

IN THE MATTER OF
ENERGY EAST PIPELINE LTD. and TRANSCANADA PIPELINES LIMITED
ENERGY EAST PROJECT AND ASSET TRANSFER, and EASTERN MAINLINE
PROJECT

NOTICE OF MOTION

Name of person bringing motion: TRANSITION INITIATIVE KENORA

- Decision or order requested:
- A. Member Gauthier recuse himself from the Panel hearing the Energy East application;
 - B. Member Mercier recuse herself from the Panel hearing the Energy East application;
 - C. Alternatively, if Members Gauthier and Mercier do not recuse themselves, the Panel refer the matter on an agreed statement of facts to the Federal Court of Appeal under s. 18.3(1) of the *Federal Courts Act*;
 - i. Before making such a reference the Board provide TIK and other interested parties with its statement of the relevant facts for their comment in order to ensure that the relevant facts are not in dispute; and
 - D. Such other relief as the Board may consider appropriate.

August 22, 2016

Date submitted



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Statement of Facts

Filing of the Energy East application and Appointment of the Energy East Panel

1. Energy East Pipeline Ltd. and TransCanada PipeLines Limited (collectively “TransCanada”) filed applications for the Energy East Project, Asset Transfer and Eastern Mainline Project (“Energy East” or the “project”) on October 30, 2014.
2. On December 17, 2014, the Board publically announced that Members George, Gauthier and Mercier would comprise the Energy East review Panel.¹ In the announcement Presiding Member George commented on the importance of conducting a fair and transparent process:

My colleagues and I are committed to upholding the NEB’s standards and supporting a fair and transparent hearing process. This is a responsibility we take to heart.²

Energy East Panel members met privately with an agent of TransCanada to discuss Energy East

3. The next day, December 18, 2014, Member Gauthier engaged in email correspondence with Jean Charest’s assistant in order to schedule a meeting with Mr. Charest (the “Charest meeting”).³
4. At the time Mr. Charest was a paid agent of TransCanada.⁴ The Board claims that Mr. Charest’s status as an agent of TransCanada was not known at the time by its Members or staff.⁵ Mr. Charest’s status as a paid agent was publically admitted by TransCanada in March 2016, after Mr. Charest’s offer to broker a meeting between the Prime Minister’s Office and TransCanada raised questions about improper lobbying.⁶

¹ The date of the Board’s media release announcing the membership of the Energy East Panel is shown on the Board’s webpage “What’s New Archive 2014”, <https://www.nebone.gc.ca/bts/nws/whtnw/archive/2014whtnweng.html>, accessed on August 5, 2016, attached at Tab 1.

² National Energy Board, “The Energy East and Eastern Mainline Projects Panel”, <https://www.nebone.gc.ca/pplctnflng/mjrpp/nrgyst/nrgstpnleng.html>, accessed on August 5, 2016, attached at Tab 2.

³ Emails from Member Gauthier to Chaghig Torikian, executive assistant to Mr. Charest, dated 18 December 2014, attached at Tab 3. We received copies of these emails through an informal access request to the Board’s Access to Information and Privacy Coordinator: see letter from Sheri Young, Access to Information and Privacy Coordinator for the Board, dated 5 August 2016, attached at Tab 4.

⁴ Mike de Souza, “Canada pipeline Panel apologizes, releases records on meeting with Charest” *National Observer* (4 August 2016), attached at Tab 5.

⁵ *Ibid.*

⁶ Daniel Leblanc, “Jean Charest denies lobbying PMO for Energy East pipeline” *The Globe and Mail* (9 March 2016), attached at Tab 6.

