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City of Richmond

Application to Consider Apprehension of Bias

Decision

December 13, 2021

Before:
T. A. Loski, Panel Chair

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1.0 City of Richmond's Application

By Letter dated September 9, 2021, the City of Richmond (Richmond) applied for, amongst other things, the disqualification of myself, Commissioner T. Loski, the Chair of the Panel for the British Columbia Utilities Commission (BCUC) Inquiry into the Regulation of Municipal Energy Utilities (Inquiry) on the grounds of a reasonable apprehension of bias due to my prior employment with FortisBC Energy Inc. (FortisBC) and the British Columbia Hydro and Power Authority (BC Hydro) (Application).

In its Application, Richmond submits that a reasonable apprehension of bias exists because I was previously employed by FortisBC for 32 years, that I held shares and share options in FortisBC, and I have a pension plan from FortisBC.

As set out in Exhibit A-19, the Application was heard by myself. Participants in the Inquiry were provided an opportunity to make submissions on the Application after which Richmond was provided its opportunity to reply.

2.0 Background

By Order G-177-19 dated August 1, 2019, and as amended by Order G-316-19 and Order G-14-20, the BCUC established the Inquiry which included a regulatory timetable consisting of intervener registration, a request for written submissions, letters of comment,[1] intervener evidence, BCUC and intervener information requests and submissions on furthers process. [2]

By Order G-56-20 dated March 17, 2020, the BCUC adjourned the Inquiry until further notice due to the global COVID-19 pandemic and the state of emergency declared in British Columbia.[3]

On July 16, 2020, the BCUC proposed an Inquiry restart date of March 31, 2021, requesting that interveners provide submissions on the proposed restart date by February 1, 2021. Following submissions, the BCUC issued a letter confirming that the Inquiry should remain adjourned until the state of emergency in British Columbia relating to the COVID-19 pandemic is lifted at which time the BCUC would seek further submissions from interveners on a possible restart date for the Inquiry.

By letter dated January 29, 2021, one of the interveners in the Inquiry, Richmond informed the BCUC that it had made a formal request to the Lieutenant Governor in Council and to the Executive Council of British Columbia to issue a direction to the BCUC to suspend the Inquiry (Formal Request). Richmond stated that its Formal Request was made on the grounds of: 1) the BCUC's lack of jurisdiction; 2) there being a reasonable apprehension of bias; and 3) alleged regulatory capture.[4]

Following submissions by interveners on the appropriate time to address the points raised by Richmond, by letter dated March 11, 2021,[5] the BCUC requested Richmond provide the following to the BCUC: 1) a copy of the Formal Request made to the Province of British Columbia; and 2) any response received from the Province of British Columbia in relation to the Formal Request, by Friday, March 19, 2021.

[1] Exhibit A-1.
[2] Exhibit A-7.
[3] Exhibit A-9.
[4] Exhibit C12-5.
[5] Exhibit A-15.

Following Richmond's letter dated March 19, 2021, by Letter dated March 25, 2021, the BCUC invited Richmond to make an application with regard to the allegation of bias and to substantiate any claims with appropriate evidence as required for such an application.

By Order G-241-21 dated August 11, 2021, the BCUC resumed the Inquiry. On September 9, 2021, Richmond applied to dismiss the proceeding on the grounds of lack of jurisdiction, institutional bias, and regulatory capture, and to disqualify the Chair of the Inquiry, Commissioner T. Loski, on the grounds of a reasonable apprehension of bias.[6] The Inquiry has been adjourned to consider the Application.[7]

3.0 Summary of the Positions of the Interveners

Of the 24 interveners in the Inquiry, other than Richmond, 10 (ten) provided submissions on the Application. Four of the interveners supported the relief sought by Richmond in its Application. Five interveners were opposed to the Application, and one intervener stated that it defers the matter to the BCUC for its determination. The summary positions of each of the ten interveners are set out immediately below. Where appropriate, further portions of the interveners' submissions are set out in subsequent sections of this document.

"Lulu Island Energy Company Ltd. ("LIEC") supports the relief sought by the City of Richmond in its application dated September 9, 2021 and adopts as its own the submissions and evidence relied upon by the City of Richmond."[8]

"[City of] Surrey (Surrey) believes that Richmond raises valid concerns regarding Commissioner Loski that have the potential to impact the integrity and impartiality of the Inquiry and affect the participants' right to procedural fairness in the Inquiry. Surrey agrees that, based on the evidence submitted by Richmond, there may be a reasonable apprehension of bias with respect to Commissioner Loski."[9]

"[BC Community Solar Coalition] BCCSC believes that the City of Richmond raises informed and real concerns regarding the Commissioner which have the potential to impact the integrity and impartiality of the Inquiry. In considering Richmond's application the BCCSC decided that it needed to consider the requirement to presume the 'impartiality of the adjudicator' with the 'reasonable apprehension of bias' and not bias per se." BCCSC concludes that, based on the evidence submitted by the City of Richmond, and Commissioner Loski's professional background (of 34 years of experience working with energy utilities in BC and no history working for a municipal utility), there is a reasonable apprehension of bias.[10]

"Metro Vancouver would encourage the BCUC to consider the pertinent facts specific to the impetus and scope of this Inquiry and carefully consider whether an informed person, viewing the matter realistically and practically – and having thought the matter through – would conclude that more likely than not Commissioner Loski, whether consciously or unconsciously, would not decide fairly as Chair of the panel for this Inquiry."[11]

"[City of] Abbotsford submits that Commissioner Loski should not be disqualified on the grounds of a reasonable apprehension of bias."[12]

[6] Exhibit C12-9.
[7] Exhibit A-18.
[8] Exhibit C13-5, p. 1.
[9] Exhibit C17-7, p. 1.
[10] Exhibit C20-2, p. 2.
[11] Exhibit C10-8, p. 6.
[12] Exhibit C7-7, p. 1.

