aboriginal or treaty right. In certain circumstances, there will also be a duty to accommodate Aboriginal interests. The duty to consult (including the duty to accommodate where appropriate)[48] arises where the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal or treaty right and contemplates conduct that might adversely affect it. The extent of the duty requires a preliminary assessment and is proportionate to the strength of the case supporting the existence of the right or title in question, and to the seriousness of the potentially adverse effect upon the right or title claimed.

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[47] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 ("*Haida*"); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 ("*Taku*"); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.C. 69 ("*Mikisew*").
[48] Any reference to the "duty to consult" in this decision includes the duty, where appropriate, to accommodate.

On these general points there appears to be broad agreement. In addition, no party argued that the Board itself had a duty to consult on the project. Where the parties differ is with regard to the Board's role in assessing the adequacy of the consultation.

The Board's Role

The Board's authority to approve leave to construct applications for electricity transmission projects comes from sections 92 and 96 of the *Ontario Energy Board Act*. Section 92 states:

> *No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the Board an order granting leave to construct, expand or reinforce such line or interconnection.*

Section 96(2) of the Act places certain restrictions on the scope of the Board's review:

> *In an application under section 92, the Board shall only consider the interests of consumers with respect to prices and the reliability and quality of electricity service when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection.*

An issue the Board must consider here is whether it is required to evaluate the adequacy of the consultation conducted by reference to the whole of the project and its potential impacts despite the section 96(2) restrictions on the Board's jurisdiction.

In the submissions of SON and MNO, the answer is yes. In its submissions, MNO states that the duty to consult arises from section 35 of the *Constitution Act*. It is a super-added duty that runs parallel to existing statutory and policy mandates. In other words, it cannot be legislated away. MNO submitted: "the OEB, as a statutory Crown decision-maker, whose discretionary authorization (i.e. a leave to contract [*sic*] order) has the potential to adversely affect Aboriginal peoples is accountable and responsible to ensure the constitutional duty has been discharged in relation to its authorization."[49]

[49] MNO final argument, para. 45

MNO cited the Supreme Court decision *Paul v. British Columbia (Forest Appeals Commission)*[50] ("Paul") in support of its contention that Crown statutory decision makers have the jurisdiction to consider Aboriginal rights related issues in the course of their decision making:

> *I am of the view that the approach set out in Martin, in the context of determining a tribunal's power to apply the Charter, is the only approach to be taken in determining a tribunal's power to apply s. 35 of the Constitution Act, 1982. The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provisions. Practical considerations will generally not suffice to rebut the presumption that arises from authority to decide questions of law. This is not to say, however, that practical considerations cannot be taken into consideration in determining what is the most appropriate way of handling a particular dispute where more than one option is available.*[51] *[Emphasis added by MNO]*

MNO then points to s. 19(1) of the OEB Act, which states: "The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact." In MNO's analysis, this leads to the conclusion that the Board has the jurisdiction to consider questions of constitutional law and s. 35 or any other related constitutional provision in its decision making process, including Aboriginal consultation issues.

SON also cites the *Paul* case and makes a similar submission:

> *... as a statutory tribunal, the Board must exercise its decision-making functions in accordance with the dictates of the Constitution, including s. 35(1) of the Constitution Act, 1982. The Board is therefore required to respect and honour, not ignore, the duty to consult and accommodate.*[52]

[50] [2003] S.C.J. No. 34
[51] *Paul*, para. 39.
[52] SON final argument, p. 42.

SON further submitted that the EA is an administrative and political process, and was therefore not an appropriate mechanism for making an independent determination regarding the Crown's consultation obligations.

SON concluded that, since consultation for the project is clearly not completed, the application should be denied.

Board staff adopted a different view. It was Board staff's submission that in this case the Board should only consider Aboriginal consultation issues that relate to prices, reliability and quality of electricity service. Board staff did not rule out the possibility of the Board considering broader consultation issues in some cases; it stated that where no other Crown actor had a responsibility to consider consultation issues relating to matters other than prices, reliability and quality of electricity service, the Board might have to adopt that role. However, given that Aboriginal consultation issues were being considered through the EA process, it was Board staff's view that the Board did not have to adopt that role in this case.

Hydro One submitted that the Board's s. 35 responsibilities are limited by its mandate under the OEB Act. The Board's s. 35 obligations, therefore, can relate solely to prices, reliability and quality of electricity service. Hydro One took issue with MNO's submission that the duty to consult is a super-added duty for the Board, and that it stands as an independent requirement of the Board outside of its enabling statutes. In Hydro One's view there is no authority for this proposition, and it should be rejected. In Hydro One's analysis, the *Paul* decision simply describes the nature of an administrative tribunal:

> *it does not stand for the proposition that Crown consultation must occur in only one venue, that the decision maker's scope of authority is expanded beyond that which is expressly provided for in the applicable legislation and that the first decision maker to consider any consultation aspects must consider all consultation aspects."*[53]

Hydro One submitted that the Board would in no way be delegating or deferring its duty to consult by leaving the issue to the EA process, because the Board has never had responsibility for any s. 35 duties relating to environmental matters. This is an

[53] Hydro One reply argument, p. 32.

obligation of the Minister of the Environment, and has never been an obligation of the Board. The Board's mandate is restricted to prices, reliability and quality of electricity service, even when considering Aboriginal consultation issues.

7.3 Board Findings

The Board's Jurisdiction to Consider Aboriginal Consultation Issues

It is agreed by all parties that Aboriginal consultation is required for the project as a whole. Where the parties disagree is with respect to the scope of the Board's assessment of the consultation. The issue presented by the parties was not whether the Board itself had an obligation or duty to consult but whether the Board had a duty to determine whether the Crown had engaged in adequate consultation. The Board's role, in this case, is to assess whether or not adequate consultation has taken place prior to granting an approval.

The Board is not aware of any cases in which a tribunal has been found to be responsible for either conducting Aboriginal consultation, or for making a determination as to whether or not Aboriginal consultation has been sufficient. Neither is the Board aware of any cases stating that a tribunal does not have these responsibilities. It appears that this issue has yet to be addressed by a Canadian court.

In the absence of definitive guidance from the courts, the Board must analyze the statutes and precedents that do exist and come to a reasoned conclusion.

Paul holds that tribunals that have the authority to determine questions of law have the jurisdiction to deal with constitutional issues. The Board accepts that it has the authority and duty to consider questions of law on matters within its jurisdiction.

Parties suggested that the Board should not approve the application because the consultation in the EA process is incomplete and/or inadequate, and that the leave to construct should only be granted when the Board determines that the consultation as a whole is complete and has been adequate. The Board does not agree with either proposition.

Although the Board has the authority to determine questions of law, the EA process is beyond the Board's jurisdiction and therefore the Board does not have the authority to determine whether the Aboriginal consultation in that process has been sufficient. The Board cannot assume authority over matters that are clearly within the legislated jurisdiction of the EA process. In addition, parties argued that the Board should consider the requirement for Aboriginal consultation related to the development of generation. The Board disagrees. The matter before us is the approval to construct transmission facilities. It does not include the approval of plans for, or development of, generation facilities. Therefore, it is not within the Board's jurisdiction, in this case, to consider the adverse impacts on Aboriginal peoples requiring consultation related to the development of generation.

Regardless of the issue of jurisdiction, the consultation surrounding this project as a whole is clearly not complete. The issue for the Board, therefore, is whether a leave to construct may be granted in the absence of a complete consultation.

Some parties suggest that the Board may not grant a leave to construct until the consultation for the project as a whole is complete. The Board does not think this is necessary. In a general sense this would be impractical and in this specific case it is unnecessary because the Board's leave to construct order is conditioned on completion of the EA process and the EA process will be dealing with the consultation issues raised in direct relation to this project.

There is only one Crown. The requirement is that the Crown ensure that Aboriginal consultation takes place for all aspects of the project. It is not necessary that each Crown actor that is involved with an approval for the project take on the responsibility to ensure that consultation for the entire project has been completed; such an approach would be unworkable. It would lead to confusion and uncertainty and the potential for duplication and inconsistency. It would also potentially lead to a circular situation in which each Crown actor finds itself unable to render a final finding on consultation because it is awaiting the completion of other processes. The *Paul* case directly addresses this practicality issue:

> *Practical considerations will generally not suffice to rebut the presumption that arises from authority to decide questions of law.*

> *This is not to say, however, that practical considerations cannot be taken into consideration in determining what is the most appropriate way of handling a particular dispute where more than one option is available.*

The *Paul* case predates the *Haida* case; however in the Board's view this principle applies equally in the consultation context. As a practical matter it is unworkable to have to separate Crown actors considering identical Aboriginal consultation issues for the same project. In fulfilling its responsibility to assess the adequacy of consultation, the Board must necessarily take responsibility for the aspects of the consultation that relate to the matter before it, but should do so with a recognition of any other forum in which consultation issues related to the project are being addressed as well.

The Evidence

Based on the evidence and argument before it, the Board is unable to identify any adverse affect on an Aboriginal or treaty right that would occur as a result of the Board's granting a leave to construct. Nor has any party identified any such issue on which there has been a failure or refusal to consult.

Neither SON nor MNO called a witness in this proceeding to address issues relating to Aboriginal consultation. MNO did file a number of documents which provided information about the Métis People. Several documents reference the asserted Métis Aboriginal right to harvest and other land related issues. For example, in a letter to HONI regarding Métis consultation on the Bruce-Milton transmission line, the MNO wrote:

> *The Crown has never undertaken a Métis traditional land use study and has never provided support to the MNO to undertake such a study in order to identify Métis land use, harvesting practices, sacred places, Métis cemeteries, etc. in the region. As such, the MNO is very concerned that Métis harvesting practices or use of land in the region has not been considered in the development of the Project.*[54]

[54] Exhibit K9.6- Letter dated March 31, 2008, filed in this proceeding as Tab 10 of the Evidentiary Submission filed on April 18, 2008 by the Métis Nation of Ontario

MNO also filed a map showing Métis traditional harvesting territories (which include the Bruce peninsula)[55].

In its pre-filed evidence, Hydro One filed minutes from a number of meetings between itself and SON. Counsel for SON questioned Hydro One's witnesses regarding the consultation activities it had undertaken with SON. Both the minutes from the meetings and the responses under cross examination from Hydro One witnesses reveal that SON had raised a number of concerns about the proposed project. Specific reference is made to, amongst other things, archaeological issues, biological issues, and issues relating to how the project fits in with the overall generation and transmission plans for the Bruce area. There are references to "local benefit" or economic issues, but the main thrust of the concerns relate to what can best be described as environmental or land related issues.

All of the evidence is that the consultation issues relate to the EA process and generation planning decisions. Generation planning is beyond the scope of the project and is the subject of other ongoing consultations. The Memorandum of Understanding between the Ministry of Energy and Hydro One[56] clearly sets out the Crown's acknowledgement of its duty to consult and establishes those areas where Hydro One will undertake some aspects of that consultation for this project. The EA process is a key component.

The Environmental Assessment Process

In addition to the Board's approval, Hydro One must complete the EA in order to commence building the project. The EA is conducted under the aegis of the Minister of the Environment, and the EA is not complete until it is approved by the Minister. The terms of reference ("TOR") for the EA were filed with the Board in this proceeding. The TOR includes a section relating to Aboriginal consultation. Section 8.4 of the TOR, entitled "Aboriginal Communities and Groups Engagement/ Consultation Plan", provides an overview of Hydro One's plan to ensure proper consultation and possibly accommodation takes place. The TOR states:

[55] Exhibit K9.6- Métis Traditional Harvesting Territories Map, Tab 5 of the Evidentiary Submission filed on April 18, 2008 by the Métis Nation of Ontario
[56] Exhibit K8.1

> *Hydro One is committed to working closely with the Crown to ensure that the duty to consult Aboriginal communities and groups is fulfilled. Hydro One's process for Aboriginal communities and groups is designed to provide information on the project to the Aboriginal communities and groups in a timely manner and to respond to and address issues, concerns or questions raised by the aboriginal communities and groups in a clear and transparent manner throughout the completion of the regulatory approval processes (e.g., the EA process).*[57]

In addition to section 8.4, there are numerous additional references to the consultation activities that Hydro One plans to undertake as part of the EA process. Under the heading "Traditional/Aboriginal Land Use", for example, it states:

> *Based on consultation with the Aboriginal communities and groups, the EA will document concerns and issues raised. The EA will also describe how Hydro One proposes to address these concerns. The EA document will describe Aboriginal communities and groups, their traditional uses of the land, and their established and asserted claims.*

The EA process, which must be approved by the Minister of the Environment, is specifically charged with addressing Aboriginal consultation issues relating to the Project through its TOR. The Board disagrees with SON'S contention that the environmental assessment process is not an appropriate mechanism for making a determination regarding the Crown's consultation obligations. The duty to consult and, if necessary accommodate, is a duty owed by the Crown to Aboriginal peoples. The Crown must satisfy itself that consultation has been adequate. A determination regarding the adequacy of consultation which is made by a Minister of the Crown after having considered the record of consultation conducted as part of an Environmental Assessment is an entirely appropriate and logical means by which the Crown can assure itself that consultation has been adequate. As the Crown will be making the decision to grant the EA, and given the Crown's broad duty to ensure adequate consultation, it is reasonable to expect the Minister to consider the Crown consultations that have gone on in areas beyond the project, namely generation planning.

[57] Approved Terms of Reference of the EA dated April 4, 2008, Pages 74-75

The Board's leave to construct order is conditioned on the granting of all other necessary approvals and permits. Specifically, the Board's order is conditional on successful completion of the EA process. In this way, the Board has satisfied itself that the process of assessment of the duty to consult (including the duty to accommodate where appropriate) will be completed prior to the commencement of the project and in a practical and workable manner.

The Board's Proposed Aboriginal Consultation Policy

Both MNO and SON made reference to the Board's draft Aboriginal Consultation Policy ("ACP").

The Board issued the draft ACP for comment on June 18, 2007. A variety of stakeholders, including several Aboriginal groups, made submissions to the Board on the draft policy. Every Aboriginal group that made substantive comments on the draft, including MNO, was opposed to the ACP as drafted and asked that the Board not adopt it. To date, the Board has not adopted the ACP, and it currently has no formal policy with regard to Aboriginal consultation.

The Board has recognized that whatever consultation responsibilities it has exist irrespective of the existence of a formal consultation policy. For that reason it has considered Aboriginal consultation issues on a case by case basis as proceedings have come before the Board. In one case cited by MNO, which was released in October 2007, the Board made reference to its proposed ACP. This decision clearly identified the ACP as "proposed" as opposed to final, and should not be taken to mean that the Board has in fact adopted an ACP. In fact, the MNO appears to have recognized that the ACP was still only a draft in a letter to Hydro One dated November 27, 2007:

> *...the Ontario Energy Board has recently issued a draft Aboriginal Consultation Policy that requires all proponents to provide information in their future applications to the Board on how the Aboriginal communities who may be affected by the projects being proposed by proponents have been consulted.*[58]

[58] Exhbit K9.6- Letter dated November 27, 2007 addressed to Hydro One, Tab 9 of the Evidentiary Submission filed on April 18, 2008 by the Métis Nation of Ontario

TAB 5

CITATION: Canadian College of Business and Computers Inc. v. Ontario (Private Career Colleges), 2010 ONCA 856
DATE: 20101216
DOCKET: C51474

COURT OF APPEAL FOR ONTARIO

Rosenberg, Cronk and Epstein JJ.A.

BETWEEN

Canadian College of Business and Computers Inc. and Pannirshelvan (Shelvan) Kannuthurai

Appellants (Respondents on Appeal)

and

Superintendent, under the *Private Career Colleges Act, 2005*

Respondent (Appellant on Appeal)

Sara Blake and Tom Schreiter, for the appellant

Julian N. Falconer and Sunil S. Mathai, for the respondents

Heard: October 18, 2010

On appeal from the order of Justices J.R.R. Jennings, G.I. Pardu and A. Karakatsanis of the Superior Court of Justice, sitting as the Divisional Court, dated July 7, 2009, with reasons reported at (2009), 251 O.A.C. 221.

Cronk J.A.:

I. Overview

[1] Until 2006, the operation of privately-run vocational schools in Ontario was regulated under the *Private Career Colleges Act*, R.S.O. 1990, c. P.26 (the "Act").[1] The

[1] Effective September 18, 2006, the Act was replaced by the *Private Career Colleges Act, 2005*, S.O. 2005, c. 28, Sched. L. The matters at issue on this appeal arose when the Act was in effect.

appellant Superintendent was the provincial official responsible for administration of and compliance under the Act.

[2] For approximately nine years (October 1996 to January 2006), the respondent, Canadian College of Business and Computers Inc. ("CCBC"), was registered under the Act to operate a private career college in Ontario, providing vocational educational services to both domestic and international students. The respondent, Pannirshelvan (Shelvan) Kannuthurai ("Kannuthurai"), is the president and sole shareholder of CCBC.

