IN THE MATTER OF the *Public Utilities Act*,
(R.S.N. 1990, Chapter P-47 (the "Act")

AND IN THE MATTER OF a General Rate Application (the "Application") by Newfoundland and Labrador Hydro for approvals of, under Section 70 of the Act, changes in the rates to be charged for the supply of power and energy to Newfoundland Power, Rural Customers and Industrial Customers; and under Section 71 of the Act, changes in the Rules and Regulations applicable to the supply of electricity to its Rural Customers

RESPONSE OF NEWFOUNDLAND POWER INC.

with respect to the Application of the Industrial Customers relative to Evidence of EES Consulting and Len Waverman

CURTIS, DAWE
Solicitors for Newfoundland Power Inc.
P. O. Box 337
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1. It is the position of Newfoundland Power Inc. ("Newfoundland Power") that:

(a) The Board of Commissioners of Public Utilities (the "Board") in exercising its statutory powers under the *Electrical Power Control Act, 1994* and the *Public Utilities Act* is a regulatory body which must consider broad issues of provincial power policy and the public interest. It is not merely deciding a dispute between parties.

(b) In order to fulfill its statutory mandate, the Board may retain counsel and consultants to present evidence touching on one or more subjects or issues in relation to the matter before it.

(c) The Board must maintain an open mind with respect to evidence presented by all parties, including evidence presented by Board's hearing counsel.

(d) No reasonable apprehension of bias arises simply from retaining counsel or consultants to present evidence.

(e) The Board must maintain an appropriate separation of the Board's hearing counsel and consultants from the Board, the hearing panel, the Board's general counsel and administrative staff to ensure that no reasonable apprehension of bias is created in a proceeding.

(f) There is no evidence of any action or conduct giving rise to any reasonable apprehension of bias in the current circumstances.

2. References:

Re Public Utilities Board Act, [1985] A. J. No. 666 (Alta. C.A.) (attached)

Sections 3 and 4 of the *Electrical Power Control Act, 1994*. (not reproduced)

Sections 6(11), 16, 118(1) and (2) of the *Public Utilities Act*. (not reproduced)

Chapters 14 and 18 of McCauley & Sprague, *Practice and Procedure before Administrative Tribunals*. (not reproduced)

3. It is the submission of Newfoundland Power that the Application of the Industrial Customers should be dismissed.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 15th day of September, 2003.

Ian F. Kelly, Q.C.
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Indexed as:

Public Utilities Board Act (Re)

IN THE MATTER OF a certain question of law raised by special case to the Court of Appeal of Alberta by the Public Utilities Board of Alberta
AND IN THE MATTER OF the Public Utilities Board Act, R.S.A. 1980, c. P-37, as amended, and section 13 of Alberta Regulation 602/57, Rules of Practice, passed pursuant to the said Public Utilities Board Act and the Gas Utilities Act, R.S.A. 1980, c. G-4, as amended

[1985] A.J. No. 666
Docket: 17502

Alberta Court of Appeal
Calgary Civil Sittings
McDermid and Kerans JJ.A. and Mason J. (ad hoc)

Oral judgment: November 25, 1985.
(9 pp.)

Counsel:

J. Major, Q.C., B. Locke, for the applicant Northwestern Utilities Limited.
D.G. Hart, Q.C., for industrial rate interveners.

MEMORANDUM OF JUDGMENT DELIVERED FROM THE BENCH

The judgment of the Court was delivered by

¶ 1 **KERANS J.A.** (orally):— This is a reference by the Public Utilities Board to this court pursuant to R. 13 of the Rules of Practice of the board (Alta. Reg. 602/57), which provides:

Preliminary Questions of Law

13. If it appears to the Board at any time that there is a question of law which it would be convenient to have decided before further proceeding with the case, it may direct such question to be raised by special case or in such other manner as it may deem expedient, and the Board may, pending such decision, order the whole or any part of the proceedings before the Board in such matter to be stayed.

¶ 2 With deference, I would read that rule as permitting the board itself to hear a preliminary point of law, the decision on which could be appealed, with leave, to this court. Such an approach has obvious merit for a tribunal, like this board, which would want, whenever possible, to see controversial points of law settled in a manner which would not put a long rate hearing in jeopardy. Nevertheless, a preliminary

decision is not quite the same beast as a preliminary reference. I could not turn up any provision (like, for example, s. 38(1) of the Expropriation Act, R.S.A. 1980, E-16) giving this court jurisdiction to supply advisory opinions to the board or to hear cases referred to it by the board. No objection was taken to jurisdiction, however, and the point was not raised by us at the hearing. Assuming without deciding, then, that we have jurisdiction, I proceed.