Mr. Flintoff does "not oppose the appointment of T. Loski as the Chair of the Inquiry based on his past employment and pensions, any public utilities' interest in this Inquiry, or the lawful withholding of any information by BCUC under the FIOPPA" and concludes that "there does not appear to be evidence of an apprehension of bias."[13]

"With respect to Commissioner Loski specifically, the [Commercial Energy Consumers Association] CEC also has no concerns. The CEC has experience in regulatory matters with Commissioner Loski during his tenure in the utilities and during his time as a Commissioner at the BCUC. As a ratepayer group concerned with the impact of utility actions and costs, the CEC has found Commissioner Loski to be fair and unbiased. The CEC also finds no pattern of bias emerging from Commissioner Loski's track record as a Commissioner…. The CEC recommends that the Commission find there is no reasonable apprehension of bias with Commissioner Loski." [14]

The BC Sustainable Energy Association (BCSEA) submits that the Application should be dismissed.[15]

''BC Hydro submits that the claim that Commissioner Loski should be disqualified from the Inquiry due to a reasonable apprehension of bias does not meet the high threshold requirement. The evidence supporting this claim in the Application would not lead a reasonable person to conclude that Commissioner Loski would not remain impartial during the Inquiry."[16]

"FortisBC ultimately defers to the BCUC to determine the merits of Richmond's application."[17]

4.0 Tom Loski Employment Background

I disclosed the following information by Letter dated September 24, 2021:[18]

i) I retired from FortisBC in 2014.

ii) I retired from BC Hydro in 2016.

iii) In accordance with Section 11 of the *Utilities Commission Ac*t, I have no beneficial interest in any entity regulated by the BCUC, including FortisBC.

iv) I am a beneficiary of a defined benefit pension plan from both FortisBC and BC Hydro.

FortisBC provided certain background facts, which I find particularly relevant to the matter at hand:[19]

- Commissioner Loski retired from FortisBC effective November 1, 2014, i.e., seven years ago.
- Commissioner Loski was appointed to the position of Vice President, Customer Service on October 1, 2010, i.e., 11 years ago. After that date, Commissioner Loski had no involvement, direct or indirect, with regulatory matters.
- Dealings with municipalities or municipal utilities were not part of Commissioner Loski's responsibilities while at FortisBC.
- FortisBC is not aware of the issues in this Inquiry arising, or receiving substantial attention from FortisBC, during the period when Commissioner Loski was involved with regulatory matters.

[13] Exhibit C3-9, p. 3.
[14] Exhibit C25-6, p. 2.
[15] Exhibit C11-7, p. 1.
[16] Exhibit C1-6, p. 1.
[17] Exhibit C5-8**,** p. 1.
[18] Exhibit A-19, p. 1.
[19] Exhibit C5-8, p. 2.

I confirm this information provided by FortisBC to be accurate. I provide the following additional information for clarity.

Between 2000 and September 30, 2010, I worked in various capacities in the regulatory affairs group at FortisBC: from 2000 as the Rate Design Manager; from 2004 as Director, Regulatory Affairs; and from 2007 as Chief Regulatory Officer until September 30, 2010. As Chief Regulatory Officer, my responsibilities included developing regulatory strategy and responsibility for administrative oversight of all regulatory submissions made to the BCUC. I also had responsibility for certain submissions made to other regulatory agencies being the National Energy Board and the Federal Energy Regulatory Commission. I did not have managerial authority or responsibility for Oil and Gas Commission (OGC) related regulatory matters, nor did I have any involvement with OGC-related issues at any time during my employment at FortisBC.

I also confirm that when I stated that I have "no beneficial interest in any entity regulated by the BCUC, including FortisBC", this means I do not hold any shares or share options in Fortis Inc. (the publicly-traded parent of FortisBC). To be clear, I divested all shares and share options of Fortis Inc. on or before December 20, 2018. As my appointment as a commissioner occurred on November 26, 2018, I note this occurred within the 3-month timeframe as required under section 11 (2) of the *Utilities Commission Act* (UCA).

5.0 Framework for Decision

In the section below, I will first address the submission that my previous employment results in an apprehension of bias. Next, I will address the submission that my defined benefit pension results in an apprehension of bias. Following which, I will address a procedural matter raised by the BCCSC where it questioned the process for dealing with the Application.

6.0 Allegation that prior employment results in an apprehension of bias

6.1 Richmond's Position

In its reply submission Richmond submits:[20]

> …Fortis introduces purported facts regarding Commissioner Tom Loski's past employment with Fortis without any supporting evidence. These purported facts are in direct contradiction to the real facts supported by real evidence relied upon by the City of Richmond. It is submitted that BC Hydro, and other interveners who oppose the relief sought by Richmond, attempt to recast and limit the factual and evidentiary record by excluding reference to relevant facts and evidence that form part of Richmond's application. Richmond continues to rely on all such facts and evidence.

