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September 22, 2016

Via Participant Portal

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Attention: Sheri Young, Secretary of the Board

Dear Sirs/Mesdames:

Re: Energy East Project, Asset Transfer and Eastern Mainline Project ("Energy East")
File OF-Fac-Oil-E266-2014-01 02
Consequences of Energy East Panel's recusal decision

We represent the intervenor Transition Initiative Kenora ("**TIK**") in the Board's review of Energy East (the "**Proceeding**"). On September 9, 2016, in Ruling 28, the former Energy East Panel found a reasonable apprehension of bias had arisen with respect to the Proceeding and, accordingly, recused themselves (the "**Recusal Decision**").[1] The former Panel also adjourned the Proceeding indefinitely.

The Recusal Decision did not address the question of whether the Proceeding is void as a result of the existence of a reasonable apprehension of bias. It is TIK's position that the Proceeding is void and must start over from the beginning.

TIK provides these comments further to its September 7, 2016 letter to the Board concerning the consequences of recusal, in which it reserved its right to provide additional submissions on the consequences of recusal should the Panel Members recuse themselves.[2] TIK reiterates its position, set out in that letter, that the current Energy East Proceeding is void. All decisions made by the former Panel are tainted by a reasonable apprehension of bias and consequently void. Any future panel must preside over a fresh proceeding based on applications resubmitted by Energy East Pipeline Ltd and TransCanada PipeLines Limited (the "**Proponents**").

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[1] National Energy Board, Hearing Order OH-002-2016, Ruling No. 28, Filing No. A79373, (9 September 2016) attached at Tab 1 ["Recusal Decision"].
[2] TIK, Letter to NEB re Consequences of Reasonable Apprehension of Bias, Filing No. A79293 in the Proceeding, (7 September 2016), attached at Tab 2.

This is the only outcome that accords with the law on consequences of a reasonable apprehension of bias, the Board's governing legislation, and all parties' interest in a fair review.

The Proceeding is subject to a reasonable apprehension of bias

The Energy East Panel Members, along with the Board's Chair and Vice-Chair, have recused themselves from the Proceeding on the basis that the conduct of Panel Members gives rise to a reasonable apprehension of bias.

The fact of the recusal of all Panel Members, and the recusal of the Board's Chair and Vice-Chair from their duties in respect of Energy East, indicates a finding by the Board that the Proceeding is subject to a reasonable apprehension of bias. The individual recusal statements of the former Panel Members accompanying the Recusal Decision reflect this. Presiding Member George noted that because he had deliberated with his fellow Panel Members since January 2015 "a reasonable person could think that [he has] been tainted as a result and that he recused himself "to avoid any apprehension of bias" in the current Energy East proceeding.[3] Member Mercier acknowledged that because of her conduct "an apprehension of bias may exist in the eyes of a reasonable person."[4]

The finding of a reasonable apprehension of bias with respect to the Proceeding should be accorded the same weight as if it were decided by a court.[5]

The existence of a reasonable apprehension of bias is no longer in question, and the steps that follow must accord with the law.

The Proceeding is void as a consequence of the reasonable apprehension of bias and the law requires it to start over, not continue

The Proceeding is void as a result of the existence of a reasonable apprehension of bias. TIK relies on its previous letter to the Board (attached at Tab 2) for analysis of the leading authorities from the Supreme Court of Canada and Federal Court of Appeal and their application to the Proceeding. Simply put, the Proceeding and all of the former Panel's decisions made within the Proceeding are void. This also means that the statutory time limit in subsection 52(4) of the *National Energy Board Act* cannot apply to the Proceeding.

To the extent that it provides a succinct and useful summary on the consequences of bias in an administrative proceeding, TIK also relies on the following passage from Halsbury's Laws of Canada:

> Everyone appearing before administrative boards is entitled to be treated fairly. It is an independent and unqualified right. It is impossible to have a fair hearing

[3] Recusal Decision, at Appendix 3.
[4] Recusal Decision, at Appendix 2.
[5] Under the *National Energy Board Act* the Board is a court of record with full jurisdiction to determine all matters of fact and law for the purposes of the Act: RSC 1985, c N-7, at ss. 11(1) and 12(2).

> 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 simply be voidable and declared 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 *ab initio*.[6]

The consequence of a reasonable apprehension of bias is that the outcome of a proceeding, or the proceeding to date, cannot stand and there must be a new proceeding.[7] The right to an unbiased decision-maker is absolute.[8] There is no alternative to a new proceeding.[9]

Therefore, any future proceeding must begin again from the Proponents submitting the project applications afresh, and a future panel making a new completeness determination. The new panel cannot decide to resume the Proceeding, and it cannot decide which of the previous panel's tainted decisions to keep. It cannot breathe life into void decisions. A future panel must make its own procedural and substantive decisions, free from any apprehension of bias.

Furthermore, a fresh proceeding would be more desirable and expeditious than the other possible scenario of the future panel facing potentially numerous challenges to individual decisions made by the former Panel on grounds that the decisions are tainted by the reasonable apprehension of bias and should be quashed or varied.

