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Via Participant Portal

National Energy Board
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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

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:

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> "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.

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> "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:

[page638]

> The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged.

26 This same principle was applied in the companion case, Save Richmond Farmland Society v. Richmond (Township), [1990] 3 S.C.R. 1213. That case concerned a municipal councillor who campaigned for election favouring a residential development. He made public statements that he would not change his mind with regard to his position despite public hearings on the issue. Sopinka J. found that the councillor should not be disqualified for bias because he did not have a completely closed mind. He determined that to have ruled otherwise would have distorted the democratic process by discouraging politicians from expressing their views openly.

27 It can be seen that there is a great diversity of administrative boards. Those that are primarily

adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine [page639] the very role which has been entrusted to them by the legislature.

28 Janisch published a very apt and useful Case Comment on Nfld. Light & Power Co. v. P.U.C. (Bd.) (1987), 25 Admin. L.R. 196. He observed that Public Utilities Commissioners, unlike judges, do not have to apply abstract legal principles to resolve disputes. As a result, no useful 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.

Indexed as:

Zündel v. Citron (C.A.)

Sabina Citron, Toronto Mayor's Committee on Community and Race Relations, the Attorney General of Canada, the Canadian Human Rights Commission, Canadian Holocaust Remembrance Association, Simon Wiesenthal Centre, Canadian Jewish Congress and League for Human Rights of B'Nai Brith (Appellants)

v.

Ernst Zündel and Canadian Association for Free Expression Inc. (Respondents)

[2000] 4 F.C. 225

[2000] F.C.J. No. 679

Court File No. A-253-99

Federal Court of Canada - Court of Appeal

Isaac, Robertson and Sexton JJ.A.

Heard: Toronto, April 4, 2000.
Judgment: Ottawa, May 18, 2000.

Administrative law -- Judicial review -- CHRT panel appointed to hear complaints against respondent Zündel following publication of pamphlet on Web site -- Pamphlet, called "Did Six Million Really Die?" same that led to 1988 press release issued by Ontario Human Rights Commission -- Ms. Devins, one of CHRT members had been member of Commission applauding verdict when Zündel convicted of publishing false statements denying Holocaust -- Zündel seeking to dismiss complaints on basis Ms. Devins subject to reasonable apprehension of bias -- Motion dismissed by CHRT -- Motions Judge finding reasonable apprehension of bias -- Press release not addressing same issue as complaint before CHRT -- Number of errors made by Motions Judge -- "Corporate taint" doctrine rejected -- Motions Judge further erred in holding, if reasonable apprehension of bias existed, CHRT could continue hearing.

Human rights -- Zündel convicted of wilfully publishing pamphlet likely to cause injury, mischief to

public interest contrary to Criminal Code, s. 177 -- Conviction overturned by S.C.C. as Code, s. 177 infringing Charter -- CHRT inquiring into complaints Web site operated by Zündel likely to expose people to hatred, contempt contrary to CHRA, s. 13(1) -- One of CHRT members had been member of Ontario Human Rights Commission that previously issued press release applauding Zündel's conviction -- Whether subject to reasonable apprehension of bias -- Press release not addressing same issue as complaint before CHRT -- [page226] Related to charge under Criminal Code, s. 177 to which truth defence -- CHRA, s. 13 providing no defence, even if discriminatory statement truthful -- Impugned statement should not be attributed to member in question.

This was an appeal from a Trial Division decision finding a reasonable apprehension of bias on the part of one member of the Canadian Human Rights Tribunal hearing complaints based on subsection 13(1) of the Canadian Human Rights Act. In May 1988, the respondent, Ernst Zündel, was found guilty of publishing a pamphlet called "Did Six Million Really Die?" that he knew was false or likely to cause injury or mischief to a public interest, contrary to section 177 of the Criminal Code. Two days after the jury had reached its verdict, the Ontario Human Rights Commission issued a press release applauding the verdict. Zündel's criminal conviction was later overturned by the Supreme Court of Canada on the ground that Code section 177 infringed Charter paragraph 2(b). In 1997, approximately four years after that decision, complaints were laid with the Canadian Human Rights Commission that an Internet Web site operated by Zündel would be likely to expose people to hatred or contempt contrary to subsection 13(1) of the Canadian Human Rights Act. The Canadian Human Rights Tribunal appointed to inquire into the complaints was composed of three persons, one of them being Reva E. Devins who had been a member of the Ontario Human Rights Commission when it issued the press release in 1988. The respondent brought a motion before the Tribunal, seeking to dismiss the subsection 13(1) complaints on the basis that Ms. Devins was subject to a reasonable apprehension of bias. The Tribunal rejected Zündel's motion, one of the reasons being that it was brought out of time. On judicial review of that decision, the Motions Judge ruled that at the time the statement was made, the members of the Ontario Human Rights Commission held a strong actual bias against Zündel and that a reasonably informed bystander would apprehend that the "extreme impropriety" of the press release would make Ms. Devins subject to a reasonable apprehension of bias. The Motions Judge concluded, however, that, even though Ms. Devins was subject to a reasonable apprehension of bias, the remaining member of the Tribunal could continue to hear and decide the complaint. Two issues were raised on appeal: (1) whether the finding of the Motions Judge that there was a reasonable apprehension of bias on the part of Ms. Devins was unreasonable, based on erroneous considerations, reached on wrong principle or as a result of insufficient weight being given to relevant matters; (2) whether the [page227] Motions Judge was correct in holding that, if there was a reasonable apprehension of bias, the Tribunal could continue with the hearing.

Held, the appeal should be allowed and the matter remitted for completion of the hearing.

(1) The test for a reasonable apprehension of bias is "what would an informed person, viewing the

matter realistically and practically, and having thought the matter through, conclude". It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. The press release draws a distinction between statements made by the Ontario Human Rights Commission, and statements made by its Chair. It was made in response to a criminal charge that did afford a defence of truthfulness under section 177 of the Criminal Code. The statements attributed to the Commission simply criticized Zündel for denying the truthfulness of the Holocaust. Thus, the truth of the statement would provide a complete defence. By contrast, the essence of the complaint before the Canadian Human Rights Tribunal was that certain people were exposed to hatred or contempt. The truth of the statement would provide no defence. Thus, the issue faced by the jury in 1988 was different from that before the Tribunal. The statement contained in the press release that might be material to the subsection 13(1) complaint was attributed to the Chief Commissioner, not to the Commission as a whole. A reasonable and informed observer would not conclude that such statement should be attributed to Ms. Devins.

The Motions Judge made six other errors. First, he failed to take into account the principle that a member of a Tribunal will act fairly and impartially, in the absence of evidence to the contrary. There is a presumption that a decision maker will act impartially. Second, he failed to consider whether the press release demonstrated an objectively justifiable disposition. Third, he failed to properly connect Ms. Devins to the press release. His reasons confused the passage of time with her connection to the press release. There was no evidence that she was aware of it, let alone agreed with its issuance so as to demonstrate [page228] actual bias at the time the press release was issued. Fourth, the Motions Judge failed to give appropriate weight to the amount of time that had passed between the date on which the press release was issued and the date Ms. Devins was asked to hear the subsection 13(1) complaints. A period of nine years between those two dates was sufficient to expunge any taint of bias that might have existed by reason of the press release. Fifth, he erred in concluding that the Ontario Human Rights Commission was only an adjudicative body and had no legitimate purpose in issuing the press release. The press release was not "thoroughly inappropriate"; rather, it was consistent with the Commission's statutory obligation "to forward the policy that the dignity and worth of every person be recognized". Finally, the Motions Judge erred in concluding that there is a doctrine of corporate "taint" that is said to paint all members of a decision-making body with bias in certain circumstances. An inference could not be drawn that each member of the Ontario Human Rights Commission authorized the entire press release.

(2) The Motions Judge also erred in concluding that, where a reasonable apprehension of bias is proven, the remaining members of the Tribunal could continue to hear and determine the complaint. When 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. Where a 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.

Statutes and Regulations Judicially Considered

Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 2(b).
Canadian Human Rights Act, R.S.C., 1985, c. H-6, s. 13(1).
Criminal Code, R.S.C. 1970, c. C-34, s. 177.
Criminal Code, R.S.C., 1985, c. C-46, s. 181.
Human Rights Code, S.O. 1981, c. 53, s. 28.
Police Services Act, R.S.O. 1990, c. P.15.
Public Utilities Act (The), R.S.N. 1970, c. 322, ss. 5, 14, 15, 79, 85.

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Cases Judicially Considered

Applied:
R. v. S. (R.D.), [1997] 3 S.C.R. 484; (1997), 161 N.S.R. (2d) 241; 151 D.L.R. (4th) 193; 1 Admin. L.R. (3d) 74; 118 C.C.C. (3d) 353; 10 C.R. (5th) 1; 218 N.R. 1.
Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892; (1990), 75 D.L.R. (4th) 577; 13 C.H.R.R. D/435; 3 C.R.R. (2d) 116.
Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia), [1997] 2 F.C. 527; (1997), 146 D.L.R. (4th) 708; 47 Admin. L.R. (2d) 244; 212 N.R. 357 (C.A.).
E.A. Manning Ltd. v. Ontario Securities Commission (1995), 23 O.R. (3d) 257; 125 D.L.R. (4th) 305; 32 Admin. L.R. (2d) 1; 7 C.C.L.S. 125; 80 O.A.C. 321 (C.A.); leave to appeal to S.C.C. refused, [1995] 3 S.C.R. vi.
Finch v. Assn. of Professional Engineers & Geoscientists (British Columbia), [1996] 5 W.W.R. 690; (1996), 38 Admin. L.R. (2d) 116; 73 B.C.A.C. 295; 18 B.C.L.R. (3d) 361 (B.C.C.A.).
Bennett v. British Columbia (Securities Commission) (1992), 94 D.L.R. (4th) 339; [1992] 5 W.W.R. 481; 18 B.C.A.C. 191; 69 B.C.L.R. (2d) 171; 31 W.A.C. 191.
Laws v. Australian Broadcasting Tribunal (1990), 93 A.L.R. 435 (H.C.).

Distinguished:
Dulmage v. Ontario (Police Complaints Commissioner) (1994), 21 O.R. (3d) 356; 120 D.L.R. (4th) 590; 30 Admin. L.R. (2d) 203; 75 O.A.C. 305 (Div. Ct.).
Pinochet Ugarte, Re, [1998] H.L.J. No. 52 (QL).
Pinochet Ugarte, Re, [1998] H.L.J. No. 41 (QL).
Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623; (1992), 95 Nfld. & P.E.I.R. 271; 4 Admin. L.R. (2d) 121; 134 N.R. 241.

Considered:

R. v. Zündel, [1992] 2 S.C.R. 731; (1992), 95 D.L.R. (4th) 202; 75 C.C.C. (3d) 449; 16 C.R. (4th) 1; 140 N.R. 1; 56 O.A.C. 161.

APPEAL from a Trial Division decision ([1999] 3 F.C. 409; (1999), 165 F.T.R. 113) finding a reasonable apprehension of bias on the part of one member of the Canadian Human Rights Tribunal hearing complaints based on subsection 13(1) of the Canadian Human Rights Act. Appeal allowed.

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Appearances:

Jane S. Bailey, for the appellants Sabina Citron and the Canadian Holocaust Remembrance Association.
Andrew A. Weretelnyk, for the appellant Toronto Mayor's Committee on Community and Race Relations.
Richard A. Kramer, for the appellant Attorney General of Canada.
René Duval, for the appellant Canadian Human Rights Commission.
Robyn M. Bell, for the appellant Simon Wiesenthal Centre.
Joel Richler and Judy Chan, for the appellant Canadian Jewish Congress.
Marvin Kurz, for the appellant League, for the Human Rights of B'Nai Brith.
Douglas H. Christie and Barbara Kulaszka, for the respondent Ernst Zündel.
Gregory Rhone, for the respondent Canadian Association, for the Free Expression Inc.

Solicitors of Record:

Torys, Toronto, for the appellants Sabina Citron and the Canadian Holocaust Remembrance Association.
City of Toronto, Legal Department, Toronto, for the appellant Toronto Mayor's Committee on Community and Race Relations.
Deputy Attorney General of Canada, for the appellant Attorney General of Canada.
Canadian Human Rights Commission, for the appellant Canadian Human Rights Commission.
Bennett Jones, Toronto, for the appellant Simon Wiesenthal Centre.
Blake, Cassels & Graydon, Toronto, for the appellant Canadian Jewish Congress.
Dale, Streiman & Kurz, Brampton, Ontario, for the appellant League, for the Human Rights of B'Nai Brith.
Douglas H. Christie, Victoria, and Barbara Kulaszka, Brighton, Ontario, for the respondent Ernst Zündel.
Gregory Rhone, Etobicoke, Ontario, for the respondent Canadian Association, for the Free Expression Inc.

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The following are the reasons for judgment rendered in English by

SEXTON J.A.:--

INTRODUCTION

1 Ms. Devins is a member of the Canadian Human Rights Tribunal (the Tribunal) that is hearing a complaint brought against Ernst Zündel. At issue in this appeal is whether Ms. Devins is subject to a reasonable apprehension of bias, stemming from a now twelve-year old press release that was issued by the Ontario Human Rights Commission (the Commission or Ontario Human Rights Commission) when Ms. Devins was a member of that Commission, in which the Commission, among other things, applauded a court ruling that found Mr. Zündel to be guilty of publishing false statements that denied the Holocaust.

BACKGROUND FACTS

2 On May 11, 1988, a jury found Mr. Zündel to be guilty of wilfully publishing a pamphlet called "Did Six Million Really Die?" that he knew was false and that causes or is likely to cause injury or mischief to a public interest, contrary to section 177 of the Criminal Code.[1]

3 Two days after the jury had reached its verdict, the Ontario Human Rights Commission issued the following press release:

TIME/DATE: SOURCE:	10:32 Eastern Time May 13, 1988 Ontario Human Rights Commission
HEADLINE:	*** HUMAN RIGHTS COMMISSION COMMENDS RECENT ZÜNDEL RULING ***

PLACELINE: TORONTO

The Ontario Human Rights Commission commends the recent court ruling that found Ernst Zundel guilty of publishing false statements denying the

Holocaust.

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> "This decision lays to rest, once and for all, the position that is resurrected from time to time that the Holocaust did not happen and is, in fact, a hoax," said Chief Commissioner, Raj Anand. "We applaud the jury's decision since it calls for sanctions against a man responsible for contradicting the truth of the suffering experienced by the Jewish people, which was visited upon them solely because of their religion and ethnicity."
>
> Mr. Anand also stated that the decision is of broader significance in that it affirms not only the rights of Jews, but also of and [sic] other religious and ethnocultural groups to be free from the dissemination of false information that maligns them.

4 Mr. Zündel's criminal conviction was eventually overturned by the Supreme Court of Canada [[1992] 2 S.C.R. 731], which held that section 177 of the Criminal Code[2] was contrary to the right of free expression guaranteed by paragraph 2(b) of the Charter [Canadian Charter of Rights and Freedoms, being part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]], and that the infringement could not be saved by section 1 of the Charter.[3]

5 Approximately four years after the Supreme Court overturned Mr. Zündel's conviction, two complainants laid complaints with the Canadian Human Rights Commission. The complainants said that they believed that an Internet Web site operated by Mr. Zündel would be "likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination," contrary to subsection 13(1) of the Canadian Human Rights Act.[4] A panel of the Canadian Human Rights Tribunal was appointed to inquire into the complaints. Reva E. Devins was one of three persons appointed to determine the complaint.

6 At the inquiry, which commenced on May 26, 1997, the Canadian Human Rights Commission relied heavily on the "Did Six Million Really Die?" pamphlet that had been published on Mr. Zündel's Web [page233] site. This pamphlet was the same one that had led to the earlier criminal charges and to the press release issued by the Ontario Human Rights Commission.

7 After approximately forty days of hearings, Mr. Zündel requested that the Tribunal fax him the biographies of the three Tribunal members. Approximately one week after the biographies had been

faxed to him, counsel for Mr. Zündel located the press release while searching Quicklaw Systems' databases. That same day, counsel for Mr. Zündel brought a motion before the Tribunal, seeking to dismiss the subsection 13(1) complaints on the basis that Ms. Devins was subject to a reasonable apprehension of bias.

THE TRIBUNAL'S DECISION

8 The Tribunal rejected Mr. Zündel's motion. It concluded that the press release had been made by the then Chief Commissioner of the Ontario Human Rights Commission, not by the Commission or by Ms. Devins personally. Moreover, the Tribunal added, the statements were arguably within the Chief Commissioner's statutory mandate. These factors, the Tribunal held, made it difficult to understand how the press release could be said to create a reasonable apprehension of bias on the part of the Chief Commissioner, or that any bias could then be imputed to Ms. Devins. In any event, the Tribunal held that even if Mr. Zündel's submission had any merit, it held that it was "totally inappropriate at this late state for this matter to be advanced."[5] The Tribunal reasoned that because the statement had been made long before the hearing had commenced, Mr. Zündel could have raised the bias allegation at the outset of the proceedings. In so doing, the Tribunal implied that Mr. Zündel had waived his right to raise an allegation of reasonable apprehension of bias. Mr. Zündel sought judicial review of the Tribunal's decision to the Federal Court--Trial Division.