[3] In mid-January 2006, the Superintendent proposed to revoke CCBC's registration under the Act due to various concerns regarding CCBC's operations. After a lengthy hearing before the Licence Appeal Tribunal (the "Tribunal") regarding the Superintendent's revocation proposal, the Tribunal directed the Superintendent to revoke CCBC's registration. On appeal to the Divisional Court by the respondents, the Tribunal's decision was set aside and a rehearing was ordered on the ground that the original hearing before the Tribunal was tainted by a reasonable apprehension of bias on the part of the presiding adjudicator.

[4] The Superintendent appeals to this court. She challenges the Divisional Court's finding of bias and its decision to remit the issue of the proposed revocation of CCBC's registration to the Tribunal for rehearing.

[5] For the reasons that follow, I would dismiss the appeal.

II. Facts

(1) Notice of Intention to Revoke

[6] The Superintendent was authorized under the Act to conduct inspections and examine the operations of private career colleges to ensure compliance with the Act (s. 13(1)). She was also empowered to refuse to renew, suspend or revoke the registration of a private career college if the registrant failed to satisfy the requirements of the Act or associated regulations (s. 6(2)).

[7] Pursuant to s. 5 of the Act and ss. 5, 6 and 20-25 of O./Reg. 939, R.R.O. 1990, registration or renewal of registration under the Act to conduct or operate a private career college required the operator of the college: (1) to be honest and financially responsible in the conduct of the college; (2) to employ qualified instructors; and (3) to adhere to prescribed rules governing the refund of fees paid by students on their withdrawal or expulsion from a vocational program.

[8] On January 19, 2006, the Superintendent delivered a notice of intention to revoke and immediately suspend CCBC's registration under the Act, citing concerns about whether CCBC could be expected to conduct its private career college in a financially responsible manner, the quality of CCBC's vocational programs, and alleged past conduct of CCBC and Kannuthurai that the Superintendent said afforded reasonable grounds for belief that CCBC would not carry on its college "in accordance with law and

with integrity and honesty", contrary to s. 5 of the Act. In response, the respondents invoked their right under s. 7(2) of the Act to a hearing before the Tribunal.

(2) Tribunal Decision

[9] The hearing was conducted before a single Tribunal hearing officer (the "adjudicator"). Kannuthurai, a non-lawyer, represented himself and CCBC throughout the hearing.

[10] At the conclusion of the 25-day hearing, the Tribunal held that there was "overwhelming and ample" evidence to substantiate the Superintendent's claim that the respondents' past conduct afforded reasonable grounds for belief that CCBC would not conduct its college operations in accordance with law and with integrity and honesty. In particular, the Tribunal found that:

> (1) CCBC had overcharged its students and failed to refund monies, in the approximate amount of $500,000, owed to 116 students from 13 countries;
>
> (2) CCBC had misrepresented to the Superintendent that it had issued refunds to applicable students;
>
> (3) CCBC had failed to comply with three separate court orders requiring it to refund monies to three students;
>
> (4) CCBC's credit-rating was in the highest risk category. Further, CCBC had exaggerated the value of its assets;
>
> (5) CCBC's landlord had locked it out of its premises for eight days due to non-payment of rent, with consequent disruption of student programming; and

> (6) notwithstanding repeated directions from the Superintendent to CCBC to resolve the issue, CCBC's premises did not comply with applicable municipal fire code requirements, thereby exposing CCBC's students to unsafe and dangerous study conditions.

[11] In addition, in its reasons, the Tribunal made numerous strongly-worded adverse credibility findings against Kannuthurai. For example, the Tribunal found that Kannuthurai was "evasive and adversarial during his entire testimony", that he had tried to intimidate several witnesses during his questioning of them, that his testimony was "inconsistent and lacked overall credibility", that he "continually tried to mislead the Tribunal", that he "deliberately and wilfully presented misleading evidence to the Tribunal throughout the hearing" and, further, that certain of the matters advanced by him at the hearing were "frivolous, vexatious and baseless". The Tribunal's reasons reveal that these and other adverse credibility findings against Kannuthurai were central to the Tribunal's decision on the merits of the Superintendent's revocation proposal.

[12] On September 28, 2007, the Tribunal ordered the Superintendent to revoke CCBC's registration under the Act. It also directed the Superintendent to develop and take additional remedial steps "to protect the international students who might otherwise be misled by [CCBC]" and, in order to partially reimburse CCBC's affected students for outstanding refund claims, ordered the forfeiture of a security bond posted by CCBC pursuant to the Act.

(3) Divisional Court Decision

[13] The respondents appealed to the Divisional Court. They argued that five particular interventions by the adjudicator during the hearing gave rise to a reasonable apprehension of bias, thereby depriving them of procedural fairness.

[14] The Divisional Court concluded that the Tribunal's decision to order the revocation of CCBC's registration by the Superintendent was "amply supported by the evidence" and noted that this decision "was not seriously challenged by counsel [for the respondents]" on the appeal before that court. The Divisional Court also considered, and rejected, the respondents' claim that three particular interventions by the adjudicator gave rise to a reasonable apprehension of bias. The respondents do not cross-appeal from these rulings by the Divisional Court.

[15] However, the Divisional Court also concluded that two other interventions by the adjudicator, "taken together in the context of these proceedings as a whole", gave rise to a reasonable apprehension of bias by the adjudicator, which necessitated a new hearing before the Tribunal. These interventions involved:

> (1) a statement by the adjudicator, made during Kannuthurai's examination of the Superintendent, that Kannuthurai was "misleading the Tribunal"; and
>
> (2) the "cross-examination" of Kannuthurai by the adjudicator regarding his possible ties to the Liberation Tigers of the Tamil Eelam ("LTTE"), an entity designated by the Canadian government as of April 8, 2006 as a

> terrorist group under s. 83.05 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[16] The respondents did not object to these interventions during the hearing. Instead, they first complained of them before the Divisional Court, in support of their bias argument. In response, the Superintendent argued that, as a matter of law, the respondents' failure to object earlier to the impugned interventions constituted waiver, thereby precluding the respondents from seeking to rely on the interventions to anchor their bias challenge.

[17] The Divisional Court held that the two interventions in question gave rise to a reasonable apprehension of bias that "constitute[d] a miscarriage of justice and trump[ed] any probability that the result of a re-hearing will be the same" and that denied CCBC "the procedural fairness to which it was entitled". The Divisional Court also rejected the Superintendent's waiver claim. Accordingly, by order dated July 7, 2009, the Divisional Court allowed the respondents' appeal, set aside the Tribunal's decision, and remitted the matter back to the Tribunal for re-hearing.

[18] The Superintendent appeals.[2]

III. Issues

[19] As framed by the Superintendent, there are three issues:

[2] The respondents' cross-appeal from the Divisional Court's decision to award no costs was withdrawn during oral argument before this court.

(1) Did the Divisional Court err in fashioning a remedy by failing to itself decide whether CCBC's registration under the Act should be revoked or, alternatively, by failing to exercise its discretion to refuse to grant a remedy altogether?

(2) Did the Divisional Court err by holding that CCBC had not waived its right to allege bias?

(3) Did the Divisional Court err by holding that certain of the adjudicator's impugned comments gave rise to a reasonable apprehension of bias?

I find it convenient to address these issues in reverse order.

IV. Analysis

(1) Reasonable Apprehension of Bias

[20] I begin with the governing principles regarding claims of reasonable apprehension of bias.

[21] There is no dispute that the Tribunal, as an adjudicative administrative body, owed a duty of fairness to the respondents in respect of the determination of whether CCBC's registration should be revoked. As observed by Cory J. in *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484, at para. 92, "It is a well-established principle that all adjudicative tribunals and administrative bodies owe a duty of fairness to the parties who must appear before them."

[22] This duty to act fairly included the duty to provide procedural fairness. And, "an unbiased appearance is, in itself, an essential component of procedural fairness": *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public*

Utilities), [1992] 1 S.C.R. 623, at p. 636. Thus, the demonstration of a reasonable apprehension of bias by the adjudicator would result in a violation of the duty of fairness owed to the respondents by the Tribunal.[3]

[23] The well-settled test for establishing a reasonable apprehension of bias was set out by de Grandpré J. in his dissenting judgment in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at p. 394:

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

See also *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, at para. 60; *S.(R.D.)*, at para. 31; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 81.

[24] The threshold for a finding of real or perceived bias is high. Mere suspicion is insufficient to support an allegation of bias. Rather, a real likelihood or probability of bias must be demonstrated: *S.(R.D.)*, at paras. 111-14. As stated in *Wewaykum* at para.

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[3] I note that, when dealing with an allegation of a breach of natural justice or of procedural fairness, it is unnecessary to address the question of the applicable standard of review; rather, the court must determine whether the duty of fairness has been breached: see for example, *London (City) v. Ayerswood Development Corp.* (2002), 167 O.A.C. 120 (C.A.), at para. 10.

76, citing de Grandpré J. in *Committee for Justice and Liberty* at p. 395, the grounds for the alleged apprehension of bias must be "substantial".

[25] The question whether a reasonable apprehension of bias arises is a highly fact-specific inquiry. See for example, *Wewaykum*, at para. 77. This court recently indicated in *Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs)*, 2010 ONCA 47, at para. 230, leave to appeal refused, [2010] S.C.C.A. No. 91, that:

> The test is an objective one. Thus, the trial record must be assessed in its totality and the interventions complained of must be evaluated cumulatively rather than as isolated occurrences, from the perspective of a reasonable observer throughout the trial. [Citations omitted.]

Although directed at interventions by a trial judge, I regard these comments as equally applicable to interventions by other adjudicative decision makers.

[26] The court also cautioned in *Chippewas*, at para. 243: "Isolated expressions of impatience or annoyance by a judge as a result of frustrations ... do not of themselves create unfairness." As the court explained at para. 231:

> [T]here are many proper reasons why a trial judge may intervene by making comments, giving directions or asking questions during the course of a trial. A trial judge has an inherent authority to control the court's process and, in exercising that authority, a trial judge will often be required to intervene in the proceedings.

Again, these comments are apposite in this case.

[27] There is also a strong presumption in favour of the impartiality of an adjudicative decision maker: see for example *Chippewas*, at para. 243; *Kelly v. Palazzo* (2008), 89 O.R. (3d) 111 (C.A.), at para. 20, leave to appeal refused, [2008] S.C.C.A. No. 152; *Peart v. Peel Regional Police Services Board* (2006), 217 O.A.C. 269 (C.A.), at para. 39, leave to appeal refused, [2007] S.C.C.A. No. 10; *Wewaykum*, at paras. 59-60; *R. v. A.G.* (1998), 114 O.A.C. 336 (C.A.), at para. 42, aff'd [2000] 1 S.C.R. 439; *S.(R.D.),* at paras. 32 and 114.

[28] In the case at bar, the Divisional Court concluded that a reasonable apprehension of bias arose from the combined effect of the adjudicator's comment to Kannuthurai that he was "misleading the Tribunal" and her subsequent repeated questioning of him concerning his possible association or involvement with the LTTE.

(i) The "Misleading the Tribunal" Statement

[29] Viewed in the context of the hearing as a whole, the adjudicator's statement that Kannuthurai was "misleading the Tribunal" might fairly be seen as nothing more than a poorly phrased rebuke of Kannuthurai during the course of a lengthy and no doubt frequently frustrating hearing involving a self-represented individual who was unschooled in litigation procedures. The record makes it abundantly clear that this was a difficult hearing to manage. Further, as the Divisional Court observed, "In most respects, the adjudicator afforded Mr. Kannuthurai a generous and fair opportunity to present his

case and was obviously at pains to assist an unrepresented party." This observation, with which I agree, is also fully supported by the record.

[30] But that is not the end of the inquiry. The impugned statement must also be considered in the context in which it was made and in relation to the facts and circumstances of this particular hearing: *Chippewas*, at paras. 230, 246.

[31] The suggestion that Kannuthurai was "misleading the Tribunal" took place during a somewhat lengthy series of questions of Kannuthurai by the adjudicator concerning the content and accuracy of a resumé of a CCBC teacher filed at the hearing. The remark was made while Kannuthurai's examination of the Superintendent on the content of the resumé in question was in progress. Presumably, the purpose of this part of the examination was to challenge the Superintendent's concerns regarding the qualifications of CCBC's instructors.

[32] As the Superintendent points out, the evidence concerning the résumé does not figure in the Tribunal's reasons for decision. That, however, misses the point. The hearing before the Tribunal involved allegations of dishonesty, financial improprieties, and conduct akin to fraud by Kannuthurai, the principal of CCBC. Consequently, the cogency of the Superintendent's evidence in support of those allegations and Kannuthurai's credibility and reliability were the central issues at the hearing. The Superintendent, therefore, was a key witness from the defence perspective.

[33] The assertion that Kannuthurai was "misleading the Tribunal" directly challenged his credibility and reliability at a time when he was examining a crucial witness on the document that gave rise to the adjudicator's questions. In this context, the adjudicator's comment takes on added significance.

[34] Given the nature of the comment and the time at which it was made, I agree that what the Divisional Court termed the adjudicator's expression of "open disbelief" in what she was being told by Kannuthurai could be seen by a reasonable observer of the hearing as indicating that the adjudicator had prejudged Kannuthurai's credibility. Certainly the remark challenged the reliability of the information provided by Kannuthurai in respect of the very document about which he was seeking to elicit the Superintendent's testimony.

(ii) The Questions Concerning the LTTE

[35] Moreover, and regrettably, the adjudicator's credibility-related questioning of Kannuthurai did not end there.

[36] Some days after the completion of the Superintendent's evidence, Kannuthurai began his own testimony before the adjudicator. During his evidence, he outlined his various efforts abroad to promote and recruit students to CCBC's school in Ontario. Among other things, he said that he had returned to his native Sri Lanka in 1996 for this purpose but that, while there, he was detained in solitary confinement by Sri Lankan authorities for 25 days on suspicion of involvement in LTTE terrorist activities.

[37] This claim prompted the adjudicator to question Kannuthurai about whether he had ever been associated with the LTTE, whether he had encountered any other problems with the Sri Lankan authorities, and whether Canadian law enforcement officials were involved in investigating Kannuthurai's sponsorship of his fiancée's immigration application to Canada. In reply, Kannuthurai said that he had never been associated with the LTTE and that, apart from the 25-day detention he had described, he had not experienced other difficulties with the Sri Lankan authorities.

[38] The Divisional Court held that the adjudicator's initial questioning on these subjects was intended to clarify Kannuthurai's evidence and, hence, that it was unobjectionable. This holding is not challenged on this appeal.

[39] However, when the hearing continued on the following day, the adjudicator embarked on a second series of questions to Kannuthurai about his possible terrorist associations. On this occasion, she inquired of Kannuthurai as to: (1) whether there was "any information on you and any dealings of you with the Tamil Tigers in Canada"; (2) the basis of his 25-day detention in Sri Lanka; (3) whether he had ever supported the "Tamil Tigers"; and (4) whether he was a member of the "Tamil Tigers". Read in context, these references to the Tamil Tigers meant the LTTE.

[40] At the conclusion of this questioning, the Superintendent's counsel immediately interjected: "[T]hose are not our concerns. We're not dealing with that at all." The following exchange then took place:

> [Adjudicator]: Yes. Yes, I know. But the, the thing is that ... as this applicant is alleging a lot of things, that all this happened because there was somebody out there to, to get him. And the tribunal has to know, is there something, as he mentioned yesterday, he is being stalked, you know, he is being followed around by the, by our authorities.
>
> [Superintendent's Counsel]: Right.
>
> [Adjudicator]: So the tribunal has one.
>
> [Superintendent's Counsel]: You're just exploring his conspiracy theory.
>
> [Adjudicator]: Absolutely. Absolutely.
>
> [Superintendent's Counsel]: I see.
>
> [Adjudicator]: You know, that, why the people were out to get him, is there anything more, you know?

[41] With respect to this questioning and the adjudicator's proferred explanation for it, the Divisional Court ruled:

> These comments cannot fairly be characterized as the adjudicator's attempt to clarify the evidence or to bring rules of evidence and procedure to the attention of a self-represented litigant. The adjudicator ... cross-examined [Kannuthurai] about his possible ties to a terrorist organization despite his evidence that he did not have such ties and despite the fact that this was not a basis of the

> proposal to revoke his licence. The comments and questions were irrelevant, inappropriate and improper in this context. An informed and reasonable observer would likely conclude that the adjudicator had pre-judged Mr. Kannuthurai's credibility. His honesty and integrity were central to the issue before her. A reasonable person may have concluded that the Tribunal had already determined that Mr. Kannuthurai would not operate CCBC in accordance with the law, with integrity and with honesty.

For the reasons that follow, I agree.

[42] As the Superintendent acknowledges on this appeal, this resumed questioning of Kannuthurai about his possible association with the LTTE was "inappropriate and of little relevance to the proceeding". I agree.