The Board could use its discretion over procedure to ensure the new proceeding is conducted in a way that minimizes disruption to all parties and commenters involved in the Proceeding. For example, if the Proponents did not wish to change the most recent versions of the project applications, the Board could deem the applications in its possession to be freshly received. Similarly, a future panel might give individuals and groups that applied to participate in the Proceeding the option to rely on their previous application to participate.

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[6] Halsbury's Laws of Canada (online), *Administrative Law*, "IV. Judicial Review, 4. Requirement of Independence and Impartiality, (2) Bias, (f) Consequences" IV.4.(2)(f) at HAD-102 "Hearing rendered void" (2013 Reissue), attached at Tab 3.

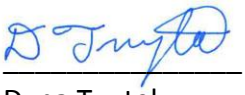
[7] Halsbury's Laws of Canada (online), *Judges and Courts*, "I. Judges, 5 .Bias, (6) Disqualification Process" I.5.6 at HJC-38 "Recusal" (2014 Reissue), citing *Slater Financial Inc v Carrefour Ltd Partnership*, [1996] OJ No 3127 at para 3, attached at Tab 4.

[8] Halsbury's Laws of Canada (online), *Administrative Law*, "IV. Judicial Review, 4. Requirement of Independence and Impartiality, (2) Bias, (a) General" IV.4.(2)(a) at HAD-92 "Bias and impartiality" (2013 Reissue), citing *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities*) at 645, attached at Tab 5.

[9] *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 at para 40, attached as Tab 6.

Regardless, resuming the Proceeding cannot be an option. Continuing the same Proceeding with a new panel would be unlawful and would not restore public confidence in the Board's review of the applications.

Sincerely,



Dyna Tuytel

Charles Hatt

National Energy Board

Office national de l'énergie

File OF-Fac-Oil-E266-2014-01 02
9 September 2016

To: All participants

Hearing Order OH-002-2016
Energy East Pipeline Ltd. and TransCanada PipeLines Limited
Energy East Project and Asset Transfer (Energy East), and Eastern Mainline Project (Eastern Mainline)
Notices of motion from Stratégies Énergétiques and the Association québécoise de lutte contre la pollution atmosphérique, and Transition Initiative Kenora (TIK)
Ruling No. 28

On 11 August 2016, Stratégies Énergétiques and Association Québécoise de lutte contre la pollution atmosphérique filed a letter with the National Energy Board (NEB or Board) seeking the following relief:

1. The recusal of Members Lyne Mercier and Jacques Gauthier from the panel assigned to hear the Energy East and Eastern Mainline applications (Hearing Panel).
2. The recusal of the Presiding Member of the Hearing Panel, Roland George.
3. The withdrawal of NEB Chair Peter Watson and Vice-Chair Lyne Mercier from their functions as Chair and Vice-Chair with respect to the applications, and the designation of an acting Chair or Vice-Chair pursuant to subsection 6(4) of the *National Energy Board Act* (NEB Act).
4. Suspension of the current hearing until a new panel is named to hear the applications.
5. That staff who willingly attended the impugned meetings be removed from further involvement in the Board's assessment of the applications, as well as their superiors for failing to ensure that the Code of Conduct and associated procedures were followed.
6. That the Board publish all information and documents regarding the impugned meetings.
7. That the newly assigned panel hold an inquiry, such that everyone involved in the impugned meetings could be cross-examined.

TIK filed a subsequent notice of motion on 22 August 2016. It requests similar relief to Item 1 above, namely, that Members Gauthier and Mercier recuse themselves from the Hearing Panel or, alternatively, that the matter be referred to the Federal Court of Appeal pursuant to subsection 18.3(1) of the *Federal Courts Act*.

.../2

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The Board decided to consider both of these requests as motions and established a written process through which hearing participants were allowed to file comments by 7 September 2016.

The Board received many comments on the motions and has considered them. The Board is of the view that the following decisions address the majority of comments received. However, certain comments were made which, in the Board's view, warrant additional explanation.

Comments were made that the Board should halt its review until a modernization of the Board is effected through new legislation. When the Board is seized by an application, it must deal with the application as expeditiously as the circumstances of fairness permit but, in any case, within the time limit imposed by the NEB Act. The Board cannot suspend its work pending speculative legislative changes that may occur in the future. If and when legislative changes are made, the Board will implement them.

Concerns were also raised about the process to dispose of bias allegations, suggesting that it was improper for the Members to be decision-makers on these motions. By their nature, bias allegations make it necessary for the accused decision-maker to first assess whether a reasonable apprehension of bias exists against him or herself. If a decision-maker does not agree to recuse him or herself, that decision may be judicially reviewed by the courts and, in this case, this would be the Federal Court of Appeal.

Comments were also submitted about restarting the hearing, using the existing record going forward, keeping the same timetable of events, reviewing the process in collaboration with Aboriginal People, and voiding decisions made after the impugned conduct. It will be up to the future hearing panel, once it is assigned to hear the Energy East and Eastern Mainline applications, to decide how it wants to go forward.

The Hearing Panel is of the view that, while all of the relief requested may be properly before the Board for determination, only Items 1, 2, and 4 of the list above fall within the scope of the delegation given to the Hearing Panel.

