EB-2011-0120

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 the **Canadian Distributed Antenna Systems Coalition** for certain orders under the *Ontario Energy Board Act*, 1998.

WRITTEN SUBMISSIONS OF

TORONTO HYDRO-ELECTRIC SYSTEM LIMITED

(On the issue of Dr. Roger Ware's expert testimony)

A. Introduction

1. At pages 3 and 4 of Procedural Order No. 5,[1] the Ontario Energy Board (the "Board") sought submissions on whether a conflict of interest or a reasonable apprehension of bias arises by having a member of the Market Surveillance Panel appear as an expert witness before a panel of the Board in an application.

2. In this case, Dr. Roger Ware, an expert retained by the Canadian Distributed Antenna Systems Coalition ("CANDAS" or the "Applicant"), is also a member of the Board's Market Surveillance Panel. For the reasons set out below, THESL submits that the Board should find that there is a conflict of interest and a reasonable apprehension of bias with respect to Dr. Ware in this proceeding.

B. Background

(i) The Market Surveillance Panel ("MSP")

3. The MSP is a panel of the Board. The mandate of the MSP is set out in OEB By-law #3 ("By-law #3).[2] As summarized on the Board's "Electricity Market Surveillance" web page,

[1] OEB Procedural Order No. 5 in EB-2011-0120, dated November 14, 2011, at pp. 3 to 4.
[2] OEB By-law #3 *Market Surveillance Panel*, in force since January 5, 2005, as recently amended in part by By-law #5 on January 11, 2008.

"The MSP monitors, investigates and reports [to the Board] on activities and behaviour in the Independent Electricity System Operator ("IESO")-administered markets in Ontario's electricity sector."[3]

4. The MSP's responsibilities include:

- Monitoring activities and behaviour in the IESO-administered markets and making recommendations to the Board regarding remedial action;
- Investigating market activities and the behaviour of specific market participants and making recommendations to the Board related to the results of its investigations; and
- Reporting to the Board on the results of its monitoring and investigations.[4]

5. A member of the Board's MSP is a Board insider. The MSP is part of the Board's hierarchy of panels. Even apart from its mandate and responsibilities, the MSP clearly has strong ties to the Board and access to highly sensitive information relating to market participants that is not publicly available. For example:

- Pursuant to article 2.1.2 of By-law #3, members of the MSP are appointed by the Management Committee of the Board.
- Pursuant to article 3.2.1 of By-law #3, the MSP may, with prior concurrence of the Board Chair, use the services of employees of the Board.
- Article 8 of By-law #3 clearly contemplates members of the MSP obtaining confidential information in the course of their duties.[5]

(i) Dr. Roger Ware

[3] OEB, "Electricity Market Surveillance", online: <http://www.ontarioenergyboard.ca/OEB/Industry/About+the+OEB/Electricity+Market+Surveillance> ["Market Surveillance webpage"].
[4] *Ibid.*
[5] Articles, 2.1.2, 3.2.1, and 8 of OEB By-law #3 *Market Surveillance Panel*, in force since January 5, 2005, as recently amended in part by By-law #5 on January 11, 2008.

6. Dr. Roger Ware ("Dr. Ware") is a professor of economics at Queen's University and has held full-time faculty positions for 31 years at the University of Toronto and Queen's University, and a visiting position at the University of California, Berkeley in 1987-88.

7. Dr. Ware has been retained by CANDAS in this proceeding and, in particular, has prepared and filed an expert report as part of CANDAS' evidence. It is safe to assume that as a condition of his retainer Dr. Ware is to be paid by CANDAS for his work in this regard.

8. Dr. Ware was appointed to the MSP by the Management Committee of the Board effective August 26, 2010 for a three year term.[6]

9. In its interrogatories on CANDAS' reply evidence filed on October 18, 2011, THESL raised the issue of a potential conflict of interest and/or reasonable apprehension of bias with respect to Dr. Ware's role as a paid expert for the Applicant and a member of the MSP.[7] This issue was explored by counsel for THESL during questioning of Dr. Ware at the November 4, 2011 Technical Conference.[8]

C. Reasonable Apprehension of Bias

(i) The Test for Reasonable Apprehension of Bias

10. The leading case which sets out the test for reasonable apprehension of bias is *Committee for Justice and Liberty v. National Energy Board*.[9] For an apprehension to be reasonable, it must be one that would be:

> "held by reasonable and rightminded people, applying themselves to the question and obtaining therefrom the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.

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[6] Curriculum Vitae of Dr. Roger Ware at p. 9, found at Appendix 1 to the CANDAS Reply Evidence of Dr. Roger Ware dated October 11, 2011; CANDAS' Responses THESL Interrogatory No. 18(a) dated October 26, 2011; and the Market Surveillance Panel webpage online at: http://www.ontarioenergyboard.ca/OEB/Industry/About+the+OEB/Electricity+Market+Surveillance.
[7] EB-2011-0120 THESL's Interrogatory No. 18 on CANDAS Reply Evidence, dated October 18, 2011 at pp. 12 to 13.
[8] EB-2011-0120 Technical Conference transcript dated November 4, 2011, at p. 96, line 24 to p. 101, line 6.
[9] [1978] 1 S.C.R. 369.

> Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."[10]

This test was recently endorsed and applied by the Board in its May 20, 2011 Decision and Order in EB-2011-0065 and EB-2011-0068 at p. 11.[11]

11. It is important to note that the relevant inquiry is not whether there is, in fact, either conscious or unconscious bias on the part of an adjudicator, but whether a reasonable person properly informed would apprehend that there was bias.[12]

12. It is well-established that members of boards with adjudicative functions, particularly quasi-judicial tribunals such as the Board, must be judged more strictly with respect to the application of this test.[13]

13. On its face, the retainer by a party of an expert who is also a member of a panel of the adjudicating body clearly gives rise to a reasonable apprehension of bias. This proposition is well-established in the case law. For example:

- In *Li v. The College of Physicians and Surgeons of Ontario*,[14] the Ontario Divisional Court held that there was a reasonable apprehension of bias where an expert retained by one of the parties was subsequent to her testimony appointed to a committee of the CPSO's discipline committee.
- In *Re Public Utilities Board*,[15] the Alberta Court of Appeal held that there was a reasonable apprehension of bias where a witness who gave evidence before the Public Utilities Board on behalf of an intervenor in a rate application was also retained by the Board as a consultant on the general issue of rate application analysis at the time that he testified.

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[10] *Ibid.*, at p. 394.
[11] OEB Decision and Order in EB-2011-0065 and EB-2011-0068, dated May 20, 2011, at p. 11.
[12] *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259.
[13] *Newfoundland Telephone Company Limited v. The Board of Commissioners of Public Utilities*, [1992] 1 S.C.R. 623 at para. 27.
[14] 2004 CanLII 32260 (Ont. Div. Ct.).
[15] 1985 ABCA 282.

- In *U.F.C.W., Local 1252 (In Trusteeship) v. Prince Edward Island (Labour Relations Board)*,[16] the P.E.I. Supreme Court held that there was a reasonable apprehension of bias where the business agent for a union seeking certification by the Labour Relations Board was a member of the Labour Relations Board (despite the fact that he did not sit on the panel hearing the application).

- In *Hutterian Bretheren Church of Starland v. Municipal District of Starland et al.*,[17] the Alberta Court of Appeal held that there was a reasonable apprehension of bias where an engineering advisor for a Municipality's Appeal Board was also retained as an expert for one of the parties to an appeal before the Board.

(i) Application of the Test

14. THESL submits that a reasonable person properly informed would, on a balance of probabilities, reasonably apprehend bias with respect to Dr. Ware in this proceeding based on the following:

- The Board has recognized Dr. Ware as a superior expert in his field, by virtue of having appointed him to the MSP over others. CANDAS has made allegations that LDCs could use their market power to unduly discriminate among Canadian carriers.[18] Similar market power issues are routinely considered by the MSP, and Dr. Ware holds himself out as an expert in the area.[19]

- The Board has greater trust and confidence in the opinion of Dr. Ware than in that of other experts, by virtue of having chosen to appoint him to the MSP.

- The Board has a loyalty to Dr. Ware because of its relationship with him.

- The Board would therefore accord more weight to the evidence of Dr. Ware than to evidence provided by another expert witness.

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[16] 1988 CarswellPEI 38 (S. C.).
[17] 1993 ABCA 76.
[18] EB-2011-0120 Application by CANDAS for Certain Relief re: Pole Access, dated April 21, 2011, at para. 2.9.
[19] The Market Surveillance Panel webpage online at: http://www.ontarioenergyboard.ca/OEB/Industry/About+the+OEB/Electricity+Market+Surveillance; and CANDAS Reply Evidence of Dr. Roger Ware dated October 11, 2011 at para. 2;

- Dr. Ware was retained by CANDAS and presumably is in receipt of a direct financial benefit from one or all of the commercial parties that make up the CANDAS consortium.
- As a member of the MSP, Dr. Ware has access to and can utilize the services of Board staff. He is therefore in a position to exert influence over the Board, and has access to resources which a truly independent consultant would not have access to.
- As outlined below, Dr. Ware's retainer is a violation of the Board's conflict of interest policies.
- There has been no attempt to ensure that Dr. Ware has had no direct contact with members of the Board panel hearing this Application.

D. Conflict of Interest

15. In any event, quite apart from the conclusion that there is a reasonable apprehension of bias with respect to Dr. Ware, THESL submits that he is giving expert testimony on behalf of CANDAS while he is a currently serving member of the MSP; this is also a clear violation of the Board's conflict of interest rules.

16. The conflict of interest rules adopted by the Board are set out in (a) the regulation to the *Public Service of Ontario Act, 2006*,[20] entitled *Conflict of Interest Rules for Public Servants (Ministry) and Former Public Servants (Ministry)* (the "Regulation"), [21] and (b) the "Addendum to the Code of Conduct" (the "Addendum").[22]

17. Pursuant to section 1.4.1 of the Addendum, "Members" to which the Code applies (and by extension, to which the Regulation applies) include members of the MSP.[23]

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[20] O. Reg. 381/07.
[21] See August 28, 2008 letter from the OEB to Stakeholders re: "New Conflict of Interest Rules", wherein the Board adopts the Regulation, acknowledging that all Board members and employees must follow the conflict of interest rules set out therein.
[22] OEB, "Addendum to the Code of Conduct: Financial Transactions, Post-Service Restrictions, and Proceedings", undated.
[23] *Ibid.*, section 1.4.1.

18. Pursuant to section 8 of the Regulation, Members are prohibited from becoming employed by or engaging in a business or undertaking outside his or her employment if, in connection with the employment or undertaking, any person would derive an advantage from the public servant's employment as a public servant.[24] In THESL's submission, this provision prohibits Dr. Ware from being engaged by CANDAS.

19. Furthermore, pursuant to section 2.2.3 of the Addendum, Members are prohibited from having a direct or indirect financial interest in a person whose conduct, rates or revenues are regulated by the Board.[25] THESL submits that this must also prevent Dr. Ware from having a financial interest in a Board applicant such as CANDAS. There is no principled reason for distinguishing between a conflict of interest in respect of a Board-regulated entity and a conflict of interest in respect of a Board applicant.

20. The Addendum also provides at section 2.5 that certain categories of former Members are prohibited from dealing with the Board in the course of any proceeding for a period of time set out therein:

> **Section 2.5 Post-Service Restrictions**
>
> 2.5.1 Except with the prior written authorization of the Chair, none of the persons described below in this section shall deal with the Board, or any Member or employee on behalf of any person, whether in the course of an application, a proceeding, a policy initiative, or informally, during the period set out below commencing on the date that the person ceases to be a full-time Member or employee:
>
> (a) in the case of a former full-time Member or Chief Operating Officer, one year;
>
> (b) in the case of a former managing director, director, manager, chief compliance officer, chief regulatory auditor, general counsel, associate general counsel, or Board Secretary, six months; and
>
> (c) in the case of a former lawyer who was employed by the Board for more than two years, three months.[26]

[24] *Supra* note 20, section 8.
[25] *Supra* note 22, section 2.2.3.
[26] *Ibid*., section 2.5.

21. In THESL's submission, the restrictions at section 2.5.1(a) of the Addendum apply to full-time members of the MSP, given that, pursuant to section 1.4.1, the term "Members" in the Addendum includes the members of the MSP. It is therefore a further conflict of interest violation for Dr. Ware to appear before the Board during his term.

E. Order Sought

22. In summary, Dr. Ware's retainer by CANDAS creates both a reasonable apprehension of bias pursuant to the principles of administrative law and case law directly on point, and a conflict of interest pursuant to the Board's own conflict of interest policies. THESL therefore asks the Board to find that there is a conflict of interest and a reasonable apprehension of bias in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: November 20, 2011

Original signed by J. Mark Rodger

BORDEN LADNER GERVAIS LLP
Counsel for the intervenor
Toronto Hydro-Electric System Limited

J. Mark Rodger

Schedule "A"
List of Authorities

1. OEB Procedural Order No. 5 in EB-2011-0120, dated November 14, 2011.
2. OEB By-law #3 *Market Surveillance Panel*, in force since January 5, 2005.
3. *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369.
4. OEB Decision and Order in EB-2011-0065 and EB-2011-0068, dated May 20, 2011.
5. *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259.
6. *Newfoundland Telephone Company Limited v. The Board of Commissioners of Public Utilities*, [1992] 1 S.C.R. 623.
7. *Li v. The College of Physicians and Surgeons of Ontario*, 2004 CanLII 32260 (Ont. Div. Ct.).
8. *Re Public Utilities Board*, 1985 ABCA 282.
9. *U.F.C.W., Local 1252 (In Trusteeship) v. Prince Edward Island (Labour Relations Board)*, 1988 CarswellPEI 38 (S. C.).
10. *Hutterian Brethren Church of Starland v. Starland (Municipal District)*, 1993 ABCA 76.
11. *Conflict of Interest Rules for Public Servants (Ministry) and Former Public Servants (Ministry)*, O. Reg. 381/07.
12. OEB Letter to Stakeholders re: "New Conflict of Interest Rules", dated August 28, 2008.
13. OEB, "Addendum to the Code of Conduct: Financial Transactions, Post-Service Restrictions, and Proceedings", undated.

TAB 1

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2011-0120

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 Canadian Distributed Antenna Systems Coalition for certain orders under the *Ontario Energy Board Act, 1998*.

PROCEDURAL ORDER No. 5

The Canadian Distributed Antenna Systems Coalition ("CANDAS") filed an application on behalf of its member companies with the Ontario Energy Board (the "Board"), received on April 25, 2011 seeking certain orders of the Board, including requests for interim relief.In letters to the Board dated May 3, 2011 and June 7, 2011, CANDAS withdrew its requests for interim relief. The current application therefore seeks the following:

1. Orders under subsections 70(1.1) and 74(1) of the *Ontario Energy Board Act, 1998* (the "Act"): (i) determining that the Board's RP-2003-0249 Decision and Order dated March 7, 2005 (the "CCTA Order") requires electricity distributors to provide "Canadian carriers", as that term is defined in the *Telecommunications Act*, S.C. 1993, c. 38, with access to electricity distributor's poles for the purpose of attaching wireless equipment, including wireless components of distributed antenna systems ("DAS"); and (ii) directing all licensed electricity distributors to provide access if they are not so doing;

2. in the alternative, an Order under subsection 74(1) of the Act amending the licences of all electricity distributors requiring them to provide Canadian carriers with timely access to the power poles of such distributors for the

purpose of attaching wireless equipment, including wireless components of DAS;

3. an Order under subsections 74(1) and 70(2)(c) of the Act amending the licences of all licensed electricity distributors requiring them to include, in their Conditions of Service, the terms and conditions of access to power poles by Canadian carriers, including the terms and conditions of access for the purpose of deploying the wireless and wireline components of DAS, such terms and conditions to provide for, without limitation: commercially reasonable procedures for the timely processing of applications for attachments and the performance of the work required to prepare poles for attachments ("Make Ready Work"); technical requirements that are consistent with applicable safety regulations and standards; and a standard form of licensed occupancy agreement, such agreement to provide for attachment permits with terms of at least 15 years from the date of attachment and for commercially reasonable renewal rights;

4. its costs of this proceeding in a fashion and quantum to be decided by the Board pursuant to section 30 of the Act; and

5. such further and other relief as the Board may consider just and reasonable.

The Board issued a Notice of Application and Hearing on May 11, 2011. A number of parties requested and were granted intervenor status in this proceeding.

On September 23, 2011, the Board issued Procedural order No. 3 in which it set certain filing dates and dates for a Technical Conference, a Settlement Conference and the related filing of any Settlement Proposal, and an oral hearing in this matter.

Motions by CCC and CANDAS

On October 31, 2011, counsel for the Consumers Council of Canada ("CCC"), an intervenor in this proceeding, filed a Notice of Motion for an order of the Board requiring Toronto Hydro Electric System Limited ("THESL") to provide further and better responses to certain interrogatories filed by CCC. On November 3, 2011, counsel for CANDAS also filed a Notice of Motion for an order of the Board requiring THESL to provide further and better responses to certain interrogatories filed by CANDAS .

The Board decided to hear both motions in writing and issued Procedural Order No. 4 on November 3, 2011, in which it set the dates for filing of written submissions in relation to the motions. In Procedural Order No. 4, the Board also set new dates for the Settlement Conference and for the related filing of any Settlement Proposal.

On November 8, 2011, CANDAS filed an Amended Notice of Motion requesting further and better answers from THESL to questions that were not part of CANDAS' November 3rd Motion. In addition, both CCC and CANDAS filed their respective written submissions on November 9, 2011 (i.e. two days after the date set in Procedural Order No. 4).

On November 10, 2011, THESL filed a letter with the Board in which it requested that the date for filing its written submission on the motions be extended to November 15, 2011, in part, as a result of the CCC's and CANDAS' late filing of their respective submissions.

The Board will grant a short extension to the dates established in paragraphs 2 and 3 of Procedural Order No. 4.

Expert Testimony

The Board notes that Dr. Roger Ware was retained by CANDAS and provided expert evidence in this proceeding. The Board also notes in its interrogatory No. 18 directed to Dr. Ware, THESL raised a number of questions in relation to Dr. Ware's status as a member of the Market Surveillance Panel and in part (g) of that interrogatory asked "...how does Dr. Ware propose to address parties' legitimate concerns about an actual or apparent bias arising in the Board's decision making process given that the Board is now being asked to consider evidence prepared by one of their own colleagues (another Board Panel member)?" THESL pursued this issue further at the Technical Conference held on November 4, 2011 by questioning of Dr. Ware and by again raising the question of a potential "...perception of bias by having one panel member appear as an expert witness before another panel of the Board...".[1]

In light of the concerns raised by THESL, the Board is of the view that it is appropriate to invite submissions from the parties in this proceeding with respect to the issue raised

[1] EB-2011-0120, Technical Conference Transcript, November 4, 2011, at pages 100-101.

by THESL's counsel. Specifically, the Board would like to receive submissions on whether a conflict of interest or a reasonable apprehension of bias arises by having a member of the Market Surveillance Panel appear as an expert witness before a panel of the Board in an application. The Board will therefore set dates for filing of written submissions and hearing oral arguments in relation to this issue. In addition, as a result of these new procedural steps, the Board will rescind the dates for the Settlement Conference and for the related filing of any Settlement Proposal that were set in paragraphs 5 and 6 of Procedural Order No. 4 and the dates for the oral hearing that were set in paragraph 8 of Procedural Order No. 3.

Please be aware that this procedural order may be amended, and further procedural orders may be issued from time to time.

THE BOARD ORDERS THAT:

1. The date in **paragraph 2** of Procedural Order No. 4 is extended to **November 15, 2011.**

2. The date in **paragraph 3** of Procedural Order No. 4 is extended to **November 18, 2011.**

3. THESL and any intervenors of the view that there could be a perception of bias by having a member of the Market Surveillance Panel appear as an expert witness before a panel of the Ontario Energy Board, shall file their written submission with the Board and copy all parties in this proceeding by **November 21, 2011.**

4. CANDAS and any intervenors that disagree with the view expressed in paragraph 3 above shall file their written submission with the Board and copy all parties in this proceeding by **November 28, 2011.**

5. THESL and intervenors referred to in paragraph 3 above, shall file their written reply submission with the Board and copy all parties in this proceeding by **December 5, 2011.**

6. An oral hearing will be held beginning at 9:30 a.m. on **December 12, 2011** in the Board's hearing room on the 25th Floor to hear the parties' oral arguments in relation to the issue of perception of bias.

7. **Paragraph 8** of Procedural Order No. 3 and **paragraphs 5 and 6** of Procedural Order No. 4 are hereby rescinded. The Board will establish new dates by Procedural Order on a later date.

All filings to the Board must quote file number EB-2011-0120, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the BoardSec@ontarioenergyboard.ca. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file seven paper copies. If you have submitted through the Board's web portal an e-mail is not required. All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

DATED at Toronto, November 14, 2011

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

TAB 2

Consolidated Version
Amendments made by the Management Committee
on January 25, 2006 and on January 11, 2008

ONTARIO ENERGY BOARD

BY-LAW #3
MARKET SURVEILLANCE PANEL

BE IT ENACTED as a By-law of the Board as follows:

ARTICLE 1

INTERPRETATION

1.1 Definitions

1.1.1 In this By-law, unless the context otherwise requires:

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

"Board" means the Ontario Energy Board continued as a corporation without share capital under S.O. 2003, c. 3;

"Board Chair" means the Member designated by the Lieutenant Governor in Council under the *Act* to be the Chair of the Board;

"confidential information" means information that is not public and that is in its nature confidential, proprietary or commercially sensitive;

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

"employee" means any person employed by another person, whether on a permanent basis, on a fixed term contract or on secondment, and includes (a) a probationary employee, (b) a temporary employee, and (c) in the case of the Board, a Crown employee providing services to the Board under an agreement contemplated in section 4.16(4) of the *Act*, but does not include a Member or a member of the Panel;

"IESO" has the meaning given to it in the *Electricity Act*;

"Management Committee" means the management committee established in accordance with section 4.2 of the *Act*;

"market manual" has the meaning given to it in the market rules;

"market rules" means the rules made under section 32 of the *Electricity Act*;

"MAU" means the market assessment unit established by the IESO;

"Member" means a member appointed to the Board by the Lieutenant Governor in Council under the *Act*, and includes the Board Chair and the Vice-Chairs;

"Minister" has the meaning given to it in the *Act*;

"Monitoring Document" has the meaning given to it in section 4.2.1;

"Panel" means the Market Surveillance Panel continued as the Market Surveillance Panel of the Board under the *Act*;

"Panel Chair" means the person appointed by the Board Chair as the chair of the Panel;

"Protocol" means a protocol or agreement between the Board and the IESO relating to the use by the Panel of the services of employees of the IESO, including employees forming part of the MAU, and to such other matters as may be required to give effect to this By-law; and

"Vice-Chair" means a Member designated by the Lieutenant Governor in Council under the *Act* to be a Vice-Chair of the Board.

1.2 Interpretation

1.2.1 Except as provided in section 1.1.1, words and expressions that are defined in the *Act* or the *Electricity Act* have the same meanings when used in this By-law.

1.2.2 In this By-law, unless the context otherwise requires:

(a) words importing the singular include the plural and vice versa;

(b) words importing a gender include any gender;

(c) words importing a person include (i) an individual, (ii) a company, sole proprietorship, partnership, trust, joint venture, association, corporation or other private or public body corporate; and (iii) any government, government agency or body, regulatory agency or body or other body politic or collegiate;

(d) a reference to a section or paragraph is to a section or paragraph of this By-law;

(e) a reference to any statute, regulation, proclamation, order in council, ordinance, by-law, resolution, rule, order or directive includes all statutes, regulations, proclamations, orders in council, ordinances, by-laws, resolutions, rules, orders or directives varying, consolidating, re-enacting, extending or replacing it;

(f) a reference to a document, including a statute, includes an amendment or supplement to, or replacement of, that document, as well as any schedule, appendix or other annexure thereto;

(g) the expression "including" means including without limitation, and the expression "include", "includes" and "included" shall be interpreted accordingly; and

(h) a list of elements preceded by the word "includes", "including", "such as" or similar language shall not be interpreted as excluding any other element, whether of the same or a different nature or scope.

ARTICLE 2

COMPOSITION, APPOINTMENT, REAPPOINTMENT, REMOVAL AND REMUNERATION

2.1 Composition, Appointment and Qualification

2.1.1 The Panel shall consist of at least three qualified persons. The quorum for the transaction of business at any meeting of the Panel consists of a majority of members. At all meetings of the Panel every question shall be decided by a majority of the votes cast on the question. In the case of an equality of votes, the Panel Chair will be entitled to a second or casting vote. Where there is a vacancy or vacancies in the Panel, the remaining members may exercise all the powers of the Panel so long as a quorum of the Panel remains in office.

2.1.2 Subject to section 2.1.3, the Management Committee shall from time to time appoint the members of the Panel.

2.1.3 A person that was a member of the Market Surveillance Panel of the Independent Electricity Market Operator prior to the date of coming into force of section 4.3.1(1) of the *Act* shall remain in office until:

(a) the person is removed from office in accordance with section 2.3.1;

(b) the person dies or resigns; or

(c) the person's term of office expires,

whichever is the earlier.

2.1.4 Except as provided in section 4.3.1(4) of the *Act*, no person shall be appointed to the Panel if that person is disqualified under section 4.3.1(3) of the *Act* or under section 2.1.5.

2.1.5 The following persons are disqualified from being a member of the Panel:

(a) a person who is less than eighteen years of age;

(b) a person who is of unsound mind and has been so found by a court in Canada or elsewhere;

(c) a person who is not an individual;

(d) a person who has the status of a bankrupt; or

(e) a person who is an employee of the Government of Ontario.

2.1.6 No person shall be appointed to the Panel unless such person has:

(a) provided to the Management Committee such certification as the Management Committee may require attesting to the fact that the person is not disqualified under sections 2.1.4 and 2.1.5; and

(b) entered into such agreement with the Board as the Board Chair, on the advice of the Management Committee, determines appropriate in order to give effect to the provisions of this By-law.

2.1.7 The Management Committee may from time to time require a member of the Panel to provide to the Management Committee such certification as the Management Committee may require attesting to the fact that the person has not become disqualified under section 2.1.4 or 2.1.5.

2.2 Term and Reappointment

2.2.1 Subject to section 2.2.2, a member of the Panel shall serve for a term of three years.

2.2.2 A person may be appointed under this By-law to serve for an initial term of more or less than three years or may be reappointed under this By-law to serve for a term of less than three years as the Management Committee considers appropriate to ensure that the terms of two or more members of the Panel do not expire at or about the same time.

2.2.3 Subject to sections 2.2.4 and 2.2.5, a member of the Panel may be reappointed by the Management Committee for a further term of up to three years, provided that no person may serve on the Panel for more than three consecutive terms.

2.2.4 The term of a member of the Panel appointed to replace a predecessor member whose term had not yet expired shall be for the balance of the predecessor's term and shall not, provided such term is no greater than two years, be counted for purposes of determining the member's eligibility for reappointment.

2.2.5 The term of a person that was a member of the Market Surveillance Panel of the Independent Electricity Market Operator on or at any time prior to the date of coming into force of section 4.3.1(1) of the *Act* shall not be counted for purposes of determining that person's eligibility for appointment or reappointment under this By-law.

2.3 Ceasing to Hold Office

2.3.1 The Management Committee may remove any member of the Panel from office at any time, with or without cause, as the Management Committee determines appropriate.

2.3.2 A member of the Panel ceases to hold office when the member:

(a) dies or resigns;

(b) is removed in accordance with section 2.3.1; or

(c) becomes disqualified under section 2.1.4 or 2.1.5.

2.4 Panel Chair

2.4.1 The Board Chair shall from time to time appoint a member of the Panel as Panel Chair. Where the office of Panel Chair is vacant, the Board Chair may appoint a member of the Panel as Acting Panel Chair pending appointment of a Panel Chair. Except as otherwise determined by the Board Chair, the Acting Panel Chair shall have the same powers and perform the same duties as the Panel Chair.

2.4.2 The Panel Chair shall act as the designated representative of the Panel in relation to the Panel's relationship with the Board in such manner as the Board Chair determines appropriate.

2.5 Remuneration

2.5.1 Members of the Panel shall be paid such remuneration for their services as shall be fixed from time to time by the Management Committee.

2.5.2 Members of the Panel shall be entitled to be reimbursed for expenses properly and actually incurred by them in connection with the performance of their duties.

2.6 Code of Conduct/Conflict of Interest

2.6.1 The Board Chair may adopt a code of conduct and conflict of interest guidelines applicable to members of the Panel. Members of the Panel shall comply with such code of conduct and conflict of interest guidelines.

ARTICLE 3

PANEL DUTIES, ASSISTANCE, PROTOCOL, AUDIT AND PANEL WEB PAGE

3.1 Duties

3.1.1 The Panel shall have the duties and perform the activities assigned to it in the *Electricity Act* and under sections 3.1.2 to 3.1.7.

3.1.2 The Panel shall direct the work of and supervise the MAU in accordance with and to the extent provided in the Protocol.

3.1.3 The Panel shall monitor activities related to the IESO-administered markets and the conduct of market participants in accordance with Article 4.

3.1.4 The Panel shall conduct investigations into activities related to the IESO-administered markets or the conduct of a market participant in accordance with Article 5.

3.1.5 The Panel shall conduct reviews of the IESO-administered markets in accordance with Article 6.

3.1.6 The Panel may provide such advice or assistance to the IESO as the IESO may request on matters that arise under the market rules, as more specifically set out in, and in accordance with the provisions of, the Protocol.

3.1.7 The Panel shall perform such other activities or functions as the Board Chair may assign to it in relation to the surveillance of electricity markets.

3.2 Assistance to the Panel

3.2.1 The Panel may, with the prior concurrence of the Board Chair, use the services of employees of the Board.

3.2.2 The Panel may, with the prior concurrence of the Board Chair, use the services of other persons having technical or professional expertise that the Panel considers necessary for the fulfillment of its duties.

3.2.3 The Panel shall comply with such restrictions and conditions as may be imposed by the Board Chair in relation to the use of the services referred to in sections 3.2.1 and 3.2.2.

3.3 Protocol

3.3.1 A member of the Panel shall comply with all provisions of the Protocol that apply to members of the Panel.

3.3.2 A member of the Panel shall promptly notify the Board Chair of:

(a) any violation of the Protocol by any person; and

(b) any perceived inefficiencies or difficulties in relation to the application of the Protocol.

3.4 Audit

3.4.1 The activities of the Panel shall be audited in accordance with such procedures as may be adopted from time to time by the Board Chair.

3.5 Panel Web Page

3.5.1 The Board shall maintain a page on its website for the purpose of posting:

(a) written reports and other documents required by this By-law to be posted on the Board's website;

(b) the manner in which persons may contact a member of the Panel; and

(c) such other information as the Board Chair considers appropriate in relation to the Panel and the duties of the Panel.

ARTICLE 4

MONITORING

4.1 Monitoring

4.1.1 The Panel shall monitor, evaluate and analyse activities related to the IESO-administered markets and the conduct of market participants with a view to:

(a) identifying inappropriate or anomalous market conduct by a market participant, including unilateral or interdependent behaviour resulting in gaming or in abuses or possible abuses of market power;

(b) identifying activities of the IESO that may have an impact on market efficiencies or effective competition;

(c) identifying actual or potential design or other flaws and inefficiencies in the market rules and in the rules and procedures of the IESO;

(d) identifying actual or potential design or other flaws in the overall structure of the IESO-administered markets and assessing whether any one or more specific aspects of the underlying structure of the IESO-administered markets is consistent with the efficient and fair operation of a competitive market; and

(e) recommending remedial actions to mitigate the conduct, flaws and inefficiencies referred to in paragraphs (a) to (d).

4.1.2 For the purpose of carrying out the monitoring, evaluation and analysis activities referred to in section 4.1.1, the Panel has the power to compel the production of information from a market participant and to enter upon the premises of a market participant as authorized by the *Electricity Act.*

4.1.3 The Panel shall prepare and deliver reports in relation to its activities under this section 4.1 in accordance with sections 7.1 and 7.5.

4.2 Monitoring Documents

4.2.1 The Panel shall adopt and from time to time amend as required the following documents (each a "Monitoring Document"):

(a) a detailed catalogue of all of the data and/or categories of data that the Panel or the MAU will have the need or means of acquiring directly from market participants;

(b) a catalogue of the monitoring indices that the Panel or the MAU will use to analyze the data so required; and

(c) such other information requirements and evaluation criteria as the Panel considers appropriate for the purpose of enabling it to effectively carry out the monitoring function referred to in section 4.1.1.

4.2.2 Prior to adopting or amending a Monitoring Document under section 4.2.1, the Panel shall provide a copy of the Monitoring Document or amendment to the Board Chair. Subject to section 4.2.3, the Board Chair shall cause such Monitoring Document or amendment to be posted on the Board's website. Such posting shall be accompanied by a notice inviting the IESO and market

participants to comment on the Monitoring Document or amendment within the time indicated in the notice.

4.2.3 No Monitoring Document referred to in paragraph 4.2.1(b) or 4.2.1(c) nor any amendment to such Monitoring Document shall be posted on the Board's website for comment under section 4.2.2 if the Board Chair, on the advice of the Panel, determines that such posting is reasonably likely to compromise the work of the MAU or the Panel.

4.2.4 The Panel retains the discretion to adopt a Monitoring Document or an amendment to a Monitoring Document notwithstanding any comments received in opposition thereto.

4.2.5 Where the Panel adopts or amends a Monitoring Document, the Panel shall provide a copy of the Monitoring Document or amendment to the Board Chair. Subject to section 4.2.6, the Board Chair shall cause such Monitoring Document or amendment to be posted on the Board's website.

4.2.6 No Monitoring Document referred to in paragraph 4.2.1(b) or 4.2.1(c) nor any amendment to such Monitoring Document adopted by the Panel under this section 4.2 shall be posted on the Board's website if the Board Chair, on the advice of the Panel, determines that such posting is reasonably likely to compromise the work of the MAU or the Panel.

4.2.7 Nothing in this section 4.2 shall be interpreted as precluding the Panel from undertaking such monitoring, evaluation or analysis as the Panel determines appropriate for the purposes of carrying out the monitoring activities referred to in section 4.1.1.

4.2.8 A Monitoring Document or an amendment to a Monitoring Document adopted by the Market Surveillance Panel of the Independent Electricity Market Operator prior to the date of coming into force of section 4.3.1(1) of the *Act* and included in a market manual prior to that date shall be deemed to have been adopted by the Panel under this By-law. Such Monitoring Document or amendment shall be posted on the Board's website.

ARTICLE 5

INVESTIGATIONS

5.1 Investigations

5.1.1 The Panel may conduct an investigation into any activities related to the IESO-administered markets or the conduct of a market participant:

(a) where the Panel considers such investigation to be warranted as a result of the monitoring activities referred to in section 4.1.1 or as a result of a review referred to in Article 6;

(b) upon receipt of a complaint or referral under section 5.1.3; or

(c) upon being requested to do so by the Board Chair.

5.1.2 Where the Panel intends to commence an investigation under paragraph 5.1.1(a) or 5.1.1(b), the Panel shall so notify the Board Chair.

5.1.3 Any person other than the Board Chair that wishes the Panel to conduct an investigation into any matter referred to in section 5.1.1, or any board, agency or tribunal that wishes to refer any such matter to the Panel for investigation, shall make a complaint or referral in writing setting out:

(a) the name and address of the complainant or person referring the matter;

(b) the particulars of the complaint or referral;

(c) any information or facts supporting the complaint or referral; and

(d) the signature of the person making the complaint or referral or, where that person is not an individual, the signature of a duly authorized representative of the person.

5.1.4 The Panel may refuse to commence an investigation into any complaint or matter referred to it under section 5.1.3 where the Panel determines that:

(a) the complaint or referral is frivolous, vexatious or otherwise not material; or

(b) the subject matter of the complaint or referral is within the jurisdiction of another person, board, agency or tribunal.

5.1.5 The Panel may, once it has commenced an investigation into any complaint or matter referred to it under section 5.1.3, terminate that investigation where the Panel determines that:

(a) the complaint or referral is frivolous, vexatious or otherwise not material; or

(b) the subject matter of the complaint or referral is within the jurisdiction of another person, board, agency or tribunal.

5.1.6 The Panel may, prior to making a determination under section 5.1.4 or 5.1.5, request that the person making the complaint or referral provide additional information relating to the complaint or referral.

5.1.7 Where the Panel makes a determination under section 5.1.4 or 5.1.5, the Panel shall notify the Board Chair in writing of the determination and of the reasons for the determination. The Board Chair shall, unless the Board Chair gives a direction to the Panel under section 5.1.8, notify the following of the Panel's determination:

(a) the person that filed the complaint or referral; and

(b) where the investigation relates to the conduct of a person, the person that is the subject matter of the investigation.

5.1.8 The Panel shall, upon being directed to do so by the Board Chair:

(a) commence an investigation that the Panel had previously determined not to commence under section 5.1.4; or

(b) resume an investigation that the Panel had terminated under section 5.1.5.

5.1.9 Where the Panel has commenced an investigation, the Panel shall upon determining that there is a *prima facie* case in respect of the conduct of a person that is the subject matter of the investigation, notify that person of the commencement of the investigation. The Panel shall not be required to so notify the person if the Panel reasonably determines, and the Board Chair confirms, that such notification will jeopardize the investigation.

5.1.10 Where the Panel has commenced an investigation, the Panel shall:

(a) periodically advise the Board Chair of the progress of the investigation; and

(b) where the investigation was commenced under section 5.1.1(b), inform the person that filed the complaint or referral of the outcome of the investigation upon being requested in writing to do so by that person.

5.1.11 For the purposes of carrying out an investigation, the Panel has the power to examine and compel the production of any documents or other things, to summon and compel testimony and to enter upon premises and search and seize as authorized by the *Electricity Act*.

5.1.12 The Panel shall notify the Board Chair prior to exercising any of the powers referred to in section 5.1.11.

5.1.13 The Panel shall prepare and deliver reports in relation to an investigation in accordance with sections 7.2 and 7.5.

ARTICLE 6

REVIEWS

6.1 Reviews

6.1.1 The Panel may, with the prior concurrence of the Board Chair, undertake a review of any actual or potential flaws or inefficiencies referred to in section 4.1.1(c) or 4.1.1(d).

6.1.2 The Panel shall prepare and deliver reports in relation to a review in accordance with sections 7.3 and 7.5.

ARTICLE 7

REPORTING

7.1 General Reporting

7.1.1 The Panel shall, not less than semi-annually and more frequently if so requested by the Board Chair, submit to the Board Chair written reports on matters pertaining to its responsibilities under this By-law including:

(a) a summary of reports provided to the Panel by the MAU;

(b) a summary of all complaints or referrals filed with the Panel; and

(c) a summary of all investigations or reviews commenced by the Panel.

Once annually, such report shall contain the Panel's general assessment of the state of the IESO-administered markets, including their efficiency and competitiveness.

7.1.2 Where the Panel, in carrying out its responsibilities, identifies that a market participant may be acting contrary to or in non-compliance with statutory authority falling within the jurisdiction of a person, board, agency or tribunal, the Panel shall prepare and submit a written report to that effect to the Board Chair. The Board Chair shall thereafter forward the relevant information to the head of the relevant authority.

7.1.3 The Panel shall provide to the Board Chair such briefings and updates regarding the performance by the Panel of its duties and activities as the Board Chair may request.

7.2 Report During or Following Investigation

7.2.1 Upon completion of an investigation under Article 5, the Panel shall prepare a written report that sets out, among other information:

(a) the matter that was investigated;

(b) the paragraph of section 5.1.1 under which the investigation was commenced;

(c) the findings of the Panel;

(d) the response of a person under section 7.2.2, if applicable; and

(e) the recommendations of the Panel, if any, and the reasons for such recommendations.

7.2.2 Where the Panel intends to include in a report referred to in section 7.2.1 findings to the effect that a person has engaged in inappropriate or anomalous conduct, the Panel must discuss its findings with the person prior to including such findings in the report. The Panel must also give the person a reasonable opportunity to respond in writing to the allegations. Where the person has not made any response within such reasonable time, the person shall be deemed to have elected to make no response.

7.2.3 A report referred to in section 7.2.1 shall be provided to the Board Chair, the IESO and any other person that the Panel considers appropriate. Where the Panel intends to provide the report to any such other person, the Panel shall so notify the Board Chair. The Board Chair may also provide the report to such persons as the Board Chair considers appropriate.

7.2.4 A report referred to in section 7.2.1 in respect of an investigation relating to the conduct of a person shall be provided by the Board Chair to that person unless the Board Chair, on the advice of the Panel, determines that such disclosure is reasonably likely to compromise the work of the MAU or the Panel. In such a case, the Board Chair shall provide the person with a redacted version of the report from which any portions that could reasonably compromise the work of the MAU or the Panel have been deleted.

7.2.5 Where the Panel determines that action is urgently required in respect of a matter that is revealed during an investigation, the Panel shall promptly make an interim written report to that effect to the Board Chair containing the applicable recommendation. Where the urgent action or recommendation that is the subject of the interim report is a matter within the authority or control of the IESO, the Panel shall also provide a copy of the report to the Chief Executive Officer of the

IESO. The Board Chair may provide the report to such persons as the Board Chair considers appropriate.

7.3 Report Following Review

7.3.1 Upon completion of a review under Article 6, the Panel shall prepare a written report that sets out, among other information:

(a) the matter that was reviewed;

(b) the manner in which the matter came to the attention of the Panel;

(c) the findings of the Panel; and

(d) the recommendations of the Panel, if any, and the reasons for such recommendations.

7.3.2 A report referred to in section 7.3.1 shall be provided to the Board Chair. The Board Chair shall provide such report to the IESO and to such other person as the Board Chair considers appropriate.

7.4 Publication

7.4.1 Subject to section 7.5, all written reports of the Panel shall be posted on the Board's website.

7.5 Confidentiality

7.5.1 Where a written report referred to in this Article contains confidential information obtained by the Panel by compulsory procedures in the course of its duties under this By-law, the Panel shall prepare one or more redacted versions of the report from which the confidential information has been deleted as may be required to enable the dissemination and publication of the report in accordance with this Article.

7.5.2 Where a written report referred to in this Article contains confidential information obtained by the Panel other than by compulsory procedures in the course of its duties, the Panel shall prepare one or more redacted versions of the report from which the confidential information has been deleted as may be required to enable the dissemination and publication of the report in accordance with this Article.

7.5.3 Sections 7.5.1 and 7.5.2 do not apply in relation to any confidential information that is the subject of an order of the Panel under section 8.2.3.

7.6 Provision of Data

7.6.1 Where the Panel receives a request from a market participant for the provision of data collected or created by the Panel during the course of the monitoring activities referred to in section 4.1.1, the Panel shall so notify the Board Chair.

7.6.2 The Board Chair may, provided that the data is not confidential information, authorize the provision of such data unless the Board Chair, on the advice of the Panel, determines that such provision is reasonably likely to compromise the work of the MAU or the Panel.

7.6.3 A reasonable fee may be charged for the provision of data under section 7.6.2.

ARTICLE 8

CONFIDENTIALITY

8.1 Panel Members

8.1.1 A member of the Panel shall enter into such confidentiality agreement with the Board as the Board Chair determines appropriate.

8.1.2 A member of the Panel shall comply with such protocols as the Board Chair considers appropriate regarding the confidentiality and security of records, data handling and communications with Members and employees of the Board.

8.2 Confidential Information Obtained by Panel

8.2.1 Subject to section 8.2.2, no employee or Member of the Board or member of the Panel shall communicate or allow access to or inspection of confidential information that is obtained by the Panel in the course of its duties under this By-law except in the ordinary course of that person's duties.

8.2.2 Except to the extent prohibited by law, confidential information that is obtained by the Panel in the course of its duties may be disclosed:

(a) to the Board Chair in a report referred to in Article 7 and to the IESO in a report referred to in section 7.2.1, 7.2.5 or 7.3.1;

(b) to the MAU where such disclosure is required to enable the MAU to conduct activities in support of the Panel as described in the Protocol;

(c) to a police force or other investigatory agency or to a regulatory agency;

(d) where required by a summons or direction of the Board;

(e) where the Panel has made an order under section 8.2.3; or

(f) where required by law, judicial order or order of a regulatory body having authority over the matter.

8.2.3 In accordance with section 37.3(3) of the *Electricity Act,* the Panel shall make an order permitting the disclosure of confidential information obtained by the Panel by compulsory procedures in the course of its duties if, after giving the person from whom the confidential information was obtained and any other person who, in the opinion of the Panel, is an interested party an opportunity to be heard, the Panel is of the opinion that disclosure is in the public interest.

8.2.4 Where the Panel intends to make an order under section 8.2.3, the Panel shall so advise the Board Chair prior to giving any notice referred to in that section.

8.3 Designated Confidential Information

8.3.1 For the purposes of section 4.3.1(8) of the *Act*, a record of information that:

(a) relates to a market participant and that was classified as "confidential" by the Independent Electricity Market Operator prior to the date of coming into force of section 4.3.1(1) of the *Act* and included in a market manual prior to that date shall be deemed to have been designated by the Panel as "confidential" under this By-law; and

(b) relates to a market participant and that was classified as "highly confidential" by the Independent Electricity Market Operator prior to the date of coming into force of section 4.3.1(1) of the *Act* and included in a market manual prior to that date shall be deemed to have been designated by the Panel as "highly confidential" under this By-law.

8.3.2 The Panel may from time to time designate other records of information relating to a market participant as "confidential" or "highly confidential" for the purposes of section 4.3.1(8) of the *Act.* Prior to so designating records of information, the Panel shall so notify the Board Chair.

ARTICLE 9

COMING INTO FORCE

9.1.1 This By-law shall come into force on January 5, 2005.

9.1.2 This By-law shall cease to have effect on the date on which a regulation made under section 4.3.1(9) of the *Act* comes into force.

TAB 3

IN THE MATTER OF the National Energy Board Act;

AND IN THE MATTER OF an application by Canadian Arctic Gas Pipeline Limited for a certificate of public convenience and necessity for the construction and operation of a natural gas pipeline, under File No. 1555-C46-1;

AND IN THE MATTER OF applications by Foothills Pipe Lines Ltd., Westcoast Transmission Company Limited and The Alberta Gas Trunk Line (Canada) Limited for certificates of public convenience and necessity for the construction and operation of certain natural gas pipelines, under File Nos. 1555-F2-3, 1555-W5-49 and 1555-A34-1;

AND IN THE MATTER OF an application by Alberta Natural Gas Company Ltd. for a certificate of public convenience and necessity for the construction and operation of certain extensions to its natural gas pipeline, under File No. 1555-A2-10;

AND IN THE MATTER OF a submission by The Alberta Gas Trunk Line Company Limited, under File No. 1555-A5-2;

AND IN THE MATTER OF an application by the National Energy Board pursuant to section 28(4) of the Federal Court Act.

The Committee for Justice and Liberty, The Consumers' Association of Canada, Canadian Arctic Resources Committee *Appellants*;

and

The National Energy Board, Canadian Arctic Gas Pipeline Limited and The Attorney General of Canada *et al.* *Respondents.*

1976: March 8, 9 and 10; 1976: March 11.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson and de Grandpré JJ.

DANS L'AFFAIRE DE la Loi sur l'Office national de l'énergie;

ET DANS L'AFFAIRE D'une demande présentée sous la cote 1555-C46-1 par Pipeline de gaz arctique canadien Limitée en vue d'obtenir un certificat de commodité et nécessité publiques pour la construction et l'exploitation d'un pipe-line pour le transport du gaz naturel;

ET DANS L'AFFAIRE DES demandes présentées sous les cotes 1555-F2-3, 1555-W5-49 et 1555-A34-1 par Foothills Pipe Lines Ltd., Westcoast Transmission Company Limited et Alberta Gas Trunk Line (Canada) Limited en vue d'obtenir des certificats de commodité et nécessité publiques pour la construction et l'exploitation de certains pipe-lines pour le transport du gaz naturel;

ET DANS L'AFFAIRE D'une demande présentée sous la cote 1555-A2-10 par Alberta Natural Gas Company Ltd., en vue d'obtenir un certificat de commodité et nécessité publiques pour la construction et l'exploitation de certaines extensions à son pipe-line pour le transport du gaz naturel;

ET DANS L'AFFAIRE D'une requête présentée par Alberta Gas Trunk Line Company Limited sous la cote 1555-A5-2;

ET DANS L'AFFAIRE D'une demande présentée par l'Office national de l'énergie en vertu de l'article 28(4) de la Loi sur la Cour fédérale.

Committee for Justice and Liberty, L'Association des consommateurs du Canada et Canadian Arctic Resources Committee *Appelants*;

et

L'Office national de l'énergie, Pipeline de gaz arctique canadien Limitée et le procureur général du Canada *et autres.* *Intimés.*

1976: 8, 9 et 10 mars; 1976: 11 mars.

