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DECISION NOS. 2018-EMA-021(g) & (h) [Group File: 2018-EMA-G02]

In the matter of an appeal under section 100 of the *Environmental Management Act,* S.B.C. 2003, c. 53

BETWEEN:	GFL Environmental Inc.	**APPELLANT**
AND:	District Director, *Environmental Management Act*	**RESPONDENT**
AND:	Michael Dumancic, Nathalie McGee, Meaghan Lyall, Margaret & Foster Richardson, Wendy Betts, David Frame, Carol Ann La Croix, Joss Rowlands, Shelley Lee, Barry Mah, Trish Steinwand, Harry Dhaliwal, Joan Hislop, Douglas Burgham, Jennifer Burgham, Douglas McDougall, and Michael W. Betts	**THIRD PARTIES**
AND:	City of Delta	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Brenda L. Edwards, Panel Chair Linda Michaluk, Panel Member Reid White, Panel Member	
DATE:	Conducted by way of oral and written submissions concluding on September 4, 2020	

APPEARING:	For the Applicant:	Gregory Nash, Counsel Alex Little, Counsel
	For the Respondent:	Gary A. Letcher, Counsel Andrea Akelaitis, Counsel
	For the Third Parties: Resident Appellants City of Delta	Margaret Richardson Alyssa Bradley, Counsel

APPLICATION TO RECUSE AND APPLICATION TO CROSS-EXAMINE

INTRODUCTION

[1] On August 1, 2018, Ray Robb, District Director (the "District Director") for the Metro Vancouver Regional District ("Metro Vancouver"), issued air quality

management permit GVA1090 (the "Permit") to Enviro-Smart Organics Ltd., which is now GFL Environmental Inc. ("GFL"). The Permit, which was issued under both the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*Act*") and the Greater Vancouver Regional District Air Quality Management Bylaw No. 1082, 2008, authorizes GFL to discharge air contaminants to the air from its aerobic composting operation (the "Facility") in Delta, British Columbia.

[2] GFL appealed various terms and conditions in the Permit.

[3] A group of concerned citizens (the "Resident Appellants") also appealed the Permit, but for different reasons than GFL's. Their appeals were joined with GFL's so the appeals could be heard together. The Resident Appellants were also made Third Parties in GFL's appeal.

[4] The City of Delta is a Third Party in all the appeals.

[5] Part way through a lengthy oral hearing of the appeals, the District Director made a motion requesting that the Panel Chair and Panel Member Michaluk recuse themselves from the hearing because they are biased or there is a reasonable apprehension of bias, and that the hearing continue before Panel Member White alone. Subsequently, the District Director filed an application setting out the details of his request.

[6] Shortly after the District Director made his motion for recusal, GFL filed an application requesting, among other things, an opportunity to cross-examine the person who swore an affidavit in support of the District Director's application.

[7] This decision addresses both of those applications.

BACKGROUND

[8] The background to the Permit and the appeals was thoroughly canvassed in the First Interim Decision and will not be repeated, in detail, here. In brief, GFL operates a composting operation at the Facility, located on 11.7 hectares of farmland specifically zoned by the Corporation of Delta for composting operations. The total property is approximately 57.4 hectares.

[9] The Facility holds a licence issued by the Greater Vancouver Sewerage and Drainage District to accept organic waste to produce compost.

[10] The initial stage of the composting process at the Facility is carried out "using the aerobic pile method, within two large, free-span covered buildings" (i.e., not enclosed). Organic waste feedstock is piled onto the building's concrete floor. An excavator or other means is used to turn the windrows as needed to optimize the primary composting process.

[11] There is no dispute that composting is an aerobic process, meaning that it occurs in the presence of oxygen. There is also no dispute that oxygen reduces the production of odorous air contaminants and, conversely, a depletion of oxygen can produce odours.

[12] In August of 2017, GFL applied for a permit to authorize "the discharge of air emissions" from the Facility. A description of the composting operation and the emission sources were identified as part of the application. At the time of the

application and when the Permit was issued, the Facility was an "open-air" operation.