[43] However, in her factum, the Superintendent also argues that the Divisional Court erred in "extrapolating an appearance of prejudgment of credibility on the force of brief inappropriate comments near the end of a long and difficult hearing". She submits that since Kannuthurai made several references during the hearing to a conspiracy against him – allegedly involving various Canadian law enforcement and national security agencies – the above-described questioning of him by the adjudicator, although inappropriate, did not give rise to a reasonable apprehension of bias. Rather, the Superintendent says, the adjudicator simply "misdirected herself regarding the proper bounds of relevance and pursued too far an issue that could have, and likely should have, been left alone".

[44] As I have already said, I accept that this was a lengthy and difficult hearing, which posed significant hearing management issues. In particular, based on the record, I recognize that the self-represented respondents raised numerous issues that appear to have been wholly irrelevant or extraneous to the matters at issue at the hearing. However, I do not agree that the adjudicator's renewed questioning of Kannuthurai about his possible ties to the LTTE was as benign as the Superintendent contends, even when considered in the overall context of this protracted hearing.

[45] As acknowledged by the Superintendent before this court, the questions at issue were both irrelevant and improper. At least inferentially, this was the position taken by the Superintendent's counsel at the hearing, immediately following the adjudicator's questioning. The questions had nothing to do with the matters at issue at the hearing.

[46] Like the Divisional Court, I reject the proposition that this renewed line of questioning by the adjudicator was justifiable because it reflected an effort by her to clarify Kannuthurai's conspiracy allegations. Earlier in the hearing, the adjudicator had informed the respondents, in blunt and unambiguous terms, that the Tribunal proceeding was not the proper forum in which to pursue these claims, describing them as time-consuming and irrelevant "red herring[s]".

[47] The adjudicator's unprompted return to this line of questioning, after Kannuthurai had already denied any connection with the LTTE, signalled, at the very least, her discomfort with the truthfulness of his earlier responses to her questions on this issue.

[48] It bears repeating that Kannuthurai's credibility and integrity were directly engaged at the Tribunal hearing. Indeed, they went to the heart of the grounds advanced by the Superintendent for the proposed revocation of CCBC's registration under the Act. In this context, the questions at issue were neither trivial nor inconsequential.

[49] In all the circumstances, I agree with the Divisional Court that the adjudicator's remarks on this occasion, viewed together with her earlier assertion that Kannuthurai had misled the Tribunal, created an appearance of unfairness such that an objective observer of the hearing would reasonably conclude that she had pre-judged Kannuthurai's credibility. It follows that the Divisional Court was correct to conclude that the requisite high threshold to establish a reasonable apprehension of bias was met.

(2) Waiver

[50] In rejecting the Superintendent's waiver claim, the Divisional Court reasoned:

> While as a general rule bias allegations should be made directly and promptly, the most egregious comments arose on the twenty-third day of a twenty-five day hearing. [Kannuthurai's] failure to raise concerns about comments made so late in the hearing does not reflect adversely on the genuineness of the apprehension of bias in these circumstances. The litigant was self-represented and there is no suggestion that he held back as a tactic or to avoid an

> explanation by the adjudicator. As well, given that the allegations arise solely from the record, a decision of the adjudicator on this issue would not shed additional light on the facts that form the basis of the allegations.

I also agree with the Divisional Court's analysis of this issue.

[51] There is no doubt that where the facts giving rise to a possible apprehension of bias become apparent during the course of a hearing, it is incumbent on the party affected "to put the allegation and the facts on which that party is relying to the decision maker at the earliest possible moment": see David J. Mullan, *Essentials of Canadian Law, Administrative Law* (Toronto: Irwin Law, 2001), at p. 348. See also *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537, at para. 11; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, at pp. 941-43. In that way, the challenged decision maker is afforded an opportunity to set out its position regarding the bias claim and a reviewing court will have the benefit of a complete record on the issue. This obligation assumes, however, that the pertinent facts are apparent to the affected party and that a voluntary and informed decision might be made whether to advance a bias claim based on those facts.

[52] Brown and Evans, in *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publication, 2010) at 11-77 – 11-78, note that objections on the ground of bias are generally deemed to have been waived if the affected party knew of the grounds for the bias claim and acquiesced in the proceedings "by failing to take objection at the earliest practicable opportunity" unless, for example, the affected

party "was unrepresented by counsel and did not know of his right to object at the time" (quoting Woolf, Jowell and LeSueur, *De Smith's Judicial Review*, 6th ed. (London: Sweet & Maxwell, 2007), c. 10-055ff).

[53] It is important to keep in mind that CCBC and Kannuthurai were self-represented litigants. Nothing on the record suggests that Kannuthurai, on his own or CCBC's behalf, appreciated prior to the completion of the hearing that the adjudicator's impugned comments might give rise to a reasonable apprehension of bias claim and, knowing that, that the respondents withheld their allegation of bias for use only if the outcome of the hearing was adverse.

[54] In my view, in the absence of some contrary indication in the record, it is unlikely that these self-represented respondents, although obviously aware of the adjudicator's comments, were also aware of their right to object to the comments during the hearing on the basis of bias and that they elected not to do so at the first opportune moment for tactical or strategic reasons. This case is therefore distinguishable from those cases in which the affected party knew or was advised, during the proceeding at issue, of a potential bias claim and chose not to object: see for example, *Stetler v. Agriculture, Food and Rural Affairs Appeal Tribunal* (2005), 76 O.R. (3d) 321 (C.A.), leave to appeal refused, [2005] S.C.C.A. No. 428.

[55] In *Taylor*, a case relied on by the Superintendent to support her waiver claim, the matter of bias was not raised until almost eight years after the tribunal hearing and, even then, was only raised in a collateral proceeding. And in *Taylor* at p. 972, McLachlin J. (as she then was), suggested in respect of a bias claim (in dissent, although not on this point), that the fact that the affected party did not have counsel would militate against a finding of waiver where there was some delay in raising the bias objection.

[56] In this case, the facts giving rise to a potential bias claim emerged in the final days of the Tribunal hearing. The respondents advanced their bias argument as soon as they had retained counsel to conduct their appeal to the Divisional Court. That appeal was undertaken on a timely basis. I am satisfied that this is sufficient to defeat an argument of waiver.

(3) Remedy

[57] I turn now to what I regard as the core issue on this appeal, namely, the appropriateness of the remedy granted by the Divisional Court as a result of the perception of unfairness arising from the adjudicator's conduct.

[58] The Superintendent argues that, having found that the Superintendent had a strong and largely uncontested case, the Divisional Court should itself have determined the question of whether CCBC's registration under the Act should be revoked or,

alternatively, that the Divisional Court should have exercised its discretion to refuse to grant a remedy altogether.

[59] There is no doubt that the Divisional Court, sitting on appeal from the Tribunal's decision, had the power under s. 134(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, (the "*CJA*") to: (1) make any order or decision that ought to or could have been made by the Tribunal; (2) order a new hearing; or (3) make any other order considered to be just. This power was limited only by the requirement that a new hearing should not be ordered unless some substantial wrong or miscarriage of justice had occurred: s. 134(6) *CJA*. As I have said, the Superintendent contends that the Divisional Court also had the authority, in the exercise of its discretion, to deny any remedy at all, notwithstanding its finding of bias by the adjudicator, if the interests of justice so warranted.

[60] There is some force to the Superintendent's attack on the remedy chosen by the Divisional Court. Not every breach of fairness or natural justice necessitates a new hearing; in exceptional cases, the court can exercise its discretion to deny a remedy: see for example, *Mining Watch Canada v. Canada (Fisheries and Oceans)*, [2010] 1 S.C.R. 6, at paras. 51-52; *Mobil Oil Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at pp. 228-29; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-78. That said, I would not interfere with the Divisional Court's disposition regarding remedy for several reasons.

[61] First, it appears that the Superintendent did not request the Divisional Court to make its own determination concerning the Superintendent's revocation proposal. Further, on the record before this court, it is unclear whether the Superintendent argued before the Divisional Court that no remedy should be granted in the circumstances of this case since, the Superintendent asserts, the result on any rehearing would be the same.

[62] Be that as it may, the Divisional Court's reasons indicate that it was mindful of its discretionary power to refuse a remedy and, further, that it considered the issue of the utility of a rehearing and the potential unnecessary expenditure of resources, given the strength of the Superintendent's case. In the Divisional Court's view, however, the finding of a reasonable apprehension of bias constituted a miscarriage of justice and "trump[ed] any probability that the result of a re-hearing will be the same". It is therefore clear that the Divisional Court did not fail to consider and did not give inadequate weight to the strength of the Superintendent's case when fashioning a remedy.

[63] Second, I underscore that the adjudicator's bias in this case occasioned a breach of the Tribunal's duty of fairness to the respondents. The nature of that breach resulted in the denial to the respondents of a full and fair hearing before an impartial decision maker, as was their right. Hearing fairness was therefore compromised.

[64] In my opinion, where a reasonable apprehension of bias by an adjudicative decision maker is made out, as in this case, a new hearing is ordinarily the only

appropriate remedy. The right to a full and fair hearing by an impartial decision maker is of fundamental importance to our system of justice, including in the administrative law domain: see *Curragh*, at para. 7. Indeed, the right to trial by an impartial tribunal is now enshrined in ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*. This right is particularly significant where, as here, the proceeding at issue involves self-represented litigants. I find it difficult to envisage a situation where, bias by an adjudicative decision maker having been established, a new hearing will be refused.

[65] I take comfort in this view from the Supreme Court's decision in *Newfoundland Telephone Co.* in which the court stated at p. 645, quoting *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 661:

> [T]he denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

See also *Curragh*, at para. 5; *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 (C.A.), at para. 131, leave to appeal refused, [2001] S.C.C.A. No. 66.

[66] I recognize that the above-quoted principle enunciated in *Cardinal* has sometimes been overstated in subsequent cases. In that regard, I agree with the following observation of the Federal Court of Appeal in *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co. K.G.*, [2007] 4 F.C.R. 101, at para. 13:

> To say that *Cardinal* stands for the proposition that any breach of any requirement of the duty of procedural fairness renders a decision invalid, or that any breach of any procedural rule constitutes a breach of the duty of procedural fairness, or that a court has no discretion to deny the relief sought, is to read the reasons of the Supreme Court of Canada out of context.

[67] Thus, for example, where the nature of the breach of procedural fairness is inconsequential, trivial or merely technical in nature, a reviewing court may determine to deny the discretionary remedy of a rehearing: see *Uniboard*, at para. 24. That said, as I will explain, the breach of fairness in this case is far removed from the realm of merely inconsequential, trivial or technical matters.

[68] The Superintendent relies on *Young v. British Columbia College of Teachers*, [1999] B.C.J. No. 1908 (B.C.S.C.), aff'd (2001), 198 D.L.R. (4th) 292 (B.C.C.A.) and *Lisyikh v. Canadian Law Enforcement Training College*, [2007] O.J. No. 3621 (S.C.) to argue that, in exceptional cases (for instance, where no useful purpose would be served by requiring a rehearing), the court may dismiss an appeal notwithstanding a breach of procedural fairness.

[69] I do not think that these cases assist the Superintendent. *Young* is the only case identified by the Superintendent where the remedy of a rehearing was denied in a bias case. However, in *Young*, the events giving rise to the appearance of unfairness based on bias took place after the completion of the hearing on the merits and after the misconduct alleged against the aggrieved party had been admitted by him. Only the penalty phase of the hearing was affected. Moreover, in *Young*, the appellant did not seek a rehearing as a remedy for the perception of bias by the involved decision maker but, rather, was content to have the matter at issue determined by the reviewing court on the basis of the available record. In *Lisyikh*, the procedural fairness deficiencies at issue did not relate to bias allegations. The deficiencies in that case involved notice defects that were found to be "more formal than substantial" (at para. 44).

[70] Here, the procedural unfairness was bias – a defect that tainted the respondents' fundamental right to an impartial hearing. As indicated by a majority of the Supreme Court in *S.(R.D.)*, at para. 100:

> If a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision. ... Thus, the mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from other words or conduct of the judge. [Citations omitted.]

[71] In addition, the bias in this case arose during the course of a hearing in which the respondents' ability to continue to earn a livelihood through the operation of a private career college was at stake. The seriousness of this issue for the respondents lends additional force to the need to preserve hearing fairness.

[72] In light of these considerations, I see no basis on which to interfere with the Divisional Court's discretionary decision to require a rehearing in this case. I would add that the rehearing should be conducted by a different Tribunal adjudicator.

V. Disposition

[73] Accordingly, for the reasons given, I would dismiss the appeal. The respondents are entitled to their costs of the appeal and of the application for leave to appeal to this court, fixed in the total amount of $15,000, inclusive of disbursements and all applicable taxes.

RELEASED:

"MR" "E.A. Cronk J.A."
"DEC 16 2010" "I agree M. Rosenberg J.A."
"I agree G.J. Epstein J.A."

TAB 6

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

R.D.S. *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Women's Legal Education and Action Fund, the National Organization of Immigrant and Visible Minority Women of Canada, the African Canadian Legal Clinic, the Afro-Canadian Caucus of Nova Scotia and the Congress of Black Women of Canada *Interveners*

Indexed as: R. *v.* S. (R.D.)

File No.: 25063.

1997: March 10; 1997: September 26.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for nova scotia

Courts -- Judges -- Impartiality -- Reasonable apprehension of bias -- Testimony of the only two witnesses (accused and police officer) at odds and that of accused accepted -- Police officer white and accused a black youth -- Oral reasons

making reference to police and racism in general context -- Youth Court Judge's comments not tied to officer appearing before the Court -- Whether reasonable apprehension of bias.

A white police officer arrested a black 15-year-old who had allegedly interfered with the arrest of another youth. The accused was charged with unlawfully assaulting a police officer, unlawfully assaulting a police officer with the intention of preventing an arrest, and unlawfully resisting a police officer in the lawful execution of his duty. The police officer and the accused were the only witnesses and their accounts of the relevant events differed widely. The Youth Court Judge weighed the evidence and determined that the accused should be acquitted. While delivering her oral reasons, the Judge remarked in response to a rhetorical question by the Crown, that police officers had been known to mislead the court in the past, that they had been known to overreact particularly with non-white groups, and that that would indicate a questionable state of mind. She also stated that her comments were not tied to the police officer testifying before the court. The Crown challenged these comments as raising a reasonable apprehension of bias. After the reasons had been given and after an appeal to the Nova Scotia Supreme Court (Trial Division) had been filed by the Crown, the Judge issued supplementary reasons which outlined in greater detail her impressions of the credibility of both witnesses and the context in which her comments were made. The Crown's appeal was allowed and a new trial was ordered on the basis that the Judge's remarks gave rise to a reasonable apprehension of bias. This judgment was upheld by a majority of the Nova Scotia Court of Appeal. At issue here is whether the Judge's comments in her reasons gave rise to a reasonable apprehension of bias.

Held (Lamer C.J. and Sopinka and Major JJ. dissenting): The appeal should be allowed.

(1) *Consideration of Supplementary Reasons*

Per curiam: The supplementary reasons issued by the Youth Court Judge after the appeal had been filed could not be taken into account in assessing whether her reasons gave rise to a reasonable apprehension of bias.

(2) *Reasonable Apprehension of Bias*

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: The courts should be held to the highest standards of impartiality. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. The trial will be rendered unfair if the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer. Judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin.

If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction. This excess of jurisdiction can be remedied by an application to the presiding judge for disqualification if the proceedings are still underway, or by appellate review of the judge's decision. A reasonable apprehension of bias, if it arises, colours the entire trial proceedings and cannot be cured by the correctness of the subsequent decision. The mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the

correct result cannot alleviate the effects of a reasonable apprehension of bias arising from the judge's other words or conduct. However, if the judge's words or conduct, viewed in context, do not give rise to a reasonable apprehension of bias, the findings of the judge will not be tainted, no matter how troubling the impugned words or actions may be.

The basic interests of justice require that the appellate courts, notwithstanding their deferential standard of review in examining factual determinations made by lower courts, including findings of credibility, retain some scope to review that determination given the serious and sensitive issues raised by an allegation of bias.

Impartiality can be described as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result or that is closed with regard to particular issues. Whether a decision-maker is impartial depends on whether the impugned conduct gives rise to a reasonable apprehension of bias. Actual bias need not be established because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind.

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. The test is what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be

reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence. The test applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic.

The requirement for neutrality does not require judges to discount their life experiences. Whether the use of references to social context is appropriate in the circumstances and whether a reasonable apprehension of bias arises from particular statements depends on the facts. A very significant difference exists between cases in which social context is used to ensure that the law evolves in keeping with changes in social reality and cases, such as this one, where social context is apparently being used to assist in determining an issue of credibility.