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THE FEDERAL COURT--TRIAL DIVISION'S DECISION

9 In his decision, the Motions Judge held that the press release was a "gratuitous political statement"[6] that made "a specific damning statement"[7] against Mr. Zündel, which was "thoroughly inappropriate for the Chair of the Ontario Commission"[8] to do. He held that "[a]n institution with adjudicative responsibilities has no legitimate purpose in engaging in such public condemnation."[9]

10 The Motions Judge reasoned that because the press release stated that "the Ontario Human Rights Commission commends the present court ruling,"[10] and that "[w]e applaud the jury's decision,"[11] the Chair purported to speak on behalf of all members of the Commission, including Ms. Devins. The Motions Judge added that it would be a "reasonable conclusion to reach that at the time the statement was made, the members of the Ontario Commission held a strong actual bias"[12] against Mr. Zündel. Nevertheless, he concluded that by the time the Canadian Human Rights Tribunal was convened to inquire into the subsection 13(1) complaint, there was "insufficient evidence to find present actual bias"[13] against Ms. Devins.

11 The Motions Judge concluded that even though the statement was released some ten years before Ms. Devins was called to inquire into the subsection 13(1) complaint brought against Mr. Zündel, a reasonably informed bystander would apprehend that the "extreme impropriety"[14] of the

press release would make her subject to a reasonable apprehension of bias.

12 The Motions Judge rejected the Tribunal's decision that Mr. Zündel had waived his right to bring the bias complaint by not bringing it at the outset of the Tribunal's proceedings. The Motions Judge accepted Mr. Zündel's evidence that he was not aware of the press release until shortly before the bias allegation was brought.

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13 Even though he concluded that Ms. Devins was subject to a reasonable apprehension of bias, the Motions Judge declined to prohibit the remaining member of the Tribunal from continuing to hear and to ultimately determine the complaint. He held that because the Canadian Human Rights Act permits one Tribunal member to complete an already commenced hearing where other appointed members are unable to continue,[15] the one remaining member of the panel could continue to hear and decide the complaint.

14 Ms. Citron and the other appellants now appeal the Motion Judge's decision that Ms. Devins was subject to a reasonable apprehension of bias. They have not appealed the Motion Judge's decision that Mr. Zündel did not waive his right to raise the bias allegation by not bringing it at the outset of the Tribunal's proceedings. Mr. Zündel has cross-appealed one aspect of the Motion Judge's decision, arguing that the Motions Judge should have quashed the Tribunal's proceedings in their entirety.

ISSUES

1. Was the finding of the Motions Judge that there was a reasonable apprehension of bias on the part of Ms. Devins unreasonable, based on erroneous considerations, reached on wrong principle, or reached as a result of insufficient weight having been given to relevant matters?
2. Was the Motions Judge correct in holding that, if there was a reasonable apprehension of bias, the Tribunal could continue with the hearing?

ANALYSIS

1. THE REASONABLE APPREHENSION OF BIAS TEST

15 In R. v. S. (R.D.),[16] Cory J. stated the following manner in which the reasonable apprehension of bias test should be applied:

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> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information... . [The] test is "what would an informed person, viewing the matter realistically and practically--and having thought the matter through--conclude ... ."[17]

16 He held that the test contained a two-fold objective element: "the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case."[18]

Does the press release address the same issue as the complaint before the Canadian Human Rights Tribunal?

17 On appeal, Mr. Zündel submits that a reasonable bystander would conclude that the press release, which attributes certain statements directly to the Ontario Human Rights Commission, and not merely to the Chair of that Commission, would cause Ms. Devins (who was a member of the Ontario Human Rights Commission when the press release was issued) to be subject to a reasonable apprehension of bias. Mr. Zündel submits that the criminal charges upon which the press release was based were directly in relation to his publication "Did Six Million Really Die?", the very same pamphlet that Mr. Zündel had reproduced on his Web site and that led to the subsection 13(1) human rights complaint that Ms. Devins and the other two members of the Tribunal were asked to determine.

18 In my view, the press release draws a distinction between statements made by the Ontario Human Rights Commission, and statements made by Mr. Anand, the Chair of the Ontario Human Rights Commission. The only statements contained in the press release that are directly attributed to the Ontario Human Rights Commission are the following:

> (i) "The Ontario Human Rights Commission commends the recent court ruling that found Ernst Zundel guilty of publishing false statements denying the Holocaust";

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> (ii) "We applaud the jury's decision since it calls for sanctions against a man responsible for contradicting the truth of the suffering experienced by the Jewish people, which was visited upon them solely because of their religion and ethnicity."

19 The criminal charge that the Ontario Human Rights Commission addressed in the press release was section 177 of the Criminal Code, later renumbered to section 181. The section states:

> 181. Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

20 By contrast, subsection 13(1) of the Canadian Human Rights Act states:

> 13. (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

21 In Canada (Human Rights Commission) v. Taylor,[19] Dickson C.J. held that "s. 13(1) [of the Canadian Human Rights Act] provides no defences to the discriminatory practice it describes, and most especially does not contain an exemption for truthful statements."[20] He concluded that "the Charter does not mandate an exception for truthful statements in the context of s. 13(1) of the Canadian Human Rights Act."[21]

22 The press release was made in response to a criminal charge that did afford a defence of truthfulness ("that he knows is false.")[22] The statements attributed to the Ontario Human Rights Commission simply criticize Mr. Zündel for denying the truthfulness of the Holocaust. By contrast, in a subsection 13(1) complaint, the truth or non-truthfulness [page238] of statements is immaterial to whether the complaint is substantiated. Consequently, the issue faced by the jury in 1988 is different from the issue faced by the Canadian Human Rights Tribunal.

23 Shortly stated, the essence of the offence in section 177 of the Criminal Code was that the statement was false and that it could or would likely cause injury or mischief to a public interest. Thus, the truth of the statement would provide a complete defence. On the other hand, the essence of the complaint before the Canadian Human Rights Tribunal is that certain people were exposed to hatred or contempt. The truth of the statement would provide no defence.

24 The only statement contained in the press release that might be material to the subsection 13(1) complaint is the following:

> Mr. Anand also stated that the decision is of broader significance in that it affirms not only the rights of Jews, but also of and [sic] other religious and ethnocultural groups to be free from the dissemination of false information that

> maligns them. [Emphasis added.]

25 It could be argued that the statement reproduced above states that the information disseminated by Mr. Zündel exposes Jews to hatred, the essence of a subsection 13(1) complaint. However, in my view, an informed person, viewing the matter realistically and practically--and having thought the matter through--would conclude that the press release draws a distinction between statements made by the Ontario Human Rights Commission (i.e. "the Ontario Human Rights Commission commends" or "we applaud" [emphasis added]) and statements made by Raj Anand, the Chief Commissioner of the Ontario Human Rights Commission. The statement reproduced above is attributed to Mr. Anand, and not to the Commission as a whole. Accordingly, I do not think that a reasonable and informed observer would conclude that the above statement should be attributed to Ms. Devins.

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26 Counsel for Mr. Zündel relied heavily on the Ontario Divisional Court's judgment in Dulmage v. Ontario (Police Complaints Commissioner)[23] to demonstrate that statements made by one member of an organization can be used to demonstrate that a different member of that organization is subject to a reasonable apprehension of bias.

27 In Dulmage, the president of the Mississauga chapter of the Congress of Black Women of Canada had been appointed to a Board of Inquiry pursuant to Ontario's Police Services Act.[24] The Board was appointed to investigate a complaint that a public strip search had taken place, contrary to the manner provided in the Metropolitan Toronto Police Force's regulations. Approximately one year before the president of the Mississauga chapter of the Congress of Black Women of Canada was appointed to the Board, the vice-president of the Toronto chapter of that organization was reported to have publicly stated that the strip search incident at issue was "not an 'isolated case' and reflects the 'sexual humiliation and abuse of black women.'"[25] In a different statement, the vice-president recommended "an RCMP investigation of [the]incident,"[26] and urged that the then-Chief of the Metropolitan Toronto Police Force resign, saying that "Chief McCormack has clearly demonstrated an inability to give effective leadership to the Police Force."[27]

28 below] In its decision, the Divisional Court concluded that the president who had been appointed to the Board of Inquiry was subject to a reasonable apprehension of bias. O'Brien J. held:

> ... inflammatory statements dealing with this very incident involved in this inquiry were made by an officer of the Congress of Black Women of Canada. Those statements were made in Toronto, closely adjacent to the City of Mississauga. They deal with an incident which received significant public attention. The statements referred to the incident as an "outrage" and called for the suspension of the [page240] officers involved. Those officers were the very

> ones involved in this hearing.
>
> Ms. Douglas was the president of the Mississauga chapter of the same organization.[28]

29 Similarly, in his dissenting reasons (although not on this point), Moldaver J. held that "[t]he remarks themselves related, at least in part, to the critical issue which the board was required to decide."[29]

30 In my view, Dulmage is distinguishable because the statements at issue in Dulmage dealt with the very question at issue before the Board of Inquiry, whereas the statements made by the Ontario Human Rights Commission address an issue that is immaterial to the subsection 13(1) Tribunal inquiry that Ms. Devins has been asked to determine.

31 I think the House of Lords' decision in Pinochet, Ugarte, Re[30] can be distinguished on a similar basis. In that appeal, the House of Lords vacated the earlier order it had made in Pinochet, Ugarte, Re[31] because Lord Hoffman, one of the members who heard the appeal, had links to an intervener (Amnesty International) that had argued on the appeal at the House of Lords.

32 When Lord Hoffman heard the appeal at issue in Pinochet, he had been a Director and Chairperson of Amnesty International Charity Limited. That corporation was charged with undertaking charity work for Amnesty International, the entity that had intervened in Pinochet.

33 The type of bias at issue in Pinochet was characterized by Lord Browne-Wilkinson as "where the judge is disqualified because he is a judge in his own cause."[32] Lord Browne-Wilkinson then held that "[i]f the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, in promoting the same causes in the same organisation as is a party [page241] to the suit."[33] Lord Browne-Wilkinson highlighted that "[t]he facts of this present case are exceptional,"[34] holding that "[t]he critical elements are (1) that [Amnesty International] was a party to this appeal; (3) the judge was a Director of a charity closely allied to [Amnesty International] and sharing, in this respect, [Amnesty International's] objects."[35] He concluded that "[o]nly in cases where a judge is taking an active role as trustee or Director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties."[36]

34 Accordingly, Pinochet is not analogous to this appeal. It might be so if the Ontario Human Rights Commission was a party to the proceedings before the Tribunal. Since it was not, I do not think that Pinochet demonstrates that Ms. Devins is subject to a reasonable apprehension of bias.

OTHER ERRORS MADE BY THE MOTIONS JUDGE

35 I now turn to other alleged errors made by the Motions Judge. In my view, he committed the following errors, each of which I address at greater length below:

1. He failed to address the presumption of impartiality;
2. He failed to consider whether the press release demonstrated an objectively justifiable disposition;
3. He failed to properly connect Ms. Devins to the press release;
4. He failed to give appropriate weight to the passage of time;
5. He erred in concluding that the Ontario Human Rights Commission was an adjudicative body and had no legitimate purpose in making the press release;

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6. He erred in concluding that a doctrine of "corporate taint" exists.

Presumption of impartiality

36 In my view, the Motions Judge erred by failing to take into account the principle that a member of a Tribunal will act fairly and impartially, in the absence of evidence to the contrary. In R. v. S. (R.D.), Cory J. held that "the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including 'the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold'."[37] He added that "the threshold for a finding of real or perceived bias is high,"[38] and that "a real likelihood of probability of bias must be demonstrated, and that a mere suspicion is not enough."[39] Further, Cory J. held that "[t]he onus of demonstrating bias lies with the person who is alleging its existence."[40]

37 In Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia),[41] this Court held that there is a presumption that a decision maker will act impartially.[42] Similarly, in E.A. Manning Ltd. v. Ontario Securities Commission,[43] the Ontario Court of Appeal held, in the context of a bias allegation levelled against a securities commission, that "[i]t must be presumed, in the absence of any evidence to the contrary, that the Commissioners will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of each case."[44] And in Finch v. Assn. of Professional Engineers & Geoscientists (British Columbia)[45] the British Columbia Court of Appeal held that it must be assumed, "unless and until the contrary is shown, that every member of this committee will carry out his or her duties in an impartial manner and consider only the evidence in relation to the charges before the panel."[46]

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Failure to consider whether the press release demonstrated an objectively justifiable disposition

38 In R. v. S. (R.D.), Cory J. offered a useful definition of the word "bias." He held that "bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues."[47] He added that "not every favourable or unfavourable disposition attracts the label of prejudice."[48] He held that where particular unfavourable dispositions are "objectively justifiable,"[49] such dispositions would not constitute impermissible bias. He offered "those who condemn Hitler"[50] as examples of objectively justifiable dispositions and, therefore, such comments do not give rise to a reasonable apprehension of bias on the part of the speaker.

39 In the Supreme Court's judgment that overturned Mr. Zündel's criminal conviction for publishing the "Did Six Million Really Die?" pamphlet, McLachlin J. (as she then was) referred to Mr. Zündel's beliefs as "admittedly offensive,"[51] while Cory and Iacobucci JJ. described the pamphlet as part of a "genre of anti-Semitic literature"[52] that "makes numerous false allegations of fact."[53] In light of these statements, how could it not be objectively justifiable for the Ontario Human Rights Commission and its Chair to have made similar statements regarding the same pamphlet in their press release?

Failure to connect Ms. Devins to the press release

40 The Motions Judge held that it would be a reasonable conclusion to think that at the time the press release was issued, both the Chair of the Ontario Human Rights Commission and its members held a strong actual bias (i.e. and not just a reasonable apprehension of bias) as against Mr. Zündel.

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41 He later held that "the passage of time does not eradicate the fact that Ms. Devins is reasonably attributed with strong actual bias."[54] However, from the Motion Judge's reasons, it appears that he took Ms. Devins' present denial of bias into account to conclude that at the time the Tribunal was appointed to inquire into the subsection 13(1) complaint, there was "insufficient evidence to find present actual bias by Ms. Devins against the applicant."[55]

42 In my view, the Motions Judge's reasons confuse the passage of time with Ms. Devins' actual connection to the press release. There was no evidence that Ms. Devins was aware of the press release, let alone agreed with or was party to its issuance so as to demonstrate actual bias at the time the press release was issued. Similarly, there was no evidence of conduct of Ms. Devins from which one could infer a reasonable apprehension of bias later.

Failure to give appropriate weight to the passage of time

43 In the instant matter now on appeal, the Motions Judge attributed little or no weight to the time that had passed between the date the press release was issued and the date on which Ms. Devins was appointed to determine the complaint launched against Mr. Zündel. He held that "the passage of time does not eradicate the fact that Ms. Devins is reasonably attributed with strong actual bias."[56]

44 In so doing, I think the Motions Judge failed to give appropriate weight to the amount of time that had passed between the date on which the press release was issued and the date Ms. Devins was asked to hear the subsection 13(1) complaint. In Dulmage, referred to earlier in these reasons, Moldaver J. concluded that the impugned board member was subject to a reasonable apprehension of bias in part because the press conference during which the statements were made had only taken place one year before the board [page245] hearing, a period of time that he did not consider to be "sufficient to expunge the taint left in the wake of these remarks."[57]

45 In the instant appeal, the Tribunal at issue was appointed some nine years after the press release was issued: a much greater time lag than was at issue in Dulmage, and one that, along with the other factors considered in this judgment, I consider to be sufficient to expunge any taint of bias that might have existed by reason of the press release.