5. Before detailing the relevant facts of this correspondence we note several aspects of concern regarding Member Gauthier's emails with Mr. Charest's assistant. First, the initial email in the correspondence from Mr. Charest's assistant refers to an earlier message from Member Gauthier. This earlier message has not been put on the public record, whether voluntarily by Member Gauthier or in response to a request under the *Access to Information Act*. Thus it is not possible to know exactly when Member Gauthier first engaged with Mr. Charest about Energy East, and on what basis. Second, the first email from Mr. Charest's assistant also appears to have been sent to an email address other than Member Gauthier's official Board email address. Member Gauthier appears to have then forwarded this email to his official Board email account on December 19, 2014. Thereafter he continued correspondence with Mr. Charest's assistant from that account. This raises the question of whether the business of the Board was being conducted through a private email account rather than through an official Board email account.
6. The substance of Member Gauthier's correspondence with Mr. Charest's assistant reveals several material facts:
 - Member Gauthier invited Mr. Charest to meet with two members of the Energy East Panel (himself and Member Mercier), Board Chairman and Chief Executive Officer ("CEO") Watson, and several Board staff.
 - Member Gauthier set out the topics for the Charest meeting.
 - Member Gauthier specifically referenced Energy East as a topic for discussion, inviting discussion of that particular proceeding at the Charest meeting.
7. The Charest meeting was held on January 15, 2015, at the offices of Mr. Charest's lawyer. It was attended by Members Gauthier and Mercier, Chairman and CEO Watson, two Board staff, Mr. Charest and Mr. Charest's lawyer. Notes from the Charest meeting taken by Board staff show that the attendees discussed several issues directly related to the Energy East application, including:
 - The need for investment in Québec's economy and concerns about not being "able to do a project";
 - A communication "reset" in the context of TransCanada, focused on benefits for Québec;
 - Using the "Lac Mégantic example" to show that pipelines are safer than rail with respect to transporting crude oil;

- The potential to “carve out a chapter of the decision” for some purpose; and
 - The potential for unions to provide “extended help” with respect to media and communications.⁷
8. The Charest meeting was held in private. The Board made no public announcement about the Charest meeting before or after it occurred. At no point did Members Gauthier and Mercier put the existence and substance of the Charest meeting on the public record, either via the Board’s registry for the Energy East application or generally in response to media inquiries. This was the case even after TransCanada publically admitted Mr. Charest’s status as an agent of TransCanada at the time of the meeting.
 9. Since the Charest meeting the Panel has continued to preside over the Energy East proceeding, making numerous procedural and substantive decisions affecting the rights of Transition Initiative Kenora (“TIK”) and other intervenors.
 10. The Charest meeting first became public knowledge on July 7, 2016, through a news report by Mike De Souza published in the *National Observer*.⁸ However, a Board spokesman was quoted in the report as saying the “[t]he NEB was not lobbied in any way during [the Charest meeting] and the Energy East proposal was not discussed.”
 11. The Board’s statement was false. On August 4, 2016, the Board released records in response to Mr. De Souza’s access to information request. Specifically, these records included Member Gauthier’s email correspondence with Mr. Charest’s assistant and the notes of the Charest meeting discussed above. The Board’s spokesman apologized for the fact that the Board’s “search for records [at the time of the July 2016 report] was not comprehensive and that [the Board’s] response did not accurately reflect the meeting”.⁹
 12. However, contrary to what the email correspondence and notes reveal about the Charest meeting, the Board continues to maintain that the NEB officials attending the Charest meeting did not permit any “inappropriate discussion” of matters related to pipeline projects being adjudicated by the Board, including Energy East.¹⁰

⁷ Notes of the Charest meeting taken by Board staff, attached at Tab 7, pp 4, 10 [“Meeting Notes”]. We received copies of these notes through an informal access request to the Board’s Access to Information and Privacy Coordinator: see letter from Sheri Young, Access to Information and Privacy Coordinator for the Board, dated 5 August 2016, attached at Tab 4.

⁸ Mike De Souza, “Québec’s Jean Charest had private meeting with pipeline watchdog after TransCanada hired him” *National Observer* (6 July 2016), attached at Tab 8.

⁹ Mike De Souza, *supra* note 4.

¹⁰ *Ibid.*

Energy East Panel members also met privately with other interested stakeholders to discuss Energy East

13. Members Gauthier and Mercier, Chairman and CEO Watson, and Board staff also met privately with other interested stakeholders in Montreal on January 15 and 16, 2015. The interested stakeholders included:

- Board of Trade of Metropolitan Montréal
- Union des Municipalités du Québec
- Fédération des Chambres de Commerce du Québec
- Mayor Coderre of Montréal
- Mayor Labeaume of Québec City.