Consideration of whether the existence of anti-black racism in society is a proper subject for judicial notice would be inappropriate here because an intervener and not the appellant put forward the argument with respect to judicial notice.

The individualistic nature of a determination of credibility and its dependence on intangibles such as demeanour and the manner of testifying requires the judge, as trier of fact, to be particularly careful and to appear to be neutral. When making findings of credibility a judge should avoid making any comment that might suggest that the determination of credibility is based on generalizations or stereotypes rather than on the specific demonstrations of truthfulness or untrustworthiness that have come from the particular witness during the trial. At the commencement of their testimony all witnesses should be treated equally without regard to their race, religion, nationality, gender, occupation or other characteristics. It is only after an individual witness has been tested and assessed that findings of credibility can be made.

Situations where there is no evidence linking the generalization to the particular witness might leave the judge open to allegations of bias on the basis that the credibility of the individual witness was prejudged according to stereotypical generalizations. Although the particular generalization might be well-founded, reasonable and informed people may perceive that the judge has used this information as a basis for assessing credibility instead of making a genuine evaluation of the evidence of the particular witness' credibility.

That judges should avoid making comments based on generalizations when assessing the credibility does not lead automatically to a conclusion of reasonable apprehension of bias. In some limited circumstances, the comments may be appropriate.

The argument that the trial was rendered unfair for failure to comply with "natural justice" could not be accepted. Neither the police officer nor the Crown was on trial.

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: Judges, while they can never be neutral in the sense of being purely objective, must strive for impartiality. Their differing experiences appropriately assist in their decision-making process so long as those experiences are relevant, are not based on inappropriate stereotypes, and do not prevent a fair and just determination based on the facts in evidence.

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. The reasonable person must know and understand the judicial process, the nature of judging and the community in which the alleged crime occurred. He or she demands that judges achieve impartiality and will be properly influenced in their deliberations by their individual perspectives. Finally, the reasonable person expects judges to undertake an open-minded, carefully considered and dispassionately deliberate investigation of the complicated reality of each case before them.

Judicial inquiry into context provides the requisite background for the interpretation and the application of the law. An understanding of the context or background essential to judging may be gained from testimony from expert witnesses, from academic studies properly placed before the court, and from the judge's personal understanding and experience of the society in which the judge lives and works. This process of enlargement is a precondition of impartiality. A

reasonable person, far from being troubled by this process, would see it as an important aid to judicial impartiality.

The reasonable person approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. He or she understands the impossibility of judicial neutrality but demands judicial impartiality. This person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community, is supportive of the principles of equality. Before finding a reasonable apprehension of bias, the reasonable person would require some clear evidence that the judge in question had improperly used his or her perspective in the decision-making process; this flows from the presumption of impartiality of the judiciary. Awareness of the context within which a case occurred would not constitute evidence that the judge was not approaching the case with an open mind fair to all parties; on the contrary, such awareness is consistent with the highest tradition of judicial impartiality.

(3) *Application of the Test*

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: The oral reasons at issue should be read in their entirety, and the impugned passages should be construed in light of the whole of the trial proceedings and in light of all other portions of the judgment. They indicated that the Youth Court Judge approached the case with an open mind, used her experience and knowledge of the community to achieve an understanding of the reality of the case, and applied the fundamental principle of proof beyond a reasonable doubt. Her comments were based entirely on the case before her, were made after a consideration of the conflicting testimony of the two witnesses and in response to the Crown's submissions, and were entirely

supported by the evidence. In alerting herself to the racial dynamic in the case, she was simply engaging in the process of contextualized judging which was entirely proper and conducive to a fair and just resolution of the case before her. Although the Judge did not make a finding of racism, there was evidence on which such a finding could be made.

The impugned comments were not unfortunate, unnecessary, or close to the line. They reflected an entirely appropriate recognition of the facts in evidence and of the context within which this case arose -- a context known to the judge and to any well-informed member of the community.

Per Cory and Iacobucci JJ.: The Youth Court Judge conducted an acceptable review of all the evidence before making the impugned comments.

The generalized remarks about a history of racial tension between police officers and visible minorities were not linked by the evidence to the actions of the police officer here. They were worrisome and came very close to the line. Yet, however troubling when read individually, they were not made in isolation and must all be read in the context of the whole proceeding, with an awareness of all the circumstances that a reasonable observer would be deemed to know. A reasonable, informed person, aware of all the circumstances, would not conclude that they gave rise to a reasonable apprehension of bias or that they tainted her earlier findings of credibility. The high standard for a finding of reasonable apprehension of bias was not met.

Per Lamer C.J. and Sopinka and Major JJ. (dissenting): A fair trial is one that is based on the law and its outcome determined by the evidence, free of bias, real

or apprehended. Evidence showing propensity has been repeatedly rejected. Trial judges must base their findings on the evidence before them. Notwithstanding the opportunity to do so, no evidence was introduced showing that this police officer was racist and that racism motivated his actions or that he lied.

The Youth Court Judge's statements were not simply a review of the evidence and her reasons for judgment in which she was relying on her life experience. Even though a judge's life experience is an important ingredient in the ability to understanding human behaviour, to weighing the evidence and to determining credibility, it is not a substitute for evidence. No evidence supported the conclusions that the Judge reached. Her comments fell into stereotyping the police officer. Judges, as arbiters of truth, cannot judge credibility based on irrelevant witness characteristics. All witnesses must be placed on equal footing before the court.

What the Judge actually intended by the impugned statements is irrelevant conjecture. Given the concern for both the fairness and the appearance of fairness of the trial, the absence of evidence to support the judgment is an irreparable defect.

Cases Cited

By Cory J.

Applied: *Committee for Justice and Liberty v. National Energy Board,* [1978] 1 S.C.R. 369; **considered:** *R. v. Parks* (1993), 15 O.R. (3d) 324, leave to appeal denied, [1994] 1 S.C.R. x; *Pirbhai Estate v. Pirbhai,* [1987] B.C.J. No. 2685

(QL), leave to appeal denied, [1988] 1 S.C.R. xii; *Foto v. Jones* (1974), 45 D.L.R. (3d) 43; **referred to:** *R. v. Wald* (1989), 47 C.C.C. (3d) 315; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537; *R. v. Gushman*, [1994] O.J. No. 813 (QL); *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833; *R. v. W. (R.)*, [1992] 2 S.C.R. 122; *Huerto v. College of Physicians and Surgeons* (1996), 133 D.L.R. (4th) 100; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Généreux*, [1992] 1 S.C.R. 259; *Liteky v. U.S.*, 114 S.Ct. 1147 (1994); *R. v. Bertram*, [1989] O.J. No. 2123 (QL); *R. v. Stark*, [1994] O.J. No. 406 (QL); *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256; *R. v. Elrick*, [1983] O.J. No. 515 (QL); *R. v. Lin*, [1995] B.C.J. No. 982 (QL); *R. v. Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850; *Metropolitan Properties Co. v. Lannon*, [1969] 1 Q.B. 577; *R. v. Gough*, [1993] 2 W.L.R. 883; *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. Wilson* (1996), 29 O.R. (3d) 97; *R. v. Glasgow* (1996), 93 O.A.C. 67; *White v. The King*, [1947] S.C.R. 268; *Brouillard v. The Queen*, [1985] 1 S.C.R. 39; *Inquiry pursuant to s. 13(2) of Territorial Court Act, Re*, [1990] N.W.T.R. 337; *R. v. Teskey* (1995), 167 A.R. 122.

By L'Heureux-Dubé and McLachlin JJ.

Applied: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; **referred to:** *Valente v. The Queen*, [1985] 2 S.C.R. 673 ; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267; *United States v. Morgan*, 313 U.S. 409 (1941); *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50; *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833; *R. v. Bartle*, [1994] 3 S.C.R. 173; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. Parks* (1993), 15 O.R.

(3d) 324; *Moge v. Moge*, [1992] 3 S.C.R. 813; *R. v. Smith* (1991), 109 N.S.R. (2d) 394; *Nova Scotia (Minister of Community Services) v. S.M.S.* (1992), 110 N.S.R. (2d) 91; *R. v. Burns*, [1994] 1 S.C.R. 656.

By Major J. (dissenting)

Metropolitan Properties Co. v. Lannon, [1969] 1 Q.B. 577; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256.

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Canadian Charter of Rights and Freedoms, ss. 7, 11(*d*), 15, 27.

Criminal Law Amendment Act, 1975, S.C. 1974-75-76, c. 93, s. 8.

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APPEAL from a judgment of the Nova Scotia Court of Appeal (1995), 145 N.S.R. (2d) 284, 418 A.P.R. 284, 102 C.C.C. (3d) 233, 45 C.R. (4th) 361, dismissing an appeal from a judgment of the Nova Scotia Supreme Court (Trial Division), [1995] N.S.J. No. 184 (QL), allowing an appeal from acquittal by Sparks F.C.J. with oral reasons December 2, 1994, with supplementary written reasons, [1994] N.S.J. No. 629 (QL). Appeal allowed, Lamer C.J. and Sopinka and Major JJ. dissenting.

Burnley A. Jones and *Dianne Pothier*, for the appellant.

Robert E. Lutes, Q.C., for the respondent.

Yola Grant and *Carol Allen*, for the interveners the Women's Legal Education and Action Fund and the National Organization of Immigrant and Visible Minority Women of Canada.

April Burey, for the interveners the African Canadian Legal Clinic, the Afro-Canadian Caucus of Nova Scotia and the Congress of Black Women of Canada.

The reasons of Lamer C.J. and Sopinka and Major JJ. were delivered by

1 MAJOR J. (dissenting) -- I have read the reasons of Justices L'Heureux-Dubé and McLachlin and those of Justice Cory and respectfully disagree with the conclusion they reach.

2 The appellant (accused) R.D.S. was a young person charged with assault on a peace officer. At trial, the Crown's only evidence came from the police officer allegedly assaulted. The appellant testified as the only witness in his defence. The testimony of the two witnesses differed in material respects. The trial judge gave judgment immediately after closing arguments and acquitted the appellant.

3 This appeal should not be decided on questions of racism but instead on how courts should decide cases. In spite of the submissions of the appellant and interveners on his behalf, the case is primarily about the conduct of the trial. A fair trial is one that is based on the law, the outcome of which is determined by the evidence, free of bias, real or apprehended. Did the trial judge here reach her decision on the evidence presented at the trial or did she rely on something else?

4 In the course of her judgment the trial judge said:

> The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who

> overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.
>
> At any rate, based upon my comments and based upon all the evidence before the court I have no other choice but to acquit. [Emphasis added.]

5 In view of the manner in which this appeal was argued, it is necessary to consider two points. First, we should consider whether the trial judge in her reasons, properly instructed herself on the evidence or was an error of law committed by her. The second, and somewhat intertwined question, is whether her comments above could cause a reasonable observer to apprehend bias. The offending comments in the statement are:

> (i) "police officers have been known to [mislead the court] in the past";
>
> (ii) "police officers do overreact, particularly when they are dealing with non-white groups";
>
> (iii) "[t]hat to me indicates a state of mind right there that is questionable";
>
> (iv) "[i]t seems to be in keeping with the prevalent attitude of the day"; and,
>
> (v) "based upon my comments and based upon all the evidence before the court I have no other choice but to acquit."

6 The trial judge stated that "police officers have been known to [mislead the court] in the past" and that "police officers do overreact, particularly when they are dealing with non-white groups" and went on to say "[t]hat to me indicates a state

of mind right there that is questionable." She in effect was saying, "sometimes police lie and overreact in dealing with non-whites, therefore I have a suspicion that this police officer may have lied and overreacted in dealing with this non-white accused." This was stereotyping all police officers as liars and racists, and applied this stereotype to the police officer in the present case. The trial judge might be perceived as assigning less weight to the police officer's evidence because he is testifying in the prosecution of an accused who is of a different race. Whether racism exists in our society is not the issue. The issue is whether there was evidence before the court upon which to base a finding that this particular police officer's actions were motivated by racism. There was no evidence of this presented at the trial.

7 Our jurisprudence has repeatedly prohibited the introduction of evidence to show propensity. In the present case had the police officer been charged with assault the trial judge could not have reasoned that as police officers have been known to mislead the Court in the past that based on that evidence she rejected this police officers credibility and found him guilty beyond reasonable doubt.

8 In the same vein, statistics show that young male adults under the age of 25 are responsible for more accidents than older drivers. It would be unacceptable for a court to accept evidence of that fact to find a defendant liable in negligence yet that is the consequence of the trial judge's reasoning in this appeal.

9 It is possible to read the trial judge's reference to the "prevalent attitude of the day" as meaning her view of the prevalent attitude in society today. If the trial judge used the "prevalent attitude of society" towards non-whites as evidence upon which to draw an inference in this case, she erred, as there were no facts in evidence

from which to draw that inference. It would be stereotypical reasoning to conclude that, since society is racist, and, in effect, tells minorities to "shut up," we should infer that this police officer told this appellant minority youth to "shut up." This reasoning is flawed.

10 Trial judges have to base their findings on the evidence before them. It was open to the appellant to introduce evidence that this police officer was racist and that racism motivated his actions or that he lied. This was not done. For the trial judge to infer that based on her general view of the police or society is an error of law. For this reason there should be a new trial.

11 In addition to not being based on the evidence, the trial judge's comments have been challenged as giving rise to a reasonable apprehension of bias. The test for finding a reasonable apprehension of bias has challenged courts in the past. It is interchangeably expressed as a "real danger of bias," a "real likelihood of bias," a "reasonable suspicion of bias" and in several other ways. An attempt at a new definition will not change the test. Lord Denning M.R. captured the essence of the inquiry in his judgment in *Metropolitan Properties Co. v. Lannon*, [1969] 1 Q.B. 577 (C.A.), at p. 599:

> [I]n considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see *Reg.* v. *Huggins*; and *Rex* v. *Sunderland Justices, per* Vaughan Williams L.J. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *Reg.* v. *Camborne Justice, Ex parte Pearce*, and *Reg.* v. *Nailsworth Licensing*

> *Justices, Ex parte Bird.* 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 inquire 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."

See also *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256.

12 The appellant and the interveners argued that the trial judge's statements were simply a review of the evidence and were her reasons for judgment. They said she was relying on her life experience and to deny that is to deny reality. I disagree.

13 The life experience of this trial judge, as with all trial judges, is an important ingredient in the ability to understand human behaviour, to weigh the evidence, and to determine credibility. It helps in making a myriad of decisions arising during the course of most trials. It is of no value, however, in reaching conclusions for which there is no evidence. The fact that on some other occasions police officers have lied or overreacted is irrelevant. Life experience is not a substitute for evidence. There was no evidence before the trial judge to support the conclusions she reached.

14 The trial judge could not decide this case based on what some police officers did in the past without deciding that all police officers are the same. As stated, the appellant was entitled to call evidence of the police officer's conduct to show that there was in fact evidence to support either his bias or racism. No such evidence was called. The trial judge presumably called upon her life experience to decide the issue. This she was not entitled to do.

15 The bedrock of our jurisprudence is the adversary system. Criminal prosecutions are less adversarial because of the Crown's duty to present all the evidence fairly. The system depends on each side's producing facts by way of evidence from which the court decides the issues. Our system, unlike some others, does not permit a judge to become an independent investigator to seek out the facts.

16 Canadian courts have, in recent years, criticized the stereotyping of people into what is said to be predictable behaviour patterns. If a judge in a sexual assault case instructed the jury or him- or herself that because the complainant was a prostitute he or she probably consented, or that prostitutes are likely to lie about such things as sexual assault, that decision would be reversed. Such presumptions have no place in a system of justice that treats all witnesses equally. Our jurisprudence prohibits tying credibility to something as irrelevant as gender, occupation or perceived group predisposition.

17 Similarly, we have eliminated the requirement for corroboration of the complainant's evidence. The absolute requirement of corroboration for particular sexual offences and the lesser requirement of a warning to the jury about relying on the victim's uncorroborated testimony have been abolished: see *Criminal Law Amendment Act, 1975*, S.C. 1974-75-76, c. 93, s. 8, and S.C. 1980-81-82-83, c. 125, s. 5. Also eliminated is the need for corroboration in cases where a prosecution is based on the unsworn evidence of children: see S.C. 1987, c. 24, s. 18. The elimination of corroboration shows the present evolution away from stereotyping various classes of witnesses as inherently unreliable.

18 It can hardly be seen as progress to stereotype police officer witnesses as likely to lie when dealing with non-whites. This would return us to a time in the history of the Canadian justice system that many thought had past. This reasoning, with respect to police officers, is no more legitimate than the stereotyping of women, children or minorities.

19 In my opinion the comments of the trial judge fall into stereotyping the police officer. She said, among other things, that police officers have been known to mislead the courts, and that police officers overreact when dealing with non-white groups. She then held, in her evaluation of this particular police officer's evidence, that these factors led her to "a state of mind right there that is questionable". The trial judge erred in law by failing to base her conclusions on evidence.