Présents: Le juge en chef Laskin et les juges Martland, Judson, Ritchie, Spence, Pigeon, Dickson et de Grandpré.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Judicial review — Boards and tribunals — Natural justice — Bias or apprehended bias — Application for certificate of public necessity — National Energy Board Act, R.S.C. 1970, c. N-6, s. 44.

The issue in this appeal arose in connection with the organization of hearings by the National Energy Board to consider competing applications for a Mackenzie Valley pipeline, *i.e.* applications for a certificate of public convenience and necessity under s. 44 of the *National Energy Board Act*, R.S.C. 1970, c. N-6. The Board assigned Mr. Crowe, Chairman of the Board, and two other of its members to be the panel to hear the applications. The appellants were recognised by the Board as "interested persons" under s. 45 of the Act. The appellants objected to the participation of Mr. Crowe as a member of the panel because of reasonable apprehension or reasonable likelihood of bias: Mr. Crowe became Chairman and Chief Executive Officer of the National Energy Board on October, 15, 1973. Immediately prior to that date he was president of the Canada Development Corporation, having assumed that position late in 1971 after first having been a provisional director following the enactment of the *Canada Development Corporation Act*, 1971 (Can.), c. 49. The objects of that Corporation included assisting in business and economic development and investing in shares, securities, ventures, enterprises and property to that end. As Corporation president and as its representative Mr. Crowe was associated with the Gas Arctic-Northwest Project Study Group which considered the physical and economic feasibility of a northern natural gas pipeline to bring natural gas to southern markets. The Agreement setting up the Study Group brought together two groups of companies which merged their efforts and pursuant to the agreement set up two companies of which Canadian Arctic Gas Pipeline Limited was one. Mr. Crowe was an active participant in the Study Group as a member of its Management Committee and a member and subsequently vice-chairman of its Finance, tax and accounting committee and during his period of membership of the Management Committee he participated in the seven meetings held during that time and joined in a unanimous decision of the Committee on June 27, 1973, respecting the ownership and routing of a Mackenzie Valley pipeline. The Canada Development Corporation remained a full participant in the Study Group until long after the applications were made for certificates of public convenience and necessity and until after the hearings had commenced, in effect to the time of the

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit administratif — Contrôle judiciaire — Offices et tribunaux — Justice naturelle — Partialité ou crainte de partialité — Demande de certificat de nécessité publique — Loi sur l'Office national de l'énergie, S.R.C. 1970, c. N-6, art. 44.

La question en litige dans le présent pourvoi a été soulevée à l'occasion de la préparation des audiences devant l'Office national de l'énergie pour l'examen des demandes en conflit au sujet d'un pipe-line dans la vallée du Mackenzie. Il s'agissait de demandes de certificats de commodité et de nécessité publiques en vertu de l'art. 44 de la *Loi sur l'Office national de l'énergie*. L'Office désigna M. Crowe, son président, et deux de ses membres pour entendre les demandes. Les appelants ont été reconnus par l'Office comme des «personnes intéressées» en vertu de l'art. 45 de la Loi. Les appelants se sont opposés à ce que M. Crowe siège en l'instance parce qu'il pouvait y avoir une cause raisonnable de crainte ou une probabilité raisonnable de partialité: Crowe est devenu président et fonctionnaire exécutif en chef de l'Office national de l'énergie le 15 octobre 1973. Jusqu'à cette date, il était président de la Corporation de développement du Canada, poste qu'il occupait depuis la fin de 1971, après avoir été un des administrateurs provisoires à la suite de l'adoption de la *Loi sur la Corporation de développement du Canada*, 1971 (Can.), c. 49. Les objets de la Corporation comprenaient l'aide aux entreprises et au développement économique et des investissements à cette fin dans des actions, valeurs, initiatives, entreprises et biens. En qualité de président et de représentant de la Corporation, M. Crowe fut membre du Gas Arctic-Northwest Project Study Group qui étudia la praticabilité physique et économique d'un pipe-line de gaz naturel reliant le grand nord au sud du pays. La Convention mettant sur pied le groupe d'étude réunissait deux groupes de compagnies qui mirent en commun leurs efforts et, conformément à la convention, créèrent deux compagnies dont l'une était Pipe-line de gaz artique canadien Limitée. M. Crowe participait activement au groupe d'étude en qualité de membre de son comité de direction et comme membre et subséquemment comme vice-président du comité des finances, des impôts et de la comptabilité; à titre de membre du comité de direction, il a assisté aux sept réunions tenues par le comité pendant cette période et il a participé à la décision unanime de ce dernier le 27 juin 1973, concernant la propriété et le tracé du pipe-line de la vallée du MacKenzie. La Corporation de développement du Canada a continué de participer à part entière au groupe d'étude longtemps après le dépôt des demandes

reference of the question of reasonable apprehension of bias in Mr. Crowe to the Federal Court of Appeal. Further, during the period of Mr. Crowe's association with the Study Group as the representative of the Canada Development Corporation the latter contributed $1,200,000 to the Study Group as its share of expenses. The National Energy Board referred to the Federal Court of Appeal the following question, "Would the Board err in rejecting the objection and in holding that Mr. Crowe was not disqualified from being a member of the panel on grounds of reasonable apprehension or reasonable likelihood of bias?" pursuant to the Federal Court Act, 1970-71-72 (Can.), c. 1, s. 28(4). That Court answered in the negative.

Held (Martland, Judson and de Grandpré JJ. dissenting): The appeal should be allowed.

Per Laskin C.J. and Ritchie, Spence, Pigeon and Dickson JJ.: In dealing with applications under s. 44 of the *National Energy Board Act*, the function of the Board is quasi-judicial, or, at least, is a function which the Board must discharge in accordance with the rules of natural justice: and if not necessarily the full range of such rules as would apply to a Court (though the Board is a court of record under s. 10 of the Act) certainly to a degree that would reflect integrity of its proceedings and impartiality in the conduct of those proceedings. A reasonable apprehension of bias arises where there exists a reasonable probability that the judge might not act in an entirely impartial manner. The issue in this situation was not one of actual bias. Thus the facts that Mr. Crowe had nothing to gain or lose either through his participation in the Study Group or in making decisions as chairman of the National Energy Board and that his participation in the Study Group was in a representative capacity became irrelevant. The participation of Mr. Crowe in the discussions and decisions leading to the application by Canadian Arctic Gas Pipeline Limited for a certificate did however give rise to a reasonable apprehension, which reasonably well-informed persons could properly have, of a biased appraisal and judgment of the issues to be determined. The test of probability or reasoned suspicion of bias, unintended though the bias may be, is grounded in the concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and emphasis is added to this concern in this case by the fact that the Board is to have regard for the public interest.

Per Martland, Judson and de Grandpré JJ. dissenting: The proper test to be applied was correctly expressed by

de certificat de commodité et nécessité publiques et après l'ouverture des audiences, en fait, jusqu'à ce que la question relative à la crainte de partialité de la part de M. Crowe soit soumise à la Cour d'appel fédérale. En outre, durant la période où M. Crowe a participé au groupe d'étude, à titre de représentant de la Corporation de développement du Canada, celle-ci a contribué 1.2 million de dollars aux dépenses occasionnées par les activités du groupe d'étude. Conformément à la *Loi sur la Cour fédérale*, 1970-1971-1972 (Can.), c. 1, art. 28(4), l'Office national de l'énergie a déféré la question suivante à la Cour d'appel fédérale: «l'Office ferait-il erreur en rejetant les objections et en statuant que M. Crowe n'est pas inhabile à faire partie du comité pour cause de crainte ou probabilité raisonnable de partialité»? Cette Cour a répondu par la négative.

Arrêt (les juges Martland, Judson et de Grandpré étant dissidents): Le pourvoi doit être accueilli.

Le juge en chef Laskin et les juges Ritchie, Spence, Pigeon et Dickson: Le rôle de l'Office, lorsqu'il se prononce sur une demande présentée en vertu de l'art. 44 de la *Loi sur l'Office national de l'énergie*, est quasi judiciaire ou, du moins, doit être exercé conformément aux principes de justice naturelle; et s'il n'est pas nécessairement soumis à toutes les règles qui s'appliquent à un tribunal (bien que l'Office soit une cour d'archives en vertu de l'art. 10 de la Loi) il l'est certainement à un degré suffisant pour être tenu de manifester l'intégrité de sa procédure et son impartialité. Il y a crainte raisonnable de partialité lorsqu'il y a une probabilité raisonnable que le juge n'agisse pas de manière tout à fait impartiale. Aucune question de partialité réelle n'est soulevée en l'espèce. Le fait que M. Crowe n'avait rien à gagner ni à perdre, en participant au groupe d'étude ou en rendant des décisions en qualité de président de l'Office national de l'énergie et qu'il participait au groupe d'étude en qualité de représentant n'est pas pertinent. La participation de M. Crowe aux discussions et décisions menant à la demande faite par Pipeline de gaz arctique canadien Limitée en vue d'obtenir un certificat a pu donner naissance, chez des personnes assez bien renseignées, à une crainte raisonnable de partialité dans l'appréciation des questions à trancher. Ce critère de probabilité ou crainte raisonnable de partialité, quelque involontaire que soit cette partialité, se fonde sur la préoccupation qu'il ne faut pas que le public puisse douter de l'impartialité des organismes ayant un pouvoir décisionnel et cette préoccupation se retrouve en l'espèce puisque l'Office est tenu de prendre en considération l'intérêt du public.

Les juges Martland, Judson et de Grandpré, dissidents: La Cour d'appel a défini avec justesse le critère

the Court of Appeal. 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 of "what would an informed person, viewing the matter realistically and practically—conclude?" There is no real difference between the expression found in the decided cases "reasonable apprehension of bias", "reasonable suspicion of bias" or "real likelihood of bias" but the grounds for the apprehension must be substantial. The question of bias in a member of a court of justice cannot be examined in the same light as that in a member of an administrative tribunal entrusted with an administrative discretion. While the basic principle that natural justice must be rendered is the same its application must take into account the special circumstances of the tribunal. By its nature the National Energy Board must be staffed with persons of experience and expertise. The considerations which underlie its operations are policy oriented. The basic principle in matters of bias must be applied in the light of the circumstances of the case at bar. The Board is not a court nor is it a quasi-judicial body. In hearing the objection of interested parties and in performing its statutory function the Board has the duty to establish a balance between the administration of policies which they are duty bound to apply and the protection of the various interests spelled out in s. 44 of the Act. In reaching its decision the Board draws upon its experience, upon that of its own experts and upon that of all agencies of the Government of Canada. The Board is not and cannot be limited to deciding the matter on the sole basis of the representations made before it. In the circumstances of the case the Court of Appeal rightly concluded that no reasonable apprehension of bias by reasonable, right minded and informed persons exists.

[*Ghirardosi v. Minister of Highways for British Columbia*, [1966] S.C.R. 367; *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833; *Szilard v. Szasz*, [1955] S.C.R. 3 referred to.]

APPEAL from a judgment of the Federal Court of Appeal[1] which answered in the negative a question referred to it by the National Energy Board. Appeal allowed, Martland, Judson, and de Grandpré JJ. dissenting.

[1] [1976] 2 F.C. 20.

applicable. La crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. Ce critère consiste à se demander «à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question ... de façon réaliste et pratique?». Il n'y a pas de différence véritable entre les expressions que l'on retrouve dans la jurisprudence, qu'il s'agisse de «crainte raisonnable de partialité», «de soupçon raisonnable de partialité», ou «de réelle probabilité de partialité», mais les motifs de crainte doivent être sérieux. La question de la partialité ne peut être examinée de la même façon dans le cas d'un membre d'un tribunal judiciaire que dans le cas d'un membre d'un tribunal administratif que la loi autorise à exercer ses fonctions de façon discrétionnaire. Le principe fondamental est le même: la justice naturelle doit être respectée. En pratique cependant, il faut prendre en considération le caractère particulier du tribunal. De par la nature même de l'organisme, les membres de l'Office national de l'énergie doivent être expérimentés et compétents. Les considérations sur lesquelles se fondent ses activités sont d'ordre politique. Le principe fondamental régissant les questions de partialité doit s'appliquer à la lumière des circonstances en l'espèce. L'Office n'est pas un tribunal judiciaire ni un organisme quasi judiciaire. En étudiant les objections des parties intéressées et en exerçant les fonctions que lui a attribuées la loi, l'Office est tenu de maintenir l'équilibre entre les lignes de conduite qu'il a l'obligation d'appliquer et la protection des différents intérêts mentionnés à l'art. 44 de la Loi. Pour parvenir à une décision, l'Office se fonde sur son expérience, sur celle de ses experts et celle de tous les organismes du gouvernement du Canada. Il est évident que l'Office ne peut être obligé de se fonder uniquement sur les représentations qui lui sont faites pour trancher la question. Compte tenu des circonstances en l'espèce, la Cour d'appel a eu raison de conclure que des personnes sensées, raisonnables et bien informées ne pouvaient avoir de crainte raisonnable de partialité.

[Arrêts mentionnés: *Ghirardosi c. Le Ministre de la Voirie de la Colombie-Britannique*, [1966] R.C.S. 367; *Blanchette c. C.I.S. Ltd.*, [1973] R.C.S. 833; *Szilard c. Szasz*, [1955] R.C.S. 3.]

POURVOI contre un arrêt de la Cour d'appel fédérale[1] qui a répondu par la négative à une question déférée par l'Office national de l'énergie. Pourvoi accueilli, les juges Martland, Judson et de Grandpré étant dissidents.

[1] [1976] 2 C.F. 20.

Ian Binnie, and *R. J. Sharpe*, for the appellants.

Hyman Soloway, Q.C., and *R. D. McGregor*, for the National Energy Board.

G. W. Ainslie, Q.C., for the Attorney General of Canada.

D. M. M. Goldie, Q.C., for Canadian Arctic Gas Pipeline Ltd.

R. J. Gibbs, Q.C., and *G. J. Gorman, Q.C.*, for Foothills Pipe Lines Ltd.

John Hopwood, Q.C., for Alberta Gas Trunk Line Co. Ltd.

W. G. Burke-Robertson, Q.C., for Alberta Gas Trunk Line (Canada) Ltd.

B. A. Crane, for Trans-Canada Pipelines Ltd.

J. R. Smith, Q.C., for Alberta Natural Gas Co. Ltd.

The judgment of Laskin C.J. and Ritchie, Spence, Pigeon and Dickson JJ. was delivered by

THE CHIEF JUSTICE—On March 11, 1976, this Court gave judgment in an appeal from a decision of the Federal Court of Appeal which answered in the negative a question referred to it by the National Energy Board pursuant to s. 28(4) of the *Federal Court Act*, 1970-71-72 (Can.), c. 1. The question so referred was as follows:

Would the Board err in rejecting the objections and in holding that Mr. [Marshall] Crowe was not disqualified from being a member of the panel on grounds of reasonable apprehension or reasonable likelihood of bias?

This Court allowed the appeal, set aside the decision of the Federal Court of Appeal and declared that the question should be answered in the affirmative. It stated in its formal judgment on March 11, 1976 that reasons of the majority and dissenting judges would be delivered later. The reasons of the majority now follow.

The issue referred to the Federal Court of Appeal and which came by leave to this Court arose in connection with the organization of hearings by the National Energy Board to consider

Ian Binnie, et *R. J. Sharpe*, pour les appelants.

Hyman Soloway, c.r., et *R. D. McGregor*, pour l'Office national de l'énergie.

G. W. Ainslie, c.r., pour le procureur général du Canada.

D. M. M. Goldie, c.r., pour Pipeline de gaz arctique canadien Limitée.

R. J. Gibbs, c.r., et *G. J. Gorman, c.r.*, pour Foothills Pipe Lines Ltd.

John Hopwood, c.r., pour Alberta Gas Trunk Line Co. Ltd.

W. G. Burke-Robertson, c.r., pour Alberta Gas Trunk Line (Canada) Ltd.

B. A. Crane, pour Trans-Canada Pipelines Ltd.

R. J. Smith, c.r., pour Alberta Natural Gas Co. Ltd.

Le jugement du juge en chef Laskin et des juges Ritchie, Spence, Pigeon et Dickson a été rendu par

LE JUGE EN CHEF—Le 11 mars 1976, cette Cour a rendu jugement sur le pourvoi à l'encontre de l'arrêt de la Cour d'appel fédérale qui a répondu négativement à la question déférée par l'Office national de l'énergie, en vertu du par. (4) de l'art. 28 de la *Loi sur la Cour fédérale*, 1970-71-72 (Can.), c. 1. La question déférée est la suivante:

L'Office ferait-il erreur en rejetant les objections et en statuant que M. [Marshall] Crowe n'est pas inhabile à faire partie du comité pour cause de crainte ou probabilité raisonnable de partialité?

Cette Cour a accueilli le pourvoi, infirmé l'arrêt de la Cour d'appel fédérale et statué qu'il fallait répondre affirmativement à la question. Le jugement du 11 mars 1976 précisait que les motifs de la majorité et des juges dissidents seraient remis plus tard. Voici les motifs de la majorité.

La question déférée à la Cour d'appel fédérale et, sur autorisation, soumise à cette Cour, a été soulevée à l'occasion de la préparation des audiences devant l'Office national de l'énergie pour l'exa-

competing applications for a Mackenzie Valley pipeline, that is, applications for a certificate of public convenience and necessity under s. 44 of the *National Energy Board Act*, R.S.C. 1970, c. N-6. One of the applications, filed on March 21, 1974 by Canadian Arctic Gas Pipeline Limited was in respect of a proposed natural gas pipeline and associated works to move natural gas in an area of the Northwest Territories (the Mackenzie River Delta and Beaufort Basin) to markets in southern Canada and also to move natural gas in Alaska to markets in other states of the United States. This application was supplemented by other material filed on January 23, 1975, on March 10, 1975 and on May 8, 1975. The competing application, filed in March, 1975 by Foothills Pipe Lines Ltd., was for a natural gas pipeline to move natural gas only from the area in the Northwest Territories, mentioned above, to southern Canada markets and not from Alaska as well.

On April 17, 1975, the National Energy Board assigned Mr. Crowe, Chairman of the Board and two other members (of the eight members in all who then constituted the Board) to be the panel, with Mr. Crowe presiding, to hear the applications, beginning on October 27, 1975. Under s. 45 of its governing statute the Board was empowered to give standing at its s. 44 hearings to "interested persons", and it was then obliged to hear their objections to the granting of a certificate of public convenience and necessity. The three appellants in this case, The Committee for Justice and Liberty Foundation, The Consumers' Association of Canada and the Canadian Arctic Resources Committee were recognized by the Board as "interested persons" as were other organizations and individuals. In all, some 88 parties were represented at the commencement of the hearings, and of these 80 indicated that they had no objection to Mr. Crowe continuing as a member and presiding over the hearings. One of the non-objectors was Canadian Arctic Gas Pipeline Limited, one of the applicants for a certificate. It was its counsel who raised on July 9, 1975 the question of reasonable apprehension of bias on Mr. Crowe's part in favour of his client by reason of Mr. Crowe's association with a

men des demandes en conflit au sujet d'un pipeline dans la vallée du Mackenzie. Il s'agit des demandes de certificats de commodité et nécessité publiques, en vertu de l'art. 44 de la *Loi sur l'Office national de l'énergie*, S.R.C. 1970, c. N-6. Une des demandes, déposée le 21 mars 1974 par Pipeline de gaz arctique canadien Limitée, vise un projet de pipe-line et d'ouvrages connexes pour transporter du gaz naturel d'une région des Territoires du Nord-ouest (le delta de la rivière Mackenzie et le bassin Beaufort) jusqu'au sud du Canada ainsi que pour transporter du gaz naturel de l'Alaska à d'autres états américains. Des documents supplémentaires à l'appui de cette demande ont été déposés les 23 janvier, 10 mars et 8 mai 1975. L'autre demande, déposée en mars 1975 par Foothills Pipe Lines Ltd., vise la construction d'un pipe-line seulement pour transporter du gaz naturel de la région susmentionnée des Territoires du Nord-ouest jusqu'au sud du Canada méridional et non pas en partant également de l'Alaska.

Le 17 avril 1975, l'Office national de l'énergie désigna M. Crowe, son président, et deux des huit autres membres pour entendre les demandes, sous la présidence de M. Crowe, à compter du 27 octobre 1975. En vertu de l'art. 45 de sa loi constitutive, l'Office est habilité à reconnaître aux «personnes intéressées» le droit d'intervenir aux auditions prévues à l'art. 44, et il doit ensuite entendre leurs objections à la délivrance d'un certificat de commodité et nécessité publiques. Les trois appelants en l'espèce, le Committee for Justice and Liberty Foundation, l'Association des consommateurs du Canada et le Canadian Arctic Resources Committee ont été reconnus par l'Office comme des «personnes intéressées», de même que d'autres associations et individus. En tout, quelque 88 parties étaient représentées au début des audiences et de celles-ci, 80 ont indiqué qu'elles n'avaient aucune objection à ce que M. Crowe siège en l'instance et préside les audiences. Pipeline de gaz arctique canadien Limitée, une des parties qui demandent un certificat, est de ceux qui n'avaient pas objection. C'est cependant son avocat qui, le 9 juillet 1975, a suggéré que l'on se demande s'il pouvait y avoir cause raisonnable de crainte de partialité chez M. Crowe en faveur de

Study Group out of whose deliberations and decisions the applicant was born.

When the hearings opened on October 27, 1975 as scheduled, Mr. Crowe read a statement detailing his involvement with the Study Group. Objections were then invited. In the result, the question mentioned at the beginning of the reasons was referred to the Federal Court of Appeal on October 29, 1975. I turn now to deal with the facts upon which the issue of reasonable apprehension of bias is raised.

Mr. Marshall Crowe became Chairman of the National Energy Board and its Chief Executive Officer on October 15, 1973. Immediately prior to that date he was president of the Canada Development Corporation, assuming that position late in 1971, after first being a provisional director following the enactment of the *Canada Development Corporation Act* by 1971 (Can.), c. 49. The principal objects of this corporation, then wholly-owned by the Government of Canada, are set out in s. 6(1) of its constituent Act which reads as follows:

> **6.** (1) The objects of the company are:
>
> (*a*) to assist in the creation or development of businesses, resources, properties and industries of Canada;
>
> (*b*) to expand, widen and develop opportunities for Canadians to participate in the economic development of Canada through the application of their skills and capital;
>
> (*c*) to invest in the shares or securities of any corporation owning property or carrying on business related to the economic interests of Canada; and
>
> (*d*) to invest in ventures or enterprises, including the acquisition of property, likely to benefit Canada;
>
> and shall be carried out in anticipation of profit and in the best interests of the shareholders as a whole.

As president of the Canada Development Corporation and as its representative, Mr. Crowe became associated with the Gas Arctic-Northwest Project Study Group which, pursuant to an agree-

sa cliente parce qu'il avait fait partie d'un groupe de travail dont les délibérations et décisions avaient abouti à la constitution de la requérante.

A l'ouverture des audiences à la date prévue, le 27 octobre 1975, M. Crowe a lu une déclaration exposant en détail sa participation au groupe d'étude. On a ensuite demandé aux parties de faire valoir leurs objections. Finalement la question énoncée au début a été déférée à la Cour d'appel fédérale, le 29 octobre 1975. J'en viens maintenant aux faits sur lesquels on prétend fonder la crainte raisonnable de partialité.

Monsieur Marshall Crowe est devenu président et fonctionnaire exécutif en chef de l'Office national de l'énergie le 15 octobre 1973. Jusqu'à cette date, il était président de la Corporation de développement du Canada, poste qu'il occupait depuis la fin de 1971, après avoir été un des administrateurs provisoires à la suite de l'adoption de la *Loi sur la Corporation de développement du Canada*, 1971 (Can.), c. 49. Les principaux objets de cette compagnie, dont toutes les actions étaient alors détenues par le gouvernement du Canada, sont énoncés au par. (1) de l'art. 6 de sa loi constitutive, comme suit:

> **6.** (1) La compagnie a pour objets:
>
> *a*) d'aider à la création ou au développement d'entreprises, de ressources, de biens et d'industries du Canada;
>
> *b*) d'augmenter, d'élargir et de développer, pour les Canadiens, les possibilités de participation au développement économique du Canada, en utilisant leurs compétences et leurs capitaux;
>
> *c*) d'investir dans les actions ou valeurs de toute corporation qui est propriétaire de biens au Canada ou qui fait des affaires se rattachant aux intérêts économiques du Canada; et
>
> *d*) d'investir dans des initiatives ou entreprises qui profiteront vraisemblablement au Canada, entre autres choses par l'acquisition de biens;
>
> la compagnie doit réaliser ces objets en vue d'un bénéfice et au mieux des intérêts de l'ensemble des actionnaires.

En qualité de président et de représentant de la Corporation de développement du Canada, M. Crowe fut membre du Gas Arctic-Northwest Project Study Group. C'est en vertu d'une conven-

ment of June 1, 1972 (hereinafter referred to as the Study Group Agreement) embarked on a consideration of the physical and economic feasibility of a northern natural gas pipeline to bring natural gas to southern markets.

The Study Group Agreement brought together two groups of companies which had previously been exploring separately the feasibility of a natural gas pipeline. The participating companies merged their efforts and resources to that end, and pursuant to the Study Group Agreement they set up two companies, Canadian Arctic Gas Study Limited and Canadian Arctic Gas Pipeline Limited. The first-mentioned company was the vehicle for seeing to the various studies involved in carrying out the pre-construction purposes of the Study Group, and the second company, which was incorporated on November 3, 1972, was to be the operating vehicle which would apply for permission to build the pipeline in implementation of the project. Article 1, s. 2 of the Study Group Agreement set out the purposes of the association of the participating companies as follows:

2. The principal purpose of the Study Group shall be: (a) the conduct of research, experimental and feasibility studies, testing and planning to determine whether the construction and operation of a gas pipeline from Northern Alaska and Northwestern Canada to locations on the border between Canada and the lower 48 states of the United States (hereinafter referred to as the Project) are feasible and desirable in light of relevant physical, environmental and economic data, terms and conditions of available financing, applicable legal requirements and governmental considerations; and if so, (b) the preparation and completion of such studies, exhibits and other data as may be required for the filing of applications with government agencies in Canada and the United States for authority to construct and operate the Project; and (c) the filing and prosecution of such applications. These activities are hereinafter referred to as the Pre-construction Activities.

In connection with the foregoing the Study Group shall study and consider all reasonably feasible gas pipeline configurations, routes and facilities and methods of ownership of any thereof, including (i) those serving eastern, central and western market areas, (ii) various routes and facilities appropriate to such purpose,

tion du 1[er] juin 1972 (ci-après appelée la «Convention du groupe d'étude») que celui-ci entreprit d'étudier la praticabilité physique et économique d'un pipe-line de gaz naturel reliant le grand nord au sud du pays.

La Convention du groupe d'étude réunissait deux groupes de compagnies qui avaient antérieurement étudié, chacun de leur côté, la praticabilité d'un pipe-line de gaz naturel. Les compagnies participantes mirent en commun leurs efforts et leurs ressources à cette fin, et conformément à la Convention du groupe d'étude elles créèrent deux compagnies, Canadian Arctic Gas Study Limited et Pipeline de gaz arctique canadien Limitée. La première devait s'occuper des diverses études nécessaires avant la phase de construction, et la seconde, constituée en corporation le 3 novembre 1972, devait demander l'autorisation de construire le pipe-line. Le deuxième paragraphe de l'art. 1 de la Convention du groupe d'étude en énonce les objets comme suit:

[TRADUCTION] 2. L'objet principal du groupe d'étude sera: (a) la conduite de recherches, d'expériences et d'études de praticabilité ainsi que l'élaboration de plans visant à déterminer si la construction et l'exploitation d'un pipe-line pour le transport du gaz à partir du nord de l'Alaska et du nord-ouest du Canada à des endroits situés à la frontière entre le Canada et les États septentrionaux américains (ci-après désignés comme étant le projet) sont réalisables et avantageuses en tenant compte du milieu, de la nature du sol et des données économiques, des modalités de financement, des exigences de la Loi et des gouvernements; et, dans l'affirmative, (b) la préparation et l'exécution des études, des pièces et autres données qui peuvent être nécessaires au dépôt des demandes auprès des agences gouvernementales canadiennes et américaines afin d'obtenir l'autorisation de construire et d'exploiter l'entreprise projetée; et (c) le dépôt et la poursuite de ces demandes jusqu'à leur conclusion. Ces travaux seront ci-après désignés comme étant les travaux précédant la construction.

Au sujet de ce qui précède, le groupe d'étude étudiera et examinera tous les tracés réalisables de pipe-lines pour le transport du gaz, les routes à suivre, les installations nécessaires ainsi que les moyens d'en détenir la propriété, y compris (i) celles qui desservent les marchés de l'est, du centre et de l'ouest, (ii) les diverses routes et

including wholly new facilities and the utilization of the whole or any portion of any presently existing system as it may now be or as it may be expanded or otherwise adapted for such purpose and (iii) ownership of such facilities and the various portions thereof, whether by one or more entities to be established at the instance of the Participants or at the instance of others or by the present owner of any portion thereof which is now in existence or by any combination of the foregoing, it being acknowledged by the Participants that in connection with each such determination as to such ownership the effect thereof upon financing and future decision-making ability, upon the effective operation of the overall pipeline system and upon regulatory matters will be relevant but that at the date hereof the Participants have made no judgment as to the nature, extent or significance of such effect.

Article IV, ss. 1 and 2 dealt with implementation as follows:

1. The Participants may, upon authorization by the Management Committee, cause one or more corporations to be organized or utilized for the purpose of implementing the Project, including the filing of applications for requisite governmental authorizations in the United States and Canada and constructing, owning and operating Project pipeline facilities following the issuance of satisfactory authorizations. Application for the incorporation of a Canadian pipeline corporation shall be filed promptly after the date hereof. Pending formulation of a practicable overall permanent financing plan, the initial issued and outstanding shares and other securities of each such corporation shall be beneficially owned by the Participants in equal undivided interests as provided relative to the Service Company in Section 4 of Article II and shall be held by the minimum required number of directors as nominees of the Study Group, until and to the extent that the Management Committee shall otherwise determine.

2. It is recognized that, inasmuch as financing plans for the Project are still in the development stage and the total capital requirements of the Project depend upon various contingencies, the question of ultimate ownership of any corporation referred to in Section 1 of this Article IV cannot be decided at this time. However, it is agreed that in the determination of such ownership the following principles will apply. It is agreed that in recognition of the substantial expenditure of funds, employee time and effort, and initiative by the Participants, and their knowledge of and interest in the Project, it is desirable and appropriate that the Participants have some reasonable opportunity to acquire ownership interests in each such corporation. In addition, shares and

les installations propres à cette fin, y compris la construction de nouvelles installations et l'utilisation en partie ou en totalité, de tout réseau déjà en place dans son état actuel ou au besoin, agrandi ou modifié d'autre façon pour répondre aux exigences de l'entreprise (iii) la propriété de ces installations, en tout ou en partie, par une ou plusieurs entités devant être constituées à la demande des participants, d'un tiers ou du propriétaire actuel de toute partie existante ou par une combinaison de ce qui précède, les participants reconnaissant que chaque décision relative à la propriété aura des répercussions sur le financement et la direction future de l'entreprise, sur l'exploitation réelle de tout le réseau de pipe-lines et sur les questions de réglementation, et que pour le moment ils n'ont pas d'opinion arrêtée quant à la nature, à l'étendue et aux conséquences de ces répercussions.

Les paragraphes 1 et 2 de l'art. IV traitent de l'exécution du projet comme suit:

[TRADUCTION] 1. Les participants peuvent, avec l'autorisation du comité de direction, constituer ou utiliser une ou plusieurs corporations aux fins de l'exécution du projet, et notamment pour déposer des demandes visant à obtenir aux États-Unis et au Canada les autorisations administratives nécessaires, et pour construire, posséder et exploiter le pipe-line après obtention des autorisations. Une requête en constitution en corporation d'une compagnie de pipe-line doit être présentée sans délai après la date des présentes. En attendant l'élaboration d'un plan général de financement, les actions initialement émises et en circulation et les autres valeurs de chacune de ces compagnies doivent être possédées par les participants en parts égales indivises, selon les modalités prévues au paragraphe 2 de l'art. IV pour la compagnie chargée des travaux préliminaires, et détenues par le nombre minimum requis d'administrateurs, à titre de représentants du groupe d'étude, jusqu'à ce que le comité de direction en décide autrement.

2. Il est admis que, vu que les plans de financement du projet en sont encore au stade initial et le montant du capital nécessaire pour le projet est soumis à diverses contingences, la question de la propriété du fonds social de toute compagnie mentionnée au paragraphe 1 ne peut être définitivement tranchée à ce moment. Toutefois, il est convenu d'appliquer, à cet égard, les principes suivants: en reconnaissance de leurs dépenses considérables en capital, en temps et efforts de leurs employés, de leur initiative ainsi que de leur connaissance et de leur intérêt dans le projet, il est souhaitable et juste que les participants aient une occasion raisonnable d'acquérir des parts du fonds social de chacune de ces compagnies. De

other securities shall be offered to investors who are not Participants. . . .

The Study Group Agreement provided for the establishment of a Management Committee, consisting of one representative from each of the participating companies, and it was charged with the steering or direction of the activities of the Study Group and of the companies incorporated pursuant to the Study Group Agreement. There was also an executive committee of the Management Committee, consisting of three representatives of each of the three participant groups into which the participating companies were classified; and although it discharged certain functions by delegation from the Management Committee, the latter was the main directing force of the Study Group. The three Participant groups were as follows:

Participant Group A: United States Companies other than producers

Participant Group B: Canadian Companies other than producers

Participant Group C: Canadian and United States producers

Section 5 of art. III charged the Management Committee to seek additional participants "who have an interest in the Project and whose participation may contribute to the objectives of the Project, as stated herein, and who have the ability to and agree to carry out the obligations under this Agreement".

Participants could withdraw upon notice being given and, indeed, the participating companies varied between fifteen and twenty-seven. So long as they remained participants, the companies were subject to the terms of the Study Group Agreement under which they were to be responsible for an equal share of obligations, including the expenses of carrying out the activities of the Study Group and of the companies incorporated under the Study Group Agreement. The Agreement contained provisions for its termination which had in view the likelihood of approval of a pipeline, but

plus, les actions et autres valeurs seront offertes à des investisseurs autres que les participants. . . .

La Convention du groupe d'étude prévoyait la constitution d'un comité de direction, formé d'un représentant de chacune des compagnies participantes et chargé d'orienter et de diriger les activités du groupe d'étude et des compagnies constituées en vertu de la Convention. Il y avait aussi un comité exécutif, composé de trois représentants de chacun des trois groupes dans lesquels les compagnies participantes étaient classées. Même si celui-ci exerçait certaines fonctions que lui déléguait le comité de direction, ce dernier demeurait l'âme dirigeante du groupe d'étude. Les participants étaient répartis en trois groupes:

Participants du groupe A: Compagnies américaines autres que des producteurs

Participants du groupe B: Compagnies canadiennes autres que des producteurs

Participants du groupe C: Producteurs canadiens et américains.

Le paragraphe 5 de l'art. III confiait au comité de direction la tâche de chercher de nouveaux participants [TRADUCTION] «qui s'intéressent au projet et dont la participation pourrait contribuer à ses objectifs, tels que décrits aux présentes, et qui sont en mesure d'assumer les obligations prévues à la Convention et prêts à le faire».

Les participants pouvaient se retirer, sur avis, et, de fait, le nombre des compagnies participantes a varié entre quinze et vingt-sept. Tant qu'elles demeuraient participantes, les compagnies étaient soumises aux conditions de la Convention du groupe d'étude en vertu de laquelle elles devaient assumer une part égale des obligations, y compris les dépenses occasionnées par les activités du groupe d'étude et celles de compagnies constituées en corporation en vertu de la Convention. Celle-ci comportait une clause d'extinction advenant l'autorisation d'un pipe-line, mais le comité de direc-

overriding power was reserved to the Management Committee to fix a termination date.

The Canada Development Corporation became a member of the Study Group on November 30, 1972. Mr. Crowe was its designated representative and, as such, became, on December 7, 1972, a member of the Management Committee. He had attended a meeting of the executive committee as an observer on October 25, 1972 when the participation of the Canada Development Corporation was being worked out, but he did not later become a member of that Committee, although he attended two other meetings thereof. In addition to being a member of the powerful Management Committee, Mr. Crowe became also a member of its finance, tax and accounting committee, and was elected vice-chairman thereof on January 25, 1973. During the period of his membership of the Management Committee, from December 7, 1972 until October 15, 1973 he participated in the seven meetings that it held in that span of time and joined in a unanimous decision of that Committee on June 27, 1973 respecting the ownership and routing of a Mackenzie Valley pipeline.

The decision of June 27, 1973 came about as a result of the establishment by the Management Committee of an *Ad Hoc* Committee on May 30, 1973 to look into ownership and routing and to report to the Management Committee at its next meeting, fixed for June 18, 1973. On June 11, 1973, the *Ad Hoc* Committee approved a report (with one dissent) which was presented to the Management Committee at its meeting of June 18, 1973. The report contained the following paragraphs:

On the understanding that this Project will be filed at the earliest possible date the Ad Hoc Committee supports the concept of single ownership for the Project, subject to the following provisions:

1. The routing of the Project will follow existing corridors and gas pipeline routes of AGTL, Alberta Natural and TCPL.

2. A policy of incremental expansion and common use of existing pipeline facilities will be followed wherever it is economically sound to do so. This means that until complete through lines are constructed, whenever the economics of the situation warrant,

tion gardait le pouvoir d'y déroger et de fixer une date d'expiration.

La Corporation de développement du Canada s'est jointe au groupe d'étude le 30 novembre 1972. M. Crowe en était le représentant et, devint à ce titre, le 7 décembre 1972, membre du comité de direction. Le 25 octobre 1972, il avait assisté, à titre d'observateur, à une réunion du comité exécutif au cours de laquelle on étudia les modalités de la participation de la Corporation de développement du Canada. Bien qu'ayant assisté à deux autres réunions, il n'est pas devenu membre de ce comité. En plus d'être membre de l'important comité de direction, M. Crowe faisait aussi partie du comité des finances, des impôts et de la comptabilité dont il fut élu vice-président le 25 janvier 1973. Du 7 décembre 1972 au 15 octobre 1973, à titre de membre du comité de direction, il a assisté aux sept réunions tenues par le comité pendant cette période et il a participé à la décision unanime de ce dernier le 27 juin 1973, concernant la propriété et le tracé du pipe-line de la vallée du Mackenzie.

La décision du 27 juin 1973 fit suite à l'établissement par le comité de direction, le 30 mai 1973, d'un comité *ad hoc* chargé d'examiner la question de la propriété et du tracé du pipe-line et de présenter un rapport au comité de direction à sa prochaine assemblée, le 18 juin 1973. Le 11 juin 1973, le comité *ad hoc* (avec une seule dissidence) approuva un rapport qui fut présenté au comité de direction le 18 juin 1973. Le rapport comportait les paragraphes suivants:

[TRADUCTION] Étant entendu que ce projet sera déposé dès que possible, le comité *ad hoc* se prononce en faveur du principe du propriétaire unique, sous réserve des points suivants:

1. Le tracé du projet doit suivre les corridors existants et les tracés des pipe-lines pour le gaz de AGTL, Alberta Natural et TCPL.

2. Il convient de prévoir, lorsque c'est rentable, l'utilisation commune des installations de pipe-lines existants et à l'accroissement de leur rendement. Jusqu'à l'achèvement de la construction de lignes directes, on emploiera donc la méthode du double-

and engineering conditions permit, incremental looping (under single ownership) will be used.

3. As a policy CAGSL will not apply for expansion of its system whenever adequate long term unused capacity is economically available in the Alberta Gas Trunk, Alberta Natural, and/or TC systems.

4. As a policy the tariffs for transmission across Alberta will be calculated on a "one zone" basis beginning and ending at the Alberta borders.

The report was discussed at the meeting of June 18, 1973 as was a counter-proposal presented by the dissenting member of the *Ad Hoc* Committee on behalf of United States pipeline members of the Study Group. It was decided that an engineering study of the two southerly legs of the proposed route would be made and a report would be made to the *Ad Hoc* Committee "of the optimum manner of moving the contemplated gas volume south of Caroline". The study and report were considered by the Management Committee at a meeting on June 27, 1973. The chairman of the *Ad Hoc* Committee (according to the minutes of the June 27 meeting) "confirmed that the committee intended the proposal to be not only a basis for the filing of regulatory applications but also to embody the fundamental concept for completion of the project—although the Study Group should retain sufficient flexibility of approach in order to be able, through appropriate future resolutions of the Management Committee, to react to changes in facts and circumstances". The *Ad Hoc* Committee's revised report was then unanimously approved. Its provisions were as follows:

The Ad Hoc Committee on Ownership and Routing respectfully recommends to the Management Committee that it request the CAGSL management to proceed forthwith with the preparation and submission of all necessary applications covering the Arctic Gas Pipeline on the following bases:

OWNERSHIP

1. All new Arctic Gas Pipeline facilities in Canada will be owned by a single entity.

SIZE AND ROUTING

1. From Prudhoe Bay and the Mackenzie Delta to the 60th Parallel the line will be 48" and will follow the routes previously agreed.

ment des pipe-lines (par leur propriétaire) lorsque ce sera économiquement souhaitable et techniquement possible.

3. CAGSL ne demandera pas l'extension de son réseau tant que les réseaux d'Alberta Gas Trunk, Alberta Natural et/ou TC disposeront à long terme d'une capacité de transport inutilisée et économiquement exploitable.

4. Les tarifs de transport à travers l'Alberta seront calculés sur la base d'une «zone unique» d'une limite à l'autre de la province de l'Alberta.

Le rapport, et le contre-projet par le membre dissident du comité *ad hoc*, au nom des compagnies de pipe-line américaines du groupe d'étude, ont été discutés à la réunion du 18 juin 1973. Il fut décidé de faire faire une étude technique des deux embranchements méridionaux du tracé projeté; le rapport final [TRADUCTION] «sur le meilleur moyen de transporter le volume de gaz prévu au sud de Caroline» devait être remis au comité *ad hoc*. Le comité de direction a examiné l'étude et le rapport à sa réunion du 27 juin 1973. Le président du comité *ad hoc* (selon le procès-verbal de cette réunion) [TRADUCTION] «a confirmé que le comité voulait que la proposition ne serve pas seulement de base à la présentation des demandes réglementaires mais aussi à la formulation des principes fondamentaux pour la réalisation du projet—le groupe d'étude devant cependant conserver une certaine liberté de manœuvre afin de pouvoir, par résolutions du comité de direction, s'adapter aux modifications des données et des circonstances». Le rapport modifié du comité *ad hoc* a été ensuite approuvé à l'unanimité. En voici le libellé:

[TRADUCTION] Le comité ad hoc sur la propriété et le tracé recommande respectueusement au comité de direction d'exiger que les dirigeants de CAGSL procèdent sans délai à la préparation et à la présentation des demandes nécessaires relatives au pipe-line de gaz arctique selon les principes suivants:

PROPRIÉTÉ

1. Toutes les nouvelles installations canadiennes du pipe-line de gaz arctique auront un propriétaire unique.

DIAMÈTRE ET TRACÉ

1. De Prudhoe Bay et du delta du Mackenzie au 60e parallèle, le pipe-line aura un diamètre de 48 pouces et suivra les tracés déjà convenus.

2. From the 60th Parallel to Caroline, Alberta the line will be 48" and will follow the existing route of AGTL.

3. From Caroline to Kingsgate the line will be 42" and will follow the routes of AGTL and ANG.

4. From Caroline to Empress the line will be 42" and will follow route of AGTL.

5. From Empress to the U.S. border the line will be 42" and will follow a direct route.

POLICY GUIDELINES

1. As noted above, the routing of the project through Alberta will follow the existing gas pipeline routes of AGTL and ANG whenever technically feasible.

2. Within the basic concept of single ownership of a complete, integral pipeline system to be constructed within a reasonable period of time advantage will be taken over the short term of surplus capacity in existing systems provided any significant engineering, operating, financing, and legal problems inherent in the utilization of such capacity can be overcome.

3. After completion of the initial Arctic Gas system full consideration will be given to the use of any long-term unused capacity if economically available in the AGTL or ANG systems as a preferred alternate to direct expansion provided undue engineering or operating problems are not thereby introduced.

4. Tariffs for transmission across Alberta will be calculated on a "one zone" basis beginning and ending at the Alberta borders.

5. Gas destined for Canadian markets East of Alberta will be delivered to TransCanada at Empress, Alberta.

In his statement at the opening of the Mackenzie Valley Pipeline hearing on October 27, 1973 Mr. Crowe referred to his involvement in the Study Group and in the decisions of the Management Committee thereof in the following terms:

Pursuant to the terms of the Study Group Agreement, each of the Participant companies owned equal shares in the Study Group assets which consisted mainly of studies and reports on the feasibility of the Arctic Gas Project. Subject to the provisions of the Study Group

2. Du 60e parallèle à Caroline (Alberta) le pipeline aura un diamètre de 48 pouces et suivra le tracé actuel d'AGTL.

3. De Caroline à Kingsgate, le pipe-line aura un diamètre de 42 pouces et suivra les tracés d'AGTL et ANG.

4. De Caroline à Empress, le pipe-line aura un diamètre de 42 pouces et suivra le tracé d'AGTL.

5. De Empress à la frontière américaine, le pipeline aura un diamètre de 42 pouces et son tracé sera en ligne droite.

PRINCIPES DIRECTEURS

1. Comme précédemment indiqué, le tracé du projet à travers l'Alberta suivra les tracés existants des pipe-lines de gaz d'AGTL et d'ANG lorsque ce sera techniquement possible.

2. Tout en respectant le principe fondamental d'un propriétaire unique d'un réseau complet et intégré des pipe-lines à construire dans un délai raisonnable, il convient, à court terme, de tirer profit de l'excédent de capacité des réseaux existants à la condition de pouvoir résoudre à cet égard tous les problèmes importants d'ordre technique et juridique, ou d'exploitation et de financement quant à l'utilisation de cet excédent.

3. Lorsque le réseau initial de gaz arctique sera terminé, on étudiera sérieusement si l'utilisation à long terme de la capacité inutilisée des réseaux AGTL ou ANG, dans la mesure où celle-ci est économiquement disponible, est une solution préférable à l'expansion directe, à condition que, sur le plan de la technique ou de l'exploitation, aucune difficulté insurmontable n'en résulte.

4. Les tarifs de transport à travers l'Alberta seront calculés sur la base d'une «zone unique» d'une limite à l'autre de la province de l'Alberta.

5. Le gaz destiné aux Canada à l'est de l'Alberta, sera livré à TransCanada, à Empress, Alberta.

Dans sa déclaration, à l'ouverture de l'audience sur le pipe-line de la vallée du Mackenzie, le 27 octobre 1973, M. Crowe a mentionné sa participation au groupe d'étude et aux décisions du comité de direction dans les termes suivants:

[TRADUCTION] Conformément aux modalités de la Convention du groupe d'étude, les compagnies participantes possédaient à part égale l'actif du groupe d'étude, formé essentiellement d'études et de rapports sur la praticabilité du projet de pipeline pour le gaz arctique.

Agreement a participant could on notice withdraw from the Study Group.

During the period I represented the CDC in the Study Group, I attended seven monthly meetings of the Management Committee, and in the months when the Management Committee did not meet, the three meetings of the Executive Committee to which I previously referred.

At the September 26th, 1973 meeting of the Management Committee, I moved the resolution appointing the Project's Banking Advisors. Also I was on a Steering Committee which recommended the Project Financial Advisors and Accounting Advisors and in the meetings of the Executive Committee which I attended, the appointment of these consultants was approved.

Between December 7th, 1972, and June 27th, 1973, the Study Group considered a number of possible routing alternatives for that portion of the pipeline south of the 60°N parallel. One issue forming part of this decision was whether the Arctic Gas Project would construct new facilities in Alberta as opposed to using existing facilities owned by Trunk Line and expanding those facilities as needed to carry volumes of gas from the Mackenzie-Beaufort Area and Prudhoe Bay. This question was the subject matter of technical analysis by Arctic Gas Financial and Engineering Advisors and was reviewed and discussed in six meetings of the Management Committee.

The final decision was that the facilities in Alberta would be owned by Arctic Gas and that the route would parallel the existing Trunk Line system on a separate right-of-way.

In addition to the foregoing the Management Committee dealt with routine matters such as the Chairman's Report, Management Reports, and other Consultant Appointments.

Although Mr. Crowe resigned from the presidency of the Canada Development Corporation as of October 15, 1973 when he became chairman and chief executive officer of the National Energy Board, the Canada Development Corporation continued as a full participant in the Study Group until October 31, 1975, becoming an associate member as of November 1, 1975 pursuant to a resolution of the Management Committee. As such, it had the following rights (as stated by counsel for the Canadian Arctic Gas Pipeline Limited to the Federal Court of Appeal on December 8, 1975):

Sous réserve des termes de la Convention, une compagnie participante pouvait, sur avis se retirer du groupe d'étude.