Richmond took issue specifically[21] with the following submission made by FortisBC that stated:

- "Dealings with municipalities or municipal utilities was [sic] not part of Commissioner Loski's responsibilities while at FortisBC. [emphasis in original]
- FortisBC is not aware of the issues in this Inquiry arising, or receiving substantial attention from FortisBC, during the period when Commissioner Loski was involved with regulatory matters."[22]

[20] Exhibit C12-10, pp. 1–2.
[21] Ibid, p. 4.
[22] Exhibit C5-8, p. 2.

Richmond states in response that the former "is an outright falsehood or deliberate attempt to mislead. There are at least two significant matters involving dealings with municipalities and with municipal infrastructure and utility projects that Commissioner Tom Loski has played a direct part in." Richmond proceeded to discuss the case of *FortisBC Energy Inc. v. Surrey (City) [2013] B.C.J. No. 2853* and states, in part:

> Again, contrary to Fortis' submission, any reasonable person knowing the role and function of a Chief Regulatory Officer would conclude that Commissioner Tom Loski would have been involved at that time. In fact, it is implausible that Commissioner Tom Loski would not have been involved in such a matter involving multiple steps and regulatory proceedings before the Oil and Gas Commission, which together with the BCUC, shares regulatory jurisdiction over Fortis.[23]

Richmond further states:[24]

> Such involvement or perceived involvement, in what can be described as evidence of a breach of public trust and evidence of behaviour unbecoming of a public utility, offends the applicable legal principle of independence. In other words, applying the legal test referred to above, a reasonable, well-informed person who has thought the matter through would perceive the decision-maker to be insufficiently independent or impartial. Commissioner Tom Loski should, therefore, be disqualified.

With respect to the second matter, Richmond identified certain information from the FortisBC website, Fortis Inc. annual reports, and Hansard.[25] Richmond asserts that this information "…reasonably establishes that Commissioner Tom Loski was:[26]

> (i) involved in matters pertaining to the regulation of district energy utilities for Fortis…and
> (ii) was involved in strategy development with respect to the delivery of district energy utilities for Fortis…"

Richmond further states:[27]

> In light of above, it is not unreasonable to perceive that the efforts of Commissioner Tom Loski in relation to district energy utilities, including strategy development, informed and played a part in the positions taken by Fortis and FAES in the BCUC proceedings related to district energy identified by Metro Vancouver in its submissions, as well as in the position taken by Fortis in this Inquiry.

Richmond's position relies, in part, on the report of Mr. Marc Eliesen.[28]

In his report, Mr. Eliesen included information indicating I held shares and share options of Fortis in 2010.[29] He states, "It is not clear when or if Commissioner Loski sold his shares or exercised his options..."[30] Mr. Eliesen further states that "Although it is expected that the requirements of the UCA have been met by Commissioner Loski, given that it is a matter of the public record that he held shares and options in Fortis Inc., confirmation that he no longer holds a beneficial interest and when those holdings were divested would be advisable."[31]

[23] Exhibit C12-10, p. 8.
[24] Ibid.
[25] Ibid, pp. 9–10.
[26] Ibid, p. 10.
[27] Ibid, p. 11.
[28] Exhibit C12-9, Appendix 3 - Written Submission by Marc Eliesen Prepared for the City of Richmond January 4, 2021.
[29] Ibid, Appendix B.
[30] Ibid, paragraph 59.
[31] Ibid, paragraph 61.

Mr. Eliesen submits that "Interveners at this hearing have not been made aware of working relationships Commissioner Loski may have had with FortisBC and BC Hydro legal and other staff participating at this Inquiry. Commissioner Loski could have been more forthright about his work history and working relationships which, given Commissioner Everett's actions, suggest a precedence for doing so."[32]

In concluding his report, Mr. Eleisen states the following:[33]

> Considering Commissioner Loski's employment history at both FortisBC and BC Hydro, the disclosure practice of Commissioner Everett, and publicly available information on Commissioner Loski's shareholdings in Fortis Inc., in my expert opinion, there is sufficient evidence that suggests a reasonable apprehension of bias exists with respect to Commissioner Loski.

As a result, Mr. Eliesen is of the opinion that I should recuse myself from this Inquiry and recommends the same, presumably, based on his conclusions in his report.[34]

6.2 Metro Vancouver's Position

In its submission Metro Vancouver states the following in relation to the proceedings the "BCUC referenced as impetus for establishing this Inquiry and setting its initial scope" in Order G-177-19, and in which FortisBC [35] intervened and provided opposing arguments:[36]

- The 2017 BCUC proceeding into Sustainable Services Ltd. (SSL) Geothermal Energy System Status as a Public Utility under the UCA, and which began in 2016.
- In the 2016 BCUC proceeding into Creative Energy Vancouver Platforms Inc. Reconsideration and Variance of Order G-88-16.
    - Creative Energy filed the underlying application with the BCUC in February 2016. That underlying application arose from the BCUC's Order C-12-15 dated December 8, 2015, which was a decision on an application for a CPCN filed with the BCUC in April 2015.
- In the 2018 BCUC proceeding into Greater Vancouver Sewerage and Drainage District's (GVS&DD) Application for an Exemption from Part 3 of the UCA.
    - GVS&DD filed its application for an exemption with the BCUC in February 2018.