Error in concluding that a doctrine of "corporate taint" exists

46 By concluding that all members of the Ontario Human Rights Commission would be biased by reason of the press release, the Motions Judge appeared to conclude that there is a doctrine of corporate "taint," a taint that is said to paint all members of a decision-making body with bias in certain circumstances. In Bennett v. British Columbia (Securities Commission),[58] the British Columbia Court of Appeal rejected the doctrine of corporate taint. It held:

> We wish to add one further observation and that is as to the target of a bias allegation. Bias is an attitude of mind unique to an individual. An allegation of bias must be directed against a particular individual alleged, because of the circumstances, to be unable to bring an impartial mind to bear. No individual is identified here. Rather, the effect of the submissions is that all of the members of the commission appointed pursuant to s. 4 of the Securities Act, regardless of who they may be, are so tainted by staff conduct that none will be able to be an impartial judge. Counsel were unable to refer us to a single reported case where an entire tribunal of unidentified members had been disqualified from carrying out statutory responsibilities by reason of real or apprehended bias. We think that not to be surprising. The very proposition is so unlikely that it does not warrant serious consideration.[59]

47 Similarly, in Laws v. Australian Broadcasting Tribunal,[60] Australia's High Court concluded

that the [page246] doctrine of corporate taint did not exist, absent circumstances that permit an inference to be drawn that all members of an administrative tribunal authorized or approved statements or conduct that gave rise to a reasonable apprehension of bias on the part of one of its members. In Laws, three members of the Australian Broadcasting Tribunal conducted a preliminary investigation of Mr. Laws, and concluded that he had breached broadcasting standards. The Director of the Tribunal's Programs Division later gave an interview in which she repeated the conclusions made by the three Tribunal members. Mr. Laws sought an order prohibiting the entire Tribunal from later holding a formal hearing to determine whether it should exercise regulatory powers against Mr. Laws. His application was brought on the basis that the prejudgment expressed by the three members who had conducted the preliminary investigation and the statements made by the Director of the Programs Division served to taint the entire Tribunal.

48 Australia's High Court rejected Mr. Laws' application. It held:

> However, though it might be correct to regard the interview as a corporate act, it was not necessarily an act done on behalf of each of the individual members of the corporation. The circumstances are not such as to justify the drawing of an inference that each of the individual members of the tribunal authorised the interview or approved of its content. At best, from the appellant's viewpoint, it might be inferred that the three members of the tribunal who made the decision of 24 November so authorised or approved the interview.[61]

49 These decisions, I think, demonstrate that there is no doctrine of corporate taint. I prefer the reasoning in these decisions to the implication drawn by the majority in the Dulmage decision that such a taint could be said to exist.[62]

50 As I have previously explained in these reasons, I do not think that the proviso contained in the paragraph reproduced above from the Laws decision [page247] applies in the circumstances of this appeal: one cannot draw an inference that each of the individual members of the Ontario Human Rights Commission authorized the entire press release that was issued. To the extent that the members of the Commission could be said to have authorized certain statements contained in the press release, any such statements are immaterial to the complaint that Ms. Devins has been asked to determine.

The Supreme Court of Canada's Judgment in Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)

51 Counsel for the appellants relied on the Supreme Court of Canada's judgment in Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)[63] for the proposition that the Ontario Human Rights Commission was engaged in a policy-making function at the time the press release was issued and therefore the statements contained in the press release were subject to a much lower standard of impartiality.

52 In Newfoundland Telephone, Andy Wells was appointed to a Board that was responsible for the regulation of the Newfoundland Telephone Company Limited. After he was appointed to the Board, and after the Board had scheduled a public hearing to examine Newfoundland Telephone's costs, Mr. Wells made several strong statements against Newfoundland Telephone's executive pay policies. Mr. Wells was one of five who sat on that hearing. Counsel for Newfoundland Telephone objected to Mr. Wells' participation at the hearing, arguing that the strong statements Mr. Wells had made demonstrated that he was subject to a reasonable apprehension of bias.

53 In Newfoundland Telephone, Cory J. recognized that administrative decision makers were subject to [page248] varying standards of impartiality. He held that "those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts,"[64] while boards with popularly elected members are subject to a "much more lenient" standard.[65] He added that administrative boards that deal with matters of policy should not be subject to a strict application of the reasonable apprehension of bias test, since to do so "might undermine the very role which has been entrusted to them by the legislature."[66] Accordingly, he held that "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."[67]

54 Accordingly, Cory J. held that, had the following statement been made before the Board's hearing date was set, it would not amount to impermissible bias: "[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." He supported that conclusion in the following manner:

> 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 position would not change, this would indicate a closed mind.[68]

55 In Newfoundland Telephone, Cory J. held that once a board member charged with a policy-making function is then asked to sit on a hearing, "a greater degree of discretion is required of a member."[69] Once a hearing date was set, Cory J. held that the board members at issue in Newfoundland Telephone had to "conduct themselves so that there could be no reasonable apprehension of bias."[70] In other words, a person who is subject to the "closed mind" standard can later [page249] be required to adhere to a stricter "reasonable apprehension of bias" standard.

56 Counsel for the appellants have seized on these aspects of Cory J.'s judgment in Newfoundland Telephone to demonstrate that the Motions Judge erred by concluding that when the Ontario Human Rights Commission issued the press release, it was engaged in adjudicative

functions, and was therefore required to abide by a high standard of impartiality. Instead, counsel for the appellants argue that the Ontario Human Rights Commission was engaged in a policy-making function when it issued the press release, and was therefore subject to a much lower standard of impartiality.

57 While I agree that the Motions Judge erred when he concluded that the Ontario Human Rights Commission was engaged in an adjudicative role when it issued the press release, I do not agree with the further implications sought to be drawn by the appellants.

58 When the press release was issued by the Ontario Human Rights Commission, it was charged with the following functions:

> 28. It is the function of the Commission,
>
> (a) to forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law;
> (b) to promote an understanding and acceptance of and compliance with this Act;
>
> ...
>
> (d) to develop and conduct programs of public information and education and undertake, direct and encourage research designed to eliminate discriminatory practices that infringe rights under this Act.[71]

59 Clauses 28(a), (b) and (d) demonstrate that the Ontario Human Rights Commission is vested with [page250] policy-making functions and with an obligation to educate and to inform the public. Accordingly, I do not agree with the Motion Judge's conclusion that the press release issued by the Ontario Human Rights Commission was "thoroughly inappropriate." Rather, the statement was consistent with its statutory obligation, inter alia, "to forward the policy that the dignity and worth of every person be recognized."

60 However, I do not think that the Newfoundland Telephone case provides much assistance to the appellants. In my view, one should bear in mind that in Newfoundland Telephone, the Board was specifically charged with dual functions: investigatory ones and adjudicative ones. Among its investigatory powers, the Board was permitted to "make all necessary examinations and enquiries to keep itself informed as to the compliance by public utilities with the provisions of law,"[72] to "enquire into any violation of the laws or regulations in force,"[73] to "summarily investigate ... [w]henever the Board believes that any rate or charge is unreasonable or unjustly discriminatory."[74] In the same breath, the Board was permitted to hold hearings "[i]f after making any summary

investigation, the Board becomes satisfied that sufficient grounds exist to warrant a formal hearing."[75] Accordingly, the statute specifically envisaged that Board members who had acted in an investigatory capacity could later act as adjudicators. Indeed, in Newfoundland Telephone, Cory J. [at page 644] held that even when the Board at issue in that appeal was required to abide by the reasonable apprehension of bias standard, the standard "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."

61 By contrast, the Canadian Human Rights Tribunal is vested with no policy functions or with dual functions: it is simply charged with the adjudication of human rights complaints. Accordingly, unlike Newfoundland Telephone, there is no statutory authority for the proposition that Parliament specifically [page251] envisaged that members of the Canadian Human Rights Tribunal would have engaged in policy-making functions with regard to the very same issues that they would later be asked to adjudicate.

CONCLUSION ON BIAS

62 In my view, the Motions Judge erred when he concluded that Ms. Devins was subject to a reasonable apprehension of bias. I would set aside his decision, and remit the matter to the Canadian Human Rights Tribunal.

2. Was the Motions Judge correct in holding that, if there was a reasonable apprehension of bias, the Tribunal could continue with the hearing?

63 In the event I am wrong on the first issue it is necessary to deal with the second issue: namely, whether the Motions Judge erred by concluding that even though Ms. Devins was subject to a reasonable apprehension of bias, the remaining member of the Tribunal could continue to determine the as-yet undetermined complaint at issue before the Canadian Human Rights Tribunal.

64 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.

65 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 [page252] 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 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.

66 My conclusions are supported by Cory J.'s reasons in R. v. S. (R.D.), where he held:

> If a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision. See Newfoundland Telephone, supra, at p. 645; see also Curragh, supra, at para. 6. Thus, the mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from other words or conduct of the judge. In the context of an application to disqualify a judge from sitting in a particular lawsuit, it has been held that where there is a reasonable apprehension of bias, "it is impossible to render a final decision resting on findings as to credibility made under such circumstances."[76]

CONCLUSION

67 I would allow the appeal, with costs and set aside the order of the Motions Judge dated April 13, 1999 and remit the matter back to the Tribunal for completion of the hearing.

ISAAC J.A.:-- I agree.
ROBERTSON J.A.:-- I agree.

1 R.S.C. 1970, c. C-34.

2 By the time the Supreme Court heard Mr. Zündel's appeal, s. 177 of the Criminal Code had been renumbered to s. 181 [of the Criminal Code, R.S.C., 1985, c. C-46].

3 [1992] 2 S.C.R. 731, at p. 778, per McLachlin J. (as she then was).

4 R.S.C., 1985, c. H-6.

5 Appeal Book, at p. 74.

6 Zündel v. Citron, [1999]3 F.C. 409 (T.D.), at p. 421.

7 Ibid.

8 Ibid.

9 Ibid.

10 Ibid. (emphasis in original).

11 Ibid. (emphasis in original).

12 Ibid.

13 Ibid., at p. 422.

14 Ibid.

15 The Motions Judge never specifically identified the provision of the Canadian Human Rights Act on which he relied.

16 [1997] 3 S.C.R. 484.

17 Ibid., at p. 530.

18 Ibid., at p. 531.

19 [1990] 3 S.C.R. 892.

20 Ibid., at p. 934.

21 Ibid., at p. 935.

22 S. 177 (which was later renumbered to s. 181) stated that "[e]very one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for two years" (emphasis added).

23 (1994), 21 O.R. (3d) 356 (Div. Ct.).

24 R.S.O. 1990, c. P.15.

25 Dulmage, supra, note 23, at p. 360.

26 Ibid.

27 Ibid., at p. 361.

28 Ibid., at p. 363 (emphasis added).

29 Ibid., at p. 365.

30 [1998] H.L.J. No. 52 (QL).

31 [1998] H.L.J. No. 41 (QL).

32 Pinochet, Ugarte, Re, supra, note 30, at para. 30.

33 Ibid., at para. 37 (emphasis added).

34 Ibid., at para. 40.

35 Ibid.

36 Ibid. (emphasis added).

37 R. v. S. (R.D.), supra, note 16, at p. 531 (emphasis in original).

38 Ibid., at p. 532.

39 Ibid., at p. 531.

40 Ibid., at p. 532.

41 [1997] 2 F.C. 527 (C.A.).

42 Ibid., at p. 542.

43 (1995), 23 O.R. (3d) 257 (C.A.), application for leave to appeal to S.C.C. dismissed August 17, 1995 [[1995] 3 S.C.R. vi].

44 Ibid., at p. 267.

45 [1996] 5 W.W.R. 690 (B.C.C.A).

46 Ibid., at p. 704.

47 R. v. S. (R.D.), supra, note 16, at p. 528.

48 Ibid.

49 Ibid.

50 Ibid.

51 R. v. Zündel, supra, note 3, at p. 743.

52 Ibid., at p. 779.

53 Ibid., at p. 781.

54 Zündel, supra, note 6, at p. 422.

55 Ibid.

56 Ibid.

57 Dulmage, supra, note 23, at p. 365.

58 (1992), 94 D.L.R. (4th) 339 (B.C.C.A.).

59 Ibid., at p. 349.

60 (1990), 93 A.L.R. 435 (A.H.C.).

61 Ibid., at p. 445.

62 In his dissenting reasons, Moldaver J. appeared to recognize that no such doctrine exists. He held that "a member need not automatically withdraw solely because of statements made by a representative of an affiliated community organization about issues before the board" (at p. 364). Later in his judgment (at p. 366), he repeated the point, holding:

> Lest there be any doubt about it, I wish to emphasize that mere association, either past or present, on the part of a board member with an organization, which, by its very nature, might be said to favour one side or the other, will not of itself satisfy the test for reasonable apprehension of bias.

63 [1992] 1 S.C.R. 623.

64 Ibid., at p. 638.

65 Ibid.

66 Ibid., at pp. 638-639.

67 Ibid., at p. 639.

68 Ibid., at pp. 642-643.

69 Ibid., at p. 643.

70 Ibid., at p. 644.

71 Human Rights Code, S.O. 1981, c. 53.

72 The Public Utilities Act, R.S.N. 1970, c. 322, ss. 5 (as am. by S.N. 1979, c. 30, s. 1), 14.

73 Ibid., s. 15.

74 Ibid., s. 79.

75 Ibid., s. 85.

76 Supra, note 16, at p. 526.

Indexed as:

Sparvier v. Cowessess Indian Band (T.D.)

Ken Sparvier (Applicant)
v.
Cowessess Indian Band #73, Richard Redman, Muriel Lavallee and Samuel Sparvier (Respondents)

[1993] 3 F.C. 142

[1993] F.C.J. No. 446

Court File No. T-1214-92

Federal Court of Canada - Trial Division

Rothstein J.

Heard: Winnipeg, January 29, 1993.
Judgment: Ottawa, May 12, 1993.

Native peoples -- Elections -- Election appeal tribunal constituted under Cowessess Indian Reserve Elections Act overturning election of applicant as Chief, calling new election because some candidates not meeting Act's residency requirement -- Act requiring election of appeal tribunal members prior to nomination meeting -- Even assuming not so elected, tribunal validly constituted as provision directory in context of Act -- Candidates' residency within tribunal's jurisdiction -- Only tribunal established by Act to deal with contraventions -- Residency requirement must be enforceable to have meaning -- Act providing election practice ground of appeal -- "Election practices" including eligibility to be candidate.

Judicial review -- Prerogative writs -- Certiorari -- Appeal tribunal established pursuant to Cowessess Indian Reserve Elections Act overturning election of Band Chief, calling new election because some candidates not meeting Act's residency requirement -- Principles of natural justice apply to tribunal's proceedings -- Breached rules of natural justice because of one member's admitted bias, very short notice of proceedings, not permitting applicant to be present during submissions of others -- Doctrine of necessity may apply if Court lacking jurisdiction to direct establishment of new appeal tribunal.

Federal Court jurisdiction -- Trial Division -- Within Court's jurisdiction to review decision of

election appeal tribunal created under Cowessess Indian Reserve Elections Act as federal board -- Unclear whether Court having jurisdiction to direct establishment of new appeal tribunal.

This was an application to quash the decision of an election appeal tribunal nullifying the election of Band Chief and directing that a new election take place. On April 24, 1992 the applicant was elected Band Chief. One of the unsuccessful candidates appealed the results. An appeal tribunal established [page143] pursuant to the Cowessess Indian Reserve Elections Act decided to call a new election on the ground that two of the five candidates (not the applicant) failed to meet the residency requirement of the Act. In the second election another candidate was elected. The applicant submitted that the Appeal Tribunal was not properly constituted. Appeal Tribunal members and alternates were proposed and agreed upon by Band Council on March 2, 1992. The nomination meeting was held April 3. They were confirmed on April 16. Cowessess Indian Reserve Elections Act, paragraph 6(4)(a) provides that the Tribunal will be elected before the nomination meeting. The applicant argued that the Appeal Tribunal was not constituted until April 16, or after the nomination meeting and therefore was not in conformity with paragraph 6(4)(a). The applicant also submitted that it was not within the Appeal Tribunal's jurisdiction to rule on residency because residency did not fall within the grounds for appeal set out in subsection 6(2), i.e. was not an election practice or an illegal, corrupt or criminal practice. It was submitted that the Appeal Tribunal's jurisdiction was intended to cover procedural matters in the course of an election only. Finally, the applicant submitted that the Appeal Tribunal committed a number of procedural errors. He alleged that a member of the Appeal Tribunal made negative remarks about him during the Appeal Tribunal's proceedings, creating a reasonable apprehension of bias with respect to the proceedings and decision of the Tribunal. Another member of the Tribunal rented farmland to the applicant before the Appeal Tribunal, also leading to a reasonable apprehension of bias. The applicant also argued that he was only given one day's notice before the hearing and that this was tantamount to no notice at all, that the hearing was not open and that the nature of the hearing was not clearly disclosed to the parties.

Held, there was a denial of procedural fairness, but the order requested should not issue pending submissions on the issue of remedy.

The Federal Court had jurisdiction over the subject-matter of this application. For the Court to have jurisdiction, it must be shown that the decision to be reviewed was made by a "federal board, commission or other tribunal" as defined in section 2 of the Federal Court Act An Indian band council elected pursuant to customary Indian law is a federal board as is one elected pursuant to the Indian Act Again, an appeal tribunal elected pursuant to customary Indian law is a federal board. The Appeal Tribunal derived its power from band custom, including the Cowessess Indian Reserve Elections Act.