Therefore, the text below, including the appendices, only addresses Items 1, 2, and 4, namely, the requests calling for the recusal of Members George, Mercier, and Gauthier and the adjournment of the OH-002-2016 hearing process. Also discussed is the alternate relief requested by TIK to refer the matter to the Federal Court of Appeal.

The Hearing Panel has collectively, and individually, as appropriate, considered the two motions and related comments and has reached the following decisions:

OH-002-2016 Hearing Order and adjournment of the hearing

In light of our decisions that are about to be made below to recuse ourselves from the Hearing Panel, our last decision as a Hearing Panel prior to signing our individual recusal decisions is to adjourn the Energy East and Eastern Mainline hearing. The OH-002-2016 Hearing Order and all

associated process steps, including the Panel Sessions, are therefore adjourned until the Chair of the NEB (or a Member authorized to act as such) designates a new panel to hear the applications and decide on the process going forward. Decisions on any outstanding requests and motions will also be adjourned until such time that a new panel is assigned to consider them.

Referral to the Federal Court of Appeal

Deciding as we will below, there is no need to refer the recusal matters to the Federal Court of Appeal, as TIK requests in its motion.

Roland R. George
Presiding Member

Lyne Mercier
Member

Jacques Gauthier
Member

Appendix 1 Recusal decision of Member Gauthier

In November 2014, Peter Watson, our Chair and CEO, launched the National Engagement Initiative. We asked Canadians to tell us what was most important to them about the work that we do, and how they felt we could adjust our pipeline safety program, public engagement activities, and communications. From December 2014 to May 2015, under the direction of our Chair, the Board held meetings with municipal and provincial leaders and staff, Aboriginal organizations, landowners, environmental groups, first responders, students, and academics, as well as professional and industrial organizations.

The purpose of these sessions was to get a clear understanding of the concerns of the public and potential stakeholders regarding the Board, pipeline safety, and environmental protection, and I participated in them in good faith.

During the planning process for the National Engagement Initiative, the Board was particularly interested in engaging with Quebeckers more effectively, and asked several leaders in Quebec for advice on whom the Board should meet. One of these meetings was held in January 2015 with Jean Charest, former Premier of Quebec, and our Chair Peter Watson, Vice-Chair Lyne Mercier, two Board staff members, and me.

As with all of the meetings held as part of the National Engagement Initiative, the purpose of the meeting with Mr. Charest was to get a clear understanding of the concerns of Quebeckers regarding the Board, pipeline safety, and environmental protection.

This being said, this meeting would never have taken place if we had known that Mr. Charest was at that time a consultant for TransCanada PipeLines Limited, one of the applicants.

However, neither Mr. Charest nor his people informed us that he was a consultant for one of the applicants at that time.

In order to preserve the integrity of the Energy East and Eastern Mainline projects' review process, I have decided to recuse myself and thereby help maintain a climate of trust, impartiality, and objectivity. This should help all Canadians contribute fully to the review process.

I will cease any involvement in the review of these two applications, and will not discuss these two applications with other Board members or Board staff.

Jacques Gauthier
Member

9 September 2016

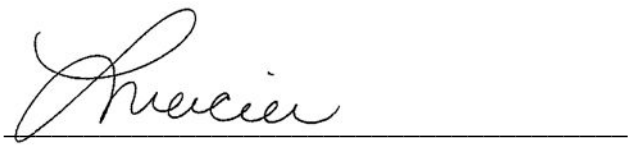
Appendix 2 Recusal decision of Member Mercier

The impugned January 2015 meetings held in Quebec were a precursor to the National Engagement Initiative launched by the Chair and CEO of the Board. The National Engagement Initiative was fully supported by the Board and me. I participated, along with Member Gauthier, in the impugned meetings in good faith and with the best intentions. Our goal was to genuinely understand the public dynamics in Quebec and what matters most to key stakeholders.

Nonetheless, I understand that, given the rules of natural justice and procedural fairness, my participation in these meetings may have cast a doubt on my impartiality as a member of the Hearing Panel and I understand how, notwithstanding our good faith and best intentions, an apprehension of bias may exist in the eyes of a reasonable person.

As a result, and with the goal of preserving the integrity of the NEB and the Energy East and Eastern Mainline review, I have decided to recuse myself from the Hearing Panel tasked to assess the Energy East and Eastern Mainline applications. I believe that my decision to recuse myself is in the best interest of all.

I will cease any involvement in the review of these two applications, and will not discuss these two applications with other Board members or Board staff.



Lyne Mercier
Member

9 September 2016

Appendix 3 Recusal decision of Member George

I have supported the strategic priority of the NEB of engaging with Canadians. I firmly believe that reaching out to stakeholders to better understand what matters to them is an important function of a regulator in the 21st century. That being said, I have never participated in any engagement meetings as part of the National Engagement Initiative or any stakeholder meetings related to that initiative.

Still, I too understand the rules of natural justice and the need for justice not only being done but being seen to be done. Given that I have deliberated with my fellow members of the Hearing Panel for an extended period following the engagement meetings, I am of the view that a reasonable person could think that I have been tainted as a result.