20 Judges, as arbiters of truth, cannot judge credibility based on irrelevant witness characteristics. All witnesses must be placed on equal footing before the court.

21 The trial judge concluded the impugned part of her reasons with the following: "[a]t any rate, based upon my comments and based upon all the evidence before the court I have no other choice but to acquit." What did she mean by basing her judgment, in part, upon her own comments? Did she mean based on her stereotyping of police officers? Or, did she mean based on her comments analysing the evidence of the parties? Based on the trial record what is clear is that the trial judge did not reach her conclusion on any facts presented at the trial.

22 It is irrelevant conjecture as to what the trial judge actually intended by these statements. I agree with my colleague Cory J., that there are other plausible

explanations of these impugned comments. It may be that all of her remarks were merely intended as a hypothetical response to the Crown's suggestion that the police officer had no reason to lie, and therefore innocuous. However, we are concerned with both the fairness and the appearance of fairness of the trial, and the absence of evidence to support the judgment is an irreparable defect.

23 I agree with the approach taken by Cory J. with respect to the nature of bias and the test to be used to determine if the words or actions of a judge give rise to apprehension of bias. However, I come to a different conclusion in the application of the test to the words of the trial judge in this case. It follows that I disagree with the approach to reasonable apprehension of bias put forward by Justices L'Heureux-Dubé and McLachlin.

24 The error of law that I attribute to the trial judge's assessment of the evidence or lack of evidence is sufficiently serious that a new trial is ordered.

25 In the result, I would uphold the disposition of Flinn J.A. in the Court of Appeal (1995), 145 N.S.R. (2d) 284, and dismiss the appeal.

The reasons of La Forest and Gonthier JJ. were delivered by

26. GONTHIER J. -- I have had the benefit of the reasons of Justice Cory, the joint reasons of Justices L'Heureux-Dubé and McLachlin and the reasons of Justice Major. I agree with Cory J. and L'Heureux-Dubé and McLachlin JJ. as to the disposition of the appeal and with their exposition of the law on bias and impartiality and the relevance of context. However, I am in agreement with and adopt the joint reasons of L'Heureux-Dubé and McLachlin JJ. in their treatment of social context

and the manner in which it may appropriately enter the decision-making process as well as their assessment of the trial judge's reasons and comments in the present case.

The following are the reasons delivered by

L'HEUREUX-DUBÉ AND MCLACHLIN JJ. --

I. Introduction

27 We have read the reasons of our colleague, Justice Cory, and while we agree that this appeal must be allowed, we differ substantially from him in how we reach that outcome. As a result, we find it necessary to write brief concurring reasons.

28 We endorse Cory J.'s comments on judging in a multicultural society, the importance of perspective and social context in judicial decision-making, and the presumption of judicial integrity. However, we approach the test for reasonable apprehension of bias and its application to the case at bar somewhat differently fromour colleague.

29 In our view, the test for reasonable apprehension of bias established in the jurisprudence is reflective of the reality that while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality. It therefore recognizes as inevitable and appropriate that the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate

stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence.

30 We find that on the basis of these principles, there is no reasonable apprehension of bias in the case at bar. Like Cory J. we would, therefore, overturn the findings by the Nova Scotia Supreme Court (Trial Division) and the majority of the Nova Scotia Court of Appeal that a reasonable apprehension of bias arises in this case, and restore the acquittal of R.D.S. This said, we disagree with Cory J.'s position that the comments of Judge Sparks were unfortunate, unnecessary, or close to the line. Rather, we find them to reflect an entirely appropriate recognition of the facts in evidence in this case and of the context within which this case arose -- a context known to Judge Sparks and to any well-informed member of the community.

II. The Test for Reasonable Apprehension of Bias

31 The test for reasonable apprehension of bias is that set out by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369. Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades: see, for example, *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267. De Grandpré J. stated, at pp. 394-95:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.... [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is

> more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> The grounds for this apprehension must, however, be substantial and I ... refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

32 As Cory J. notes at para. 92, the scope and stringency of the duty of fairness articulated by de Grandpré depends largely on the role and function of the tribunal in question. Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias. This is because judges "are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances": *United States v. Morgan*, 313 U.S. 409 (1941), at p. 421. The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 361 in *Commentaries on the Laws of England*, Book III, cited at footnote 49 in Richard F. Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S." (1995), 18 *Dalhousie L.J.* 408, at p. 417, "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea". Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect: *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (C.A.), at pp. 60-61.

33 Notwithstanding the strong presumption of impartiality that applies to judges, they will nevertheless be held to certain stringent standards regarding bias --

"a reasonable apprehension that the judge might not act in an entirely impartial manner is ground for disqualification": *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833, at pp. 842-43.

34 In order to apply this test, it is necessary to distinguish between the impartiality which is required of all judges, and the concept of judicial neutrality. The distinction we would draw is that reflected in the insightful words of Benjamin N. Cardozo in *The Nature of the Judicial Process* (1921), at pp. 12-13 and 167, where he affirmed the importance of impartiality, while at the same time recognizing the fallacy of judicial neutrality:

> There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them -- inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs.... In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.
>
> ...
>
> Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether he [or she] be litigant or judge.

35 Cardozo recognized that objectivity was an impossibility because judges, like all other humans, operate from their own perspectives. As the Canadian Judicial Council noted in *Commentaries on Judicial Conduct* (1991), at p. 12, "[t]here is no human being who is not the product of every social experience, every process of education, and every human contact". What is possible and desirable, they note, is impartiality:

> ...the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
>
> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

III. The Reasonable Person

36 The presence or absence of an apprehension of bias is evaluated through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail (*Committee for Justice and Liberty*, *supra.*) The person postulated is not a "very sensitive or scrupulous" person, but rather a right-minded person familiar with the circumstances of the case.

37 It follows that one must consider the reasonable person's knowledge and understanding of the judicial process and the nature of judging as well as of the community in which the alleged crime occurred.

A. *The Nature of Judging*

38 As discussed above, judges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity

of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.

39 It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function. As David M. Paciocco and Lee Stuesser write in their book *The Law of Evidence* (1996), at p. 277:

> *In general, the trier of fact is entitled simply to apply common sense and human experience in determining whether evidence is credible and in deciding what use, if any, to make of it in coming to its finding of fact.* [Emphasis in original.]

40 At the same time, where the matter is one of identifying and applying the law to the findings of fact, it must be the law that governs and not a judge's individual beliefs that may conflict with the law. Further, notwithstanding that their own insights into human nature will properly play a role in making findings of credibility or factual determinations, judges must make those determinations only after being equally open to, and considering the views of, all parties before them. The reasonable person, through whose eyes the apprehension of bias is assessed, expects judges to undertake an open-minded, carefully considered, and dispassionately deliberate investigation of the complicated reality of each case before them.

41 It is axiomatic that all cases litigated before judges are, to a greater or lesser degree, complex. There is more to a case than who did what to whom, and the

questions of fact and law to be determined in any given case do not arise in a vacuum. Rather, they are the consequence of numerous factors, influenced by the innumerable forces which impact on them in a particular context. Judges, acting as finders of fact, must inquire into those forces. In short, they must be aware of the context in which the alleged crime occurred.

42 Judicial inquiry into the factual, social and psychological context within which litigation arises is not unusual. Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality. In that regard, Professor Jennifer Nedelsky's "Embodied Diversity and the Challenges to Law" (1997), 42 *McGill L.J.* 91, at p. 107, offers the following comment:

> What makes it possible for us to genuinely judge, to move beyond our private idiosyncracies and preferences, is our capacity to achieve an "enlargement of mind". We do this by taking different perspectives into account. This is the path out of the blindness of our subjective private conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective .... It is the capacity for "enlargement of mind" that makes autonomous, impartial judgment possible.

43 Judicial inquiry into context provides the requisite background for the interpretation and the application of the law. For example, in a case involving alleged police misconduct in denying an accused's right to counsel, this Court inquired not simply into whether the accused had been read their *Charter* rights, but also used a contextual approach to ensure that the purpose of the constitutionally protected right was fulfilled: *R. v. Bartle*, [1994] 3 S.C.R. 173. The Court, placing itself in the position of the accused, asked how the accused would have experienced and responded to arrest and detention. Against this background, the Court went on to determine what was required to make the right to counsel truly meaningful. This

inquiry provided the Court with a larger picture, which was in turn conducive to a more just determination of the case.

44 An understanding of the context or background essential to judging may be gained from testimony from expert witnesses in order to put the case in context: *R. v. Lavallee*, [1990] 1 S.C.R. 852, *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), and *Moge v. Moge*, [1992] 3 S.C.R. 813, from academic studies properly placed before the Court; and from the judge's personal understanding and experience of the society in which the judge lives and works. This process of enlargement is not only consistent with impartiality; it may also be seen as its essential precondition.

45 A reasonable person far from being troubled by this process, would see it as an important aid to judicial impartiality.

B. *The Nature of the Community*

46 The reasonable person, identified by de Grandpré J. in *Committee for Justice and Liberty*, *supra*, is an informed and right-minded member of the community, a community which, in Canada, supports the fundamental principles entrenched in the Constitution by the *Canadian Charter of Rights and Freedoms*. Those fundamental principles include the principles of equality set out in s. 15 of the *Charter* and endorsed in nation-wide quasi-constitutional provincial and federal human rights legislation. The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the *Charter*'s equality provisions. These are matters of which judicial notice may be taken. In *Parks*, *supra*, at p. 342, Doherty J.A., did just this, stating:

> Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes.

47 The reasonable person is not only a member of the Canadian community, but also, more specifically, is a member of the local communities in which the case at issue arose (in this case, the Nova Scotian and Halifax communities). Such a person must be taken to possess knowledge of the local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues: *Royal Commission on the Donald Marshall Jr. Prosecution* (1989); *R. v. Smith* (1991), 109 N.S.R. (2d) 394 (Co. Ct.). The reasonable person must thus be deemed to be cognizant of the existence of racism in Halifax, Nova Scotia. It follows that judges may take notice of actual racism known to exist in a particular society. Judges have done so with respect to racism in Nova Scotia. In *Nova Scotia (Minister of Community Services) v. S.M.S.* (1992), 110 N.S.R. (2d) 91 (Fam. Ct.), it was stated at p. 108:

> [Racism] is a pernicious reality. The issue of racism existing in Nova Scotia has been well documented in the Marshall Inquiry Report (sub. nom. *Royal Commission on the Donald Marshall, Jr., Prosecution*). A person would have to be stupid, complacent or ignorant not to acknowledge its presence, not only individually, but also systemically and institutionally.

48 We conclude that the reasonable person contemplated by de Grandpré J., and endorsed by Canadian courts is a person who approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. The reasonable person understands the

impossibility of judicial neutrality, but demands judicial impartiality. The reasonable person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community, is supportive of the principles of equality.

49 Before concluding that there exists a reasonable apprehension of bias in the conduct of a judge, the reasonable person would require some clear evidence that the judge in question had improperly used his or her perspective in the decision-making process; this flows from the presumption of impartiality of the judiciary. There must be some indication that the judge was not approaching the case with an open mind fair to all parties. Awareness of the context within which a case occurred would not constitute such evidence; on the contrary, such awareness is consistent with the highest tradition of judicial impartiality.

IV. Application of the Test to the Facts

50 In assessing whether a reasonable person would perceive the comments of Judge Sparks to give rise to a reasonable apprehension of bias, it is important to bear in mind that the impugned reasons were delivered orally. As Professor Devlin puts it in "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S.", *supra*, at p. 414:

> Trial judges have a heavy workload that allows little time for meticulously thought-through reasoning. This is particularly true when decisions are delivered orally immediately after counsel have finished their arguments.

(See also *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664.)

It follows that for the purposes of this appeal, the oral reasons issued by Judge Sparks should be read in their entirety, and the impugned passages should be construed in light of the whole of the trial proceedings and in light of all other portions of the judgment.

51 Judge Sparks was faced with contradictory testimony from the only two witnesses, the appellant R.D.S., and Constable Stienburg. Both testified as to the events that occurred and were subjected to cross-examination. As trier of fact, Judge Sparks was required to assess their testimony, and to determine whether or not, on the evidence before her, she had a reasonable doubt as to the guilt of the appellant R.D.S. It is evident in the transcript that Judge Sparks proceeded to do just that.

52 Judge Sparks briefly summarized the contradictory evidence offered by the two witnesses, and then made several observations about credibility. She noted that R.D.S. testified quite candidly, and with considerable detail. She remarked that contrary to the testimony of Constable Stienburg, it was the evidence of R.D.S. that when he arrived on the scene on his bike, his cousin was handcuffed and not struggling in any way. She found the level of detail that R.D.S. provided to have "a ring of truth", and found him to be "a rather honest young boy". In the end, while Judge Sparks specifically noted that she did not accept all the evidence given by R.D.S., she nevertheless found him to have raised a reasonable doubt by raising queries in her mind as to what actually occurred.

53 It is important to note that having already found R.D.S. to be credible, and having accepted a sufficient portion of his evidence to leave her with a reasonable doubt as to his guilt, Judge Sparks necessarily disbelieved at least a portion of the conflicting evidence of Constable Stienburg. At that point, Judge

Sparks made reference to the submissions of the Crown that "there's absolutely no reason to attack the credibility of the officer", and then addressed herself to why there might, in fact, be a reason to attack the credibility of the officer in this case. It is in this context that Judge Sparks made the statements which have prompted this appeal:

> The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.
>
> At any rate, based upon my comments and based upon all the evidence before the court I have no other choice but to acquit.

54 These remarks do not support the conclusion that Judge Sparks found Constable Stienburg to have lied. In fact, Judge Sparks did quite the opposite. She noted firstly, that she was <u>not</u> saying Constable Stienburg had misled the court, although that could be an explanation for his evidence. She then went on to remark that she was <u>not</u> saying that Constable Stienburg had overreacted, though she was alive to that possibility given that it had happened with police officers in the past, and in particular, it had happened when police officers were dealing with non-white groups. Finally, Judge Sparks concluded that, though she was not willing to say that Constable Stienburg did overreact, it was her belief that he <u>probably</u> overreacted. And, in support of that finding, she noted that she accepted the evidence of R.D.S. that "he was told to shut up or he would be under arrest".

55 At no time did Judge Sparks rule that the probable overreaction by Constable Stienburg was motivated by racism. Rather, she tied her finding of probable overreaction to the evidence that Constable Stienburg had threatened to arrest the appellant R.D.S. for speaking to his cousin. At the same time, there was evidence capable of supporting a finding of racially motivated overreaction. At an earlier point in the proceedings, she had accepted the evidence that the other youth arrested that day, was handcuffed and thus secured when R.D.S. approached. This constitutes evidence which could lead one to question why it was necessary for both boys to be placed in choke holds by Constable Stienburg, purportedly to secure them. In the face of such evidence, we respectfully disagree with the views of our colleagues Cory and Major JJ. that there was no evidence on which Judge Sparks could have found "racially motivated" overreaction by the police officer.

56 While it seems clear that Judge Sparks did not in fact relate the officer's probable overreaction to the race of the appellant R.D.S., it should be noted that if Judge Sparks had chosen to attribute the behaviour of Constable Stienburg to the racial dynamics of the situation, she would not necessarily have erred. As a member of the community, it was open to her to take into account the well-known presence of racism in that community and to evaluate the evidence as to what occurred against that background.

57 That Judge Sparks recognized that police officers sometimes overreact when dealing with non-white groups simply demonstrates that in making her determination in this case, she was alive to the well-known racial dynamics that may exist in interactions between police officers and visible minorities. As found by Freeman J.A. in his dissenting judgment at the Court of Appeal (1995), 145 N.S.R. (2d) 284, at p. 294:

> The case was racially charged, a classic confrontation between a white police officer representing the power of the state and a black youth charged with an offence. Judge Sparks was under a duty to be sensitive to the nuances and implications, and to rely on her own common sense which is necessarily informed by her own experience and understanding.

58 Given these facts, the question is whether a reasonable and right-minded person, informed of the circumstances of this case, and knowledgeable about the local community and about Canadian *Charter* values, would perceive that the reasons of Judge Sparks would give rise to a reasonable apprehension of bias. In our view, they would not. The clear evidence of prejudgment required to sustain a reasonable apprehension of bias is nowhere to be found.

59 Judge Sparks' oral reasons show that she approached the case with an open mind, used her experience and knowledge of the community to achieve an understanding of the reality of the case, and applied the fundamental principle of proof beyond a reasonable doubt. Her comments were based entirely on the case before her, were made after a consideration of the conflicting testimony of the two witnesses and in response to the Crown's submissions, and were entirely supported by the evidence. In alerting herself to the racial dynamic in the case, she was simply engaging in the process of contextualized judging which, in our view, was entirely proper and conducive to a fair and just resolution of the case before her.