The Appeal Tribunal was validly constituted. The provision requiring that it be elected before the nomination meeting is, in the context of the Act, directory, not mandatory and non-compliance did

not result in the Appeal Tribunal not being properly constituted. Nor did non-compliance invalidate the election process or the actions or orders of the Appeal Tribunal. The main object of the Cowessess Indian Reserve Elections Act is to provide the mechanism to elect a chief and Band Council in [page144] accordance with Band custom. An Appeal Tribunal is elected before the nomination meeting so that it will be in place throughout the election process to deal with election practices or illegal, corrupt or criminal practices of candidates and so that its members will at an early stage avoid becoming involved in a partisan way in the election. Neither reason is of such overriding importance that non-compliance with the timing requirement of paragraph 6(4)(a) should result in the actions of an Appeal Tribunal elected after a nomination meeting being of no legal effect. Invalidating the actions of an Appeal Tribunal solely because it was elected after the nomination date could well work a serious inconvenience or injustice to the members of the Band who have no control over those entrusted with ensuring compliance with the Act.

The question of residency of candidates was within the Appeal Tribunal's jurisdiction under subsection 6(2). The Appeal Tribunal is the only tribunal established by the Act to deal with contraventions of the Act. If the Appeal Tribunal cannot deal with the issue, then a non-resident, if nominated, could become a councillor or chief contrary to the Act. If the residency requirement is to be given meaning, it must be enforceable. The Appeal Tribunal process is the means which the Act has established for enforcing this requirement. The term "election practices" includes the question of eligibility to be a candidate for election. For a non-resident to stand for nomination would amount to a practice that was illegal as it would be contrary to the Act.

While the political movement of the Aboriginal People to take more control over their own lives should not be quickly interfered with by the courts, band members are individuals who are entitled to due process and procedural fairness on the part of tribunals the decisions of which affect them. To the extent that the Federal Court has jurisdiction, the principles of natural justice and procedural fairness apply. Whether the Appeal Tribunal is acting judicially, quasi-judicially or administratively, a fair hearing including an unbiased tribunal, notice and the opportunity to make representations was essential.

The Appeal Tribunal did not follow the basic rules of procedural fairness. Members of an Appeal Tribunal are not popularly elected, but are selected by the Band Council. Absent compelling reasons, more rigorous, rather than a less strict application of the reasonable apprehension of bias test is desirable, but on the facts, even a more lenient application of the test lead to the same result. The evidence was clear that one of the Appeal Tribunal members was actually biased with respect to the applicant. That that member did not vote did not resolve the matter. A reasonable apprehension of bias in one member is sufficient to disqualify the whole tribunal, even though that member merely sat at the hearing without taking an active role in either it or subsequent deliberations. In the case at bar, the biased member had taken an active role in the proceedings prior to resigning because of his bias. A reasonably informed [page145] bystander would perceive bias on the part of the Appeal Tribunal as a result of the biased member's admitted position -- to oust the applicant -- and his participation in the Appeal Tribunal's proceedings. This fatally affected the

proceedings and the decision of the Appeal Tribunal.

The Band was not large. It would not be realistic to expect members of the Appeal Tribunal, if they are residents of the reservation to be completely without social, family or business contacts with a candidate in an election. If a rigorous test for reasonable apprehension of bias were applied, the membership of decision-making bodies such as the Appeal Tribunal, in bands of small populations could constantly be challenged on grounds of bias, frustrating the election process and endangering the process of autonomous elections of band governments. The issues raised herein call attention to these questions of policy.

The very short notice period raised several concerns: (a) relevant persons may not be available; (b) there was practically no time to investigate the facts relating to the subject-matter of the appeal; (c) it was unreasonable to expect the participants to adequately organize and prepare their representations. That the applicant had actual notice and attended the proceedings did not detract from the disadvantageous situation of having to proceed without an adequate opportunity to investigate the matter and prepare representations. The applicant's participation represented neither genuine consent to the proceedings nor waiver of his right to adequate notice.

To deny the applicant, whose position as Chief Elect was at stake before the Tribunal, the right to be present during the submissions of others raised the question of whether he was able to know the case to be met, another basic requirement of procedural fairness.

If the Appeal Tribunal's decision were quashed without anything further, the results of the April 24 election would be reinstated. The Court, for procedurally technical reasons, instead of Band members, would be determining who should be Chief. An appeal validly filed with the Appeal Tribunal, the question of residency of candidates, and the validity of the April 24 election would remain undetermined. Such unsatisfactory results might be avoided by referring the matter back to a differently constituted Appeal Tribunal. The Court, being unclear as to its jurisdiction to direct the establishment of a new Appeal Tribunal, no order would be issued until the question of remedy is addressed by counsel. If the Court lacks jurisdiction, this may be a case to which the doctrine of necessity would apply.

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Statutes and Regulations Judicially Considered

Federal Court Act, R.S.C., 1985, c. F-7, ss. 2 (as am. by S.C. 1990, c. 8, s. 1), 18 (as am. idem, s. 4), 18.1 (as enacted idem, s. 5).
Indian Act, R.S.C. 1970, c. I-6.
The Indian Act, S.C. 1951, c. 29.

Cases Judicially Considered

Applied:
Gabriel v. Canatonquin, [1978] 1 F.C. 124 (T.D.); affd [1980] 2 F.C. 792; [1981] 4 C.N.L.R. 61 (C.A.).
Montreal Street Railway Company v. Normandin, [1917] A.C. 170 (P.C.).
Apsassin v. Canada (Department of Indian Affairs and Northern Development), [1988] 3 F.C. 20; [1988] 1 C.N.L.R. 73; (1987), 14 F.T.R. 161 (T.D.).
Simpson v. Attorney-General, [1955] N.Z.L.R. 271 (S.C.); affd [1955] N.Z.L.R. 276 (C.A.).
Lakeside Colony of Hutterian Brethren v. Hofer, [1992] 3 S.C.R. 165; (1992), 142 N.R. 241.
Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311; (1978), 88 D.L.R. (3d) 671; 78 CLLC 14,181; 23 N.R. 410.
Martineau v. Matsqui Institution Disciplinary Board, [1980] 1 S.C.R. 602; (1979), 106 D.L.R. (3d) 385; 50 C.C.C. (2d) 353; 15 C.R. (3d) 1 (Eng.); 15 C.R. (3d) 315 (Fr.); 30 N.R. 119.
Cardinal et al. v. Director of Kent Institution, [1985] 2 S.C.R. 643; (1985), 24 D.L.R. (4th) 44; [1986] 1 W.W.R. 577; 69 B.C.L.R. 255; 16 Admin. L.R. 233; 23 C.C.C. (3d) 118; 49 C.R. (3d) 35; 63 N.R. 353.
Rex v. Sussex Justices Ex parte McCarthy, [1924] 1 K.B. 256.
Committee for Justice and Liberty et al. v. National Energy Board et al., [1978] 1 S.C.R. 369; (1976), 68 D.L.R. (3d) 716; 9 N.R. 115.
Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623; (1992), 95 Nfld. & P.E.I.R. 271; 4 Admin. L.R. (2d) 121; 134 N.R. 241.
Regina v. Ont. Labour Relations Bd., Ex p. Hall, [1963] 2 O.R. 239; (1963), 39 D.L.R. (2d) 113; 63 C.L.L.C. 15,478 (H.C.).
Haight-Smith v. Kamloops School District No. 34 (1988), 51 D.L.R. (4th) 608; [1988] 6 W.W.R. 744; (1988), 28 B.C.L.R. (2d) 391; 30 Admin. L.R. 298 (C.A.).
Kane v. Board of Governors (University of British Columbia), [1980] 1 S.C.R. 1105; (1980), 110 D.L.R. (3d) 311; [1980] 3 W.W.R. 125; 18 B.C.L.R. 124; 31 N.R. 214.

Considered:
Szilard v. Szasz, [1955] S.C.R. 3; [1955] 1 D.L.R. 370.

Referred to:
Trotchie v. The Queen et al., [1981] 2 C.N.L.R. 147 (F.C.T.D.).
Beauvais v. R., [1982] 1 F.C. 171; [1982] 4 C.N.L.R. 43 (T.D.).
Rider v. Ear (1979), 103 D.L.R. (3d) 168; [1979] 6 W.W.R. 226; [1979] 4 C.N.L.R. 119 (Alta. T.D.).

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Mullan, David. Administrative Law, 2nd ed.
Wade, H. W. R. Administrative Law, 6th ed. Oxford: Clarendon Press, 1988.

APPLICATION to quash the decision of an election appeal tribunal pursuant to the Cowessess Indian Reserve Elections Act nullifying election of Band Chief and directing that a new election take place. The tribunal acted unfairly, but its decision was not to be quashed pending submissions on the issue of remedy.

Counsel:

Marusia A. Kobrynsky and C. Mervin Ozirny, for the applicant. Orest Rosowsky, for the respondents.

Solicitors:

Ozirny, Fisher, Bell & Matthews, Melville, Saskatchewan, for the applicant. Rosowsky & Campbell, Kamsack, Saskatchewan, for the respondents.

The following are the reasons for order drendered in English by

1 ROTHSTEIN J.:-- This is an application made pursuant to section 18 of the Federal Court Act, R.S.C., 1985, c. F-7 as amended, for an order quashing, and seeking ancillary relief from, the decision dated May 5, 1992 made by an election appeal tribunal pursuant to the Cowessess Indian Reserve Elections Act (the Act). The decision nullified the result of a band election held on April 24, 1992, for Chief of the Band and directed that a new election take place. In addition, the applicant also seeks an order declaring invalid and setting aside the result of the re-election for the office of Chief held pursuant to the said decision.

SUMMARY OF FACTS

2 The Cowessess Indian Reserve Elections Act, along with other non-codified customs and traditions, govern elections for Band Chief and Councillors of the Cowessess Band. Such elections are to be held every three years. On April 24, 1992, an election was held in which the applicant, Ken Sparvier, was the [page148] successful candidate. One of the unsuccessful candidates, Terry Lavallee, appealed the election to an appeal tribunal established pursuant to the Act on the grounds that two of the five candidates in the election (not Mr. Sparvier or himself) were non-residents and were therefore ineligible candidates. The Appeal Tribunal conducted a hearing on May 5, 1992, and

decided to call a new election which was held on May 22, 1992. In the second election Terry Lavallee was the successful candidate. Following the decision of the Appeal Tribunal on May 5, 1992, the applicant commenced proceedings in the Court of Queen's Bench of Saskatchewan challenging the Appeal Tribunal, its procedures and the decision it made. That Court held that it did not have jurisdiction to hear the application. The applicant subsequently filed this application in the Federal Court of Canada.

PRELIMINARY MOTIONS

3 At the outset of this hearing, counsel for the applicant moved to add Terry Lavallee as a respondent. Counsel said this was necessary due to her desire to seek a declaration that Mr. Lavallee is illegally acting as Chief of the Band and an injunction enjoining him from exercising any authority or performing any duties as Chief of the Band.

4 Counsel for the respondents acknowledged that if the order of the Court resulted in a quashing of the decision of the Appeal Tribunal, it was likely that everything following from such decision would have no legal effect, including the subsequent election in which Mr. Lavallee was elected Chief.

5 After hearing argument, I denied this preliminary motion. In my opinion if an order were to issue quashing the decision of the Appeal Tribunal, and Mr. Lavallee did not voluntarily relinquish the position of Chief, a subsequent application could be brought seeking the appropriate order to ensure that the order quashing the decision of the Appeal Tribunal would be effective. I indicated to counsel that I would consider remaining seized of the matter for that purpose.

6 A second preliminary motion was made by counsel for the respondents and related to the submission by counsel for the applicant that the Appeal Tribunal [page149] was not properly constituted. Specifically, counsel for the respondents argued that the issue of the constitution of the Appeal Tribunal required the calling of viva voce evidence. He submitted there were discrepancies in the affidavit evidence between the applicant and the respondents and that the only way to resolve such discrepancies would be by way of oral evidence. He therefore sought an order that the application be treated as an action and that evidence be heard on this and other issues.

7 Counsel for the applicant submitted that there was evidence as to how the Appeal Tribunal was constituted in 1989 which gave an indication of the customs and tradition relating to this matter. Therefore the affidavit evidence before the Court was sufficient.

8 I decided to reserve my decision on this matter and directed the parties to argue the matter on the basis of the written material. I indicated that, if necessary, the calling of viva voce evidence could be considered subsequently. In view of my decision in respect of the constitution of the Appeal Tribunal, it is not necessary that viva voce evidence on custom and tradition be called on that issue and the motion of the respondents is therefore denied.

JURISDICTION OF THE FEDERAL COURT

9 On May 19, 1992, Mr. Sparvier made an application to the Court of Queen's Bench of Saskatchewan to quash the decision of the Appeal Tribunal. Mr. Justice McLean of that Court ruled that the Federal Court of Canada had exclusive jurisdiction to deal with the subject-matter of the application and declined jurisdiction on that basis.

10 The parties have agreed that this Court has jurisdiction to decide this matter. However, because jurisdiction cannot be conferred by consent, I will set forth my reasons as to why I have concluded that this Court has such jurisdiction.

11 By Order in Council P.C. 6016, dated November 12, 1951 [SOR/51-529], it was declared that the Cowessess Indian Band No. 73 would conduct its elections for Chief and Band Councillors in accordance with the provisions of the The Indian Act [S.C. 1951, c. 29]. In or about 1980, the Cowessess Band [page150] adopted the "Cowessess Indian Reserve Elections Act" which codified, at least to some extent, the Band's customs as the basis for selecting a chief and councillors. This reversion to Band custom was approved by the federal government on the 10th day of November, 1980, when Order in Council P.C. 6016 was amended by deleting from the Schedule thereto, the Cowessess Band of Indians. The effect of this deletion was that members of the Cowessess Band would no longer select their Chief and Councillors pursuant to the Indian Act [R.S.C. 1970, c. I-6] but rather, according to the custom of their Band. As a result, the Cowessess Indian Reserve Elections Act enacted by the Cowessess Indian Band No. 73 now governs the election of chief and councillors.

12 This application was brought pursuant to section 18 [as am. by S.C. 1990, c. 8, s. 4] of the Federal Court Act In order for the Court to have jurisdiction, it must be shown that the decision being reviewed is one made by a "federal board, commission or other tribunal" as defined in section 2 [as am. idem, s. 1] of the Federal Court Act Section 2 states:

> 2. ...
>
> "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867.

13 It is well settled that for purposes of judicial review, an Indian band council and persons purporting to exercise authority over members of Indian bands who act pursuant to provisions of the Indian Act constitute a "federal, board, commission or other tribunal" as defined in section 2 of the

Federal Court Act See Trotchie v. The Queen et al., [1981] 2 C.N.L.R. 147 (F.C.T.D.); Beauvais v. R., [1982] 1 F.C. 171 (T.D.); Rider v. Ear (1979), 103 D.L.R. (3d) 168 (Alta. T.D.). Gabriel v. Canatonquin, [1978] 1 F.C. 124 (T.D.); affd [1980] 2 F.C. 792 (C.A.), decided that an Indian band council came within the jurisdiction of the Federal Court where the election of the band council was pursuant to band custom and [page151] not the Indian Act Pratte J.A., in writing for the Court, stated at page 793:

> We are all of the view that the judgment below [[1978] 1 F.C. 124] correctly held that the council of an Indian band is a "federal board" within the meaning of section 2 of the Federal Court Act ... .
>
> We see no merit in the appellants' contention that the Trial Division does not have jurisdiction because the only issue raised by the action, namely the validity of the election of the defendants to the Council of the Band, is governed by customary Indian law and not by a federal statute.

14 If Gabriel v. Canatonquin is correct and a council of a band, elected pursuant to customary Indian law, is a federal board in the same manner as would be the case had it been elected pursuant to a federal statute such as the Indian Act, then an appeal tribunal, elected pursuant to customary Indian law would, by similar logic, be a federal board.

15 The Appeal Tribunal in this case derives its power from band custom including the Cowessess Indian Reserve Elections Act. Applying Gabriel v. Canatonquin, the Appeal Tribunal is a federal board. This Court thus has jurisdiction to decide this application.

16 I now turn to the substantive matters before me.

CHRONOLOGY OF EVENTS

March 2, 1992 --

> Special meeting of Band Council.
>
> Electoral Officer and Deputy Electoral Officer appointed.
>
> Nomination date of April 3, 1992 set.
>
> Appeal Tribunal members and alternates proposed and agreed upon by Band Council. The members were to be Clifford Lerat, Bob Stevenson and Maryanne Lavallée. If any of these persons did not wish to participate, Muriel Lavallée

and/or Sam Sparvier would be asked.

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April 3, 1992 --

Nomination date.

April 16, 1992 --

Regular meeting of Band Council.

Appeal Tribunal members and alternate confirmed. Members were Sam Sparvier, Maryanne Lavallée and Muriel Lavallée. The alternate was Clifford Urat.

April 24, 1992 --

Election for Chief and Councillors held. Results of the election:

Ken Sparvier	137
Terry Lavallée	121
Reynold Delorme	86
Theresa Stevenson	67
Tony Sparvier	17

Total:	408

April 30, 1992 --

Notice of appeal to Appeal Tribunal filed by Terry Lavallée.