[13] Following public consultation on the permit application, and after considerable discussion between GFL and the District Director (and staff at Metro Vancouver), in the spring of 2018, Metro Vancouver provided GFL with draft permits for comment. In response, GFL provided the District Director with a five-page set of "Proposed Criteria" for an air discharge permit that would allow GFL "to continue operating our composting business in the interim while we move forward in a timely manner towards fully enclosing our operations."

[14] On August 1, 2018, the District Director issued the Permit. The Permit is effective for a term of five years, set to expire on September 30, 2023. It is 43 pages long and contains detailed requirements for: operations; design and engineering plan approvals; and 97 submission requirements including those for 13 plans and 15 types of ongoing performance/progress reports.

[15] GFL's stated intention throughout the permit application and appeal process has been to upgrade the Facility. It first committed to constructing a new fully enclosed composting facility (the "New Facility") by February 28, 2020[1], subject to the necessary government approvals to construct and operate the New Facility on an expedited basis.

[16] GFL filed its Notice of Appeal with the Board on August 29, 2018. It appeals various terms and conditions in the Permit on the grounds that the District Director erred and exceeded his jurisdiction by including "unduly prescriptive and unnecessary requirements".

Previous Preliminary Applications

[17] With its Notice of Appeal, GFL applied for a stay of two specific categories of those terms, pending a hearing and decision on the merits of its appeal. On December 10, 2018, the (then) Chair of the Board denied the stay application: *GFL Environmental Inc. v. District Director* (Decision No. 2018-EMA-021(a)). As a result, these terms and conditions remained enforceable according to the deadlines in the Permit.

[18] The hearing of the appeals was originally set for 15 days commencing on June 3, 2019. The hearing convened as scheduled from June 3 to 28, 2019, but was not completed in that time. The hearing reconvened from October 28 to November 15, 2019, before adjourning, once again without being completed.

[19] Following the adjournment, on November 20, 2019, GFL brought an application for interim relief. Initially, GFL applied to adjust (vary) certain deadlines in the Permit from February 28, 2020 and March 1, 2020 to later dates (the "First Interim Application").

[20] Shortly after GFL applied for that interim order, the Resident Appellants also applied for an interim order. They sought to vary and add terms in the Permit. They

[1] Amended to May 1, 2020 in the Board's First Interim Decision, discussed below.

also sought an order requiring that a separate permit be issued to GFL for new works it was constructing at the site of the existing Facility.

[21] The Panel granted GFL's application (*GFL Environmental Inc. v. District Director*, Decision No. 2018-EMA-021(d), January 15, 2020) (the "First Interim Decision"). In a separate decision issued on the same day, the Board denied the Resident Appellants' application on the basis that their requests were in the nature of final remedies rather than interim remedies (*Michael Dumancic et al v. District Director*, Decision Nos. 2018-EMA-020(a), 022(a)-028(a), 031(a)-034(a) and 036(a)-040(a), January 15, 2020).

[22] The hearing of the appeals reconvened from March 9 to 16, 2020, and was scheduled to continue the week of March 16 to 20, 2020. However, on March 16, the Resident Appellants sought, and the Panel granted, an adjournment of the hearing due to health concerns related to the COVID-19 pandemic.

[23] Prior to the hearing adjourning on March 16, 2020, counsel for GFL advised the other Parties and the Panel that it anticipated bringing an interim application to address deadlines under the Permit, as varied by the First Interim Decision.

[24] On March 18, 2020, by Ministerial Order No. M073, the Minister of Public Safety and Solicitor General declared a state of emergency throughout the Province under the *Emergency Program Act*, R.S.B.C. 1996, c. 111, due to the pandemic. The state of emergency was subsequently extended and, at the time of this decision, continues.[2] A series of Ministerial Orders related to the pandemic have followed, including Ministerial Orders relevant to the operation of the Facility as an "essential service".

[25] On April 1, 2020, GFL brought a second application (the "Second Interim Application") asking the Panel for sixty-day extensions to the dates varied in the First Interim Decision. GFL sought these extensions to provide sufficient time for the emergency situation to subside, and for GFL to identify and assess the impacts, and ripple effects, of emergency conditions on the construction and commissioning of the new, full-enclosed facility, state of the art biofilter (and its enclosure), and 15.4 meter stack (collectively the "New Facility"), while allowing for ongoing operation of the Facility as an essential service.[3] Recognizing the looming Permit deadlines, the Panel decided the Second Interim Application on an expedited basis.

