

## DECISION

To all interested parties

**RE: Application No. 1478550 - AltaLink Management Ltd.**  
**Application No. 1479163 - Epcor Transmission Inc.**  
**Decision 2005-031 and Decision 2006-114**

The Alberta Energy and Utilities Board (EUB/Board) has reviewed all of the above decisions, the circumstances surrounding them, and matters relating to them, that are the subject of appeals before the Alberta Court of Appeal and an Originating Notice before the Alberta Court of Queen's Bench. Both the 500 kV panel, as it affects proceedings before them, and the Board as a whole as to the entirety of the proceedings, have made the following unanimous decision.

At times, in the life of a judge, due to misadventure, questionable judgment or circumstances beyond the judge's ability to control, that judge must withdraw from a proceeding and declare a mistrial. They must do so when they can no longer decide the case with the apparent fairness and impartiality that is the foundation of our system of law.

This decision involves the administrative tribunal equivalent of that situation. It concludes that, in respect to the proceedings involving the decisions regarding need and the proposed Edmonton to Calgary 500 kV power line, the Alberta Energy and Utilities Board has lost jurisdiction. Circumstances have accumulated into a reasonable apprehension of bias.

Reaching such a conclusion is rarely easy for a judge; it is as difficult and legally more complex for an administrative tribunal. Underlying all the statutory rules and the complexity of regulatory and administrative law, there remains the same fundamental principles of fairness and impartiality.

The Supreme Court of Canada has said<sup>1</sup>:

*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*

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<sup>1</sup> *Newfoundland Telephone Company v. Newfoundland (Board of commissioners of Public Utilities)* [1992] 1 S.C.R. 623 at para: 40.

*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. (emphasis added)*

The test is not whether the board is biased, it is whether there is a reasonable apprehension of bias, the test for which the Supreme Court frames as:<sup>2</sup>

*What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.*

Impartiality is the other side of this coin. Every decision maker; judicial or quasi-judicial, must be and must feel competent and free to decide the matter honestly and independently. The Chief Justice of Canada described the importance of impartiality as follows:

*The ultimate duty of a decision-maker is to be impartial. Impartiality refers to the absence of bias and freedom of outside pressure. Independence refers to the situation of the decision-maker and tribunal that allow them to act impartially. It is the necessary condition of impartial decision-making.*

*Courts refer to two kinds of impartiality, both of which are essential for valid decision-making. First, the decision-maker must be impartial in deciding a particular case. This is a subjective matter. While partiality may leave clues, often it is only the decision-maker himself or herself who knows whether or not he or she has decided impartially. Second, the decision-maker must be perceived to act impartially. This is an objective matter.*

*Both kinds of impartiality are essential for valid decision-making. It is obviously essential that tribunals in fact act impartially. But it is also essential that tribunals must be perceived as impartial. For tribunals to function effectively, they must enjoy the confidence of the people whose rights they adjudicate. A tribunal that is not perceived to be impartial is unlikely to inspire the confidence of the public.<sup>3</sup>*

This decision concludes that, for this case, and in these circumstances, the reasonably informed person would indeed hold a reasonable apprehension about the EUB's ability to decide this matter fairly and impartially and that, as a result, jurisdiction has been lost.

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<sup>2</sup> *Wewaykun Indian Band v. Canada* [2003] S.C.R. 259

<sup>3</sup> *Independence: Tribunal Decision Making* by the Honourable Madam Justice Beverly McLachlin, Oct. 12, 1999, Council of Canadian Administrative Tribunals, Vancouver BC

These reasons will review

- (a) the basic rules of bias and impartiality
- (b) the situation as it exists currently before the EUB
- (c) several ways in which the legal issues of bias and impartiality present themselves before a tribunal like the EUB in a different form than before the Courts
- (d) the circumstances that have led to this conclusion, and
- (e) the process the EUB will follow, or recommends be followed by others, from here.

### **The Basic Rules of Impartiality and Bias**

As noted above, a reasonable perception of bias or lack of impartiality voids a decision making process. Neither actual bias nor actual lack of impartiality are required. There are several different types of bias. Bias can arise because of the way the institution is structured, or the way it conducts itself, rather than because of what individual members do or think.<sup>4</sup>

*50 The fifth type of bias is institutional bias. This type of bias generally arises when one person in a tribunal acts as both complainant, investigator, prosecutor, and adjudicator in the same proceeding. This is the type of bias that is often dictated by the statute, and accordingly does not give rise to a challenge: Brosseau and the other cases following it, supra, paras. 41-42.*