May 4, 1992 --

Recount of ballots.

Notice by Appeal Tribunal that hearing would be held on appeal of Terry Lavallée on May 5, 1992.

May 5, 1992 --

Hearing of Appeal Tribunal.

May 19, 1992 --

Applicant applies to Court of Queen's Bench for relief. Court of Queen's Bench declines jurisdiction.

May 22, 1992 --

Second election held. Results of this election:

Terry Lavallée	220
Ken Sparvier	106
Theresa Stevenson	21

Total:	347

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ANALYSIS

1. Constitution of the Appeal Tribunal

17 The first substantive argument of the applicant was that the Appeal Tribunal was not properly constituted. Counsel for the applicant submitted that the Cowessess Indian Reserve Elections Act contains provisions which reflect certain customs and traditions of the Band respecting elections. In particular, I was referred to paragraph 6(4)(a) of the Act which states:

6. (4) A Tribunal will rule on whether to allow or disallow an appeal hearing.

(a) The Tribunal will be elected before the nomination meeting and will consist of persons from the Cowessess Reserve membership.

18 In this case, the nomination meeting was held on April 3, 1992, but the Appeal Tribunal referred to in paragraph 6(4)(a) was not, in the submission of counsel for the applicant, constituted until April 16, 1992. Counsel for the applicant argued that since the Appeal Tribunal was elected after the nomination meeting, it was not constituted in conformity with paragraph 6(4)(a) and had no legal status. Although counsel for the applicant acknowledged that the Act was not a "code" and should not be considered to be a comprehensive enactment governing all matters to do with the

election of Chief and Councillors of the Band, she argued that it was specific with respect to the Appeal Tribunal and, in particular, that the Appeal Tribunal must be constituted before the nomination meeting.

19 Counsel for the applicant submitted that the reason for this timing requirement in the Act was to avoid members of the Band becoming involved, in a partisan way, at a nomination meeting and then being selected for what was supposed to be an impartial Appeal Tribunal to deal with election irregularities. Applicant's counsel also acknowledged that the timing in paragraph 6(4)(a) of the Act may be necessary in order for the Appeal Tribunal to be in place to deal with any election irregularity that takes place through the entire election process including the nomination process.

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20 Counsel for the respondents submitted that if the Appeal Tribunal had not been properly constituted, then the first election itself would have no legal effect since an integral part of the election process had not been properly established.

21 The members of the Appeal Tribunal had been proposed and agreed upon by the Band Council at its meeting on March 2, 1992. The membership and alternate member of the Tribunal were confirmed on April 16, 1992. While I think a good argument could be made that the members were "elected" on March 2, 1992, before the nomination meeting, I will, for the purposes of this decision, assume that they were not and that there was not formal compliance with paragraph 6(4)(a) of the Act.

22 Essentially, the question with which I must deal is whether the non-compliance with paragraph 6(4)(a) of the Cowessess Indian Reserve Election Act has the effect of invalidating the actions taken by the Appeal Tribunal. This raises the issue of whether paragraph 6(4)(a) is mandatory or merely directory.

23 The leading case in this area of the law is the decision of the House of Lords in Montreal Street Railway Company v. Normandin, [1917] A.C. 170 (P.C.). In that case, it was claimed that a jury verdict should be set aside due to the failure of the sheriff to update the voters list from which were taken prospective members of juries. At pages 174 and 175, Sir Arthur Channel for the House of Lords stated:

> It is necessary to consider the principles which have been adopted in construing statutes of this character, and the authorities so far as there are any on the particular question arising here. The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected

> in Maxwell on Statutes, 5th ed., p. 596 and following pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, [page155] though punishable, not affecting the validity of the acts done. [Emphasis mine.]

24 In the case of Apsassin v. Canada (Department of Indian Affairs and Northern Development), [1988] 3 F.C. 20 (T.D.), Addy J., after adopting the passage from Montreal Street Railway quoted above, stated at page 71 of his decision:

> Examination of the object of the statute reveals that a decision which would render the surrender null and void solely because of non-compliance with the formalities of subsection 51(3) would certainly not promote the main object of the legislation where all substantial requirements have been fulfilled; it might well cause serious inconveniences or injustice to persons having no control over those entrusted with the duty of furnishing evidence of compliance in proper form. In the subsection, unlike subsection (1), where it is provided that unless it is complied with no surrender shall be valid or binding, there is no provision for any consequences of non-observance. I therefore conclude that the provisions of subsection 51(3) are merely directory and not mandatory.

25 The Montreal Street Railway decision was also cited in Simpson v. Attorney-General, [1955] N.Z.L.R. 271 (S.C.); affd [1955] N.Z.L.R. 276 (C.A.). That case involved the question of whether the Parliament of New Zealand was properly constituted in light of the writs for election apparently not being made returnable within the time designated by the relevant legislation. At page 275, Barrowclough C.J. stated:

> The main object of that Act I conceive to be to sustain, and not to destroy the House of Representatives; and I am satisfied that those provisions of s. 101 which relate to the times when the warrant and the writs shall be issued are directory and not mandatory; and that neglect to take, within the specified times, the several steps there directed cannot invalidate the election.

26 The main object of the Cowessess Indian Reserve Elections Act is to provide the mechanism to elect a Chief and Band Council in accordance with Band custom. The Appeal Tribunal is to be elected to deal with election practices or illegal, corrupt or criminal practices of candidates as more particularly set forth in subsection 6(2) of the Act:

[page156]

> 6. (2) Grounds for an appeal are restricted to:
>
> (a) Election practices which contravene this Act.
> (b) Illegal, corrupt or criminal practice on the part of the candidate which might discredit the high integrity of the Indian Government of Cowessess Reserve.

27 In my view, an important reason for electing the Appeal Tribunal before the nomination meeting is that it will be in place throughout the election process to deal with the matters over which it has jurisdiction. Another reason for it being constituted before the nomination meeting may be that its members will, at an early stage, avoid becoming involved in a partisan way in the election. Neither reason, however, suggests that the timing of the election of the Appeal Tribunal is of such overriding importance that non-compliance with the timing requirement of paragraph 6(4)(a) should result in the actions of an appeal tribunal elected after a nomination meeting being of no legal effect.

28 In my opinion, if the Tribunal is not elected until some portion of the election process has taken place, it may still deal with appeals once it is constituted. If any member finds that he or she has become aligned with a candidate in such a manner as to raise a reasonable apprehension of bias, he or she should not accept election to the Appeal Tribunal.

29 Invalidating the actions of an appeal tribunal solely because it was elected after the nomination date could well work a serious inconvenience or injustice to the members of the Band who have no control over those entrusted with ensuring compliance with the Act. I am satisfied that the provision requiring that the Appeal Tribunal be elected before the nomination meeting is, in the context of the Act, directory and not mandatory, and that non-compliance does not result in the Appeal Tribunal not being properly constituted. Nor does non-compliance invalidate the election process or the actions or orders of the Appeal Tribunal.

2. Excess of Jurisdiction -- Residency

30 In this case, the Appeal Tribunal found that the election of April 24, 1992, in which the applicant was [page157] elected Chief was invalid because two of the five candidates failed to meet the residency qualification of the Act. The Tribunal's decision states:

> (1) To the best of our ability and in reference to the stipulations as outlined in the Cowessess Band Election Act [sic] we find that the candidates for the position of Chief, namely Reynold Delorme and C. Tony Sparvier fail to meet the definition of the term "resident" as stated in the Cowessess Band Election Act [sic]. Therefore it is the decision of the Tribunal that these two individuals names

> be deleted from the ballot and that a re-election for the position of Chief be held with the remaining candidates names intact on the new ballot. The office of Chief will remain vacant until the results of such election become evident. This re-election to be scheduled and held at the earliest possible date to be set by the Electorial [sic] Officer.

31 The issue of residency is dealt with in subsection 2(7) of the Act. It states:

> 2. (7) All Candidates for Chief and Councillors must file nomination documentation to show non-conflict of interests. Candidates must be a resident of the Reserve for a period of one year before nomination.

32 Counsel for the applicant submitted that a ruling on residency did not fall within the jurisdiction of the Appeal Tribunal because this issue did not constitute an election practice or an illegal, corrupt or criminal practice referred to in subsection 6(2) of the Act. It was submitted that the jurisdiction of the Appeal Tribunal was narrowly circumscribed in subsection 6(2) and was intended to cover procedural matters in the course of an election only. Further, it was submitted that the issue of residency is unclear as resident or residency is not defined in the Act. Finally, it was said that it could not be reasonably argued that the candidates whose residency was being challenged, had participated in any illegal, corrupt or criminal practice.

33 Counsel for the respondents argued that the two candidates whose residency was questioned signed a consent to nomination, declaring that to the best of their knowledge and belief, they were legally qualified to be nominated, elected and to hold the office of Chief. He submitted that the process of being nominated and consenting to nomination was an election practice and that, in declaring that they were legally [page158] qualified to be nominated, these candidates mis-stated the facts with respect to their residency. Accordingly, it was within the jurisdiction of the Appeal Tribunal to deal with the matter.

34 My consideration of the Act has caused me to conclude that the Appeal Tribunal did not exceed its jurisdiction in respect of its decision regarding residency. The Appeal Tribunal is the only tribunal established by the Act to deal with contraventions of the Act. It is given the power to uphold the election or order a new election. Subsection 6(7) of the Act states:

> 6. (7) The decision of the group (6.6) will represent the final decision regarding the election. The hearing may:
>
> (a) Uphold the election.
> (b) Order a new election for the position(s) appealed only.

35 Counsel for the applicant urges an interpretation of the terms "election practices" or "illegal practices" in subsection 6(2) that would focus only on those matters related to election procedures.

This would exclude the issue of residency which, in her submission, is a question of the eligibility of candidates to run for office and not election procedures.

36 I cannot agree with this distinction. Although I follow the interpretive approach she suggests, she has provided no rationale that would explain why the drafters of the Act intended to exclude the question of residency from the jurisdiction of the Appeal Tribunal. The Act has no other provision dealing with non-residency of candidates. If the Appeal Tribunal cannot deal with the issue, it would follow that a non-resident, if nominated, could become a councillor or chief contrary to the Act.

37 Counsel for the applicant argued that the time to raise such an issue would be at a nomination meeting. However, persons voting at a nomination meeting must still comply with the provisions of the Act. If the residency requirement is to be given meaning, the requirement must be one that can be enforced. It seems to me that the Appeal Tribunal process is the means which the Act has established for enforcing this requirement.

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38 In my view, the term "election practices" includes the question of eligibility to be a candidate for election. Further, for a non-resident to stand for nomination would amount to a practice that was illegal in that it would be contrary to subsection 2(7) of the Cowessess Indian Reserve Elections Act. As such, I conclude that the question of residency of candidates is within the jurisdiction of the Appeal Tribunal under subsection 6(2) of the Act.

39 The Act does not define residency. However, this in itself does not preclude the Appeal Tribunal from dealing with the issue. The Courts are regularly faced with the necessity of interpreting words that are not defined in relevant legislation.

3. Procedural Errors

40 Counsel for the applicant submitted that the Appeal Tribunal committed a number of procedural errors. First, it was alleged that a member of the Appeal Tribunal, Clifford Lerat, made negative remarks about the applicant during the Appeal Tribunal's proceedings. Although Mr. Lerat did not participate in the vote of the Appeal Tribunal, it was submitted that his presence and comments created an apprehension of bias with respect to the proceedings and decision of the Tribunal. In addition, counsel for the applicant argued that Muriel Lavallee, another member of the Tribunal, rented farmland to Terry Lavallee, the applicant before the Appeal Tribunal. It was submitted that this also led to a reasonable apprehension of bias. Finally, on the question of bias, it was argued that a residency issue with respect to the election of one of the councillors was raised before the Appeal Tribunal but that this was never dealt with by the Tribunal.

41 Applicant's counsel also submitted that there was no evidence before the Tribunal upon which it could rule on the residency of candidates. She therefore said that the Tribunal must have ruled on the basis of information not before it.

42 Applicant's counsel also argued that the applicant was given only one day's notice before the hearing and that this was tantamount to no notice at all, that the hearing was not an open one, and that the nature [page160] of the hearing itself was not clearly disclosed to the parties. She therefore argued that even if the Tribunal had been properly constituted and had ruled within its jurisdiction, its procedures were so tainted that the decision could not stand in any event.

43 With respect to Mr. Lerat's presence, respondents' counsel argued that there was no evidence that he affected the decision of the Appeal Tribunal. As to Muriel Lavallee, respondents' counsel argued that because of the small size of bands, and the fact that in many cases, a band consists of only a few families, no procedure could be held without some relationship creating an apprehension of bias and that if such rule were strictly applied, it would run counter the trend toward increased Indian self-government.

44 On the question of notice, respondents' counsel submitted that there was no indication of any complaint by the applicant that he had not been given adequate notice and that the applicant did attend the meeting of the Appeal Tribunal and made submissions. Counsel for the respondents also said that the applicant knew that residency was the issue because the night before the meeting, he had questioned whether the Appeal Tribunal had jurisdiction to deal with the issue.

45 It was submitted by respondents' counsel that the Appeal Tribunal's proceedings were conducted in accordance with Band custom. Richard Redman, the Electoral Officer for the Band, stated at paragraph 24 of his affidavit:

> 24. THE procedure followed by the Tribunal at the hearing was in accordance with Band custom.

Respondents' counsel takes the position that because the procedure of the Appeal Tribunal was in accordance with Band custom, the degree of natural justice or procedural fairness owed to the applicant is minimal. To hold otherwise, it was said, would render nugatory the procedures followed by all other bands in Canada who elect their officials according to their own custom, because the Court would simply be [page161] imposing its rules of procedure in place of customary band procedures.

46 No authority was cited by counsel for the respondents to the effect that the principles of natural justice or procedural fairness are not to be applied in situations where band custom dictates procedures to be followed by band tribunals.

47 While I accept the importance of an autonomous process for electing band governments, in my opinion, minimum standards of natural justice or procedural fairness must be met. I fully

recognize that the political movement of Aboriginal People taking more control over their lives should not be quickly interfered with by the courts. However, members of bands are individuals who, in my opinion, are entitled to due process and procedural fairness in procedures of tribunals that affect them. To the extent that this Court has jurisdiction, the principles of natural justice and procedural fairness are to be applied.

48 In deciding what "principles" should apply to the matter at bar, I have had regard to the Supreme Court of Canada decision in Lakeside Colony of Hutterian Brethren v. Hofer, [1992] 3 S.C.R. 165, where at page 195 of the decision, Gonthier J., for the majority, states:

> The content of the principles of natural justice is flexible and depends upon the circumstances in which the question arises. However, the most basic requirements are that of notice, opportunity to make representations, and an unbiased tribunal. [My emphasis.]

In the case at bar, there is an Appeal Tribunal that is empowered to make decisions affecting elections and the rights of candidates in those elections. Its powers entitle it to uphold an election or order a new election. it has a duty to consider appeals alleging election practices which contravene the Act or illegal, corrupt or criminal practices on the part of candidates.

49 In the material before me, counsel used the terms "natural justice" and "procedural fairness" interchangeably. Since Nicholson v. Haldimand-Norfolk [page162] Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311, it has not been necessary to classify the functions of tribunals as judicial, quasi-judicial or administrative to ascertain whether principles of natural justice are applicable. Nicholson introduced the concept of procedural fairness which applied to all tribunals whether judicial, quasi-judicial or administrative.

50 In Martineau v. Matsqui Institution Disciplinary Board, [1980] 1 S.C.R. 602, Dickson J. (as he then was) in a concurring but separate judgment from the majority, stated at page 629:

> In general, courts ought not to seek to distinguish between the two concepts [natural justice or procedural fairness], for the drawing of a distinction between a duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldy conceptual framework.

At page 630 he stated:

> It is wrong, in my view, to regard natural justice and fairness as distinct and separate standards and to seek to define the procedural content of each.

Accordingly, the terminology I will use in this decision is procedural fairness.

51 I am satisfied that the Appeal Tribunal, in this case, had an obligation to conduct its

proceedings in accordance with rules of procedural fairness. In Cardinal et al. v. Director of Kent Institution, [1985] 2 S.C.R. 643, Le Dain J. stated at page 661:

> 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.

There is no question that the candidates in a band election are affected by a decision of an appeal tribunal. Whether the Appeal Tribunal is considered to be acting judically, quasi-judically or administratively, a fair hearing is essential.

52 Having come to this conclusion, I am of the opinion that the basic requirements set forth by Gonthier J. in Hofer, (supra), are applicable to the Appeal Tribunal of the Cowessess Indian Band No. 73. These [page163] are the requirements of an unbiased tribunal, notice and the opportunity to make representations.

a. Bias

53 The question of bias strikes at the heart of the validity of the Appeal Tribunal's actions. The underlying doctrine with respect to bias is based on the oft-quoted maxim of Lord Chief Justice Hewart in Rex v. Sussex Justices.Ex parte McCarthy, [1924] 1 K.B. 256, at page 259:

> ... justice should not only be done, but should manifestly and undoubtedly be seen to be done.