Metro Vancouver further states:

In summary, the impetus for establishing this Inquiry as stated in Order G-177-19 is issues and complaints that arose in certain BCUC proceedings during the 2015 to 2018 timeframe involving energy utility services provided by local government entities. Those issues and complaints were raised by FEI and to a lesser extent FAES.[37] [emphasis added]

6.3 Other Parties' Positions

BC Hydro submits that any facts pointing to a financial or personal interest of the decision-maker, past or present, must be examined in light of the entire context, and cites the following cases:[38]

[32] Exhibit C12-9, Appendix 3 - Written Submission by Marc Eliesen – paragraph 63.
[33] Ibid, paragraph 64.
[34] Ibid, paragraph 67.
[35] In this case FortisBC refers to one or both of FortisBC Energy Inc. and FortisBC Alternative Energy Services.
[36] Exhibit C10-8, pp. 2–3.
[37] Exhibit C10-8, p. 3.
[38] Exhibit C1-6, pp. 2–3.

- In *Kowallsky v Public Service Alliance of Canada*, the Federal Court of Appeal found no reasonable apprehension of bias when the decision-maker was employed eight years prior by one of the parties to the proceeding; and
- In *R. v. Melnichuk*, the B.C. Court of Appeal (BCCA) found no reasonable apprehension of bias where a judge had worked, 17 months prior, in the same Crown counsel office that was now prosecuting the defendant before the judge. The BCCA held in *Melnichuk* that the judge's prior association with the Crown counsel office, in and of itself, was insufficient and did not constitute cogent, factual evidence showing an apprehension of bias.

BC Hydro submits that "an informed person, viewing the factual context of this matter, would not conclude it is more likely than not that Commissioner Loski would not decide the Application fairly due to his previous employment at Fortis," noting the following:[39]

- Commissioner Loski retired from Fortis in 2014, approximately seven years ago. Aside from this fact, the Application presents no other evidence that Commissioner Loski's prior employment with Fortis results in a reasonable apprehension of bias;
- The fact that Commissioner Loski held shares and options in Fortis, is inconsequential as Commissioner Loski does not currently hold shares and options in Fortis; and
- The fact that Commissioner Loski has a pension plan from Fortis is unrelated to the Inquiry issues before the BCUC … there is no evidence that the outcome of the Inquiry could affect Fortis's financial stability such that Commissioner Loski's pension plan could be jeopardized.

BCSEA submits that prior business or professional relationship does not normally support a reasonable apprehension of bias, "at least so long as there has been a reasonable lapse of time following the association and matter in issue, and the prior association did not relate to [the matter in issue]."[40] [emphasis in original] Neither exception applies in the present circumstances, in BCSEA's view…., as seven years is a "reasonable lapse of time" between the professional association and the current Inquiry so as to satisfy the principle that a prior professional relationship does not normally support a reasonable apprehension of bias.[41]

As a general principle, the CEC considers there to generally be a significant benefit in having Commissioners with experience in utility regulation, which can be very complex and require a significant learning curve. The CEC also notes that Commissioners are appointed from a variety of backgrounds, and that typically a panel of more than one, and often three or more, Commissioners consider and decide on the applications. The additional Commissioners can serve to balance out any theoretical interest or influence that may be brought intentionally or inadvertently by a single Commissioner.[42]

7.0 Allegation that a defined benefit pension results in conflict of interest

7.1 Richmond's Position

In its submission, Richmond stated:[43]

[39] Exhibit C1-6, p. 3.
[40] BSCEA cites 4 British Columbia Administrative Law and Practice Manual, section 4-21, citing Brown and Evans, Judicial Review of Administrative Action in Canada, looseleaf (Canvasback, 1998), at 11.4432, underline added.
[41] Exhibit C11-7, pp. 1–2.
[42] Exhibit C25-6, p. 1.
[43] Exhibit C12-9, p. 5.

> If Commissioner Loski has a pension plan contingent on the financial stability of FortisBC this might also be construed as a conflict of interest in decisions that might impact FortisBC's financial position.

In his report, Mr. Eliesen stated:[44]

> …although it is not a requirement of the UCA to disclose pension arrangements from prior employers, if Commissioner Loski has a pension plan contingent on the financial stability of FortisBC it might be construed that he has a conflict of interest in decisions that might impact FortisBC's financial position.

7.2 Other Parties' Position

In its submission, the City of Abbotsford (Abbotsford) stated:[45]

> While Commissioner Loski has disclosed that he is in fact "a beneficiary of a defined benefit pension plan from both FortisBC and BC Hydro and Power Authority," Abbotsford submits this is of no significance and should not form any basis for Commissioner Loski's disqualification.
>
> The appearance of bias is to be assessed by the informed, reasonable person viewing the matter realistically and practically. That person would be aware of a number of things:
>
> 1. Both the FortisBC Energy Inc. Retirement Plan for Management and Exempt Employees and British Columbia Hydro and Power Authority Pension Plan are registered in British Columbia in accordance with the Pension Benefit Standards Act (the "PBSA").
> 2. The PBSA requires plan sponsors to adequately fund all benefits earned by members, and to make special payments to make up any funding shortfalls.
> 3. The PBSA also requires that contributions to a pension plan, and the related investment income, be held in a pension fund that is separate from the employer. Benefits under a defined benefit pension plan are not affected by bankruptcy if the plan is fully funded.
>
> There is no evidence to suggest that the "financial stability" of FortisBC or BC Hydro is such that Commissioner Loski's pension entitlement is under any threat (and conversely, no suggestion that Commissioner Loski's pension benefit would increase if either plan sponsor did in fact "commercially benefit from a determination that municipalities become subject to BCUC regulatory authority").
>
> "[A]n informed person, viewing the matter realistically and practically-and having thought the matter through,"[46] could only conclude that Commissioner Loski has no meaningful incentive to prioritize the interests of the sponsors of his pension plans - FortisBC or BC Hydro.