Au cours de la période où je représentais au groupe d'étude la Corporation de développement du Canada, j'ai assisté à sept réunions mensuelles du comité de direction, et au cours des mois où il n'a pas siégé aux trois réunions du comité exécutif dont j'ai déjà parlé.

A la réunion du comité de direction du 26 septembre 1973, j'ai proposé la résolution quant à la nomination d'institutions bancaires comme conseillères. Je faisais aussi partie du comité directeur qui a recommandé les conseillers financiers et comptables et j'étais présent aux réunions du comité exécutif lorsque ces nominations y ont été approuvées.

Entre le 7 décembre 1972 et le 27 juin 1973, le groupe d'étude a étudié un certain nombre de tracés possibles pour la partie du pipe-line située au sud du 60e parallèle. Il fallait à ce propos décider si Pipeline de gaz arctique construirait des installations nouvelles en Alberta ou si l'on utiliserait les installations existantes de Trunk Line en les accroissant suffisamment pour transporter le gaz de la région de Mackenzie-Beaufort et Prudhoe Bay. Cette question a fait l'objet d'une analyse technique par les experts financiers et les ingénieurs-conseils et elle a été examinée et discutée au cours de six réunions du comité de direction.

Il a été finalement décidé que Pipeline de gaz arctique serait propriétaire des installations en Alberta et que le tracé serait parallèle aux réseaux existants de Trunk Line mais sur une emprise distincte.

Outre, le comité de direction a traité d'affaires courantes, comme le rapport du président, les rapports de la direction et la nomination de conseillers.

M. Crowe s'est démis de sa fonction de président de la Corporation de développement du Canada le 15 octobre 1973, lorsqu'il est devenu président et fonctionnaire exécutif en chef de l'Office national de l'énergie, mais la Corporation a continué de participer à part entière au groupe d'étude jusqu'au 31 octobre 1975; elle est devenue membre associé le 1er novembre 1975, conformément à une résolution du comité de direction. A ce titre, la Corporation avait les droits suivants (selon la description faite par l'avocat de Pipeline de gaz arctique canadien Limitée devant la Cour d'appel fédérale, le 8 décembre 1975):

1. For so long as an Equity Commitment Letter dated April 22, 1975 remains in effect CDC will be entitled to receive notice of, and attend, through a non-voting representative all meetings of all Committees of the Study Group except the Executive Committee of the Management Committee.

2. To receive all materials that a full participant would be from time to time entitled to receive.

In turn the CDC agrees to be bound by the confidentiality rules binding all participants.

This relationship may after 31 December, 1975, be terminated by either party.

The equity commitment letter of April 22, 1975 indicates a provisional interest in subscribing for $100 million of [equity] in the capital of CAGPL subject to the terms and conditions set out in that letter.

In brief, the Canada Development Corporation remained a full participant long after the applications were made for certificates of public convenience and necessity and after the hearings thereon commenced, and, in effect, until the National Energy Board referred to the Federal Court of Appeal the question concerning reasonable apprehension of bias in Mr. Crowe. During the period of Mr. Crowe's association with the Study Group as the representative of the Canada Development Corporation the latter contributed a total of 1.2 million dollars to the activities of the Study Group as its share of expenses.

Section 44 of the *National Energy Board Act*, the central provision respecting certificates of public convenience and necessity, reads as follows:

44. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline or an international power line if the Board is satisfied that the line is and will be required by the present and future public convenience and necessity, and, in considering an application for a certificate, the Board shall take into account all such matters as to it appear to be relevant, and without limiting the generality of the foregoing, the Board may have regard to the following:

(*a*) the availability of oil or gas to the pipeline, or power to the international power line, as the case may be;

(*b*) the existence of markets, actual or potential;

[TRADUCTION] 1. Tant que sa promesse de participation, en date du 22 avril 1975, demeurera en vigueur, CDC aura droit d'être avisée de la tenue des réunions de tous les comités du groupe d'étude, excepté le comité exécutif du comité de direction, et d'y être représentée à titre de membre sans droit de vote.

2. De recevoir tout document que les participants à part entière ont droit de recevoir à l'occasion.

En retour la CDC convient de respecter, au même titre que les autres participants, le caractère confidentiel des communications.

L'une ou l'autre des parties peut mettre fin à cette entente après le 31 décembre 1975.

La promesse de participation en date du 22 avril 1975, énonce un engagement conditionnel à souscrire $100 millions d'actions du fonds social de CAGPL, conformément aux modalités y indiquées.

En résumé, la Corporation de développement du Canada est demeurée participante à part entière longtemps après le dépôt des demandes de certificats de commodité et nécessité publiques et après l'ouverture des audiences, en fait, jusqu'à ce que l'Office national de l'énergie soumette à la Cour d'appel fédérale la question relative à la crainte de partialité de la part de M. Crowe. Durant la période où M. Crowe a participé au groupe d'étude, à titre de représentant de la Corporation de développement du Canada, celle-ci a contribué 1.2 million de dollars aux dépenses occasionnées par les activités du groupe d'étude.

L'article 44 de la *Loi sur l'Office national de l'énergie*, la principale disposition ayant trait aux certificats de commodité et nécessité publiques, se lit comme suit:

44. Sous réserve de l'approbation du gouverneur en conseil, l'Office peut délivrer un certificat à l'égard d'un pipe-line ou d'une ligne internationale de transmission de force motrice si l'Office est convaincu que la commodité et la nécessité publiques requièrent présentement et requerront à l'avenir la canalisation ou la ligne internationale de transmission et, en étudiant une demande de certificat, celui-ci doit tenir compte de toutes les données qui lui semblent pertinentes, et, sans limiter la généralité de ce qui précède, peut considérer ce qui suit:

a) l'accessibilité du pétrole ou du gaz au pipe-line, ou de la force motrice à la ligne internationale de transmission de force motrice, selon le cas;

b) l'existence de marchés, effectifs ou possibles;

(*c*) the economic feasibility of the pipeline or international power line;

(*d*) the financial responsibility and financial structure of the applicant, the methods of financing the line and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the line; and

(*e*) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.

It was contended by counsel supporting the judgment of the Federal Court of Appeal that Mr. Crowe's involvement in the Study Group and in the work and decisions of the Management Committee did not touch all the considerations expressly delineated in items (*a*) to (*e*) of s. 44. Indeed, the position urged was that on a question of reasonable apprehension of bias the character and degree of involvement must be considered and, if it was minimal or did not touch the major elements of concern under s. 44, then a different conclusion would have to be reached than would be the case if, so to speak, all the bases were touched. It was also contended, and of this there can be no doubt, that the National Energy Board has a variety of functions which interlock; for example, it has broad advisory functions under s. 22 of its Act, as well as the more specifically directed function under s. 44. It is said, and properly so, that the Board cannot compartmentalize its knowledge, acquired through studies which it commissions or through experience of its members or otherwise, and relate that knowledge only to the particular function out of which it has emerged.

It was pointed out in this connection that the Board conducted a public inquiry, with Mr. Crowe presiding over the three-member panel, into the supply and requirements for natural gas, pursuant to powers which it has under s. 14(2) of the *National Energy Board Act* to inquire, of its own motion, into matters within its jurisdiction. The inquiry began in November, 1974 and a report was published in April, 1975, following which the panel was constituted for the Mackenzie Valley Pipeline hearing, with two members thereof (Mr.

c) la praticabilité économique du pipe-line ou de la ligne internationale de transmission de force motrice;

d) la responsabilité et la structure financières de l'auteur de la demande, les méthodes de financement de la canalisation ou de la ligne internationale de transmission, ainsi que la mesure dans laquelle les Canadiens auront l'occasion de participer au financement, à l'organisation et à la construction du pipe-line ou de la ligne internationale de transmission de force motrice; et

e) tout intérêt public qui, de l'avis de l'Office, peut être atteint par l'octroi ou le rejet de la demande.

A l'appui de l'arrêt de la Cour d'appel fédérale, on prétend que la participation de M. Crowe au groupe d'étude et aux travaux et décisions du comité de direction n'a pas touché toutes les considérations expressément définies aux al. *a*) à *e*) de l'art. 44. De fait, on soutient que sur une question de crainte raisonnable de partialité, il faut examiner la nature et le degré de la participation. Lorsqu'elle est infime ou ne porte pas sur les facteurs les plus importants définis à l'art. 44, il conviendrait de conclure différemment que si elle visait tous ces éléments. On prétend aussi, ce qu'on ne peut mettre en doute, que l'Office national de l'énergie a de multiples fonctions interdépendantes; par exemple, il a des fonctions consultatives générales, en vertu de l'art. 22 de la Loi, et des pouvoirs plus particuliers définis à l'art. 44. On dit, à bon droit, que l'Office ne peut compartimenter l'ensemble de ses connaissances acquises grâce aux études qu'il a fait faire, à l'expérience de ses membres ou autrement et n'appliquer ces connaissances qu'à la fonction particulière, qui a été l'occasion de leur acquisition.

A cet égard, on a rappelé que, conformément au pouvoir qui lui est conféré par le par. (2) de l'art. 14 de la *Loi sur l'Office national de l'énergie* d'examiner de sa propre initiative les questions qui relèvent de sa compétence, l'Office a mené une enquête publique, par une formation de trois membres sous la présidence de M. Crowe, sur les approvisionnements et besoins de gaz naturel. L'enquête débuta en novembre 1974 et aboutit à la publication d'un rapport en avril 1975. C'est alors que furent désignés les membres chargés des

Crowe and Mr. Farmer) having been on the panel for the public inquiry. Nothing, in my opinion, can be drawn from the report of this inquiry that would blunt the effect of Mr. Crowe's participation in decisions leading to the Canadian Arctic Gas Pipeline Limited application for a certificate filed on March 21, 1974. The fact that the report indicated there were problems in estimating supply, that more information was needed, and that other matters as well that would be relevant on a s. 44 application were in an uncertain state, does not go any farther than it would if these problems and matters had been raised initially before the Board and it considered them for the first time at the pipeline hearing. That the holding of the inquiry may have prepared Mr. Crowe for the pipeline hearings does not provide support for his participation in those hearings.

What must be kept in mind here is that we are concerned with a s. 44 application in respect of which, in my opinion, the Board's function is quasi-judicial or, at least, is a function which it must discharge in accordance with rules of natural justice, not necessarily the full range of such rules that would apply to a Court (although I note that the Board is a court of record under s. 10 of its Act) but certainly to a degree that would reflect integrity of its proceedings and impartiality in the conduct of those proceedings. This is not, however, a prescription that would govern an inquiry under ss. 14(2) and 22.

I am of the opinion that the only issue here is whether the principle of reasonable apprehension or reasonable likelihood of bias applies to the Board in respect of hearings under s. 44. If it does apply—and this was accepted by all the respondents—then, on the facts herein, I can see no answer to the position of the appellants.

Before setting out the basis of this conclusion I wish to reiterate what was said in the Federal Court of Appeal and freely conceded by the appellants, namely, that no question of personal or financial or proprietary interest, such as to give rise to an allegation of actual bias, is raised against

audiences sur le pipe-line de la vallée du Mackenzie. Deux d'entre eux (M. Crowe et M. Farmer) avaient fait partie de la formation qui avait procédé à l'enquête publique. A mon avis, rien dans le rapport de cette enquête ne vient diminuer l'effet de la participation de M. Crowe aux décisions ayant mené à la demande de certificat déposée par Pipeline de gaz arctique canadien Limitée le 21 mars 1974. Le fait que le rapport indique qu'il existait des problèmes quant à l'évaluation des approvisionnements, que d'autres renseignements étaient nécessaires et que d'autres données pertinentes à la demande faite en vertu de l'art. 44 demeuraient incertaines, n'apporte rien de plus que si ces problèmes et ces questions avaient été soulevés à l'origine devant l'Office et examinés pour la première fois à l'audience concernant le pipe-line. Que la tenue de l'enquête ait préparé M. Crowe aux audiences relatives au pipe-line ne justifie pas sa participation à ces audiences.

Il faut se rappeler, en l'espèce, qu'il s'agit d'une demande en vertu de l'art. 44, où, à mon avis, le rôle de l'Office est quasi-judiciaire ou, du moins, doit être exercé conformément aux principes de justice naturelle; même s'il n'est pas nécessairement soumis à toutes les règles qui s'appliquent à un tribunal il l'est certainement à un degré suffisant pour être tenu de manifester l'intégrité de sa procédure et son impartialité (je note cependant que l'Office est une cour d'archives en vertu de l'art. 10 de sa loi constitutive). Toutefois ces principes ne s'appliquent pas à une enquête menée en vertu du par. (2) de l'art. 14 ou de l'art. 22.

Je suis d'avis qu'en l'espèce, la seule question en litige est de savoir si le principe de la récusation au cas de crainte raisonnable ou de probabilité raisonnable de partialité s'applique à l'Office pour les audiences tenues en vertu de l'art. 44. S'il s'applique—et ce point est admis par tous les intimés—la position des appelants m'apparaît irréfutable, selon les faits en l'espèce.

Avant d'exposer le fondement de cette conclusion, je tiens à réitérer ce qui a été dit à la Cour d'appel fédérale et admis sans restriction par les appelants, savoir, qu'aucune question d'intérêt personnel, pécuniaire ou relié à des droits de propriété, de nature à donner naissance à une alléga-

Mr. Crowe. The Federal Court of Appeal founded its conclusion against disqualification on the following statement of principle:

> It is true that all of the circumstances of the case, including the decisions in which Mr. Crowe participated as a member of the study group, might give rise in a very sensitive or scrupulous conscience to the uneasy suspicion that he might be unconsciously biased, and therefore should not serve. But that is not, we think, the test to apply in this case. It is, rather, 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 Mr. Crowe, whether consciously or unconsciously, would not decide fairly.

This was followed by an encompassing factual conclusion which was as follows:

> On the totality of the facts, which have been described only in skeletal form, we are all of the opinion that they should not cause reasonable and right minded persons to have a reasonable apprehension of bias on the part of Mr. Crowe, either on the question of whether present or future public convenience and necessity require a pipeline or the question of which, if any, of the several applicants should be granted a certificate.

The Federal Court of Appeal supported this factual conclusion by emphasizing that Mr. Crowe participated in the Study Group as merely a representative, that he had nothing to gain or lose by his participation or by any decision he might reach in the course of his duties as chairman of the National Energy Board in connection with the applications that were before it. I do not think that Mr. Crowe's representative capacity is a material consideration on the issue in question here, any more than representative capacity would be a material consideration if the president or chairman of one of the other participants in the Study Group had been appointed chairman of the National Energy Board and had then proceeded to sit on an application which he had a hand in fashioning, albeit he was divorced from the Study Group at the time the application was filed. Mr. Crowe was not a mere cipher, carrying messages from the board of directors of the Canada Development Corporation and having no initiative or flexibility in the manner and degree of his participation in the work of the

tion de partialité réelle, n'est soulevée contre M. Crowe. La Cour d'appel fédérale a fondé son refus de prononcer l'inhabilité sur la déclaration de principes suivante:

> Il est vrai que toutes les circonstances de l'affaire, notamment les décisions auxquelles Crowe a participé comme membre du groupe d'étude, peuvent jeter le doute chez une personne de nature scrupuleuse ou tatillonne et la porter à croire qu'il pourrait à son insu être prévenu et devrait être récusé. Mais, croyons-nous, ce n'est pas le critère applicable en l'espèce. Il faut plutôt se demander à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique. Croirait-elle que, selon toute vraisemblance, Crowe, consciemment ou non, ne rendra pas une décision juste?

Cette déclaration est suivie d'une conclusion globale sur les faits, que voici:

> En nous fondant sur l'ensemble des faits, qui n'ont été exposés que sommairement, nous sommes tous d'avis qu'une personne juste et raisonnable n'aurait pas lieu de craindre que Crowe ne soit pas impartial sur la question de savoir si la commodité et la nécessité publiques, présentes et futures, rendent nécessaire la construction d'un pipe-line ni sur la question de savoir, si elle se pose, laquelle des diverses requérantes devrait obtenir le certificat.

A l'appui de cette conclusion, la Cour d'appel fédérale souligne que M. Crowe a participé au groupe d'étude à titre de simple représentant, qu'il n'avait rien à gagner ni à perdre en y participant ou en rendant une décision quelconque, en sa qualité de président de l'Office national de l'énergie, au sujet des demandes soumises à l'Office. A mon avis, la représentativité de M. Crowe n'est pas pertinente en l'espèce, pas plus que cette considération ne le serait si le président d'un des autres participants au groupe d'étude avait été nommé président de l'Office national de l'énergie et avait ensuite commencé à siéger pour entendre une demande à laquelle il aurait mis la main, sous prétexte qu'au moment du dépôt de la demande il n'avait plus aucun lien avec le groupe d'étude. M. Crowe n'était pas un simple figurant, porteur des messages du conseil d'administration de la Corporation de développement du Canada sans aucune initiative ni liberté de manœuvre pour déterminer comment et jusqu'à quel point il participerait aux travaux du groupe d'étude. Rien n'indique, dans la

Study Group. Nowhere in the Study Group Agreement nor in the minutes of proceedings of the Management Committee is there any indication that the representatives came to the meetings with fixed instructions from which they could not depart without a reference back. The nature of the exercise carried on under the Study Group Agreement required the representatives to apply their own judgment and their own talents to the joint project, with of course concern for the interests of the companies that they represented and subject, of course, to such directions as the companies might give. Since the representatives were all high officials of the companies, they had latitude in their participation that would not have been open to a junior employee.

Nor do I think that anything turns in this case on the fact that Mr. Crowe (according to the Federal Court of Appeal) had nothing to gain or lose either through his participation in the Study Group or in making decisions as chairman of the National Energy Board. The Federal Court of Appeal appears here to have moved over into the area of actual bias and that is not an issue.

The additional factor which underlay the Federal Court of Appeal's factual conclusion is, in its own words, as follows:

> It must, we think, be borne in mind that two years have passed since that participation came to an end and that the issues to be resolved by the Board, with which there is no reason to think he is not familiar, are widely different from those to which the study group devoted its attention. Theirs were problems of assessing the economic feasibility of a pipeline project as a method of moving gas from the Arctic over long distances to southern markets and planning the project in the interests of establishing a viable and profitable operation. In the issues to be considered by the Board the interest involved is that of the Canadian public, whether it will be well served by the construction and operation of such a system and if so which, if any, among competing applicants should be accorded the opportunity. On the material before us there appears to be no valid reason for apprehension that Mr. Crowe, who is not fettered by any interest of his own in any of the applicant companies or any proprietary interest in the result of any decision in which he participated and is no longer in the service of the study group or the Canada Development Corporation, cannot approach these new issues with the

Convention ni dans les procès-verbaux des assemblées du comité de direction, que les représentants se rendaient aux assemblées avec des directives précises auxquelles ils ne pouvaient déroger sans en référer à leur mandant. La nature du travail accompli en vertu de la Convention exigeait que les représentants mettent leur jugement personnel et leurs propres aptitudes à contribution, au profit du projet conjoint, tout en gardant en vue les intérêts des compagnies qu'ils représentaient et sous réserve évidemment des directives que celles-ci pouvaient leur donner. Comme les représentants étaient tous des cadres supérieurs des compagnies, ils pouvaient participer aux décisions avec une latitude que n'aurait pas eue un employé subalterne.

Je ne crois pas non plus qu'en l'espèce, le fait que M. Crowe (selon la Cour d'appel fédérale) n'avait rien à gagner ni à perdre, soit par sa participation au groupe d'étude, soit par ses décisions en qualité de président de l'Office national de l'énergie, ait quelque importance. La Cour d'appel fédérale semble avoir considéré la situation sous l'angle de la partialité réelle qui n'est pas en litige.

La Cour d'appel fédérale appuie sa conclusion sur un autre facteur qu'elle expose comme suit:

> N'oublions pas que deux ans se sont écoulés depuis la fin de sa participation et que les questions soumises à l'Office, que rien ne nous permet de croire qu'elles lui sont bien connues, sont très différentes de celles que le groupe a étudiées. Celui-ci avait à se prononcer sur la praticabilité économique d'un projet de pipe-line pour le transport du gaz de l'Arctique sur de longues distances jusqu'aux marchés méridionaux et il devait s'assurer que l'entreprise offrirait toutes les garanties d'une exploitation saine et rentable. Les questions soumises à l'Office concernent le public en général car il s'agit de savoir s'il est dans l'intérêt national de construire et d'exploiter un pipe-line, et dans l'affirmative, à laquelle des compagnies requérantes, ou à quelle autre compagnie, il faut accorder cette possibilité. Crowe n'a aucun intérêt dans aucune de ces compagnies; les décisions auxquelles il a participé ont été prises libres de toute considération pécuniaire et il ne fait plus partie du groupe d'étude ni de la Corporation de développement du Canada. Donc, rien dans la preuve ne permet de craindre qu'il ne puisse pas aborder ces nouvelles questions avec la sérénité et

equanimity and impartiality to be expected of one in his position.

The passage of time referred to by the Federal Court of Appeal—two years since Mr. Crowe resigned as president of the Canada Development Corporation—is related to the date of the opening of the actual hearings on the competing applications. The application of Canadian Arctic Gas Pipeline Limited was filed five months after that resignation and the consequent departure of Mr. Crowe from the Study Group. Be that as it may, we are not dealing with a case where Mr. Crowe's association with the Study Group is by virtue of that fact alone urged as a disqualification, for example, in relation to some application that the Study Group has initiated or promoted after Mr. Crowe's termination of his relationship with the Group. While I would not see any vice in Mr. Crowe sitting on an application coming from or through the Study Group in relation to a matter in which he was not involved, even though it was decided upon shortly after his dissociation from the Study Group, that is not this case.

Lawyers who have been appointed to the Bench have been known to refrain from sitting on cases involving former clients, even where they have not had any part in the case, until a reasonable period of time has passed. *A fortiori*, they would not sit in any case in which they played any part at any stage of the case. This would apply, for example, even if they had drawn up or had a hand in the statement of claim or statement of defence and nothing else. There is, at the lowest, a parallel here between being involved in taking instructions or drawing up pleadings for litigation and being involved in helping to plan the terms of a contemplated s. 44 application which is in fact made.

I cannot agree with the conclusion (if it be that) of the Federal Court of Appeal or with its observation that "the issues to be resolved by the Board, with which there is no reason to think he is not familiar, are widely different from those to which the Study Group devoted its attention", as if that provided an answer, whether wholly or partially, to an allegation of reasonable apprehension of bias. A considerable point was made of this by counsel for

l'impartialité auxquelles on s'attend d'une personne dans sa situation.

Le laps de temps dont parle la Cour d'appel fédérale—deux ans depuis que M. Crowe a démissionné comme président de la Corporation de développement du Canada—se rapporte à la date d'ouverture des audiences sur les demandes en conflit. La demande de Pipeline de gaz arctique canadien Limitée a été déposée cinq mois après la démission de M. Crowe et son départ du groupe d'étude. Quoi qu'il en soit, il ne s'agit pas d'un cas où la partialité de M. Crowe au groupe d'étude, serait, de ce fait seulement, invoquée comme motif de récusation relativement, par exemple, à quelque demande suggérée ou favorisée par le groupe d'étude après son départ. Je ne verrais rien de répréhensible à ce que M. Crowe entende une demande venant directement ou indirectement du groupe d'étude à l'égard d'une question dont il ne s'est pas occupé, même si elle a fait l'objet d'une décision peu de temps après son retrait du groupe d'étude, mais ce n'est pas ce qui s'est produit en l'espèce.

On sait que des avocats nommés juges se sont abstenus pendant une période raisonnable, d'entendre des affaires auxquelles d'anciens clients étaient parties même s'ils n'avaient rien eu à faire avec le dossier. A plus forte raison, nul ne siègerait dans une cause à laquelle il aurait pu prendre part à un stade quelconque de l'affaire. Ce serait le cas par exemple même s'il n'avait fait que participer à l'élaboration ou à la rédaction de la déclaration ou de la défense. Il y a au moins un certain parallèlisme entre le fait de recevoir des directives ou de rédiger les conclusions d'une partie et le fait de participer à l'élaboration d'une demande à faire en vertu de l'art. 44, demande qui est effectivement ensuite déposée.

Je ne puis souscrire à la conclusion (si c'en est une) de la Cour d'appel fédérale ni à ses observations selon lesquelles «les questions soumises à l'Office, que rien ne nous permet de croire qu'elles lui sont inconnues, sont très différentes de celles que le groupe a étudiées», comme si cela répondait totalement ou partiellement à l'allégation de crainte raisonnable de partialité. Les avocats du procureur général du Canada et de Pipeline de gaz

the Attorney General of Canada and counsel for the Canadian Gas Arctic Pipeline Limited, and I wish to deal with it in some detail.

Of course, the functions of the Board are different from the functions of an applicant or group of applicants for a board certificate, just as the functions of a court are different from those of a litigant seeking a favourable decision. It does not matter whether or not there is a *lis inter partes*, in a traditional court sense, in a Board hearing for the grant of a certificate, so long as the Board is required to apply statutory standards to any application, and, indeed where there are, as here, competing applications the resemblance to a *lis* is increased. An applicant seeking a certificate must inevitably direct itself to the statutory prescriptions by which the Board is governed, taking into consideration of course, the scope of discretion which those standards permit. To say, therefore, that the issues before the Board are different than those to which the Study Group directed itself is not entirely correct, save as it reflects the different roles of the Board and of the Study Group. Moreover, it does not meet the central issue in this case, namely, whether the presiding member of a panel hearing an application under s. 44 can be said to be free from any reasonable apprehension of bias on his part when he had a hand in developing and approving important underpinnings of the very application which eventually was brought before the panel.

There was some inconsistency in the approaches taken by counsel for the Attorney General of Canada and counsel for the Canadian Arctic Gas Pipeline Limited, who made the main submissions in support of the position of all the respondents. The former asserted at one point in his submissions that the decision to seek a pipeline had already been made by the Study Group before Canada Development Corporation became a participant. It was his further contention that Mr. Crowe participated only in the decisions as to routing and as to single ownership of the proposed pipeline and as to the appointment of auditors and bankers. In his view, these decisions fell short of an involvement in the crucial considerations of economic and financial

arctique canadien Limitée ont attaché beaucoup d'importance à cet argument et je veux y répondre en détail.

Il est évident que les fonctions de l'Office sont différentes des fonctions d'une personne ou d'un groupe qui demande un certificat, comme les fonctions d'un tribunal sont différentes de celles d'une partie à un litige qui cherche à obtenir gain de cause. Il importe peu qu'il y ait ou non *lis inter partes*, au sens judiciaire traditionnel, à une audience devant l'Office pour l'octroi d'un certificat, puisque l'Office est tenu d'appliquer des normes légales à toute demande et, de fait, puisqu'il est en présence, en l'espèce, de demande en conflit, la similitude avec un *lis* s'accentue. Celui qui demande un certificat doit nécessairement se reporter aux prescriptions légales régissant l'Office, en tenant compte naturellement de l'étendue de la discrétion autorisée par les normes. Il n'est donc pas tout à fait juste de dire que les questions dont l'Office est saisi sont différentes de celles que le groupe d'étude a examinées, sauf pour faire ressortir les rôles différents de l'Office et du groupe d'étude. De plus, cela ne répond pas à la question principale dans le présent litige, qui consiste à déterminer si l'on peut dire qu'il n'existe aucune crainte raisonnable de partialité à l'égard du président d'une audience sur une demande en vertu de l'art. 44, lorsque ce président a contribué à l'élaboration et à l'approbation de certains fondements essentiels de la demande qui finalement est soumise à l'Office.

Les points de vue de l'avocat du procureur général du Canada et de l'avocat de Pipeline de gaz arctique canadien Limitée, qui ont soumis les principaux arguments à l'appui de la thèse des intimés, sont jusqu'à un certain point incompatibles. Le premier soutient que la décision de faire une demande d'autorisation d'un pipe-line avait déjà été prise par le groupe d'étude avant que la Corporation de développement du Canada en fasse partie. Il prétend de plus que M. Crowe n'a participé qu'aux décisions sur le tracé et la propriété du pipe-line projeté de même qu'à la nomination des vérificateurs et des banquiers. Selon lui, ces décisions tout loin de constituer une participation aux décisions fondamentales sur la praticabilité écono-

cial feasibility which, presumably, were either determined before Mr. Crowe became a representative member of the Study Group or were redetermined after he ceased to be such a member. This is an untenable position. Economic and financial feasibility were involved in the very decision to pursue the pipeline project by an application to the Board, and the fact that the proposed application was later refined or revised did not make it one to which Mr. Crowe was a stranger before it came to the Board.

Counsel for Canadian Arctic Gas Pipeline Limited appeared to say that there was no concluded decision to apply for a certificate while Mr. Crowe was a representative member of the Study Group. He did agree that economic and financial feasibility were involved in decisions made by the Study Group in which Mr. Crowe participated, but he contended that, in so far as this affected a decision to apply for a certificate, it was not conclusive on the question whether public convenience and necessity existed or would exist two years hence. This submission either begs the question of reasonable apprehension of bias or makes it depend on whether the Study Group can be said to have made the very decision which the Board is called upon to make. There can be no such dependence. Any application under s. 44 would, of course, be pitched to securing a favourable decision, but the Board's powers are wide enough to entitle it to insist on changes in a proposal as a condition of the grant of a certificate. The vice of reasonable apprehension of bias lies not in finding correspondence between the decisions in which Mr. Crowe participated and all the statutory prescriptions under s. 44, especially when that provision gives the Board broad discretion "to take into account all such matters as to it appear to be relevant", but rather in the fact that he participated in working out some at least of the terms on which the application was later made and supported the decision to make it. The Federal Court of Appeal had no doubt that Mr. Crowe (to use its words) "took part in [the] meetings and in the decisions taken which . . . dealt with fairly advanced plans for the implementation of the pipeline project".

mique et financière, qui auraient été prises avant que M. Crowe devienne membre du groupe d'étude ou auraient été reconsidérées après son départ. Cette position est insoutenable. La praticabilité économique et financière était en cause dans la décision même de donner suite au projet de pipe-line en faisant une demande à l'Office et le fait que la demande proposée a été par la suite remaniée ou révisée ne signifie pas que M. Crowe y ait été étranger avant qu'elle soit soumise à l'Office.

L'avocat de Pipeline de gaz arctique canadien Limitée semble affirmer qu'aucune décision définitive n'a été prise quant à la demande de certificat pendant que M. Crowe était membre du groupe d'étude. Il reconnaît que la praticabilité économique et financière a été prise en considération dans les décisions du groupe d'étude auxquelles M. Crowe a participé, mais il prétend qu'en ce qui concerne la décision de demander un certificat, cela n'était pas concluant sur le point de savoir si la commodité et la nécessité publiques existaient ou existeraient deux ans plus tard. Cette prétention tient pour admise l'absence de crainte raisonnable de partialité ou en fait défendre l'existence de la question de savoir si l'on peut dire que le groupe d'étude avait pris la décision même que l'Office doit rendre. Il ne peut exister un tel lien de causalité. Naturellement toute demande en vertu de l'art. 44 est élaborée en vue d'une décision favorable mais l'Office a des pouvoirs assez étendus pour exiger des modifications à une proposition comme condition de l'octroi d'un certificat. La crainte raisonnable de partialité ne vient pas de ce qu'on prétend trouver une concordance entre les décisions auxquelles M. Crowe a participé et toutes les prescriptions législatives de l'art. 44, puisque de toute façon celui-ci donne à l'Office toute discrétion pour «tenir compte de toutes les données qui lui semblent pertinentes». La crainte de partialité vient plutôt du fait qu'il a participé à l'élaboration d'au moins quelques-unes des modalités de la demande déposée par la suite, et a appuyé la décision de la présenter. La Cour d'appel fédérale (selon ses propres termes) ne doute pas que M. Crowe ait «participé [aux] réunions et aux décisions prises qui . . . se rapportaient à des plans assez avancés sur la mise en œuvre du projet de pipe-line».

I come then to the question whether the Federal Court of Appeal's negative answer to the question propounded to it is supportable. I have already indicated that that Court introduced considerations into its test of reasonable apprehension of bias which should not be part of its measure. When the concern is, as here, that there be no prejudgment of issues (and certainly no predetermination) relating not only to whether a particular application for a pipeline will succeed but also to whether any pipeline will be approved, the participation of Mr. Crowe in the discussions and decisions leading to the application made by Canadian Arctic Gas Pipeline Limited for a certificate of public convenience and necessity, in my opinion, cannot but give rise to a reasonable apprehension, which reasonably well-informed persons could properly have, of a biased appraisal and judgment of the issues to be determined on a s. 44 application.

This Court in fixing on the test of reasonable apprehension of bias, as in *Ghirardosi v. Minister of Highways for British Columbia*[2], and again in *Blanchette v. C.I.S. Ltd.*[3], (where Pigeon J. said at p. 842-43, that "a reasonable apprehension that the judge might not act in an entirely impartial manner is ground for disqualification") was merely restating what Rand J. said in *Szilard v. Szasz*[4], at pp. 6-7 in speaking of the "probability or reasoned suspicion of biased appraisal and judgment, unintended though it be". This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and I think that emphasis is lent to this concern in the present case by the fact that the National Energy Board is enjoined to have regard for the public interest.

For these reasons, the appeal is allowed and the question submitted to the Federal Court of Appeal is answered in the affirmative. As stated in the

[2] [1966] S.C.R. 367.
[3] [1973] S.C.R. 833.
[4] [1955] S.C.R. 3.

J'en viens à la question de savoir si la réponse négative de la Cour d'appel fédérale à la question soumise est bien fondée. J'ai déjà indiqué qu'on y a pris en considération dans l'analyse de la crainte raisonnable de partialité, des facteurs qui n'auraient pas dû l'être. Lorsqu'il est important, comme en l'espèce, de ne pas avoir de préjugé sur les questions en litige (ni d'opinion préconçue) non seulement à l'égard de la décision sur une demande relative à un pipe-line en particulier mais aussi sur le principe même de la construction d'un pipe-line, la participation de M. Crowe aux discussions et décisions menant à la demande faite par Pipeline de gaz arctique canadien Limitée en vue d'obtenir un certificat de commodité et nécessité publiques, ne peut, à mon avis, que donner naissance, chez des personnes assez bien renseignées, à une crainte raisonnable de partialité dans l'appréciation des questions à trancher sur une demande en vertu de l'art. 44.

Cette Cour en définissant ainsi le critère de la crainte raisonnable de partialité, comme dans l'arrêt *Ghirardosi c. Le Ministre de la Voirie de la Colombie-Britannique*[2], et aussi dans l'arrêt *Blanchette c. C.I.S. Ltd.*[3], (où le juge Pigeon dit aux pp. 842-843 qu'«une crainte raisonnable que le juge pourrait ne pas agir d'une façon complètement impartiale est un motif de récusation») reprenait simplement ce que le juge Rand disait dans l'arrêt *Szilard c. Szasz*[4], aux pp. 6-7, en parlant de [TRADUCTION] «la probabilité ou la crainte raisonnable de partialité dans l'appréciation ou le jugement, quelque involontaire qu'elle soit». Ce critère se fonde sur la préoccupation constante qu'il ne faut pas que le public puisse douter de l'impartialité des organismes ayant un pouvoir décisionnel, et je considère que cette préoccupation doit se retrouver en l'espèce puisque l'Office national de l'énergie est tenu de prendre en considération l'intérêt du public.

Pour ces motifs, le pourvoi est accueilli et nous répondons affirmativement à la question déférée à la Cour d'appel fédérale. Comme le mentionne le

[2] [1966] R.C.S. 367.
[3] [1973] R.C.S. 833.
[4] [1955] R.C.S. 3.

formal judgment of this Court, delivered on March 11, 1976, there will be no order as to costs.

The judgment of Martland, Judson and de Grandpré JJ. was delivered by

DE GRANDPRÉ J. (*dissenting*)—As mentioned in the formal judgment of March 11, 1976, I hold the dissenting view that the Federal Court of Appeal was right in coming unanimously to the conclusion that a negative answer should be given to the question referred to it by the National Energy Board:

Would the Board err in rejecting the objections and in holding that Mr. Crowe was not disqualified from being a member of the panel on the grounds of reasonable apprehension or reasonable likelihood of bias?

This question submitted pursuant to subs. 28(4) of the *Federal Court Act* was the result of a concern expressed during the pre-hearing conference on July 9, 1975, by counsel for one of the applicants, namely Canadian Arctic Gas Pipeline Limited (hereinafter referred to as "Arctic Gas"), that if Mr. M. A. Crowe were a member of the panel chosen to deal with the competing applications, a reasonable apprehension of bias in favour of Arctic Gas might be feared. As expressed in the Order of the National Energy Board, dated October 29, 1975, referring the question to the Federal Court of Appeal, the basis of this concern was the fact that the Chairman of the National Energy Board was, prior to that appointment, Chairman of the Canada Development Corporation. That corporation at that time and at all relevant times was wholly owned by the Government of Canada and was one of some 25 or 26 members of the Arctic Gas—Northwest Project Study Group, a consortium of companies which had brought about the incorporation of Canadian Arctic Gas Pipeline Limited. In his capacity as Chairman of Canada Development Corporation, until his resignation in 1973, Mr. Crowe had participated in certain determinations and decisions of the Study Group concerning relevant issues now the subject matter of the application, including the routing of the proposed Canadian Arctic Gas pipeline.

prononcé de cette Cour, en date du 11 mars 1976, il n'y a pas d'adjudication de dépens.

Le jugement des juges Martland, Judson et de Grandpré a été rendu par

LE JUGE DE GRANDPRÉ (*dissident*)—Tel que mentionné dans le jugement du 11 mars 1976, je suis dissident en l'espèce, étant d'avis que la Cour d'appel fédérale était fondée à conclure unanimement qu'il fallait répondre négativement à la question déférée par l'Office national de l'Énergie:

L'Office ferait-il erreur en rejetant les objections et en statuant que M. Crowe n'est pas inhabile à faire partie du comité pour cause de crainte ou probabilité raisonnable de partialité?

Cette question a été déférée en vertu du par. (4) de l'art. 28 de la *Loi sur la Cour fédérale*, par suite de l'inquiétude exprimée par l'avocat de l'un des requérants, Pipeline de gaz arctique canadien Limitée (ci-après appelée «Gaz arctique»), lors de la conférence préalable du 9 juillet 1975, que si M. Crowe faisait partie du groupe désigné pour entendre les demandes en conflit, il y avait raisonnablement lieu de craindre qu'il y ait, chez ce dernier, partialité en faveur de Gaz arctique. Comme le mentionne l'ordonnance de l'Office national de l'énergie, en date du 29 octobre 1975, déférant la question à la Cour d'appel fédérale, cette inquiétude se fondait sur le fait que le président de l'Office national de l'énergie était, avant cette nomination, président de la Corporation de développement du Canada. A cette époque et à toutes les époques pertinentes, tout le capital-actions de la corporation était détenu par le gouvernement du Canada et elle était l'un des vingt-cinq ou vingt-six membres de Gaz arctique—Northwest Project Study Group, un consortium de compagnies qui avait constitué en corporation Pipeline de gaz arctique canadien Limitée. En sa qualité de président de la Corporation de développement du Canada, jusqu'à sa démission en 1973, M. Crowe avait participé à certaines délibérations et décisions du groupe d'étude ayant trait à des questions faisant maintenant l'objet de la demande, notamment le tracé projeté pour le pipeline de gaz arctique canadien.

As a result of this expression of concern, counsel for Arctic Gas, at the direction of the Board, forwarded in mid-September to all interested persons a number of documents, the relevant ones being correspondence between Canadian Arctic Study Group and Canada Development Corporation, the relevant minutes of the Management and Executive Committees of the Canadian Arctic Gas Study Group, (all irrelevant entries, namely reports and discussions where no action was taken, having been blanked out), minutes of the Finance, Tax and Accounting Committee of the Study Group, the Study Group agreement itself.

In addition, on the 17th of October, a copy of the written statement to be read at the opening of the hearing by Mr. Crowe was addressed to all interested persons.

The hearing of the applications commenced on the 27th day of October 1975. Mr. Crowe at the outset read his statement. Of the 88 interested persons recognized by the Board either as applicants or under s. 45 of the Statute, only 5 objected and 3 of these are appellants before this Court. All of the competing applicants were satisfied that no reasonable apprehension of bias could be entertained.

On this bare outline of the facts, the following preliminary points may be made:

(1) there is no suggestion that there exists any actual or pecuniary bias on the part of Mr. Crowe;

(2) the reasonable apprehension of bias, if it exists, could refer to

(a) the need for a pipeline, and

(b) if point (a) is decided in the affirmative, the identity of the party who should receive the certificate;

inasmuch as all of the competing applicants are satisfied with the presence of Mr. Crowe on the panel, this last point is not before us; of course, it is common ground that all applications might be turned down;

Par suite de cette manifestation d'inquiétude, l'avocat de Gaz arctique, à la demande de l'Office, fit parvenir vers la mi-septembre à tous les intéressés un certain nombre de documents. Parmi ceux-ci s'avéraient pertinents la correspondance entre le groupe d'étude sur le gaz arctique canadien et la Corporation de développement du Canada, les procès-verbaux du comité de direction et du comité exécutif du groupe d'étude ayant trait au sujet (les autres écritures, comme par exemple les rapports et les discussions qui n'avaient pas eu de suite, ayant été rayées), les procès-verbaux du comité des finances, des impôts et de la comptabilité et le texte de la Convention du groupe d'étude.

De plus, le 17 octobre, une copie de la déclaration que M. Crowe devait lire à l'ouverture de l'audience a été communiquée à tous les intéressés.

L'audition des demandes débuta le 27 octobre 1975 et s'ouvrit sur l'exposé de M. Crowe. Sur les 88 personnes intéressées, à titre de requérants ou reconnues comme telles par l'Office en vertu de l'art. 45 de la Loi, 5 seulement, dont les 3 appelants, ont présenté des objections. Tous les requérants en conflit estimaient qu'il n'y avait raisonnablement pas lieu de craindre la partialité.

D'après ce bref exposé des faits, on peut établir d'abord les points suivants:

(1) rien ne laisse entendre qu'il y ait partialité, chez M. Crowe, pouvant se fonder sur un intérêt réel ou pécuniaire;

(2) la crainte raisonnable de partialité, si elle existe, pourrait avoir trait

a) à la nécessité d'un pipeline et,

b) en cas de réponse affirmative à l'alinéa a), au choix du requérant qui pourrait obtenir le certificat;

dans la mesure où les requérants en conflit ne s'opposent pas à la présence de M. Crowe à titre de membre du groupe chargé d'entendre les demandes, nous n'avons pas à trancher cette dernière question; il est admis que toutes les demandes peuvent être rejetées;

(3) the question must be studied in the sole light of the documents submitted to the Court which, in addition to those already mentioned, are:

(a) the proceedings before the Board on October 27, 1975;
(b) the guidelines for northern pipelines issued by the Canadian Government on August 13, 1970;
(c) a report of the National Energy Board, dated April 1975, entitled 'Canadian Natural Gas—Supply & Requirements' following public hearings held pursuant to Part 1 of the National Energy Board Act, from November 1974 to March 1975.

It is on this material that the Federal Court of Appeal unanimously came to its conclusion:

On the totality of the facts, which have been described only in skeletal form, we are all of the opinion that they should not cause reasonable and right minded persons to have a reasonable apprehension of bias on the part of Mr. Crowe, either on the question of whether present or future public convenience and necessity require a pipeline or the question of which, if any, of the several applicants should be granted a certificate.

I have already stated my concurrence with this reading of the facts.

I

The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of

(3) la question doit être examinée à la seule lumière des documents soumis à la Cour, qui, en plus de ceux déjà mentionnés sont:

a) les procédures devant l'Office, le 27 octobre 1975;
b) les directives régissant les pipe-lines dans le nord, édictées par le gouvernement du Canada le 13 août 1970;
c) un rapport de l'Office national de l'énergie, d'avril 1975, intitulé «Le Gaz naturel au Canada—Besoins & Approvisionnements», publié à la suite d'audiences publiques tenues conformément à la Partie I de la Loi sur l'Office national de l'énergie, de novembre 1974 à mars 1975.

C'est sur ces documents que la Cour d'appel fédérale s'est fondée pour conclure unanimement:

En nous fondant sur l'ensemble des faits, qui n'ont été exposés que sommairement, nous sommes tous d'avis qu'une personne juste et raisonnable n'aurait pas lieu de craindre que Crowe ne soit pas impartial sur la question de savoir si la commodité et la nécessité publiques, présentes et futures, rendent nécessaire la construction d'un pipe-line ni sur la question de savoir, si elle se pose, laquelle des diverses requérantes devrait obtenir le certificat.

J'ai déjà indiqué que je suis d'accord avec cette interprétation des faits.

I

La Cour d'appel a défini avec justesse le critère applicable dans une affaire de ce genre. Selon le passage précité, la crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. Selon les termes de la Cour d'appel, ce critère consiste à se demander «à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique. Croirait-elle que, selon toute vraisemblance, M. Crowe, consciemment ou non, ne rendra pas une décision juste?»

Je ne vois pas de différence véritable entre les expressions que l'on retrouve dans la jurisprudence, qu'il s'agisse de «crainte raisonnable de

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".

This is the proper approach which, of course, must be adjusted to the facts of the case. The question of bias in a member of a court of justice cannot be examined in the same light as that in a member of an administrative tribunal entrusted by statute with an administrative discretion exercised in the light of its experience and of that of its technical advisers.

The basic principle is of course the same, namely that natural justice be rendered. But its application must take into consideration the special circumstances of the tribunal. As stated by Reid, *Administrative Law and Practice*, 1971, at p. 220:

> ... 'tribunals' is a basket word embracing many kinds and sorts. It is quickly obvious that a standard appropriate to one may be inappropriate to another. Hence, facts which may constitute bias in one, may not amount to bias in another.

To the same effect, the words of Tucker L.J., in *Russell v. Duke of Norfolk and others*[5], at p. 118:

> There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

In the case at bar, the test must take into consideration the broad functions entrusted by law to the Board. These are numerous and it is sufficient for our purpose to refer to the two main classes:

(1) the advisory functions under Part II of the Act; s. 22 imposes upon the Board the obligation

[5] [1949] 1 All E.R. 109.

partialité», «de soupçon raisonnable de partialité», ou «de réelle probabilité de partialité». Toutefois, les motifs de crainte doivent être sérieux et je suis complètement d'accord avec la Cour d'appel fédérale qui refuse d'admettre que le critère doit être celui d'«une personne de nature scrupuleuse ou tatillonne».

Telle est la façon juste d'aborder la question mais il faut évidemment l'adapter aux faits de l'espèce. La question de la partialité ne peut être examinée de la même façon dans le cas d'un membre d'un tribunal judiciaire que dans le cas d'un membre d'un tribunal administratif que la loi autorise à exercer ses fonctions de façon discrétionnaire, à la lumière de son expérience ainsi que de celle de ses conseillers techniques.

Évidemment, le principe fondamental est le même: la justice naturelle doit être respectée. En pratique cependant, il faut prendre en considération le caractère particulier du tribunal. Comme le remarque Reid, *Administrative Law and Practice*, 1971, à la p. 220:

> [TRADUCTION] ... 'tribunal' est un mot fourre-tout qui désigne des organismes multiples et divers. On se rend vite compte que des normes applicables à l'un ne conviennent pas à un autre. Ainsi, des faits qui pourraient être des motifs de partialité dans un cas peuvent ne pas l'être dans un autre.

Lord Tucker abonde dans le même sens dans *Russell v. Duke of Norfolk and others*[5], à la p. 118:

> [TRADUCTION] Il n'existe pas à mon avis un principe qui s'applique universellement à tous les genres d'enquêtes et de tribunaux internes. Les exigences de la justice naturelle doivent varier selon les circonstances de l'affaire, la nature de l'enquête, les règles qui régissent le tribunal, la question traitée, etc.

En l'espèce, le critère employé doit prendre en considération les vastes fonctions conférées à l'Office par la loi. Elles sont nombreuses et, aux fins des présentes, il suffit d'en citer les deux principales catégories:

(1) les fonctions consultatives, en vertu de la Partie II de la Loi; l'art. 22 impose à l'Office de

[5] [1949] 1 All E.R. 109.

to make continuous studies and reports, on its own and at the request of the Minister; to that end, "the Board shall, wherever appropriate, utilize agencies of the Government of Canada to obtain technical, economic and statistical information and advice";

(2) the issuance of certificates of public convenience and necessity under Part III; s. 44 enacts that in the discharge of this duty, "the Board shall take into account all such matters as to it appear to be relevant and without limiting the generality of the foregoing, the Board may have regard . . ." to five factors listed in the section.

faire des études suivies et des rapports, de sa propre initiative ou sur la demande du Ministre; à ces fins, «l'Office doit, quand la chose est pertinente, recourir aux organismes du gouvernement du Canada pour obtenir les renseignements et avis d'ordre technique, économique et statistique»;

(2) la délivrance de certificats de commodité et de nécessité publiques en vertu de la Partie III; l'art. 44 prévoit qu'à cette fin, l'Office «doit tenir compte de toutes les données qui lui semblent pertinentes, et, sans limiter la généralité de ce qui précède, peut considérer . . .» les cinq facteurs énumérés dans l'article.