54 The test for a reasonable apprehension of bias was stated by de Granpre J. in the Committee for Justice and Liberty et al. v. National Energy Board et al., [1978] 1 S.C.R. 369, at page 394:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and rightminded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. ..."

55 The application of the test for reasonable apprehension of bias will depend on the nature of the tribunal in question. In Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623, Cory J. states at pages 638-639:

> 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-judgement 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 the very role which has been entrusted to them by the legislature.

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56 In my view, the function of the Appeal Tribunal is adjudicative. Its duty is to decide appeals based on contraventions of the Cowessess Indian Reserve Elections Act or illegal, corrupt or criminal practices on the part of candidates. Even though Appeal Tribunal members may not be legally trained, it appears that they are to decide, based on facts and their application of the Act or other Band customs, traditions or perhaps other laws, whether or not to uphold an election or order a new election. Members are not popularly elected. Although the Act uses the term "elected", members are selected by the Band Council.

57 This leads me to conclude that in the absence of compelling reasons, a more rigorous rather than a less strict application of the reasonable apprehension of bias test would be desirable in the case of the Appeal Tribunal. I will comment further on the question of compelling reasons to the contrary subsequently. I should add, however, that on the facts of this case, a less strict application of the test leads me to the same conclusion I would have reached had I applied the test in a more rigorous fashion.

58 In the case at bar, Clifford Lerat, during the proceedings of the Appeal Tribunal, made disparaging remarks towards the applicant. At paragraph 23 of his affidavit dated May 19, 1992, the applicant states:

> 23. THAT even before I started on my presentation, Clifford Lerat said to me, "Kenny, you've always been after me since day one." I replied that I was only there to make my presentation.

Comments of a similar vein were apparently made to another Band member at his appearance before the Tribunal. At paragraph 4 of his affidavit dated May 19, 1992, Clifford Young deposes as follows:

4. THAT before I even started my presentation, Clifford Lerat stood up and said, "I want you to know that we're doing this because Kenny (meaning Ken Sparvier) is too mean to the people and that is why we've got this guy to get him out." Clifford Lerat pointed to the Electoral Officer, Richard Redman, as he made this comment. The other persons in the room heard what Clifford Lerat said but did not say anything.

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Mr. Redman's affidavit contains the following information:

19. THAT during the said hearing, Clifford Lerat made several derogatory statements with respect to the Chief elect, Ken Sparvier.
20. THAT I indicated that I could not disqualify Clifford Lerat as it was not my function to do so and that Clifford Lerat had a right to his own opinions and was entitled to participate in the election process by supporting any candidate that he chose to support.
21. THAT subsequent to Ken Sparvier's presentation, Ken Sparvier left the room and a discussion took place amongst the Tribunal where Clifford Lerat voluntarily agreed to step down from the Tribunal as he felt that he was not able to render an unbiased decision due to his feelings against Ken Sparvier.
22. THAT accordingly the Tribunal continued to function with its remaining members, Muriel Lavallee and Samual Sparvier.

59 Mr. Lerat's actions created more than a reasonable apprehension of bias. The evidence is clear that with respect to the applicant, he was actually biased. If this were a situation only of an apprehension of bias of a member of a policy-oriented board, the incident might not be fatal. However, in a case such as this, where there is no doubt as to the actual bias of a member of an adjudicative board such as the Appeal Tribunal, even on a lenient application of the test, that bias cannot be ignored. A lenient application of the test after all, does not mean no application of the test at all.

60 Mr. Lerat apparently did not participate in the vote of the Appeal Tribunal. That he did not vote, however, does not resolve the matter. In Regina v. Ont. Labour Relations Bd., Ex p. Hall, [1963] 2 O.R. 239 (H.C.), McRuer C.J.H.C. states at page 243:

> It is likewise well settled that if one member of a Board is shown to be biased the decision of the Board may be quashed on certiorari: The Queen v. Meyer et al. (1875), 1 Q.B.D. 173, and Frome United Breweries Co. v. Keepers of the Peace and Justices for County Borough of Bath, [1926] A.C. 586 at p. 591. The general principles of law to be applied to the case before me can no better be stated than

in the language of Viscount Cave in the Frome case. At p. 590 he said:

> My Lords, if there is one principle which forms an integral part of the English law, it is that every member of a [page166] body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal. This rule has been asserted, not only in the case of Courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called Courts, have to act as judges of the rights of others. (The italics are mine.)

At p. 591 Viscount Cave went on:

> From the above rule it necessarily follows that a member of such a body as I have described cannot be both a party and a judge in the same dispute, and that if he has made himself a party he cannot sit or act as a judge, and if he does so the decision of the whole body will be vitiated.

61 This "poisoning of the well" rule is summarized by Esson J.A. in Haight-Smith v. Kamloops School District No. 34 (1988), 51 D.L.R. (4th) 608 (B.C.C.A.), at page 614:

> What does apply is the rule that, if a person disqualified by bias is present at a hearing and sits or retires with the tribunal, the decision may be set aside notwithstanding that that person took no part in the decision and did not actually influence it.

In Mullan, Administrative Law (2nd ed.), at page 3-131 the learned author states the usual implication succinctly:

> A reasonable apprehension of bias in one member of a tribunal is sufficient to disqualify the whole tribunal, even though that member merely sat at the hearing without taking an active role in either it or subsequent deliberations. Mere presence is generally enough.

On the evidence before me, it is clear that Mr. Lerat sat with the Appeal Tribunal during the submissions made to it. While the evidence indicates that he stepped down from the Appeal Tribunal because of his admitted bias, it appears that up to this point, he took an active role in the

proceedings. I am of the opinion that there can be no other conclusion but that a reasonably informed bystander would perceive bias on the part of the Appeal Tribunal as a result of Mr. Lerat's admitted position to oust the applicant and his participation in the Appeal Tribunal's proceedings. This fatally affected the proceedings and the decision of the Appeal Tribunal.

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62 In view of this finding, it is unnecessary for me to decide the allegation by the applicant that the presence of Muriel Lavallee on the Appeal Tribunal also provided a basis for apprehension of bias. However, a few comments may nonetheless be in order. Muriel Lavallee rented farmland to the applicant before the Appeal Tribunal, Terry Lavallee, and there was thus a business relationship of landlord and tenant between them.

63 In Szilard v. Szasz, [1955] S.C.R. 3, Rand J. stated at pages 6-7:

> These authorities illustrate the nature and degree of business and personal relationships which raise such a doubt of impartiality as enables a party to an arbitration to challenge the tribunal set up. It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication as its threshold. 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.

64 The Cowessess Indian Band is not large. The total number of electors who voted in the April 24, 1992 vote was 408. In respect of the size of the community in question, the Cowessess Band is, in my opinion, analogous with the voluntary religious associations to which Gonthier J. referred in Hofer, supra, where at page 197 he stated:

> However, given the close relationship amongst members of voluntary associations, it seems rather likely that members of the relevant tribunal will have had some previous contact with the issue in question, and given the structure of a voluntary association, it is almost inevitable that the decision makers will have at least an indirect interest in the question.

I indicated earlier that in view of the adjudicative function of the adjudicative function of the Appeal Tribunal, in the absence of compelling reasons to the contrary, a more rigor application of the reasonable apprehension of bias test would be desirable. However, it does not appear to me to be realistic to expect members of the Appeal Tribunal, if they are residents of the reservation, to be completely without social, family or business contacts with a candidate in an election. At paragraph 15 of his affidavit dated June 16, 1992, Lionel Sparvier states:

> 15. THAT pursuant to Cowessess Band custom, the members of the tribunal are selected from members of the Cowessess [page168] Indian Band, and are invariably related to one or more candidates for council or Chief due to the large number of candidates who run for elected positions traditionally.

If a rigorous test for reasonable apprehension of bias were applied, the membership of decision-making bodies such as the Appeal Tribunal, in bands of small populations, would constantly be challenged on grounds of bias stemming from a connection that a member of the decision-making body had with one or another of the potential candidates. Such a rigorous application of principles relating to the apprehension of bias could potentially lead to situations where the election process would be frustrated under the weight of these assertions. Such procedural frustration could, as stated by counsel for the respondents, be a danger to the process of autonomous elections of band governments.

65 It may be that to avoid these difficulties, Appeal Tribunal members could be selected from outside the residents of the reservation, perhaps on a reciprocal basis with other bands. Such a process may create difficulties of its own or be unsustainable in the context of an autonomous Indian band. These are policy matters to which the issues in this case call attention.

66 However, the Court must work within the framework of the existing law. I have added these comments because of the difficulties I see with the application of a more desirable strict bias test in the case of an adjudicative board such the Appeal Tribunal, to the practicalities of inevitable social and business relationships in a small community such as the Cowessess Band.

67 As to the allegation that the Appeal Tribunal did not deal with the residency challenge to the election of one of the Band Councillors, I have not been provided with sufficient facts to indicate the basis upon which the Appeal Tribunal refused to deal with that issue. Without more information, I am unable to say that a reasonably informed bystander could perceive bias on the part of the Tribunal with respect to candidates for the election of Chief because of the Tribunal's [page169] inaction with respect to an election for Band Councillor.

(b) Notice

68 Although it is not necessary to decide whether or not there was adequate notice in view of my decision respecting bias, a few comments may prove to be useful.

69 On May 4, 1992, the applicant, presumably along with other individuals, attended at the Old Day School on the Cowessess Reserve to witness a recount of the ballots in the April 24, 1992 election. At this point, the Appeal Tribunal consisted of Sam Sparvier, Muriel Lavallee and Maryanne Lavallee. Maryanne Lavallee then resigned due to a conflict of interest (she was the mother of Terry Lavallee, applicant before the Appeal Tribunal) and was replaced by Clifford Lerat. This newly constituted Tribunal met with Mr. Redman and concluded that there was sufficient evidence to warrant the holding of an appeal hearing. Immediately following this determination,

Mr. Redman announced that the Appeal Tribunal would commence its hearing on the appeal at 9:00 am the next morning, May 5, 1992.

70 It is without question that the applicant had a direct interest in the proceedings of the Tribunal. His election as Chief was to be either confirmed or voided by the Tribunal. Counsel for the applicant submitted that notice in this case, approximately twelve hours, was inadequate.

71 The Cowessess Indian Reserve Elections Act is silent on the issue of notice, nor do the authorities set out, in terms of hours or days, guidelines as to what does or does not constitute adequate notice. What is adequate notice must be determined on the circumstances of each case. Clearly, a notice period of less than twelve hours is very short. Such a short notice period raises a number of concerns: (a) relevant persons may not be available; (b) there is practically no time to investigate the facts relating to the subject-matter of the appeal; (c) it is unreasonable to expect the participants to adequately organize and prepare their representations. No evidence was led to indicate [page170] any compelling reason for the Tribunal commencing its proceedings upon such short notice.

72 It is true that the applicant had actual notice and attended the Appeal Tribunal proceedings. However, his attendance does not detract from the disadvantageous conditions of having to proceed without an adequate opportunity to investigate the matter and prepare representations. I think it is reasonable for me to infer that the applicant's participation did not represent genuine consent to the proceedings of the Appeal Tribunal and that he did not waive his right to adequate notice.

(c) Opportunity to make representations before the Tribunal

73 In view of my findings with respect to bias, it is not necessary for me to deal with the question of whether there was a reasonable opportunity for participants to make representations to the Appeal Tribunal or whether the Appeal Tribunal had evidence before it upon which it was able to make a decision with respect to the issue before it. I would observe, however, that the applicant's position as Chief Elect was, to all intents and purposes, what was at stake in the Appeal Tribunal's proceedings. For the applicant not to be present during the submissions of others, raises the question as to whether he was able to know the case he had to meet. I have grave doubt about the adequacy of a procedure which entitles those who wish to make presentations to do so but not to be able to listen to the presentations of others or answer adverse evidence or arguments.

74 In Kane v. Board of Governors (University of British Columbia), [1980] 1 S.C.R. 1105, Dickson J., as he then was, for the majority, stated at pages 1113-1114:

> 4. The tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity "for correcting or contradicting any relevant statement prejudicial to their views". Board of Education v. Rice, at p. 182; Local Government Board v. Arlidge, supra, at pp. 133 and 141.

> 5. It is a cardinal principle of our law that, unless expressly or by necessary implication, empowered to act ex parte, an [page171] appellante authority must not hold private interviews with witnesses (de Smith, Judicial Review of Administrative Action, (3rd. ed.) 179) or, a fortiori, hear evidence in the absence of a party whose conduct is impugned and under scrutiny. Such party must, in the words of Lord Denning in Kanda v. Government of the Federation of Malaya, at p. 337, "... know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. ... Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other."

75 It does not appear to me that these basic rules of procedural fairness were followed by the Appeal Tribunal in this case.

76 With respect to the matter of whether the Appeal Tribunal had evidence before it upon which it could determine the question of residency of candidates, I do not have sufficient information before me to make a determination on this question. The Appeal Tribunal did not transcribe its proceedings. It would be desirable, where a decision of a tribunal has been challenged on the basis that it was made without evidence, for those seeking to uphold the decision to give an indication of what evidence, if any, there was before the tribunal.

4. Error in Establishing Election Procedure

77 A final argument of counsel for the applicant was that even if the applicant was unsuccessful on all other points, the Appeal Tribunal erred in establishing its own procedure for the election it ordered. Counsel for the applicant argued that under subsection 6(7) of the Act the jurisdiction of the Appeal Tribunal was only to order a new election and to leave the procedure to those provisions set forth in the Act.

78 In view of my findings with respect to bias, it is not necessary for me to decide this issue. I would add, however, that to avoid this type of controversy arising, any order made by an appeal tribunal with respect to a new election should conform to the provisions of the Act and other relevant customs and traditions.

SUMMARY OF CONCLUSIONS

79

1. The Appeal Tribunal was validly constituted.

[page172]

2. The residency of candidates for the purpose of eligibility is a matter within the Appeal Tribunal's jurisdiction to decide.
3. The Appeal Tribunal's members' ability to consider the issue of residency in an impartial manner was adversely affected by the presence and participation of Clifford Lerat in the proceedings of the Appeal Tribunal. His involvement gave rise to a reasonable apprehension of bias in the entire Appeal Tribunal. This amounts to a denial of procedural fairness to the applicant in the proceedings of the Appeal Tribunal.

DISPOSITION

80 Subsection 18.1(3) [as enacted by S.C. 1990, c. 8, s. 5] of the Federal Court Act provides:

18.1 ...

(3) On an application for judicial review, the Trial Division may

(a) order a federal board, commission or other tribunal to do any act or thing it has, unlawfully failed or refused to do or has unreasonably delayed in doing; or
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Upon a finding of reasonable apprehension of bias amounting to a denial of procedural fairness in the proceedings of a tribunal, a court would normally quash the decision of the tribunal. Depending upon the circumstances, the court could refer the matter back for determination in accordance with such directions as it considers to be appropriate.

81 The effect of the Court quashing the decision of the Appeal Tribunal in this case, without anything further, would be to reinstate the results of the April 24, 1992 [page173] election. I do not find such a result to be satisfactory for a number of reasons. In essence, the Court, for procedurally technical reasons, instead of the Band members, would be determining who should be Chief of the Cowessess Indian Band No. 73. It would leave unresolved an appeal validly filed with the Appeal Tribunal. The question of residency of candidates and the validity of the April 24, 1992 election would be left undetermined. The applicant would be required to assume and carry on the duties of

Chief under a cloud.

82 These unsatisfactory results might be avoided if, in addition to quashing the decision of the Appeal Tribunal, the Court referred the matter back to a differently constituted Appeal Tribunal for redetermination of the residency issue, following appropriate procedures in so far as bias, notice and the right to make representations are concerned. If the Appeal Tribunal concluded that all candidates in the April 24, 1992 election were properly resident of the reserve for a period of over one year before nomination, it would then uphold that election and the applicant, being the successful candidate, could be declared Chief. If the Appeal Tribunal found one or more of the candidates ineligible by reason of non-residency and concluded that it was necessary to order a new election for Chief, it could do so.

83 However, it is not clear to me that I have the jurisdiction to give directions requiring the establishment of a new appeal tribunal. A new appeal tribunal would have to be elected by the Band Council. The question arises as to whether or not I could order the Band Council to elect a new appeal tribunal. Band custom or tradition may also have a bearing. There may also be procedural difficulties which may have to be addressed.