[26] The Panel granted the relief sought on April 23, 2020, subject to certain conditions (*GFL Environmental Inc. v. District Director*, Decision No. 2018-EMA-021(e), April 23, 2020) (the "Second Interim Decision"). In particular, GFL was required to submit a further application for interim relief by June 1, 2020, that addressed and provided the best available evidence regarding the state of construction at the New Facility, the timeline for readiness to commence operations, the reasons for delays in construction since the appeals adjourned, the steps taken to address delays, and the consequences if the relief was not granted.

[27] After the hearing adjourned, and in the context of the ongoing provincial state of emergency, the Chair of the Board convened two case management

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[2] For example, see Order in Council 494/2020, September 1, 2020.

[3] See Second Interim Decision at paragraph 27.

conferences ("CMCs") to discuss options for reconvening the hearing. The first CMC occurred on April 7, 2020, and the second on June 16, 2020. After the second CMC, and considering the Parties' availability and desire to proceed with an in-person hearing, at the direction of the Board Chair, the Registrar set July 21 to 24, and 27 to 30, 2020, to conclude the hearing of the evidence in the appeals. In order to accommodate the recommended health precautions due to the ongoing pandemic, the Board reserved two hotel ballrooms, wired to record and amplify sound, arranged to provide for the appropriate social distancing, and live-streamed (sound only) the proceedings.

[28] On June 1, 2020, GFL filed a third application for interim relief, as required by the Second Interim Decision. GFL sought "specific timeline relief" that would, with two exceptions, vary the deadlines approved in the Second Interim Decision from June 30, 2020 to August 31, 2020, or from July 1, 2020 to September 1, 2020. The Panel granted the relief sought on June 25, 2020 (see *GFL Environmental Inc. v. District Director*, Decision No. 2018-EMA-021(f), June 25, 2020).

Present Applications

[29] On July 14, 2020, the District Director wrote the Board, giving notice that he intended to bring a motion, at the earliest opportunity, that the Panel Chair and Member Michaluk (the "Member") recuse themselves from continuing with the hearing of the appeal on the ground of bias.

[30] The Board's Vice Chair, Service Delivery, wrote in reply on July 14, 2020, informing the District Director that, to bring the motion, he needed to file a general application under section 6 of the Board's Practice and Procedure Manual and Rule 16(2). The Vice Chair further advised that filing the application would not act as a postponement of the oral hearing set to reconvene on July 21, 2020.

[31] Rule 16 of the Board's Rules governs applications brought outside of the hearing process, and states as follows:

> **Rule 16 – General procedure**
>
> 1. All pre-hearing and post-hearing applications must be made to the Board in writing. …
> 2. All applications must include:
>
> a. the grounds (the reasons) for the application;
>
> b. the relief requested (the nature of the order or direction);
>
> c. whether the other parties agree to it (if known); and
>
> d. any evidence to be relied upon.

[32] Similarly, section 6 of the Board's Practice and Procedure Manual states:

> **6.0 APPLICATIONS: GENERAL**
>
> …

> To ask for a particular order, decision, direction or exercise of discretion, a party, participant, or intervenor must make an application, in writing. Rule 16(2) sets out the basic requirements for making an application to the Board.
>
> They are:
>
> (a) the grounds (reasons) for the application;
>
> (b) the relief requested (the nature of the order or direction);
>
> (c) whether other parties and participant agree to it (if known); and
>
> (d) any evidence to be relied upon.

[33] On Friday, July 17, 2020, the District Director filed a three-page Notice of Motion with the Board seeking orders that the Panel Chair and the Member recuse themselves from the hearing, on the basis of actual bias in the proceeding or, alternatively, the reasonable apprehension of bias arising from their conduct in this proceeding. The District Director also requested that the about-to-be-reconvened hearing occur before Member White alone.