While, under s. 22, there is no obligation to take into account the submissions of third parties, s. 45 states that "the Board shall consider the objections of any interested person". Finally, it is to be noted that both these duties culminate in conclusions which are submitted in the first case to the Minister who may decide to act or not to act and, in the second case, to the Governor in Council who may decide to approve or not to approve.

Alors qu'aux termes de l'art. 22 il n'y a aucune obligation de prendre en considération les prétentions de tierces parties, l'art. 45 décrète que «l'Office doit étudier les objections de toute personne intéressée». Enfin, il faut noter que dans les deux cas l'Office doit en arriver à des conclusions que, respectivement, il soumet au Ministre qui peut décider d'y donner suite ou non et au gouverneur en conseil qui peut les approuver ou non.

It follows that the National Energy Board is a tribunal that must be staffed with persons of experience and expertise. As was said by Hyde J. of the Quebec Court of Appeal in *R. v. Picard et al.*[6], at p. 661:

Professional persons are called upon to serve in judicial, quasi-judicial and administrative posts in many fields and if Governments were to exclude candidates on such ground, they would find themselves deprived of the services of most professionals with any experience in the matters in respect of which their services are sought. Accordingly, I agree with the Court below that this ground was properly rejected.

L'Office national de l'énergie est donc un tribunal dont les membres doivent être expérimentés et compétents. Comme le remarquait le juge Hyde de la Cour d'appel du Québec dans *R. v. Picard et al.*[6], à la p. 661:

[TRADUCTION] On fait appel à des professionnels pour remplir des fonctions judiciaires, quasi-judiciaires et administratives dans plusieurs domaines. Si le gouvernement devait exclure des candidats pour ce motif, il se priverait des services de la plupart des professionnels ayant quelque expérience dans les domaines pour lesquels on recherche leurs services. Par conséquent, j'estime que le tribunal d'instance inférieure a rejeté, à bon droit, ce moyen.

The same thought is to be found in the decision of the Court of Appeal of Nova Scotia in *Tomko v. N.S. Labour Relations Board et al.*[7], where one MacNeil, a member of the Board, had actively participated in meetings attended by representatives of the employer and representatives of the

La même opinion est exprimée dans l'arrêt de la Cour d'appel de la Nouvelle-Écosse, *Tomko v. N.S. Labour Relations Board et al.*[7], où un certain MacNeil, membre de la Commission des relations de travail, avait participé activement à des réunions portant sur la question même que devait

[6] (1968), 65 D.L.R. (2d) 658.
[7] (1974), 9 N.S.R. (2d) 277 affd. [1977] 1 S.C.R. 112.

[6] (1968), 65 D.L.R. (2d) 658.
[7] (1974), 9 N.S.R. (2d) 277 confirmée [1977] 1 S.C.R. 112.

unions respecting the subject matter on the very point to be adjudicated before the Board. In particular, in a meeting five days before the Order was issued, he had said that the facts gave no excuse to the men to be on strike. Studying the allegation of bias, MacKeigan, C.J., said (at p. 298):

One of the principles of 'natural justice' that must be observed by the Panel and its members in exercising power under s. 49 is to act fairly, in good faith, and without bias. The rules which disqualify judges for personal interest in the result or likelihood of bias thus apply. See: de Smith on *Judicial Review of Administrative*, Action 3rd ed., c. 5, and Reid on *Administrative Law and Practice*, c. 7.

This does not mean, however, that the standards of what constitutes disqualifying interest or bias are the same for a tribunal like the Panel as for the courts. The nature and purpose of the *Trade Union Act* dictate that members 'bring an experience and knowledge acquired extra-judicially to the solution of their problems' (Lord Simonds in *John East*, supra, A.C. at p. 151, D.L.R. at p. 682).

The many unions and many subcontractors and suppliers involved in any single construction project make it inevitable that union representatives on the Panel and most employer representatives would each have at least an indirect interest, much knowledge and many preconceptions and prejudgments respecting any matter coming before the Panel. Thus mere prior knowledge of the particular case or preconceptions or even prejudgments cannot be held *per se* to disqualify a Panel member.

And he concluded (at p. 299):

I cannot find on the evidence that MacNeil had the kind of interest or displayed the kind of bias that should disqualify him as a member of the Panel. He obviously knew all about the walkout and its causes, thought it was an illegal work stoppage, knew that the plaintiff was involved in it and had 'condoned' it, and was fully aware of the plaintiff's commanding position in the Labourers' Union. I cannot see, however, that such knowledge and opinions show likelihood of bias, likelihood that MacNeil would be unable to exercise his duties impartially as a member of the Board.

trancher la Commission et auxquelles assistaient des représentants de l'employeur et des syndicats. En particulier, au cours d'une réunion tenue cinq jours avant que l'ordonnance soit rendue, il avait déclaré que les faits ne justifiaient pas une grève des employés. Examinant la question de la partialité, le juge en chef MacKeigan dit (à la p. 298):

[TRADUCTION] Selon les principes de la 'justice naturelle' que doivent observer le comité et ses membres dans l'exercice des pouvoirs conférés par l'art. 49, ils doivent notamment agir de façon équitable, de bonne foi et sans partialité. Les règles relatives à la récusation des juges à cause de leur intérêt personnel dans le résultat du litige ou de la probabilité de partialité s'appliquent donc. Voir de Smith, *Judicial Review of Administrative Action* 3e éd., c. 5 et Reid, *Administrative Law and Practice*, c. 7.

Cela ne signifie pas toutefois que dans l'appréciation de ce qui constitue l'intérêt ou la partialité entraînant la récusation, on applique les mêmes critères à un tribunal comme le comité qu'aux cours de justice. Le caractère et le but du *Trade Union Act* requièrent que les membres du comité [TRADUCTION] «se servent de l'expérience et des connaissances acquises extra-judiciairement pour résoudre les problèmes» (Lord Simonds, dans *John East*, supra, A.C. à la p. 151, D.L.R. à la p. 682).

Vu la multitude de syndicats, de sous-entrepreneurs et de fournisseurs participant à un seul projet de construction il est inévitable que les représentants des syndicats siégeant au comité ainsi que la plupart des représentants des employeurs soient au moins indirectement concernés, par la question soumise au comité, au moins, qu'ils la connaissent bien et qu'ils aient à son sujet des opinions préconçues et des préjugés. Ainsi ni la simple connaissance antérieure du cas particulier ni certaines opinions préconçues ou préjugés ne suffisent d'eux-mêmes pour récuser un membre du comité.

Et il conclut (à la p. 299):

[TRADUCTION] La preuve ne me permet pas de conclure que MacNeil avait cet intérêt ou a fait preuve de cette partialité qui devrait le rendre inhabile à siéger au comité. Il était évidemment au courant du débrayage et de ses causes, il estimait que l'arrêt de travail était illégal, il savait que le demandeur était impliqué dans cet arrêt de travail et y était sympatique, et il connaissait parfaitement l'importance du rôle du demandeur dans le syndicat. Toutefois je ne peux conclure que cette connaissance et ces opinions démontrent la probabilité de partialité, savoir que MacNeil serait incapable d'exercer ses fonctions de membre de la Commission de façon impartiale.

This judgment was confirmed by our Court on December 19, 1975 where Laskin, C.J.C., speaking for the majority, said:

There was also an allegation of bias against a member of the Panel but this Court did not require the respondents to meet it, holding the allegation to be without substance.

Members of administrative boards acquire their expertise by virtue of previous exposure to the industry which they are appointed to regulate. The system would not work if it were not premised on an assertion of faith in those appointed to adjudicate:

It is to be assumed that a body of men entrusted by the Legislature with large powers affecting the rights of others will act with good faith.

Re Schabas et al and Caput of the University of Toronto et al (1975), 52 D.L.R. (3d) 495 at page 506.

Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.

United States v. Morgan (1940), 313 U.S. 409 at page 421, per Mr. Justice Frankfurter.

That good faith is not shaken by the fact a member of the Board may have held tentative views. Not only is this the situation in Canada as appears from the judgment in *Tomko*, above but it is the situation in England—1 Halsbury (4th edition) at pp. 83-84:

In a wide range of other situations the impression may be received that an adjudicator is likely to be biased. A person ought not to participate or appear to participate in an appeal against his own decision, or act or appear to act as both prosecutor and judge; the general rule is that in such circumstances the decision will be set aside. Normally it will also be inappropriate for a member of a tribunal to act as witness. Likelihood of bias may also arise because an adjudicator has already indicated partisanship by expressing opinions antagonistic or favourable to the parties before him, or has made known his views about the merits of the very issue or issues of a

Ce jugement a été confirmé par cette Cour le 19 décembre 1975, alors que le juge en chef Laskin, parlant au nom de la majorité, disait:

On allèguait aussi la partialité d'un membre du Comité, mais cette Cour, considérant la prétention sans fondement, n'a pas demandé aux intimés d'y répondre.

Les membres de commissions administratives deviennent experts grâce à leurs contacts antérieurs avec l'industrie qu'ils sont appelés à réglementer. Le système ne fonctionnerait pas s'il n'était pas fondé sur une affirmation de confiance envers ceux qui sont nommés pour prendre des décisions:

[TRADUCTION] On doit présumer que ceux à qui la Législature confie des pouvoirs étendus, touchant les droits des tiers, agiront de bonne foi.

Re Schabas et al and Caput of the University of Toronto et al (1975) 52 D.L.R. (3d) 495, à la p. 506.

[TRADUCTION] Les membres du Cabinet qui, dans l'exercice des pouvoirs conférés par le Congrès, doivent rendre des décisions, ne sont pas censés être des êtres amorphes, pas plus que les juges d'ailleurs. Les uns et les autres peuvent avoir leur propre philosophie lorsqu'ils abordent un cas particulier, mais on présume qu'ils sont des hommes de conscience pouvant, grâce à leur discipline intellectuelle, juger un litige donné de façon équitable selon les circonstances particulières qui l'entourent.

United States v. Morgan (1940), 313 U.S. 409, à la p. 421, par M. le juge Frankfurter.

Cette bonne foi n'est pas mise en doute du seul fait qu'un membre de l'Office peut antérieurement avoir eu certaines opinions sur le sujet. Le principe est reconnu non seulement au Canada, comme le démontre l'arrêt *Tomko*, mais aussi en Angleterre—1 Halsbury (4e édition) pp. 83-84:

[TRADUCTION] Dans bien d'autres cas, on peut avoir l'impression qu'un arbitre est susceptible d'être partial. Une personne ne doit pas participer ou sembler participer à un appel à l'encontre de sa propre décision, ni agir, ou sembler agir, à la fois à titre de poursuivant et de juge; en règle générale, dans de telles circonstances, la décision sera infirmée. Normalement un membre d'un tribunal ne devrait pas non plus comparaître à titre de témoin. La probabilité de partialité peut aussi résulter du fait qu'un arbitre a déjà exprimé des opinions défavorables ou favorables aux parties ou qu'il a fait connaître son point de vue sur le bien-fondé de la question en litige

similar nature in such a way as to suggest prejudgment because he is so actively associated with the institution or conduct of proceedings before him, either in his personal capacity or by virtue of his membership of an interested organisation, as to make himself in substance, both judge and party, or because of his personal relationship with a party or for other reasons. It is not enough to show that the person adjudicating holds strong views on the general subject matter in respect of which he is adjudicating, or that he is a member of a trade union to which one of the parties belongs where the matter is not one in which a trade dispute is involved.

The fact that an administrator may incline towards deciding an issue before him one way rather than another, in the light of implementing a policy for which he is responsible, will not affect the validity of his decision, provided that he acts fairly and with a mind not closed to argument; and similar standards may be applied to other persons whose prior connection with the parties or the issues are liable to preclude them from acting with total detachment.

and in Australia, in *Ex parte The Angliss Group*[8], at p. 151 (A.L.J.R.):

It is therefore important to bear in mind that the Commission does not sit to enforce existing private rights. Amongst other things, it is its function to develop and apply broad lines of action in matters of public concern resulting in the creation of new rights and in the modification of existing rights. It is not necessarily out of place, and indeed it might be expected that a member of the Commission from time to time in the course of discharging his duties should express more or less tentative views as to the desirability of change in some principle of wage fixation. The very nature of the office of a member of the Commission requires that he should apply his mind constantly to general questions of arbitral policy and consider the lines along which the processes of conciliation and arbitration for the prevention and settlement of industrial disputes ought to move.

and in the United States—*New Hampshire Milk Dealers Association v. New Hampshire Milk Control Board*[9], at p. 198:

It is a well-established legal principle that a distinction must be made between a preconceived point of view about certain principles of law or a predisposed view

[8] (1969), 122 C.L.R. 546, 43 A.L.J.R. 150. (H. Ct.).
[9] (1967), 222 A. (2d) 194.

ou de questions similaires, de façon à laisser croire qu'il a des préjugés parce qu'il est activement associé à l'institution ou à la marche des procédures à titre personnel ou à titre de membre d'un organisme intéressé, de façon à être en fait juge et partie. Les relations personnelles de l'arbitre avec l'une des parties où d'autres motifs peuvent en être aussi la source. Il ne suffit pas de démontrer qu'un arbitre a des idées bien arrêtées dans le domaine où il est appelé à se prononcer, ou qu'il est membre du même syndicat qu'une des parties dans la mesure où il ne s'agit pas de règler un conflit syndical.

Le fait qu'un fonctionnaire, dans l'application d'une politique dont il est responsable, puisse être porté à trancher la question qui lui est soumise dans un sens plutôt que dans un autre, n'aura pas d'effet sur la validité de sa décision, dans la mesure où il agit équitablement et avec un esprit ouvert; et les mêmes critères s'appliquent à d'autres personnes dont les relations antérieures avec les parties ou les questions en litige pourraient les empêcher d'agir de façon complètement désintéressée.

et en Australie, dans *Ex parte The Angliss Group*[8], à la p. 151 (A.L.J.R.):

[TRADUCTION] Il est donc important de retenir que la Commission ne siège pas pour protéger les droits privés existants. Ses fonctions, entre autres, sont d'élaborer et d'appliquer des lignes de conduite générales dans des questions d'intérêt public menant à la création de droits nouveaux et à la modification des droits existants. Il n'est pas nécessairement déplacé qu'un membre de la Commission, dans l'exercice de ses fonctions, exprime à l'occasion des opinions plus ou moins définitives sur l'opportunité d'un changement à quelque principe en matière de détermination des salaires. Le caractère même des fonctions d'un membre de la Commission exige qu'il examine constamment les questions générales de politique d'arbitrage et les principes qui doivent guider les processus de conciliation et d'arbitrage en vue de la prévention et du règlement des différends industriels.

et aux États-Unis—*New Hampshire Milk Dealers Association v. New Hampshire Milk Control Board*[9], à la p. 198:

[TRADUCTION] C'est un principe juridique bien établi qu'il faut faire la distinction entre d'une part une idée préconçue sur certaines questions de droit ou sur les

[8] (1969), 122 C.L.R. 546, 43 A.L.J.R. 150 (H. Ct.).
[9] (1967), 222 A. (2d) 194.

about the public or economic policies which should be controlling and a prejudgement concerning issues of fact in a particular case. 2 Davis, Administrative Law Treatise, s. 12.01, p. 131. There is no doubt that the latter would constitute a cause for disqualification. However 'Bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification.'(. . .) If this were not the law, Justices Holmes and Brandeis would have been disqualified as would be others from sitting on cases involving issue of law or policy on which they had previously manifested strong diverging views from the holdings of a majority of the members of their respective courts.

It is obvious that the considerations which underlie the operations of the Board are policy oriented. Section 91 imposes upon the Board the obligation through the Minister to report to Parliament on a yearly basis and the Act establishes numerous points of contact between the Minister and the Board. This policy orientation is the joint effort of the Minister and of the Board. The guidelines announced by the Government on August 13, 1970 for northern pipelines are relevant and I quote them at length:

1. The Ministers of Energy, Mines and Resources, and Indian Affairs and Northern Development will function as a point of contact between Government and industry, acting as a Steering Committee from which industry and prospective applicants will receive guidance and direction to those federal departments and agencies concerned with the particular aspects of northern pipelines.
2. Initially, only one trunk oil pipeline and one trunk gas pipeline will be permitted to be constructed in the north within a 'corridor' to be located and reserved following consultation with industry and other interested groups.
3. Each of these lines will provide either 'common' carrier service at published tariffs or a 'contract' carrier service at a negotiated price for all oil and gas which may be tendered thereto.
4. Pipelines in the north, like pipelines elsewhere which are within the jurisdiction of the Parliament of Canada, will be regulated in accordance with the National Energy Board Act, amended as may be appropriate.

politiques générales ou économiques qui devraient prévaloir et d'autre part des préjugés à l'égard des questions de fait dans un cas particulier. 2 Davis, Administrative Law Treatise, art. 12.01, p. 131. Il s'agit indubitablement dans ce dernier cas d'un motif de récusation. Toutefois, la «partialité au sens d'opinion bien précise sur des questions de droit ou de politique est presque universellement reconnue, comme n'étant pas un motif de récusation» (. . .) Dans le cas contraire, les juges Holmes et Brandeis, comme bien d'autres, auraient été considérés inhabiles à siéger dans les affaires concernant des questions de droit ou de politique sur lesquelles ils avaient antérieurement exprimé des opinions très différentes des décisions de la majorité des membres de leurs tribunaux respectifs.

Il est évident que les considérations sur lesquelles se fondent les activités de l'Office sont d'ordre politique. L'article 91 exige que chaque année l'Office, par l'intermédiaire du Ministre, soumette un rapport au Parlement et la Loi établit des rapports entre le Ministre et l'Office dans bien des cas. Les lignes de conduite sont établies conjointement par le Ministre et l'Office. Les directives régissant les pipe-lines dans le nord, annoncées par le gouvernement le 13 août 1970, sont pertinentes et je les cite au complet:

1. Le ministre de l'Énergie, des Mines et des Ressources et celui des Affaires indiennes et du Nord canadien feront la liaison entre le gouvernement et l'industrie, et constitueront le Comité directeur chargé d'aviser et de diriger l'industrie et les candidats éventuels vers les ministères et organismes fédéraux responsables des divers aspects de la région des pipe-lines dans le Nord.
2. Dans le Nord, on ne permettra au début que la construction d'une seule conduite principale pour le pétrole et d'une seule pour le gaz et elles seront situées dans les limites d'un «corridor» dont le tracé sera fixé à la suite de consultations avec les représentants de l'industrie et d'autres groupes intéressés.
3. Chacune de ces conduites dispensera soit un service de transport «en commun» à des tarifs établis, soit un service de transport «par contrat» à un tarif qui sera négocié pour l'ensemble du pétrole et du gaz qui feront l'objet d'appels d'offres.
4. Les pipe-lines du Nord, tout comme ceux situés à d'autres endroits et qui tombent sous la juridiction du gouvernement du Canada, seront réglementés en vertu des dispositions de la Loi sur l'Office national de l'énergie et des modifications qu'on pourra juger bon d'y apporter.

5. Means by which Canadians will have a substantial opportunity for participating in the financing, engineering, construction, ownership and management of northern pipelines will form an important element in Canadian government consideration of proposals for such pipelines.

6. The National Energy Board will ensure that any applicant for a Certificate of Public Convenience and Necessity must document the research conducted and submit a comprehensive report assessing the expected effects of the project upon the environment. Any certificate issued will be strictly conditioned in respect of preservation of the ecology and environment, prevention of pollution, prevention of thermal and other erosion, freedom of navigation, and the protection of the rights of northern residents, according to standards issued by the Governor General in Council on the advice of the Department of Indian Affairs and Northern Development.

7. Any applicant must undertake to provide specific programs leading to employment of residents of the north both during the construction phase and for the operation of the pipeline. For this purpose, the pipeline company will provide for the necessary training of local residents in coordination with various government programs, including on-the-job training projects. The provision of adequate housing and counselling services will also be a requirement.

5. Les possibilités offertes aux Canadiens de participer dans une bonne mesure au financement, à la planification, à la construction, au contrôle et à la gestion des pipe-lines du Nord constitueront un facteur important lorsque le gouvernement canadien étudiera les projets de construction de tels pipe-lines.

6. L'Office national de l'énergie exigera que tout candidat à un Certificat de commodité et de nécessité publiques fournisse les documents justifiant les recherches entreprises et présente un rapport complet sur les effets probables du projet sur le milieu naturel. Chaque certificat émis contiendra des restrictions sévères concernant la préservation de l'écologie et du milieu, la prévention de la pollution, de l'érosion thermique et d'autres formes d'érosion, la liberté de la navigation et la protection des droits des habitants du Nord, conformément aux normes établies par le Gouverneur général en conseil, après consultation avec le ministère des Affaires indiennes et du Nord canadien.

7. Chaque candidat doit s'engager à mettre au point des programmes précis d'emploi des habitants du Nord tant durant les travaux de construction que pour l'exploitation du pipe-line. A cet effet, la société du pipe-line dispensera aux habitants la formation nécessaire, qui sera coordonnée avec les différents programmes gouvernementaux et comprendra des stages de formation. On exigera aussi la mise en œuvre de services de logement et de consultation appropriés.

Thus the basic principle in matters of bias must be applied in the light of the circumstances of the case at bar. The Board is not a Court nor is it a quasi-judicial body. In hearing the objections of interested parties and in performing its statutory functions, the Board has the duty to establish a balance between the administration of policies they are duty bound to apply and the protection of the various interests spelled out in s. 44 of the Act. The decision to be made by the Board transcends the interest of the parties and involves the public interest at large. In reaching its decision, the Board draws upon its experience, upon the experience of its own experts, upon the experience of all agencies of the Government of Canada and, obviously, is not and cannot be limited to deciding the matter on the sole basis of the representations made before it. It is not possible to apply to such a

Le principe fondamental régissant les questions de partialité doit s'appliquer à la lumière des circonstances en l'espèce. L'Office n'est pas un tribunal judiciaire ni un organisme quasi-judiciaire. En étudiant les objections des parties intéressées et en exerçant les fonctions, que lui a attribuées la Loi, l'Office est tenue de maintenir l'équilibre entre les lignes de conduite qu'elle a l'obligation d'appliquer et la protection des différents intérêts mentionnés à l'art. 44 de la Loi. La décision que doit rendre l'Office va au-delà des intérêts des parties et concerne l'intérêt public en général. Pour parvenir à une décision l'Office se fonde sur son expérience, sur celle de ses experts et celle de tous les organismes du gouvernement du Canada. Il est évident qu'il ne peut être obligé de se fonder uniquement sur les représentations qui lui sont faites pour trancher la question. On ne

body the rules of bias governing the conduct of a court of law.

II

Such being the legal principles involved, what would a reasonable and right minded person have discovered if he had taken the time and trouble of informing himself of the true situation?

He would first have discovered in the words of the representative of the Committee for Justice and Liberty Foundation before the Board on the 27th October 1975 that the industry "had foreseen the need to transport northern natural gas south several years ago" and that "Mr. Crowe was actively involved in a sequence of decisions based on the presupposition that a pipeline was required". In other words, the basic decision to build a pipeline or at least to make an application to the National Energy Board was taken in principle long before Mr. Crowe became involved in the Study Group and for that matter in the CDC. As already noted, on August 13, 1970, the Canadian Government published guidelines for northern pipelines; the press release prepared jointly by the Department of Energy, Mines and Resources and by the Department of Indian Affairs and Northern Development underlines:

> The guidelines relate to pipelines tapping oil and gas resources north of the 60th degree of latitude in the Yukon Territory and the Northwest Territories and from Alaska. They establish requirements ranging from environmental protection, pollution control and Canadian ownership and participation to training and employment of residents of the north. Initially, only one trunk line each for oil and gas will be permitted in the north within a 'corridor' to be established at a future date.

At that time, the industry had already not only expressed interest in constructing pipelines but had already plans and research underway. It is not surprising therefore that when the separate groups decided to join forces on June 1, 1972 in order to

peut appliquer à un organisme de ce genre les critères de partialité qui régissent les tribunaux judiciaires.

II

Les règles de droit étant établies, qu'aurait découvert une personne sensée et raisonnable qui aurait pris le temps et se serait donné la peine de se renseigner sur la véritable situation?

Elle aurait d'abord appris que le représentant du Committee for Justice and Liberty Foundation avait dit devant l'Office le 27 octobre 1975 que l'industrie [TRADUCTION] «avait prévu la nécessité de transporter le gaz naturel vers le sud depuis plusieurs années» et que [TRADUCTION] «M. Crowe avait participé activement à une série de décisions fondées sur l'hypothèse de la nécessité d'un pipe-line». En d'autres termes, la décision initiale de construire un pipe-line ou du moins d'en faire la demande à l'Office national de l'énergie avait fait l'objet d'un accord de principe longtemps avant que M. Crowe participe au groupe d'étude et, avant même son entrée en fonctions à la Corporation de développement du Canada. Comme je l'ai déjà mentionné, le gouvernement du Canada a publié le 13 août 1970 des directives régissant les pipe-lines dans le nord. Le communiqué de presse préparé conjointement par le ministère de l'Énergie, des Mines et des Ressources et le ministère des Affaires indiennes et du Nord canadien, souligne que:

> Ces lignes de conduite s'appliquent aux pipe-lines destinés au transport du pétrole et du gaz produits au nord du 60e parallèle, tant au Yukon et dans les Territoires du Nord-Ouest qu'en Alaska. Elles comportent des exigences qui vont de la protection du milieu naturel, du contrôle de la pollution et de la participation canadienne aux entreprises, à la participation à la formation et à l'embauche des habitants du Nord. Au départ, on ne permettra dans le Nord que la construction d'une seule conduite principale pour le pétrole et d'une autre pour le gaz, et elles devront être situées dans un «corridor» dont les limites seront déterminées à une date ultérieure.

A l'époque, l'industrie avait non seulement indiqué qu'elle s'intéressait à la construction de pipe-lines mais elle avait déjà commencé à préparer les plans et à effectuer des recherches. Il n'est donc pas surprenant que lorsque les divers groupes décidè-

conform with the guidelines, they had already spent $17,000,000 in these plans and research. When the CDC became a member of the Study Group at the end of November 1972 and Mr. Crowe became the representative of the Corporation on the Management Committee grouping representatives of each of the participants, the problem was that of routing and of ownership and it is to these two points and to these two points only that Mr. Crowe gave his attention. This is the only inference that can be drawn from the records and it is sufficient to refer to the following:

1) the application itself submitted by Arctic Gas states that the need to transport northern natural gas to the southern markets had been foreseen several years before;

2) the routing by October 25, 1972 when Mr. Crowe for the first time was present as a guest, had already given rise to various studies;

3) that very same question of routing was the major matter discussed at subsequent meetings attended by Mr. Crowe;

4) the timing, not the advisability of regulatory filings, was officially discussed on February 28, 1973;

5) this discussion had been preceded by a letter of February 27, 1973, describing the project scheduling "up to the time of application" in late 1973;

6) on May 30, 1973, the minutes mention that "preparations for filings could continue";

7) one of the memoranda studied at the meeting of June 27, 1973 states that the application to the National Energy Board is "to be filed this Fall" and underlines "the question that must be resolved now is what kind of an application is to be filed".

What else would the reasonable and right minded person have discovered had he decided to inform himself of the true situation? He would have found that

—the CDC, a corporation wholly owned by the Government of Canada, has by statute a

rent de se réunir le 1er juin 1972 pour se conformer aux directives, ils avaient déjà dépensé $17,000,000 pour ces plans et recherches. Lorsque la Corporation de développement du Canada devint membre du groupe d'étude à la fin de novembre 1972 et que M. Crowe fut nommé représentant de la Corporation au comité de direction formé de représentants de tous les participants, les questions à décider étaient le tracé et la propriété et c'est à ces deux questions et à celles-ci seulement que M. Crowe s'est arrêté. C'est là la seule conclusion que l'on peut tirer des faits au dossier parmi lesquels il suffit de mentionner:

1) la demande elle-même soumise par Gaz arctique allègue que la nécessité de transporter le gaz naturel du nord jusqu'au sud avait été prévue plusieurs années auparavant;

2) le 25 octobre 1972, lorsque M. Crowe pour la première fois était présent à titre observateur, la question du tracé avait déjà fait l'objet de différentes études;

3) cette question du tracé a été le principal objet des discussions aux réunions subséquentes auxquelles a assisté M. Crowe;

4) le 28 février 1973, les discussions officielles ont porté sur la date, et non l'opportunité du dépôt des demandes à l'Office;

5) cette discussion suivait la lettre du 27 février 1973 décrivant le programme du projet [TRADUCTION] «jusqu'à la date du dépôt de la demande» à la fin de 1973;

6) le 30 mai 1973, le procès-verbal précise que [TRADUCTION] «la préparation du dépôt des demandes peut se poursuivre»;

7) un des mémoires étudiés à la réunion du 27 juin 1973 indique que la demande présentée à l'Office national de l'énergie doit [TRADUCTION] «être déposée cet automne» et souligne qu' [TRADUCTION] «il faut déterminer à présent quelle espèce de demande sera déposée».

Qu'aurait encore découvert une personne sensée et raisonnable qui aurait voulu se renseigner sur la situation réelle? Elle aurait constaté que

—la CDC est une compagnie possédée entièrement par le gouvernement du Canada et a, en vertu de

number of corporate objects which "shall be carried out in anticipation of profits";

—that two of its directors at the relevant time are the Deputy Minister of Industry, Trade and Commerce and the Deputy Minister of Finance;

—when the CDC joined the Study Group, more than $23 millions had been invested in the project and the eventual share of the CDC stood at a figure in the neighbourhood of $1 million;

—the Study Group which during the participation of Mr. Crowe had decided only two things, namely routing and ownership, had split and that the applications now before the Board, competing as they are for the obtaining of the certificate under s. 44 of the Act, are in fact being made by parties who during Mr. Crowe's participation in the work of the Study Group, had expressed concurrence in the decision of June 27, 1973 which is the major gun in appellant's arsenal.

Thus it follows that to a considerable degree the sole decision taken by Mr. Crowe and his partners, namely that relative to routing and ownership, was now being contested by some of the participants who at the time agreed therewith.

Obviously, the parties to the agreement could have a change of heart and decide not to continue with the project. Such a possibility is always present in a proposal of such a magnitude and of such a complexity where the relevant factors are numerous and subject to change practically on a daily basis. In that sense and in that sense only, nothing was definite during the period that Mr. Crowe participated in the work of the Study Group. Apart from this ever present possibility to change one's mind, and this possibility was not discussed between December 1972 and November 1973, the project was on the rails prior to Mr. Crowe joining the group. It is obvious that this ticklish problem of ownership and routing having been settled on June 27, 1973, albeit by a compromise that did not last too long as appears from the competing applications now before the Board, the petition to the National Energy Board had to be prepared. But Mr. Crowe did nothing else but reiterate the decision taken before his coming into the picture to proceed therewith.

la loi, un certain nombre d'objets qu'elle «doit réaliser . . . en vue d'un bénéfice»;

—que deux de ses administrateurs à l'époque pertinente sont le sous-ministre de l'Industrie et du Commerce et le sous-ministre des Finances;

—lorsque la CDC s'est jointe au groupe d'étude, plus de 23 millions de dollars avaient été investis dans le projet et la part éventuelle de CDC était d'environ 1 million de dollars;

—le groupe d'étude qui, au moment de la participation de M. Crowe, n'avait décidé que deux questions, le tracé et la propriété, s'était divisé et les demandes maintenant devant l'Office, bien que en conflit pour l'obtention du certificat en vertu de l'art. 44 de la Loi, sont en fait présentées par des parties qui, à l'époque où M. Crowe participait au groupe d'étude, s'étaient mises d'accord sur la décision du 27 juin 1973, qui est la meilleure arme de l'arsenal des appelants.

Il s'ensuit que la seule décision importante prise par M. Crowe et ses associés,—le tracé et la propriété—est maintenant sérieusement contestée par certains des participants qui à l'époque étaient d'accord.

Évidemment les parties à l'entente auraient pu changer d'idée et décider de ne pas donner suite au projet. C'est toujours possible dans un projet d'une telle importance et d'une telle complexité dont les facteurs pertinents sont nombreux et sujets à des fluctuations presque quotidiennes. Dans ce sens et, dans ce sens seulement, rien n'était définitif pendant la durée de la participation de M. Crowe aux activités du groupe. Faisant exception de cette possibilité toujours présente de changer d'idée, ce qui n'a jamais été discuté entre décembre 1972 et novembre 1973, on peut dire que le projet était en marche avant que M. Crowe se joigne au groupe. Il est évident qu'après avoir réglé cette délicate question de propriété et de tracé le 27 juin 1973, à la suite d'un compromis qui n'a pas duré longtemps si l'on en juge par les demandes en conflit actuellement devant l'Office, il fallait préparer la demande à l'Office national de l'énergie. Mais M. Crowe n'a fait qu'entériner la décision prise à ce sujet avant son arrivée.

The reasonable and right minded person would also have learned that the applications had been from time to time modified so that the proposal put forth by Arctic Gas and which the Board was to examine in the course of the hearings which started on October 27 last would be different from that examined by the Study Group between December 1972 and November 1973.

He would also have discovered that the report of April 1975 on the supply and requirements of Canadian Natural Gas discloses that Mr. Crowe and the other members of the Board have many question marks on the various points which by s. 44 of the Act may be considered by the Board, namely availability of gas, existence of market, economic feasibility, methods of financing and other public interest matter. It is sufficient here to quote from the conclusions of that study:

> Improving deliverability is a complex national problem requiring the cooperation and coordinated planning of producers, gathering and transmission companies and distribution utilities, as well as the governments of producing and consuming provinces and the federal government. Furthermore, short term improvements will have to come from gas already found, but there is a lead time generally of about three years between the initiation of development activity and the delivery of the gas in the market place. It therefore seems imperative to mobilize a concerted effort to bring about appropriate action if any significant improvement in deliverability is to be achieved in the remainder of the 1970's. If Frontier gas were connected—assuming adequate reserves are discovered and suitable transportation arrangements made—the need for and reliance on improved deliverability of gas from the Western Provinces would be reduced after that date.

It is interesting to note that two of the appellants before this Court, namely Canadian Arctic Resources Committee and Consumers' Association of Canada appeared before the Board at the hearing that preceded the publication of this study.

He would also have learned that the Government of Canada as well as the Governments of British Columbia, Saskatchewan, Manitoba,

Une personne sensée et raisonnable aurait aussi appris que les demandes avaient été modifiées à l'occasion de sorte que le projet soumis par Gaz arctique et que l'Office devait examiner aux audiences qui ont commencé le 27 octobre dernier, différait du projet étudié par le groupe d'étude entre décembre 1972 et novembre 1973.

Elle aurait aussi découvert que le rapport d'avril 1975 sur les besoins et approvisionnements de gaz naturel au Canada révèle que M. Crowe et les autres membres de l'Office ont encore plusieurs problèmes à résoudre sur divers points qui, en vertu de l'art. 44 de la Loi, peuvent être examinés par l'Office, notamment, la disponibilité du gaz, l'existence de marchés, la praticabilité économique, les méthodes de financement et autres sujets d'intérêt public. Il suffit de citer ici les conclusions de cette étude:

> L'amélioration de la capacité de livraison constitue un problème national complexe qui nécessite la coopération et la planification coordonnée des producteurs, des collecteurs, des compagnies de transport et des distributeurs, de même que des gouvernements des provinces productrices et consommatrices et du gouvernement fédéral. En outre, les améliorations à court terme devront nécessairement provenir du gaz déjà découvert; toutefois, il existe généralement un délai de démarrage d'environ trois années entre le début des travaux de mise en exploitation et la livraison du gaz sur le marché. Voilà pourquoi il semble indispensable que tous concertent leurs efforts et prennent les mesures nécessaires si nous voulons accroître de façon sensible la capacité de livraison d'ici la fin des années 1970. Si le gaz des régions pionnières était relié aux centres de consommation—en supposant la découverte de réserves suffisantes et les ententes appropriées quant au transport—il ne serait alors plus autant nécessaire d'accroître la capacité de livraison du gaz des provinces de l'Ouest.

Il est intéressant de souligner que deux des appelants devant cette Cour, savoir Canadian Arctic Resources Committee et l'Association des consommateurs du Canada ont comparu devant l'Office à l'audience qui a précédé la publication de cette étude.

Elle aurait aussi appris que le gouvernement du Canada, ainsi que les gouvernements de la Colombie-Britannique, de la Saskatchewan, du Mani-

Ontario and Quebec have expressly recognized that they cannot entertain any reasonable apprehension of bias on the part of Mr. Crowe. Nothing has been heard from the Province of Alberta but considering its vital interest in the subject matter, it is reasonable to infer that its silence is a complete acceptance of Mr. Crowe's ability to render justice. It is not unreasonable to assume that these seven governments together would look after the public interest and would be the first to raise the question of bias if any reasonable apprehension existed that the basic principles would be offended by the presence of Mr. Crowe.

In my opinion, the Court of Appeal was right in concluding that no reasonable apprehension of bias by reasonable, right minded and informed persons could be entertained.

For all these reasons, as well as for those of the Court of Appeal, I would dismiss the appeal with costs.

Appeal allowed, no order as to costs, MARTLAND, JUDSON *and* DE GRANDPRÉ JJ. *dissenting.*

Solicitors for the appellant Committee for Justice and Liberty Foundation: McTaggart, Potts, Stone & Herrige, Toronto.

Solicitor for the appellant Consumers' Association of Canada: T. Gregory Kane, Toronto.

Solicitor for the appellant Canadian Arctic Resources Committee: Alastair Lucas, Toronto.

Solicitor for the Attorney General of Canada: D. S. Thorson, Ottawa.

Solicitor for The National Energy Board: F. H. Lamar, Ottawa.

Solicitor for Canadian Arctic Gas Pipeline Limited et al.: D. G. Gibson, Ottawa.

Solicitors for Foothills Pipe Lines Ltd.: McLaws & Company, Calgary.

toba, de l'Ontario et du Québec ont expressément reconnu qu'ils ne pouvaient pas craindre raisonnablement la partialité de M. Crowe. La province de l'Alberta n'a pas fait connaître son point de vue, mais compte tenu de ses intérêts fondamentaux en la matière, on peut raisonnablement déduire de son silence qu'elle admet sans réserve que M. Crowe n'a aucun motif de se récuser. Il n'est pas déraisonnable de présumer que ces sept gouvernements surveillent les intérêts du public et seraient les premiers à soulever la question de la partialité s'il y avait raisonnablement lieu de craindre que la présence de M. Crowe vienne à l'encontre des principes fondamentaux.

A mon avis, la Cour d'appel a eu raison de conclure que des personnes sensées, raisonnables et bien informées ne pouvaient avoir de crainte raisonnable de partialité.

Pour ces motifs, aussi bien que pour ceux de la Cour d'appel, je rejetterais le pourvoi avec dépens.

Pourvoi accueilli, sans adjudication de dépens, les juges MARTLAND, JUDSON *et* DE GRANDPRÉ *étant dissidents.*

Procureurs de l'appelant, Committee for Justice and Liberty Foundation: McTaggart, Potts, Stone & Herrige, Toronto.

Procureur de l'appelante, l'Association des consommateurs du Canada: T. Gregory Kane, Toronto.

Procureur de l'appelant, Canadian Arctic Resources Committee: Alastair Lucas, Toronto.

Procureur du procureur général du Canada: D. S. Thorson, Ottawa.

Procureur de l'Office national de l'énergie: F. H. Lamar, Ottawa.

Procureur de Pipeline de Gaz arctique canadien Limitée: D. G. Gibson, Ottawa.

Procureurs de Foothills Pipe Lines Ltd.: McLaws & Company, Calgary.

Solicitors for The Alberta Gas Trunk Line (Canada) Limited et al.: Burke-Robertson, Chadwick & Ritchie, Ottawa.

Solicitors for Alberta Natural Gas Company: MacKimmie, Matthews, Calgary.

Solicitor for Westcoast Transmission Company Limited: C. D. Williams, Vancouver.

Procureurs de The Alberta Gas Trunk Line (Canada) Limited et autres: Burke-Robertson, Chadwick & Ritchie, Ottawa.

Procureurs de l'Alberta Natural Gas Company: MacKimmie, Matthews, Calgary.

Procureur de Westcoast Transmission Company Limited: C. D. Williams, Vancouver.

TAB 4

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

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.*

BEFORE: Paul Sommerville
Presiding Member

Cynthia Chaplin
Vice-Chair

DECISION AND ORDER

I. Background

ACH Limited Partnership ("ACH") filed an application on March 3, 2011 for an amendment to Schedule 1 of its electricity generator licence EG-2006-0124. The requested amendment is to change ACH's status as owner of eight hydroelectric generating stations to owner and operator. The facilities are the following: Iroquois Falls Generating Station, Twin Falls Generating Station, Island Falls Generating Station, Calm Lake Generating Station, Sturgeon Falls Generating Station, Fort Frances Generating Station, Kenora Generating Station and Norman Generating Station.

AbiBow Canada Inc. ("AbiBow", and, together with ACH, the "Applicants"), formerly Abitibi Consolidated Company of Canada, filed an application on March 7, 2011 for an amendment to its electricity generation licence EG-2003-0204. The requested amendment is to change the name on the licence EG-2003-0204 from Abitibi Consolidated Company of Canada to AbiBow Canada Inc., and to remove eight hydroelectric generating stations listed above, which AbiBow currently operates, from Schedule 1 of its licence.

On March 29, 2011, the Board issued a combined Notice of Application and Hearing for the above mentioned applications (the "Applications"). The Applicants were directed to serve the Notice upon the parties who receive electricity from the facilities that ACH will be operating and Keshen Major Law firm ("Keshen Major") who had submitted a letter of interest on behalf of twelve First Nations (the "First Nations group") prior to publication of the Notice.

By Letter dated April 5, 2011, Keshen Major on behalf of the First Nations group filed a request for combined intervenor status, an oral hearing and eligibility for an award of cost. The intervention request revolved around the Crown's duty to consult.

On April 5, 2011 Davis LLP on behalf of Fort Frances Power Corporation ("FFPC") requested intervenor status. On April 15, following clarification by ACH of the issues addressed in the FFPC's letter, FFPC withdrew its request to intervene and replaced it with a request for observer status. FFPC did not object to a written hearing.

On April 14, 2011 counsel for the Applicants filed a joint reply to the intervenor status request and the objections to written hearings. The Applicants submitted that the First Nations group does not qualify as intervenors as they have not demonstrated that they have a "substantial interest" in the outcome of the proceedings as required in accordance with Rule 23.02 of the Board's *Rules of Practice and Procedure* based on the fact that the issues raised by the First Nations group are outside of the scope of these proceedings and that the operation by ACH of the facilities it currently owns will not have any adverse impact on Aboriginal rights.

On April 17, 2011 the Board received an additional letter from Keshen Major expressing the intention of the First Nations group to exercise its right to respond to the Applicants' submission under Rule 23.08 of the Board's *Rules of Practice and Procedure* and requested time to consider and prepare the response proposing May 6, 2011 as a

deadline. The letter further stated that the issues before the Board are in the very preliminary context and may require extensive Affidavit evidence and complete legal argument to support assertions made in the April 5th submission.

On April 18, 2011 the Applicants replied to the First Nations group letter and objected to the request for an extension to the timelines. The Applicants stated that the Board has enough information before it to determine whether intervenor status should be granted.

On April 21, 2011 AbiBow filed a letter, supported by ACH, waiving their objection to the First Nations group's request for intervenor status. However, the Applicants stated they do not believe the First Nations group has a "substantial interest" in these proceedings as required by the Board's *Rules of Practice and Procedure*. The letter also stated that AbiBow will face significant financial harm unless the Board brings this matter to resolution by May 20, 2011.

On April 29, 2011 the Board issued Procedural Order No.1. In Procedural Order No.1 the Board sought further submissions from the parties with respect to the First Nations group's interest in the proceeding.

On May 6, 2011 the First Nations group filed a submission in accordance with Procedural Order No.1. The Applicants replied to the First Nations group submission on May 9, 2011. The First Nations group filed its final submission on May 13, 2011.

II. The Duty to Consult

The issue before the Board

The central principles of the duty to consult, as set out in *Haida Nation v. British Columbia (Minister of Forests) ("Haida")*[1], are well known: the duty arises where the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect it. The duty applies even where Aboriginal rights have been asserted but not yet proven. In some cases, the duty to consult will require the Crown to accommodate. The nature of this accommodation will vary depending on the strength of the Aboriginal claim and the extent of the potential infringement.

[1] [2004] SCC 73.

The issue in this case is whether the action being contemplated by the Board (the approval of the requested license amendments) could give rise to an adverse impact which would trigger the duty to consult. The First Nations group identifies a number of circumstances in which First Nations' interests have allegedly not been considered. A further issue is therefore what role does the Board have with regard to assessing any duty to consult that arises from the circumstances described by the First Nations group.

The role of tribunals with respect to the duty to consult

The Board accepts that in some circumstances it will be its role to assess whether the Crown has adequately discharged the duty to consult. As initially described in *Paul v. British Columbia (Forest Appeals Commission)*[2] and *Nova Scotia (Workers' Compensation Board) v. Martin*,[3] and later confirmed in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*,[4] where a tribunal has a broad statutory mandate and the ability to consider questions of law, it will have the concomitant power to consider Constitutional questions, including the adequacy of Crown consultation efforts.[5] Section 19 of the *Ontario Energy Board Act, 1998* (the "Act") states: "The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and fact." The Board has in fact already recognized in its Yellow Falls decision that the responsibility to consider the duty to consult will lie within its mandate in certain circumstances.[6]

The Board further observes that the courts have been clear that a tribunal itself will not be permitted to undertake "Crown" consultation absent a clear statutory mandate to do so. As the Supreme Court stated in Rio Tinto:

> 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

[2] [2003] S.C.J. 34 ("Paul")
[3] [2003] S.C.J. 54 ("Martin")
[4] [2010] S.C.J. 43 ("Rio Tinto").
[5] Rio Tinto, paras. 55, 66-73; Paul para. 39; Martin paras. 37-39.
[6] EB-2009-0120, Decision on Questions of Jurisdiction and Procedural Order No. 4, issued November 18, 2009 ("Yellow Falls"), pp. 8-11. In Yellow Falls the Board ultimately held it did not have the power to consider the duty to consult on electricity leave to construct applications, as section 96(4) of the Act specifically limits the Board's jurisdiction in these cases. Section 96(4), however, does not apply to the current case.

> 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 consultation. [Emphasis added].[7]

Aside from section 19 of the Act, the Board has no specific legislative mandate with respect to the duty to consult. There is clearly no provision in the Act which provides, either expressly or impliedly, that the Board is empowered to undertake Crown consultation with Aboriginal peoples itself. Indeed, the Board is a quasi-judicial tribunal, and such a role would be incompatible with its responsibility to adjudicate disputes between parties. As the Supreme Court observed in *Quebec (Attorney General) v. Canada (National Energy Board)*:

> The appellants' argument is that the fiduciary duty owed to aboriginal peoples by the Crown ... extends to the Board, as an agent of government and creation of Parliament, in the exercise of delegated powers. ...
>
> The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision making agencies by imposing on them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty. Counsel for the appellants conceded in oral argument that it could not be said that such a duty should apply to the courts, as a creation of government, in the exercise of their judicial function. In my view, the considerations which apply in evaluating whether such an obligation is impressed on the process by which the Board decides whether to grant a licence for export differ little from those applying to the courts. The function of the Board in this regard is quasi-judicial. While the characterization may not carry with it all the procedural and other requirements identical to those applicable to a court, it is inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it.[8]

The First Nations group does not necessarily argue that the Board itself has a duty to consult, although it reserves the right to make submissions on that issue if and when the question arises.[9] In the Board's view, however, this is still an important point to address

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[7] Rio Tinto, para. 60.
[8] [1994] 1 S.C.R. 159, paras. 34-35.
[9] First Nations reply submissions, p. 10.

here. To the extent that the Crown's duty to consult has been triggered, the "Crown" in question is not the Board. The Board's role, if any, would be to assess the adequacy of consultation efforts undertaken by other Crown actors.

The nature of the First Nations group's interest

With this as background, the Board will now turn to the question before it. The First Nations group has sought intervenor status in this proceeding. If accepted as intervenors, it is their intention to explore the adequacy of the Crown's consultation efforts with respect to potential infringements of their Aboriginal rights to harvest wild rice. To the extent that these Crown consultation efforts are found to be wanting, they would presumably ask the Board to not approve the proposed license amendment.

In order to accept the First Nations group as intervenors, the Board must find that they have an interest in these proceedings. In other words, the Board must make a determination that the duty to consult issues identified by the First Nations group are within the scope of the current proceedings. Therefore, for the purposes of this decision, the Board will accept the factual claims made by the First Nations group as correct (or at least potentially correct).