Abbotsford notes that if Richmond's submissions on this point were accepted more generally, public servants and other employees who are the beneficiaries of defined benefit pension plans would be disqualified from serving on administrative tribunals whenever matters that may impact the "financial position" of their former employers are to be heard, even in the absence of serious solvency concerns with their respective pension plans.[47]

In support of its position, Abbotsford notes that judges are both paid by government and also receive pensions plans from government; yet judges often order the Crown to pay significant compensation even though, doing

[44] Exhibit C12-9, Appendix 3, Written Submission by Marc Eliesen at para. 62.
[45] Exhibit C7-7, pp. 1–2.
[46] Abbottsford cites *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 SCR 369 at page 394.
[47] Exhibit C7-7, p. 2.

so, directly impacts the financial position of government. Further, it relies on *Galati v. Harper,* [2016] FCA 39 at para 35 (per Pelletier J.A.) and para. 40 (per Stratas J.A., concurring), a case where the applicant claimed that if the court did not order solicitor and client costs to be paid by government to the applicant then the Court would be "in bed" with government.

In its reply submission Richmond stated:[48]

> …with respect to the City of Abbotsford's musings of the far-reaching implications of a statement made by Mr. Eliesen in his expert report, the concerns raised by Abbotsford are not founded in law, nor are they incorporated in any relevant legal test applicable to the determination of Richmond's application. We can assure the City of Abbotsford that the BCUC will survive without former Fortis executives filling its ranks.

BCSEA submits that "any theoretical linkage between the impact of the Inquiry on FortisBC's finances and Commissioner Loski's pension would be too remote to support a finding of reasonable apprehension of bias."[49]

8.0 Applicable Law on Reasonable Apprehension of Bias

The reasonable apprehension of bias test is well settled and was first set out in 1978 by the Supreme Court of Canada *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 (*Committee for Justice and Liberty*), at p. 394, per de Grandpré J. (dissenting):

> [T]the 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. […] [T]hat test is "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 Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

Since then, the Supreme Court of Canada has consistently endorsed this test in numerous cases, including *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, [2015] 2 SCR 282 and *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 (*Wewaykum*), where, at paras. 76–77, the Court provided further guidance on the application of the test (paras. 76–77):

> 76 First, it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. In this respect, de Grandpré J. added these words to the now classical expression of the reasonable apprehension standard:
>
> > The grounds for this apprehension must, however, be substantial, and I … refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". (*Committee for Justice & Liberty v. Canada (National Energy Board)*, supra, at p. 395)
>
> 77 Second, this is an inquiry that remains highly fact-specific. In *Man O'War Station Ltd v. Auckland City Council*, [2002] 3 N.Z.L.R. 577 (New Zealand P.C.), at para. 11, Lord Steyn stated that "This is a corner of the law in which the context, and the particular circumstances, are of supreme importance." As a result, it cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker;

[48] Exhibit C12-10, p. 11.
[49] Exhibit C11-7, p. 2.

present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.

The reasonable apprehension of bias standard applies equally to administrative tribunal members and was addressed by the Supreme Court of Canada in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners Public Utilities*), [1992] 1 SCR 623 (*Newfoundland Telephone Co*), at paras. 27–29:

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

As noted in *Wewaykum,*[50] there is a strong presumption of judicial impartiality and a similar presumption of impartiality applies to administrative tribunals.[51] Further, section 30 of the *Administrative Tribunals Act* requires tribunal members to act faithfully, honestly and impartially in the performance of their duties.

In *Bell Canada v. Canadian Telephone Employees Association,* [2003] 1 S.C.R. 884 (Bell Canada), the Supreme Court of Canada explained how the concepts of independence and impartiality are related:

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[50] *Wewaykum* at para. 76.

[51] Law Society (Manitoba) v. Ritchot, 2010 MBCA 13 (Man. C.A.) at para. 37-38; Zundal v. Toronto's Mayor's Committee on Community and Race Relations (2000) 189 DLR (4th) 131 (Fed. C.A.) and Blake, S., Administrative Law in Canada, 6th ed. (LexisNexis Canada Incorporated, 2017).