My continued presence on the Hearing Panel has the potential to undermine the public's confidence in the integrity of the Board's decision-making process. As an adjudicator in a quasi-judicial function, I hold above all else the need for impartiality and integrity. As a result, I have decided to recuse myself from the Hearing Panel to avoid any apprehension of bias as it relates to the Energy East and Eastern Mainline applications.

I will cease any involvement in the review of these two applications, and will not discuss these two applications with other Board members or Board staff.

Roland R. George
Presiding Member

9 September 2016

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September 7, 2016

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Attention: Sheri Young, Secretary of the Board

Dear Sirs/Mesdames:

Re: Energy East Project, Asset Transfer and Eastern Mainline Project ("Energy East")
File OF-Fac-Oil-E266-2014-01 02
Consequences for the Board's review of Energy East if Members Gauthier and Mercier recuse themselves from the Panel

We represent the intervenor Transition Initiative Kenora ("**TIK**") in this proceeding. Members Gauthier and Mercier are currently considering TIK's motion requesting they recuse themselves from the Energy East Panel on grounds that their conduct has raised a reasonable apprehension of bias ("**recusal motion**"). The Board has given participants in the Energy East review until September 7, 2016, to present their views on how the motion should be resolved.

In the cover letter to its recusal motion TIK indicated it would provide further submissions on how the Board should deal with the Energy East review if and when Members Gauthier and Mercier recuse themselves. However, the Board is now under pressure, including from the Minister of Natural Resources, to resolve this matter "immediately".[1] Given this pressure TIK feels compelled to outline its position on the consequences for the Board's review of Energy East should Members Gauthier and Mercier recuse themselves. TIK provides its position here while reserving its right, first asserted in the cover letter to its recusal motion, to provide additional submissions if and when Members Gauthier and Mercier do recuse themselves.

[1] Media Release, "Statement from the Honourable Jim Carr on the Suspension of the Energy East Hearings" (1 September 2016), online: http://news.gc.ca/web/article-en.do?nid=1119459.

Consequences of a reasonable apprehension of bias

The existence of a reasonable apprehension of bias, as evidenced through Members Gauthier and Mercier's recusal, would mean that the Energy East proceedings are void and should be quashed in their entirety and re-started.[2]

Members Gauthier and Mercier have sat on the Energy East Panel for approximately two and a half years. During that time the Panel has decided dozens of procedural and substantive matters that have shaped the Board's review of Energy East. Specifically, the Panel has:

- Made 27 rulings on various matters;
- Issued 6 procedural directions;
- Made 9 information requests to the proponent;
- Determined the List of Issues indicating the intended scope of the Board's review of Energy East under the *National Energy Board Act* and the *Canadian Environmental Assessment Act, 2012*;
- Determined the Energy East application to be complete, thereby triggering the legislated timeline for the hearing;
- Decided hundreds of applications to participate from groups and individuals seeking to participate in the Board's review of Energy East;
- Issued a Hearing Order determining the nature and timing of each step in the Board's hearing on Energy East;
- Decided the Factors and Scope for the Environmental Assessment under the *Canadian Environmental Assessment Act, 2012*;
- Presided over Panel Sessions in New Brunswick; and
- Engaged in extensive correspondence with hearing participants on everything from small technical points to the adequacy of consultations with First Nations.

Almost all of these decisions and actions were taken by the Panel *after* Members Gauthier and Mercier engaged in the conduct impugned in the recusal motion. Thus, the entirety of the Energy East proceedings up to this point have been affected by Members Gauthier and Mercier's presence on the Panel.

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[2] *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, attached at Tab 1 ["*Newfoundland Telephone Co*"]; *Zundel v Citron*, [2000] 4 FC 225 (FCA), attached at Tab 2 ["*Zundel*"]; *Sparvier v Cowesses Indian Band*, [1993] 3 FC 142 (FCTD), attached at Tab 3; *Dulmage v Ontario (Police Complaints Commissioner)* (1994), 21 OR (3d) 356 (Ont Sup Ct - Div Ct), attached at Tab 4.

The Supreme Court of Canada has outlined the consequences that flow from a reasonable apprehension of bias in an administrative proceeding. In *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, Cory J writing for a unanimous court held that "it is impossible to have a fair hearing or to have procedural fairness if a reasonable apprehension of bias has been established."[3] The Court was clear that a proceeding subject to a reasonable apprehension of bias is void:

> The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, is void.[4]

While the Supreme Court in *Newfoundland Telephone Co* was dealing with an administrative proceeding that had concluded by the time of its decision, the Federal Court of Appeal stated in *Zundel v Citron* that an ongoing administrative proceeding must also be quashed in its entirety if a reasonable apprehension of bias exists and the panel presiding over the proceedings has made a number of serious interlocutory decisions over the course of the proceedings.[5] This is so even if a statutory provision on its face would allow the tribunal to continue with the proceedings, for example with fewer members.[6]

The rationale for the need to quash ongoing proceedings in their entirety was explained by Sexton JA, writing for the unanimous Federal Court of Appeal in *Zundel*. Justice Sexton posed a number of rhetorical questions that show how an administrative proceeding would be irredeemably undermined if allowed to continue despite a panel member's conduct raising a reasonable apprehension of bias:

> In my view, the Motions Judge erred by concluding that where a reasonable apprehension of bias is proven, the remaining members of the Tribunal could continue to hear and determine the complaint. At the time the bias allegation was raised, the panel of which Ms. Devins was a member had sat for some 40 days, and had made approximately 53 rulings. Counsel for Mr. Zündel argued that each one of those rulings was contrary to the result for which he had argued.
>
> Viewed in this light, I cannot see how the Tribunal's proceedings could somehow be remedied merely by virtue of there being one remaining member of the Tribunal who could determine the complaint. How could one ever know whether the Tribunal's ultimate decision was somehow affected by one or more of the Tribunal's rulings? How could one ever know whether the biased member had expressed her preliminary views on the merits of the complaint before she was ordered to be recused from the proceedings? And how could one ever know whether those consultations might have somehow affected the remaining

[3] *Newfoundland Telephone Co*, at para 40.
[4] *Ibid*.
[5] *Zundel* at para 65.
[6] *Ibid*.

> member's decisions on the interlocutory rulings? These concerns, I think, demonstrate that where one member of an administrative tribunal is subject to a reasonable apprehension of bias and a number of serious interlocutory orders have been made over the course of a lengthy hearing, the tribunal's proceedings should be quashed in their entirety, even though a statutory provision on its face permits the tribunal to proceed with fewer members where a member is, for some reason, unable to proceed.[7]

As in *Zundel*, the Energy East proceedings are well past the point where they could continue despite the reasonable apprehension of bias raised by Members Gauthier and Mercier's conduct. The Panel has made dozens of decisions affecting the substance of and procedure for the Energy East review, as well as decisions on whether and to what extent hundreds of groups and individuals may participate in the review. Almost all of these decisions postdate the impugned conduct of Members Gauthier and Mercier.

The entire Energy East proceedings up to this point are affected by the reasonable apprehension of bias and must be re-started. Continuing the proceedings with either Member George presiding as the sole Member, or with new Members replacing Members Gauthier and Mercier on the Panel, would not save the proceedings from the consequence that flows from a reasonable apprehension of bias. As the Supreme Court of Canada has held, the "damage created by apprehension of bias cannot be remedied" and the proceeding is void.[8]

The Chair's authority to alter the composition of the Energy East panel does not apply here

The provisions in the *National Energy Board Act* that normally allow a proceeding to continue with one Panel Member, or several newly appointed Panel Members, cannot apply where a Panel has been tainted by a reasonable apprehension of bias. In other words, the Energy East proceedings cannot continue with either Member George presiding as the sole Member or with new Members appointed to replace Members Gauthier and Mercier on the Panel. The Federal Court of Appeal stated in *Zundel* that statutory authority to alter the composition of a Panel during an ongoing review process cannot save that process from the consequence of a reasonable apprehension of bias where the Panel has already made a number of important decisions.

Pursuant to subsection 6(2.2), the Chair may take measures to ensure the time limit for a review before the Board is met, including removing panel members or changing the number of panel members dealing with an application. However, the condition precedent for the Chair taking such measures is his opinion that the legislated time limit for the review is not likely to be met.

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[7] *Ibid*, at paras 64-65 (emphasis added). See also, Sara Blake, *Administrative Law in Canada*, 4th Ed (Markham, ON: LexisNexis, 2006), at 114, attached at Tab 5, where the author states that "… the bias of one tribunal member can taint the whole decision, even though a majority of members were not biased. It is assumed that the biased member influenced the other members."

[8] *Newfoundland Telephone Co*, at para 40.

As shown above, the consequence of a reasonable apprehension of bias in circumstances such as these is that the proceedings are rendered void. Therefore, the legislated time limit imposed on the Board's review of Energy East, which began when the application was determined complete, would be a nullity because the review process is void.

Subsection 16(3) provides for the replacement of one Member of a three Member Panel if and when that Member becomes incapacitated, resigns or dies during the hearing. For the same reason as above this provision is meaningless where the proceedings are rendered void by a reasonable apprehension of bias.

Even if subsection 16(3) did somehow apply despite the existence of a reasonable apprehension of bias rendering the proceedings void, it does not fit the facts of the Energy East review. The recusal of Members Gauthier and Mercier on grounds of a reasonable apprehension of bias does not equate to the three circumstances in which subsection 16(3) is triggered – the incapacitation, resignation or death of a Member during a proceeding. These circumstances, and the context in which they appear in subsection 16(3), suggests that the Chair's power to authorize replacement of that Member is only to be exercised where the exit of the Member from the Panel is for a reason that does not affect the underlying legitimacy of the proceeding itself. It does not follow from the incapacity, resignation (e.g. for personal reasons), or death of a Member that participants' rights to a fair and impartial proceeding before the Board have been breached. However, this does follow from the recusal of a Member from a Panel on grounds of a reasonable apprehension of bias.

Sincerely,

Charles Hatt

Dyna Tuytel

Guy Régimbald, Matthew Estabrooks (Contributors)

Halsbury's Laws of Canada - Administrative Law (2013 Reissue)

IV. JUDICIAL REVIEW

4. Requirement of Independence and Impartiality

(2) Bias

(f) Consequences

HAD-102 Hearing rendered void.