The Board has determined that, even assuming all the factual matters relied upon by the First Nations group are correct, the Board has no responsibility or authority to consider the adequacy of the Crown's consultation efforts in the current proceedings. The First Nations group has identified no other interests in the proceedings. The Board will therefore not accept the First Nations group as intervenors in these proceedings.

In order to reach this determination, the Board has carefully considered the elements of the duty to consult as described in *Haida* and subsequent cases. The duty to consult arises where the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect it. In the current case, however, the analysis cannot stop there. The further question before the Board is whether the Board has any responsibility or authority to address this issue in the current proceedings in relation to other processes happening separate from the current applications.

It is helpful to break out the elements of the duty to consult as they apply in this case. The First Nations group argues that the Board's consideration of the license

amendment applications triggers the duty to consult. Further, the First Nations group argues that the Crown consultations to date in relation to the facilities have been inadequate. The "Crown" in this case has been identified by the First Nations group as the Ontario Minister of Energy and Infrastructure (the "Minister") and the Ontario Power Authority (the "OPA").[10] The Crown conduct at issue is a directive from the Minister to the OPA encouraging the OPA to procure new generation contracts for hydroelectric facilities, and the OPA's subsequent creation of the Hydroelectric Contract Initiative (the "HCI") which offers attractive long term contracts for hydroelectric power generators, including incentives for upgrades and expansions. The potential impact to Aboriginal rights or title is the possibility that the HCI will result in increased or expanded hydroelectric generation, with attendant possible changes to water levels and flows in various watercourses and wetlands. Any changes to water levels or flows may impact the ability of the First Nations to harvest wild rice, which they assert is an Aboriginal right. Specifically with respect to the applications before the Board, the concern is that the proposed license amendments will facilitate the sale of the existing generating assets to a third party ("Bluearth") that intends to ultimately expand operations to take advantage of an HCI contract already held by ACH.

As noted above, the Board accepts that under certain circumstances it will have a responsibility to assess the adequacy of the Crown's efforts with respect to the duty to consult. However, there must be a clear nexus between the matter before the Board (i.e. the applications the Board is being asked to approve) and the circumstances giving rise to the (possible) duty to consult. In the current case, the alleged deficiencies in the Crown's consultation efforts are not related to the Board's consideration of the requested license amendments.

The Crown conduct in question – i.e. the Minister's directive and the OPA's development of the HCI – is not before the Board and the Board has no approval function with respect to these activities. The Board accepts that strategic, high level decisions that may have an impact on Aboriginal rights can trigger the duty to consult. That does not mean, however, that the Board must assess the adequacy of Crown consultation for these types of decisions where there is little or no connection between the decisions in question and the applications before the Board. The Board does not dispute that the conduct of the Minister and the OPA may have triggered the duty to consult; what it does dispute is that this conduct is directly relevant to the applications before the Board.

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[10] First Nations group's response to Applicants' objection to request for intervenor status, p. 15.

The applications before the Board are for a license amendment to allow ACH to operate the facilities it is already licensed to own, and for Abibow's generator license amendment to remove its authority to operate these same facilities. Although these amendments are apparently being undertaken to facilitate a sale to Bluearth, this Board is not being asked to approve this future sale in the current proceedings. Indeed, Bluearth is not even a party to these proceedings.

The potential infringement to Aboriginal rights or title identified by the First Nations group relates to its ability to harvest wild rice. The applications before the Board, if approved, will have no direct impact on water levels or flows, and therefore no direct impact on the First Nations' ability to harvest wild rice. To the extent that there is any potential indirect impact, the connection to the current proceeding is peripheral at best. Section 57 of the Act requires electricity generators to be licensed by the Board. The license itself does little more than authorize the licensee to generate electricity for the Independent Electricity System Operator ("IESO") administered markets, purchase electricity from the IESO administered market, and sell electricity to the IESO administered market.[11] Although the individual generation facilities are identified, the license does not include the generation capacity of the facilities.

The current applications, if approved, would change only the identity of the owner/operator. Although ACH, AbiBow and Bluearth may regard the amendments as a condition precedent to a future sale, the proposed amendments in no way authorize (or even directly contemplate) such a sale. Moreover, the proposed amendments will have no impact whatsoever with regard to the owner and operator's ability to operate the facilities. The proposed amendments to the license relate only to the identity of the owner and operator – there are no other changes. To the extent a sale is ultimately realized, Bluearth will have exactly the same authority to operate the facilities as ACH and AbiBow have today.

More importantly, the proposed license amendments, and indeed the licenses themselves, are not connected to the potential infringement as identified by the First Nations group. The potential infringement may occur only if there are changes to water levels or flows. The license - whether held by ACH, AbiBow, Bluearth, or anyone else - does not in any way manage or control water levels or flows. These are matters governed by the Lake of the Woods Control Board and the International Rainy Lake

[11] A copy of ACH's current generation license is attached as Appendix "A".

Board of Control, and entirely outside the control of the Board and the licensing regime it oversees. To the extent that any parties seek changes, it would be through these agencies and without input from the Board.

The First Nations group submits that a Crown authorized transfer or renewal of a license to private parties can trigger the duty to consult, and that in fact *Haida* involved just such a facts scenario. In *Haida*, however, there was a direct and immediate connection between the license in question (i.e. a tree farming license) and the potential infringement to Aboriginal rights or title (i.e. cutting down cedar trees without consulting or accommodating with the Aboriginals for whom such trees were an intrinsic part of their culture and economy). In Rio Tinto, the Court summarized the potential impact of the license transfer in *Haida* as follows:

> Assuming that the creation of the Joint Operating Committee and the ongoing reservoir operation plan can be viewed as organizational changes effected by the 2007 EPA, **the question is whether they have the potential to adversely impact the claims or rights of the CSTC First Nations**. In cases where adverse impact giving rise to a duty to consult has been found as a consequence of organizational or power-structure changes, it has generally been on the basis that the operational decision at stake may affect the Crown's future ability to deal honourably with Aboriginal interests. Thus, in Haida Nation, the Crown proposed to enter into a long-term timber sale contract with Weyerhaeuser. **By entering into the contract, the Crown would have reduced its power to control logging of trees, some of the old growth forest, and hence its ability to exercise decision making over the forest consistent with the honour of the Crown. The resource would have been harvested without the consultation discharge that the honour of the Crown required.** The Haida people would have been robbed of their constitutional entitlement.[12] [Emphasis added]

In the current case, the licenses in question have no direct connection to the potential infringement – i.e. changes to water levels or flows that could impact the First Nations ability to harvest wild rice. The proposed amendments to the licenses would not in any way limit the Crown's ability to discharge the duty to consult if and when Bluearth (or any other generator) seeks approval to alter water levels or flows. Nor would it in any way impede the ability of the water control boards to assess the adequacy of any Crown

[12] Rio Tinto, para. 90.

consultation with respect to any previous high level government decisions, such as the development of the HCI.

Although the First Nations group submits that the Board is the central or final decision maker with respect to this project, this is not correct. The Board has no approval authority in relation to the physical operation of the "project".

Conclusion with respect to the First Nations group's request for intervenor status

In sum, the nexus between the Crown conduct and potential infringement of Aboriginal rights on the one hand, and the subject of the Board's proceedings on the other, is not sufficiently strong to provide the Board with the responsibility or authority to assess the adequacy of Crown consultation. The requested approval has no direct connection to the Crown conduct in question, nor to the potential infringement of Aboriginal rights. The Board will therefore not accept the First Nations group as intervenors in these proceedings. To the extent that the Crown conduct to date (the Minister's Directive and the OPA's creation of the HCI) or in the future (with respect to potential future requests by Bluearth or any other entity to alter water levels or flows) has triggered or will trigger the duty to consult, the assessment of whether that duty has been adequately discharged will reside elsewhere.

III. Allegations of an Apprehension of Bias

In its submissions dated May 6, 2011, the First Nations group alleges that the person (or persons) responsible for drafting Procedural Order No. 1 has demonstrated a reasonable apprehension of bias, and should recuse him or herself from considering this matter further. In the First Nations group's view, the statements made in the Procedural Order demonstrate that its author is predisposed to reject the First Nations group's submissions even before reading them.

The First Nations group notes that it is not clear who wrote the Procedural Order, which appears under the signature of the Board Secretary. This proceeding was originally to be decided by Counsel, Special Projects, who is a staff member that had been delegated authority to determine this matter pursuant to section 6 of the Act. The Board's practice is that only routine and non-controversial matters will be decided by a delegated authority pursuant to section 6. Once it became clear that this proceeding would be contested, it was transferred to a panel of the Board pursuant to section 6(7).

It was this panel that authorized Procedural Order No. 1. The same panel has also issued this decision and order.

The test for reasonable apprehension of bias, as originally set out in the dissent in *Committee for Justice and Liberty v. National Energy Board*,[13] and later confirmed in *Baker v. Canada (Minister of Citizenship and Immigration)*,[14] is as follows:

> ... 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. According to the Court of Appeal, the 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?[15]

The First Nations group alleges that some of the statements in Procedural Order No. 1 demonstrate that its author is predisposed to reject the First Nations group's arguments. In particular, the First Nations group argues that the Board had already determined that there was no Crown involvement in the applications, and that the Board had already essentially determined that there could be no adverse impacts arising from the applications before the Board.

As the Applicants noted in their submissions on this issue, the standard for demonstrating bias is a high one. The Court of Appeal stated:

> 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. As stated in *Wewaykum* at para. 76, citing de Grandpre J. in Committee for Justice and Liberty at p. 395, the grounds for the alleged apprehension of bias must be "substantial". [16]

The Court of Appeal has further held that it is not improper for the decision maker to express tentative views on a matter:

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[13] [1978] 1 S.C.R. 369 ("Committee for Justice and Liberty")
[14] [1999] 2 S.C.R. 817
[15] Committee for Justice and Liberty, p. 394.
[16] *Canadian College of Business and Computers Inc. v. Ontario* , 2010 ONCA 856 (CanLii), para. 24.

> ...we do not consider it as 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... [17]

With respect to the argument that it had already determined that there was no Crown involvement in the applications, the Board disagrees that it demonstrated any level of bias or predetermination. The statement in the Procedural Order is factually correct – there is no Crown actor directly involved in the applications before the Board, nor the transaction (i.e. the sale) that will apparently follow approvals from the Board. No Crown actor has intervened or otherwise participated in this proceeding, nor (to the Board's knowledge) is any Crown actor a signatory to whatever sale arrangement will follow.

Regardless, the Board has paid careful attention to the First Nations group's submissions with regard to the Crown's involvement with the potential infringement. The First Nations group's letter seeking intervenor status says virtually nothing about the involvement of any Crown actor. It states that the Government of Ontario has a duty to consult, but it provides no information describing how that duty to consult is engaged with respect to the applications. Only in its response to the Procedural Order did the First Nations group describe its views on the connection between the Crown's duty to consult and the applications. As discussed above, the Board has accepted that it is possible that the Crown's conduct has triggered the duty to consult. The Board has ultimately determined that there was not a sufficient connection between the Crown conduct and the Board's proceeding, but this does not indicate that the Board did not have an open mind with respect to the issue of the Crown's involvement.

With respect to the allegation that the Board had already determined that there was no infringement arising from the applications, the Board again disagrees. The very purpose of Procedural Order No. 1 was to receive submissions on this issue. The Board's *Rules of Practice and Procedure* (and the common law) allow only parties that have a legitimate interest in the outcome of a proceeding to intervene. The Board has a responsibility to applicants and the process to ensure that proceeding time and parties' resources are used efficiently, and must therefore ensure that proposed intervenors have a legitimate interest in the outcome of the proceeding.

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[17] *R. v. Parker*, 1998 CanLii 4792 (ON CA), para. 2

It was not clear to the Board upon reviewing the First Nations group's letter seeking intervenor status what the exact nature of the potential infringement was or whether the First Nations group had a legitimate interest in the outcome of these proceedings. For example, the Aboriginal right to harvest wild rice, which the Board learned through the submissions following the Procedural Order is the Aboriginal right that might be infringed, is not even mentioned in the initial correspondence. In that light, the Board provided the First Nations group with the opportunity to clarify and elaborate on the exact nature of its interest in the proceedings before the Board. There is nothing at all improper about such an approach; indeed it was necessary for the Board to understand and consider all the information relevant to the intervention request.

For these reasons, the Board rejects the First Nations group's arguments that the panel has demonstrated a reasonable apprehension of bias, and it has therefore not appointed a different panel to consider the submissions arising from Procedural Order No. 1.

IV. Decision with Respect to the Applications

Aside from the issues raised by the First Nations group and dealt with above, there were no further submissions in these proceedings. There are no intervenors.

After considering the Applications, the Board finds it to be in the public interest to grant the requested amendments because no adverse impacts have been identified. The amended licences will be issued when the Board receives confirmation from the Applicants that the commercial transaction has closed and operation of the eight generation stations has been transferred to ACH from AbiBow, and will be effective from the date of closing.

IT IS THEREFORE ORDERED THAT:

1. The name on electricity generation licence EG-2003-0204 is changed to AbiBow Canada Inc.

2. Schedule 1 of the electricity generator licence EG-2003-0204 will be amended to delete Iroquois Falls Generating Station, Twin Falls Generating Station, Island Falls Generating Station, Calm Lake Generating Station,

Sturgeon Falls Generating Station, Fort Frances Generating Station, Kenora Generating Station and Norman Generating Station when the Board receives confirmation from AbiBow Canada Inc. that the commercial transaction has closed.

3. Schedule 1 of the electricity generator licence EG-2006-0124 will be amended to replace "owned" with "owned and operated" for Iroquois Falls Generating Station, Twin Falls Generating Station, Island Falls Generating Station, Calm Lake Generating Station, Sturgeon Falls Generating Station, Fort Frances Generating Station, Kenora Generating Station and Norman Generating Station when the Board receives confirmation from ACH Limited Partnership that the commercial transaction has closed.

DATED at Toronto, May 20, 2011

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Attachment A

Electricity Generation Licence EG-2006-0124

ACH Limited Partnership

Electricity Generation Licence

EG-2006-00124

ACH Limited Partnership

Original signed by

Mark C. Garner
Managing Director, Market Operations
Ontario Energy Board
Date of Issuance: March 5, 2007
Effective Date: 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 ACH Limited Partnership;

"**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 Subject to section 8.2, this Licence shall take effect on the date the commercial transaction closes and expire 20 years from that date. The term of this Licence may be extended by the Board.

8.2 In order for this licence to take effect, the commercial transaction must close on or before December 31, 2007.

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

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

1. Iroquois Falls Generating Station, owned by the Licensee at Iroquois Falls, Ontario.
2. Twin Falls Generating Station, owned by the Licensee at Teefy Township, Cochrane District, Ontario.
3. Island Falls Generating Station, owned by the Licensee at Menapiat Tolmie Township, Cochrane District, Ontario.
4. Calm Lake Generating Station, owned by the Licensee at Bennet Township, District of Rainy River, Ontario.
5. Sturgeon Falls Generating Station, owned by the Licensee at Bennet Township, District of Rainy River, Ontario.
6. Fort Frances Generating Station, owned by the Licensee at Town of Fort Frances, District of Rainy River, Ontario.
7. Kenora Generating Station, owned by the Licensee at Town of Kenora, District of Kenora, Ontario.
8. Norman Generating Station, owned by the Licensee at Township of Kenora, District of Kenora, Ontario.

TAB 5

Wewaykum Indian Band *v.* Canada, [2003] 2 S.C.R. 259, 2003 SCC 45

Roy Anthony Roberts, C. Aubrey Roberts and John Henderson, suing on their own behalf and on behalf of all other members of the Wewaykum Indian Band (also known as the Campbell River Indian Band) *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Ralph Dick, Daniel Billy, Elmer Dick, Stephen Assu and James D. Wilson, suing on their own behalf and on behalf of all other members of the Wewaikai Indian Band (also known as the Cape Mudge Indian Band) *Respondents/Appellants*

and between

Ralph Dick, Daniel Billy, Elmer Dick, Stephen Assu, Godfrey Price, Allen Chickite and Lloyd Chickite, suing on their own behalf and on behalf of all other members of the Wewaikai Indian Band (also known as the Cape Mudge Indian Band) *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, Attorney General of British Columbia, Gitanmaax Indian Band, Kispiox Indian Band and Glen Vowell Indian Band *Interveners*

Indexed as: Wewaykum Indian Band *v.* Canada

Neutral citation: 2003 SCC 45.

File No.: 27641.

2003: June 23; 2003: September 26.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Arbour, LeBel and Deschamps JJ.

motion for directions

motions to vacate a judgment

Courts — Judges — Impartiality — Reasonable apprehension of bias — Supreme Court judgment dismissing Indian bands' appeals — Indian bands presenting motions to set aside judgment alleging reasonable apprehension of bias arising from involvement of judge in bands' claims while serving as federal Associate Deputy Minister of Justice over 15 years prior to hearing of appeals — Whether judgment tainted by reasonable apprehension of bias — Whether judgment should be set aside.

In 1985 and 1989 respectively, the Campbell River Band and the Cape Mudge Band instituted legal proceedings against each other and the Crown, each band claiming exclusive entitlement to two reserves on Vancouver Island. In 1995, the Federal Court, Trial Division dismissed the actions and the Federal Court of Appeal upheld the decision. In December 2002, in reasons written by Binnie J. and concurred in unanimously, this Court dismissed the bands' appeals. In February 2003, the Campbell

River Band made an access to information request to the federal Department of Justice seeking copies of all records to, from or which make reference to Mr. Binnie concerning the bands' claims against the Crown Mr. Binnie, when he was Associate Deputy Minister of Justice in 1982-1986, had been responsible for all litigation, except tax matters and cases in Quebec, involving the Government of Canada and had supervisory authority over thousands of cases. The Department of Justice found a number of internal memoranda which indicate that, in late 1985 and early 1986, Mr. Binnie had received some information concerning the Campbell River Band's claim and that he had attended a meeting where the claim was discussed. The Crown filed a motion in this Court seeking directions as to any steps to be taken. Binnie J. recused himself from any further proceedings in this matter and filed a statement setting out that he had no recollection of personal involvement in the case. The bands sought an order setting aside this Court's judgment. Both bands agree that actual bias is not at issue and accept Binnie J.'s statement that he had no recollection of personal involvement in the case. However, they allege that Binnie J.'s involvement as federal Associate Deputy Minister of Justice in the early stages of the Campbell River Band's claim in 1985 and 1986 gives rise to a reasonable apprehension of bias.

Held: The motion for directions and the motions to vacate a judgment should be dismissed. In the circumstances of this case, no reasonable apprehension of bias is established and hence Binnie J. was not disqualified from hearing the appeals or participating in the judgment.

Public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so. A judge's impartiality is presumed and a party arguing for

disqualification must establish that the circumstances justify a finding that the judge must be disqualified. The criterion of disqualification is the reasonable apprehension of bias. The question is what would an informed, reasonable and right-minded 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 judge, whether consciously or unconsciously, would not decide fairly?

It is necessary to clarify the relationship of this objective standard to two other factors: the subjective consideration of actual bias and the notion of automatic disqualification. Most arguments for disqualification are not based on actual bias. When parties say that there was no actual bias on the part of a judge, it can mean one of three things: (1) that reasonable apprehension is a surrogate for actual bias; (2) that unconscious bias can exist even where the judge acted in good faith; and (3) that looking for real bias is simply not the relevant inquiry since justice should not only be done but must be seen to be done. This third justification for the objective standard of reasonable apprehension of bias envisions the possibility that a judge may be totally impartial in circumstances which nevertheless create a reasonable apprehension of bias, requiring his disqualification. The idea that "justice must be seen to be done" cannot be severed from the standard of reasonable apprehension of bias. The relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was. With respect to the notion of automatic disqualification, recent English case law suggests that automatic disqualification is justified in cases where a judge has an interest in the outcome of a proceeding. This case law is not helpful here because automatic disqualification does not extend to judges somehow involved in the litigation or linked to counsel at an earlier stage. In Canada, proof of actual bias or a reasonable

apprehension of bias is required. In any event, on the facts of this case, there is no suggestion that Binnie J. had any financial interest in the appeals, or had such an interest in the subject matter of the case that he was effectively in the position of a party to the cause.

In this case, disqualification can only be based on a reasonable apprehension of bias. In light of the strong presumption of judicial impartiality, the standard refers to an apprehension based on serious grounds. Each case must be examined contextually and the inquiry is fact-specific. Where, as here, the issue of bias arises after judgment has been rendered, it is not helpful to determine whether the judge would have recused himself had the matter come to light earlier. Although the standard remains the same, an abundance of caution guides many, if not most judges, at this early stage, and judges often recuse themselves where it is not legally necessary. Lastly, this Court's dictum that judges should not preside over a case in which they played a part at any stage is but an illustration of the general principle. It does not suggest that any degree of earlier participation in a case is cause for automatic disqualification, but rather suggests that a reasonable and right-minded person would likely view unfavourably the fact that the judge acted as counsel in a case over which he is presiding, and could take this fact as the foundation of a reasonable apprehension of bias.

Here, neither Binnie J.'s past status as Associate Deputy Minister nor his long-standing interest in matters involving First Nations is by itself sufficient to justify his disqualification. The source of concern for the bands is Binnie J.'s involvement in this case in the mid-1980s. The documentary record, however, does not support a reasonable apprehension of bias. Binnie J.'s involvement in the dispute was confined to a limited supervisory and administrative role. While his link to this litigation

exceeded *pro forma* management of the files, he was never counsel of record and played no active role after the claim was filed, nor did he plan litigation strategy. Any views attributed to Binnie J. earlier on were offered in the context of wider implications of the negotiation process, and not in the context of litigation. Furthermore, in his capacity of Associate Deputy Minister, he was responsible for thousands of files at the relevant time and the matter on which he was involved in this file was not unique to this case but was an issue of general application to existing reserves in British Columbia. More importantly, Binnie J.'s supervisory role dates back over 15 years. This lengthy period is significant in relation to Binnie J.'s statement that he had no recollection of his involvement because it is a factor that a reasonable person would properly consider, and it makes bias or its apprehension improbable. Nor would a reasonable person, viewing the matter realistically, conclude that Binnie J.'s ability to remain impartial was unconsciously affected by a limited administrative and supervisory role dating back over 15 years.

Even if the involvement of a single judge had given rise to a reasonable apprehension of bias in this case, no reasonable person informed of the decision-making process of this Court and viewing it realistically could conclude that the eight other judges who heard the appeals were biased or tainted.

Cases Cited

Applied: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; **distinguished:** *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)*, [1999] 2 W.L.R. 272; **referred to:** *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Locabail (U.K.) Ltd.*

v. Bayfield Properties Ltd., [2000] Q.B. 451; *R. v. Bertram*, [1989] O.J. No. 2123 (QL); *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *R. v. Gough*, [1993] A.C. 646; *The Queen v. Barnsley Licensing Justices*, [1960] 2 Q.B. 167; *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256; *Dimes v. Proprietors of the Grand Junction Canal* (1852), 3 H.L.C. 759, 10 E.R. 301; *Man O'War Station Ltd. v. Auckland City Council (Judgment No. 1)*, [2002] 3 N.Z.L.R. 577, [2002] UKPC 28; *Panton v. Minister of Finance*, [2001] 5 L.R.C. 132, [2001] UKPC 33.

Statutes and Regulations Cited

Access to Information Act, R.S.C. 1985, c. A-1.

Indian Act, R.S.C. 1985, c. I-5.

Rules of the Supreme Court of Canada, SOR/2002-156, Rule 3.

Authors Cited

Canadian Judicial Council. *Ethical Principles for Judges*. Ottawa: The Council, 1998.

Wilson, Bertha. "Decision-making in the Supreme Court" (1986), 36 *U.T.L.J.* 227.

MOTION FOR DIRECTIONS and MOTIONS TO VACATE a judgment of the Supreme Court of Canada, *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79. Motions dismissed.

Michael P. Carroll, Q.C., and *Malcolm Maclean*, for the appellants Roy Anthony Roberts et al.

John D. McAlpine, Q.C., and *Allan Donovan*, for the respondents/appellants Ralph Dick et al.

J. Vincent O'Donnell, Q.C., and *Jean Bélanger*, for the respondent Her Majesty the Queen.

Written submissions only by *Patrick G. Foy, Q.C.*, and *Angus M. Gunn, Jr.*, for the intervener the Attorney General of British Columbia.

Written submissions only by *Peter R. Grant* and *David Schulze*, for the interveners the Gitanmaax Indian Band, the Kispiox Indian Band and the Glen Vowell Indian Band.

The following is the judgment delivered by

THE CHIEF JUSTICE AND GONTHIER, IACOBUCCI, MAJOR, BASTARACHE, ARBOUR, LEBEL AND DESCHAMPS JJ. —

I. Introduction

1 The Wewaykum or Campbell River Indian Band ("Campbell River") and the Wewaikai or Cape Mudge Indian Band ("Cape Mudge") allege that the unanimous judgment of this Court in *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, with reasons written by Justice Binnie, is tainted by a reasonable apprehension of bias and should be set aside. The alleged reasonable apprehension of bias is said to arise from Binnie J.'s involvement in this matter in his capacity as federal Associate

Deputy Minister of Justice over 15 years prior to the hearing of the bands' appeals by this Court.

2 An allegation that a judgment may be tainted by bias or by a reasonable apprehension of bias is most serious. That allegation calls into question the impartiality of the Court and its members and raises doubt on the public's perception of the Court's ability to render justice according to law. Consequently, the submissions in support of the applicant bands and the other parties have been examined in detail as reflected in the following reasons.

3 After an analysis of the allegations and the record upon which they are based, all of which is attached as an appendix to these reasons, we have concluded that no reasonable apprehension of bias is established and hence that Binnie J. was not disqualified. The involvement of Binnie J. in this dispute was confined to a limited supervisory and administrative role, over 15 years prior to the hearing of the appeals. In his written statement filed as part of the record, Binnie J. has stated that he has no recollection of any involvement in this litigation, and no party disputes that fact. In light of this and for the reasons which follow, we are of the view that a reasonable person could not conclude that Binnie J. was suffering from a conscious or unconscious bias when he heard these appeals, and that, in any event, the unanimous judgment of this Court should not be disturbed. Accordingly, the motions to set aside this Court's judgment of December 6, 2002, are dismissed.

II. Factual Background

4 The bands have each presented motions to set aside the unanimous judgment of this Court, dated December 6, 2002, with reasons written by Binnie J. The judgment dismissed their appeals from an order of the Federal Court of Appeal. The motions to set aside allege that Binnie J.'s involvement as federal Associate Deputy Minister of Justice in the early stages of Campbell River's claim in 1985 and 1986 gives rise to a reasonable apprehension of bias by properly informed and right-thinking members of the public. These motions were brought following an application by the Crown in right of Canada for directions and were heard on June 23, 2003. Binnie J. had recused himself from any participation in this process after filing a statement as part of this record indicating that he had no recollection of participating in the litigation process involving these claims while serving in the Department of Justice.

5 Prior to his appointment to the Supreme Court of Canada in 1998, Binnie J. had a long and varied career as a practising lawyer. Called to the Ontario Bar in 1967, Binnie J. practised litigation with Wright & McTaggart and successor firms until 1982. Between 1982 and 1986, and of most relevance to these motions, Binnie J. served as Associate Deputy Minister of Justice for Canada, having joined the federal civil service on a secondment. As Associate Deputy Minister of Justice, Binnie J. was responsible for all litigation involving the government of Canada, except cases originating from the province of Quebec and tax litigation. He also had special responsibilities for aboriginal matters. Upon leaving the Department of Justice on July 31, 1986, Binnie J. joined the firm of McCarthy Tétrault where he remained until his appointment to this Court. Understandably, when Binnie J. left the Department of Justice, the files he worked on, in accordance with usual practice, remained with the Department of Justice. As a result, in the absence of recollection, judges who leave their firms or institutions do not have

the ability to examine their previous files in order to verify whether there has been any prior involvement in a matter coming before them.

6 To distinguish between his role as judge and as Associate Deputy Minister, Justice Binnie is referred to in these reasons as Binnie J. and Binnie respectively.

A. *The Original Appeals*

7 To understand the allegations of reasonable apprehension of bias, it is necessary to examine the factual and procedural background of this case. Campbell River and Cape Mudge are sister bands of the Laich-kwil-tach First Nation. Since the end of the 19th century, members of each band have inhabited two reserves located a few miles from each other on the east coast of Vancouver Island. In particular, members of Campbell River inhabit Reserve No. 11 (Campbell River) and members of Cape Mudge inhabit Reserve No. 12 (Quinsam). In 1985 and 1989 respectively, Campbell River and Cape Mudge instituted legal proceedings against each other and the Crown. In these proceedings, each band claimed exclusive entitlement to both Reserves Nos. 11 and 12.

8 The bands' claims rely on a historical review of the process that led to the creation of the two reserves. In 1888, Mr. Ashdown Green, a federal government surveyor, recommended the creation of these reserves. In his report, however, he did not allocate the reserves to a particular band but rather to the Laich-kwil-tach Indians. The first Schedule of Indian Reserves, published in 1892 by the Department of Indian Affairs, listed Reserves Nos. 11 and 12 as belonging to Laich-kwil-tach Indians without any indication of how the reserves were to be distributed between the bands of the Laich-kwil-tach Indians. By 1902, the Schedule indicated that both reserves were allocated

to the "Wewayakay" (Cape Mudge) Band. The Schedule allocated Reserves Nos. 7 through 12 to Cape Mudge. The name of the Cape Mudge Band ("Wewayakay") was written in the entry corresponding to Reserve No. 7. Ditto marks were used to reproduce the same reference for entries corresponding to Reserves Nos. 8 through 12.

9 The allocation of Reserve No. 11 to Cape Mudge created difficulties. Cape Mudge was not and had never been in possession of Reserve No. 11. Members of Campbell River had occupied the reserve for several years to the exclusion of Cape Mudge. In 1905, a disagreement between the two bands over fishing rights in the Campbell River led to a dispute over possession of Reserve No. 11. In 1907, this dispute was settled by a resolution in which Cape Mudge ceded to Campbell River any claim to Reserve No. 11, subject to retaining fishing rights in the area. This resulted in the Department of Indian Affairs modifying the 1902 Schedule of Indian Reserves by marking "We-way-akum band" (Campbell River) in the entry corresponding to Reserve No. 11. By inadvertence, the "ditto marks" in the subsequent entry corresponding to Reserve No. 12 were not altered creating the erroneous appearance that Reserve No. 12 was also allocated to Campbell River. However, the alteration of the Schedule was intended to refer only to Reserve No. 11 and there was no intention to make any change to Reserve No. 12.

10 In 1912, the McKenna McBride Commission was established to address continuing disagreements between the federal and provincial governments about the size and number of reserves in British Columbia. The Commission acknowledged that Reserve No. 11 was properly allocated to Campbell River but noted the irregularity that was the source of the confusion with respect to Reserve No. 12. Nevertheless, the Commission made no alteration to the Schedule so that matters remained with Cape

Mudge occupying Reserve No. 12 and Campbell River occupying Reserve No. 11 subject to the fishing rights in the waters of the Campbell River given to Cape Mudge.

11 The McKenna McBride Report did not receive approval by the province. Both the provincial and federal governments then established the Ditchburn Clark Commission to resolve the outstanding federal-provincial disagreements. In its 1923 report, the Ditchburn Clark Commission restated the position proposed in the McKenna McBride Report concerning Reserves Nos. 11 and 12. In 1924, both levels of government adopted the McKenna McBride recommendations as modified by the Ditchburn Clark Commission. In 1938, a provincial Order-in-Council was issued transferring administration and control of the reserve lands to the federal Crown.

12 In the 1970s, a dispute between the bands resurfaced. Eventually, in December 1985, Campbell River started an action against the Crown and Cape Mudge in the Federal Court. It claimed that the Crown had acted in breach of its fiduciary duty, had acted negligently, had committed fraud, equitable fraud and deceit, and had breached and continued to breach statutory duties owed to Campbell River. Campbell River further claimed that Cape Mudge had trespassed and continued to trespass on Reserve No. 12. In 1989, Cape Mudge counterclaimed against Campbell River and brought its own claim against the Crown. Cape Mudge claimed that the Crown had breached its fiduciary duty, duty of trust and statutory duties under the *Indian Act*, R.S.C. 1985, c. I-5. Each band thus claimed both reserves for itself, but sought compensation from the Crown as relief rather than dispossession of either band from their respective Reserves Nos. 11 and 12.

13 The two joined actions were heard together in the Federal Court, Trial Division by Teitelbaum J. The trial lasted 80 days and the actions were dismissed on September 19, 1995 (99 F.T.R. 1). The bands appealed to the Federal Court of Appeal. By unanimous judgment the appeals were dismissed on October 12, 1999 (247 N.R. 350).

14 The bands applied for and were granted leave to appeal on October 12, 2000, [2000] 2 S.C.R. vii. The appeals were heard by the full Court on December 6, 2001. On December 6, 2002, in reasons written by Binnie J. and concurred in unanimously, the appeals were dismissed. The Court held that the Crown had not breached its fiduciary duty to either band. In any event, it found that the equitable defences of laches and acquiescence were available to the Crown. As well, the Court concluded that the bands' claims were statute barred under the applicable statutes of limitations.

B. *The Access to Information Request*

15 In February 2003, a request under the *Access to Information Act*, R.S.C. 1985, c. A-1, made by Campbell River was received by the Department of Justice. The request sought:

> . . . copies of all records, including letters, correspondence and internal memoranda to, from or which make reference to Mr. William Binnie (Ian Binnie) [now Justice Binnie] in the matter of the claim against Canada by the Wewaykum (or Campbell River) Indian Band and the Wewaikai (or Cape Mudge) Indian Band for Quinsam IR 12 and Campbell River IR 11 between the years 1982 and 1986.

16 During the hearing of these motions, counsel for Campbell River explained the origin of the access to information request. Subsequent to the release of the Court's

reasons, the band's solicitor, Mr. Robert T. Banno, reviewed the reasons with the band and, as stated by its counsel, the band was upset both by the tone and the result of the appeal. Counsel for Campbell River stated that:

> They were upset, quite frankly, with the tenor of the reasons in the sense that the claim had been dismissed; some of the words used were "a paper claim". And in effect they thought, as parties sometimes feel when they lose cases, that their arguments had not been properly addressed.

17 Counsel for Campbell River offered the following explanation as to why an unsuccessful litigant would be unusually inclined to present an access to information request about one of the authors of the reasons of the Court:

> Now, one could look at the FOI [freedom of information] request and could sort of infer something from it other than perhaps a proper -- well, something improper about doing it. In my submission, what happens if a client is upset, an FOI request may be the very thing to satisfy that client or that litigant that everything is fine. I mean that may be the type of situation that comes back -- the FOI request comes back with nothing and the client is satisfied. Well, the chips fall where they fall. . . .
>
> . . .
>
> . . . in something like this, in sitting down with a client and -- a litigant and explaining what has happened, this is the kind of thing that helps explain what has happened. You say, look, there is nothing untoward here, everything is above board.
>
> . . .
>
> . . . in my submission, there should be no improper motive at all attributed to the filing of that information. That sometimes helps lawyers explain to litigants, helps quell those kinds of concerns.

18 Counsel for Campbell River offered this explanation as a rejection of any suggestion that Binnie J.'s involvement in the band's claim as Associate Deputy Minister in the Department of Justice many years previous was suspected prior to or during the

hearing before this Court but only investigated subsequently when a negative decision was rendered.

C. *Results of the Access to Information Request*

19 Pursuant to the access to information request, the Department of Justice found a number of internal memoranda to, from or making reference to Binnie and related to Campbell River's claim. These memoranda show that in late 1985 and early 1986, Binnie, in his capacity at that time as Associate Deputy Minister of Justice, received some information and attended a meeting in the early stages of Campbell River's claim. On May 23, 2003, the Assistant Deputy Attorney General, James D. Bissell, Q.C., wrote the Registrar of the Supreme Court of Canada to inform her that as a result of the preparation of the Department's response to the access to information request, it appeared "that Mr. W.I.C. Binnie in 1985 and early 1986, in the course of his duties as Associate Deputy Minister of Justice, participated in discussions with Department of Justice counsel in the *Wewaykum* [Campbell River] *Indian Band* case".

20 Accompanying Assistant Deputy Attorney General Bissell's letter to the Registrar were several documents, dated between 1985 and 1988, referring to Mr. Binnie and the Campbell River claim against Canada in regard to Reserves Nos. 11 and 12. Assistant Deputy Attorney General Bissell advised the Registrar that, in view of its duty as an officer of the Court, the Department was waiving solicitor-client privilege to these documents and that they would be provided to the requester under the *Access to Information Act*. He also advised that the Department intended to file a motion for directions, pursuant to Rule 3 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, as to what steps, if any, should be taken by reason of the information found in his

letter. Attached to the letter was a Statement setting forth the following factual information that is part of the motion record:

> 1. The case of *Wewaykum Indian Band* v. *Canada*, [2002] S.C.C. 79, file no. 27641 was heard in the Supreme Court of Canada on December 6, 2001 and judgment was rendered December 6, 2002.
>
> 2. The original claim in the case was filed in December 1985 and the original Defense on behalf of the Crown was filed on February 28, 1986.
>
> 3. The trial judgment was released by the Federal Court Trial Division on September 19, 1995 and the appeal judgment was released on October 12, 1999 by the Federal Court of Appeal.
>
> 4. Mr. W.I.C. Binnie was Associate Deputy Minister of Justice from September 2nd, 1982 until July 31st, 1986; at that time he left the Department of Justice and entered private practice.
>
> 5. As Associate Deputy Minister, Mr. Binnie's duties included responsibility for all litigation, civil as well as criminal matters, involving the Government of Canada as a party, arising in the common law provinces and territories of Canada; in that context he would have had under his general supervisory authority thousands of cases. In addition to his responsibilities for litigation, Mr. Binnie was also responsible for Native Law in the Department.
>
> 6. In the course of the preparation of a response to a request for information under the *Access to Information Act* received in February 2003, it has come to light that Mr. Binnie had occasion to discuss the case with Department of Justice counsel, in late 1985 and early 1986.
>
> 7. In the course of preparing for the hearing of the case before the Supreme Court of Canada, Department of Justice counsel noted the fact of Mr. Binnie's position as Associate Deputy Minister in 1985 and 1986, and asked themselves whether Mr. Binnie had had any specific involvement in the case.
>
> 8. Counsel did not conduct a thorough examination of the files. Consequently, Mr. Binnie's involvement was not discovered by counsel at that time.

21 Copies of Assistant Deputy Attorney General Bissell's letter, the Statement and the documents were provided to counsel for the other parties and the interveners.

D. *The Motion for Directions*

22 The Crown served and filed a motion for directions on May 26, 2003, on the following grounds:

> 1. Judgment in this appeal was handed down on December 6, 2002. The appeal from the Federal Court of Appeal was unanimously dismissed (9:0). The Honourable Mr. Justice Binnie wrote the decision;
>
> 2. It has recently come to the attention of counsel for the Respondent, Her Majesty The Queen, that in 1985 and 1986, when Mr. Justice Binnie was Associate Deputy Minister of Justice (Litigation), he had been involved in some of the early discussions within the Department of Justice regarding the proceeding that eventually came before the Court as this appeal;
>
> 3. The Respondent therefore brings this motion in order to formally place this fact before the Court, and to ask this Court for directions as to any steps to be taken.

23 Produced with the motion for directions were the documents referring to Mr. Binnie while in the employ of the Department of Justice and Campbell River's claim in relation to Reserves Nos. 11 and 12. Upon receipt of the motion by the Court, Binnie J. recused himself from any further proceedings on this matter and, on May 27, 2003, filed the following statement with the Registrar of the Supreme Court:

> With respect to the Motion for Directions filed yesterday by the Crown, would you please place this note on the Court file and communicate its contents to counsel for the parties.
>
> It is a matter of public record that between September 1982 and July 1986 I was Associate Deputy Minister of Justice responsible for all litigation for and against the federal Crown except tax matters and cases in Quebec. This included Indian claims. At any given time, the responsibility covered several thousand cases.
>
> When this appeal was pending before the Court in 2002, I had no recollection of personal involvement 17 years earlier at the commencement

> of this particular file, which was handled by departmental counsel in the Vancouver Regional Office.
>
> I do not recall anything about any involvement in this case to add to what is set out in the departmental file.
>
> I recuse myself from consideration of the pending motion.

24 The Court invited further submissions by the parties with respect to the Crown's motion for directions. The Crown filed a memorandum in which it submitted that there was no reasonable apprehension of bias affecting the Court's judgment as a result of Binnie J.'s employment in the Department of Justice and involvement in this matter some 17 years earlier and for which he had no recollection. In response, Cape Mudge sought an order setting aside the Court's judgment of December 6, 2002, and requesting that the Court recommend that the parties enter into a negotiation and reconciliation process. In the alternative, Cape Mudge sought an order suspending the operation of the judgment for a period of four months to permit negotiation and reconciliation between the parties with further submissions to the Court if required.

25 Campbell River for its part sought an order vacating the Court's judgment of December 6, 2002, and the reasons for judgment, as well as an order permitting a further application for relief in the event the Supreme Court's decision was vacated. The Crown opposed both motions. It also opposed Cape Mudge's submission that further negotiation would be an appropriate remedy in this matter.

26 The Attorney General of British Columbia, an intervener, submitted that there was no reasonable apprehension of bias and that the motions to vacate should be dismissed.

27 Several other interveners, being the Gitanmaax Band, the Kispiox Band and the Glen Vowell Band, submitted that the Court's judgment should be vacated.

E. *Details of Binnie J.'s Involvement in the Appellants' Litigation 1985-86*

28 We turn now to the documents produced by the Crown, in order to determine the nature and extent of Binnie's involvement in the Campbell River claim in 1985-86. Seventeen documents were produced by the Crown. As noted previously, the documents are reproduced in their entirety in the Appendix. All documents were shown to or seen by Binnie in his official capacity as Associate Deputy Minister of Justice. Where relevant, the documents relate to the Campbell River claim. Cape Mudge's claim was commenced in 1989, several years after Binnie left the Department of Justice. As can be seen, the 17 documents include one letter and 16 internal memoranda. The letter, dated May 23, 1985, is from Binnie to Chief Sol Sanderson of the Federation of Saskatchewan Indian Nations and is obviously not relevant to these motions. Of the remaining 16 documents, two were produced twice; they are the memorandum dated December 13, 1985, and the memorandum dated February 25, 1986, from Ms. Mary Temple to Binnie. Consequently, 14 documents require examination, which will be done in chronological order.

29 Memorandum No. 1, dated June 19, 1985, is a memo to file written by Ms. Temple, Acting Senior Counsel, Office of Native Claims. The memorandum refers to Binnie by reason of the fact that it includes a reference to his letter of May 23, 1985, to Chief Sanderson. The memorandum does not detail any involvement of Binnie in the Campbell River claim and is of no relevance to these motions.

30 Memorandum No. 2, dated August 9, 1985, is from Ms. Temple to Binnie. The memo pre-dates Campbell River's statement of claim. It indicates that an issue raised by the Campbell River claim and another matter known as the Port Simpson claim were referred to Mr. Tom Marsh of the Vancouver Office for his opinion. The memo further states that Mr. Marsh's opinion would not be ready before the middle of September. It concludes with a request to be informed of any further communications with respect to the Port Simpson opinion from Band representatives.

31 Memorandum No. 3 also pre-dates Campbell River's statement of claim. It is from Mr. R. Green, General Counsel in the Department of Indian Affairs and Northern Development, to Binnie and is dated October 11, 1985. This memo, which relates to the Campbell River and Port Simpson claims, was prepared for a meeting between Binnie and Mr. Green to discuss a legal issue "which potentially touches on all claims from B.C. bands, or at least all involving a determination of rights and liabilities arising out of the pre-McKenna/McBride period". The memo addresses the gazetting of notices and reserve creation in British Columbia. In his memo, Mr. Green refers to the work of Mr. Marsh and sets out three likely interpretations of the B.C. legislation:

1. no reserve is legally established until the notice is Gazetted;
2. the Gazetting provision is for the purpose of land banking;
3. the Gazetting process is a condition precedent to transferring administration and control of reserves to the federal government but not to the creation of the Indian interest.

32 A handwritten note on the margin, presumably from Mr. Green to Binnie, reads: "On the surface argument 3 seems to be the least damaging way to go."

33 Memorandum No. 4, dated December 12, 1985, is from Mr. Duff Friesen, General Counsel, Civil Litigation Section, to Binnie. In it, Mr. Friesen proposes that Campbell River's statement of claim, filed on December 2, 1985, be referred to the Vancouver Regional Office of the Department of Justice. In a handwritten note on the memo, Binnie wrote "I agree".

34 Memorandum No. 5, dated December 13, 1985, is from Ms. Temple to Mr. G. Donegan, General Counsel, Vancouver Regional Office, and copied to Binnie. The memo indicates that Campbell River had filed a statement of claim and intended to proceed by way of litigation rather than negotiation under the Department of Indian Affairs policy. The memo also indicates that certain aspects of the claim were the subject of correspondence with Mr. Marsh of the Vancouver Regional Office and were also discussed with Binnie in Ottawa. With respect to these discussions, Ms. Temple wrote that:

> In particular, Ian Binnie formed the opinion that the McKenna McBride report, to the extent that it specified that Quinsam Reserve No. 12 was the Campbell River Band's Reserve, should be taken at its face value notwithstanding the apparent fact that the designation of the Reserve for this band stemmed from an administrative error in the list of reserves on which the Commission relied as its primary source of information.

35 Memorandum No. 6, dated January 14, 1986, is from Binnie to Ms. Temple. It acknowledges receipt of Memorandum No. 5 and sets out the above-quoted passage from that memorandum. Binnie then wrote:

> I recall some discussion about this, but not in the raw terms you have stated it. Could you let me have a note setting out the factual circumstances of the case and the legal points addressed in our discussion and any other relevant legal points you think should be considered?

36 Memorandum No. 7, dated January 15, 1986, is from Binnie to Mr. Harry Wruck of the Vancouver Regional Office. In it Binnie wrote that he is delighted with the assignment of this matter to Mr. Bill Scarth (now Scarth J.). He further asks to be informed of anything that the Minister should be made aware of.

37 Memorandum No. 8, dated January 20, 1986, is from Ms. Temple to Binnie in response to Memorandum No. 6. In this memo, Ms. Temple describes the factual background of Campbell River's claim. She concludes the memo with the following description of their discussions in relation to the claim:

> In our discussion of this claim in October 1985, we spent most of the time on another legal issue. However, when we turned to the issue of the effect of the McKenna McBride Commission report vis a vis Reserves No.'s 11 and 12, you indicated that such a qualification of the apparent terms of the McKenna McBride Report, as suggested by me, should not be supported and that a report should be accepted on its face so as to result in the legal vesting of an interest for the Campbell River Band only in these two reserves. My understanding of your reasons for such a position was that if we started to qualify the face of the record in any way, we would call into question other aspects of the McKenna McBride exercise.
>
> The other issue on which we spent most of our time during the October discussion was in relation to the question of the effect of the B.C. Land Act Legislation on the establishment of Reserves during the time of the nineteen [*sic*] century reserve commissions. In particular, one interpretation of this legislation would have confirmed the necessity of publishing in the B.C. Gazette the decision of the B.C. Government or officials authorized by it to establish reserves for bands before a band could be considered to have a vested interest in such a reserve. We concluded that notwithstanding the basis for such an interpretation, we should maintain the position that at least with respect to the Campbell River and Quinsam Reserves there was no requirement to gazette notices of those reserves before they could be considered to have been established. The legislation in question was somewhat ambiguous and our decision reflected an attempt to support an interpretation which was, of course, reasonably arguable but which also was reflective of the treatment of these reserves during the period preceeding [*sic*] the McKenna McBride report implementation.

As indicated in the above-quoted passage, the discussions referred to by Ms. Temple occurred in October 1985, before Campbell River filed its statement of claim and while the parties were still in the negotiation process.

38 Memorandum No. 9 is dated February 25, 1986, and is also from Ms. Temple to Binnie. The memo transmits to Binnie a copy of Campbell River's statement of claim. The memo clarifies that when Binnie participated in discussions in this case "it was still in the ONC [Office of Native Claims] claims process and before the Campbell River Band decided to proceed with litigation". The memo further advises that Mr. Scarth, who had earlier been retained and had carriage of the action, had been instructed to file a full defense. Ms. Temple also indicates in her memo that:

> I would just like to note for your information that a full defense of the action by the Crown might involve the Crown in arguing some qualification or interpretation of the implementation of the McKenna McBride Report which was a position which in our discussions respecting negotiation of the claim you advised against. It seemed to Bob Green and I [*sic*] and to the Departmental officials that such a defense in the context of this court action was, nevertheless, justified.