> 17. The requirements of independence and impartiality at common law are related. Both are components of the rule against bias, *nemo debet esse judex in propria sua causa*. Both seek to uphold public confidence in the fairness of administrative agencies and their decision-making procedures. It follows that the legal tests for independence and impartiality appeal to the perceptions of the reasonable, well-informed member of the public. Both tests require us to ask: What would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude? (See *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.), at p. 394, per de Grandpré J., dissenting.)[52]

The Court in *Bell Canada* continued on to explain the contextual nature of the duty of impartiality and how the procedural requirements that apply to a particular tribunal will depend upon the nature and the function of the particular tribunal:[53]

> 21. The requirements of procedural fairness -- which include requirements of independence and impartiality -- vary for different tribunals. As Gonthier J. wrote in *IWA v. Consolidated Bathurst- Packaging Ltd*., 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, at pp. 323-24: "the rules of natural justice do not have a fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces". Rather, their content varies. As Cory J. explained in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623, at p. 636, the procedural requirements that apply to a particular tribunal will "depend upon the nature and the function of the particular tribunal" (see also *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3, at para. 82, and *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at paras. 21-22, *per* L'Heureux-Dubé J.). As this Court noted in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52, administrative tribunals perform a variety of functions, and "may be seen as spanning the constitutional divide between the executive and judicial branches of government" (para. 24). Some administrative tribunals are closer to the executive end of the spectrum: their primary purpose is to develop, or supervise the implementation of, particular government policies. Such tribunals may require little by way of procedural protections. Other tribunals, however, are closer to the judicial end of the spectrum: their primary purpose is to adjudicate disputes through some form of hearing. Tribunals at this end of the spectrum may possess court-like powers and procedures. These powers may bring with them stringent requirements of procedural fairness, including a higher requirement of independence (see *Newfoundland Telephone*, at p. 638, *per* Cory J., and *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.)).

The burden of proof is on the party alleging a real or apprehended breach of the duty of impartiality, who must establish actual or a reasonable apprehension of bias.

In *Sagkeeng First Nation v. Canada (Attorney General)***,** 2015 FC 1113 (CanLII), the Court held:

> [105] Absent evidence to the contrary, a decision-maker is presumed to be impartial … Similarly, public servants are presumed to be impartial and independent … Further, allegations of a lack of independence or a reasonable apprehension of bias are serious and cannot be based on speculation or limited evidence …. A mere suspicion of bias is not enough (Hughes at para 43). Here the allegation is anticipatory and there is no evidence as to potential bias … A reasonable apprehension of bias on an institutional level requires the identification of a substantial number of similar cases …

[52] *Bell Canada v. Canadian Telephone Employees Assn.,* [2003] SCC 36 at para. 17.
[53] Ibid*,* at para 21.

In Practice and Procedure Before Administrative Tribunals, Macauley states that technical knowledge is a critical element in the appointment of board members to tribunals such as energy and public utility tribunals.[54]

The prior employment of a panel member alone does not raise a reasonable apprehension of bias and in this regard, the SCC in *Newfoundland Telephone Co.* commented on the appropriateness of selecting members with expertise for administrative tribunals, as noted above.[55] Further, Laskin C.J., in *Committee for Justice and Liberty*, stated at para. 45, in part:

> It follows that the National Energy Board is a tribunal that must be staffed with persons of experience and expertise. As was said by Hyde J. of the Quebec Court of Appeal in *R. v. Picard et al.*, at p. 661:
>
> > Professional persons are called upon to serve in judicial, quasi-judicial and administrative posts in many fields and if Governments were to exclude candidates on such ground, they would find themselves deprived of the services of most professionals with any experience in the matters in respect of which their services are sought. Accordingly, I agree with the Court below that this ground was properly rejected.

As well, in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603, the court rejected the argument that the Information and Privacy Commissioner was legally disqualified from adjudicating a freedom of information dispute involving his former client, Translink. The court held at paras. 50(d) and 51:

> … a former professional relationship will generally not give rise to a reasonable apprehension of bias if there has been a reasonable lapse of time following the association and the prior association did not relate to the matter in issue, see *Zundel*, *supra*, *Committee for Justice and liberty*, *supra*, *[Fogal] v. Canada* [, 1999 CanLII 7465 (FC)]; *Flamborough (Township) v. Canada (National Energy Board)* [[1984] F.C.J. No. 526 (QL) (C.A.)].
>
> I have concluded that the circumstances in this case, given the nature of the Commissioner's functions and the time limited nature of his appointment, are not such as to give rise to a reasonable apprehension of bias. The Commissioner had no involvement in this matter prior to assuming his office. His professional relationship with Translink had ended 19 months previously. There has been, in my view, an appropriate "cooling off period".

I note that recently the Canadian Judicial Council revised its 'Ethical Principles for Judges'. It notes that "judges should not sit on a matter in which the judge's former law firm is involved until after a 'cooling off period', often established by local law or tradition, of between two and five years."[56]

Further, and in the context of provincial labour relations tribunals, I note the following from *Pacific Opera Victoria Assoc. v. I.A.T.S.E. Local 168*, [2001] CarswellBC 3471, at para. 17:

> "17. Thus, in the labour relations context, the mere fact that a vice-chair has some prior professional relationship with a party appearing before it does not in and of itself give rise to a reasonable apprehension of bias. See also Sean Parr, BCLRB No. B211/96 (Leave for Reconsideration of BCLRB No. B81/96), where, after noting the decision in Marques v. Dylex Ltd., the Board stated:
>
> > In other cases, the courts have recognized that, given the nature and functions of the Board, Vice-Chairs are necessarily drawn from one side of the labour community or the other, and are bound to have some prior association with the parties coming before the Board: BCGEU v.