V. Conclusion

60 In the result, we agree with Cory J. as to the disposition of this case. We would allow the appeal, overturn the findings of the Nova Scotia Supreme Court (Trial Division) and the majority of the Nova Scotia Court of Appeal, and restore the acquittal of the appellant R.D.S.

The judgment of Cory and Iacobucci JJ. was delivered by

61 CORY J. -- In this appeal, it must be determined whether a reasonable apprehension of bias arises from comments made by the trial judge in providing her reasons for acquitting the accused.

I. Facts

62 R.D.S. is an African-Canadian youth. When he was 15 years of age he was charged with three offences: unlawfully assaulting Constable Donald Stienburg; unlawfully assaulting Constable Stienburg with the intention of preventing the arrest of N.R.; and unlawfully resisting Constable Stienburg in the lawful execution of his duty.

63 The Crown proceeded with the charges by way of summary conviction. There were only two witnesses at the trial: R.D.S. himself and Constable Stienburg. Their accounts of the relevant events differed widely. The credibility of these witnesses would determine the outcome of the charges.

A. *Constable Stienburg's Evidence*

64 Constable Stienburg testified that he was in his police cruiser with his partner when a radio transmission alerted them that other officers were in pursuit of a stolen van. In the car was a "ride-along", Leslie Lane, who was unable to testify at the trial. The occupants of the stolen van were described as "non-white" youths. When Constable Stienburg and his partner arrived at the designated area they saw

two black youths running across the street in front of them. Constable Stienburg detained one of the individuals, N.R., while his partner pursued the other. He testified that there were a number of other people standing around at the time.

65 N.R. was detained outside the police car since the "ride along" was in the back seat. While Constable Stienburg was standing by the side of the road with N.R., the accused, R.D.S., came towards Constable Stienburg on his bicycle. Constable Stienburg testified that R.D.S. ran into his legs, and while still on the bicycle, yelled at him and pushed him. R.D.S. was then arrested for interfering with the arrest of N.R., and Constable Stienburg called for back-up. Constable Stienburg stated that he put both R.D.S. and N.R. in "a neck restraint". When R.D.S. was finally brought to the police station, he was read his rights, and charged with the three offences.

66 In cross-examination, it was suggested to Constable Stienburg that R.D.S. had been overcharged. It was pointed out that R.D.S. had no prior record and it was suggested, although not particularly clearly, that R.D.S. had been singled out because he was black.

B. *Testimony of R.D.S.*

67 R.D.S. testified that he remembered that the weather on the particular day was misty and humid. While riding his bike from his grandmother's to his mother's house he saw the police car and the crowd standing beside it. A friend told him that his cousin N.R. had been arrested. R.D.S. approached the crowd, and stopped his bike when he saw N.R. and the officer. R.D.S. then tried to talk to N.R. to ask him what had happened and to find out if he should tell N.R.'s mother. Constable Stienburg told him: "Shut up, shut up, or you'll be under arrest too". When R.D.S. continued

to ask N.R. if he should call his mother, Constable Stienburg arrested R.D.S. and put him in a choke hold. R.D.S. indicated that he could not breathe, and that he heard a woman tell the officer to "Let that kid go . . . ." He also heard her ask for his phone number. He could not talk so N.R. gave the number to her. R.D.S. indicated that the crowd standing around were all "little kids" under the age of 12. He denied that he ran into anyone or that he intended to run into anyone on his bike. He also testified that his hands remained on the handlebars, and he did not push the officer.

68 In cross-examination, he indicated that the reason he approached the crowd was because he was "being nosey". He remembered that N.R. was handcuffed when he arrived. Both R.D.S. and N.R. were placed in a choke hold at the same time. He repeated his denial that he touched the officer either with his bicycle or his hands. He also denied that he said anything to Constable Stienburg prior to his arrest. He indicated that all his questions were directed to N.R.

C. *History of Proceedings*

69 In Youth Court, Judge Sparks weighed the evidence of the two witnesses and determined that R.D.S. should be acquitted. In her oral reasons, she made comments which were challenged as raising a reasonable apprehension of bias. They are the subject of this appeal. After the reasons had been given and an appeal to the Nova Scotia Supreme Court (Trial Division) had been filed by the Crown, Judge Sparks issued supplementary reasons which outlined in greater detail her impressions of the credibility of both witnesses and the context in which her comments were made.

70 In the Trial Division, Glube C.J.S.C., sitting as summary conviction appeal judge, allowed the Crown's appeal. She held in oral reasons that a new trial was warranted on the basis that the remarks of Judge Sparks gave rise to a reasonable apprehension of bias. This decision was upheld in the Nova Scotia Court of Appeal by Flinn J.A. and Pugsley J.A., Freeman J.A. dissenting.

II. Judgments Below

A. *Youth Court*

71 In her oral reasons, Judge Sparks reviewed the details of Constable Stienburg's testimony, and noted that R.D.S.'s evidence was directly opposed to it. In describing R.D.S.'s testimony, she observed that she was impressed with his clear recollection of the weather conditions on that day, and his candour in pointing out that he was simply being nosey in approaching the crowd. She also noted that his description of being placed in the choke hold was vivid. R.D.S. stated clearly that when he was placed in the choke hold, he could not speak and had difficulty breathing. In fact, he was unable to respond when a woman asked him for his phone number so she could notify his mother.

72 The Youth Court Judge paid particular attention to R.D.S.'s testimony that N.R. was handcuffed when R.D.S. arrived on the scene. This aspect of R.D.S.'s testimony suggested that N.R. was not a threat to the officer. Significantly, Constable Stienburg did not mention that N.R. was handcuffed, and gave the court the distinct impression that he had difficulty restraining N.R. In Judge Sparks' view, R.D.S.'s testimony that N.R. was handcuffed had "a ring of truth" to it, which raised questions

in her mind about the divergence between R.D.S.'s evidence and the evidence of Constable Stienburg on this point.

73 In general, Judge Sparks described R.D.S's demeanour as "positive", even though he was not particularly articulate. She found him to be a "rather honest young boy". In particular, she was struck by his openness in acknowledging his own "nosiness" and by his surprise at the hostility of the police officer. Judge Sparks indicated that she was not saying that she accepted everything that R.D.S. said, but noted that "certainly he has raised a doubt in my mind". She still had queries about "what actually transpired on the afternoon of October the 17th". As a result, she concluded that the Crown had not discharged its evidentiary burden to prove all the elements of the offence beyond a reasonable doubt.

74 She concluded her reasons with the controversial remarks that gave rise to this appeal. They are as follows:

> The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.
>
> At any rate, based upon my comments and based upon all the evidence before the court I have no other choice but to acquit.

In conclusion, she agreed with the defence counsel that the accused had been overcharged, and that the first two counts duplicated each other. However, nothing turned on this since she dismissed all three charges.

B. *Nova Scotia Supreme Court (Trial Division)*, [1995] N.S.J. No. 184 (QL)

75 On appeal, Glube C.J.S.C. expressed the view that she could not consider the supplementary reasons provided by the Youth Court Judge. The decision was, in her view, made in the oral reasons at the original trial, and the supplementary reasons did not form the basis for the Crown's appeal. If Judge Sparks had intended to issue additional reasons, she should have indicated this to counsel either at the trial or shortly thereafter. Both parties agreed that Judge Sparks was *functus officio* when she issued her supplementary reasons, and that they could not be considered. Glube C.J.S.C. indicated that her own review of the case law supported this conclusion.

76 Glube C.J.S.C. then considered the allegations of actual and apprehended bias made by the Crown on the basis of Judge Sparks' final remarks in her oral reasons. She rejected the defence's argument that there is no appeal on questions of fact and summarized the general principles pertaining to appellate review of those findings. She observed, at para. 17, that a Crown's appeal from an acquittal will only succeed "where the verdict is unreasonable or not supported by the evidence".

77 She expressed the view that if a reasonable apprehension of bias arises, the verdict would not be supported by the evidence. Relying on *R. v. Wald* (1989), 47 C.C.C. (3d) 315 (Alta. C.A.), she indicated that the entitlement to an impartial decision-maker applies to the Crown as well as the accused. The principles of fundamental justice "includ[e] natural justice and a duty to act fairly" (para. 21).

These principles impose a duty on the decision-maker to be and to appear to be impartial. If these principles apply to administrative tribunals, they must apply even more to courts.

78 Glube C.J.S.C. found nothing in the transcript of the hearing itself that would give rise to an impression that Judge Sparks was biased. Furthermore, if the reasons of Judge Sparks had ended with her conclusion that the Crown had not satisfied its burden of proof, there would be no basis for the appeal. Judge Sparks had made clear findings of credibility that favoured the accused. Unfortunately, however, she went on and made the impugned comments. Glube C.J.S.C. was of the view that there was no basis in the evidence for Judge Sparks' statements. In particular, there was no evidence of the "prevalent attitude of the day" (para. 24). She stated at para. 25 that "judges must be extremely careful to avoid expressing views which do not form part of the evidence".

79 She found that the test for reasonable apprehension of bias is an objective one, based on what the reasonable, right-minded person with knowledge of the facts would conclude. In her view, the reasonable person would conclude that there was a reasonable apprehension of bias on the part of Judge Sparks, in spite of her thorough review of the facts and her findings of credibility. As a result, a new trial was warranted.

C. *Court of Appeal* (1995), 145 N.S.R. (2d) 284

(i) Flinn J.A. (Pugsley J.A. concurring)

80 Flinn J.A. noted that the Crown can only appeal a summary conviction acquittal on a question of law with leave of the court. If the summary conviction appeal court judge made no error of law, then there is no appeal from her decision. He then rejected the accused's argument that Glube C.J.S.C. had improperly reexamined and redetermined issues of credibility. Since her decision was based on reasonable apprehension of bias, she did not err in law in declining to defer to the trial judge's findings.

81 Flinn J.A. reviewed the test for reasonable apprehension of bias. He concluded that bias reflects the inability of the judge to act impartially. The test is objective and the standard of reasonableness applies to the person who perceives the bias, as well as the apprehension of bias itself. The test requires a consideration of what the reasonable, right-minded person, with knowledge of all the facts, would think with regard to the apprehension of bias. The apprehension must be reasonable, and suspicion or conjecture is not enough. Finally, it is not necessary to show that actual bias influenced the result.

82 In Flinn J.A.'s opinion, Glube C.J.S.C. made no error in applying the test to the decision of the Youth Court Judge. She was correct to point out that there was no evidence to justify Judge Sparks' comments. Whether or not the comments reflected "an unfortunate social reality", the issue was whether Judge Sparks considered factors not in evidence when she made her critical findings of credibility and decided to acquit the accused. Judge Sparks used her general comments to

conclude that Constable Stienburg overreacted. There was no evidence regarding "the prevalent attitude of the day" or the reasons why the officer overreacted. Concerns regarding overreaction were not canvassed in cross-examination of the officer, and the officer had no opportunity to address these concerns in his testimony.

83 As a result, Flinn J.A. was of the view that "[t]he unfortunate use of these generalizations, by the Youth Court judge" would lead a reasonable, fully informed person to conclude that Judge Sparks had based her findings of credibility at least partially on the basis of matters not in evidence. This was unfair. The appeal was therefore dismissed.

84 Finally, Flinn J.A. rejected the argument that Glube C.J.S.C. had inappropriately adopted a formal equality approach to the question of reasonable apprehension of bias. He agreed with the Crown that the appellant's *Charter* argument on this point was not properly raised by the appeal, and in any event, that Glube C.J.S.C.'s approach was not inappropriate.

(ii) Freeman J.A. (dissenting)

85 Freeman J.A. agreed with the articulation of the law set out by the majority. However, he was of the view at p. 292 that "it was perfectly proper for the trial judge, in weighing the evidence before her, to consider the racial perspective". He was not satisfied that this gave rise to a perception that she was biased.

86 He indicated that although it was not clear what Judge Sparks meant by her reference to the "prevalent attitude of the day", it was possible that she was referring to the attitudes exhibited on the day of R.D.S.'s arrest. There was evidence

before her on that point. At any rate, he was prepared to give Judge Sparks the benefit of the doubt on this remark, and to regard it as a neutral factor in the decision. The only remaining remarks related to the possible racism of the police.

87 Freeman J.A. was struck by the delicate racial dynamics of the courtroom. In his view, at p. 294, "Judge Sparks was under a duty to be sensitive to the nuances and implications, and to rely on her own common sense which is necessarily informed by her own experience and understanding". He noted the unfortunate truth that most individuals generally know that police officers have on occasion misled the court or overreacted when dealing with non-white groups. Judge Sparks did not state that the officer did either of these things. Such a finding would have required evidence.

88 Judge Sparks did state that the officer overreacted, but she related it to her finding that she believed R.D.S.'s statement that the officer told him to shut up or he would be under arrest. This was not a biased conclusion, since it indicated her concern that the charges might have arisen more as a result of R.D.S.'s verbal interference, than of any physical act. There was certainly some evidence on which Judge Sparks could conclude that the officer overreacted, and this determination was within her purview. If the finding of overreaction did not give rise to a reasonable apprehension of bias, Freeman J.A. was not satisfied that any other comments made by Judge Sparks would do so. He would have allowed the appeal.

III. Issues

89 Only one issue arises on this appeal:

Did the comments made by Judge Sparks in her reasons give rise to a reasonable apprehension of bias?

IV. Analysis

A. *Can this Court Consider Judge Sparks' Supplementary Reasons?*

90 Glube C.J.S.C. correctly concluded that the supplementary reasons issued by Judge Sparks after the appeal had been filed could not be taken into account in assessing whether or not the reasons of Judge Sparks gave rise to a reasonable apprehension of bias. The parties did not dispute this determination in the Court of Appeal. In this Court, the appellant did not raise this issue in argument and proceeded on the basis that the supplementary reasons were not before the Court. The respondent Crown submitted in oral argument that the supplementary reasons should be considered as part of the overall picture in determining whether a reasonable apprehension of bias arose from Judge Sparks' conduct. The Crown appeared to be suggesting that the very fact of their issuance, as well as their substance, was an important factor in the impression of bias that was created. At this late stage it would be most unfair to accept that submission. Accordingly, the supplementary reasons should not be considered.

B. *Ascertaining the Existence of a Reasonable Apprehension of Bias*

(i) Fair Trial and The Right to an Unbiased Adjudicator

91 A system of justice, if it is to have the respect and confidence of its society, must ensure that trials are fair and that they appear to be fair to the informed

and reasonable observer. This is a fundamental goal of the justice system in any free and democratic society.

92 It is a well-established principle that all adjudicative tribunals and administrative bodies owe a duty of fairness to the parties who must appear before them. See for example *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at p. 636. In order to fulfil this duty the decision-maker must be and appear to be unbiased. The scope of this duty and the rigour with which it is applied will vary with the nature of the tribunal in question.

93 For very good reason it has long been determined that the courts should be held to the highest standards of impartiality. *Newfoundland Telephone*, *supra*, at p. 638; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at pp. 660-61. This principle was recently confirmed and emphasized by the majority in *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537, at para. 7, where it was said "[t]he right to a trial before an impartial judge is of fundamental importance to our system of justice". The right to trial by an impartial tribunal has been expressly enshrined by ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

94 Trial judges in Canada exercise wide powers. They enjoy judicial independence, security of tenure and financial security. Most importantly, they enjoy the respect of the vast majority of Canadians. That respect has been earned by their ability to conduct trials fairly and impartially. These qualities are of fundamental importance to our society and to members of the judiciary. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. If the words or actions of the presiding judge give rise to a

reasonable apprehension of bias to the informed and reasonable observer, this will render the trial unfair.

95 Canada is not an insular, homogeneous society. It is enriched by the presence and contributions of citizens of many different races, nationalities and ethnic origins. The multicultural nature of Canadian society has been recognized in s. 27 of the *Charter*. Section 27 provides that the *Charter* itself is to be interpreted in a manner that is consistent with the preservation and enhancement of the multicultural heritage of Canadians. Yet our judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin. This is a far more difficult task in Canada than it would be in a homogeneous society. Remarks which would pass unnoticed in other societies could well raise a reasonable apprehension of bias in Canada.

96 Usually, in a criminal trial, actual or perceived judicial bias is alleged by the accused. However, nothing precludes the Crown from making a similar allegation. Indeed it has a duty to make such a submission in appropriate circumstances. Even in the absence of explicit constitutional protection, it is an important principle of our legal system that a trial must be fair to all parties -- to the Crown as well as to the accused. See, for example, *R. v. Gushman*, [1994] O.J. No. 813 (Gen. Div.). In *Curragh*, *supra*, this Court recently upheld an allegation of perceived bias arising from the conduct of a trial judge towards a Crown attorney. In a slightly different context, it has been held that if a judge forms or appears to form a biased opinion against a Crown witness, for example, a sexual assault complainant, the trial may be unfair to the Crown: *Wald*, *supra*, at p. 336.