HAD-102 Hearing rendered void. Everyone appearing before administrative boards is entitled to be treated fairly. It is an independent and unqualified right. 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 simply be voidable and declared 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 *ab initio*.[1]

Waiver. Generally, when there is a reasonable apprehension of bias, any decision taken by the decision-maker is invalid. The apprehension of bias is waived if not raised at the first possibility. A party must have full knowledge and an opportunity to object for the waiver to be effective. Other courts have held that it is not necessary to object because the proceeding is a nullity.[2]

Footnote(s)

1 *Cardinal v. Kent Institution*, [1985] S.C.J. No. 78, [1985] 2 S.C.R. 643 at 661 (S.C.C.); *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] S.C.J. No. 21, [1992] 1 S.C.R. 623 at 645 (S.C.C.).

2 D.P. Jones & A.S. De Villars, *Principles of Administrative Law*, 4th ed. (Toronto: Thomson Carswell, 2004) at 413-14.

Lorne Sossin, Philip Bryden, Jay Brecher (Contributors)

Halsbury's Laws of Canada - Judges and Courts (2014 Reissue)

I. JUDGES

5. Bias

(6) Disqualification Process

HJC-38 Recusal.

HJC-38 Recusal. Judges swear an oath upon taking office that they will discharge their duties in an impartial manner.[1] There is as well a professional or ethical duty to decide all matters impartially.[2] A judge may therefore disqualify himself or herself on his or her own motion in any case in which an issue of bias (or apprehension of bias) might arise. This self-disqualification is known as recusal. A judge may recuse himself or herself despite the express wishes of all parties that the judge continue. From the judge's point of view, the consent of the parties is not determinative, although consent will count against an appellant if bias is raised on appeal.

Rules and guidelines. The Québec *Code of Civil Procedure* contains a scheme of *recusation* rules that specify in some detail the circumstances in which a judge should not hear a case.[3] The Canadian Judicial Council has set out a non-binding statement of principles with respect to recusal:

- Judges should disqualify themselves in any case in which they believe they will be unable to judge impartially.
- Judges should disqualify themselves in any case in which they believe that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest (or that of a judge's immediate family or close friends or associates) and a judge's duty.
- Disqualification is not appropriate if:
  - the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification; or
  - no other tribunal can be constituted to deal with the case, or because of urgent circumstances, failure to act could lead to a miscarriage or justice.[4]

Effect of disqualification or recusal. The remedy in the case of a successful argument of judicial bias on appeal is that the judgment below be vacated and a new hearing ordered.[5] The Supreme Court of Canada has recently suggested that where, as reasonable apprehension of bias affects only one judge on a multi-member panel and that judge does not cast the deciding vote, it does not

automatically follow that the disqualification of that judge after a decision has been rendered has the effect of invalidating the decision of the panel itself.[6] Similarly, a panel of the Alberta Court of Appeal concluded that the decision of one member of the panel to recuse himself in circumstances in which he was not legally obligated to do so did not require the other members of the panel to recuse themselves.[7]

Footnote(s)

1 The formulation sometimes used is " ... duly and faithfully ... exercise ... trusts ... ". The full text of the oath sworn by British Columbia Supreme Court Justices is as follows:

> I, ..., Do Solemnly and Sincerely Swear that I will duly and faithfully and to the best of my skill and knowledge, exercise the powers and trusts reposed in me as a Judge of The Supreme Court of British Columbia. So Help Me God.

The Ontario oath makes explicit reference to impartiality: "I solemnly swear that I will faithfully, impartially and to the best of my skill and knowledge execute the duties of [judge]".

2 "The duty of every judge, so far as is possible, is to ensure that the defeated litigant has no justifiable sense of injustice." (Canadian Judicial Council, *Commentaries on Judicial Conduct* (Cowansville, QC: Yvon Blais, 1991) at 55).

3 (QC) CQLR, c. C-25,arts. 234, 235.

4 Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998), Principle 6.E "Conflicts of Interest".

5 See, *e.g.*, *Slater Financial Inc. v. Carrefour Ltd. Partnership*, [1996] O.J. No. 3127, 65 A.C.W.S. (3d) 593 (Ont. C.A.).

6 *Wewaykum Indian Band v. Canada*, [2003] S.C.J. No. 50, [2003] 2 S.C.R. 259 at para. 93 (S.C.C.). This observation is difficult to reconcile with the traditional view that if one member of a panel of adjudicators has failed to respect the principles of natural justice the decision of the entire panel is invalidated: see *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] S.C.J. No. 21, 4 Admin. L.R. (2d) 121 at 140 (S.C.C.); *Mehr v. Law Society of Upper Canada*, [1955] S.C.J. No. 21, [1955] S.C.R. 344 (S.C.C.). It may be that this observation is associated with the particular status of the Supreme Court of Canada as a final court of appeal.