[54] Robert W. Macaulay, Q.C., James L.H. Sprague, Lorne Sossin, Practice and Procedure Before Administrative Tribunals (Sep 6, 2021).
[55] *Newfoundland Telephone Co*. at paras. 27–29.
[56] Canadian Judicial Council, Ethical Principles for Judges (2021) at para. 53.

> Labour Relations Board of B.C. (1986), 2 B.C.L.R. (2d) 66 (C.A.), at p. 78, 26 D.L.R. (4th) 560, at p. 572. In considering objections based on bias, the courts have found that after a suitable period of time, past professional or business relationships of a Vice-Chair of the Board with either a party or its counsel will not be a ground for disqualification, provided those past relationships do not extend to the matter in issue before the decision-maker: Wire Rope Industries Ltd., IRC No. C19/88, (1988), 18 CLRBR (NS) 347, at 357, and authorities reviewed therein. Consistent with the principles outlined in Wire Rope, supra, the Board has adopted a general policy under which Vice-Chairs for a minimum period of six months following their appointment to the Board do not have any dealings with applications involving their former professional colleagues or clients unless disclosure is made and all parties consent. That rule may also extend longer than six months if the issue raised by an application was one in which a Vice-Chair had a particularly close association.
>
> (para. 31, emphasis added)

9.0 My Response

Richmond alleges the facts establish a reasonable apprehension of bias by me. No party has raised any allegation of actual bias.

I will address the matters raised by Richmond next, and then those raised by Metro Vancouver.

Regarding the case of *FortisBC Energy Inc. v. Surrey (City) [2013] B.C.J. No. 2853*, Richmond did not provide any evidence that I was involved in that matter. Rather Richmond speculated that I was involved based on my job title prior to and at the time the case was heard. To be clear, the role and function I performed as Chief Regulatory Officer did not include, at any time, responsibilities related to the OGC. I did not have managerial authority or responsibility for OGC-related regulatory matters, nor did I have any involvement with OGC-related issues at any time during my employment at FortisBC. Although I was aware of the case, at the time, I did not participate in the discussions or decisions leading to the involvement by FortisBC in the case.

Richmond asserts, in part, that:[57]

> ...any reasonable person knowing the role and function of a Chief Regulatory Officer would conclude that Commissioner Tom Loski would have been involved at that time. In fact, it is implausible that Commissioner Tom Loski would not have been involved in such a high profile matter involving multiple regulatory proceedings before the Oil and Gas Commission, which together with the BCUC, shares regulatory jurisdiction over Fortis.

However, the fact is that I was not involved in this matter. It is well acknowledged in law that to allege a mere suspicion of bias, or to merely surmise or engage in conjecture, is not enough. The party alleging bias must show that the evidence supports a reasonable apprehension of bias. The fact that the I gained experience by previously working for one or more regulated utilities does not provide a basis for reasonable apprehension of bias. Instead, it simply reinforces the fact that my technical qualifications in the area of provision of utility services provided a basis for my appointment as a Commissioner of the BCUC.

With respect to the proceedings regarding the provision of energy service by municipalities identified by Metro Vancouver as being the impetus for the Inquiry, and as stated by Metro Vancouver, all of this occurred in the 2015 to 2018 timeframe. As previously noted, I retired from FortisBC on November 1, 2014. Further, as previously discussed in this decision, I was not involved, either directly or indirectly, with regulatory matters for FortisBC after October 1, 2010. Additionally, dealings with municipalities or municipal utilities were not part of

[57] Exhibit C12-10, p. 7.

my responsibilities during my career with FortisBC. To be clear, I was not involved with the proceedings identified by Metro Vancouver in any manner, and I did not participate in the discussions and decisions leading to the involvement by FortisBC in these proceedings.

With respect to Richmond's allegation that a defined benefit pension results in a conflict of interest, if an entitlement to an earned defined benefit pension constitutes a conflict of interest, it has the same effect as a reasonable apprehension of bias.[58] If such entitlement amounts to a conflict of interest, I must recuse myself.

In my view, however, the allegations raised by Richmond are unfounded. My defined benefit pension does not rely upon the financial stability of FortisBC or any of its related entities. Richmond has not provided any evidence that my defined benefit pension results in a conflict of interest. As noted by Abbotsford, both the FortisBC Pension Plan and the BC Hydro Pension Plan are defined benefit pensions which are registered in British Columbia in accordance with the PBSA. The PBSA requires that pension funding be made during employment and that funds collected be held separate from the employer. Due to this structure, benefits under such defined benefits plans are not affected by the performance or bankruptcy of the employer when fully funded. These requirements of the PBSA cannot be altered by FortisBC or the BCUC. As a defined benefit pension plan, my pension benefits were earned, established and funded during the tenure of employment with those entities, and I have no ongoing financial interest in either of these entities. As such, I agree with Abbotsford and I find Richmond's allegation to be without any merit.

In *Angleland Holdings*, the appellant sought to seek the recusal of Madam Justice Bennet hearing its appeal on the basis, in part, that "she may be entitled to a provincial pension and thus may have a financial interest in the results of the underlying litigation because the Province had an interest in acquiring the property in issue in the underlying litigation for a reduced price."[59]

After reviewing the relevant law, much of which has already been cited above, and without commenting on the veracity of the facts alleged, the BC Court of Appeal found there was no substance to the recusal request because the complaints were so disconnected from the parties to the appeal and the underlying litigation.[60] Likewise, there is simply no substance or evidence to support the allegation that my defined benefit pension plan puts me in a conflict of interest in this proceeding because it is not tied to the financial stability of the public utility that is subject to BCUC regulation.