14. As with the Charest meeting, most of these meetings involved some discussion of TransCanada and Energy East. Specific issues regarding Energy East that arose in the meetings included Cacouna (at the time TransCanada’s plan for a marine export terminal in Cacouna, QC was under heavy criticism for its negative impacts on endangered Beluga Whales) and the Energy East Panel’s pending completeness decision.¹¹

15. The Board held these stakeholder meetings in private and made no public announcement about the meetings before or after they occurred. At no point did Members Gauthier and Mercier put the existence and substance of these meetings on the public record via the Board’s registry for the Energy East application. As yet, the Board has released no documents that show how the meetings were scheduled and how topics for discussion were set.

National Engagement Tour

16. From January to June 2015 the Board conducted a six-month national tour to engage with stakeholders and the public and gather their thoughts about the NEB, its processes, pipeline safety and environmental protection.¹²

17. The Board has stated that the purpose of the Charest meeting and other stakeholder meetings conducted on January 15 and 16, 2015, was to seek out “advice from several

¹¹ Meeting Notes, attached at Tab 7.

¹² The tour was summarized in National Energy Board, “National Engagement Initiative Report: Engaging Canadians on Pipeline Safety” (2015), attached at Tab 9 [“NEB Engagement Tour Report”].

leaders in Québec society on whom the NEB should meet during [the Québec] portion of the national engagement tour.”¹³

18. The Board has acknowledged that the participants at the Charest meeting and other stakeholder meetings discussed projects subject to NEB hearings, such as Energy East. However, the Board says that, in accordance with its *Code of Conduct for National Energy Board Employees* (“*Code of Conduct*”), the Members and staff present at the meetings did not permit “inappropriate discussion” of matters before the Board:

While those we met with, at times, wanted to discuss pipeline projects that were being adjudicated upon by the Board, at no time did the NEB officials at the meetings permit any inappropriate discussion of those matters.

It is very important to note that the NEB’s Board Members are bound by a Code of Conduct and Ethical Guidelines – they are obligated to act with honesty and uphold the highest ethical standards.¹⁴

19. There is no evidence that Member Gauthier or Member Mercier intervened at any point during the Charest meeting or the other stakeholder meetings to curtail specific discussion of TransCanada and Energy East.¹⁵ In fact, because minutes of the meetings were either not created or have not yet been released, there is no evidence that Members Gauthier and Mercier did not themselves engage directly in discussion of TransCanada and Energy East.
20. During the Board’s national engagement tour its Members and staff met with various other groups in Québec, including First Nations, mayors of various municipalities, emergency response personnel, and an environmental organization. Contrary to the Charest meeting and other stakeholder meetings of January 15 and 16, 2015, the existence of these meetings and their substance was disclosed publically in the Board’s report on the engagement tour.¹⁶
21. The Board also met with TIK on its national engagement tour. None of the Energy East Panel members were present. The existence and substance of this meeting was reported publically in the Board’s report on the engagement tour.¹⁷

¹³ National Energy Board, “NEB Engagement in Québec” media release (9 August 2016), accessed 12 August 2016, attached at Tab 10 [“NEB Statement on Engagement in Québec”].

¹⁴ *Ibid.*

¹⁵ See Meeting Notes, attached at Tab 7.

¹⁶ NEB Engagement Tour Report, *supra*, attached at Tab 9.

¹⁷ *Ibid.*

Code of Conduct requirements were not met

22. The Board's *Code of Conduct* sets out a number of requirements to be followed regarding meetings with stakeholders on matters before the Board. These requirements will be analyzed in detail below.