*51 The sixth type of bias is operational bias. This type of bias arises when the procedures adopted by the tribunal result in unfairness to one party or the other. This type of bias can arise out of ex parte communications between the tribunal and one of the parties, or other unbalanced procedures that give rise to unfairness.*

The Alberta Courts have held that the bias test is to be applied as follows:<sup>5</sup>

*53 The test is objective: Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623 at para. 22. It is not sufficient that the party before the tribunal honestly believes there is bias or an appearance of bias: CEP (Local 707) v. Alberta (Labour Relations Board), 2004 ABQB 63 at para. 235. The test is that of a reasonable observer, who is not unduly suspicious or cynical. As I have previously held in these proceedings (Robertson v. Edmonton (City) Police Service (#9), 2004 ABQB 243 at para. 65) whether there is a reasonable apprehension of bias is a question of law, and opinion evidence on the point is not admissible.*

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<sup>4</sup> *Robertson v. City of Edmonton Police Service* [2004] A.J. 805 (Slatter J.)

<sup>5</sup> *Robertson*, supra, footnote 1.

## **The Situation as it Exists Currently Before the EUB**

The proceedings to approve this line are, by law, subject to a two stage review under Sections 34 and 35 of the *Electric Utilities Act*. The Board considered, in respect to the first step, high level options as to the potential line's location. It favoured what is called "The West Corridor". Certain parties objected to the result, claiming a lack of notice and a lack of an opportunity to express their views on the question of need and location. The Board heard a request to reconsider but the resulting decision left several parties dissatisfied. Among other issues they raised bias and a lack of notice as part of their grounds for appeal. They applied to the Alberta Court of Appeal for leave to appeal. A Justice of that Court granted leave. That appeal is scheduled to be heard in November 2007.

The Board began the second phase hearings. The hearings, partly as a result of ongoing discontent over alleged lack of notice and too narrow a scope for participation became difficult to manage and were disrupted and violence broke out. Hearings were adjourned and resumed in a new location. Officials of the Board hired an outside contractor to assist in Board security. The persons thus hired attended the hearings in plain clothes and engaged in activities that some parties say interfered with their solicitor client privilege. One of the persons hired, a private investigator, by obtaining a password, participated in a telephone conference call where participants discussed their concerns. This participation in the phone call was authorized by a senior EUB official. It has risen suspicions about what other activity of a similar kind may have occurred.

In addition, parties sought appellate review of an interlocutory ruling made by the Board panel concerning the role to be played by the NID (Needs Identification Document) in the facility application. This question was also granted leave and will be heard in November of 2007.

Parties to the case have filed a motion in the Court of Queen's Bench alleging that the EUB's actions in this matter raise a reasonable apprehension of bias. The motion has been raised directly with the Court, apparently without a clear formal request that the EUB decide the matter first. It is to be heard during the first week of October.

The public debate over these allegations has been extensive. Commentary has been given in the media, by academics and politicians and the public at large about the propriety of the EUB's actions. This has concerned particularly the propriety of ever retaining a private security firm and the propriety of that firm's activities, whatever the extent of those activities may prove to be. Questions have been raised about the EUB's involvement in directing or controlling those activities, its knowledge of the results, and the degree to which information may have been shared with the Board's members. There have been statements by Ministers of the Crown commenting critically on the EUB's conduct of this matter. A report by retired Queen's Bench Justice Perras contains

criticism of some of these events. A report of the Information and Privacy Commissioner is similarly critical.

This approval process, summarized below, has involved several different panels of the board. A three person panel, following the latest hearings, is currently adjudicating the final stage of the matter. Some of the bias issues raised before the Court of Appeal raise concerns about the constitution of the various panels of the Board.

### **Differences in Court and Board Processes**

When single judges declare a mistrial and recuse themselves from a case it involves a more personal decision, and less complexity, than does a similar step in a large administrative tribunal like the EUB. There are several reasons for this, all of which touch upon what we are doing, how we are doing it, and what ought to follow from here.