7 *Boardwalk Reit LLP v. Edmonton (City)*, [2008] A.J. No. 515, 2008 ABCA 176 at paras. 89-92 and 109-113 (*per* Coté J.A.) and 115 (*per* O'Brien J.A.) (Alta. C.A.). The effects of the recusal of a judge can be damaging. When Mr. Justice Jean-Guy Boilard decided to withdraw from the "Hell's Angels" trial, the subsequent judge, Mr. Justice Pierre Beliveau of the Québec Superior Court, had no other choice but to dissolve the jury because they had been

compromised. Judge Beliveau said that it would be better to start a new trial that would last six months than it would be to add several months to the proceedings: T.T. Ha & A. Lawlor, "Judge Pulls Plug on Hells Angels Trial" *Globe and Mail* (August 7, 2002). Justice Boilard's decision to recuse himself from the case led the Attorney General of Québec to ask the Canadian Judicial Council to carry out an inquiry into the judge's conduct and whether it constituted misconduct or grounds for removal. The council had previously expressed disapproval of Boilard J.'s actions towards a defence lawyer, which was the basis for the judge's decision to recuse himself as the judge in *R. v. Beauchamp*. The Inquiry Committee concluded that, although his decision to withdraw was improper, it was not grounds for his removal from the bench ("Report to the Canadian Judicial Council of the Inquiry Committee Appointed Pursuant to s. 63(3) of the Judges Act to Conduct an Inquiry Concerning Mr. Justice Jean-Guy Boilard with Respect to the Decision Made by Him on July 22, 2002 to Abandon the Conduct of the Trial in *R. v. Beauchamp*", at 4.).The council itself, on the other hand, decided that there was nothing in the record to rebut the presumption that Boilard J. had acted in good faith in making a discretionary decision, and therefore his decision to disqualify himself was not capable of constituting "misconduct" or "placing himself in a position incompatible with the due execution of his office" within the meaning of the *Judges Act*, R.S.C. 1985, c. J-1: "Report of the Canadian Judicial Council to the Minister of Justice of Canada under s. 65(1) of the *Judges Act* concerning Mr. Justice Jean-Guy Boilard of the Superior Court of Justice of Québec", at 1. The council concluded (at 3-4):

> While some may disagree with Justice Boilard's decision to step aside, it was his decision to make. It is the individual responsibility of every judge to determine, in good faith, when there are circumstances that render him or her unable to hear or continue to hear a particular case. He or she is not required to consult with any other person, including his or her Chief Justice. In the end, it was Justice Boilard, acting in good faith, who was required to decide his capacity to continue.

Guy Régimbald, Matthew Estabrooks (Contributors)

Halsbury's Laws of Canada - Administrative Law (2013 Reissue)

IV. JUDICIAL REVIEW

4. Requirement of Independence and Impartiality

(2) Bias

(a) General

HAD-92 Bias and impartiality.

HAD-92 Bias and impartiality. Judicial impartiality is one of the most basic tenets of the legal world. It is a constitutional and a common law requirement of paramount and fundamental importance.[1] Independent and impartial decision-making have been called the "cornerstone of the common law duty of procedural fairness".[2] Natural justice[3] comprises two main features: *audi alteram partem* and *nemo judex in causa sua debet esse*. Bias and impartiality are included in the latter.[4] It requires administrative decision-makers to be free of bias, whether real or perceived, and to maintain an open mind.[5] In essence, no one should be a judge in one's own cause.[6]

An adequate opportunity to be heard and to present one's case fully requires that the decision-maker not be biased or prejudiced in a way that precludes fair and genuine consideration being given to the arguments advanced by the parties.[7] Where an adjudicator has personal interests and opinions which reflect a certain state of mind, the adjudicator may not be impartial and thus must be disqualified.

Definitions. Impartiality is defined as "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case [... which] connotes absence of bias, actual or perceived".[8] It may also be described "as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions".[9] Bias is a lack of neutrality on the issue to be decided.[10]

Absolute right. The right to an unbiased decision-maker is absolute and cannot be remedied by the fact that the decision was correct.[11] The main rationale for this fundamental requirement is that, "justice should not only be done, but should manifestly and undoubtedly be seen to be done".[12] Canadian courts have used the same basic approach to impartiality in the constitutional setting that they employ at common law.[13] The requirement is similar and applies throughout the judicial sphere, including administrative tribunals.[14] There are two elements to the right to an impartial decision-maker. First, an applicant has a right to an unbiased decision. Second, the applicant also

has a right to an independent decision-maker.

Biased decision-maker. Procedural fairness and the rules of natural justice require that decisions be made by an impartial decision-maker based on the record before it, free from any reasonable apprehension of bias.[15] A biased decision-maker is one who has an unauthorized predilection towards a particular result or who is subject to unauthorized factors which lead to a particular result.[16]

Footnote(s)

1 *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] S.C.J. No. 21, [1992] 1 S.C.R. 623 at 638 (S.C.C.); *Idziak v. Canada (Minister of Justice)*, [1992] S.C.J. No. 97, [1992] 3 S.C.R. 631 at 660-61 (S.C.C.); *R. v. Curragh Inc.*, [1995] S.C.J. No. 61 at para. 7, [1995] 1 S.C.R. 900 (S.C.C.); *R. v. S. (R.D.)*, [1997] S.C.J. No. 84 at para. 93, [1997] 3 S.C.R. 484, *per* Cory J. dissenting (S.C.C.); *Wewaykum Indian Band v. Canada*, [2003] S.C.J. No. 50 at para. 57, [2003] 2 S.C.R. 259 (S.C.C.); See also William Blackstone, *Commentaries on the Laws of England*, Book III, 4th ed. (Oxford: Clarendon Press, 1768) at 361, where Blackstone commented: "The law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea"; see also Richard F. Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S." (1995) 18 Dal. L.J. 408.