97 The question which must be answered in this appeal is whether the comments made by Judge Sparks in her reasons give rise to a reasonable apprehension that she was not impartial as between the Crown and the accused. The Crown's position, in essence, is that Judge Sparks did not give the essential and requisite appearance of impartiality because her comments indicated that she prejudged an issue in the case, or to put it another way, she reached her determination on the basis of factors which were not in evidence.

(ii) Standard of Review

98 Before dealing with the issue of apprehended bias, it is necessary to address an argument raised by the appellant and the interveners African-Canadian Legal Clinic et al. They stressed that this appeal turns entirely on findings of credibility. There were only two witnesses, and their evidence was contradictory. Judge Sparks' role was therefore simply to determine the issue of credibility. The appellant and the interveners argued that it is a well-established principle of law that appellate courts should defer to such findings, and that Glube C.J.S.C. improperly reviewed Judge Sparks' findings of credibility. In my view, these submissions are not entirely correct.

99 If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction. See *Curragh*, *supra*, at para. 5; *Gushman*, *supra*, at para. 28. This excess of jurisdiction can be remedied by an application to the presiding judge for disqualification if the proceedings are still underway, or by appellate review of the judge's decision. In the context of appellate review, it has recently been held that a "properly drawn conclusion that there is a

reasonable apprehension of bias will ordinarily lead inexorably to the decision that a new trial must be held": *Curragh, supra*, at para. 5.

100 If a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision. See *Newfoundland Telephone, supra*, at p. 645; see also *Curragh, supra*, at para. 6. Thus, the mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from other words or conduct of the judge. In the context of an application to disqualify a judge from sitting in a particular lawsuit, it has been held that where there is a reasonable apprehension of bias, "it is impossible to render a final decision resting on findings as to credibility made under such circumstances": *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833, at p. 843. However, if the words or conduct of the judge, viewed in context, do not give rise to a reasonable apprehension of bias, the findings of the judge will not be tainted, no matter how troubling the impugned words or actions may be.

101 Therefore, while the appellant is correct that appellate courts have wisely adopted a deferential standard of review in examining factual determinations made by lower courts, including findings of credibility, it is somewhat misleading to characterize the issue in this appeal as one of credibility alone. If Judge Sparks' findings of credibility were tainted by bias, real or apprehended, they would be made without jurisdiction, and would not warrant appellate deference. On the other hand, if her findings were not tainted by bias, then the case turned entirely on her findings of credibility and an appellate court should not interfere with those findings, unless they were clearly unreasonable or not supported by the evidence. See for example, *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at pp. 131-32.

102 Thus the sole issue is whether Judge Sparks' reasons demonstrated actual or perceivable bias. If they did, then Glube C.J.S.C. not only had the jurisdiction to overturn them but also an obligation to order a new trial. A judicial determination at first instance that real or apprehended bias exists may itself be worthy of some deference by appellate courts: *Huerto v. College of Physicians and Surgeons* (1996), 133 D.L.R. (4th) 100 (Sask. C.A.), at p. 105. However, an allegation of judicial bias raises such serious and sensitive issues that the basic interests of justice require appellate courts to retain some scope to review that determination.

(iii) What is Bias?

103 It may be helpful to begin by articulating what is meant by impartiality. In deciding whether bias arises in a particular case, it is relatively rare for courts to explore the definition of bias. In this appeal, however, this task is essential, if the Crown's allegation against Judge Sparks is to be properly understood and addressed. See Prof. Richard F. Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S." (1995), 18 *Dalhousie L.J.* 408, at pp. 438-39.

104 In *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 685, Le Dain J. held that the concept of impartiality describes "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case". He added that "[t]he word 'impartial' . . . connotes absence of bias, actual or perceived". See also *R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 283. In a more positive sense, impartiality can be described -- perhaps somewhat inexactly -- as a state of mind in which the

adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.

105 In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. A helpful explanation of this concept was provided by Scalia J. in *Liteky v. U.S.*, 114 S.Ct. 1147 (1994), at p. 1155:

> The words [bias or prejudice] connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts). [Emphasis in original.]

Scalia J. was careful to stress that not every favourable or unfavourable disposition attracts the label of bias or prejudice. For example, it cannot be said that those who condemn Hitler are biased or prejudiced. This unfavourable disposition is objectively justifiable -- in other words, it is not "wrongful or inappropriate": *Liteky*, *supra*, at p. 1155.

106 A similar statement of these principles is found in *R. v. Bertram*, [1989] O.J. No. 2123 (H.C.), in which Watt J. noted at pp. 51-52:

> In common usage bias describes a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

See also *R. v. Stark*, [1994] O.J. No. 406 (Gen. Div.), at para. 64; *Gushman*, *supra*, at para. 29.

107 Doherty J.A. in *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), leave to appeal denied, [1994] 1 S.C.R. x, held that partiality and bias are in fact not the same thing. In addressing the question of potential partiality or bias of jurors, he noted at p. 336 that:

> Partiality has both an attitudinal and behavioural component. It refers to one who has certain preconceived biases, and who will allow those biases to affect his or her verdict despite the trial safeguards designed to prevent reliance on those biases.

In demonstrating partiality, it is therefore not enough to show that a particular juror has certain beliefs, opinions or even biases. It must be demonstrated that those beliefs, opinions or biases prevent the juror (or, I would add, any other decision-maker) from setting aside any preconceptions and coming to a decision on the basis of the evidence: *Parks*, *supra*, at pp. 336-37.

108 This analysis is certainly not exhaustive. Different factors may determine the issue where, for example, the allegation relates to direct pecuniary bias or some other personal interest in the outcome of a case. Yet the concepts articulated can be used as guiding principles in the consideration of this case.

(iv) The Test for Finding a Reasonable Apprehension of Bias

109 When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable

apprehension of bias. *Idziak, supra*, at p. 660. It has long been held that actual bias need not be established. This is so because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind. See *Newfoundland Telephone, supra*, at p. 636.

110 It was in this context that Lord Hewart C.J. articulated the famous maxim: "[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done": *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259. The Crown suggested that this maxim provided a separate ground for review of Judge Sparks' decision, and implied that the threshold for appellate intervention is lower when reviewing a decision for "appearance of justice" than for "appearance of bias". This submission cannot be sustained. The *Sussex Justices* case involved an allegation of bias. The requirement that justice should be seen to be done simply means that the person alleging bias does not have to prove actual bias. The Crown can only succeed if Judge Sparks' reasons give rise to a reasonable apprehension of bias.

111 The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. . . ."

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be

reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram*, *supra*, at pp. 54-55; *Gushman*, *supra*, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark*, *supra*, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

112 The appellant submitted that the test requires a demonstration of "real likelihood" of bias, in the sense that bias is probable, rather than a "mere suspicion". This submission appears to be unnecessary in light of the sound observations of de Grandpré J. in *Committee for Justice and Liberty*, *supra*, at pp. 394-95:

> I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis added.]

Nonetheless the English and Canadian case law does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough. See *R. v. Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850 (Q.B.D.); *Metropolitan Properties Co. v. Lannon*, [1969] 1

Q.B. 577 (C.A.); *R. v. Gough*, [1993] 2 W.L.R. 883 (H.L.); *Bertram*, *supra*, at p. 53; *Stark*, *supra*, at para. 74; *Gushman*, *supra*, at para. 30.

113 Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark*, *supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

114 The onus of demonstrating bias lies with the person who is alleging its existence: *Bertram*, *supra*, at p. 28; *Lin*, *supra*, at para. 30. Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case.

115 Finally, in the context of the current appeal, it is vital to bear in mind that the test for reasonable apprehension of bias applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic. A judge who happens to be black is no more likely to be biased in dealing with black litigants, than a white judge is likely to be biased in favour of white litigants. All judges of every race, colour, religion, or national background are entitled to the same presumption of judicial integrity and the same high threshold for a finding of bias. Similarly, all judges are subject to the same fundamental duties to be and to appear to be impartial.

(v) Judicial Integrity and the Importance of Judicial Impartiality

116 Often the most significant occasion in the career of a judge is the swearing of the oath of office. It is a moment of pride and joy coupled with a realization of the onerous responsibility that goes with the office. The taking of the oath is solemn and a defining moment etched forever in the memory of the judge. The oath requires a judge to render justice impartially. To take that oath is the fulfilment of a life's dreams. It is never taken lightly. Throughout their careers, Canadian judges strive to overcome the personal biases that are common to all humanity in order to provide and clearly appear to provide a fair trial for all who come before them. Their rate of success in this difficult endeavour is high.

117 Courts have rightly recognized that there is a presumption that judges will carry out their oath of office. See *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (C.A.), and *Lin, supra.* This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with "cogent evidence" that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias. See *Smith & Whiteway, supra*, at para. 64; *Lin, supra*, at para. 37. The presumption of judicial integrity can never relieve a judge from the sworn duty to be impartial.

118 It is right and proper that judges be held to the highest standards of impartiality since they will have to determine the most fundamentally important rights of the parties appearing before them. This is true whether the legal dispute arises between citizen and citizen or between the citizen and the state. Every comment that a judge makes from the bench is weighed and evaluated by the

community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve neutrality and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct.

119 The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial

> does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
>
> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

(Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991), at p. 12.)

It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging. See for example the discussion by the Honourable Maryka Omatsu, "The Fiction of Judicial Impartiality" (1997), 9 *C.J.W.L.* 1. See also Devlin, *supra*, at pp. 408-9.

120 Regardless of their background, gender, ethnic origin or race, all judges owe a fundamental duty to the community to render impartial decisions and to appear impartial. It follows that judges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was predetermined or that a question was decided on the basis of stereotypical assumptions or generalizations.

(vi) Should Judges Refer to Aspects of Social Context in Making Decisions?

121 It is the submission of the appellant and interveners that judges should be able to refer to social context in making their judgments. It is argued that they should be able to refer to power imbalances between the sexes or between races, as well as to other aspects of social reality. The response to that submission is that each case must be assessed in light of its particular facts and circumstances. Whether or not the use of references to social context is appropriate in the circumstances and whether a reasonable apprehension of bias arises from particular statements will depend on the facts of the case.

122 At the outset, I would note that this appeal was not put forward by the appellant as engaging the principles of judicial notice. Rather it was the appellant's contention that the references to social context by Judge Sparks simply made use of her background, experience and knowledge of social conditions to assist her in the analysis of the persons involved in the case. One of the interveners did argue that the principles of judicial notice apply in this case. However, since the appellant did not put forward this position, it would be inappropriate to consider the question as to

whether the existence of anti-black racism in society is a proper subject for judicial notice.

123 Certainly judges may, on the basis of expert evidence adduced, refer to relevant social conditions in reasons for judgment. In some circumstances, those references are necessary, so that the law may evolve in a manner which reflects social reality. For example, in *R. v. Lavallee*, [1990] 1 S.C.R. 852, expert evidence of the psychological experiences of battered women was used to inform the standard of reasonableness to be applied when self-defence is invoked by women who have been victims of domestic violence.

124 In *Lavallee*, the references to social context were based on expert evidence and were used solely to develop the relevant legal principle. In an individual case, however, it is still the responsibility of the woman putting forward the defence to establish that the general principles about women's experiences of domestic violence actually apply. The trier of fact still retains the important task of determining whether the evidence of a battered woman of her experiences in the particular case is in fact believable -- in other words, whether the generalizations about social reality apply to the individual female accused. See *Lavallee*, *supra*, at p. 891.

125 Similarly, judges have recently made use of expert evidence of social conditions in order to develop the appropriate legal framework to be utilized for ensuring juror impartiality. In *Parks*, *supra*, Doherty J.A. referred to a body of studies and reports documenting the prevalence of anti-black racism in the Metropolitan Toronto area. On the basis of his conclusions, at p. 338, that anti-black racism is a "grim reality" in that community he developed a legal framework

permitting jurors to be challenged for cause on the basis of racial preconceptions. This legal framework is applicable in circumstances where a realistic possibility exists that such preconceptions might threaten juror impartiality.

126 Other cases have applied and extended these principles on the basis of expert knowledge of the social context existing in the particular community, or in the particular relationships between parties to the case. See, for example, *R. v. Wilson* (1996), 29 O.R. (3d) 97 (C.A.); *R. v. Glasgow* (1996), 93 O.A.C. 67.

127 In *Parks* and *Lavallee*, for instance, the expert evidence of social context was used to develop principles of general application in certain kinds of cases. These principles are legal in nature, and are structured to ensure that the role of the trier of fact in a particular case is not abrogated or usurped. It is clear therefore that references to social context based upon expert evidence are sometimes permissible and helpful, and that they do not automatically give rise to suspicions of judicial bias. However, there is a very significant difference between cases such as *Lavallee* and *Parks* in which social context is used to ensure that the law evolves in keeping with changes in social reality and cases, such as this one, where social context is apparently being used to assist in determining an issue of credibility.

(vii) Use of Social Context in Assessing Credibility

128 It is, of course, true that the assessment of the credibility of a witness is more of an "art than a science". The task of assessing credibility can be particularly daunting where a judge must assess the credibility of two witnesses whose testimony is diametrically opposed. It has been held that "[t]he issue of credibility is one of fact and cannot be determined by following a set of rules . . .": *White v. The King*, [1947]

S.C.R. 268, at p. 272. It is the highly individualistic nature of a determination of credibility, and its dependence on intangibles such as demeanour and the manner of testifying, that leads to the well-established principle that appellate courts will generally defer to the trial judge's factual findings, particularly those pertaining to credibility. See, for example, *W. (R.)*, *supra*.

129 However, it is also the individualistic nature of a determination of credibility that requires the judge, as trier of fact, to be particularly careful to be and to appear to be neutral. This obligation requires the judge to walk a delicate line. On one hand, the judge is obviously permitted to use common sense and wisdom gained from personal experience in observing and judging the trustworthiness of a particular witness on the basis of factors such as testimony and demeanour. On the other hand, the judge must avoid judging the credibility of the witness on the basis of generalizations or upon matters that were not in evidence.

130 When making findings of credibility it is obviously preferable for a judge to avoid making any comment that might suggest that the determination of credibility is based on generalizations rather than on the specific demonstrations of truthfulness or untrustworthiness that have come from the particular witness during the trial. It is true that judges do not have to remain passive, or to divest themselves of all their experience which assists them in their judicial fact finding. See *Brouillard v. The Queen*, [1985] 1 S.C.R. 39; *Commentaries on Judicial Conduct*, *supra*, at p. 12. Yet judges have wide authority and their public utterances are closely scrutinized. Neither the parties nor the informed and reasonable observer should be led to believe by the comments of the judge that decisions are indeed being made based on generalizations.

131 At the commencement of their testimony all witnesses should be treated equally without regard to their race, religion, nationality, gender, occupation or other characteristics. It is only after an individual witness has been tested and assessed that findings of credibility can be made. Obviously the evidence of a policeman, or any other category of witness, cannot be automatically preferred to that of accused persons, any more than the testimony of blue eyed witnesses can be preferred to those with gray eyes. That must be the general rule. In particular, any judicial indication that police evidence is always to be preferred to that of a black accused person would lead the reasonable and knowledgeable observer to conclude that there was a reasonable apprehension of bias.

132 In some circumstances it may be acceptable for a judge to acknowledge that racism in society might be, for example, the motive for the overreaction of a police officer. This may be necessary in order to refute a submission that invites the judge as trier of fact to presume truthfulness or untruthfulness of a category of witnesses, or to adopt some other form of stereotypical thinking. Yet it would not be acceptable for a judge to go further and suggest that all police officers should therefore not be believed or should be viewed with suspicion where they are dealing with accused persons who are members of a different race. Similarly, it is dangerous for a judge to suggest that a particular person overreacted because of racism unless there is evidence adduced to sustain this finding. It would be equally inappropriate to suggest that female complainants, in sexual assault cases, ought to be believed more readily than male accused persons solely because of the history of sexual violence by men against women.

133 If there is no evidence linking the generalization to the particular witness, these situations might leave the judge open to allegations of bias on the basis that the

credibility of the individual witness was prejudged according to stereotypical generalizations. This does not mean that the particular generalization -- that police officers have historically discriminated against visible minorities or that women have historically been abused by men -- is not true, or is without foundation. The difficulty is that reasonable and informed people may perceive that the judge has used this information as a basis for assessing credibility instead of making a genuine evaluation of the evidence of the particular witness' credibility. As a general rule, judges should avoid placing themselves in this position.

134 To state the general proposition that judges should avoid making comments based on generalizations when assessing the credibility of individual witnesses does not lead automatically to a conclusion that when a judge does so, a reasonable apprehension of bias arises. In some limited circumstances, the comments may be appropriate. Furthermore, no matter how unfortunate individual comments appear in isolation, the comments must be examined in context, through the eyes of the reasonable and informed person who is taken to know all the relevant circumstances of the case, including the presumption of judicial integrity, and the underlying social context.

135 Before applying these principles to the facts of this case, it may be helpful to review some selected examples of the way in which courts have dealt with allegations of bias in similar cases.