- (a) Judges are individuals, whereas administrative tribunals are institutions. Not only that, they are complex institutions where decision making authority is allocated, not always with great precision, between the tribunal chair, members, panels and the full board.
- (b) Judges have broad and plenary authority based on a tradition of an independent judiciary built up over hundreds of years. Tribunals are creatures of statute created by and dependent upon the rules created for them by the Legislature. Nevertheless, subject to statutory exemptions, the same principles for fairness apply.
- (c) Unlike Judges, and more like Ministers of the Crown, boards like the EUB employ staff who of necessity, must carry out a multitude of regulatory functions on behalf of and in the name of the Board. Judicial responsibility carries little analogy to ministerial responsibility, where Ministers are traditionally responsible for the actions of those they employ. Administrative tribunals in this respect are wedged somewhere between the two. What is indisputable is that public perception of a board's fairness can be influenced by any arm of the institution not just the actions of the Board's adjudicators.
- (d) Unlike Judges, the EUB has both regulatory and adjudicative functions. It is given very wide powers to act in the public interest. Often it must act of its own motion and at times without a hearing where the public interest so dictates. Ensuring that Albertans have a secure, stable and well planned electrical system is one such public interest, but so are social and environmental concerns and the economic interests that arise from our industrial base and our land based agricultural economy. No one interest is paramount. Balancing these interests is a policy laden function, quite unlike what takes place in Court trials.
- (e) Applications before the EUB, of necessity, proceed in stages. The legislation requires this to a degree, but so does the complexity of hearing and balancing these interests in an orderly way. The matters before the Board can be seen as one proceeding, or several individual proceedings. A perception of bias, however, particularly where it includes allegations of institutional or operational

bias, can taint the institution's whole proceedings and rise above the various legal stages into which the proceedings are sub-divided. This is significant in that, at times, due to the vagaries of judicial review, the Courts may become seized with part of the process but not the whole. However, the same can be true of board panels charged with specific issues. Whatever the forum, the question of an apprehension of operational or institutional bias has to be viewed in a global sense.

- (f) Judicial powers for maintaining order and civility are stronger, better understood and more readily accepted. Judicial business infrequently combines utility accountants and engineers, farmers and ranchers concerned over the land they depend upon and love deeply, and citizens groups committed to social causes like the environment, the export of natural resources or wildlife habitat.

Despite all these differences, however, the EUB accepts that nothing can justify conduct that raises a reasonable apprehension of bias or that diminishes the appearance of impartiality.

### **The Circumstances that have led to this Conclusion**

The Board has considered the entirety of the proceedings before it, as well as the reports and leave rulings it has received as noted below. In addition, it has considered the submissions made by parties to the several challenges to the Board's proceedings which outline the parties' positions on the apprehension of bias issues as raised in those proceedings. The Board particularly considered the following issues and circumstances in arriving at this decision.

1. The EUB review and variance panel found that, (quoting, for convenience, Justice Conrad's summary in the leave decision):

*[12] A quorum of the full board of the EUB (the quorum) considered the review requests. In a letter decision written by board counsel, the quorum stated it was convinced the notification process surrounding the NID application was adequate, but acknowledged that members of the public were confused about the new two-part process for project approval. The quorum also stated in the letter:*

*[T]he Board recognizes that significant numbers of Albertans with serious concerns with respect to the selection of the west corridor did not participate in the hearing thereby denying the Board the benefit[of] their evidence and submissions.*

*[13] The quorum decided to grant review on this basis. Having decided to grant review, however, to allow non-participants to participate, the quorum went on to restrict the scope of review to the suitability of the West Corridor. It stated:*

*“The issue of need and all other matters decided at the original hearing will not be subject to review.”*

See also the Review Board decision reference in the Board’s December 6, 2006 decision at p. 9. We find it significant that the panel acknowledged the limitation of input on a significant group of people.

2. Justice Conrad in the Court of Appeal has granted leave to appeal on a bias issue saying:<sup>6</sup>

*[46] While I do not have a full record of the proceedings, I am satisfied that the continued membership of the Chair on the review and variance panel, as well as the comments alleged to have been made during the hearing, make it arguable that a reasonable apprehension of bias existed. As bias is a jurisdictional issue, leave ought to be granted with respect to this ground of appeal.*

This finding, albeit on a leave motion without a formal ruling, indicates serious questions of bias arising before any questions arose over the private investigators situation. The allegations are raised by essentially the same groups as now raise concerns about these subsequent events.

3. Justice Conrad also commented on the limited scope of submissions allowed following the review:

*[36] In my view, Lavesta has raised a serious and arguable issue of law and/or jurisdiction. The quorum recognized that the various applications for review, filed in response to the NID decision, were based on the fact the applicants seeking review and variance did not have actual notice. It went on to grant review of the decision to approve the use of the West Corridor because “significant numbers of Albertans with serious concerns with respect to the selection of the west corridor did not participate in the hearing thereby denying the Board the benefit of their evidence and submissions.” If the quorum was correct in this finding, however, those same Albertans were denied more than just the opportunity to speak to the selection of the West Corridor. They were also denied the opportunity to make submissions on the need for the transmission line. Thus, it is arguable that even if the quorum was entitled to limit the scope of the review and variance hearing, once it found a need for review on the basis that significant number of Albertans were denied the opportunity to make submissions, the EUB could not limit the scope of the review and variance hearing. (emphasis added)*