23. We assert the following facts based on the lack of any evidence to the contrary on the public record:

- Member Gauthier, Member Mercier, and/or other Board Members or staff engaged in communication directly with Mr. Charest and other stakeholders after the Energy East application was filed on October 30, 2014 to arrange the Charest meeting and other meetings with stakeholders held on January 15 and 16, 2015. Communication did not proceed through the Board's Secretary, Process Advisor or Legal Counsel.
- The Board's Chief Operating Officer ("COO") failed to authorize either the Charest meeting or the other stakeholder meetings held on January 15 and 16, 2015, or obtain advice from the Board's General Counsel.
- Presiding Member George failed to authorize either the Charest meeting or the other stakeholder meetings held on January 15 and 16, 2015.
- No email confirming the safeguard procedures to be followed for the meetings was sent to the COO in advance of the Charest meeting or the other stakeholder meetings held on January 15 and 16, 2015.
- The "protected Members and employees" were not identified and excluded prior to the Charest meeting and other stakeholder meetings held on January 15 and 16, 2015, despite knowledge that Energy East would be discussed.
- The "meeting employees" were not identified and excluded from matters to do with the Energy East proceeding after the Charest meeting and other stakeholder meetings were held on January 15 and 16, 2015.
- No formal agenda was established for the Charest meeting and other stakeholder meetings held on January 15 and 16, 2015.
- Minutes were not kept for the Charest meeting and other stakeholder meetings held on January 15 and 16, 2015.
- Documents made with respect to the Charest meeting and other stakeholder meetings held on January 15 and 16, 2015, including notes of the meetings, were

not subject to the safeguard procedures outlined in Appendix 2 to the *Code of Conduct*.

Grounds

The Board Members of the Energy East Panel must abide by the rule against bias

24. The Board's *Governance Manual* explains that the Board acts as a quasi-judicial tribunal when it exercises adjudicatory functions with respect to applications that come before it.¹⁸ Accordingly, the Board acknowledges that the rules of natural justice, including the rule against bias, apply to the Members comprising the Energy East Panel:

With respect to adjudicative decision-making (and making recommendations to the Minister for Section 52 certificate applications), the Board is bound by the statutory mandate contained in the NEB Act and the Additional Legislation, the rules of natural justice and the exercise of Member and Temporary Member discretion.¹⁹

25. The Board's main tool for ensuring that its Members do not contravene the rule against bias is its *Code of Conduct*. The *Code of Conduct* prescribes a number of measures to ensure meetings with stakeholders on matters before the Board do not compromise the fairness and impartiality of those proceedings.

26. The *Governance Manual* links the need to conduct a fair and impartial quasi-judicial process with the responsibility of Board Members sitting on a Panel to carefully consider how their contact with outside parties might affect appearances of bias:

As regulators carrying out a quasi-judicial function, Members and Temporary Members must treat all parties fairly and equally, and conduct Board business in a manner that protects the Board's impartiality with respect to all matters brought before it. Members and Temporary Members must also ensure that the confidence and impartiality of matters deliberated before the Board is maintained.

...

¹⁸ National Energy Board, *Governance Manual* (March 2016), attached at Tab 11, p 7.

¹⁹ *Ibid*, at 12 (emphasis added).

All contacts with outside parties must be carefully considered by Members and Temporary Members so as to avoid any appearances of favoritism or bias.

...

The relevant sections of the Guidelines for Meetings of Board Employees with Stakeholders, which is Appendix 2 to the Code of Conduct for NEB Employees, must be adhered to in respect of meetings involving Members and Temporary Members and outside parties.

When an application is before the Board, Members and Temporary Members must avoid any substantive discussions regarding the application with any party involved or potentially involved in the proceeding.²⁰

27. The rule against bias is essential because justice must not only be done but must be seen to be done.²¹ As the Board stated during its review of the Trans Mountain Expansion Project, when it struck, of its own volition, the evidence of one of the proponent's experts when that expert was appointed as a Board Member: "There can be no question that public confidence in the impartiality of tribunal decision-makers is integral to the administration of justice."²²
28. The well-established test for the existence of a reasonable apprehension of bias is whether "an informed person, viewing the matter realistically and practically – and having thought the matter through" would have "a reasonable apprehension of bias."²³
29. The Board's *Governance Manual* acknowledges and incorporates the law on reasonable apprehension of bias in its definition of the rule against bias:

THE RULE AGAINST BIAS means that right to an impartial hearing by an independent decision-maker. Decision-makers must base their decisions, and must be seen to be basing their decisions, on nothing but the relevant law and the evidence that is properly before them. If they are

²⁰ *Ibid*, at 31-33.