39 Memorandum No. 10 is also dated February 25, 1986, and is from Ms. Temple to Mr. Scarth. The memo conveys instructions to file a full statement of defense. The following passage from this memo relates to Binnie's involvement in discussions relating to the claim:

> Since such a defense might result in legal arguments which involve "going behind" the face of the McKenna McBride decisions as implemented by the legislation and Orders in Council, these instructions are being communicated to Ian Binnie because when the Government position respecting the claim was initially discussed with him, he advised that, at least, in the claims process we should not challenge the McKenna McBride report itself.

40 Memos 8, 9 and 10 establish that any advice given by Binnie in relation to the preferred treatment of the McKenna McBride Report was offered in the context of the negotiation process not litigation. Indeed, Binnie's advice, in the context of the negotiation towards a settlement of Campbell River's claim, is what led to acceptance of the claim as valid for the purposes of negotiation. In Memorandum No. 9, Ms. Temple wrote:

> When we discussed the position the Crown should take for the purpose of negotiating a settlement under the claims process, we decided to recommend acceptance of the Campbell River Band's claim for negotiation since to do otherwise would suggest that the implementation of the McKenna McBride Report was ineffective to vest Reserve No. 12 in the Campbell River Indian Band. At the time, this position was understood to be justified since although both on legal issues and factual issues the claim was debatable, there seem to be sufficiently reasonable arguments to support it so as to justify settlement, at least on a pro-rated basis, especially since it would presumably have involved a surrender by the Campbell River Band and therefore a clarification of the interest of the Cape Mudge Band in the Reserve.

41 Memorandum No. 11, dated February 27, 1986, is from Ms. Temple to Ms. Carol Pepper, Legal Counsel, Specific Claims Branch Vancouver. The memo transmits to Ms. Pepper a number of opinions culled from the Campbell River claim file. In this memo, Ms. Temple writes that her opinions eventually reflected Ian Binnie's preferred position "to not 'go behind' the McKenna McBride Report".

42 Memorandum No. 12, dated March 3, 1986, is from Mr. Scarth to Binnie. The memo transmits to Binnie a copy of the statement of defence presumably prepared by Mr. Scarth and filed on behalf of the Crown on February 28, 1986. In this memo, Mr. Scarth indicates that he believes that the defence reflects the positions of both Justice and Indian Affairs. He further indicates that he has attempted not to repudiate the McKenna McBride Commission Report.

43 Memorandum No. 13, dated March 5, 1986, is from Binnie to Ms. Temple and is in response to Memorandum No. 9. In this memo, Binnie wrote:

> With respect to the treatment of the McKenna McBride Report, I suggest that we all await the advice of Bill Scarth as to how this aspect of our possible defence should be dealt with. So far as I am concerned Bill Scarth is in charge of the file. I am sure he will take note of the view expressed by you and Bob Green and "departmental officials" that it would be appropriate in the Crown's defence to argue some qualification or interpretation of the implementation of the McKenna McBride Report.
>
> I look forward to hearing Bill Scarth's views on this aspect of the matter in due course. We will then decide what to do.

44 Memorandum No. 13 is the last document evidencing Binnie's involvement in this matter. As conceded by the parties, the Court's determination of the extent of Binnie's involvement in the Campbell River claim is limited by the documentary record produced by the Crown. The record does not disclose any further involvement on Binnie's part and, in particular, no involvement in this matter between March 5, 1986, and his departure from the Department of Justice on July 31, 1986.

45 Finally, Memorandum No. 14 is dated February 3, 1988, after Binnie left the Department of Justice, and is from Mr. Scarth to Mr. E.A. Bowie, Q.C., Assistant Deputy Attorney General (now Bowie J.). In this memo, Mr. Scarth provides a summary of the Campbell River case to Mr. Bowie. In the body of his memo, Mr. Scarth writes:

> I point out, parenthetically, that Ian Binnie, during his time as Associate Deputy Minister, suggested, because of its wider impact, that we not challenge the validity of what was done by the Royal Commission. With respect, I continue to concur with that advice, and suggest it is a question of defining more narrowly what the Commission did, at least insofar as the Reserves in question are concerned.

III. The Parties' Arguments

A. *Cape Mudge, Campbell River and the Interveners the Gitanmaax Band, the Kispiox Band and the Glen Vowell Band*

46 Campbell River and Cape Mudge both agree that actual bias is not at issue. Neither band makes any submission that actual bias affected Binnie J., the reasons for judgment or the judgment of the Court. Both bands unreservedly accept Binnie J.'s statement that he had no recollection of personal involvement in the case. The bands submit, however, that the material disclosed by the Crown gives rise to a reasonable apprehension of bias.

47 Cape Mudge submitted that Binnie J.'s involvement in Campbell River's claim was so significant that he effectively acted as a senior counsel for the Crown and that he was disqualified on account of the principle that no judge should sit in a case in which he or she acted as counsel at any stage of the proceeding. According to Cape Mudge, the disclosed documents reveal that Binnie J. was actively involved in risk analysis and the development of litigation strategy on behalf of the defendant Crown. Cape Mudge submitted that Binnie J.'s involvement in the litigation while he was Associate Deputy Minister of Justice raises legitimate questions as to whether the positions he formulated and recommended and the various memoranda and documents he read would have had an influence on his approach to the same case as a judge. In Cape Mudge's submission, such influence could well be unconscious and Binnie J.'s lack of recollection does not change the fact that he was involved in a significant and material way. According to Cape Mudge, the fact that Binnie J. was involved as a lawyer for the defendant Crown, combined with the fact that some 15 years later he wrote a judgment in the same litigation that freed the Crown of potential liability, gives

rise to a reasonable apprehension of bias. Cape Mudge submitted that had the documents disclosed by the Crown come to light prior to the hearing before the Court, Binnie J. would have recused himself from the hearing of the appeals.

48 Campbell River submitted that the test for reasonable apprehension of bias is met where a judge sits in a case in which he or she has had any prior involvement. In Campbell River's view, the documents disclosed by the Crown indicate that Binnie J.'s prior involvement in the band's claim was substantial. Like Cape Mudge, Campbell River submitted that had Binnie J.'s earlier involvement in these matters come to light prior to the hearing he would have had no choice but to recuse himself absent the consent of all the parties. According to Campbell River, subjective evidence of a judge's state of mind, and thus Binnie J.'s absence of recollection, is legally irrelevant to a determination of whether there is a reasonable apprehension of bias. Moreover, Campbell River submitted that, owing to Binnie J.'s special interest in aboriginal matters, the unique "ditto mark error" at issue in this case and his involvement as counsel in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, common sense would indicate that some contaminating knowledge would have survived the passage of time, albeit unconsciously.

49 With respect to remedy, both bands submitted that a judgment affected by a reasonable apprehension of bias is void and must be set aside. According to Campbell River, the concurrence of the eight other judges of this Court does not remove the taint of bias. Campbell River submitted that in law a reasonable apprehension of bias taints the entire proceeding and is presumed to be transmitted among decision-makers.

50 As indicated previously, Cape Mudge submitted that this Court should also recommend that the parties enter into a negotiation and reconciliation process or, in the alternative, suspend operation of the judgment for four months so that discussions between the parties could take place. For its part, Campbell River requested an order permitting it to bring an application for further relief following a decision to set aside the judgment. During oral argument, counsel for both bands indicated that a rehearing of the appeals may ultimately become necessary should the decision be set aside and agreement between the parties prove impossible.

51 The interveners the Gitanmaax Band, the Kispiox Band and the Glen Vowell Band presented written arguments in support of the motions to vacate the Court's judgment. In their submission, the facts of this case give rise to a reasonable apprehension of bias and a legal finding of bias must result. Binnie J.'s lack of actual recollection is, in their view, irrelevant. The interveners go further suggesting that actual bias may have existed on Binnie J.'s part even if he neither intended it nor recalled his involvement in the case. Like Campbell River and Cape Mudge, the interveners submitted that Binnie J. would have recused himself had he recalled his participation in this case before the hearing.

B. *The Crown and the Intervener the Attorney General of British Columbia*

52 The Crown submitted that the Court's judgment should not be set aside and that no other remedy was required. In the Crown's view, the rule that a judge is disqualified if he or she previously acted as counsel in the case is subject to the general principle that disqualification results only where there is a reasonable apprehension of bias. Accordingly, the Crown submitted that the general test set out by de Grandpré J.

in dissent in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, and approved in *Valente v. The Queen*, [1985] 2 S.C.R. 673, should be applied to the particular circumstances of this case.

53 The Crown submitted that since Binnie J. had no recollection, he brought no knowledge of his prior participation by way of discussions about Campbell River's claim. As a result, there was neither actual bias nor any reasonable apprehension of bias on his part. Relying on the English Court of Appeal's decision in *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.*, [2000] Q.B. 451, the Crown submitted that Binnie J.'s lack of recollection dispels any appearance of possible bias. According to the Crown, the fact that Binnie J.'s prior involvement occurred 17 years earlier reinforces the conclusion that there can be no reasonable apprehension of bias. On this point, the bands concede that the passage of time is a relevant factor. Finally, the Crown submitted that since the judgment of the Court was unanimous in dismissing the appeals, and since Binnie J. had no recollection of his earlier involvement, no reasonable person could conclude that he somehow influenced the minds of the other eight judges who heard the case.

54 The Attorney General of British Columbia also submitted that the Court's judgment should not be disturbed. He submitted that the information disclosed by the Crown would not have necessitated Binnie J.'s recusal had an application been made before the hearing. *A fortiori*, the disclosed information does not establish a reasonable apprehension of bias nor require that the judgment be set aside. The Attorney General of British Columbia further submitted that although evidence of a judge's subjective state of mind is not determinative as to the issue of whether a reasonable apprehension of bias arises, it remains relevant and of assistance to the reasonable and right-minded observer.

55 The Attorney General of British Columbia submitted that Binnie J. did not act as counsel for the Crown in this case. His involvement was in a general administrative and supervisory capacity which does not give rise to a reasonable apprehension of bias. It was submitted that a reasonable person would not consider that the tentative views on a general issue expressed by Binnie J. 15 years earlier, in his capacity as Associate Deputy Minister, would prevent him from deciding the case impartially.

56 The Attorney General of British Columbia further submitted that since the decision-maker was the Court as a whole, a reasonable apprehension of bias in respect of Binnie J. is not legally significant unless it also establishes a reasonable apprehension of bias in respect of the judgment of the Court as a whole. In this case, the judgment of the Court as a whole is not tainted by any apprehension of bias. Moreover, the presumption of impartiality has a practical force in respect of appellate tribunals. The fact that appellate courts normally evaluate a written record and the collegial nature of an appellate bench reduces the leeway within which the personal attributes, traits and dispositions of each judge can operate. Finally, the Attorney General submitted that if there was a disqualifying bias in respect of the Court as a whole, the remedy would be to vacate the judgment and for the Court to reconsider the appeals in the absence of Binnie J. under the doctrine of necessity.

IV. Analysis

A. *The Importance of the Principle of Impartiality*

57 The motions brought by the parties require that we examine the circumstances of this case in light of the well-settled, foundational principle of impartiality of courts of justice. There is no need to reaffirm here the importance of this principle, which has been a matter of renewed attention across the common law world over the past decade. Simply put, public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.

58 The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. Conversely, bias or prejudice has been defined as

> 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.
>
> (*R. v. Bertram*, [1989] O.J. No. 2123 (QL) (H.C.), quoted by Cory J. in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 106.)

59 Viewed in this light, "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, *Ethical Principles for Judges* (1998), at p. 30). It is the key to our judicial process, and must be presumed. As was noted by L'Heureux-Dubé J. and McLachlin J. (as she then was) in *S. (R.D.)*, *supra*, at para. 32, the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial

impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.

60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board, supra*, at p. 394, is the reasonable apprehension of bias:

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

61 We will return shortly to this standard, as it applies to the circumstances outlined in the factual background. Before doing that, it is necessary to clarify the relationship of this objective standard to two other factors: the subjective consideration of actual bias; and the notion of automatic disqualification re-emerging in recent English decisions.

B. *Reasonable Apprehension of Bias and Actual Bias*

62 Determining whether the judge brought or would bring prejudice into consideration as a matter of fact is rarely an issue. Of course, where this can be established, it will inevitably lead to the disqualification of the judge. But this said, most arguments for disqualification typically begin with an acknowledgment by all parties that there was no actual bias, and move on to a consideration of the reasonable

apprehension of bias. Here, as in many cases, it is conceded by the parties that there was no actual bias on Binnie J.'s part, and his statement that he had no recollection of involvement is similarly accepted by all concerned. As submitted by the parties, his personal integrity is not in doubt, either in these appeals or in any appeal in which he has sat as a member of this Court. Nevertheless, it is said, the circumstances of the present case are such as to create a reasonable apprehension of bias on his part. Since the two propositions go hand in hand, to understand what is meant by reasonable apprehension of bias, it is helpful to consider what it means to say that disqualification is not argued on the basis of actual bias.

63 Saying that there was "no actual bias" can mean one of three things: that actual bias need not be established because reasonable apprehension of bias can be viewed as a surrogate for it; that unconscious bias can exist, even where the judge is in good faith; or that the presence or absence of actual bias is not the relevant inquiry. We take each in turn.

64 First, when parties say that there was no actual bias on the part of the judge, they may mean that the current standard for disqualification does not require that they prove it. In that sense, the "reasonable apprehension of bias" can be seen as a surrogate for actual bias, on the assumption that it may be unwise or unrealistic to require that kind of evidence. It is obviously impossible to determine the precise state of mind of an adjudicator (Cory J. in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at p. 636). As stated by the English Court of Appeal in *Locabail (U.K.)*, *supra*, at p. 472:

> The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences

> affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.

Again, in the present instance, no one suggests that Binnie J. was consciously allowing extraneous influences to affect his mind. Consequently, it would appear that reasonable apprehension of bias is not invoked here as a surrogate for actual bias.

65 Second, when parties say that there was no actual bias on the part of the judge, they may be conceding that the judge was acting in good faith, and was not consciously relying on inappropriate preconceptions, but was nevertheless unconsciously biased. In *R. v. Gough*, [1993] A.C. 646 (H.L.), at p. 665, quoting Devlin L.J. in *The Queen v. Barnsley Licensing Justices*, [1960] 2 Q.B. 167 (C.A.), Lord Goff reminded us that:

> Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit.

As framed, some of the arguments presented by the parties suggest that they are preoccupied that Binnie J. may have been unconsciously biased despite his good faith.

66 Finally, when parties concede that there was no actual bias, they may be suggesting that looking for real bias is simply not the relevant inquiry. In the present case, as is most common, parties have relied on Lord Hewart C.J.'s aphorism that "it is not merely of some importance but 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). To put it differently, in cases where disqualification is argued, the relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was. In that sense, the reasonable apprehension of bias is not just a surrogate for unavailable evidence, or an evidentiary device to establish the likelihood of unconscious bias, but the manifestation of a broader preoccupation about the image of justice. As was said by Lord Goff in *Gough*, *supra*, at p. 659, "there is an overriding public interest that there should be confidence in the integrity of the administration of justice".

67 Of the three justifications for the objective standard of reasonable apprehension of bias, the last is the most demanding for the judicial system, because it countenances the possibility that justice might not be seen to be done, even where it is undoubtedly done – that is, it envisions the possibility that a decision-maker may be totally impartial in circumstances which nevertheless create a reasonable apprehension of bias, requiring his or her disqualification. But, even where the principle is understood in these terms, the criterion of disqualification still goes to the judge's state of mind, albeit viewed from the objective perspective of the reasonable person. The reasonable person is asked to imagine the decision-maker's state of mind, under the circumstances. In that sense, the oft-stated idea that "justice must be seen to be done", which was invoked by counsel for the bands, cannot be severed from the standard of reasonable apprehension of bias.

68 We emphasize this aspect of the criterion of disqualification in Canadian law because another strand of this area of the law in the Commonwealth suggests that some circumstances of conflict of interest may be enough to justify disqualification, whether

or not, from the perspective of the reasonable person, they could have any impact on the judge's mind. As we conclude in the next section, this line of argument is not helpful to counsel for the bands in the present case.

C. *Reasonable Apprehension of Bias and Automatic Disqualification*

69 At the opposite end from claims of actual bias, it has been suggested that it is wrong to be a judge in one's own cause, whether or not one knows this to be the case. The idea has been linked to the early decision of *Dimes v. Proprietors of the Grand Junction Canal* (1852), 3 H.L.C. 759, 10 E.R. 301. More recently, in *Gough, supra*, at p. 661, Lord Goff stated that

> there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand. . . . These cases arise where a person sitting in a judicial capacity has a pecuniary interest in the outcome of the proceedings. . . . In such a case, . . . not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand.

70 This has been described as "automatic disqualification", and was recently revisited by the House of Lords in *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)*, [1999] 2 W.L.R. 272. There, the House of Lords dealt with a situation in which Lord Hoffmann had participated in a decision in which Amnesty International was an intervener, while sitting as a director and chairperson of a charity closely allied with Amnesty International and sharing its objects. In that context, it was found that the rule of "automatic disqualification" extended to a limited

class of non-financial interests, where the judge has such a relevant interest in the subject matter of the case that he or she is effectively in the position of a party to the cause. As a result, Lord Hoffmann was disqualified, and the decision of the House of Lords was set aside, in a judgment that drew much attention around the world.

71 A more recent decision of the English Court of Appeal suggests that this extension of the rule of automatic disqualification, beyond cases of financial interests, is likely to remain exceptional (*Locabail (U.K.)*, *supra*). Even so extended, the rule of automatic disqualification does not apply to the situation in which the decision-maker was somehow involved in the litigation or linked to counsel at an earlier stage, as is argued here.

72 Whatever the case in Britain, the idea of a rule of automatic disqualification takes a different shade in Canada, in light of our insistence that disqualification rest either on actual bias or on the reasonable apprehension of bias, both of which, as we have said, require a consideration of the judge's state of mind, either as a matter of fact or as imagined by the reasonable person. In any event, even on the assumption that the line of reasoning developed in *Pinochet*, *supra*, is authoritative in Canada, it is of no relevance in the present case. On the facts before us, there is no suggestion that Binnie J. had any financial interest in the appeals, or had such an interest in the subject matter of the case that he was effectively in the position of a party to the cause.

73 To sum up, if disqualification is to be argued here, it can only be argued on the basis of a reasonable apprehension of bias. It can only succeed if it is established that reasonable, right-minded and properly informed persons would think that Binnie J. was consciously or unconsciously influenced in an inappropriate manner by his participation

in this case over 15 years before he heard it here in the Supreme Court of Canada. We now move to this aspect of the matter.

D. *Reasonable Apprehension of Bias and Its Application in This Case*

74 The question, once more, is as follows: What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would this person think that it is more likely than not that Binnie J., whether consciously or unconsciously, did not decide fairly?

75 Three preliminary remarks are in order.

76 First, it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. In this respect, de Grandpré J. added these words to the now classical expression of the reasonable apprehension standard:

> 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".
>
> (*Committee for Justice and Liberty v. National Energy Board, supra*, at p. 395)

77 Second, this is an inquiry that remains highly fact-specific. In *Man O'War Station Ltd. v. Auckland City Council (Judgment No. 1)*, [2002] 3 N.Z.L.R. 577, [2002] UKPC 28, at par. 11, Lord Steyn stated that "This is a corner of the law in which the context, and the particular circumstances, are of supreme importance." As a result, it cannot be addressed through peremptory rules, and contrary to what was submitted

during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.

78 Third, in circumstances such as the present one, where the issue of disqualification arises after judgment has been rendered, rather than at an earlier time in the proceedings, it is neither helpful nor necessary to determine whether the judge would have recused himself or herself if the matter had come to light earlier. There is no doubt that the standard remains the same, whenever the issue of disqualification is raised. But hypotheses about how judges react where the issue of recusal is raised early cannot be severed from the abundance of caution that guides many, if not most, judges at this early stage. This caution yields results that may or may not be dictated by the detached application of the standard of reasonable apprehension of bias. In this respect, it may well be that judges have recused themselves in cases where it was, strictly speaking, not legally necessary to do so. Put another way, the fact that a judge would have recused himself or herself *ex ante* cannot be taken to be determinative of a reasonable apprehension of bias *ex post*.

79 As the parties acknowledged, Binnie J.'s past status as Associate Deputy Minister is by itself insufficient to justify his disqualification. The same can be said of his long-standing interest in matters involving First Nations. The source of concern, for the bands in these motions to vacate the judgment, is Binnie J.'s involvement in this case, as opposed to his general duties as head of litigation for the Department of Justice in the mid-1980s.

80 In this respect, the bands relied, among other arguments, on the following statement of Laskin C.J., in *Committee for Justice and Liberty v. National Energy Board*, *supra*, at p. 388:

> Lawyers who have been appointed to the Bench have been known to refrain from sitting on cases involving former clients, even where they have not had any part in the case, until a reasonable period of time has passed. *A fortiori*, they would not sit in any case in which they played any part at any stage of the case. This would apply, for example, even if they had drawn up or had a hand in the statement of claim or statement of defence and nothing else.

81 This dictum must be understood in the context of the principle of which it is but an illustration. It does not suggest that any degree of earlier participation in a case is cause for automatic disqualification. This statement provides sensible guidance for individuals to consider *ex ante*. It suggests that a reasonable and right-minded person would likely view unfavourably the fact that the judge acted as counsel in a case over which he or she is presiding, and could take this fact as the foundation of a reasonable apprehension of bias.

82 However, contrary to what has been argued, it cannot realistically be held that Binnie J. acted as counsel in the present case, and the limited extent of his participation does not support a reasonable apprehension of bias. To repeat, what is germane is the nature and extent of Binnie J.'s role. The details of Binnie J.'s involvement in this case, as outlined in the earlier part of these reasons and which should be viewed in the context of his broad duties in the Department of Justice, would convince a reasonable person that his role was of a limited supervisory and administrative nature.

83 Admittedly, Binnie J.'s link to this litigation exceeded *pro forma* management of the files. On the other hand, it should be noted that he was never counsel of record, and played no active role in the dispute after the claim was filed. Memorandum No. 4, dated December 12, 1985, shows that the case was referred to the Vancouver Regional Office within a few days after filing of the Campbell River claim. Although subsequent memoranda indicate that Binnie was kept informed of some developments in relation to this claim, carriage of the action was in the hands of Mr. Bill Scarth in Vancouver. The facts do not support the proposition that Binnie planned litigation strategy for this case, as is suggested by the bands. For example, in their submissions, the Cape Mudge Band seemed to imply that the handwritten note in the margin of Memorandum No. 3 was written by Binnie in that "[he] was part of the Crown's early tactical considerations in this case; considering which approach would create the lowest risk for the Crown; which approach would constitute the 'least damaging way to go'" (see Cape Mudge's factum, at para. 12). However, upon examination of this note it would appear that it is addressed to "Ian [Binnie]" and signed "Bob [Green]". Furthermore, and as indicated above, Memos 8, 9 and 10, in particular, establish that any views attributed to Binnie earlier on were offered in the context of wider implications of the negotiation process, and not in the context of litigation.

84 Furthermore, in assessing the potential for bias arising from a judge's earlier activities as counsel, the reasonable person would have to take into account the characteristics of legal practice within the Department of Justice, as compared to private practice in a law firm. See the Canadian Judicial Council's *Ethical Principles for Judges*, *supra*, at p. 47. In this respect, it bears repeating that all parties accepted that a reasonable apprehension of bias could not rest simply on Binnie J.'s years of service in

the Department of Justice. In his capacity as Associate Deputy Minister, Binnie had responsibility for thousands of files at the relevant time. While his views were sought in the negotiations stage of the present dispute, it is relevant that he was consulted on strategic orientations in dozens of cases or classes of cases. In this regard, the matter on which he was involved in this file, principally the effect of the McKenna McBride Report, was not an issue unique to this case, but was an issue of general application to existing reserves in British Columbia. This was presumably the reason why he was approached in the first place.

85 To us, one significant factor stands out, and must inform the perspective of the reasonable person assessing the impact of this involvement on Binnie J.'s impartiality in the appeals. That factor is the passage of time. Most arguments for disqualification rest on circumstances that are either contemporaneous to the decision-making, or that occurred within a short time prior to the decision-making.

86 In *Locabail (U.K.)*, *supra*, at p. 480, the English Court of Appeal stated:

> . . . every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

87 Similarly, in *Panton v. Minister of Finance*, [2001] 5 L.R.C. 132, [2001] UKPC 33, at para. 15, the Privy Council said:

> Another consideration which weighs against any idea of apparent or potential bias in the present case is the length of time which intervened between Rattray P.'s conduct in connection with the Act or indeed his holding of the office of Attorney General and the time when he sat as President in the Court of Appeal to hear the present case. . . . It appears that

> Rattray P. retired as Attorney General in 1993. The hearing of the appeal was in 1998. While that interval of time is not so great as to make the former connection with the Act one of remote history, it is nevertheless of some significance in diminishing to some degree the strength of any objection which could be made to his qualification to hear the case.

88 In the present instance, Binnie J.'s limited supervisory role in relation to this case dates back over 15 years. This lengthy period is obviously significant in relation to Binnie J.'s statement that when the appeals were heard and decided, he had no recollection of his involvement in this file from the 1980s. The lack of knowledge or recollection of the relevant facts was addressed by the English Court of Appeal in *Locabail (U.K.), supra.* There, at p. 487, the Court of Appeal asked:

> How can there be any real danger of bias, or any real apprehension or likelihood of bias, if the judge does not know of the facts that, in argument, are relied on as giving rise to the conflict of interest?

89 The parties have not challenged Binnie J.'s statement, and we are of the view that they are not required to do so. The question is whether the reasonable person's assessment is affected by his statement, in light of the context – that is, in light of the amount of time that has passed, coupled with the limited administrative and supervisory role Binnie played in this file. In our view, it is a factor that the reasonable person would properly consider, and it makes bias or its apprehension improbable in the circumstances.

90 Binnie J.'s lack of recollection is thus relevant. Yet it is not decisive of the issue. This is not a case in which the judge never knew about the relevant conflict of interest, which would be much easier, but a case in which the judge no longer recalls it. Without questioning his recollection, the argument can be made that his earlier involvement in the file affected his perspective unconsciously. Nevertheless, we are

convinced that the reasonable person, viewing the matter realistically, would not come to the conclusion that the limited administrative and supervisory role played by Binnie J. in this file, over 15 years ago, affected his ability, even unconsciously, to remain impartial in these appeals. This is true, quite apart from the multitude of events and experiences that have shaped him as a lawyer and judge in the interim and the significant transformations of the law as it relates to aboriginal issues, that we have all witnessed since 1985.

91 We thus conclude that no reasonable apprehension of bias is established and that Binnie J. was not disqualified in these appeals. The judgment of the Court and the reasons delivered by Binnie J. on December 6, 2002, must stand. It is unnecessary to examine the question whether, in the event that the Court had found that Binnie J. was disqualified, the judgment of the Court in these appeals would have been undermined. Nevertheless, because of the importance of the issue, we offer a few comments in this respect.

92 The decision-making process within the Supreme Court of Canada, while not widely known, is a matter of public record. Many Justices of the Court have spoken publicly on this matter, and a rather complete description of it can be found in an essay published in 1986 by Justice Bertha Wilson ("Decision-making in the Supreme Court" (1986), 36 *U.T.L.J.* 227). For present purposes, it is enough to say the following. Each member of the Supreme Court prepares independently for the hearing of appeals. All judges are fully prepared, and no member of the Court is assigned the task to go through the case so as to "brief" the rest of the panel* before the hearing. After the case is heard,

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* See Erratum [2003] 3 S.C.R. iv

each judge on the panel** expresses his or her opinion independently. Discussions take place on who will prepare draft reasons, and whether for the majority or the minority. Draft reasons are then prepared and circulated by one or more judges. These reasons are the fruit of a truly collegial process of revision of successive drafts. In that sense, it can be said that reasons express the individual views of each and every judge who signs them, and the collective effort and opinion of them all.

93 Here, the nine judges who sat on these appeals shared the same view as to the disposition of the appeals and the reasons for judgment. Cases where the tainted judge casts the deciding vote in a split decision are inapposite in this respect. In the circumstances of the present case, even if it were found that the involvement of a single judge gave rise to a reasonable apprehension of bias, no reasonable person informed of the decision-making process of the Court, and viewing it realistically, could conclude that it was likely that the eight other judges were biased, or somehow tainted, by the apprehended bias affecting the ninth judge.

V. Conclusion

94 We conclude that no reasonable apprehension of bias is established. Binnie J. was not disqualified to hear these appeals and to participate in the judgment. As a result, the motions to vacate the judgment rendered by this Court on December 6, 2002, are dismissed. The Crown's motion for directions is also dismissed. Although the bands requested costs, the Crown did not. Under the circumstances, each party will bear its own costs.

** See Erratum [2003] 3 S.C.R. iv

APPENDIX

Documents produced by the Crown and referred to in the reasons:

Motions dismissed.

Solicitors for the appellants Roy Anthony Roberts et al.: Davis & Company, Vancouver.

Solicitors for the respondents/appellants Ralph Dick et al.: McAlpine & Associates, Vancouver.

Solicitors for the respondent Her Majesty the Queen: Lavery de Billy, Montréal.

Solicitors for the intervener the Attorney General of British Columbia: Borden Ladner Gervais, Vancouver.

Solicitors for the interveners the Gitanmaax Indian Band, the Kispiox Indian Band and the Glen Vowell Indian Band: Hutchins, Soroka & Grant, Vancouver.

TAB 6

Indexed as:

Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)

Newfoundland Telephone Company Limited, appellant;
v.
The Board of Commissioners of Public Utilities, respondent.

[1992] 1 S.C.R. 623

[1992] S.C.J. No. 21

1992 CanLII 84

File No.: 22060.

Supreme Court of Canada

1991: November 7 / 1992: March 5.

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

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND (42 paras.)

Administrative law -- Apprehension of bias -- Policy-making board -- Board member expressing strong views as to issue board considering -- Decision made after Board declined to remove member from panel -- Extent to which an administrative board member may comment on matters before the board -- Whether or not reasonable apprehension of bias -- If so, whether or not decision void or merely voidable.

Respondent Board, whose members are appointed by cabinet subject only to the qualification that they not be employed by or have an interest in a public utility, regulates appellant. One commissioner, a former consumers' advocate playing the self-appointed role of champion of consumers' rights on the Board, made several strong statements which were reported in the press against appellant's executive pay policies before a public hearing was held by the Board into appellant's costs. When the hearing commenced, appellant objected to this commissioner's participation on the panel because of an apprehension of bias. The Board found that it had no jurisdiction to rule on its own

members and decided that the panel would continue as constituted. A number of public statements relating to the issue before the Board were made by this commissioner during the hearing and before the Board released its decision which (by a majority which included the commissioner at issue) disallowed some of appellant's costs. A minority would [page624] have allowed these costs. Appellant appealed both the order of the Board and the Board's decision to proceed with the panel as constituted to the Court of Appeal.

The Court of Appeal found that the Board had complete jurisdiction to determine its own procedures and all questions of fact and law and that it declined to exercise its jurisdiction when it refused to remove the commissioner from the panel. Although the court concluded that there was a reasonable apprehension of bias, it held that the Board's decision was merely voidable and that, given that the commissioner's mind was not closed to argument, the Board's order was valid.

The issues under consideration here were: (1) the extent to which an administrative board member may comment on matters before the board and, (2) the result which should obtain if a decision of a board is made in circumstances where a reasonable apprehension of bias is found.

Held: The appeal should be allowed.

The duty of fairness applies to all administrative bodies. The extent of that duty, however, depends on the particular tribunal's nature and function. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. Because it is impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision, an unbiased appearance is an essential component of procedural fairness. The test to ensure fairness is whether a reasonably informed bystander would perceive bias on the part of an adjudicator.

There is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts: there must be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members where the standard will be much more lenient. In such circumstances, a reasonable apprehension of bias occurs if a board member pre-judges the matter to such an extent [page625] that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of elected members. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.

A member of a board which performs a policy-formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing. As long as those statements do not indicate a mind so closed that any submissions would be futile, they should not be subject to attack on the basis of bias. Statements manifesting a mind so closed as to make submissions futile would, however, even at the investigatory stage, constitute a basis for raising an issue of apprehended bias. Once the matter reaches the hearing stage a greater degree of discretion is required of a member.

The statements at issue here, when taken together, indicated not only a reasonable apprehension of bias but also a closed mind on the commissioner's part on the subject. Once the order directing the holding of the hearing was given, the Utility was entitled to procedural fairness. At the investigative

stage, the "closed mind" test was applicable but once matters proceeded to a hearing, a higher standard had to be applied. Procedural fairness at that stage required the commission members to conduct themselves so that there could be no reasonable apprehension of bias.

A denial of a right to a fair hearing cannot be cured by the tribunal's subsequent decision. A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, must be void. The order of the Board of Commissioners of Public Utilities was accordingly void.

Cases Cited

Considered: Szilard v. Szasz, [1955] S.C.R. 3; Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369; Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170; Save Richmond Farmland Society v. Richmond (Township), [1990] 3 S.C.R. 1213; Cardinal v. Director of Kent [page626] Institution, [1985] 2 S.C.R. 643; referred to: Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311; Martineau v. Matsqui Institution Disciplinary Board, [1980] 1 S.C.R. 602.

Statutes and Regulations Cited

Public Utilities Act, R.S.N. 1970, c. 322, ss. 5(1) [as am. by S.N. 1979, c. 30, s. 1], (8), 6, 14, 15, 79, 83, 85, 86.

Authors Cited

Janisch, Hudson N. Case Comment: Nfld. Light & Power Co. v. P.U.C. (Bd.) (1987), 25 Admin. L.R. 196.

APPEAL from a judgment of the Newfoundland Court of Appeal (1990), 83 Nfld. & P.E.I.R. 257, 260 A.P.R. 257, 45 Admin. L.R. 291, dismissing an appeal from an order and from a ruling of the Board of Commissioners of Public Utilities. Appeal allowed.

James R. Chalker, Q.C., and Evan J. Kipnis, for the appellant.
Chesley F. Crosbie, for the respondent.

Solicitors for the appellant: Chalker, Green & Rowe, St. John's.
Solicitors for the respondent: Kendell & Crosbie, St. John's.

The judgment of the Court was delivered by

1 **CORY J.**:-- Two issues are raised on this appeal. The first requires a consideration of the extent to which an administrative board member may be permitted to comment upon matters before the board. The second, raises the question as to what the result should be if a decision of a board is made in circumstances where there is found to be a reasonable apprehension of bias.

The Factual Background

2 Pursuant to the provisions of The Public Utilities Act, R.S.N. 1970, c. 322, the Board of Commissioners of Public Utilities ("the Board") is responsible for the regulation of the Newfoundland Telephone Company Limited. Commissioners of the Board are appointed by the Lieutenant-Governor [page627] in Council. The statute simply provides that commissioners cannot be employed by, or have any interest, in a public utility (s. 6). In 1985, Andy Wells was appointed as a Commissioner to the Board. Earlier, while a municipal councillor, Wells had acted as an advocate for consumers' rights. When he was appointed, Wells publicly stated that he intended to play an adversarial role on the Board as a champion of consumers' rights. The Public Utilities Act neither provides for the appointment of commissioners as representatives of any specific group nor does it prohibit such appointments. The appointment of Wells has not been challenged.

3 Acting in accordance with The Public Utilities Act, the Board commissioned an independent accounting firm to provide an analysis of the costs and of the accounts of Newfoundland Telephone for the period between 1981 and 1987. The Board received the report from the accountants on November 3, 1988. In light of the report the Board, on November 10, decided to hold a public hearing. The hearing was to be before five commissioners including Wells and was to commence on December 19.

4 On November 13, 1988, The Sunday Express, a weekly newspaper published in St. John's, reported that Wells had described the pay and benefits package of appellant's executives as "ludicrous" and "unconscionable". Wells was quoted as saying:

> "If they want to give Brait [the Chief Executive Officer of the appellant] and the boys extra fancy pensions, then the shareholders should pay it, not the rate payers," ...
>
> ...
>
> "So I want the company hauled in here -- all them fat cats with their big pensions -- to justify (these expenses) under the public glare ... I think the rate payers have a right to be assured that we are not permitting this company to be too extravagant."

5 On November 26, The Evening Telegram, a daily newspaper, published in St. John's, quoted Wells:

[page628]

> "Who the hell do they think they are?" Mr. Wells asked. "The guys doing the real work, climbing the poles never got any 21 per cent increase."

> "Why should we, the rate payers, pay for an extra pension plan," he continued, adding that if the executive employees want more money put in their pensions they should take it out of shareholders' profits.
>
> ...
>
> Mr. Wells said he senses an attitude of contempt by the telephone company towards the Public Utilities Board. The company seems to expect to always get its own way, he said, adding that the auditors had problems getting information from the company to do the audit requested by PUB. "But, I'm not having anything to do with the salary increases and big fat pensions," said Mr. Wells.
>
> ...
>
> The telephone company wants the report kept confidential, "but, who do they think they are," said Mr. Wells. "This document should be public."

6 When the hearing commenced on December 19, the appellant objected to Wells' participation on the panel on the grounds that his statements had created an apprehension of bias. The Board found that there was no provision in the Act which would allow it to rule on its own members and it decided that it did not have jurisdiction to do so. The Board rejected the appellant's submission and ruled that the panel would continue as constituted.

7 On December 20, The Evening Telegram reported the previous day's events at the hearing. The article read in part:

> Following Monday's proceedings, Mr. Wells said he was not surprised by the request to remove him from the PUB panel for the Newfoundland Telephone hearing.

[page629]

> "I don't think those expenses can be justified," said Mr. Wells. "I'm concerned about bias the other way."

8 On January 24, 1989, the "NTV Evening News" (a television news program originating in St. John's) reported on the continuation of the hearing. That report contained the following statements made by a reporter, Jim Thoms, and by Mr. Wells. They were as follows:

Jim Thoms:	Before the hearing began last night board member Andy Wells went public with what he thought of the phone company. He nailed in particular increases in salary and pension benefits for top executives including president Anthony Brait and let it be known even before the board heard any evidence what his judgment would be.

...

Andy Wells:	I was absolutely astounded to find out for 1988 that, that Brait is now about up to two hundred and thirty-five thousand dollars and I think that's an incredible sum of money to be paid for to manage a small telephone company.
Jim Thoms:	Now Mr. Wells is trying to find out what happened for this year. He was going after '89 salary figures at a meeting today.
Andy Wells:	And I just think that it is unfair to expect ratepayers, the consumers, you and I to pay for this kind of extravagance.
Jim Thoms:	Okay now ... Mr. Wells has left no doubt how his vote will come down in this matter. He wants the board to disallow the salary and pension increases as unreasonable for rate making purposes and to tell the stockholders to pick up the tab.
Andy Wells:	And I think that's, that's a reasonable way of proceeding, it's too easy, [page630] it's too easy for, for the Company to pass off all these expenses as, onto the ratepayers ... .

9 On January 30, 1989 The Evening Telegram reported further comments of Mr. Wells pertaining to the salaries of the executives. The article read in part:

> Mr. Wells complained in December that the salaries paid to the company executives, in particular to president Anthony Brait, were so high they were driving up the cost of telephone service to consumers.
>
> ...
>
> Mr. Wells said Sunday that additional company documents subpoenaed by the board indicate Mr. Brait's salary for 1988 was close to $235,000, a figure Mr. Wells described as "ludicrous".
>
> ...
>
> "I can't see what circumstances would justify that kind of money," Mr. Wells said.
>
> "I don't think the ratepayers of this province should be expected to pay that kind of salary. The company can bloody well take it out of the shareholders' profits."
>
> ...

> Mr. Wells said he doesn't know when the case will be before the court, but said if he is biased, it is on the side of the consumers who pay too much for their phone bills.

10 On April 4, Mr. Wells discussed the issue that was before the Board on the CBC morning radio program. His comments in part are as follows:

> What's wrong is that it's not necessary to provide telephone services to the people of this Province for chief executive officer of a company operating in a protected enclave in the economy like that where revenues are down too where there's no real business pressure. To be paid at that level, I think the company is asking the board, I suppose, or asking the rate payers to approve a level of compensation which is excessive and I just don't know, there's absolutely no justification for it at all. The company, obviously, is out of touch with reality and insensitive to the cold hard facts of life that many [page631] Newfoundlanders face in earning living from day to day.

During the same program Commissioner Wells also commented:

> There's no question about that, the question is whether or not this is excessive and very clearly, in my mind, it's certainly is and when you're as I say, you're not talking about a free enterprise situation where you have the competitive pressures in the market place, you're talking about a monopoly that's got a guaranteed situation and if something goes wrong then they can come crying to the board and get rate relief ... .
>
> ...
>
> Well that's the point, that's the point, I mean I don't particularly care what the company decides to pay its top executives, I care about how much of that compensation is to be paid for by rate payers, by you, as consumers of telephone services and very clearly that issue has to be addressed and I hope when we have an order out on this issue later on the month, they, they will in fact, be addressed. No justification whatsoever to expect the consumers of telephone services in this Province to be paying the full cost of salary levels for these people, no justification whatsoever.
>
> ...
>
> Very clearly, very clearly there is a significant level of executive over compensation and very clearly the board has to deal with that. To what degree the board does in fact deal with it, by that I mean, to what level we're, we're prepared to allow for rate making purposes, of course, awaits determination and the result of the hearing.
>
> ...

> Well I, no you're right, it's not the amount of money, I mean the amount of money relative to the overall revenues of the company is in fact incidental, it's peanuts but what's important here is the issue of equity, the issue of fairness ... what's important is that pay levels be set with in tune with what's paid generally in the community and that they be fair and be perceived to be fair, very clearly in the minds of I suppose, 99 percent of Newfoundlanders, paying Mr. Brait over $200,000.00 a year along with what's being paid to the rest of the [page632] executives is not fair in the minds of ordinary Newfoundlanders and I think they're perfectly right and indeed, I think it's incumbent on this board to address that inequity even though as you say, it's not going to result in lower telephone bills. But as somebody once said if you watch the pennies the dollars look after themselves you know.

11 It is to be noted that all these comments were made before the Board released its decision on the matter. The decision was contained in Order No. P.U. 20 (1989) dated August 3, 1989. In that order, the Board (i) disallowed the "cost of the enhanced pension plan" for certain senior executive officers of the appellant as an expense for rate-making purposes, and (ii) directed the appellant to refund to its customers in the former operating territory of the Newfoundland Telephone Company Limited the sums of $472,300 and $490,300 which were the amounts charged as expenses to the appellant's operating account for 1987 and 1988 to cover the costs of the enhanced pension plan; (iii) made no order respecting the individual salaries of the senior executive officers of the appellant.

12 Mr. Wells and two others constituted the majority of the Board which disallowed the costs of the enhanced pension plan for executive officers of the appellant. A minority of the Board would have allowed this item as a reasonable and prudent expense. Although the Board made no order respecting the salaries of senior executive officers, Mr. Wells added a concurring opinion and comment in which he stated:

> Because the Board failed to properly address those issues and on the basis of the evidence presented, I have to agree with the rest of the Board.
>
> ...
>
> In conclusion I am in complete agreement with the Majority on the issue of the special executive retirement plan and given the evidence as presented at the hearing, [page633] I have to concur with the rest of the Board on the issue of executive salaries. However, the latter issue requires a more thorough examination by the Board in the future. It is not an issue that has been finally resolved.

Proceedings in the Court of Appeal (1990), 83 Nfld. & P.E.I.R. 257

13 The appellant appealed both the order itself and the ruling of the Board to proceed with Wells as a member of the hearing panel.

14 The Court of Appeal found that the Board had been in error in concluding that it had no jurisdiction to change the composition of the panel. It noted that the Board had complete jurisdiction to determine its own procedures as well as all questions of law and fact. It held that the Board had

declined to exercise its jurisdiction when it refused to consider the removal of Wells from the hearing panel.

15 Morgan J.A. for the Court of Appeal then considered whether the comments of Wells had raised a reasonable apprehension of bias with regard to the Board's decision. He observed that natural justice requires that an administrative board proceed without actual bias or in a way that does not raise a reasonable apprehension of bias. He noted that the standard of natural justice varies with the nature and functions of the tribunal in question. While he found that the enabling statute required the Board in this case to act as investigator, prosecutor and judge, he rejected the contention that the hearing formed part of the investigatory process. He held that the members of the Board must act fairly and with their minds open to persuasion. The fact that they have given prior opinions should not disqualify them. However, he concluded that Wells' comments did indeed raise a reasonable apprehension of bias which might well have disqualified him [page634] from the hearing if the appellant had sought a writ of mandamus to have the matter resolved.

16 He then considered the consequences of his conclusion that a reasonable apprehension of bias had been established. In his view a hearing of an administrative board is void ab initio if the adjudicator has an actual conflict of interest. On the other hand, if only a reasonable apprehension of bias exists, the proceedings are simply voidable. He then examined the conclusions of the Board and observed that Wells did not find against the company on the matter of executive wage increases. He took this as proof that Wells' mind had not been closed to argument. As a result he determined that the order of the Board was valid.

Analysis

The Composition and Function of Administrative Boards

17 Administrative boards play an increasingly important role in our society. They regulate many aspects of our life, from beginning to end. Hospital and medical boards regulate the methods and practice of the doctors that bring us into this world. Boards regulate the licensing and the operation of morticians who are concerned with our mortal remains. Marketing boards regulate the farm products we eat; transport boards regulate the means and flow of our travel; energy boards control the price and distribution of the forms of energy we use; planning boards and city councils regulate the location and types of buildings in which we live [page635] and work. In Canada, boards are a way of life. Boards and the functions they fulfil are legion.

18 Some boards will have a function that is investigative, prosecutorial and adjudicative. It is only boards with these three powers that can be expected to regulate adequately complex or monopolistic industries that supply essential services.

19 The composition of boards can, and often should, reflect all aspects of society. Members may include the experts who give advice on the technical nature of the operations to be considered by the Board, as well as representatives of government and of the community. There is no reason why advocates for the consumer or ultimate user of the regulated product should not, in appropriate circumstances, be members of boards. No doubt many boards will operate more effectively with representation from all segments of society who are interested in the operations of the Board.

20 Nor should there be undue concern that a board which draws its membership from a wide spectrum will act unfairly. It might be expected that a board member who holds directorships in leading corporations will espouse their viewpoint. Yet I am certain that although the corporate per-

spective will be put forward, such a member will strive to act fairly. Similarly, a consumer advocate who has spoken out on numerous occasions about practices which he, or she, considers unfair to the consumer will be expected to put forward the consumer point of view. Yet that same person will also strive for fairness and a just result. Boards need not be limited solely to experts or to bureaucrats.

[page636]

The Duty of Boards

21 All administrative bodies, no matter what their function, owe a duty of fairness to the regulated parties whose interest they must determine. This was recognized in Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311. Chief Justice Laskin at p. 325 held:

> ... the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question ... .

22 Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. See Martineau v. Matsqui Institution Disciplinary Board, [1980] 1 S.C.R. 602. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

23 In Szilard v. Szasz, [1955] S.C.R. 3, Rand J. found a commercial arbitration was invalid because of bias. He held that the arbitrator did not possess "judicial impartiality" because he had a business relationship with one of the parties to the arbitration. This raised an apprehension of bias that [page637] was sufficient to invalidate the proceedings. At p. 7 he wrote:

> Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.

24 This principle was relied upon in Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369. In that case a member of the Board had participated in a Study Group which had examined the feasibility of the Mackenzie pipeline. The appellants objected to his assignment to a panel which was considering competing applications for a certificate to undertake the pipeline. The standard the Board was required to apply in considering the applications was one of public convenience and necessity. Chief Justice Laskin held that the member's prior activity raised a reasonable apprehension of bias. He observed that the National Energy Board was charged with the

duty to consider the public interest. Public confidence in the impartiality of Board decisions was required to further the public interest.

25 Bias was considered in a different setting in Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170. That case concerned a planning decision which was made by elected municipal councillors. The governing legislation for municipalities was designed so that councillors would become involved in planning issues before taking part in their final determination. The decision of the Court recognized that city councillors are political actors who have been elected by the voters to represent particular points of view. Considering the spectrum of administrative bodies whose functions vary from being almost purely adjudicative to being political or policy-making in nature, the Court held that municipal councils fall in the legislative end. Sopinka J., at p. 1197, set forth the "open mind" test for this type of situation:

[page638]

> The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged.

26 This same principle was applied in the companion case, Save Richmond Farmland Society v. Richmond (Township), [1990] 3 S.C.R. 1213. That case concerned a municipal councillor who campaigned for election favouring a residential development. He made public statements that he would not change his mind with regard to his position despite public hearings on the issue. Sopinka J. found that the councillor should not be disqualified for bias because he did not have a completely closed mind. He determined that to have ruled otherwise would have distorted the democratic process by discouraging politicians from expressing their views openly.

27 It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine [page639] the very role which has been entrusted to them by the legislature.