[34] In support of the Notice of Motion, the District Director filed an affidavit sworn on July 17, 2020, by Raman Rai, a Legal Administrative Assistant in the office of Messrs. Nash and Little ("Affidavit #1"). The exhibits attached to her Affidavit #1 consisted of two pages of notes she took while attending two days of the appeal hearing, and several news articles about the COVID pandemic. The motion also referred to hearing transcripts "including, but not limited to" June 7, 2019, and March 9 through 14 and March 16, 2020, but mentioned no specific aspects of, or lines within, those transcripts. The Notice of Motion referred to section 26(7) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*"), but did not provide the legal test to be applied when assessing allegations of bias or a reasonable apprehension of bias, or any supporting judicial decisions.

[35] Section 26(7) of the *ATA* provides for the continuation of proceedings where a member or members are unable to complete their duties:

> **26** (7) If a member of a panel is unable for any reason to complete the member's duties, the remaining members of that panel, with consent of the chair of the tribunal, may continue to hear and determine the matter, and the vacancy does not invalidate the proceeding.

[36] The Board's Practice and Procedure Manual identifies the process to be followed when a member of a multi-person panel is unable to complete their duties:

> **Quorum**
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> Section 26 of the *Administrative Tribunals Act* provides that, if one member of a three-person panel is unable to complete the member's duties, the remaining members of the panel may continue to hear and decide the matter with the consent of the Board's chair.
>
> …
>
> **Withdrawal or disqualification of a board member on the grounds of bias**

> If the chair or a member of a panel becomes aware of any facts that would lead an informed person, viewing the matter reasonably and practically, to conclude that a member, whether consciously or unconsciously, would not decide a matter fairly, the member will be prohibited from conducting the appeal unless consent is obtained from all parties to continue. In addition, any party to an appeal may challenge a member on the basis of a real or reasonable apprehension of bias.
>
> To raise an allegation of bias during a hearing, the party should make a motion to the panel promptly. All parties will be given an opportunity to make submissions on the motion before a decision is rendered.

[37] In a letter dated July 20, 2020, the Panel Chair acknowledged the District Director's Notice of Motion and advised (based on Rule 16(2)) that the motion and accompanying materials provided insufficient information for the other parties to respond to the application. The Panel Chair further advised that allowing the motion to be heard at the recommencement of the oral hearing would most likely require an adjournment of the oral hearing to allow the other parties time to prepare their responses, resulting in further delay in completing the oral hearing.

[38] Later in the day on July 20, the Panel received an application from GFL to cross-examine Ms. Rai on her Affidavit #1. GFL also sought orders directing the District Director to provide particulars with respect to paragraph 5 of the District Director's Notice of Motion and providing for a written hearing of the recusal application and GFL's application in response. The Panel was apprised of GFL's application after arriving at the hearing location on the eve of the hearing.

[39] The hearing reconvened on July 21, 2020. The District Director sought, in his application and at the hearing, to use the hearing time to argue the recusal application. The Panel Chair confirmed that the dates of July 21 to 24 and 27 to 30 had been set aside, after consulting with the Parties during the recent CMC, to hear the remaining evidence in the appeal. The Panel Chair directed that the Parties would be provided with a schedule for making written submissions to address the District Director's application and GFL's related application.

[40] In a July 23, 2020 letter to the Parties, the Panel Chair set a schedule for making written submissions on the District Director's recusal application and GFL's application to cross-examine Ms. Rai.

[41] On July 30, 2020, after 44 days of the Parties presenting evidence, the hearing concluded. The Panel Chair subsequently set a schedule for written closing submissions on the merits of the appeal. That schedule ended on October 4, 2020.

[42] On August 7, 2020, the District Director filed a complete recusal application with supporting documents (the "Recusal Application").

[43] The Board's Vice Chair, Service Delivery, wrote to the Resident Appellants on August 27, 2020, and advised them that if they wished to raise their own allegation of actual or apprehended bias with respect to themselves as appellants (as they appeared to have done in their response to the District Director's application), they must file an application under Rule 16 of the Board's Rules.

[44] On August 30, 2020, the Resident Appellants wrote the Vice Chair stating that they "would not be presenting any further documents to the (Board) with regard to the recusal submissions".

ISSUES

[45] The sole issue raised in the District Director's application is:

> Whether the Panel Chair and the Member ought to recuse themselves from the hearing and participating in the determination of any issues to be determined in the appeal, due to an actual or reasonable apprehension of bias.