²¹ Jones and de Villars, *Principles of Administrative Law*, 6th Ed (Carswell: Toronto, 2014) at 410 paraphrasing Lord Chief Justice Hewart in *R v Justices of Sussex* (1923), [1924] 1 KB 256 (Eng KB) at p 259, attached at Tab 12.

²² National Energy Board, Order Striking of evidence prepared by or under the direction of Mr. Steven J. Kelly and postponement of oral summary argument in Calgary and Burnaby (File OF-Fac-Oil-T260-2013-03 02), dated August 21, 2015, attached at Tab 13.

²³ *Committee for Justice and Liberty v National Energy Board*, (1976), [1978] 1 SCR 369 (SCC) per de Grandpré J at pp 394-95, attached at Tab 17 ["*Committee for Justice and Liberty*"].

biased, or if there is a reasonable apprehension of bias, the Board's decision can be set aside by a court.²⁴

Member Gauthier and Mercier did not comply with the Code of Conduct

30. The Board's *Code of Conduct* came into effect on June 1, 2014, and applied at the time of the Charest meeting and other stakeholder meetings held on January 15 and 16, 2015.

31. The *Code of Conduct* stipulates that, owing to the rules of natural justice and the rule against bias, certain types of meetings require approval. These include meetings "on matters before the Board" or meetings "with parties before the Board".²⁵ For these types of meetings the *Code of Conduct* prescribes a number of measures to ensure meetings do not compromise the fairness and impartiality of Board proceedings. The measures are found in Appendix 2 – Guidelines for Meetings of Board Members with Stakeholders (the "Guidelines").

32. The Guidelines outline four categories of meetings with stakeholders:

- Pre-application meetings with stakeholders
- Meetings with stakeholders on matters unrelated to an application
- Meetings on regulatory issues before the Board
- Post-application meetings.²⁶

33. The Charest meeting and other meetings with stakeholders fall under the third category – "meetings on regulatory issues before the Board". Member Gauthier invited discussion of Energy East in advance of the Charest meeting. Energy East was in fact discussed during the Charest meeting and other meetings with stakeholders on January 15 and 16, 2015. There is no evidence that any Board Members or staff present at the meetings intervened at any point to curtail specific discussion of TransCanada and Energy East. The Charest meeting was set up and held after the Energy East application had been received and the Panel had been appointed.

34. Meetings on regulatory issues before the Board must follow the "Procedures for Meetings on Matters before the Board" (the "safeguard procedures") prescribed in the Guidelines.²⁷

²⁴ *Governance Manual*, attached at Tab 11, at p 39 (emphasis added).

²⁵ *Code of Conduct*, attached at Tab 14, at 2.1.4.

²⁶ *Code of Conduct*, at Appendix 2.

²⁷ *Ibid.*

35. There is a limited set of exemptions to the safeguard procedures, but neither the Charest meeting nor the other meetings with stakeholders would have triggered an exemption. The Guidelines exempt the following types of meetings:

- meetings with a company to clarify or provide general information about Tolls Task Force resolutions (these meetings are about resolutions that are either approved unanimously or unopposed);
- initial contact with companies to discuss financial audits and meetings, as required, while preparing financial audit reports (Note: the Board should approve audit plans identifying the companies to audit and the timing);
- meetings on industrywide initiatives related to regulatory or standards development, such as new regulations or guidelines and generic regulatory approaches;
- meetings on matters related to the *Canada Petroleum Resources Act* and the *Canada Oil and Gas Operations Act* and that are not assigned to a Panel;
- discussions, calls, meetings about the use and operation of the Board's electronic information submission and retrieval systems;
- Cost Recovery Liaison Committee Meetings;
- meetings with companies who may have applications before the Board or be interveners in Board proceedings, strictly for the purposes of providing market or supply knowledge and market intelligence, and where applications matters are explicitly not discussed;
- meetings between Legal Counsel to discuss procedural matters during a proceeding of any kind, including hearings;
- during the course of proceedings of any kind, including hearings, meetings to discuss procedures with stakeholders (including meetings/discussions relating to the Process Advisor role);
- meetings/discussions relating to the Participant Funding Program;
- meetings or contact as part of the issue resolution process; and
- Environmental Studies Research Fund Meetings.