¶ 3 The board asks:

> (a) Is a reasonable apprehension of bias raised by reason of the fact that, unknown to the applicant, N.U.L. (Northwestern Utilities Ltd.) at the time a Mr. Mark Drazen gave evidence before the board at the g.r.a. (general rate application) on behalf of certain industrial rate interveners, the said Mr. Mark Drazen and/or his firm was on a retainer to the board in a consulting capacity with respect to the board's approach to, and process of analysis of, a general rate application?
> (b) If the answer to question (a) is yes, what is the appropriate remedy to be applied?

¶ 4 In support of the questions, the board offers a statement of facts, of which these are key: on 14th August 1984 the board engaged Mr. Drazen to "assess the board's approach and process of analysis of the general rate application". In late September 1984 the board received his "preliminary report". Meanwhile, Northwestern Utilities applied for the approval of the general rate for its gas product and a hearing began before a panel of three members of the board designated for this purpose. A group of industrial firms, called the industrial rate interveners, opposed the application and, on 10th and 11th December, led evidence from the same Mr. Drazen about the issues involved in that application. He obviously has some expertise and this has led to this demand for his services in various capacities, although we are not told precisely what that expertise is. Finally, on 20th January 1985, Northwestern Utilities applied to the panel to direct itself that the Drazen evidence "be disregarded and struck from the record . . ." on the basis that, when he testified, he was "on a retainer to, or was being consulted by, the Board in his professional capacity . . ." The panel did not decide upon this application; instead it directed the reference of this "special case" to us on the grounds that "no one can be judge in his own cause" and that the appearance of justice prevented them from deciding it. The panel then adjourned the general application pending our decision. Before us, the board solicitor made no submissions.

¶ 5 We must first observe, with respect, that the board rule speaks only of a point of law. This special case obviously involves matters of fact as well as law. Moreover, we do not know all of the relevant facts. Questions about apprehension of bias cannot be decided in the abstract. We doubt that the board can properly refuse to decide such issues. Individual members, when the panel resolved not to decide the application before it, put themselves at risk of an application for a writ of prohibition on the ground that the individual is disqualified for bias. The advantage of that proceeding at least is that it permits the Queen's Bench judge to inquire into the facts of the matter. If s. 67 of the Act forbids such an attack, then all the more reason for the board to decide the case.

¶ 6 In any event, we do not think we have nearly enough facts before us to offer an unequivocal answer to the first question posed by the board. For example, it is not clear that the matters about which Drazen testified were totally distinct from the matters about which he was consulted. We understand that the board must develop policy about its procedure generally (as well as decide individual cases) and properly consults experts privately in that regard: see s. 14(1) of the Act. Mr. Hart, for the interveners, understands that Drazen was consulted about "streamlining procedures". But the description of the retainer supplied by the board is extremely vague, and Mr. Hart acknowledges that he has not seen the retainer or the preliminary report. Nor have either been put before us. In fairness, Mr. Major for Northwestern Utilities accepts that, in general terms, Drazen was not retained to advise about the issue which arose on its gas rate application.

¶ 7 Similarly, we are not told what, if any, private communications have passed between Drazen and any of the panel members from the time he began to testify until now (that is, while the question of reliance on his testimony remains under deliberation by the panel). In fairness, Mr. Hart says that he understands that there have been some with at least one panel member.

¶ 8 We will not answer the question put. Nonetheless, we shall endeavour to meet as best we can the implicit request for assistance from the board. We do so dubitante, for the reasons expressed.

¶ 9 The standard to be applied by the board in the circumstances is settled. It is an error, and probably jurisdictional error, for a tribunal - or any member of it - to allow itself to be in the invidious situation where there could be ". . . a reasonable apprehension, which reasonably well-informed persons could properly have, of a biased appraisal and judgment of the issues to be determined . . ." See Committee for Justice and Liberty v. Nat. Energy Bd., [1978] 1 S.C.R. 369 at 391.