84 If the Court's jurisdiction does not extend to directing the establishment of a new appeal tribunal, the question of the application of the doctrine of necessity, arises. The doctrine of necessity arises in cases in which, when no one else is empowered to act, otherwise disqualified tribunal members (other than Clifford Lerat, whose bias was real and proven) may be qualified to hear and determine an appeal. The principle is stated in Administrative Law by Sir William Wade, 6th ed., 1988 at pages 478-479:

> In all the cases so far mentioned the disqualified adjudicator could be dispensed with or replaced by someone to whom the objection did not apply. But there are many cases where no substitution is possible, since no one else is empowered to act. Natural justice then has to give way to necessity; for otherwise [page174] there is no means of deciding and the machinery of justice or administration will break down.

The doctrine of necessity was not argued when this matter was originally heard by me. Whether or not it is applicable in this case may be a matter for consideration.

85 For the foregoing reasons, I am of the opinion that counsel should have the opportunity to more fully address the question of remedy in this case, including if possible, agreement as to how the matter may be resolved, before an order is issued by the Court. The Registrar of the Court will therefore communicate with counsel shortly after these reasons are issued to arrange for a conference call with me so that I may ascertain how counsel wish to proceed -- that is whether by way of oral hearing, by written argument, or in some other manner, with respect to the issue of remedy.

86 So there will be no doubt and to avoid confusion or inconvenience to the Band, I expressly state that at this time, the administration of the Band is not affected by the issuance of these reasons. An order shall not be issued until counsel have the opportunity to make further submissions on the issue of remedy.

Re

Dulmage et al. and Police Complaints Commissioner et al. [Indexed as: Dulmage v. Ontario (Police Complaints Commissioner)]

21 O.R. (3d) 356

[1994] O.J. No. 2781

Action No. 603/94

Ontario Court (General Division), Divisional Court,

O'Driscoll, O'Brien and Moldaver JJ.

November 30, 1994

Administrative law -- Bias -- Reasonable apprehension of bias -- Vice-president of Toronto chapter of organization publicly criticizing behaviour of police officers who allegedly caused public strip search to be conducted -- President of Mississauga chapter of same organization sitting as member of Board of Inquiry appointed to deal with allegations against those officers -- Reasonable apprehension of bias existing -- Chair of Board of Inquiry erring in refusing to disqualify member.

A Board of Inquiry was appointed under the Police Services Act, R.S.O. 1990, c. P.15, to deal with allegations that the applicant police officers had caused a female police officer to conduct a public strip search of a black woman contrary to the manner provided in the regulations of the Metropolitan Toronto Police Force. A member of the panel, D, was President of the Mississauga chapter of the Congress of Black Women of Canada. The vice-president of the Toronto chapter of that organization stated at a press conference that the strip search incident was not an isolated case and reflected the sexual humiliation and abuse of black women. The applicants applied for an order disqualifying D on the basis of a reasonable apprehension of bias. The board adjourned. When the board reconvened, the Chair advised counsel that he had sought out and obtained additional information, primarily that the Mississauga and Toronto chapters of the Congress of Black Women of Canada were two separate legal incorporations, and that as president of the Mississauga chapter D was not aware of any involvement of herself or her chapter in discussions or actions concerning either the complaint in question or any other complaint regarding strip searches.

Rejecting the argument of counsel for the applicants that it was improper for the board to seek additional information as it had, the Chair refused to disqualify himself and also dismissed the motion to disqualify D. In his decision not to disqualify D, the Chair dealt with two main rationales the board felt would support a finding of reasonable apprehension of bias. These were: (a) an apprehension that the position taken by a member of another chapter of the Congress might somehow influence or pressure D because she was president of a different chapter of the same congress; and (b) a suggestion that D might be perceived to have prejudged the case or to have adopted the position taken by another chapter if she did not repudiate that position.

The applicants applied for judicial review of those decisions.

Held, the application should be allowed.

Per O'Brien J. (O'Driscoll J. concurring): The board's approach to the question of reasonable apprehension of bias was not complete. It is unnecessary to show an individual is biased, or that a person might be influenced, or that a certain position be repudiated. The test is whether there is a reasonable apprehension of bias on the part of a reasonable person. A high standard of justice is required when the right to continue one's profession or employment is at stake. That inflammatory statements dealing with the very incident involved in this inquiry were made by an officer of an organization of which a member of the board was an officer gave rise to a reasonable apprehension of bias; the motion to disqualify D should have been allowed.

While the subsequent actions of the Chair in attempting to deal with the matter might not, of themselves, have led to a reasonable apprehension of bias, they did aggravate the appearance of bias which existed. The board, as presently constituted, should be prohibited from proceeding further with the inquiry, and the proceedings should be heard before a completely differently constituted panel.

Per Moldaver J. (dissenting in part): The Board erred in failing to remove D due to a reasonable apprehension of bias. While the board recognized that the motion to disqualify D rested upon a reasonable apprehension of bias as opposed to actual or likely bias on her part and while it also appreciated the proper test to be applied, it did not properly apply that test in arriving at its conclusion. Instead, the board appeared to be looking for evidence from which actual or likely bias on the part of D could be found or reasonably inferred.

Faced with an allegation of bias against one of its members, it was perfectly proper for the board to retire and seek out any factual information which might be relevant to the issue. Having done so, the board immediately reconvened and fully disclosed the information which it had obtained to all concerned. There was no evidence to suggest that when it retired, the board was seeking out information designed to resist the motion to disqualify D. When an allegation of disqualifying bias is made against an adjudicator, there is no reason why the adjudicator should be precluded from disclosing matters of fact which may be relevant to the motion. Accordingly, there was no basis for ordering the removal of the other two members of the board.

Cases referred to

Committee for Justice & Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115; Duncan (Re), [1958] S.C.R. 41, 11 D.L.R. (2d) 616; Ellis-Don Ltd. v. Ontario (Labour Relations Board) (1993), 98 D.L.R. (4th) 762, 93 C.L.L.C. 14,024 (Ont. Div. Ct.); Kane v. University of British Columbia, [1980] 1 S.C.R. 1105, [1980] 3 W.W.R. 125, 31 N.R. 214, 18 B.C.L.R. 124, 110 D.L.R. (3d) 311; Robinson v. Comité Garderie Plein Soleil (1992), 8 Admin. L.R. (2d) 304 (N.W.T.S.C.)

Statutes referred to

Police Services Act, R.S.O. 1990, c. P.15, s. 93

APPLICATION for judicial review of decisions of a Board of Inquiry dismissing an application to disqualify a member and dismissing an application to have the inquiry proceed before a differently constituted panel.

Joanne Mulcahy, for applicants.

W.J. Manuel, for respondents.

O'BRIEN J. (O'DRISCOLL J. concurring): -- Police Constables Dulmage and Sommer seek judicial review of two decisions of a board of inquiry constituted under the Police Services Act, R.S.O. 1990, c. P.15. In those decisions the board:

(i) Dismissed the constables' application to disqualify one of three members of the board, a Ms. Frederica Douglas;
(ii) Dismissed the constables' application to have the three members withdraw and requiring the inquiry to proceed before a differently constituted board.

The applications were based on the constables' allegations of reasonable apprehension of bias on the part of Ms. Douglas and subsequently, of the board, arising from the manner the board dealt with the initial application to disqualify.

The board of inquiry was appointed under the Police Services Act to deal with allegations made against the constables that they caused a female police officer to conduct a public strip search of the complainant Audrey Smith contrary to the manner provided in the regulations of the Metropolitan Toronto Police Force.

The alleged infraction occurred while they were engaged in investigating an alleged offence on the part of Ms. Smith of possession of cocaine for the purposes of trafficking.

Background

The board of inquiry was established pursuant to s. 93 of the Police Services Act. That Act provides for a three-person panel; one member to be a member of the Law Society of Upper Canada, one chosen from a panel recommended by the Ontario Police Association (and not a police officer or lawyer) and one from a panel recommended by the Ontario Association of Municipalities (and not a lawyer, or police officer).

The complainant Audrey Smith alleges the improper public strip search was conducted in the early morning hours of August 10, 1993, near Queen Street and Jameson Avenue in Toronto.

The inquiry was originally scheduled to commence its hearings in April of 1994. The hearing was adjourned to September 1994, when it appeared a potential witness was the son of one of the panel members. That adjournment had nothing to do with the issues raised in these applications.

The inquiry commenced again September 12, 1994, at which time the matter of disclosure of information was dealt with and the hearing adjourned to September 15, 1994.

On that date counsel for the applicants applied for an order disqualifying Ms. Douglas. The application was on the basis that Ms. Douglas was president of the Mississauga chapter of the Congress of Black Women of Canada and representatives of that organization had made statements and given press releases which created a reasonable apprehension of bias.

Applicants' counsel learned that news broadcasts were made and press conferences held in the month of September 1993 dealing with the incident involving Audrey Smith.

Reports of the press conferences were carried in an issue of The Toronto Sun of September 29, 1993, and the newspaper "Share" on September 30, 1993. Those reports are exhibited in the material filed in support of this application. Both reports referred specifically to the Audrey Smith incident.

The Toronto Sun report included the following:

METRO COPS HAMMERED

> The alleged Audrey Smith strip-search reflects growing racial and sexual violence against non-white women by Metro Police, black action groups charged today.
>
> Smith is the Jamaican visitor who claimed police strip-searched her and left her naked on Queen St. in Parkdale one night last month.

At a packed Queen's Park press conference minority group spokesmen called for an outside RCMP probe into the Smith case, the suspension of the Metro officers involved and the resignation of Chief Bill McCormack.

"This is a complete outrage and a humiliating and personal affront to every minority woman" said Barbara Isaac of the National Organization of Immigrant and Visible Women.

"Women can no longer feel safe on our streets knowing they can be stopped and strip-searched at any time."

"This is a chilling message to everyone in our community," said Kike Roach of the National Action Committee on the Status of Women.

The Smith incident is not an "isolated case" and reflects the "sexual humiliation and abuse of black women," said Adonica Huggins of the Congress of Black Women.

She questioned the force's "impartiality" in the Smith investigation and called for the RCMP to step in.

Huggins said the officers involved should be suspended until the probe is over and called for McCormack's resignation.

The Share report included the following:

WOMENS GROUPS CONDEMN POLICE ACTION

McCormack, the Metro Police Force and Ontario politicians were all roundly criticized on Tuesday by community and national groups, who charged that police abuse of women of colour is commonplace in society.

The groups, which held a press conference at Queen's Park, included the Congress of Black Women of Canada (CBWC), the National Action Committee on the Status of Women, the Toronto Coalition Against Racism, the Black Action Defense Committee (BADC), Theatre in the Rough, the African Resource Centre, the National

> Organization of Immigrant and Visible Minority Women of Canada, the Assault Womens Program at George Brown College and the Coalition of Visible Minority Women.
>
> All speakers expressed a lack of confidence in the Metro police investigation of the allegations by Smith, and CBWC representative Adonica Huggins called for the intervention of the Royal Canadian Mounted Police (RCMP).
>
> "An RCMP investigation of this incident is critical," said Huggins, a Vice-President of the Toronto Chapter of the CBWC.
>
> She echoed the sentiments of many speakers, and was applauded when she demanded the resignation of McCormack.
>
> "Chief McCormack has clearly demonstrated an inability to give effective leadership to the Police Force," Huggins said. "His continued failure to set the standards for acceptable and appropriate behaviour, and to reprimand those police officers who break the law is evidence of his incompetence".
>
> The groups accused the police of being "racist and sexist", and charged that they are involved in a "disinformation campaign" to discredit Smith.

The Toronto Sun report refers to statements made by Adonica Huggins. The material filed on this application indicated she was vice-president of the Toronto chapter of the Congress of Black Women of Canada.

On September 15, counsel for the constables sought the disqualification of Ms. Douglas on the basis of her involvement, and association with, the same organization that had made public statements, or taken a public position regarding the allegations against his clients.

During the course of submissions to the board, the constables' counsel indicated he had been aware for some months prior to the hearing that Ms. Douglas was president of the Mississauga chapter of the Congress of Black Women of Canada but had no concern about her appointment to the panel. His concern developed after he learned of the statements and press releases made by other members of that organization.

During proceedings before it, dealing with allegations of possible bias, the board adjourned. There were some discussions among board members in private. The board Chair, Mr. Gary Yee,

then advised counsel that he had obtained additional information which he provided the inquiry as follows:

(i) The Mississauga chapter and Toronto chapters (of the Congress of Black Women of Canada) were two separate legal incorporations.
(ii) Ms. Douglas became president of the Mississauga chapter in February of 1993 and was still the president at that time; and
(iii) As president of that chapter Ms. Douglas was not aware of any involvement of herself or her chapter in discussions or actions concerning either the Audrey Smith complaint or any other complaint regarding strip searches.

Mr. Yee then had a faxed letter sent to all counsel confirming that information.

Counsel for the constables then argued it was improper for the board to seek additional information as it had. On September 15, the Chair rejected that argument.

At that time the Chair indicated there were still six of the original eight scheduled days for hearing available, and was confident a new board member would be available the next day as there were a number of (potential) panel members in the Toronto area from which a new board could be constituted.

The Chair also stated that if no reasonable apprehension of bias were found it was still within the discretion of Ms. Douglas to voluntarily step aside. Ms. Douglas did not do so.

The following day, counsel for the Police Complaints Commissioner called as a witness the National President of the Congress of Black Women of Canada who testified under oath.

Ms. Jordan testified as to the national and regional nature of the organization and testified that Adonica Huggins was vice-president of the Toronto chapter.

Ms. Jordan also testified that she had seen the newspaper articles but that she was not aware of the position taken by Ms. Huggins and that the process of the Congress for consulting regional representatives had not been taken prior to Ms. Huggins taking the position, she apparently had, in the public statements.

On September 16 the Chair made two additional rulings:

(i) It refused to disqualify itself; and
(ii) It found no reasonable apprehension of bias and denied the motion to disqualify Ms. Douglas.

In its decisions of September 16, the Chair dealt with two main rationales the board felt would support a finding of reasonable apprehension of bias. They were:

(a) An apprehension that the position taken by a member of another chapter of the congress might somehow influence or pressure Ms. Douglas because she was president of a different chapter of the same congress;
(b) A suggestion that Ms. Douglas might be perceived to have prejudged the case or to have adopted the position taken by another chapter if she did not, in fact, repudiate that position.

Conclusions

In my view the board's approach to the question of reasonable apprehension of bias is not complete.

It is unnecessary to show an individual is biased, or that a person might be influenced, or that a certain position be repudiated. The test is whether there is a reasonable apprehension of bias on the part of a reasonable person.

This is outlined by Laskin C.J.C., for the majority, in Committee for Justice & Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369 at p. 391, 68 D.L.R. (3d) 716 at p. 733:

> This Court in fixing on the test of reasonable apprehension of bias, as in Ghirardosi v. Minister of Highways (B.C.) (1966), 56 D.L.R. (2d) 469, [1966] S.C.R. 367, 55 W.W.R. 750, and again in Blanchette v. C.I.S. Ltd. (1973), 36 D.L.R. (3d) 561, [1973] S.C.R. 833, [1973] 5 W.W.R. 547 (where Pigeon, J., said at p. 579 D.L.R., p. 842-3 S.C.R., that "a reasonable apprehension that the Judge might not act in an entirely impartial manner is ground for disqualification"), was merely restating what Rand, J., said Szilard v. Szasz, [1955] 1 D.L.R. 370 at p. 373, [1955] S.C.R. 3 at pp. 6-7, in speaking of the "probability or reasoned suspicion of biased appraisal and judgment unintended though it be". This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and I think that emphasis is lent to this concern in the present case by the fact that the National Energy Board is enjoined to have regard for the public interest.

It is clear that a high standard of justice is required when the right to continue one's profession or employment is at stake and it is obvious that a disciplinary hearing can have grave and permanent consequences upon a professional career: see Kane v. University of British Columbia, [1980] 1 S.C.R. 1105 at p. 1113, [1980] 3 W.W.R. 125 at p. 136, per Dickson J. (as he then was) for the majority.

Returning to this decision, inflammatory statements dealing with the very incident involved in this inquiry were made by an officer of the Congress of Black Women of Canada. Those statements were made in Toronto, closely adjacent to the City of Mississauga. They deal with an incident which received significant public attention. The statements referred to the incident as an "outrage" and called for the suspension of the officers involved. Those officers were the very ones involved in

this hearing.

Ms. Douglas was the president of the Mississauga chapter of the same organization.

In the circumstances I conclude there was a reasonable apprehension of bias on the part of a reasonable person and the motion to disqualify Ms. Douglas should have been allowed.

While the subsequent actions of the board chairman in attempting to deal with that matter might not, of itself, have led to a reasonable apprehension of bias, it did aggravate the appearance of bias which I find existed.

In the circumstances, I would allow the application and would quash the decision dismissing the application to disqualify Ms. Douglas.

An order will go prohibiting the board, as presently constituted, from proceeding further with the inquiry, and, in the circumstances, there will be an order directing the proceedings be heard before a completely differently constituted panel.

The applicants are to have their costs payable by the Police Complaints Commissioner fixed at $2,500 plus costs of transcripts for this hearing and fixed at $750 in the application to stay proceedings heard by White J. on September 19, 1994.