36. The only exemption that might have conceivably applied is “meetings to discuss procedures with stakeholders (including meetings/discussions relating to the Process Advisor role)”. However, the facts show that the Charest meeting and other stakeholder meetings involved substantive discussion about the Board’s decision-making on the Energy East application and strategies for promoting crude oil pipelines in Québec. Indeed, Member Gauthier invited specific discussion of Energy East in advance of the Charest meeting.
37. The Guidelines state that meetings with stakeholders on regulatory issues before the Board where a Panel has been appointed may only be held with the agreement of the COO, the Chair of the Panel, and upon the advice of the Board’s General Counsel. The facts, barring evidence to the contrary, are that none of these authorizations were sought or granted.
38. Once a meeting is properly authorized, the Board employees attending the meeting must provide the COO with an email confirming the safeguard procedures that will be followed for the meeting. Similarly the facts, barring evidence to the contrary, are that neither Members Gauthier and Mercier, Chair and CEO Watson, nor relevant Board staff confirmed the safeguard procedures that would be in place for the Charest meeting and other meetings with stakeholders.
39. The safeguard procedures define two sets of Board personnel: “meeting employee(s)” and “protected Members and employees”. The former are the Board staff who will be attending the meeting. The latter are the Members and employees who should not have any involvement with the meetings, before, during, or after:

protected Members and employees - the Members and employees who should not receive information regarding the meeting in question (as they are involved with the issue currently before the Board). This would normally be the Panel and staff assigned to a hearing, and would include, any alternate Member until the hearing commences.

The need to isolate the protected Members and employees begins when an application is filed, not just when the hearing commences. This is supported by the fact that an alternate Member is a protected Member “until the hearing commences”.

40. The Guidelines prescribe eleven different safeguard procedures, some or all of which will be appropriate depending on the circumstances of a particular meeting. The following safeguard procedures were appropriate and should have been employed for the Charest meeting and other meetings with stakeholders held on January 15 and 16, 2015:

- The protected Members and employees are identified and will not be part of the meeting employee(s).
- Subsequent to the meeting, the meeting employees will not participate in the Board proceeding in any way.
- The meeting employees will not discuss the matter with the protected Members and staff at any time prior to release of the Board’s decision or recommendation on the proceeding.
- An agenda will be established for each meeting.
- Minutes will be kept for each meeting.
- All notes and information from the meetings will be kept on confidential computer drives until the decision or recommendation in the Board proceeding is released. All hard copies of meeting documents will be kept locked at all times when not being worked on.

41. The facts, barring evidence to the contrary, are that none of these safeguard procedures were complied with. Most importantly, Members Gauthier and Mercier attended and participated in the meetings rather than being identified and treated as “protected Members”. Moreover, Member Gauthier actually initiated the Charest meeting and invited specific discussion on Energy East.

42. In sum, the Guidelines were disregarded wholesale. Authorizations were neither sought nor granted. Safeguard procedures were not confirmed and followed, if they were even considered. This is troubling because the purpose of the Guidelines is to ensure fair, impartial proceedings before the Board and to promote Board Members’ compliance with the rule against bias.

43. In claiming that NEB officials involved in the Charest meeting and other stakeholder meetings did not permit “any inappropriate discussion” of Energy East the Board has recently stressed the important function of the *Code of Conduct*:

It is very important to note that the NEB’s Board Members are bound by a Code of Conduct and Ethical Guidelines – they are obligated to act with honesty and uphold the highest ethical standards.²⁸

²⁸ NEB Engagement in Quebec statement, attached at Tab 10.

44. We agree that the *Code of Conduct* serves a very important function. However, it is only useful to the extent that it is followed in practice.

Members Gauthier and Mercier's conduct gives rise to a reasonable apprehension of bias

45. The conduct in question here meets the test for a reasonable apprehension of bias. That is to say, an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that Members Gauthier and Mercier's conduct gives rise to a reasonable apprehension of bias.