28 Janisch published a very apt and useful Case Comment on Nfld. Light & Power Co. v. P.U.C. (Bd.) (1987), 25 Admin. L.R. 196. He observed that Public Utilities Commissioners, unlike judges, do not have to apply abstract legal principles to resolve disputes. As a result, no useful pur-

pose would be served by holding them to a standard of judicial neutrality. In fact to do so might undermine the legislature's goal of regulating utilities since it would encourage the appointment of those who had never been actively involved in the field. This would, Janisch wrote at p. 198, result in the appointment of "the main line party faithful and bland civil servants". Certainly there appears to be great merit in appointing to boards representatives of interested sectors of society including those who are dedicated to forwarding the interest of consumers.

29 Further, a member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing. This does not of course mean that there are no limits to the conduct of board members. It is simply a confirmation of the principle that the courts must take a flexible approach to the problem so that the standard which is applied varies with the role and function of the Board which is being considered. In the end, however, commissioners must base their decision on the evidence which is before them. Although they may draw upon their relevant expertise and their background of knowledge and understanding, this must be applied to the evidence which has been adduced before the board.

[page640]

Application to the Case at Bar

30 It is first necessary to review the legislation which constitutes the Board and sets out its role and function. The key sections to The Public Utilities Act are as follows:

> 5. (1) The Lieutenant-Governor in Council may appoint three or more persons who shall constitute a Board of Commissioners of Public Utilities, and shall designate a chairman and two vice-chairmen of and appoint a clerk for the Board.
>
> ...
>
> (8) The commissioners and the clerk shall be paid such salaries as the Lieutenant-Governor in Council determines.
>
> 14. The Board shall have the general supervision of all public utilities, and may make all necessary examinations and enquiries and keep itself informed as to the compliance by public utilities with the provisions of law and shall have the right to obtain from any public utility all information necessary to enable the Board to fulfil its duties.
>
> 15. The Board may enquire into any violation of the laws or regulations in force in this province by any public utility doing business therein, or by the officers, agents or employees thereof, or by any person operating the plant of any public utility, and has the power and it is its duty to enforce the provisions of this Act as well as all other laws relating to public utilities.

> 79. Whenever the Board believes that any rate or charge is unreasonable or unjustly discriminatory, or that any reasonable service is not supplied, or that an investigation of any matter relating to any public utility should for any reason be made, it may, of its own motion, summarily investigate the same with or without notice.
>
> 83. The Board shall give the public utility and the complainant, if any, ten days' notice of the time and place when and where the hearing and investigation referred to in Section 82 [i.e. when a complaint is made] will be held and such matters considered and determined and both the public utility and the complainant [page641] are entitled to be heard and to have process to enforce the attendance of witnesses.
>
> 85. If after making any summary investigation, the Board becomes satisfied that sufficient grounds exist to warrant a formal hearing being ordered as to the matters so investigated, it shall furnish such public utility interested a statement notifying the public utility of the matters under investigation and ten days after such notice has been given the Board may proceed to set a time and place for a hearing and an investigation as provided in this Act.
>
> 86. Notice of the time and place for the hearing referred to in Section 85 shall be given to the public utility and to such other interested persons as the Board shall deem necessary as provided in this Act and thereafter proceedings shall be held and conducted in reference to the matter investigated in like manner as though complaints had been filed with the Board relative to the matter investigated [see s. 83], and the same order or orders may be made in reference thereto as if such investigation had been made on complaint.

31 It can be seen that the Board has been given the general supervision of provincial public utilities. In that role it must supervise the operation of Newfoundland Telephone which has a monopoly on the provision of telephone services in the Province of Newfoundland. The Board, when it believes any charges or expenses of a utility are unreasonable, may of its own volition summarily investigate the charges or expenses. As a result of the investigation it may order a public hearing regarding the expenses. In turn, at the hearing the utility must be accorded the fundamental rights of procedural fairness. That is to say, the utility must be given notice of the complaint, the right to enforce the attendance of witnesses and to make submissions in support of its position.

32 When determining whether any rate or charge is "unreasonable" or "unjustly discriminatory" the Board will assess the charges and rates in economic terms. In those circumstances the Board will not be dealing with legal questions but rather policy issues. The decision-making process of this Board will come closer to the legislative end of the [page642] spectrum of administrative boards than to the adjudicative end.

33 It can be seen that the Board, pursuant to s. 79, has a duty to act as an investigator with regard to rates or charges and may have a duty to act as prosecutor and adjudicator with regard to these same expenses pursuant to ss. 83, 85 and 86.

34 What then of the statements made by Mr. Wells? Certainly it would be open to a commissioner during the investigative process to make public statements pertaining to the investigation. Although it might be more appropriate to say nothing, there would be no irreparable damage caused by a commissioner saying that he, or she, was concerned with the size of executive salaries and the executive pension package. Nor would it be inappropriate to emphasize on behalf of all consumers that the investigation would "leave no stone unturned" to ascertain whether the expenses or rates were appropriate and reasonable. During the investigative stage, a wide licence must be given to board members to make public comment. As long as those statements do not indicate a mind so closed that any submissions would be futile, they should not be subject to attack on the basis of bias.

35 The statements made by Mr. Wells before the hearing began on December 19 did not indicate that he had a closed mind. For example, his statement: "[s]o I want the company hauled in here -- all them fat cats with their big pensions -- to justify (these expenses) under the public glare ... I think the rate payers have a right to be assured that we are not permitting this company to be too extravagant" is not objectionable. That comment is no more than a colourful expression of an opinion that the salaries and pension benefits seemed to be unreasonably high. It does not indicate a closed mind. Even Wells' statement that he did not think that the expenses could be justified, did not indicate a closed mind. However, should a commissioner state that, no matter what evidence might be disclosed as a result of the investigation, his or her [page643] position would not change, this would indicate a closed mind. Even at the investigatory stage statements manifesting a mind so closed as to make submissions futile would constitute a basis for raising an issue of apprehended bias. However the quoted statement of Mr. Wells was made on November 13, three days after the hearing was ordered. Once the hearing date had been set, the parties were entitled to expect that the conduct of the commissioners would be such that it would not raise a reasonable apprehension of bias. The comment of Mr. Wells did just that.

36 Once the matter reaches the hearing stage a greater degree of discretion is required of a member. Although the standard for a commissioner sitting in a hearing of the Board of Commissioners of Public Utilities need not be as strict and rigid as that expected of a judge presiding at a trial, nonetheless procedural fairness must be maintained. The statements of Commissioner Wells made during and subsequent to the hearing, viewed cumulatively, lead inexorably to the conclusion that a reasonable person appraised of the situation would have an apprehension of bias.

37 On January 24, while the hearing was already in progress, Wells was making statements that might readily be understood by a reasonable observer, as they were by the telecast reporter Jim Thoms, that Wells had made up his mind what his judgment would be even before the Board had heard all the evidence. Evidence sufficient to create a reasonable apprehension of bias can be found in some of the statements made by Wells during the course of a January 24th telecast, and in the subsequent comments to the press and to the radio. For example, during a radio broadcast he said:

> To be paid at that level, I think the company is asking the board, I suppose, or asking the rate payers to approve a level of compensation which is excessive and I just don't know, there's absolutely no justification for it at all.

...

> There's no question about that, the question is whether or not this is excessive and very clearly, in my mind, it's [page644] certainly is and when you're as I say, you're not talking about a free enterprise situation where you have the competitive pressures in the market place, you're talking about a monopoly that's got a guaranteed situation ... .
>
> ...
>
> No justification whatsoever to expect the consumers of telephone services in this Province to be paying the full cost of salary levels for these people, no justification whatsoever.
>
> Very clearly, very clearly there is a significant level of executive over compensation and very clearly the board has to deal with that.
>
> ...
>
> ... I suppose, 99 percent of Newfoundlanders, paying Mr. Brait over $200,000.00 a year along with what's being paid to the rest of the executives is not fair in the minds of ordinary Newfoundlanders and I think they're perfectly right and indeed, I think it's incumbent on this board to address that inequity even though as you say, it's not going to result in lower telephone bills.

38 These statements, taken together, give a clear indication that not only was there a reasonable apprehension of bias but that Mr. Wells had demonstrated that he had a closed mind on the subject.

39 Once the order directing the holding of the hearing was given the Utility was entitled to procedural fairness. At that stage something more could and should be expected of the conduct of board members. At the investigative stage, the "closed mind" test was applicable. Once matters proceeded to a hearing, a higher standard had to be applied. Procedural fairness then required the board members to conduct themselves so that there could be no reasonable apprehension of bias. The application of that test must be flexible. It need not be as strict for this Board dealing with policy matters as it would be for a board acting solely in an adjudicative capacity. This standard of conduct will not of course inhibit the most vigorous questioning of [page645] witnesses and counsel by board members. Wells' statements, however, were such, that so long as he remained a member of the Board hearing the matter, a reasonable apprehension of bias existed. It follows that the hearing proceeded unfairly and was invalid.

The Consequences of a Finding of Bias

40 Everyone appearing before administrative boards is entitled to be treated fairly. It is an independent and unqualified right. As I have stated, it is impossible to have a fair hearing or to have procedural fairness if a reasonable apprehension of bias has been established. If there has been a denial of a right to a fair hearing it cannot be cured by the tribunal's subsequent decision. A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. Procedural fairness is an essential aspect of any hearing before a tribunal. The damage created by apprehension of bias cannot be remedied. The

hearing, and any subsequent order resulting from it, is void. In Cardinal v. Director of Kent Institution, [1985] 2 S.C.R. 643, at p. 661, Le Dain J. speaking for the Court put his position in this way:

> ... I find it necessary to affirm that the 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.

41 In my view, this principle is also applicable to this case. In the circumstances, there is no alternative but to declare that the Order of the Board of Commissioners of Public Utilities is void.

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Disposition

42 In the result the appeal will be allowed, the order of the Court of Appeal will be set aside, and Order No. P.U. 20 (1989) of the Board of Commissioners of Public Utilities is declared void ab initio. The appellant should have the costs of the appeal in this Court and in the Court of Appeal.

TAB 7

COURT FILE NO.: 23/03
DATE: 20041001

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

GRAVELY, CARNWATH & PITT JJ.

B E T W E E N:	
DR. HEUNG-WING LI	*Christopher A. Wayland & Sara J. Erskine*, for the Appellant
Appellant	
- and -	
THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO	*Linda Rothstein & Megan Shortreed*, for the Respondent
Respondent	
	HEARD: September 20, 2004

CARNWATH J.:

[1] On December 19, 2002, the College of Physicians and Surgeons of Ontario found Dr. Heung-Wing Li guilty of three counts of sexual abuse, one count of sexual impropriety, as well as other related allegations. A Panel of the Discipline Committee revoked his certificate of registration on the same day, although the reasons for decision with respect to both liability and penalty were not released until May 23, 2003.

[2] Dr. Pamela Chart testified for the College as both a fact and expert witness. Shortly before the decision of December 19, 2002, Dr. Chart was appointed to the Discipline Committee.

[3] The first, and disposing, issue on this appeal is whether Dr. Chart's activity as a member of the Panel raises a reasonable apprehension of bias. I find that it does and the decision of the Panel is quashed as being void *ab initio*.

BACKGROUND

[4] The allegations against Dr. Li were of improper touching of women's breasts during the course of medical examinations and of improper comments of a sexual nature. The hearing took place during the weeks of May 13, November 22, and December 16, 2002. The Panel consisted of: Dr. D. Braden; Dr. J. Doherty; Dr. R. Guscott; Ms. J. Frederick; and Ms. P. Beecham. The Panel did not release its Reasons for decision with respect to liability and penalty until May 23, 2003.

[5] During the first week of evidence (in May, 2002), the College called Dr. Pamela Chart, a family doctor with a specialty in breast issues, as both a fact and expert witness.

[6] As a fact witness, Dr. Chart testified that she had instructed the appellant on how properly to conduct a breast examination. This evidence was relevant to one of the allegations, which was that the appellant had touched a complainant's breasts improperly during the course of a clinical breast examination which took place after the appellant had seen Dr. Chart.

[7] At the same time, Dr. Chart was qualified as an expert in the area of "breast disease, breast screening and breast detection". She gave opinion evidence to the effect that, *inter alia*, the examinations of the appellant conducted on the complainants fell below the standard of care.

[8] When the hearing resumed in November, Dr. Chart continued her participation by sitting with the College prosecutor and assisting him.

[9] The defence called its own expert, Dr. Howard Rudner. Dr. Rudner is a family doctor. He testified that, if the appellant performed the examinations in the manner he described, three of the examinations were appropriate and met the standard of care. Dr. Rudner explained how some incidental touching of the breast tissue may be inevitable during the course of certain appropriate examinations. Dr. Rudner also said that certain aspects of the fourth examination (a breast examination) also met the standard of care, while others (most notably that the appellant conducted the examination from behind the patient) did not.

[10] Dr. Chart had inquired by e-mail on July 12, 2002, whether the College needed physicians for the Discipline or other Committees. Ironically enough, Dr. Chart disclosed in the e-mail that "she recently gave evidence in a case before the College and, as the case was to resume in the fall, she would like to see it completed before making any further commitments". On August 26, 2002, Dr. Chart was advised that her application would not be considered, since she had missed the deadline, but that it would be kept on file to be considered in the event of any vacancies. Vacancies arose in the fall and the Nominating Committee considered Dr. Chart's application. College Council appointed Dr. Chart to the Discipline Committee on November 29,

2002. Three members of Dr. Li's Panel were present at that College Council meeting – Dr. Guscott, Ms. Frederick, and Ms. Beecham.

[11] Dr. Chart's appointment was noted in the January/February, 2003 edition of the Member's Dialogue, the College's official publication. Under Committee Members 2002-2003, Dr. Chart is listed as a member of the Discipline Committee and the publication was distributed to members of the profession and public in March, 2003.

[12] When appointed, all members of the Discipline Committee are provided with a copy of the Discipline Committee Manual. The hearings office sent Dr. Chart the Discipline Committee Manual with a letter of introduction on November 29, 2002. In addition, a copy of the Manual is available to Discipline Committee members during discipline hearings. In the Manual, Discipline Committee members are cautioned not to "speak to any person involved in the hearing...or witnesses, while the hearing is in progress" and that their findings "must be made exclusively on the evidence presented at the hearing".

[13] The College did not set up any formal measure to ensure that Dr. Chart not communicate with the members of Dr. Li's Discipline Panel before the decision on December 19, 2002, and the release of the written reasons on May 23, 2003.

[14] After her appointment to the Discipline Committee on November 29, 2002, Dr. Chart did not attend any formal meetings with any members of the Discipline Committee until January 8, 2003, when she attended a new-member orientation session. None of the Panel Members from Dr. Li's discipline case attended that session, as they had received orientation in prior years.

[15] In the winter of 2003, Dr. Chart sat on Discipline Panels with members of the Panel that heard Dr. Li's case as follows:

(a) January 20, 2003 – *CPSO v. Cauchi*

(b) February 17-21, 2003 – *CPSO v. Cowan*

(c) February 10, 2003 – *CPSO v. Koffman*

[16] Several months after the Committee issued its reasons on May 23, 2003, Dr. Li's counsel learned for the first time that Dr. Chart had been appointed to the Discipline Committee.

[17] On September 19, 2003, Dr. Li's counsel wrote to the College prosecutor indicating that it had come to his attention that Dr. Chart may have begun sitting as a member of the Discipline Committee in early 2003 and asking that the College confirm her membership and the date of her appointment to the Committee. Dr. Li's counsel sent subsequent letters dated October 3, October 20, 21 and 27, requesting an answer to his letter of October 3, 2003.

[18] The College replied by letter dated October 9, 2003, prompting Dr. Li's counsel to make further inquiries in a letter dated October 30, 2003. Almost two months later, on December 22,

2003, defence counsel again wrote to the counsel requesting disclosure of the information. Following further prompting, on February 18, 2004, the College answered the request for information of October 30, 2003.

THE STANDARD OF REVIEW

[19] In considering the question of a reasonable perception of bias, a court owes little, if any, deference to the College. It is the court's function to enforce the rules of natural justice and procedural fairness. (*Gale* v. *College of Physicians and Surgeons of Ontario*, [2003] O.J. No. 3948, Q.L.)

[20] Where a tribunal is said to have failed to give a party natural justice, the court does not need to engage in an assessment of the appropriate standard of review, but goes directly to the question whether the rules of procedural fairness or the duty of fairness have been adhered to. The court assesses the specific circumstances and determines what safeguards were required to comply with the duty to act fairly. (*London (City)* v. *Ayerswood Development Corporation*, [2002] O.J. No. 4859 (C. App.) at ¶10).

THE TEST FOR REASONABLE APPREHENSION OF BIAS

[21] The parties agree the test for reasonable apprehension of bias is as follows:

> "What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude?"
>
> *Committee for Justice and Liberty* v. *Canada (National Energy Board)*, [1978] 1 S.C.R. 369

[22] The relevant inquiry is not whether there was, in fact, either conscious or unconscious bias on the part of an adjudicator, but whether a reasonable person properly informed would apprehend that there was bias. (*Wewaykum Indian Band* v. *Canada*, [2003] 2 S.C.R. 259)

[23] If a reasonable apprehension of bias is found to exist, the decision is void *ab initio* and a new hearing must be ordered, regardless of whether it may appear to a reviewing court that the hearing would likely have resulted in a different decision. A reviewing court cannot deny the right to an independent and impartial hearing on the basis of its view as to what the result might have been had there been a fair hearing. (*Newfoundland Telephone Co.* v. *Newfoundland (Public Utilities Board)*, [1992] 1 S.C.R. 263.

THE POSITION OF THE PARTIES

[24] Dr. Li's counsel submits the apprehension of bias arises from the appointment to the Discipline Committee of an expert who had testified before a Panel of that Committee and assisted the prosecution. Moreover, members of the Panel participated in the appointment of Dr. Chart to the Discipline Committee. The defence was never told of these events. Counsel

submits the members of the Panel would have to weigh Dr. Chart's evidence, for the purpose both of making a decision and drafting reasons with the knowledge that she was a colleague of theirs on the Committee alongside whom they would sit on other Panels in the future. Although there is no evidence as to whether Dr. Chart ever discussed this case with members of the Panel, she had "private dealings" with several Panel members when she sat on Panels with them in other cases while the reasons were being drafted. Counsel submits the College was asking the Panel to accept Dr. Chart's evidence on "core" and contentious issues. The defence was relying on conflicting evidence of its own expert and asking the Panel to prefer its expert to Dr. Chart on certain points. Further, there was no evidence of any institutional mechanism put in place by the College to ensure that Dr. Chart did not speak to the members of the Panel, as was the direction from the College to newly-appointed members to the Discipline Committee. The failure to disclose all this to the defence until after the reasons for the decision were issued prevented the defence from attempting to re-open the examination of Dr. Chart and to explore to what extent, if any, she had discussions about Dr. Li's matter with the Panel members.

[25] Counsel for the College submits that an informed person would have to consider the practical reality of the College's institutional structure. Counsel submits the College is responsible for many aspects of regulation (registration, complaints, discipline, incapacity, patient relations, quality assurance, etc.) and that while the College is a single corporation, the reality of its structure is that the various functions are administered separately. It was not reasonable to assume that completely separate functional arms of the College (the Nominating and Discipline Committees) should be aware of the other's activities. The College submits the onus is on the appellant; there is a presumption of impartiality. The College further submits it is not reasonable to assume that the Panel holds Dr. Chart's evidence in greater esteem simply because she was appointed to the Committee. Physicians who testify as experts are inevitably well-known both within and outside the College. In any event, says the College, there was virtually no conflict in the testimony of Dr. Chart and Dr. Rudner, the two opinion experts.

WHAT A REASONABLY-INFORMED BYSTANDER WOULD KNOW

[26] The hypothetical informed bystander would learn the following:

a) the decision of the Panel puts an end to Dr. Li's professional life;

b) Dr. Chart obviously believed it would be preferable to be appointed to the Discipline Committee after the hearing of Dr. Li's matter was completed;

c) in convicting Dr. Li, the Panel was required to weigh the evidence of Dr. Chart, where it conflicted with the defence medical evidence on the issue of Dr. Li's standard of care;

d) following her evidence, Dr. Chart continued in the hearing with one minor absence to assist the College prosecutor;

e) the evidence in Dr. Li's hearing concluded on November 22, 2002;

f) Dr. Chart was appointed to the Discipline Committee on November 29, 2002;

g) closing arguments in Dr. Li's hearing took place on December 16 and 17, 2002;

h) the Panel delivered its oral decision and heard and determined the issue of penalty on December 19 saying that its reasons would follow;

i) Discipline Committee members were cautioned not to "speak to any person involved in the hearing or witnesses while the hearing is in progress";

j) contrary to this policy of the College, Dr. Chart sat with members of the Dr. Li Panel on three occasions in 2003;

k) no machinery was put in place by the College to ensure that its policy of non-contact between witnesses and Panel members should take place until a hearing was completed;

l) the proceedings were not completed until May 23, 2003, and the Panel members would be required to consider Dr. Chart's evidence in the course of drafting the Committee's decision;

m) Dr. Li's counsel did not find out about Dr. Chart's appointment to the Discipline Committee and her subsequent activity on that Committee with members of Dr. Li's Panel until well after the reasons for decision were issued on May 23, 2003

n) from the time Dr. Li's counsel initiated his first inquiry about Dr. Chart's membership on the Discipline Committee, it took five months for defence counsel to obtain all the details of Dr. Chart's participation in the Discipline Committee;

Having so informed him or herself of the above facts, the question remains for this court to determine what that informed person, viewing the matter realistically and practically and having thought the matter through, would conclude.

ANALYSIS

[27] I find that such an informed person viewing the matter realistically and practically and having thought the matter through, would conclude that it is more likely than not that the

decision-maker, whether consciously or unconsciously would not decide fairly. There are a number of analogous cases, not directly on point, which assist me in coming to this conclusion.

[28] A Prince Edward Island case involved the certification application by a trade union before the Labour Relations Board. A Mr. MacDonald was both a member of the Labour Relations Board and the business agent for the union seeking certification. Mr. MacDonald did not sit on the panel hearing the certification application, but the matter was brought before the trial division of the Supreme Court to determine whether these circumstances gave rise to a reasonable apprehension of bias. Chief Justice MacDonald commented on Mr. MacDonald being called as a witness at the hearing:

> Here we have the situation of Mr. MacDonald being either a witness or propounder in this matter. As such, there will arise awkwardness in rejecting his testimony or the submissions made on behalf of the Union which he represents. Would a reasonable person be able to conclude that Board members would be able to separate their respective roles as Board member, witness, and propounder? I do not believe so. Persons who are appointed to the Board are, generally, not lawyers who have been trained, as part of their profession, to separate issues and parties. That is not to say that if Mr. MacDonald were a lawyer, in the present circumstance, I would reach a different conclusion. [*U.F.C.W., Local 1252 (In Trusteeship)* v. *Prince Edward Island (Labour Relations Board)*, [1988] P.E.I.J. No. 11 (S.C.T.D.)]

[29] In Dr. Li's case, it remained for members of the Panel to weigh Dr. Chart's evidence, for the purpose of making a decision and for the purpose of drafting reasons, with the knowledge that she was a colleague of theirs on the Discipline Committee with whom they likely would be called upon to sit on other panels in the future. These circumstances could affect how the Panel members viewed her evidence, if only on a subconscious level.

[30] In Alberta, a witness gave evidence before the Public Utilities Board on behalf of certain industrial rate intervenors. At the time the evidence was given, the witness was on a retainer to the Board on a consulting capacity with respect to the Board's approach to and process of analysis of a general rate application. The Alberta Court of Appeal held the mere fact that the witness had been retained as a consultant by the Board at some point in the past did not, in itself, give rise to a reasonable apprehension of bias. However, the fact that the witness continued to play this role at the time his evidence was considered was fatal:

> The real thrust of Mr. Major's complaint, as he conceded during oral argument, is not so much the past engagement of Drazen as its result: his ongoing relationship with the board. This, we think, is a legitimate concern. It is a dangerous policy to put Mr. Drazen in a position where he is at once advisor and witness. Assume, for example, that he has met regularly and privately with a member of the panel while his testimony is under consideration by that member. No matter how much the member protests that the merits were never

> discussed, a well-informed person can reasonably fear that these private dealings might lead the trier to hesitate to cause himself – and Mr. Drazen – the awkwardness of rejection of his testimony. A professionalism which transcends these concerns is not only demanded of but possible for those who perform a judicial role; but one might reasonably fear failure to comply with that standard by one who exposes himself to avoidable pressure of this sort. Private dealings between an individual member and a witness – unless shown to be totally innocuous – should not be permitted to occur while his evidence is under deliberation. [*Re Public Utilities Board*, [1985] A.J. No. 666]

[31] In Dr. Li's case, there is no evidence whether Dr. Chart ever discussed the case with members of the Panel. What is known is that she had "private dealings" with some of them when she sat on Panels with them in January and February of 2003 while the reasons for the Panel's decision were being drafted. There is no evidence one way or the other as to how innocuous these "private dealings" were. However, the College's own policy was to instruct new members of the Discipline Committee not to speak to anyone while a hearing was ongoing in the circumstances in which Dr. Chart found herself. Indeed, as noted earlier, Dr. Chart herself had recognized the potential difficulty of being appointed to the Committee while a case in which she was a witness was ongoing.

[32] I reject the submission that the College's institutional structure somehow explains or excuses the College's failure to disclose Dr. Chart's appointment to the Discipline Committee to Dr. Li's counsel. At the meeting of November 29, 2002, the minutes of College Council show Dr. Guscott, Ms. Beecham and Ms. Frederick as present. The minutes show further Dr. Chart's appointment to the Discipline Committee. The Panel members had to be aware of her membership on the Discipline Committee over two weeks before closing argument and the decision of December 19, 2002.

[33] I reject the submission that to all intents and purposes, the hearing ended on December 19, 2002. This is yet another example of the danger in announcing a decision "with reasons to follow". The reasoning process may lead to a change of mind. In any event, it remained for the Panel to weigh Dr. Chart's opinion on the standard of care during a period in which she sat with Panel members on other matters.

[34] I reject the submission there was virtually no conflict in the testimony of the experts. I refer to but two instances. They disagreed on the construction to be placed on Dr. Li's remark that a patient's boyfriend could carry out a breast examination. They disagreed on whether "cupping" of a breast could take place in a proper breast examination. The Panel was required to weigh these differences in its deliberations.

[35] The College's failure to put in place a mechanism to prevent the very event College policy warned against – speaking "to any person involved in a hearing or witnesses while the hearing is in progress" – resulted in a breach of the policy. The further failure to disclose Dr. Chart's appointment foreclosed any inquiry by the defence about what, if any, discussions she

may have had with Panel members concerning Dr. Li's case. The difficulty defence counsel had in obtaining the details of what happened does nothing to dispel a reasonable apprehension of bias.

[36] I find on a preponderance of the evidence a reasonable apprehension of bias to exist. The decision of the Panel is quashed as being void *ab initio*. It is therefore unnecessary to consider the other grounds for judicial review advanced by the applicant.

[37] The parties may make written submissions as to costs to be forwarded to the Registrar of the Divisional Court.

GRAVELY J.

CARNWATH J.

PITT J.

Released: 200409

COURT FILE NO.: 23/03
DATE: 20041001

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

GRAVELY, CARNWATH & PITT JJ.

B E T W E E N:

DR. HEUNG-WING LI

Appellant

- and -

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

Respondent

JUDGMENT

CARNWATH J.

Released: 20041001

TAB 8

In the Court of Appeal of Alberta

Citation: re Public Utilities Board Act, 1985 ABCA 282

Date: 19851125
Docket: 17502
Registry: Calgary

Special Case

The Court:

The Honourable Mr. Justice McDermid
The Honourable Mr. Justice Kerans
The Honourable Mr. Justice Mason

Memorandum of Judgment
Delivered from the Bench

COUNSEL:

M.A. Putnam, Esq., Q.C. and Ms. A. Lapko, for the Public Utilities Board

J. Major Esq. Q.C. and Ms. B. Locke, for Northwestern Utilities Limited

D.G. Hart. Esq. Q.C. for Industrial Rate Intervenors

MEMORANDUM OF JUDGMENT DELIVERED FROM THE BENCH

KERANS, J.A. (for the Court):

[1] This is a reference by the Public Utilities Board to this Court pursuant to Rule 13 of the Rules of Practice of the Board (Alta. Reg. 602/57), which provides:

> Preliminary Questions of Law
>
> 13. If it appears to the Board at any time that there is a question of law which it would be convenient to have decided before further proceeding with the case, it may direct such question to be raised by special case or in such other manner as it may deem expedient, and the Board may, pending such decision, order the whole or any part of the proceedings before the Board in such matter to be stayed.

[2] With deference, I would read that Rule as permitting the Board itself to hear a preliminary point of law, the decision on which could be appealed, with leave, to this Court. Such an approach has obvious merit for a tribunal, like this Board, which would want, whenever possible, to see controversial points of law settled in a manner which would not put a long rate hearing in jeopardy. Nevertheless, a preliminary decision is not quite the same beast as a preliminary reference. I could not turn up any provision, (like, for example, s. 38(1) of the Expropriation Act 1980 R.S.A. E-16) giving this Court jurisdiction to supply advisory opinions to the Board or to hear cases referred to it by the Board. No objection was taken to jurisdiction, however, and the point was not raised by us at the hearing. Assuming without deciding, then, that we have jurisdiction. I proceed.

[3] The Board asks:

(a) Is a reasonable apprehension of bias raised by reason of the fact that, unknown to the applicant, NUL (Northwestern Utilities Ltd.) at the time a Mr. Mark Drazen gave evidence before the Board at the GRA (General Rate Application) on behalf of certain Industrial Rate Intervenors, the said Mr. Mark Drazen and/or his firm was on a retainer to the Board in a consulting capacity with respect to the Board's approach to, and process of analysis of, a general rate application?

(b) If the answer to question (a) is yes, what is the appropriate remedy to be applied?

[4] In support of the questions, the Board offers a statement of facts, of which these are key: on August 14, 1984 the Board engaged Mr. Drazen to "assess the Board's approach and process of analysis of the general rate application". In late September, 1984, the Board received his "preliminary report". Meanwhile, Northwest Utilities applied for the approval of the general rate for its gas product and a hearing began before a panel of three members of the Board designated for this purpose. A group of industrial firms, called the industrial rate intervenors, opposed the application and, on December 10 and 11, led evidence from the same Mr. Drazen about the issues involved in that application. He obviously has some expertise and this has led to this demand for his services in various capacities, although we are not told precisely what that expertise is. Finally, on January 20, 1985, Northwest Utilities applied to the panel to direct itself that the Drazen evidence "be disregarded and struck from the record ..."on the basis that, when he testified, he was "on a retainer to, or was being consulted by, the Board in his professional capacity ...". The panel did not decide upon this application; instead it directed the reference of this "special case" to us on the grounds that "no one can be judge in his own cause" and that the appearance of justice prevented them

from deciding it. The panel then adjourned the general application pending our decision. Before us, the Board solicitor made no submissions.

[5] We must first observe, with respect, that the Board Rule speaks only of a point of law. This special case obviously involves matters of fact as well as law. Moreover, we do not know all of the relevant facts. Questions about apprehension of bias cannot be decided in the abstract. We doubt that the Board can properly refuse to decide such issues. Individual members, when the panel resolved not to decide the application before it, put themselves at risk of an application for a writ of Prohibition on the ground that the individual is disqualified for bias. The advantage of that proceeding at least is that it permits the Queen's Bench judge to enquire into the facts of the matter. If s. 67 of the Act forbids such an attack, then all the more reason for the Board to decide the case.

[6] In any event, we do not think we have nearly enough facts before us to offer an unequivocal answer to the first question posed by the Board. For example, it is not clear that the matters about which Drazen testified were totally distinct from the matters about which he was consulted. We understand that the Board must develop policy about its procedure generally (as well as decide individual cases) and properly consults experts privately in that regard. See s. 4(1) of the Act. Mr. Hart, for the intervenors understands that Drazen was consulted about "streamlining procedures". But the description of the retainer supplied by the Board is extremely vague, and Mr. Hart acknowledges that he has not seen the retainer or the preliminary report. Nor have either been put before us. In fairness, Mr. Major for Northwestern Utilities accepts that, in general terms, Drazen was not retained to advise about the issue which arose on its gas rate application.

[7] Similarly, we are not told what, if any, private communications have passed between Drazen and any of the panel members from the time he began to testify until now (that is, while the question of reliance on his testimony remains under deliberation by the panel). In fairness, Mr. Hart says that he understands that there have been some with at least one panel member.

[8] We will not answer the question put. Nonetheless, we shall endeavour to meet as best we can the implicit request for assistance from the Board. We do so dubitante, for the reasons expressed.

[9] Standard to be applied by the Board in the circumstances is settled. It is an error, and probably jurisdictional error, for a tribunal - or any member of it – to allow itself to be in the invidious situation where there could be "... a reasonable apprehension which reasonably well-informed persons could properly have of a biased appraisal and judgment of the issues to be determined ..." See Committee for Justice and Liberty et al v. N.E.B. et al (1978) 1 S.C.R. 369 at 391 (S.C.C.).

[10] It is said for Northwestern Utilities that:

> ... a reasonably well-informed person could properly have a reasonable apprehension that:
>
> (a) the Board recognized Drazen as a superior expert in his field, by the fact of having retained him in preference to others;
>
> (b) the Board reposed greater trust and confidence in the opinion of Drazen than in that of other experts, by the fact that the Board had chosen to consult Drazen:
>
> (c) the Board had a loyalty to Drazen because of its business relationship with him; and
>
> (d) the Board would accord more weight to the evidence of Drazen than to that evidence provided by another expert witness.

[11] We agree that a reasonably well-informed person could properly fear - based solely on the fact of the retainer - that the Board has great confidence in Drazen and his skills. We do not accept that this fact alone permits an reasonable apprehension that the Board thinks he is better than other experts; he may have been chosen over others for many reasons, as for example availability. Moreover, the respect shown by the retainer would not, of itself, raise an apprehension in the mind of a reasonable and well-informed person that the Board would, as a result of its high opinion of Drazen, pre-judge a case by unthinkingly preferring his evidence. We test this thesis in this way: assume the retainer was completed before the hearing began. Would a reasonable apprehension of bias remain? We think not. We liken the expression of respect involved in a hiring to the expression of respect involved in accepting his testimony - and relying on it - in a previous case. Past expressions of respect, whether by hiring or by acceptance of testimony, surely do not lead to a reasonable fear of a future unthinking (by which we mean based upon anything other than the merits of the case), reliance on later testimony by the same expert.

[12] Mr. Major suggests that a decent interval must elapse after such past reliance before the glow of warm regard wanes. We do not agree. In most circumstances, we would not assume that there is an "afterglow". A reasonable well-informed person will not count so little on the sobering effect of the oath of office which, as Wilson. J. says in R. v. Pickersgill et al (1970) 14 D.L.R. (3d) 717 (Manitoba Q.B.) at p. 723, commands a trier of fact not to "... yield to his pre-conceptions or become captive to unexamined and untested preliminary impressions".

[13] The real thrust of Mr. Major's complaint, as he conceded during oral argument, is not so much the past engagement of Drazen as its result: his on-going relationship with the Board. This, we think, is a legitimate concern. It is a dangerous policy to put Mr. Drazen in the position where he is at once advisor and witness. Assume, for example, that he has met regularly and privately with a member of the panel while his testimony is under consideration by that member. No matter how much the member protests that the merits were never discussed, a well-informed person can reasonably fear that these private dealings might lead the trier to hesitate to cause himself - and Mr. Drazen - the awkwardness of rejection of his testimony. A professionalism which transcends such concerns is not only demanded of but possible for those who perform a judicial role; but one might reasonably fear failure to comply with that standard by one who exposes himself to avoidable pressure of this sort. Private dealings between an individual board member and a witness - unless shown to be totally innocuous - should not be permitted to occur while his evidence is under deliberation.

[14] This takes us to the second issue, and the novel suggestion by Mr. Major that the solution is that the Drazen evidence be struck from the record. He offers no support for this suggestion in the authorities except for The King v. Salford Assessment Committee ex parte Ogden (1937) 2 K.B.1 (C.A.). With respect, that case does not support the proposition that a relevant and compellable witness should not be permitted to testify because there is a reasonable apprehension that the tribunal before which he testifies might have a bias for or against his testimony. In that case, a tribunal hearing rate appeals asked an officer of the rating authority to act as clerk of its proceedings. The rating authority unfortunately was the very body appealed from, and it was held that to permit him some involvement in the appeal proceeding would offend the rules of natural justice.

[15] We think the rule was correctly stated by this Court in Murray, Lunz et al v. Council of the M.D. of Rockyview No. 44 (1980) 21 A.R. 512. In that case, some members of the

tribunal had put themselves in the position of being relevant witnesses. This Court held that they were, thereby, disqualified from sitting on the tribunal and the issue would have to be re-heard by members not so disqualified.

[16] In conclusion, we repeat that we do not know precisely what has occurred here and therefore do not know whether any Board member should be disqualified. But a Board member who has trespassed the rule stated by the Supreme Court obviously should disqualify himself or be removed from participation in the hearing. If, as a consequence of such disqualification, the panel falls below a quorum, there must be a re-hearing before another panel. Of course, it is open to the parties, by agreement, to arrange for a less drastic solution. For now, we can only say that those who are not qualified should not sit.

TAB 9

1988 CarswellPEI 38, 31 Admin. L.R. 196, 71 Nfld. & P.E.I.R. 156, 220 A.P.R. 156

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1988 CarswellPEI 38, 31 Admin. L.R. 196, 71 Nfld. & P.E.I.R. 156, 220 A.P.R. 156

U.F.C.W., Local 1252 v. Prince Edward Island (Labour Relations Board)

NATIONAL AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA) v. UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 1252 (In Trusteeship)

Prince Edward Island Supreme Court, Appeal Division

Carruthers C.J.P.E.I., Mitchell and McQuaid JJ.A.

Heard: May 6, 9, 10, 11 and 12, 1988
Judgment: May 24, 1988
Docket: Nos. AD-0034/AD-0037

Counsel: *David W. Hooley* , for appellant.

Eugene P. Rossiter , for respondent.

John A. O'Keefe , for intervenor, Labour Relations Bd.

Subject: Public; Labour and Employment

Labour Law --- Bargaining rights — Certification — Jurisdiction of Board — Judicial review — Grounds for review.

Judgment not to be reversed where lawful and reasonable basis for it existing.

Witness at proceedings.

Witness at proceedings.

C.A.W. appealed from the two judgments of MacDonald C.J.T.D. of the Prince Edward Island Supreme Court reported post, at p. 200 and p. 213.

Held:

The appeals were dismissed.

In appeals from the Trial Division, the proper test to be applied was whether the trial Judge's exercise of discretion had a lawful and reasonable basis.

In light of the Board's important adjudicative role and the need for public confidence in its impartiality, and given the role played by MacD on behalf of C.A.W. and his concurrent membership on the board, there was a reasonable basis for the trial Judge's holding. Moreover, U.F.C.W. had raised its objection in a timely fashion. The union was not to be expected to have anticipated that MacD would have continued to act as both board member and business agent for C.A.W. Moreover, given the full consideration of the issue in the first case and that the facts were common to each case, and notwithstanding the desirability of not deciding cases on grounds not advanced or argued, no purpose was to be served by allowing an appeal in the second case because bias had not been pleaded.

The reasonable apprehension of bias tainted all the orders of the board in relation to these two matters whether administrative or judicial. A new panel was to be set up quickly but not containing members who had sat on these matters up to that point or who had served on any panel with MacD since the two matters had come before the board.

Cases considered:

Homex Realty & Development Co. v. Wyoming, Village of, [1980] 2 S.C.R. 1011, 13 M.P.L.R. 234, 116 D.L.R. (3d) 1, 33 N.R. 475 (S.C.C.) — *referred to*

P.E.I. Public Service Assn. Inc. v. Holland College (1986), 60 Nfld. & P.E.I.R. 82, 181 A.P.R. 82 (P.E.I. C.A.) — *applied*

APPEALS from orders of certiorari quashing ruling by the Prince Edward Island Labour Relations Board, post, pp. 200 and 213.

The judgment of the Court was delivered by *Mitchell J.A.* :

1 The appellant seeks to set aside two decisions of MacDonald C.J.T.D. granting orders in the nature of certiorari to quash certain decisions and orders of the Labour Relations Board on grounds of reasonable apprehension of bias. The board decisions and orders in question related to applications for certification by the appellant for bargaining rights with respect to workers at Cavendish Farms Ltd. and Garden Province Meats (1985) Inc. presently represented by the respondents.

2 The question of which of the two unions before the Court will in future represent the workers affected by the dispute has gone unanswered too long. I do not intend to add to the delay by taking the time to write lengthy reasons for judgment. Anyhow, the role of this Court on appeals from orders granting or denying certiorari is restricted to determining whether or not the trial Judge had a lawful and reasonable basis for exercising his discretion as he did. *P.E.I. Public Service Assn. Inc. v. Holland College* (1986), 60 Nfld. & P.E.I.R. 82, 181 A.P.R. 82 (P.E.I. C.A.) .

3 The Labour Relations Board has an important judicial function in our society and therefore such a tribunal must inspire public confidence in its impartiality. When I consider in that light the nature of the dispute, the central role of the appellant's business agent, his special relationship with the board and the fact that a member of the panel assigned to these cases was at the same time his colleague on another board panel, I am unable to conclude that Chief Justice MacDonald did not have a reasonable basis for his finding that a reasonable apprehension of bias existed. Furthermore, I cannot find that the trial Judge erred in law or did not have a reasonable basis for his ruling that the respondents had raised their objection to the panel in a timely fashion. Even if the respondents did know that the appellant's business agent was a member of the board, they did not know that he would continue to sit on board panels after the appellant filed its applications. Once the respondents became aware that he had, they raised their objection. It may be

understood that union employees will serve on labour relations boards from time to time but surely it cannot be taken as accepted that these employees will continue to sit as active board members while their employer has a contentious application before the board.

4 Chief Justice MacDonald decided the case relating to the Garden Province Meats (1985) Inc. application on the basis of reasonable apprehension of bias even though that was never pleaded or argued by the parties. Ideally, a Judge should not decide a case on grounds neither pleaded nor argued but such a step is not unprecedented: *Homex Realty & Development Co. v. Wyoming, Village of*, [1980] 2 S.C.R. 1011, 13 M.P.L.R. 234, 116 D.L.R. (3d) 1, 33 N.R. 475 (S.C.C.) . The merits of the apprehension of bias issue were fully argued before the Chief Justice on the application relating to the Cavendish Farms hearings. The facts relating to the issue of apprehension of bias are common to both the Cavendish Farms and the Garden Province Meats applications. That being the case, I can see nothing to be gained by the considerable added delay that would result by requiring the issue to be pleaded and argued again. Accordingly, I would dismiss both appeals. This dismissal applies to the decisions of the Chief Justice with respect to all board orders including those characterized by the appellant and the Labour Relations Board as administrative in nature. Once a reasonable apprehension of bias existed the panel had no jurisdiction to do anything, except, perhaps, with the consent of the parties. The respondents did not consent to any of the orders in question.

5 A new panel should be struck by the Chairman of the Labour Relations Board as soon as possible to deal with all the applications before the board to which the appellant and respondents are parties. The new panel could be composed of board members who have not sat on these matters to date and who have not served on any panels with the appellant's business agent since the matters in dispute first came before the board. I recognize that this may require the appointment of one or more new members of the board but I see no reason why that cannot be done easily and quickly. The Lieutenant Governor in Council can appoint as many members to the board as are required from time to time. That would seem to provide a viable solution to deal with this rather special situation without exposing the integrity of the system to any unnecessary risk. The problem that arose in this case could be avoided in future if a board member whose principal has an interest in an application before the board would refrain from sitting as a panel member or meeting with the board until the board has disposed of the case.

6 Considering the unusual nature of the problem in these cases and the fact that neither party caused it, I would award no costs on these appeals.

Appeals dismissed.

END OF DOCUMENT

TAB 10

In the Court of Appeal of Alberta

Citation: Hutterian Brethren Church of Starland v. Starland (Municipal District), 1993 ABCA 76

Date: 19930304
Docket: 13056
Registry: Calgary

Between:

Hutterian Brethren Church of Starland

Appellant

- and -

**Municipal District of Starland No. 47,
Development Appeal Board of the Municipal District of Starland No. 47,
Bradley Hoover, Norraine Hoover, Murray Hoover, Gary Pearson, Kevin Boon,
Arnold Shand and Norvan Boon**

Respondents

The Court:

**The Honourable Mr. Justice Belzil
The Honourable Mr. Justice Gallant
The Honourable Mr. Justice Côté**

**Reasons for Judgment of The Honourable Mr. Justice Côté
Concurred in by The Honourable Mr. Justice Belzil
Concurred in by The Honourable Mr. Justice Gallant**

**APPEAL FROM DEVELOPMENT APPEAL BOARD OF
THE MUNICIPAL DISTRICT OF STARLAND**

COUNSEL:

A. J. Jordan, for the Appellant

P. A. Smith, Q.C., for the M.D. and D.A.B.

F. A. Laux, for Individuals (Hoover et al)

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE COTÉ

A. INTRODUCTION

[1] The main issue is whether one counsel and one expert were too aligned with the Development Appeal Board on one hand, and a contending party, on the other, thus producing apparent bias.

B. FACTS

[2] This is a brief overview of the facts. Some details bearing on more contentious issues are found in Parts C, D, and F below.

[3] The Church wished to set up a new Hutterian Colony within the Municipality. It proposed an intensive agriculture operation, which was a discretionary use under the Municipality's land use by-law. The Church applied for and got a development permit from the Municipal Planning Commission ("M.P.C."). However, a number of neighbours appealed to the Development Appeal Board ("D.A.B."). The Municipality had earlier appointed 3 of its 6 councillors to constitute the D.A.B.

[4] On the first hearing before the D.A.B. the Municipality's engineer appeared and expressed the opinion that the Church had not given enough information. He said that one could not tell whether there would be bad effects from the development, so that one could not justify granting a permit. A lawyer for the Municipality, Mr. A, also appeared but took little part; his role is discussed below. The D.A.B. allowed the appeal and denied the development.

[5] The respondents' joint factum says:

> "9. Both Mr. [A] and [the engineer] serve as solicitor and engineer, respectively, to the M.D. and its agencies including the M.P.C. and D.A.B., on an as-needed basis."

[6] The Church moved before a member of this Court for leave to appeal, and got such leave. The motion for leave to appeal and the appeal itself were resisted both by Mr. A and by a lawyer for the neighbours who had appealed to the D.A.B. Mr. A and the neighbours' lawyer filed a joint factum. The appeal was then argued, and succeeded, this Court ordering a new hearing before the D.A.B.

[7] Before the second hearing the D.A.B. told counsel for the Church to deal with Mr. A on certain procedural questions, not directly with the D.A.B. They did so, but the two lawyers did not agree on procedure.

[8] At the second D.A.B. hearing, 2/3 of the members of the D.A.B. were the same councillors of the Municipality. The municipal secretary and Mr. A and the same engineer sat at a special table near the front of the room. Counsel for the Church and for the opposing neighbours sat at a different table. The D.A.B. explained that the engineer was there to help the D.A.B. interpret technical evidence. The Church produced a court reporter, but he proposed to use a shorthand machine, not pen and ink. The D.A.B. members said nothing, but Mr. A announced that pursuant to D.A.B. policy, the Church could use a shorthand reporter only. The reporter would be permitted to use a stenographic machine only if the Church's counsel undertook not to try to put the resulting transcript before the Court. He so undertook, and the reporter stayed. The secretary apparently took longhand notes, and the record this Court now has is her summary; it is not verbatim.

[9] The Church objected that the hearing was out of time, but the neighbours' lawyer disagreed. Mr. A retired with the D.A.B. for about 15 minutes despite the Church's objection to his doing so. The D.A.B. then returned and announced that the Church's objection was overruled, partly because of the facts. Mr. A's advice was to overrule the objection.

[10] Before the hearing, the engineer had filed a report which concluded that the development posed excessive risks of pollution, and similar water-supply problems. He testified orally to the same effect, and was cross-examined by counsel for the Church. The Church led its own expert who disagreed, and was cross-examined by counsel for the neighbours.

[11] The D.A.B. concluded that the evidence of its own engineer was more weighty than that of the Church's engineer, and again allowed the appeal and again denied the development.

[12] Again the Church moved for and got leave to appeal to this Court, and now appeals. The three questions on which leave was granted for this second appeal were

a. possible bias of the D.A.B.

b. adequacy of the record kept by the D.A.B.

c. the proper legal test for adverse impact.

[13] Again Mr. A and the lawyer for the opposing neighbours opposed both the motion for leave and the appeal. Again Mr. A and the lawyer for the opposing neighbours filed a joint factum. It says that Mr. A is counsel for the Municipality and for the D.A.B. When the appeal

opened for oral argument, those two counsel appeared to oppose the appeal. The Court members then sitting questioned whether Mr. A should argue an appeal which might turn on his own conduct at earlier stages. He did not dispute the point, nor did the other counsel. Mr. A withdrew, the hearing did not proceed then, and on a later day the appeal proceeded with a new counsel representing both the Municipality and the O.A.B.