MOLDAVER J. (dissenting in part): -- I have had the advantage of reading the reasons of my colleague O'Brien J. I agree with him that the board erred in failing to remove Ms. Douglas due to reasonable apprehension of bias. My reasons for so concluding are very much dependent upon the particular facts and circumstances of this case, as I shall explain.

In my view, the board, in its reasons, quite correctly recognized that a member need not automatically withdraw solely because of statements made by a representative of an affiliated community organization about issues before the board.

That acknowledged, it seems to me that once the board's attention had been drawn to such statements in the context of a motion to disqualify, the board had a duty to carefully consider a variety of factors in order to properly determine whether the allegation of reasonable apprehension of bias had been made out. These factors included:

(a) What position did the author of the statements hold within the affiliated organization;
(b) When the statements were made, did the author purport to make them on behalf of the entire organization or were they limited to the author's personal views or perhaps the views of a separate and distinct chapter within the organization;
(c) What was the nature of the issue being discussed in the statements? Did the comments relate to the critical issue or issues which the board was required to

decide or were they directed to peripheral, less consequential or general matters;

(d) If the remarks were directed to the critical issue or issues, did they reflect a position of neutrality or were they pointed, direct and judgmental;

(e) Were the remarks directed towards a private, discrete audience or were they directed to the public at large and intended for public consumption;

(f) When, in relation to the scheduled board hearing, were the remarks made;

(g) What position within the organization did the impugned board member hold (i) when the statements were made by the affiliated member and (ii) at the time of the scheduled hearing.

This list is not meant to be exhaustive; furthermore, the importance of any one or more of these factors will vary depending upon the particular circumstances of the case.

I now propose to consider these factors contextually.

The statements of concern are found in two newspaper articles dated September 29 and 30, 1993, respectively, which my colleague O'Brien J. has reproduced in full. From those clippings, it would appear that shortly after the events giving rise to the Audrey Smith incident, a number of representatives from various community-based organizations called a press conference to voice their concerns about the prevalence of racism and sexism on the part of the Metro Police Force towards women from visible minorities.

In those articles, various statements were attributed to Ms. Adonica Huggins. At the time, Ms. Huggins was the vice-president of the Toronto chapter of the Congress of Black Women of Canada (the "congress"). As such, she certainly held a position of some prominence within the organization. According to the newspaper clippings, it would appear that in making her remarks, Ms. Huggins purported to speak on behalf of the congress as a whole. There is no evidence, either in the clippings or elsewhere, to suggest that Ms. Huggins attempted to limit her remarks to the Toronto chapter or to her own personally held views.

The remarks themselves related, at least in part, to the critical issue which the board was required to decide. Moreover, they were pointed, direct and highly judgmental. In fact, I think it fair to say that from her perspective, Ms. Huggins had already predetermined the guilt of the subject officers in the Audrey Smith matter.

While Ms. Huggins was certainly entitled to hold this view and express it publicly, she did so while ostensibly representing the congress. Furthermore, there can be no doubt that Ms. Huggins intended that these remarks be both public and widely distributed. That, after all, was the purpose for holding a press conference.

While it is true that the press conference took place approximately one year before the board hearing, I do not consider that time gap to be, in and of itself, sufficient to expunge the taint left in the wake of these remarks. This is particularly so having regard to the substantial publicity which

the Audrey Smith case has continued to attract since that time.

Finally, as regards Ms. Douglas, at all materials times she was the president of the Mississauga chapter of the congress. Accordingly, it is apparent that throughout, she not only maintained a prominent position within the organization but also, she headed up the chapter which neighbours upon the Toronto chapter.

Considering the collective impact of these factors and recognizing that an unbiased appearance is an essential component of procedural fairness, I have concluded that a reasonably informed member of our society could reasonably perceive bias on the part of Ms. Douglas.

While the board clearly recognized that the motion to disqualify Ms. Douglas rested upon a reasonable apprehension of bias as opposed to actual or likely bias on her part and while it also appreciated the proper test to be applied, a close reading of the board's decision has left me with the distinct impression that it did not properly apply that test in arriving at its conclusion. Instead, the board appeared to be looking for evidence from which actual or likely bias on the part of Ms. Douglas could be found or reasonably inferred. The following excerpt at p. 6 of the board's reasons serves to highlight this concern:

> What we are left with has no real precedent that we are aware of. Essentially, counsel for the officers are attempting to remove a member of this board, not for any statement or position she has taken, not for any financial interest, not for any close family or personal relationship, not for any improper conduct of the board member, and I must add, not even for the mere fact that she is president of the Congress of Black Women, Mississauga chapter, but solely because a representative of the Toronto chapter of the congress has apparently taken a position on this case, and the board member is president of the Mississauga chapter, separately incorporated and autonomous, as shown by the evidence. [See Application Record, Tab. 4, p. 18]

(Emphasis added)

As I have attempted to point out, the factors which I have considered in concluding that Ms. Douglas should be removed from the board go well beyond the fact that "a representative of the Toronto chapter of the congress has apparently taken a position in this case, and the board member is the president of the Mississauga chapter, separately incorporated and autonomous".

By framing the issue that way, the board precluded itself from taking into account and adequately assessing the various factors, which, as I have earlier outlined, it should have considered in resolving the "reasonable apprehension of bias" issue.

Lest there be any doubt about it, I wish to emphasize that mere association, either past or present, on the part of a board member with an organization, which, by its very nature, might be said to favour one side or the other, will not of itself satisfy the test for reasonable apprehension of bias.

Indeed, s. 93 of the Police Services Act, R.S.O. 1990, c. P.15, contemplates this very situation by requiring that one board member be chosen from a panel recommended by the Ontario Police Association and another from a panel recommended by the Ontario Association of Municipalities.

Thus, as all parties recognized in this case, the mere fact that Ms. Douglas held a position of prominence within the congress would not, in and of itself, serve to disqualify her from sitting on the Audrey Smith matter. Likewise, there would be no reason to preclude a former police officer from sitting as a board member simply because of his or her prior affiliation with the police.

For these reasons, the order of the board permitting Ms. Douglas to continue as a member in the Audrey Smith hearing is quashed and an order will go prohibiting her from proceeding further with the inquiry.

The applicants have also sought an order prohibiting the other two board members, Mr. Gary Yee (Chair) and Mr. John Robinson, from proceeding further with the inquiry.

In support of this application, counsel for the applicant submitted that a reasonable apprehension of bias had arisen from the conduct which the board engaged in following upon the application to disqualify Ms. Douglas.

It is apparent from the record that after the motion to disqualify Ms. Douglas had been made, the board retired in order to seek additional information from her which might be relevant to the motion. After doing so, the board reconvened and in the presence of all concerned, Mr. Yee disclosed the following pieces of information to the parties:

(a) That Ms. Douglas is currently the president of the Congress of Black Women, Mississauga chapter and has been since February 1992;
(b) As president of the Mississauga chapter, Ms. Douglas was not aware of any involvement of herself or her chapter in discussion or actions concerning either the Audrey Smith complaint, or any other complaint regarding strip searches; and
(c) That the Congress of Black Women, Mississauga chapter, is separately incorporated and it is one of 12 independent local chapters in Ontario.

Thereafter, Mr. Black, counsel for officers Sommer and Dulmage, sought and received a brief adjournment.

When the hearing reconvened, Mr. Black took the position that the board was not entitled to consider the information disclosed in the absence of his consent, and while he was prepared to accept the points relating to Ms. Douglas' position in the Mississauga chapter and the autonomous nature of that chapter, he was not prepared to accept information regarding what Ms. Douglas was or was not aware of.

The board then ruled that it had done nothing improper in seeking out and disclosing the various

pieces of information. Furthermore, the board left it open for any of the parties to call additional evidence if anyone disagreed with the information which the board had supplied. Furthermore, each of the parties was entitled to make submissions about the meaning or inferences to be drawn from this information (see Supplementary Record, Tab 5).

Mr. Black nevertheless persisted in his motion to disqualify the entire board, which motion was refused (see Supplementary Record, Tab 6).

Before this court, counsel for the applicants submitted that by seeking out additional information from Ms. Douglas in private and treating it as evidence, the board had placed itself in a position of appearing to resist the application to disqualify Ms. Douglas. In doing so, it was contended that the board had exceeded its jurisdiction and breached the rules of natural justice and the duty of procedural fairness owed to the applicants.

With respect, I disagree. In my opinion, the applicants have completely mischaracterized the conduct of the board.

Faced as it was with an allegation of bias against one of its members, I am of the view that it was perfectly proper for the board to retire and seek out any factual information which might be relevant to this issue. Having done so, the board immediately reconvened and fully disclosed the information which it had obtained to all concerned.

There is no evidence to support the suggestion that when it retired, the board was seeking out information designed to resist the motion to disqualify Ms. Douglas. Instead, it is apparent that the board was simply attempting to uncover any factual information which might be relevant, irrespective of its implications. This is self-evident when one considers the content of at least one of the pieces of information which the board disclosed. The fact that Ms. Douglas had been the president of the Mississauga chapter since 1992 could be viewed as evidence tending to support the applicant's motion, given that she would have occupied that senior office at the time of the September 1993 press conference.

Beyond that, it is equally apparent that the board was only seeking information concerning matters of fact. It was not seeking out Ms. Douglas's opinion on the merits of the motion or any arguments which she might have sought to advance to resist it.

Finally there is no evidence from which it could be concluded or even inferred that the board withheld information which it had learned in private from the parties upon reconvening the hearing.

When an allegation of disqualifying bias is made against an adjudicator, be it judge or tribunal member, I see no reason why the adjudicator should be precluded from disclosing matters of fact which may be relevant to the motion. Indeed the case-law would seem to suggest that such conduct on the part of an adjudicator is perfectly proper: see Ellis-Don Ltd. v. Ontario (Labour Relations Board) (1993), 98 D.L.R. (4th) 762, 93 C.L.L.C. 14,024 (Ont. Div. Ct.), and Robinson v. Comité

Garderie Plein Soleil (1992), 8 Admin. L.R. (2d) 304 (N.W.T.S.C.).

Indirect support for doing exactly what the board did in this case may be found in a Supreme Court of Canada decision cited as Re Duncan, [1958] S.C.R. 41, 11 D.L.R. (2d) 616.

Although the issue in that case concerned Mr. Duncan's conduct before the Supreme Court and whether such conduct amounted to contempt, the facts giving rise to that issue are instructive.

At the outset of an appeal in which Mr. Duncan was representing one of the parties, he stood up and made the following statement to the full court:

> In my opinion, the administration of justice would not be served by Mr. Justice Locke sitting on this appeal. It is in the interests of my client and my personal interest that Mr. Justice Locke should withdraw.

At that juncture, Mr. Justice Locke said: "Why, for what reason?" Mr. Duncan declined to give any reason. The Chief Justice then asked Mr. Duncan: "Is that all you have to say?", to which he replied, "Yes".

The court then retired and upon reconvening, the Chief Justice announced:

> The Court has considered the unprecedented situation which has arisen. None of us knows of any reason for the remarkable statement earlier this morning and no reason has been advanced. The Court, therefore, proposes to continue.

(Emphasis added)

Mr. Justice Locke then said:

> I have something to say, however. I do not know you, Mr. Duncan. I have never had anything to do with you in my life. I have no feeling of any kind towards you. I know nothing about the case we are about to hear, but, since you have chosen to take this stand, I decline to sit in this case, I withdraw.

These excerpts from the case lead me to conclude that although the Chief Justice did not come out and directly say so, it is apparent that upon retiring, the members of the court were seeking to uncover any facts which might have shed some light on Mr. Duncan's motion. The fact that the exercise proved futile does not detract from its apparent legitimacy.

For these reasons, I see no basis for ordering the removal of Messrs. Yee and Robinson from the board. In my opinion they are perfectly entitled, should they see fit to do so, to continue in their adjudicative roles.

In the result, the application is allowed in part.

In view of the limited success on the part of each side, I would make no order as to costs.

Application allowed.

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6. Procedure

There is a presumption that a tribunal member will act fairly and impartially, in the absence of evidence to the contrary. The onus of proving bias lies on the person who alleges it.[128] A real likelihood or probability of bias must be demonstrated. Mere suspicion is not enough.[129] In the absence of a volunteered statement of the facts by the tribunal member, the allegations of bias must be proven with evidence under oath. An allegation that turns on comments made by the member outside the hearing room must be proven by direct evidence from a person who heard the comments. It is not sufficient to file a newspaper clipping without an affidavit from the journalist who heard the comments and wrote the article.[130]

An allegation of bias should be made first to the tribunal. This gives the tribunal an opportunity to correct the problem when it first arises. It is a faster and cheaper solution than an application for judicial review. The need to confront the adjudicator directly may cause a party to take greater care in making allegations of bias. Also, it allows the tribunal to state on the record the facts within its knowledge, creating a record for subsequent review by a court. This type of unsworn evidence is generally accepted by reviewing courts because it would be unseemly to permit a party to cross-examine a tribunal member and tribunals have sufficient institutional controls to ensure reliability of the information.

Allegations of bias should be raised at the outset of the hearing because 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. If, at the outset, the tribunal decides that one of its members is biased, that member should have nothing further to do with the proceeding and should avoid communication with the panel until after the final decision is made.[131]

When an allegation of bias is made, the tribunal should rule on the allegation. If it rules that it is not biased, it may continue with the hearing.

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[128] *Mugesera v. Canada (Minister of Citizenship & Immigration)*, [2005] S.C.J. No. 40, 2005 SCC 39.

[129] *Zündel v. Toronto Mayor's Committee on Community and Race Relations*, [2000] F.C.J. No. 679, 189 D.L.R. (4th) 131 at 142-43 (C.A.), leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 322; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] S.C.J. No. 5, 194 D.L.R. (4th) 385 at 406.

[130] *Cameron v. East Prince Health Authority*, [1999] P.E.I.J. No. 44, 176 Nfld. & P.E.I.R. 296 at 313 (S.C.T.D.).

[131] *Roberts v. College of Nurses*, [1999] O.J. No. 2281, 122 O.A.C. 342 (S.C.J.).

It is not obliged to halt the proceeding. A tribunal is not to be paralysed every time someone alleges bias.[132]

The parties may be unaware that there is a circumstance that may give rise to a reasonable apprehension of bias. A tribunal member who is aware of a problem may recuse him or herself from the hearing without consulting the parties.[133] If uncertain, the member should state the facts at the outset of the hearing and invite the parties to make submissions as to whether there is a reasonable apprehension of bias.

7. Objection and Waiver

Bias may be waived. A party who was aware of bias during the proceeding, but failed to object, may not complain later when the decision goes against it. The genuineness of the apprehension becomes suspect when it is not stated right away. An objection must be stated when the bias first comes to the party's attention.[134]

It is unwise and unnecessary to absent oneself from the hearing after the tribunal has ruled against an objection. If the objection is clearly raised and not withdrawn, continued participation will not be interpreted as acquiescence.[135]

8. Necessity

As bias is a rule of common law, it may not be applied to preclude the performance of the statutory mandate. If all tribunal members are subject to the same allegation of bias, out of necessity they will not be disqualified, because the statutory mandate must be carried out.[136] Similarly, if the

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[132] *Flamborough (Town) v. Canada (National Energy Board)*, [1984] F.C.J. No. 526, 55 N.R. 95 at 104 (C.A.), leave to appeal to S.C.C. refused (1984), 58 N.R. 79*n* (S.C.C.).

[133] *Kentville (Town) v. Nova Scotia (Human Rights Commission)*, [2004] N.S.J. No. 117, 222 N.S.R. (2d) 398 (C.A.).

[134] *Canada (Human Rights Commission) v. Taylor*, [1990] S.C.J. No. 129, 75 D.L.R. (4th) 577 at 611, 633; *Stetler v. Ontario (Agriculture, Food & Rural Affairs Appeal Tribunal)*, [2005] O.J. No. 2817, 76 O.R. (3d) 321 at paras. 96-100 (C.A.); *Eckervogt v. British Columbia (Minister of Employment & Investment)*, [2004] B.C.J. No. 1492, 241 D.L.R. (4th) 685 at 698-99 (C.A.); *263657 Alberta Ltd. v. Banff (Town) (Subdivision and Development Appeal Board)*, [2003] A.J. No. 1019, 346 A.R. 236 (C.A.); *Syndicat canadien de la Fonctrino publique, section locale 1378 v. Résidences Mgr. Chiasson Inc.*, [1996] N.B.J. No. 86, 172 N.B.R. (2d) 308 (C.A.).

[135] *McGill v. Brantford (City)* (1980), 111 D.L.R. (3d) 405 at 418 (Ont. Div. Ct.).

[136] *Caccamo v. Canada (Minister of Manpower & Immigration)* (1977), 75 D.L.R. (3d) 720 at 726 (F.C.A.).