46. The apprehension of bias here is reasonable, not merely one that would only trouble the very sensitive or scrupulous conscience.²⁹ This is evidenced by the wholesale disregard of the Guidelines. The *Governance Manual* and *Code of Conduct* explicitly anticipate that the conduct of Board Members in meeting with stakeholders about matters before the Board has the potential to raise appearances of bias. The Guidelines prescribe the authorizations and safeguard procedures necessary to ensure that Board Members – especially those on the Panel presiding over the matter before the Board – do not contravene the rule against bias. Here, there is no evidence suggesting the Guidelines were complied with. Rather, the facts according to the evidence on the record demonstrate that Members Gauthier and Mercier's conduct was generally opposite to what the Guidelines require.

47. The apprehension of bias here is also reasonable in light of relevant authority. Brown and Evans write that “*ex parte* activities by a decision-maker, either in finding facts or otherwise determining a matter, may be antithetical to meaningful participation by the parties.”³⁰ They note that “this principle is not limited to communications with persons who are parties to the proceedings” but that “where the proceeding is adversarial, the situation is exacerbated if the decision-maker's *ex parte* contacts are with one of the parties.”³¹

48. The Federal Court addressed the issue of private communications giving rise to a reasonable apprehension of bias in the specific context of the National Energy Board in *CNG Transmission Corp v Canada (National Energy Board)* (“*CNG Transmission*”).³² In that case, the NEB denied an application for a gas pipeline which also needed U.S. approval. When the U.S. authority approved it, a consultant for the proponents

²⁹ See *Committee for Justice and Liberty*, at pp 394, where de Grandpré J states that “[t]he 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’”, attached at Tab 17.

³⁰ Brown and Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Updated July 2016) vol 3 (Toronto: Canvasback Publishing, 1998), at 11-66, attached at Tab 15.

³¹ *Ibid*, at 11-66, 11-67.

³² *CNG Transmission Corp v Canada (National Energy Board)*, 1991 FCJ No 1028, [1992] 1 FC 346 (FC TD) (*CNG Transmission*), attached at Tab 18.

communicated directly with the Chair to suggest a meeting, and the proponents then met with the NEB Chair and Vice Chair and discussed the proponents' views that the U.S. approval was a changed circumstance that warranted a review of the NEB's decision. The Court found that the proponents not only made the case for a review but for the conclusions that should be reached. It was agreed at the meeting that the proponents could file for a review and ask for it to be expedited. Thorough notes about the meeting were circulated to 11 Board Members. The proponents successfully filed for an expedited review. The notes were not sent to the other parties. The Court held that the NEB's actions gave rise to a reasonable apprehension of bias.

49. In *CNG Transmission*, the Federal Court found a number of problems with the NEB's actions. First, both communicating directly with an agent of the proponent and discussing the merits of a particular application were contrary to the NEB's written policies and rules in place at that time.³³ This is similar to the case at hand which involves wholesale disregard for the Guidelines in the *Code of Conduct*.
50. Second, it was wrong to have such a meeting unless it was only to discuss procedure. The Court held that "[t]he NEB has a powerful mandate and with it goes a heavy responsibility to be fair, not to favour one side to the detriment of the other, or not to seem to do so."³⁴ The Court held that the Board Members should have stopped the proponents or cancelled the meeting when they raised matters of substance. In this case, Members Gauthier and Mercier were exposed to opinions about how the Board should handle the Energy East file and other matters of substance. The facts demonstrate no attempt to curtail discussion of TransCanada and Energy East.
51. The Court in *CNG Transmission* was also troubled that the summary of the meeting did not include minutes to indicate who dominated the meeting or who made representations, and that the notes were not sent to other interested parties, who, not being aware of the meeting, did not know to ask for them.³⁵ In this case there is even less of a record of the meetings. The meeting notes of Board staff were disclosed only recently after an access to information request following the Board's initial false statement that Energy East was not discussed.
52. The Court therefore concluded in *CNG Transmission* that the test for a reasonable apprehension of bias was met:

[A] reasonably informed person could envisage that the NEB was going to be asked at some point to make some decision and ... there was some risk

³³ *CNG Transmission* at pp 10-11.