[46] It is clear from the District Director's submissions (set out below) that actual bias need not be shown; the legal test requires only evidence that a reasonable apprehension of bias exists. Consequently, this decision focuses on whether there is a reasonable apprehension of bias.

[47] GFL's response to the District Director's application and GFL's application to cross-examine Ms. Rai raise two further issues which are directly related to the District Director's application:

1. Whether the District Director has waived his right to bring a recusal application; and
2. Whether the Board ought to permit GFL to cross-examine Ms. Rai on Affidavit #1 filed in support of the District Director's application, before the Panel rules on the District Director's recusal application.

[48] The Panel has addressed these issues in the order that the parties raised them, as laid out above. The two issues raised by GFL's application are addressed in the Panel's reasons on the District Director's application.

DISCUSSION AND ANALYSIS

Whether the Panel Chair and the Member ought to recuse themselves from the hearing and deliberation regarding the decision due to a reasonable apprehension of bias.

The District Director's Submissions

[49] In his Notice of Motion, the District Director submits that, in the proceedings, the Panel Chair and the Member: failed to maintain a demeanour of neutrality and independence as fact-finders and decision-makers; assumed the role of advocates, descended into the fray, and became partisan and argumentative cross-examiners; made sarcastic, skeptical and condescending comments in the District Director's case, indicative of having predetermined the credibility of witnesses and the outcome of the appeals; and appear to have pre-judged a key Permit term.

[50] The District Director expanded on those allegations in his August 7, 2020 Recusal Application. He submits that the Panel Chair and the Member conducted the hearing in a way that was aggressive, accusatorial, sarcastic, disbelieving, hostile,

impatient, skeptical, condescending, or sneering. The District Director submits that the rule against bias is a common law natural justice rule that requires decision-makers to maintain an open mind and to manifest neither bias nor interest in the exercise of their decision-making functions. Decision-makers must be, and appear to be, both impartial and independent to ensure that their decisions are based on an assessment of the evidence and relevant law, without regard to improper considerations: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities),* [1992] 1 S.C.R. 623 [*Newfoundland Telephone*].

[51] The Director submits that establishing actual bias is not required; courts and tribunals concern themselves with the question of whether there is a reasonable apprehension of bias. Courts need not and will not inquire into the subjective state of mind of the decision-maker. Rather the test is an objective one, namely "whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would have a reasonable apprehension of bias": *Committee for Justice & Liberty et al* v. *Canada (National Energy Board)*, [1978] 1 S.C.R. 369 [*Committee for Justice*], at page 394; *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 [*Wewaykum*], at para. 60.

[52] The District Director adds that the test for reasonably apprehended bias accounts for the presumption of judicial impartiality: *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851, at para. 2. Where a tribunal like the Board acts in an adjudicative capacity, it will be held to the same standard applicable to the courts: *Newfoundland Telephone*, at pages 636, 638.

[53] The District Director asserts that there are many types of bias. He submits that the focus of his application is on attitudinal bias which he submits is manifest from the manner in which the Panel Chair and the Member questioned two of the District Director's key witnesses, and the Panel Chair's characterization of certain of GFL's expert evidence. The District Director further asserts that in assessing claims of attitudinal bias, impugned comments or conduct are not considered in isolation. Rather they must be considered in the context of the circumstances, and in light of the proceeding to the point where the recusal application is made: *R. v. S. (R.D.),* [1997] 3 S.C.R. 484 [*R. v. S. (R.D.)*], at para. 141; *Chippewas of Mnjikaning First Nation v. Chiefs of Ontario*, [2010] ONCA 47 [*Chippewas*], at para. 230 (application for leave to appeal dismissed [2010] S.C.C.A. No. 91).