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<sup>6</sup> 2007 ABCA 194 at para. 46

4. Justice O'Brien has said he is likewise satisfied that leave should be granted.<sup>7</sup> Both Justice O'Brien and Justice Conrad granted leave in broad terms. In refusing a stay application, Justice O'Brien (see paragraph 29) nevertheless suggested that the Board was "entitled to determine its course in light of the leaves now granted"
5. Justice Perras (Retired) described certain conduct of an individual acting on behalf of the Board as "repulsive" and "more so because it is not needed to carry out the security mandate". The people affected are the very same people raising bias and lack of an opportunity to be heard in the earlier proceedings, thus giving a cumulative effect.

Justice Perras' report did not investigate some allegations fully, and he did not absolve the EUB on those issues. Instead he said:

*The allegations of spying and listening to solicitor-client conversations are troubling and problematic and if established are serious matters. This examination is not broad enough nor does it have the time to delve into the allegations of solicitor-client transgressions in depth.*

and further

*Since issues of solicitor-client transgressions have been raised as an issue in an application before the Court of Queen's Bench, I leave that issue to be canvassed in the Court where I am sure it will be thoroughly aired.*

6. The Privacy Commissioner has found that some of the actions taken on the board's behalf contravened Alberta's privacy legislation.
7. The grounds in the notice of motion for judicial review and the supporting affidavits raise additional concerns, particularly troubling of which are those about the inference with solicitor client relationships. While the Board has not heard from the parties directly on this issue, it has before it, and has considered, the submissions of all parties on those allegations placed before the Court of Queen's Bench. The Board is profoundly troubled by the impact actions taken by Board officials, on its behalf, to protect its security, have had on the parties and the public's perception of the Board.
8. If the Board were to maintain, in Court, that no bias existed, it would compound the problem of perception, which it wishes to avoid doing. In the Board's view, it is important that it decide, for itself, on whether its proceedings are now void. The Board does not want to add anything further to a perception that it is unaware of, or insensitive to, those

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<sup>7</sup> 2007 ABCA 210

perceptions of bias that have been created. Rather it is taking steps itself to restore that confidence.

9. The public, political and media reaction to these events have exacerbated the likelihood of there being a reasonable apprehension of bias and public faith in the Board's ability to discharge its duties impartially.

### **What happens from here**

In summary, the Board has determined that the need decision and related review and variance decision and the subsequent 500 kV Edmonton to Calgary proposal application are void. The more difficult question is what is to be done from here. Many of the following steps turn, at least in part, on what the proponents decide to do including the timing of the filing of any new applications.

1. Acting Board Members could be added to the EUB by the Lieutenant Governor in Council to form a panel to consider the applications. Should this occur, the Board would urge that the government ensure that this panel includes judicial or quasi-judicial experience at a high level, as well as relevant experience such as engineering expertise and familiarity with relevant issues affecting persons over whose lands such development would pass. This panel should be made up of persons who have had no involvement whatsoever with the prior hearings or events related to them.

Those sitting as members of the EUB prior to the filing of any such applications, would not be assigned to any further panels dealing with these applications or any successor applications.

2. Counsel for the EUB retained to appear in response to the Court of Queen's Bench motion, alleging EUB bias, will be provided with fresh instructions. The Court will be advised of the steps being taken by the Board in this decision. Counsel for the Board will be instructed to withdraw any submissions that suggest that no reasonable apprehension of bias exists. If the Court provides any directions to the Board arising from those proceedings they will of course be followed totally and completely.

3. For greater certainty, the Board has decided to grant a stay of the operation of its orders and directions in the matters before the Court of Appeal pursuant to Section 26(5) of the *Alberta Energy and Utilities Board Act*. As a consequence, the Board stays all further proceedings pursuant to those orders and directions, the suspension and stay to last for the time provided in that section or until further order of this Board or the Court.

4. As to the arguments about the legal interpretation of sections 34 and 35 and related issues of statutory interpretation, the Board's counsel will be instructed to invite the Court of Appeal, notwithstanding this decision, to provide an interpretation of those sections so that future proceedings over this proposal and others can proceed without

interruption and based on the Court's view of each of the sections' scope and any other relevant statutory provisions.

Decided unanimously and dated at Calgary, the 30<sup>th</sup> day of September, 2007.

ALBERTA ENERGY AND UTILITIES BOARD

Per: <original signed by>  
William A. Tilleman, J.S.D., Q.C.  
Chairman