2 *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9 at para. 32, [2007] 1 S.C.R. 350 (S.C.C.).

3 See Section IV.3 ("Requirement of Procedural Fairness").

4 *Bell Canada v. Canadian Telephone Employees Assn.*, [2003] S.C.J. No. 36 at para. 17, [2003] 1 S.C.R. 884 (S.C.C.); *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] S.C.J. No. 28 at para. 189, [2003] 1 S.C.R. 539 (S.C.C.); *IWA, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] S.C.J. No. 20, [1990] 1 S.C.R. 282 at 332 (S.C.C.); *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] S.C.J. No. 1 at para. 79, [1995] 1 S.C.R. 3 (S.C.C.); *R. v. Généreux*, [1992] S.C.J. No. 10, [1992] 1 S.C.R. 259 at 283-84 (S.C.C.).

5 *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] S.C.J. No. 137, [1990] 3 S.C.R. 1170 at 1190 (S.C.C.); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 at para. 45, [1999] 2 S.C.R. 817 (S.C.C.); Lorne Sossin, "An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law" (2002) 27 Queen's L.J. 809; *Wewaykum Indian Band v. Canada*, [2003] S.C.J. No. 50 at para. 58, [2003] 2 S.C.R. 259 (S.C.C.).

6 Coke elevated this proposition to a fundamental principle of common law in *Dr. Bonham's case* (1610) 8 Co. Rep. 113b. See S.A. De Smith, H. Woolf & J.L. Jowell, *Principles of*

Judicial Review, 5th ed. (London: Sweet & Maxwell, 1999) at 416.

7 S.A. De Smith, H. Woolf & J.L. Jowell, *Principles of Judicial Review*, 5th ed. (London: Sweet & Maxwell, 1999) at 413.

8 *R. v. Valente*, [1985] S.C.J. No. 77, [1985] 2 S.C.R. 673 at 685 (S.C.C.); *R. v. Généreux*, [1992] S.C.J. No. 10, [1992] 1 S.C.R. 259 at 283 (S.C.C.).

9 *R. v. S.(R.D.)*, [1997] S.C.J. No. 84 at para. 104, [1997] 3 S.C.R. 484, *per* Cory J. dissenting (S.C.C.).

10 Sara Blake, *Administrative Law in Canada*, 4th ed. (Toronto: Butterworths, 2006) at 101.

11 *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] S.C.J. No. 21, [1992] 1 S.C.R. 623 at 645 (S.C.C.).

12 *R. v. Sussex JJ., ex. p. McCarthy*, [1924] 1 K.B. 256 at 259; see *R. v. S. (R.D.)*, [1997] S.C.J. No. 84 at para. 110, [1997] 3 S.C.R. 484, *per* Cory J. dissenting (S.C.C.).

13 Notably, the test for reasonable apprehension of bias set in *Committee for Justice and Liberty v. National Energy Board*, [1976] S.C.J. No. 118, [1978] 1 S.C.R. 369 (S.C.C.), is an administrative law case. The same test was later used in constitutional adjudication. Philip Bryden, "Legal Principles Governing the Disqualification of Judges" (2003) 82 Can. Bar Rev. 555 at 563; see also *R. v. S.(R.D.)*, [1997] S.C.J. No. 84 at para. 31, [1997] 3 S.C.R. 484 (S.C.C.), *R. v. Lippé*, [1990] S.C.J. No. 128, [1991] 2 S.C.R. 114 (S.C.C.); *Ruffo v. Conseil de la magistrature*, [1995] S.C.J. No. 100, [1995] 4 S.C.R. 267 (S.C.C.); *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] S.C.J. No. 112, [1996] 3 S.C.R. 919 (S.C.C.).

14 For example, in *R. v. Campbell*, [1997] S.C.J. No. 75 at para. 10, [1997] 3 S.C.R. 3 (S.C.C.), Lamer C.J.C. opined that "public confidence in the impartiality of the judiciary . . . [is] essential to the effectiveness of the court system".

15 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 at para. 45, [1999] 2 S.C.R. 817 (S.C.C.); see also J. McCormack, "The Price of Administrative Justice" (1998) 6 C.L.E.L.J. 1 at 17.

16 Robert W. Macaulay & James L.H. Sprague, *Practice and Procedure before Administrative Tribunals*, looseleaf (Toronto: Thomson Carswell, 2004) at 39-2.

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] 1 R.C.S. 623

[1992] S.C.J. No. 21

[1992] A.C.S. 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 perspective 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.

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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:

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> 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 purpose 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.

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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.