[54] The District Director submits that the burden of proof lies with the party bringing an allegation of bias to establish an evidentiary foundation to support a bias allegation. In support of his application, the District Director relies on the Affidavit #1 of Ms. Rai, the excerpted transcripts of the proceedings referenced in his August 7, 2020 Recusal Application and his August 28, 2020 final reply, the Panel Chair's July 20, 2020 written ruling that the recusal application would be heard in writing and the appeal hearing would proceed as scheduled on July 21, 2020 (the "Ruling"), and her July 21, 2020 refusal to reopen that Ruling to cure an alleged critical defect in procedural fairness. The District Director provided an additional affidavit from Ms. Rai that includes, as exhibits, copies of certain correspondence with the Board's office, but he only referred to her Affidavit #1 in his submissions.

a. Affidavit #1 of Raman Rai

[55] The District Director references Affidavit #1 of Ms. Rai, in which she attests to observing the Panel Chair at certain identified times on March 12 and 13, 2020, smirking, glaring, rolling her eyes and shaking her head during the testimony of one of the District Director's witnesses, Ms. Hirvi-Mayne, Senior Project Engineer at Metro Vancouver. Ms. Rai attests to observing similar conduct by the Panel Chair at certain identified times on March 13, 2020, during the testimony of another District Director witness, Trevor Scoffield, Metro Vancouver Permitting Specialist. Affidavit #1 attests to the Panel Chair's tone of voice and manner in addressing these two witnesses as "variously skeptical, sneering, condescending, rude and challenging". Ms. Rai further attests that the Member also appeared to be skeptical, disbelieving and challenging when addressing Mr. Scoffield.

b. Transcript evidence

[56] The District Director includes with his August 7, 2020 Recusal Application and his August 28, 2020 final reply excerpted passages from the transcripts of various hearing days in June and November 2019 and March 2020[4] that he says demonstrate a reasonably apprehended bias on the part of the Panel Chair and the Member. For example, the District Director references 69 pages of transcript from the hearing on March 10, "2019" (I believe he meant to reference March 10, 2020, as the hearing was not in progress on March 10, 2019) during the examination in chief of Ms. Hirvi-Mayne (who testified on March 10, 2020, not March 10, 2019). The District Director submits that the Panel Chair repeatedly interrupted the witness' testimony. Some of her interjections were to deal with routine matters such as marking exhibits or establishing hearing breaks. The majority were to ask additional questions or make comments. In a number of those instances, the further questions asked went on for all or most of a page of transcript.

[57] The District Director submits that such interruptions are examples of the Panel Chair and the Member "cross(ing) the line" from managing the hearing to improperly interfering with the case. The District Director submits that the transcripts further establish that these panel members inserted themselves into the proceedings repeatedly and inappropriately by extensively "cross-examining" the District Director's witnesses, Mr. Scoffield and Ms. Hirvi-Mayne, and assisting GFL by picking up on and bolstering counsel's cross-examination.

[58] The District Director further submits that the transcript excerpts reveal examples of where the Panel Chair and/or the Member called into question these witnesses' credibility and made "highly inappropriate" and "injudicious" comments to the witnesses. He cites two examples of comments that he submits raise a reasonable apprehension of bias. The first cited example is from June 7, 2019, when the Panel Chair asked questions of an expert witness called by GFL, Mr. Frans

[4] The District Director repeatedly submits that he is referencing transcripts from March 2019, but I assume this to be in error as the hearing was not convened in March 2019 but did convene on various dates in March 2020.

Vossen. Mr. Vossen testified regarding European Standard EN: 13725[5]. The District Director references the following exchange between the Panel Chair and Mr. Vossen:

> Pages 131-132, lines 32-27
>
> Q Okay. Fair enough. All right. So, that leaves me, because I understand that n-Butanol is the current reference material that's set out in the European standard. That's all subject to much debate and I gather has been for many years.
> A Yes.
> Q But it's now squarely being put on the table in this draft revision.
> A Yeah.
> Q As a result of Klarenbeek and perhaps as a result of research that Dr. Dalton is adding to the pile, if you like. If the new European standard says we can't resolve this debate, you may use a secondary reference material.
> A Mm-hm.
> Q But you don't have to.
> A Mm-hm.
> Q And that isn't accepted or that doesn't pass, you said, well that's a very interesting question.
> A That's a very interesting --
> Q What do we do now with a standard that we know is fundamentally flawed, but we haven't yet agreed on a new one? So, obviously this Panel is left in that never-never-land. We have a standard that the information we have is flawed, we don't yet have a better solution. As our expert witness, what do you give in the way of a suggestion for where we go right now during this interim period? If you have one.
> A That is also a very good question. I think that many odour laboratories realize that there is a problem.
> Q Mm-hm.
> A And that things need to change and if the -- the draft standard is rejected, that could be the grave for olfactometry. So, I can really feel that these commercial laboratories will do anything they can to try to make it a success or at least a clear improvement compared to what we've had so far. Leaving olfactometry is not regarded as a good option. We have worked on this methodology for 30, 40 years and yes, we have not reached perfection yet, but we should go on.