(viii) How Have Courts Addressed Allegations of Judicial Bias?

136 Allegations of reasonable apprehension of bias are entirely fact-specific. It follows that other cases in which courts have dealt with similar allegations are of

very limited precedential value. It is simply not possible to look at an individual case and conclude that the determination of the presence or absence of bias in that case must apply to the case at bar. Nonetheless, it is helpful to review some selected cases in which similar allegations have been made if only to observe the benchmarks against which the allegations were measured.

137 Thus, in *Bertram, supra*, some comments made by the trial judge during the course of a sentencing hearing suggested that he was predisposed to give effect to a joint sentencing submission before he had heard the details of the submission. Although the comments were described at p. 60 as "wholly inappropriate", Watt J. indicated that the remarks must not be looked at in isolation. On the basis of a review of the whole proceedings, Watt J. concluded that no reasonable apprehension of bias arose from the trial judge's conduct because he had on other occasions stressed his willingness to hear submissions on the question that he appeared to have predetermined. In the circumstances, therefore, it could not be said that a reasonable person hearing his comments, with knowledge of the case, would conclude that he might not be impartial. See also *Inquiry pursuant to s. 13(2) of Territorial Court Act, Re*, [1990] N.W.T.R. 337 (Bd. Inq.), at pp. 345-47; *R. v. Teskey* (1995), 167 A.R. 122 (Q.B.); *Lin, supra.*

138 In *Pirbhai Estate v. Pirbhai*, [1987] B.C.J. No. 2685, leave to appeal denied, [1988] 1 S.C.R. xii, the British Columbia Court of Appeal considered an allegation of reasonable apprehension of bias. The trial judge, in assessing the credibility of a witness commented that the demeanour of the witness had been shifty and evasive. The trial judge then said at p. 5, "[i]t is obvious to me that he carried on a successful business in Pakistan in a corrupt society . . . ." Seaton J.A. looked at the whole proceeding, and held, at pp. 5-6, that "I think the remarks unfortunate, but that

no reasonable person reading them would apprehend any bias on the part of the trial judge in this case". The remainder of the trial judge's reasons revealed that he came to his conclusions on credibility on the basis of the evidence, not on the basis of the kind of bias or prejudice suggested by his comments about the "corrupt society".

139 By contrast, a reasonable apprehension of bias was found in *Foto v. Jones* (1974), 45 D.L.R. (3d) 43 (Ont. C.A.). In that case, at p. 44, the trial judge in finding that the plaintiff in the case was not a credible witness stated that: "I regret to have to say that too many newcomers to our country have as yet not learned the necessity of speaking the whole truth. . . . They have not learned that frankness is essential to our system of law and justice". The Court of Appeal concluded that a reasonable apprehension of bias arose in that these were not acceptable ingredients of any judgment, and ought not to influence or appear to influence the trial judge's determination of credibility.

140 In the current appeal, the Crown's position is that in *Foto*, *supra*, the circumstances are precisely the same as in the case at bar. I disagree. In *Foto*, *supra*, the remarks of the trial judge were fundamental to his findings of credibility, and appeared to be the sole basis on which the witness was disbelieved. This is not the situation in the current appeal, which has to be assessed on its own particular facts, and in its own context.

141 These examples demonstrate that allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be

looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding.

C. *Application of These Principles to the Facts*

142 Did Judge Sparks' comments give rise to a reasonable apprehension of bias? In order to answer that question, the nature of the Crown's allegation against Judge Sparks must be clearly understood. At the outset, it must be emphasized that it is obviously not appropriate to allege bias against Judge Sparks simply because she is black and raised the prospect of racial discrimination. Further, exactly the same high threshold for demonstrating reasonable apprehension of bias must be applied to Judge Sparks in the same manner it would be to all judges. She benefits from the presumption of judicial integrity that is accorded to all who swear the judicial oath of office. The Crown bears the onus of displacing this presumption with "cogent evidence".

143 Similarly, her finding that she could not accept the evidence of Constable Stienburg cannot raise a reasonable apprehension of bias. Neither Constable Stienburg nor any other police officer has an automatic right to be believed, any more than does the accused R.D.S. or any other accused. Police officers cannot expect to be immune from a finding that their testimony is not credible on some occasions. The basic function of a trial judge to determine issues of credibility and make findings of fact would be rendered meaningless if the credibility of police officers were to be accepted without question whenever their evidence diverged from that given by another witness. An unfavourable finding relating to the credibility of Constable Stienburg could only give rise to an apprehension of bias if it could reasonably be perceived to have been made on the basis of stereotypical

generalizations, or as Scalia J. put it in *Liteky, supra*, on the basis of "wrongful or inappropriate" opinions not justified in the evidence.

144 The Crown contended that the real problem arising from Judge Sparks' remarks was the inability of the Crown and Constable Stienburg to respond to the remarks. In other words, the Crown attempted to put forward an argument that the trial was rendered unfair for failure to comply with "natural justice". This cannot be accepted. Neither Constable Stienburg nor the Crown was on trial. Rather, it is essential to consider whether the remarks of Judge Sparks gave rise to a reasonable apprehension of bias. This is the only basis on which this trial could be considered unfair.

145 Before finding that a reasonable apprehension of bias did arise Glube C.J.S.C. found that Judge Sparks conducted an acceptable review of all the evidence before making the comments that are the subject of the controversy. She concluded that if the decision had ended after the general review of the evidence and the resulting assessments of credibility, there would be no basis on which to impugn Judge Sparks' decision. I agree completely with this assessment. It is with the finding of a reasonable apprehension of bias that I must, with respect, differ.

146 A reading of Judge Sparks' reasons indicates that before she made the challenged comments, she had a reasonable doubt as to the veracity of the officer's testimony and had found R.D.S. to be a credible witness. She gave convincing reasons for these findings. It is clear that Judge Sparks was well aware that the burden rested on the Crown to prove all the elements of the offence beyond a reasonable doubt, and she applied that burden. None of the bases for reaching these initial conclusions on credibility was based on generalizations or stereotypes. Her

reasons for rejecting or accepting testimony could be applied to any witness, regardless of race or gender.

147 Did Judge Sparks' subsequent comments about race taint her findings of credibility? The unfortunate remarks took this form:

> The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.

148 The statement that police officers have been known to mislead the court, or to overreact is not in itself offensive. Police officers are subject to the same human frailties that affect and shape the actions of everyone. The remarks become more troubling, however, when it is stated that police officers do overreact in dealing with non-white groups.

149 The history of anti-black racism in Nova Scotia was documented recently by the *Royal Commission on the Donald Marshall Jr. Prosecution* (1989). It suggests that there is a realistic possibility that the actions taken by the police in their relations with visible minorities demonstrate both prejudice and discrimination. I do not propose to review and comment upon the vast body of sociological literature referred to by the parties. It was not in evidence at trial. In the circumstances it will suffice to say that they indicate that racial tension exists at least to some degree

between police officers and visible minorities. Further, in some cases, racism may have been exhibited by police officers in arresting young black males.

150 However, there was no evidence before Judge Sparks that would suggest that anti-black bias influenced this particular police officer's reactions. Thus, although it may be incontrovertible that there is a history of racial tension between police officers and visible minorities, there was no evidence to link that generalization to the actions of Constable Stienburg. The reference to the fact that police officers may overreact in dealing with non-white groups may therefore be perfectly supportable, but it is nonetheless unfortunate in the circumstances of this case because of its potential to associate Judge Sparks' findings with the generalization, rather than the specific evidence. This effect is reinforced by the statement "[t]hat to me indicates a state of mind right there that is questionable" which immediately follows her observation.

151 There is a further troubling comment. After accepting R.D.S.'s evidence that he was told to shut up, Judge Sparks added that "[i]t seems to be in keeping with the prevalent attitude of the day". Again, this comment may create a perception that the findings of credibility have been made on the basis of generalizations, rather than the conduct of the particular police officer. Indeed these comments standing alone come very close to indicating that Judge Sparks predetermined the issue of credibility of Constable Stienburg on the basis of her general perception of racist police attitudes, rather than on the basis of his demeanour and the substance of his testimony.

152 The remarks are worrisome and come very close to the line. Yet, however troubling these comments are when read individually, it is vital to note that

the comments were not made in isolation. It is necessary to read all of the comments in the context of the whole proceeding, with an awareness of all the circumstances that a reasonable observer would be deemed to know.

153 The reasonable and informed observer at the trial would be aware that the Crown had made the submission to Judge Sparks that "there's absolutely no reason to attack the credibility of the officer". She had already made a finding that she preferred the evidence of R.D.S. to that of Constable Stienburg. She gave reasons for these findings that could appropriately be made based on the evidence adduced. A reasonable and informed person hearing her subsequent remarks would conclude that she was exploring the possible reasons why Constable Stienburg had a different perception of events than R.D.S. Specifically, she was rebutting the unfounded suggestion of the Crown that a police officer by virtue of his occupation should be more readily believed than the accused. Although her remarks were inappropriate they did not give rise to a reasonable apprehension of bias.

154 A reasonable and informed person observing the entire trial and hearing the reasons would be aware that Judge Sparks did not conclude that Constable Stienburg misled the court or overreacted on the basis of the racial dynamics of the situation. This is clear from her observation "I am not saying that the Constable has misled the court" and "I am not saying that the officer overreacted". Although she went on to suggest that she believed he probably did overreact, she did not say that he did so because he was discriminating against R.D.S. on the basis of race. She links her findings that Constable Stienburg overreacted to the statement made to R.D.S.: "Shut up, shut up, or you'll be under arrest too".

155 Judge Sparks suggested that Constable Stienburg overreacted on some basis. Although she noted that he was young, she was careful not to make a final determination as to the reason for his overreaction. In fact, it was not necessary for her to resolve the question as to why the officer might have overreacted. The reasonable and informed observer would know that the Crown at all times bore the onus of proving the offence beyond a reasonable doubt. It was obvious that Judge Sparks had a reasonable doubt on the evidence. As long as she had a reasonable doubt regarding the veracity of the officer's testimony, R.D.S. was entitled to an acquittal. Judge Sparks' remarks could reasonably be taken as demonstrating her recognition that the Crown was required to prove its case, and that it was not entitled to use presumptions of credibility to satisfy its obligation.

156 Judge Sparks accepted the evidence of R.D.S. that he was told to shut up or he would be under arrest because that was the "prevalent attitude of the day". This comment is particularly unfortunate because of its potential to associate her findings of credibility with generalizations. However, it is ambiguous. It is not clear whether it refers to a prevalent attitude of anti-black racism, or the attitude that prevailed on the day in question. I accept that it refers to the specific day of the incident.

157 Finally, she concluded that "[a]t any rate", on the basis of her comments and all the evidence in the case, she was obliged to acquit. A reasonable, informed person reading the concluding statement would perceive that she has reached her determination that R.D.S. should be acquitted on the basis of all the evidence presented. The perception that her impugned remarks were made in response to the Crown's suggestion that she should automatically believe the police officer is reinforced by her use of the words "[a]t any rate".

158 A high standard must be met before a finding of reasonable apprehension of bias can be made. Troubling as Judge Sparks' remarks may be, the Crown has not satisfied its onus to provide the cogent evidence needed to impugn the impartiality of Judge Sparks. Although her comments, viewed in isolation, were unfortunate and unnecessary, a reasonable, informed person, aware of all the circumstances, would not conclude that they gave rise to a reasonable apprehension of bias. Her remarks, viewed in their context, do not give rise to a perception that she prejudged the issue of credibility on the basis of generalizations, and they do not taint her earlier findings of credibility.

159 Both Glube C.J.S.C. and the majority of the Court of Appeal correctly articulated the test to be applied when a reasonable apprehension of bias is alleged. However, in applying the test to the facts and circumstances of this case they failed to consider the impugned comments in context and to take into account the high threshold that must be met in order to find that a reasonable apprehension of bias has been established.

V. Conclusion

160 In the result the judgments of the Court of Appeal and of Glube C.J.S.C. are set aside and the decision of Judge Sparks dismissing the charges against R.D.S. is restored. I must add that since writing these reasons I have had the opportunity of reading those of Major J. It is readily apparent that we are in agreement as to the nature of bias and the test to be applied in order to determine whether the words or actions of a trial judge raise a reasonable apprehension of bias. The differences in our reasons lies in the application of the principles and test we both rely upon to the words of the trial judge in this case. The principles and the test we have both put

forward and relied upon are different from and incompatible with those set out by Justices L'Heureux-Dubé and McLachlin.

Appeal allowed, LAMER C.J. *and* SOPINKA *and* MAJOR JJ. *dissenting.*

Solicitor for the appellant: Dalhousie Legal Aid Service, Halifax.

Solicitor for the respondent: The Attorney General of Nova Scotia, Halifax.

Solicitor for the interveners the Women's Legal Education and Action Fund and the National Organization of Immigrant and Visible Minority Women of Canada: Women's Legal Education and Action Fund, Toronto.

Solicitor for the interveners the African Canadian Legal Clinic, the Afro-Canadian Caucus of Nova Scotia and the Congress of Black Women of Canada: African Canadian Legal Clinic, Toronto.

TAB 7

Date: 19980210
Docket:**C26792**

COURT OF APPEAL FOR ONTARIO

RE: **HER MAJESTY THE QUEEN (Respondent) v. JANET LYNN PARKER (Appellant)**

BEFORE: **McMURTRY C.J.O., CHARRON and BORINS JJ.A.**

COUNSEL: **Peter J. Harte for the appellant**

Gary T. Trotter for the respondent

HEARD: **February 2, 1998**

E N D O R S E M E N T

[1] This is an appeal from the decision of a summary conviction appeal court judge, dismissing the appellant's appeal from a conviction for impaired driving. The appeal court judge was not satisfied that the comments made by the trial judge, at the conclusion of the case for the Crown, in respect to the viability of the proposed defence of necessity gave rise to a reasonable apprehension of bias.

[2] Although we do not consider that it is inappropriate, at the conclusion of the case for the Crown, for the trial judge to canvas with defence counsel the defence which the accused intends to present and to express his, or her, tentative views concerning the viability of the defence, it is our view that in this appeal the trial judge went further than was appropriate. In his lengthy dialogue with defence counsel, in which he became argumentative at times, he made it clear that he saw no merit in the proposed defence. In our view, it appeared that he had pre-judged the merits of the defence adversely to the appellant.

[3] Although this was not raised by counsel for the appellant, in considering whether the trial judge's comments indicated an apprehension of bias, it is relevant to observe that, at the conclusion of the appellant's evidence, the trial judge intervened to cross-examine her in a way which reflected the views he had expressed earlier concerning the merits of her defence. A similar observation is warranted in respect to his cross-examination of the defence witness, Campbell.

[4] In dismissing the appeal, the appeal court judge concluded that the trial judge "did not exhibit bias under the circumstances." Read in the context of his reasons, it appears this conclusion was based on the fact that the trial judge permitted the appellant to present her defence and "did not make a final decision until he had heard all of the evidence," and because he correctly decided that the defence of necessity was not a defence to impaired driving in the circumstances of a badly impaired driver.

[5] In our view, the summary conviction appeal court judge erred in principle in the test which he applied to the determination of whether the comments of the trial judge gave rise to a reasonable apprehension of bias on the part of the appellant.

[6] In *R. v. S.(R.D.)* (1997), 118 C.C.C. (3d) 353 (S.C.C.) the Supreme Court of Canada reiterated that the test to be applied when it is alleged that a judge is not impartial is "whether the particular conduct gives rise to a reasonable apprehension of bias." At pp. 389 and 390, Cory J. stated:

> ... 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.... The test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude."

[7] Applying this test, it is our view that the hypothetical person described in the test, on listening to the dialogue between the trial judge and defence counsel concerning the proposed defence, would conclude that the trial judge had pre-judged the defence and lacked impartiality and that the appellant had not obtained a fair trial. Any reasonable person present in the courtroom would probably have believed that the conduct of the trial was unfair.

[8] It may well be that the defence of necessity was tenuous at best and that the trial judge reached the correct result in convicting the appellant. However, the fact the trial judge may have reached the right result does not mean that this court cannot interfere with it where it is satisfied that the manner in which the trial judge conducted the trial gave rise to a reasonable apprehension of bias. In this regard, we

join Krever J.A. who, on behalf of this court in *R. v. Scianna*, [1989] O.J. No. 100, adopted the following observations of Dubin J.A. in *Baker v. Hutchinson* (1977), 13 O.R. (2d) 591 at 596 and held that it applied to both civil and criminal trials:

> While it would appear that the plaintiff's case was tenuous at best, the conduct of the trial cannot be dependent on the merit of the cause. Every litigant is entitled to have his case fully presented and fairly considered.

[9] In our view, the interests of justice and the integrity of the criminal justice system can only be vindicated by allowing the appeal, setting aside the conviction and directing that there be a new trial.