¶ 10 It is said for Northwestern Utilities that:

> . . . a reasonably well-informed person could properly have a reasonable apprehension that:
>
> (a) the board recognized Drazen as a superior expert in his field, by the fact of having retained him in preference to others;
> (b) the board reposed greater trust and confidence in the opinion of Drazen than in that of other experts, by the fact that the board had chosen to consult Drazen;
> (c) the board had a loyalty to Drazen because of its business relationship with him; and
> (d) the board would accord more weight to the evidence of Drazen than to that evidence provided by another expert witness.

¶ 11 We agree that a reasonably well-informed person could properly fear - based solely on the fact of the retainer - that the board has great confidence in Drazen and his skills. We do not accept that this fact alone permits a reasonable apprehension that the board thinks he is better than other experts; he may have been chosen over others for many reasons, as for example availability. Moreover, the respect shown by the retainer would not, of itself, raise an apprehension in the mind of a reasonable and well-informed person that the board would, as a result of its high opinion of Drazen, pre-judge a case by unthinkingly preferring his evidence. We test this thesis in this way: assume the retainer was completed before the hearing began. Would a reasonable apprehension of bias remain? We think not. We liken the expression of respect involved in a hiring to the expression of respect involved in accepting his testimony - and relying on it - in a previous case. Past expressions of respect, whether by hiring or by acceptance of testimony, surely do not lead to a reasonable fear of a future unthinking (by which we mean based upon anything other than the merits of the case) reliance on later testimony by the same expert.

¶ 12 Mr. Major suggests that a decent interval must elapse after such past reliance before the glow of warm regard wanes. We do not agree. In most circumstances, we would not assume that there is an "afterglow". A reasonable, well-informed person will not count so little on the sobering effect of the oath of office which, as Wilson J. quotes in R. v. Pickersgill (1970), 14 D.L.R. (3d) 717 at 723, commands a trier of fact not to ". . . yield to his preconceptions or become captive to unexamined and untested preliminary impressions".

¶ 13 The real thrust of Mr. Major's complaint, as he conceded during oral argument, is not so much the past engagement of Drazen as its result: his ongoing relationship with the board. This, we think, is a legitimate concern. It is a dangerous policy to put Mr. Drazen in the position where he is at once advisor and witness. Assume, for example, that he has met regularly and privately with a member of the panel while his testimony is under consideration by that member. No matter how much the member protests that the merits were never discussed, a well-informed person can reasonably fear that these private dealings might lead the trier to hesitate to cause himself - and Mr. Drazen - the awkwardness of rejection of his testimony. A professionalism which transcends such concerns is not only demanded of but possible for those who perform a judicial role; but one might reasonably fear failure to comply with that standard by one who exposes himself to avoidable pressure of this sort. Private dealings between an individual board member and a witness - unless shown to be totally innocuous - should not be permitted to occur while his evidence is under deliberation.

¶ 14 This takes us to the second issue, and the novel suggestion by Mr. Major that the solution is that the Drazen evidence be struck from the record. He offers no support for this suggestion in the authorities except for R. v. Salford Assessment Committee, ex parte Ogden, [1937] 2 K.B.1. With respect, that case does not support the proposition that a relevant and compellable witness should not be permitted to testify because there is a reasonable apprehension that the tribunal before which he testifies might have a bias for or against his testimony. In that case, a tribunal hearing rate appeals asked an officer of the rating authority to act as clerk of its proceedings. The rating authority, unfortunately, was the very body appealed from, and it was held that to permit him some involvement in the appeal proceeding would offend the rules of natural justice.

¶ 15 We think the rule was correctly stated by this court in Murray v. Rockyview No. 44 (1980), 12 Alta. L.R. (2d) 342. In that case, some members of the tribunal had put themselves in the position of being relevant witnesses. This court held that they were, thereby, disqualified from sitting on the and the issue would have to be reheard by members not so disqualified.

¶ 16 In conclusion, we repeat that we do not know precisely what has occurred here and therefore do not know whether any board member should be disqualified. But a board member who has trespassed the rule stated by the Supreme Court obviously should disqualify himself or be removed from participation in the hearing. If, as a consequence of such disqualification, the panel falls below a quorum, there must be a rehearing before another panel. Of course, it is open to the parties, by agreement, to arrange for a less drastic solution. For now, we can only say that those who are not qualified should not sit.

KERANS J.A.

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