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[5] Authors Johannes Van Klarenbeek and others described EN 13725 as the European standard by which odour emissions from industrial and agricultural sources are measured. Key elements of this standard are the quality criteria for trueness and precision (repeatability). Both are linked to standard values of n-butanol in nitrogen. It is assumed in this standard that whenever a laboratory complies with the overall sensory quality criteria for n-butanol, the quality level is transferable to other environmental odors: *Odor measurements according to EN 13725: A statistical analysis of variance components,* Atmospheric Environment, Volume 86, April 2014, Pages 9-15

[59] The District Director submits that by using the term “fundamentally flawed” when referencing the European Standard, the Panel Chair demonstrated actual bias. The District Director submits that it is not the role of a neutral decision maker to reach conclusions without hearing all of the evidence.

[60] The District Director further references an excerpt from the examination in chief of Ms. Hirvi-Mayne on March 11, 2019 (sic):

> Q Could you please turn to Exhibit 8A, page 3? …
> Q Did you recommend the one odour unit limit in these terms to the District Director?
> A I agreed with the recommendation. As Mr. Scoffield said yesterday, we make recommendations that we believe are advisable for the protection of the environment.
> THE CHAIRPERSON: Sorry, the question was …
> THE CHAIRPERSON: -- did you make the recommendation?
> A Did I? It’s kind of semantics there. I --
> THE CHAIRPERSON: Well, was --
> A I was one of the people who had draft -- so, yes, I made the recommendation. In addition, other people made the recommendation, so it’s --
> MS. MICHALUK: Whose bright idea was it? That’s the question.
> A Whose --
> MS. MICHALUK: Who said there should be an odour unit in this permit?
> A The odour unit really originally came from this concept of the Moose Creek model. GFL is going to build the Moose Creek facility in Ladner and it has --
> THE CHAIRPERSON: That's not the question. Let's not go there.
> A Okay.
> THE CHAIRPERSON: I'm not going to start talking about another facility that's not involved with this.
> A Okay.
> THE CHAIRPERSON: I'm not going to start talking about another facility that's not involved with this.
> MR. NASH: Well, no, it is involved with this.
> THE CHAIRPERSON: Moose Creek in Ladner?
> MR. NASH: No, not Moose Creek in Ladner. Moose Creek in Ontario.
> THE CHAIRPERSON: Isn't that what you just said?
> A No, I said it's the Moose Creek model.
> THE CHAIRPERSON: Yes.
> A So --
> THE CHAIRPERSON: And then you said GFL is going to build...?
> A The Moose Creek -- they're going to build -well, okay. I've probably phrased it poorly. They're going to build a facility in Ladner according to the Moose Creek model. That's what they said.
> THE CHAIRPERSON: Okay.
> A And so the tie-in for me is --
> THE CHAIRPERSON: I don't have --
> MR. NASH: What's your problem, Madam Chair?

> THE CHAIRPERSON: My problem is that this witness is now telling me something about another facility that she heard from somewhere else in response to a question about who recommended odour units.

[61] The District Director submits that the law is clear that the types of comments made by the Panel Chair and the Member (i.e., referencing the European Standard as "fundamentally flawed" and the recommendation to use odour units in the Permit as a "bright idea", respectively), should never be made and should be met with condemnation. Further, the nature of their "cross-examination" creates the impression of cross-examining "for pure sport" in a manner aimed at "undermining, belittling or discredit (sic) the witness" and seeking admissions in order to bolster GFL's case.

[62] The District Director submits that, viewed contextually, in light of the continuous and aggressive questioning by the Panel Chair and the Member throughout these witnesses' testimony during their examination in chief, cross-examination, re-examination and further cross-examination, there is no apparent, reasonable or principled justification for their decision to proceed to aggressively ask questions for hours after this evidence had been given. An informed and reasonable person having thought the matter through would apprehend that they had prejudged the appeals in favour of GFL, as if they were members of the GFL legal team with a common purpose to try to undermine these two public servants.