³⁴ *CNG Transmission* at p 11.

³⁵ *CNG Transmission* at p 14 (emphasis added).

that the information discussed at the meeting could possibly find its way into such a decision.³⁶

Here, the Charest meeting and other stakeholder meetings involved specific discussion of decisions the Panel would have to make, including the completeness decision and the potential to “carve out” a chapter of the Panel’s final recommendation for some purpose.

Members Gauthier and Mercier should recuse themselves from the Energy East Panel; Alternatively the Panel should refer the matter to the Federal Court of Appeal

53. In light of the reasonable apprehension of bias raised by the facts of the Charest meeting and other meetings with stakeholders held on January 15 and 16, 2015, Members Gauthier and Mercier should recuse themselves from the Energy East Panel. This decision is for Members Gauthier and Mercier themselves to make.³⁷

54. Should Members Gauthier and Mercier decide not to recuse themselves, TIK requests alternatively that the Panel refer the matter on an agreed statement of facts to the Federal Court of Appeal under s. 18.3(1) of the *Federal Courts Act*.³⁸ This procedure would be the most expeditious course for intervenors, TransCanada, and the Board.

55. Early resolution of this matter is imperative given that the Energy East hearing has only just begun and the Panel will preside over the hearing for another 19 months. Addressing the issue of bias after such lengthy proceedings have concluded, with the potential for the entire proceedings to be quashed, risks wasting a great deal of each parties’ time and effort. Many community-oriented groups like TIK could lack the capacity to engage in a lengthy hearing process on a 38,000 plus page application not once, but twice. This would also likely prejudice TransCanada given the nature of its project planning and its various contractual relationships described in the application.

56. There is precedent for the Board referring the question of whether a Panel Member’s conduct raises a reasonable apprehension of bias to the Federal Court of Appeal on an uncontested statement of the facts. Namely, in *Committee for Justice and Liberty* the Board was at the beginning of a long pipeline application hearing involving many participants. There, the Board referred the matter of the Panel Chair’s conduct prior to the hearing and whether it raised a reasonable apprehension of bias to the Federal Court of

³⁶ *CNG Transmission* at p 16.

³⁷ Mullan and Boyle, “Raising and Dealing with Issues of Bias and Disclosure” 18 Can J Admin L & Prac 37 (April 2005), attached at Tab 16, at p 51.

³⁸ RSC 1985, c F-7.

Appeal on a statement of the facts that was not contested by any party.³⁹ This approach has found approval in commentary on how to raise and deal with issues of bias.⁴⁰

Decision Sought

57. TIK requests that:

- A. Member Gauthier recuse himself from the Panel hearing the Energy East application;
- B. Member Mercier recuse herself from the Panel hearing the Energy East application;
- C. Alternatively, if Members Gauthier and Mercier do not recuse themselves, the Panel refer the matter on an agreed statement of facts to the Federal Court of Appeal under s. 18.3(1) of the *Federal Courts Act*;
 - i. Before making such a reference the Board provide TIK and other interested parties with its statement of the relevant facts for their comment in order to ensure that the relevant facts are not in dispute; and
- D. Such other relief as the Board may consider appropriate.

³⁹ *Committee for Justice and Liberty, supra*. While the Board referred the matter under authority that no longer appears in the *National Energy Board Act*, RSC 1985, c N-7, this is of no consequence because the Board may still refer the matter to the Federal Court of Appeal pursuant to s. 18.3(1) of the *Federal Courts Act*, provided no party contests the facts. The lack of disagreement as to the facts is the key criterion for using the referral power in s. 18.3(1): see for example *Air Canada, Re* (1999), 241 NR 157 (Fed CA), attached at Tab 19.

⁴⁰ See Mullan and Boyle, *supra* note 37, at 48 and 53, where the authors describe how exceptional circumstances like those in *Committee for Justice and Liberty* call for resolution before the hearing process has ended and justify use of a tribunal's power to refer the matter to a reviewing court.