C. WAS THE MUNICIPALITY NEUTRAL?

[14] As the respondents point out, much of the bias argument made by the appellant Church is premised on the Municipality's not being neutral, but an opponent of the development. The respondents deny that.

[15] That stance is striking for three reasons. First, the joint factum with Mr. A has never been withdrawn, and so the Municipality by it still actively opposes the present appeal. Second, the oral arguments of new counsel for the Municipality also oppose this appeal. Neither the Municipality nor the D.A.B. confined itself to questions of jurisdiction (even if one took the technical view that bias is a question of jurisdiction). They oppose the appeal on all grounds, including type of record kept and whether the wrong legal test was used to assess adverse impact. Third, the new counsel replacing Mr. A is still counsel for both the M.D. and the D.A.B.

[16] However, maybe events after the second D.A.B. hearing are not relevant. Maybe we should not infer that the Municipality was not neutral at the time of the second D.A.B. hearing just because it has since allied itself with one side in this contest.

[17] Counsel for the Church points out that Mr. A wrote a letter November 2, 1992 to the Justice of Appeal who was hearing the application for leave to bring the present appeal. The letter says that throughout the first appeal and since, counsel for the neighbours opposing the Church is and was funded by the Municipality. Counsel for the Church and the letter both say that Council minutes approve such payment. That is not in the Appeal Book, but neither counsel for the neighbours, nor counsel for the Municipality and the D.A.B., objected. They did not question our power to hear such factual assertions, nor did they deny their accuracy. I have no hesitation in relying on the letter, as it is expressly written to disclose the matter to the Court, with the authorization of Mr. A's "client". All that either of the respondents' counsel said on the subject, was that counsel for the opposing neighbours prepared all the material opposing the development and sent it to Mr. A, who agreed with it. It was signed jointly

because counsel for the neighbours desired economy. There could be no economy to the neighbours thereby, so that must mean economy to the Municipality.

[18] The respondents point out that Alberta's *Planning Act* s. 153(1)(a) restricts us to evidence which was before the D.A.B. But it seems to me that letters written to or from the D.A.B. before the hearing must fit within that category. We had some of those, on the subject of court reporters. Nor am I by any means certain that that section of the *Planning Act* is intended to bar formal admissions by proper parties to an appeal to the Court of Appeal. Admissions are not evidence; they obviate the need for evidence. If that were not so, there could never be a consent appeal to the Court of Appeal from a D.A.B., and much time would be wasted perfecting the record and adducing evidence to prove facts which all the parties concede.

[19] I see no reason to ignore the present factual submissions. They appear to be undisputed, and though they are unsworn, they constitute an admission by the Municipality and the D.A.B.

[20] It was also admitted before us that the engineer whose evidence sank the development on each occasion, was paid by the Municipality and was its regular engineer. It is argued that on the first D.A.B. hearing, he did not go into the merits, but merely said that the Church's information was inadequate. But that was an argument against the development permit, and it was so received. It caused the D.A.B. to revoke the development permit the first time. Furthermore, before the second D.A.B. hearing began, it was known that the engineer was taking a stand adverse to the development by the Church, because he filed a report to that effect.

[21] At the first D.A.B. hearing, the record filed shows Mr. A as appearing for the Municipality. Counsel for the opposing neighbours now suggests that that was an error, and that Mr. A was in fact then only counsel for the D.A.B. In view of the fact that Mr. A thereafter adopted a long course of acting for the Municipality in this matter, that seems improbable.

[22] Furthermore, the argument that Mr. A really only acted for the D.A.B., and the first minutes are wrong, involves a number of logical contradictions. In the first place, I do not see why the respondents should be able to rely heavily upon the record made by the D.A.B. at each of its hearings when they wish to, and then abandon the same record when it is not convenient, without offering any opposing evidence. Second, the D.A.B. must be fixed with its

own admission. The Municipality doubtless is not so fixed, but does that matter? If it is no more than a nominal party and has no real interest, then it has no reason or standing to oppose the appeal, and so to argue this point. But if it has a real interest, that answers the very question posed by this Part C.

[23] In Part E below, I suggest that the test is appearance of bias. If that is correct, the recital in the earlier D.A.B. minutes may materially contribute to that.

[24] Finally, before us counsel for the opposing neighbours conceded that the Municipality would have some interest in this matter, as it would be the recipient of pollution and other adverse effects should the development not work so well as the Church hoped.

[25] Counsel for the Church says that Mr. A filed a written memorandum when the first motion for leave to appeal was made in respect of the first D.A.B. hearing. He quotes from it a sentence by Mr. A submitting that the Municipality was affected, and had an interest, an involvement, and a stake in the first D.A.B. decision (see para. 8 of Church's factum). I have not found that memorandum on the Court of Appeal file, but the factum of the respondents on the present appeal (signed by Mr. A also) does not deny that. And it is quite clear that there was another written submission filed opposing the earlier grant of leave in respect of the first D.A.B. decision. It is not signed, and if it is not by Mr. A, it is by the present counsel for the neighbours (the present individual respondents). It also argues at length that the Municipality would be affected by the first D.A.B. decision and by the proposed development, in respect of tax base, roads, schools, fire, police, etc. It says that the Municipality had claimed then to be affected, and "The Engineer spoke on its behalf."

[26] Counsel for the Municipality and the D.A.B. now contends that the Municipality had not really been opposed to the Church, because at all previous proceedings its opposition had been on legal or procedural grounds, not on the merits of the development. I cannot see that that makes any difference. If the Municipality chose to don a uniform and sit on the neighbours' players' bench and to take the ice alongside the neighbours against the Church, it seems to me to matter little whether it played as goalie or forward. And that is quite apart from the question of whether it was paying the wages of the neighbours' team.

[27] Counsel for the neighbours also argues that the Municipality was not really adverse in any of the proceedings before this Court, because the Court and the *Planning Act* s. 152(4) both ordained that the Municipality must be a respondent. But that does not require it to take

an active role. It need not have retained counsel at all, and if it did, that counsel could have held a mere watching brief. Still less did he have to adopt the arguments of the neighbours opposing the Church. The Municipality did not confine itself even to jurisdiction.

D. WAS MR. A NEUTRAL?

[28] I will not spend long on this issue. There are only two suggestions that Mr. A was neutral. First, it is said that he acted only for the D.A.B., not the Municipality. I cannot agree, for all the reasons given above.

[29] Second, it is suggested that at the second D.A.B. hearing, Mr. A only went into procedural matters, and never addressed the planning merits of the development. That surely is irrelevant. The procedural questions were to be decided by the D.A.B., not by any other body. It had to avoid bias in deciding them as much as it did in deciding the planning merits. Those issues could win the game just as much as could the planning merits. And we are investigating Mr. A's neutrality for the purpose of seeing whether the D.A.B. appeared biased.

[30] I repeat that on behalf of the D.A.B., Mr. A first objected to the presence at the hearing of a court reporter using a shorthand machine instead of a pen. Then he agreed to allow it only in return for an undertaking not to use the transcript for any court purposes. Those stands are eloquent. We heard argument about the supposed inhibiting effect of the presence of a court reporter. I have some trouble understanding that, but in any event it is irrelevant. Mr. A had no objection to a court reporter who would take down all the evidence by pen shorthand. It was also argued before us that any machinery would be noisy or disruptive. Surely any Alberta barrister is acquainted with shorthand machines and their silence and unobtrusiveness. Furthermore, Mr. A permitted even that machine, if he could be guaranteed that the transcript would not be used in court. I can see but one rational objective there: to have his client control the record which the Court of Appeal would see. Yet the *Planning Act* allows no such thing. Section 85(2) says that the D.A.B. may keep a mere summary, but does not forbid it to do more. Nor does it say anything about what record <u>others</u> may take or keep, or whose record is to go before the Court of Appeal. The Court of Appeal can hear only what evidence the D.A.B. heard, but the Act says nothing about whose record of that evidence it may receive.

[31] The article by Milmo and Bristow on "Contempt of Court" in 8 Hals. Laws 2, 14 (3d ed.), and cases cited, suggest that it may be contempt to dissuade a witness from giving

evidence in court. Cf. Law Society of Alberta, Professional Conduct Handbook, Chap. 8, Commentary 4 (pp. 28-9); Proposed Code of Professional Conduct, Commentary G.2 (p. 28), and para. 22 (p. 77). What is clear is that deterring the opposing side from giving evidence is (at best) at the very outer limits of what a party or its counsel may do. For a neutral tribunal to do that is unthinkable. Hobbling one party but not oneself or the other parties is a most unneutral act. The undertaking so exacted could not bind this Court, and had I thought that the first day's transcript would have been of use, I should not have hesitated to suggest that our Court subpoena it and adjourn the appeal.

[32] It will be recalled that on the first appeal to this Court from the first D.A.B. decision, all the respondents filed a joint factum. It is signed by Mr. A as "Solicitor for the Respondents Municipal District of Starland No. 47 and the Development Appeal Board of the Municipal District of Starland No. 47", and by counsel for the respondent neighbours. It contains 27 pages of argument on 9 different issues. It opposes the first appeal on every issue, and asks that the first appeal be dismissed with costs. The last 17 pages of its argument address these issues:

-- whether the Church had given enough information about soil conditions, waste storage, etc.

-- whether the Church had given enough information about ground water supply

-- whether the D.A.B. was bound by the findings of government agencies on those subjects

-- how to interpret one section in the Municipality land use by-law about animal wastes

-- whether water wells were too close to waste storage

The old joint factum argues fully against the Church on each of those points, and in so doing addresses in detail what are appropriate planning considerations, impact on neighbours, pollution legislation, and health legislation. I cannot imagine what would be argument on the merits if that is not. So Mr. A was firmly on the players' bench of the opponents of the Church during the previous appeal.

[33] In my view, all the facts show that clearly Mr. A was hired by the Municipality, which allied itself with the Church's opponents. Furthermore, they show that Mr. A acted throughout as an opponent of the Church's development.

E. WHAT IS THE TEST FOR BIAS?

[34] The respondents contend that Canada now has a new stricter test for bias, in any event where the tribunal has to decide some policy questions. They say that reasonable apprehension of bias is no longer the test, and that the test is now whether the tribunal's mind was unalterably made up, citing *Old St. Boniface Res. Assn. v. Winnipeg* (*City*) [1990] 3 S.C.R. 1170, 75 D.L.R. (4th) 385, and *Nfld. Tel. Co. v. Pub. Utils. Comm.* [1992] 1 S.C.R. 623, 89 D.L.R. (4th) 289.

[35] I do not read those decisions that way, for three reasons. In the first place, even the earlier decision, *Old St. Boniface,* says that the test for the forbidden closed mind is whether a reasonably well-informed person would think that the situation complained of might influence the exercise of the tribunal's duty. And the *Nfld. Tel. Co.* case says that the test of a closed mind is used only when the tribunal is in the earlier investigative stage. At the later hearing state, it must be more discreet, and then the test is reasonable apprehension of bias, which is a standard higher than closed mind.

[36] In the second place, the complaint in each of those cases was preconceived notions possessed by one member of the tribunal. But most of the case law on "bias" is not about that at all. It is about some connection between the tribunal and one party. "Bias" then refers to an institutional problem, not to an actual state of mind at all. Such an institutional problem is the allegation here. That is elementary law. For example. Griffith & Steet's *Principles of Administrative Law* 156-7 (4th ed. 1967) divides "bias" into 3 different categories:

(a) an opinion about the subject matter so strong as to produce fixed and unalterable conclusions;

(b) any pecuniary bias, however slight;

(c) personal bias either by association with a party or personal hostility to a party, where the test is real likelihood of bias and the appearance that justice is done.

The *Old St. Boniface* case was in head (a), but the test was not met there. The allegations in this case are in the first part of head (c), with the easier test. I would scarcely presume that the Supreme Court would overrule all that law, indeed that whole basic approach, silently. Indeed they did not, for in the *Old St. Boniface* case the Supreme Court expressly says that the thing which might influence the exercise of the tribunal's duty can come from pecuniary

interest or *relation to one party* (as opposed to existing opinions of tribunal members), and if so one uses the test of reasonable apprehension of bias: p. 410 (D.L.R.)

[37] In the third place, the committee in *Old St. Boniface* was legislative, which is not true of this D.A.B. That its members happen to be councillors does not make it a legislative body.

[38] Therefore, the Church here need not show that the D.A.B. or any of its members had firmly closed minds.

F. DID THE D.A.B. VIOLATE THE RULE AGAINST BIAS?

[39] A long well-known line of cases holds that the tribunal cannot seem to admit to its decision-making process one of the parties, or someone too closely connected with one of the parties. The classic case (cited here) is *R. v. Sussex Justices* [1924] 1 K.B. 256, 93 L.J.K.B. 129 (D.C.). There the acting Clerk to the Justices retired with them when they decided a criminal case, as was the custom. But the acting Clerk was also a solicitor in private practice, and his partner was acting for the other side in the civil suit arising out of the same set of facts. Of course the acting Clerk may not have known of the connection, or thought of it. And his legal advice was non-existent: in fact, he said nothing. This was the precise context in which the court gave the famous statement that "it is not merely of some importance, but of fundamental importance, that justice should not only be done, but be manifestly and undoubtedly seen to be done".

[40] I must stress the conclusions above, that in this case neither the Municipality nor Mr. A. was neutral. Had they been neutral, the result might well be very different.

[41] At the opening of the hearing, the D.A.B. made it plain by the seating arrangements that Mr. A and the engineer had a special position. They were advisers to the D.A.B. That was confirmed by the D.A.B.'s actual announcement. The engineer was to assist the D.A.B. in understanding the technical evidence which it would hear. During oral argument before this Court, counsel for the objecting neighbours agreed that the D.A.B. were using the engineer as their assessor, much as courts sometimes use a maritime or other technical assessor.

[42] From the outset, that could be seen to be a very dangerous step. The engineer had already filed a written report reaching a conclusion adverse to the development on the merits. Furthermore, during the hearing the engineer gave oral evidence to the same effect. And at the end, the D.A.B. used him as an expert witness, not just as an assessor, for they found

that his evidence had more weight than that of the Church's expert, who had testified to the opposite effect. That was surely a result which an informed bystander might have expected. It is the natural result of mingling the roles of assessor and expert witness, not to mention an expert witness who has already pronounced for one side.

[43] Nor was it a pure coincidence that the engineer pronounced for one side. He was hired by the Municipality, and had acted as their witness (not as the D.A.B.'s assessor) on the previous D.A.B. hearing. And the Municipality was not neutral, but was opposed to the Church, for reasons given above in Part C.

[44] Mr. A played an analogous role. Before the hearing, the D.A.B. made him their representative, to negotiate certain procedural matters on their behalf. During the hearing, he assumed the same role, ruling on the question of a court reporter. And he retired with the D.A.B. to advise them on the question of a time limit, contrary to the *Sussex Justices* line of cases.

[45] Yet we have seen above that Mr. A had previously acted in a way far from neutral. His connection with the Church's opponents was far stronger than was the acting Clerk's in the *Sussex Justices* case. Therefore, Mr. A. was connected to the Municipality and to the D.A.B. He linked the two, or at least appeared to do so. Linking the D.A.B. with either or both might be harmless if both had been neutral. But as noted, neither was neutral; both had entered the lists against the Church.

[46] It is true that the conduct of Mr. A might arguably violate other rules of natural justice, upon which the Church has not got leave to appeal. And that conduct might affect the D.A.B.'s decision on the supposed breach of a time limit, on which the Church has not got leave either. But those other possible flaws are irrelevant to the question of whether the role of the engineer and of Mr. A constitutes "bias" for purposes of administrative law, and the Church has got leave to appeal on that ground. One act can violate several rules of administrative law.

[47] Nor is that leave to appeal for bias expressed to be limited to the D.A.B.'s decision on any particular topic; it is expressed generally. No one cited to us any authority suggesting that a tribunal may be biased in the eyes of the law on one issue but not on another issue, where it is all one proceeding with the same parties. Nor do I see how that could be so, given the reasoning in the cases on bias.

[48] Counsel for the Church does not seek our ruling on bias because of any single act which occurred here. He expressly does not so reason. Instead, he asks that we consider the totality of the facts outlined above, and then ask whether a reasonably-informed fair bystander would conclude that the tribunal might well have been influenced in its decision, whether or not it actually was. I have no hesitation in saying that that is the test, and that it is clearly met here. There is a reasonable apprehension of bias here.

[49] Only one precedent exists for this entire family of conflicts of interest. It is from Act I of Gilbert & Sullivan's *Mikado.* Even at the risk that we'll none of us be missed, one must quote it:

> "Ko-Ko:.. I want to consult you as to the amount I ought to spend upon them.
>
> Pooh-Bah: Certainly. In which of my capacities ? As First Lord of the Treasury, Lord Chamberlain, Attorney General, Chancellor of the Exchequer, Privy Purse, or Private Secretary?
>
> Ko-Ko: Suppose we say as Private Secretary.
>
> Pooh-Bah: Speaking as your Private Secretary, I should say that as the city will have to pay for it, don't stint yourself, do it well.
>
> Ko-Ko: Exactly -- as the city will have to pay for it. That is your advice.
>
> Pooh-Bah: As Private Secretary. Of course you will understand that as Chancellor of the Exchequer, I am bound to see that due economy is observed.
>
> Ko-Ko: Oh! But you said just now "Don't stint yourself, do it well".
>
> Pooh-Bah: As Private Secretary.
>
> Ko-Ko: And now you say that due economy must be observed.
>
> Pooh-Bah: As Chancellor of the Exchequer.
>
> Ko-Ko: I see. Come over here, where the Chancellor can't hear us. (They cross the stage.) Now, as my Solicitor, how do you advise me to deal with this difficulty?
>
> Pooh-Bah: Oh, as your Solicitor, I should have no hesitation in saying "Chance it ---"
>
> Ko-Ko: Thank you. (Shaking his hand) I will."

[50] It is clear that we need not conclude that there was actual bias, still less that the result must have been different without it. And so it is not helpful to consider that the other half of the Council had been on the M.P.C. which earlier was favourable to the development, nor to consider that the D.A.B. took 12 or 15 hours to hand down its written decision (whose length and detail the respondents stress).

[51] The respondents also suggest that our accepting the Church's attack on this D.A.B. for bias must upset the workings of all D.A.B.'s and prevent them from ever using municipal staff or consultants or funding, whether for the D.A.B. hearing or on a later motion for leave to appeal to the Court of Appeal. That is not so. I weigh the totality of all the evidence here. I stress again that it might be very different where the municipality has no real interest in a development, and does not care what becomes of it, and has taken no role and has not assisted either side, and merely lends a secretary or a lawyer to the D.A.B., which secretary or lawyer then does nothing to ally herself to either side. But that question is not before us, and I need not decide it.

[52] One of the respondents argued that receiving representations privately from Mr. A was in keeping with the practice of some appellate courts and administrative tribunals which sit in panels containing only part of the judges or tribunal members. Yet the other members of the court or tribunal who did not sit on a particular case often comment privately on the pending decision to the members who did sit. He referred to the Supreme Court's decision in *Consol. Bathurst Pkg. v. I.W.A.* [1990] 1 S.C.R. 282. I do not find any analogy there at all. Such courts or tribunals do not get such input from those who are not members of the court or tribunal, still less from persons who have any partiality, or connection with one side. And such input is limited in scope and purpose. In the case of the Alberta Court of Appeal, it is instructive to quote our own policy decision reiterating that very point, adopted and authorized for release, at a Court meeting in Calgary on October 7, 1992:

> "Our Court will, on its own motion, require re-argument of cases before larger panels, even the full Court, in appropriate cases. Any decision labelled as 'reserved' will have been circulated, before final publication, to the entire Court for reaction on the question whether re-argument is appropriate. (Other decisions are labelled either as 'memorandum of judgment' or 'memorandum of judgment delivered from the bench'.) When a reserved judgment is published without re-argument, it is fair to infer that the Court decided against re-argument, and therefore that a substantial majority, if not all, the judges of the Court accepted the statements of law in the decision."

[53] In my view, there is operative bias here. Whatever its result on a judicial review hearing, it is plainly a defect in law or jurisdiction. The appeal must be allowed.

G. OTHER ISSUES

[54] As noted above, the Church also got leave to appeal on the adequacy of the record, and on whether a certain section of the *Planning Act* was used inappropriately when ruling on the merits. Though those grounds were fully argued, I see no need to decide them

here, given the conclusion about bias. Even if there is a new D.A.B. hearing, those problems may well not arise the second time.

H. REMEDY

[55] The respondents submit that the only possible remedy is to order a third hearing before the D.A.B. Nothing has been argued which would suggest that a neutral properly-instructed fact finder must or will certainly find that the proposed development is good planning or sufficiently harmless to the neighbourhood.

[56] However, the appellant Church does not wish a new hearing. It wishes us to quash the decision and not order a new hearing, thus in effect deciding the appeal to the D.A.B. ourselves, even without looking at the planning merits. The Church wishes that because it says that by the third hearing, the same D.A.B. will certainly be biased. And says that despite one death, the present D.A.B. is still 2/3 composed of people who sat on one of the previous appeals, and 1/3 composed of someone who sat on both, and at least 2/3 composed of councillors of the non-neutral Municipality.

[57] There might be some force in that contention, but dispensing with the hearing would probably be even worse. Maybe the Municipality and the D.A.B. got themselves into this mess, but the neighbours opposing the development may not be the authors of it. And there may be other neighbours who take no part, but count on the D.A.B.'s deciding on the merits.

[58] I would order a new (third) hearing, but add this observation. Nothing requires any municipality, even a small one, to staff its D.A.B. with municipal councillors. I would not tell the Municipality what to do next time, but if it leaves the members of the D.A.B. as they now stand, and if they sit on the D.A.B. and if the Church loses again before the D.A.B., it is easy to predict another motion for leave to appeal to the Court of Appeal, and to predict its grounds. I do not say whether such motion would succeed; I only point out the time and money which it would consume. If the Municipality really wants to get a decision on the merits, and have it stick without risking a third appeal to the Court of Appeal, it might want to see whether there is some legal way to have different more independent people sit on the D.A.B. next time.

[59] Clearly the appellant Church should have costs of this appeal and of all the interlocutory steps in court leading to it, including the earlier abortive opening of this appeal.

They should be payable in any event and as soon as taxed. The development in question obviously will have large financial implications for both sides, whoever wins. The costs should be taxed on column 6. Any other direction necessary or useful to fix these costs should be given later by any member of this panel, in my view.

[60] Who should pay those costs? The appellant Church did not address that in oral argument, but its factum asks for such costs only against "the individual respondents". I believe that one of the respondents briefly questioned our power to order costs against one of the respondents, and the counsel for the Church said nothing about that. In my view who should pay the costs (the individual respondents, the Municipality, or the D.A.B.) should be the subject of written submissions within 30 days.

JUDGMENT DATED at CALGARY, Alberta,
this 4th day of MARCH,
A.D. 1993

TAB 11

Français

Public Service of Ontario Act, 2006

ONTARIO REGULATION 381/07

CONFLICT OF INTEREST RULES FOR PUBLIC SERVANTS (MINISTRY) AND FORMER PUBLIC SERVANTS (MINISTRY)

Consolidation Period: From August 20, 2007 to the e-Laws currency date.

No amendments.

This is the English version of a bilingual regulation.

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20. Restriction re certain transactions

PART I
RULES FOR PUBLIC SERVANTS WHO WORK IN A MINISTRY

INTERPRETATION

Definitions

1. In this Part,

"confidential information" means information that is not available to the public and that, if disclosed, could result in harm to the Crown or could give the person to whom it is disclosed an advantage;

"gift" includes a benefit of any kind;

"spouse" means,

(a) a spouse as defined in section 1 of the *Family Law Act*, or

(b) either of two persons who live together in a conjugal relationship outside marriage. O. Reg. 381/07, s. 1.

Application

2. This Part applies to every public servant who works in a ministry. O. Reg. 381/07, s. 2.

PROHIBITED CONDUCT

Benefiting self, spouse or children

3. (1) A public servant shall not use or attempt to use his or her employment by the Crown to directly or indirectly benefit himself or herself or his or her spouse or children. O. Reg. 381/07, s. 3 (1).

(2) A public servant shall not allow the prospect of his or her future employment by a person or entity to detrimentally affect the performance of his or her duties to the Crown. O. Reg. 381/07, s. 3 (2).

Accepting gifts

4. (1) A public servant shall not accept a gift from any of the following persons or entities if a reasonable person might conclude that the gift could influence the public servant when performing his or her duties to the Crown:

1. A person, group or entity that has dealings with the Crown.
2. A person, group or entity to whom the public servant provides services in the course of his or her duties to the Crown.
3. A person, group or entity that seeks to do business with the Crown. O. Reg. 381/07, s. 4 (1).

(2) Subsection (1) shall not operate to prevent a public servant from accepting a gift of nominal value given as an expression of courtesy or hospitality if doing so is reasonable in the circumstances. O. Reg. 381/07, s. 4 (2).

(3) A public servant who receives a gift in the circumstances described in subsection (1) shall notify his or her ethics executive. O. Reg. 381/07, s. 4 (3).

Disclosing confidential information

5. (1) A public servant shall not disclose confidential information obtained during the course of his or her employment by the Crown to a person or entity unless the public servant is authorized to do so by law or by the Crown. O. Reg. 381/07, s. 5 (1).

(2) A public servant shall not use confidential information in a business or undertaking outside his or her work for the Crown. O. Reg. 381/07, s. 5 (2).

(3) A public servant shall not accept a gift directly or indirectly in exchange for disclosing confidential information. O. Reg. 381/07, s. 5 (3).

Giving preferential treatment

6. (1) When performing his or her duties to the Crown, a public servant shall not give preferential treatment to any person or entity, including a person or entity in which the public servant or a member of his or her family or a friend has an interest. O. Reg. 381/07, s. 6 (1).

(2) When performing his or her duties to the Crown, a public servant shall endeavour to avoid creating the appearance that preferential treatment is being given to a person or entity that could benefit from it. O. Reg. 381/07, s. 6 (2).

(3) A public servant shall not offer assistance to a person or entity in dealing with the Crown other than assistance given in the ordinary course of the public servant's employment. O. Reg. 381/07, s. 6 (3).

Hiring family members

7. (1) A public servant shall not, on behalf of the Crown, hire his or her spouse, child, parent or sibling. O. Reg. 381/07, s. 7 (1).

(2) A public servant shall not, on behalf of the Crown, enter into a contract with his or her spouse, child, parent or sibling or with a person or entity in which any of them has a substantial interest. O. Reg. 381/07, s. 7 (2).

(3) A public servant who hires a person on behalf of the Crown shall ensure that the person does not report to, or supervise the work of, the person's spouse, child, parent or sibling. O. Reg. 381/07, s. 7 (3).

(4) A public servant who reports to, or supervises the work of, his or her spouse, child, parent or sibling shall notify his or her ethics executive. O. Reg. 381/07, s. 7 (4).

Engaging in business, etc.

8. A public servant shall not become employed by or engage in a business or undertaking outside his or her employment by the Crown in any of the following circumstances:

1. If the public servant's private interests in connection with the employment or undertaking could conflict with his or her duties to the Crown.

2. If the employment or undertaking would interfere with the public servant's ability to perform his or her duties to the Crown.

3. If the employment is in a professional capacity and is likely to influence or detrimentally affect the public servant's ability to perform his or her duties to the Crown.

4. If the employment would constitute full-time employment for another person. However, this paragraph does not apply with respect to a public servant who is employed part-time by the Crown. This paragraph also does not apply with respect to a public servant who is on an authorized leave of absence from his or her position, but only if the employment is not contrary to or inconsistent with the terms of the leave of absence.

5. If, in connection with the employment or undertaking, any person would derive an advantage from the public servant's employment as a public servant.

6. If government premises, equipment or supplies are used in the employment or undertaking. O. Reg. 381/07, s. 8.

Participating in decision-making

9. (1) A public servant shall not participate in decision-making by the Crown with respect to a matter that the public servant is able to influence in the course of his or her duties if the public servant could benefit from the decision. O. Reg. 381/07, s. 9 (1).

(2) Subsection (1) does not apply if the public servant obtains the prior approval of his or her ethics executive to participate in decision-making by the Crown with respect to the matter. O. Reg. 381/07, s. 9 (2).

(3) A public servant who, in the course of his or her employment in a ministry, is a member of a body or group shall not participate in, or attempt to influence, decision-making by the body or group with respect to a matter if the public servant could benefit from the decision or if, as a result of the decision, the interests of the body or group could conflict with the interests of the Crown. O. Reg. 381/07, s. 9 (3).

(4) A public servant described in subsection (3) shall inform the body or group if the circumstances described in that subsection exist. O. Reg. 381/07, s. 9 (4).

MATTERS THAT MIGHT INVOLVE THE PRIVATE SECTOR

Interpretation

10. (1) Sections 11 and 12 apply to every public servant who works in a ministry, who routinely works on one or more matters that might involve the private sector and who has access to confidential information about the matter obtained during the course of his or her employment by the Crown. O. Reg. 381/07, s. 10 (1).

(2) In this section and in sections 11 and 12,

"matter that might involve the private sector" means a matter,

(a) that relates to services currently provided under a program of the Crown or by a public body, an agency of the Crown or a corporation controlled by the Crown with respect to which it is possible that a private sector entity will provide all or part of the financing for the services or will provide some or all of the services, and

(b) that has been referred to a ministry, a public body or an agency of the Crown by the Executive Council or a member of the Executive Council for review or implementation. O. Reg. 381/07, s. 10 (2).

Duty to declare certain financial interests

11. (1) When a public servant described in subsection 10 (1) begins work on a matter that might involve the private sector, he or she shall make a declaration to the Conflict of Interest Commissioner in which the public servant discloses the following matters respecting his or her financial interests:

1. A legal or beneficial interest of the public servant in securities or derivatives of corporations or governments, other than the Government of Ontario.

2. A legal or beneficial interest of the public servant in a business entity or a commercial operation or in the assets of such an entity or operation.

3. A legal or beneficial interest of the public servant in real property.

4. A legal or beneficial interest of the public servant in a mutual fund that is operated as an investment club where,

   i. its shares or units are held by not more than 50 persons and its indebtedness has never been offered to the public,

   ii. it does not pay or give any remuneration for investment advice or in respect of trades in securities, except normal brokerage fees, and

   iii. all of its members are required to make contributions in proportion to the shares or units each holds for the purpose of financing its operations. O. Reg. 381/07, s. 11 (1).

(2) Despite subsection (1), the public servant is not required to disclose his or her legal or beneficial interest in any of the following:

1. A mutual fund within the meaning of subsection 1 (1) of the *Securities Act* other than a mutual fund described in paragraph 4 of subsection (1) of this Regulation.
2. Fixed-value securities issued or guaranteed by a government or a government agency.
3. A guaranteed investment certificate or similar financial instrument issued by a financial institution entitled by law to issue such instruments.
4. A registered pension plan, an employee benefit plan, an annuity or life insurance policy or a deferred profit sharing plan.
5. Real property that the public servant, or a member of his or her family, uses primarily as a residence or for recreational purposes. O. Reg. 381/07, s. 11 (2).

(3) The public servant shall disclose the information required by subsection (1), with necessary modifications, in respect of his or her spouse and dependent children, but only to the extent that the legal or beneficial interests of the spouse or a child could create a conflict of interest. O. Reg. 381/07, s. 11 (3).

(4) For the purpose of subsection (3), the public servant shall make reasonable efforts to obtain information about the financial interests described in subsection (1) of his or her spouse and dependent children. O. Reg. 381/07, s. 11 (4).

(5) The public servant shall give the Conflict of Interest Commissioner a revised declaration whenever there is a change in any of the information required to be disclosed. O. Reg. 381/07, s. 11 (5).

Prohibition on certain purchases

12. (1) A public servant described in subsection 10 (1) shall not purchase, or cause another person to purchase on his or her behalf, a legal or beneficial interest in an entity that is carrying on, or proposes to carry on, an activity relating to a matter that might involve the private sector. O. Reg. 381/07, s. 12 (1).

(2) Despite subsection (1), a public servant may purchase an interest in a mutual fund (within the meaning of subsection 1 (1) of the *Securities Act*) that includes securities of a person or entity described in subsection (1) but not an interest in a mutual fund described in paragraph 4 of subsection 11 (1) of this Regulation that includes such securities. O. Reg. 381/07, s. 12 (2).

(3) The prohibition described in subsection (1) ceases to have effect with respect to the matter,

(a) six months after the date on which the action in respect of the matter is completed; or

(b) six months after the date the Crown ceases to work on the matter. O. Reg. 381/07, s. 12 (3).

List of positions

13. (1) The Public Service Commission shall maintain a current list of positions in which public servants work in a ministry and routinely work on one or more matters that might involve the private sector. O. Reg. 381/07, s. 13 (1).

(2) The Commission shall ensure that public servants employed by the Crown in the positions described in subsection (1) are advised of the duties and restrictions imposed upon them under sections 11 and 12. O. Reg. 381/07, s. 13 (2).

(3) Every ethics executive shall notify the Commission of changes to be made to the list with respect to those persons for whom he or she is the ethics executive. O. Reg. 381/07, s. 13 (3).

PART II
RULES FOR FORMER PUBLIC SERVANTS WHO WORKED IN A MINISTRY

INTERPRETATION

Definition

14. In this Part,

"designated senior position" means any of the following positions:

1. The Secretary of the Cabinet.
2. Deputy minister, associate deputy minister or assistant deputy minister.
3. A position that is classified under subsection 33 (1) of the Act as SMG 2, XOFA 1, XOFA 2, ITX 2, ITX 3 or ITX 4. O. Reg. 381/07, s. 14.

Application

15. (1) This Part applies with respect to every former public servant who, immediately before he or she ceased to be a public servant, worked in a ministry. O. Reg. 381/07, s. 15 (1).

(2) Despite subsection (1), this Part does not apply to a person who ceases be a public servant before the day on which section 57 of the Act comes into force. O. Reg. 381/07, s. 15 (2).

PROHIBITED CONDUCT

Seeking preferential treatment, etc.

16. A former public servant shall not seek preferential treatment by, or privileged access to, public servants who work in a minister's office, a ministry or a public body. O. Reg. 381/07, s. 16.

Disclosing confidential information

17. (1) A former public servant shall not disclose confidential information obtained during the course of his or her employment by the Crown to a person or entity unless the former public servant is authorized to do so by law or by the Crown. O. Reg. 381/07, s. 17 (1).

(2) A former public servant shall not use confidential information in a business or undertaking. O. Reg. 381/07, s. 17 (2).

Restriction on lobbying

18. (1) This section applies to a former public servant who, immediately before ceasing to be a public servant, was employed in a designated senior position. O. Reg. 381/07, s. 18 (1).

(2) For 12 months after ceasing to be a public servant, the former public servant shall not lobby any of the following persons on behalf of a public body or another person or entity:

1. A public servant who works in a ministry or public body in which the former public servant worked at any time during the 12 months before he or she ceased to be a public servant.
2. The minister of any ministry in which the former public servant worked at any time during the 12 months before he or she ceased to be a public servant.
3. A public servant who works in the office of a minister described in paragraph 2. O. Reg. 381/07, s. 18 (2).

Restriction on employment, etc.

19. (1) This section applies to a former public servant who, immediately before ceasing to be a public servant, was employed in a designated senior position and who, at any time during the 12 months before he or she ceased to be employed as a public servant, in the course of his or her employment as a public servant,

(a) had substantial involvement with a public body or another person or entity; and

(b) had access to confidential information that, if it were to be disclosed to the public body, person or entity, could result in harm to the Crown or could give the public body, person or entity an unfair advantage in relation to one or more third parties. O. Reg. 381/07, s. 19 (1).

(2) For 12 months after ceasing to be a public servant, the former public servant shall not accept employment with the public body, person or entity or serve as a member of the board of directors or other governing body of the public body, person or entity. O. Reg. 381/07, s. 19 (2).

Restriction re certain transactions

20. (1) This section applies to a former public servant who, when he or she was a public servant working in a ministry, advised the Crown about a particular proceeding, negotiation or other transaction. O. Reg. 381/07, s. 20 (1).

(2) The former public servant shall not advise or otherwise assist any public body or any other person or entity in connection with the particular proceeding, negotiation or other transaction until the Crown ceases to be involved in it. O. Reg. 381/07, s. 20 (2).

(3) Despite subsection (2), the former public servant may continue to advise or otherwise assist the Crown in connection with the particular proceeding, negotiation or other transaction. O. Reg. 381/07, s. 20 (3).

21. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS REGULATION). O. Reg. 381/07, s. 21.

Français

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TAB 12

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Chef de l'exploitation

Ontario

August 28, 2008

To our stakeholders:

Re: New Conflict of Interest Rules

As you may know, the *Public Service of Ontario Act, 2006* (the "PSOA") came into force on August 20, 2007.

The PSOA sets out the ethical framework for all public servants, including those in public bodies. The Board is designated as a public body and all Board members and employees are included in the term "public servant".

The PSOA sets out rules regarding the conduct of public servants, including rules regarding conflicts of interest and related issues. The PSOA gives public bodies such as the Board the choice of:

(a) adopting their own conflict of interest rules, subject to approval by the Conflict of Interest Commissioner; or
(b) following the rules regarding conflicts of interest set out in the regulation made under the PSOA.

The Board has decided to follow option (b). Therefore, as of August 20, 2008, all Board members and employees must follow the conflict of interest rules set out in Ontario Regulation 381/07—*Conflict of Interest Rules for Public Servants (Ministry) and Former Public Servants (Ministry)* (the "Regulation").

Section 4 of the Regulation deals with the acceptance of gifts by public servants and states that:

4(1) A public servant shall not accept a gift from any of the following persons or entities if a reasonable person might conclude that the gift could influence the public servant when performing his or her duties to the Crown:

1. A person, group or entity that has dealings with the Crown.

2. A person, group or entity to whom the public servant provides services in the course of his or her duties to the Crown.
3. A person, group or entity that seeks to do business with the Crown.

(2) Subsection (1) shall not operate to prevent a public servant from accepting a gift of nominal value given as an expression of courtesy or hospitality if doing so is reasonable in the circumstances.

(3) A public servant who receives a gift in the circumstances described in subsection (1) shall notify his or her ethics executive.

A gift is defined in the regulation as including a benefit of any kind.

The Board has always required its Board members and employees to maintain a high standard of honesty, integrity and impartiality. The Regulation requires that all Board members and employees continue to maintain that high standard.

Other sections in the Regulation set out rules regarding the relationship between public servants and other parties (which includes those the Board regulates). You can find the complete text of the Regulation on e-Laws at the following link:

http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_070381_e.htm#BK6.

If you have any questions, please contact Joanna Rosset, Board Counsel at 416-440-7669 or joanna.rosset@oeb.gov.on.ca.

Yours truly,

ORIGINAL SIGNED BY

Aleck Dadson
Chief Operating Officer

TAB 13

ADDENDUM TO THE CODE OF CONDUCT

FINANCIAL TRANSACTIONS, POST-SERVICE RESTRICTIONS, AND PROCEEDINGS

SECTION 1: INTRODUCTION

Section 1.1 Application of the Addendum to the Code of Conduct (the "Code")

1.1.1 Members and employees shall at all times abide by the requirements set forth in this Code. It shall be a term and condition of each Member's appointment and each employee's employment that he or she is required to comply with this Code. Each Member and employee must sign a declaration upon the commencement of their appointment or employment that he or she is in compliance with the Code. Furthermore, each Member and employee must sign a declaration each year at a time determined by the Management Committee that he or she remains in compliance with this Code.

Section 1.2 Exemptions

1.2.1 Any person who believes that any requirement of this Code will result in undue hardship in a particular case may apply for an exemption.

1.2.2 No exemptions from this Code shall be permitted except with the written consent of the Chief Operating Officer (in the case of employees, other than the Chief Operating Officer), the Chair (in the case of the Chief Operating Officer and Members, other than the Chair) or a Vice-Chair (in the case of the Chair).

1.2.3 Exemptions from this Code may be permitted where the obligations are not, in the opinion of the person granting the exemption, appropriate in the circumstances.

1.2.4 All exemptions granted by the Chair, a Vice-Chair or the Chief Operating Officer shall be reported to and be subject to any contrary decision of the Management Committee.

Section 1.3 Definitions

1.3.1 For the purposes of this Code:

"child" means a person whom a parent has demonstrated a settled intention to treat as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody (and children has a corresponding meaning);

"spouse" means either of two persons who:

(a) are married to each other;
(b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right; or
(c) live together in a conjugal relationship outside of marriage.

Section 1.4 Members of the Market Surveillance Panel

1.4.1 The term "Members" in this Code includes the members of the Market Surveillance Panel of the Board.

1.4.2 As may be directed by the Chair, Section 1 and sections 2.1 to 2.4 (inclusive) of Section 2 of this Code apply to the members of Market Surveillance Panel. The application of Section 1 and sections 2.1 to 2.4 (inclusive) of Section 2 of this Code is in addition to, and not in lieu of, the provisions of sections 2.1.4 and 2.3.2 of By-law #3 of the Board.

SECTION 2: REQUIREMENTS

Section 2.1 Avoidance of Breaches of this Code and Disclosure of any Breaches

2.1.1 Each Member and employee shall endeavour to avoid actual or apparent breaches of this Code and shall immediately report in writing any actual or apparent breaches of this Code.

2.1.2 Members and employees must use the Board's Declaration Form to report their actual or apparent breaches of the Code.

2.1.3 An employee other than the Chief Operating Officer shall report to the Chief Operating Officer, the Chief Operating Officer and Members other than the Chair shall report to the Chair, and the Chair shall report to a Vice-Chair. In any case of doubt about the existence of an actual or apparent breach, the Chair, a Vice-Chair or the Chief Operating Officer shall be consulted.

2.1.4 In determining how to deal with an actual or apparent breach, all of the circumstances of the case, including the actual state of knowledge, the bona fides of the person involved and the materiality of the breach, shall be considered.

2.1.5 If a situation in the nature of that described in section 2.2.3 is found to exist, options for the resolution of the situation could include, but are not limited to, divestment of the asset by selling the asset in an arm's length transaction or by the creation of a blind trust for the asset. If a blind trust is used, the trust must not leave in the hands of the Member or employee any power of management or decision-making authority over the asset placed in the trust. It will be the responsibility of the Member or employee to provide the Board with evidence that the blind trust has terms and conditions that meet the aforementioned criteria and

prove that the Member or employee has divested himself or herself of the asset. The trustee of the blind trust may not be the spouse, parent, child, or sibling of the Member or employee.

Section 2.2 Rules Regarding Financial Interests

2.2.1 No Member or employee shall accept the services of a person or an affiliate of a person whose conduct, rates, or revenues are regulated by the Board on terms that he or she knows to be more favourable than those generally available from the person.

2.2.2 No Member or employee shall hold office in or be a director of a corporation or an affiliate of a corporation whose conduct, rates, or revenues are regulated by the Board.

2.2.3 No Member or employee shall have a direct or indirect financial interest in a person or an affiliate of a person whose conduct, rates, or revenues are regulated by the Board.

Section 2.3 Interpretation

2.3.1 For the purposes of section 2.2.3:

(a) a Member or employee is deemed to have a direct or indirect financial interest in a person or an affiliate of a person whose conduct, rates, or revenues are regulated by the Board if that Member or employee's spouse or dependent child has a direct or indirect financial interest in such a person or the affiliate of such a person;

(b) the following interests shall not be considered to be a direct or indirect financial interest:

(i) a financial interest in a mutual fund which has an interest in a person or an affiliate of a person whose conduct, rates, or revenues are regulated by the Board; and
(ii) membership in a pension plan as defined in the *Pension Benefits Act* related to the Member or employee's prior employment by a person or an affiliate of a person whose conduct, rates, or revenues are regulated by the Board;

(c) the following persons are considered to be persons whose conduct, rates, or revenues are regulated by the Board:

(i) gas distributors;
(ii) gas transmitters;
(iii) gas storage companies;

(iv) gas marketers;
(v) electricity distributors;
(vi) electricity transmitters;
(vii) electricity generators;
(viii) electricity retailers; and
(ix) electricity smart sub-metering providers;

(d) persons who are licensed solely as electricity wholesalers and not for any other purpose are not considered to be persons whose conduct, rates, or revenues are regulated by the Board; and

(e) affiliates of persons whose conduct, rates, or revenues are regulated by the Board do not include any level of Canadian government, i.e., federal, provincial, or municipal governments.

Section 2.4 Disciplinary Action and Appeals

2.4.1 The failure to comply with any of the provisions of this Code by a Member or employee without an exemption may be cause for disciplinary or other appropriate action, including termination of his or her employment or, in the case of a Member, a recommendation of termination of his or her appointment.

2.4.2 Any Member or employee directly affected by any such action shall be entitled to a hearing and review thereof by the Board or any person or persons designated by the Board for such purposes.

Section 2.5 Post-Service Restrictions

2.5.1 Except with the prior written authorization of the Chair, none of the persons described below in this section shall deal with the Board, or any Member or employee on behalf of any person, whether in the course of an application, a proceeding, a policy initiative, or informally, during the period set out below commencing on the date that the person ceases to be a full-time Member or employee:

(a) in the case of a former full-time Member or Chief Operating Officer, one year;
(b) in the case of a former managing director, director, manager, chief compliance officer, chief regulatory auditor, general counsel, associate general counsel, or Board Secretary, six months; and
(c) in the case of a former lawyer who was employed by the Board for more than two years, three months.

SECTION 3: PROCEEDINGS

Section 3.1 General Rule

3.1.1 No Member shall participate in a proceeding if:

(a) in respect of such proceeding he or she has a personal interest which is, or could reasonably be perceived to be, incompatible with an unbiased exercise of his or her judgment;
(b) for any other reason he or she is of the opinion that he or she would be unable to render an impartial decision; or
(c) his or her continuing or prior associations or relationships (including family and other close personal relationships) would reasonably be perceived as not enabling him or her to render an impartial decision in respect of such proceeding.

3.1.2 For the purposes of Section 3, a proceeding does not include rule-making or code-making or any other process for the development of general policy by the Board.

Section 3.2 Rules Relating to Relationship of Member with Party to Proceeding

3.2.1 Without limiting the generality of section 3.1,

(a) no Member shall participate in a proceeding if such Member has any material financial interest in, or continuing material relationship with, or has within the past twelve months had a material relationship with, a party to such proceeding;
(b) no Member shall participate in a proceeding if any associate of such Member has a material financial interest in, or continuing material relationship with, or has within the past twelve months had a material relationship with, a party to such proceeding; and
(c) no Member shall participate in a proceeding if such Member has, within the past two years, had a long-standing professional relationship with a party to such proceeding.

3.2.2 For the purposes of section 3.2.1(a) and (b), a material financial interest shall include any type of economic interest that is material to the Member or his or her associate, as applicable, including material pensions or other material benefits, but for greater certainty shall be deemed not to include a portfolio investment of a value not in excess of $10,000 that does not constitute more than 1 percent of a Member's net worth.

3.2.3 For the purposes of section 3.2.1(a) and (b), a material relationship shall include any type of relationship that is material to the Member or his or her associate, as applicable, including that of a director, officer, employee, partner, adviser or consultant.

Section 3.3 Rules Relating to Relationship of Member with Person Representing Party to Proceeding

3.3.1 Without limiting the generality of section 3.1,

(a) no Member shall participate in a proceeding if such Member has any material financial participation in, or continuing material relationship with, any individual, firm or company representing, or otherwise associated with, a party to such proceeding;

(b) no Member shall participate in a proceeding if such Member has, within the past twelve months, had a material relationship with any individual, firm or company representing, or otherwise associated with, a party to such proceeding; and

(c) no Member shall participate in a proceeding if the firm or company with which such Member was associated immediately prior to his or her appointment as a Member was involved to a substantial degree in the particular matter before the Board in such proceeding while such Member was associated with such firm or company.

3.3.2 For the purposes of section 3.3.1(a), material financial participation means a form of profit participation and excludes, for greater certainty, a fixed interest such as a pension or the provision of office premises.

3.3.3 For the purposes of section 3.3.1(a) and (b) above, a material relationship shall not include occasional consultations of an informal nature with directors, officers, employees, partners or associates of a firm, company or other person.

Section 3.4 Procedure

3.4.1 In connection with any proceeding in which they are asked to participate, Members, other than the Chair, shall disclose all continuing and prior interests, participations and relationships that could potentially give rise to a conflict of interest to the Chair, and the Chair shall make similar disclosure to a Vice-Chair.

3.4.2 Notwithstanding sections 3.1 through 3.3, the Chair shall be entitled to determine whether or not any other Member shall participate in a proceeding and a Vice-Chair shall be entitled to make such a determination in respect of the Chair.

3.4.3 Any determination under section 3.4.2 shall be final and binding for all purposes of this Code.

3.4.4 Members shall not request any party to a proceeding to waive any of the provisions of this Code or to consent to the participation of any Member in a proceeding if such participation would be contrary to this Code.