Richmond relies, in part, on Mr. Eliesen's report that my past employment and roles within FortisBC, my shareholdings in Fortis Inc. and my pension with both FortisBC and BC Hydro as providing sufficient evidence to create a reasonable apprehension of bias. I disagree. I find the expert opinion of Mr. Eliesen to be unsupportable based on the evidence and applicable law. Neither the factual background nor applicable law provide the necessary grounds for me to conclude that I must disqualify myself on the basis of a reasonable apprehension of bias or conflict of interest.

As noted in the cases cited above, my prior employment with a regulated utility does not in and of itself raise a reasonable apprehension of bias, particularly with respect to public utility tribunals and where there has been a reasonable lapse of time between my former employment and my appointment as a Commissioner.[61]

Although it is true that I previously worked for FortisBC and BC Hydro, in my view, there is no real possibility that any reasonable and right-minded person, properly informed, viewing the circumstances realistically and practically, and having thought the matter through could conclude that it is more likely than not that I, whether consciously or unconsciously, would not decide this matter fairly. It has been seven years since I stopped

[58] Gregory N. Harney Law Corp. v. Angleland Holdings Inc., [2016] BCCA 262 at para. 27 (Angleland Holdings).
[59] Angleland Holdings, at para. 25.
[60] Ibid, at paras. 29–30.
[61] *Committee for Justice and Liberty* (paras. 45-46); Newfoundland Telephone Co. (paras. 27–29).

working for FortisBC and five years since I stopped working for BC Hydro. By any metric, these are significant "cooling off" periods that are more than adequate in the circumstances.

10.0 Process for Dealing with the Application

BCCSC in its submission poses a question on the proper process for dealing with the Application:[62]

> Our question would be is Mr. Loski the sole commissioner to hear the application? If so, it confuses the BCCSC as to the procedural fairness of the situation. BCCSC does not understand the legal structure of this hearing and respectfully asks for accommodation of our untrained opinion about this specific situation.

In its submission, BC Hydro states:[63]

> The Commission is following correct legal procedure in hearing the Application regarding apprehension of bias against its own commission member...

BC Hydro further states:[64]

> While the Application does not allege that the Commission should not be hearing an application regarding a reasonable apprehension of bias against its own commissioner, BC Hydro submits that the law is settled that allegations of apprehension of bias should be raised and decided in the first instance before the tribunal whom the allegation is made against and not on appeal or judicial review.[12] Courts will dismiss such allegations if a party fails to first make the allegation before the tribunal.[13] The BC Court of Appeal made this point clear in *Eckervogt v. British Columbia (Minister of Employment and Investment)*.[14] Accordingly, BC Hydro submits that the BCUC has acted appropriately in hearing the Application to consider the allegation of a reasonable apprehension of bias against Commissioner Loski.

The procedure the BCUC follows where an allegation of bias is alleged against a particular panel member is to have the matter be directed to and addressed by that particular panel member, which I have done. This procedure was followed by the Supreme Court of Canada in *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851 and established as the correct procedure in this province in *Eckervogt v. British Columbia* (Minister of Employment and Investment), [2004] BCCA 398 at paras. 46–49 (Eckervogt). As such, I find that the process for addressing this Application, as laid out in this decision, is the correct one and there is no basis in law for me to deviate from this well established process.

I think it is noteworthy to point out that the Inquiry was established by the BCUC on August 1, 2019, with the Panel being appointed on August 2, 2019. Although the Inquiry was adjourned, Richmond first raised these allegations against me in its submission of March 8, 2021, more than 17 months after I was appointed as Chair of the Panel, a significant amount of time since Richmond became aware of my role in this matter.

11.0 Determinations

Rest assured that I am fully aware that an allegation of a reasonable apprehension of bias or conflict of interest by a decision-maker is the most serious allegation against a decision-maker. I do not take this matter lightly and agree that it must be addressed in a timely and responsible manner. If a reasonable apprehension of bias or conflict of interest exists, it must be acted upon by the immediate recusal of the decision-maker.

[62] Exhibit C20-2, p. 2.
[63] Exhibit C1-6, p. 1.
[64] Ibid, page 3.

The allegation made by Richmond is that because of my past employment and roles within FortisBC, a reasonable apprehension of bias exists. As stated above, I disagree. In my view, the facts, the evidence and the law in this case do not lead a fair-minded person to objectively conclude that I should disqualify myself due to a reasonable apprehension of bias. Additionally, there is no evidence that my defined benefit pension, as earned through my course of employment, results in any real or perceived conflict of interest in my conduct of the Inquiry. I find that a reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through carefully, would conclude, as I have, that I will carry out my duties as Panel Chair of the Inquiry fairly and impartially. **I therefore deny Richmond's request that I disqualify myself from the Inquiry due to a reasonable apprehension of bias or conflict of interest.**

DATED at the City of Vancouver, in the Province of British Columbia, this 13th day of December 2021.

*Original signed by:*_____
T. A. Loski
Panel Chair / Commissioner