[63] The District Director submits that, viewed cumulatively, the conduct of the Panel Chair and the Member creates a solid foundation on which to ground reasonably apprehended bias. The District Director believes that these Panel members have not only prejudged the merits of the appeals but have also prejudged and predetermined the District Director's recusal application to have no merit.

[64] Further, the District Director submits that the behaviour complained of "reflects negatively not just on the EAB [Board] but also on the system of administrative justice generally".

c. Procedural unfairness as evidence of bias

[65] Finally, the District Director submits that in her letter of July 20, 2020 directing that the application would be heard in writing rather than in person, on July 21, 2020 when the hearing reconvened, and by directing that a schedule for submissions would be sent to the Parties, the Panel Chair acted in a procedurally unfair manner. The District Director submits that, by making her ruling, the Panel Chair acceded to a portion of GFL's application filed on July 20, 2020 (i.e., the request for a written hearing of the application) without giving the District Director the opportunity to respond.

The Third Parties' Submissions

[66] The Resident Appellants submit that there is merit to the District Director's submissions. However, their submissions, for the most part, address their perception that the Panel Chair was biased during the hearing against the Resident Appellants rather than the District Director. Given the Resident Appellants'

indication in their August 30, 2020 letter to the Board's Vice Chair that they did not intend to file their own application alleging bias, the Panel will only address the aspects of the Resident Appellants' submissions that respond to the District Director's application.

[67] The Resident Appellants submit that the Panel Chair did not take conduct of the hearing but, instead, allowed GFL to set the cadence and tone of the proceedings. They submit that the Panel Chair allowed objections when raised by counsel for GFL but denied similar objections when raised by the District Director. Further, the Resident Appellants submit that the Panel Chair appeared to single out a Metro Vancouver witness, Ms. Hirvi-Mayne, both prior to and after her testimony while she sat in the gallery. They submit that the Panel Chair interrupted the proceeding to reprimand Ms. Hirvi-Mayne for holding her cell phone in her hand, and for any slight noise by making a remark or glaring directly at Ms. Hirvi-Mayne. While both Mr. Scoffield and Ms. Hirvi-Mayne gave testimony, the Resident Appellants noticed an attitude of disrespect toward them from the Panel Chair and the Member. The Resident Appellants submit that the cross-examination of these two witnesses was significantly more than requests for clarification of previous testimony given by both of these witnesses, and became probative, aggressive, and often used a tone of incredulity. In sum, the Resident Appellants submit that Panel Chair exhibited bias by appearing to favour counsel for GFL over counsel for the District Director (or the Resident Appellants).

[68] Finally, the Resident Appellants express concern with the provision in the *ATA* "which allows a Panel member to self-determine the validity of a recusal application against themselves". They submit that this conflicts with the principle that "(j)ustice must not only be done, it must be seen to be done." They submit that they are "doubly troubled in making this submission believing in the already displayed bias of the Panel Chair and Panel Member and fully aware that this submission may prejudice the Panel Chair further". They submit that they find it "difficult to feel confident that the Panel under the leadership of Ms. Edwards will be able to determine an outcome that could be considered anything other than 'prejudicial', regardless of the nature of the decision".

City of Delta's Submissions

[69] The City of Delta took no position with respect to the District Director's application.

GFL's Submissions

a. Preliminary issue - waiver

[70] GFL submits that the District Director's application ought to be dismissed based on waiver because it is purportedly based on events that occurred in June and November 2019 and mid-March 2020, yet the District Director did not raise any concerns in respect of his bias allegations until July 14, 2020, over a year after some of the events that he relies on as allegations of bias. GFL notes that the District Director has provided no justification for this significant delay.

[71] GFL further submits that the British Columbia Court of Appeal in *Eckervogt v. British Columbia (Minister of Employment and Investment),* 2004 BCCA 398 [*Eckervogt*], at para. 48, ruled that bias allegations must be made without delay, observing that "the genuineness of the apprehension becomes suspect when it is not acted on right away". Mr. Justice Donald, writing for a five-member panel of the Court of Appeal, stated at paras. 48 - 49:

> I do not think it is proper for a party to hold in reserve a ground of disqualification for use only if the outcome turns out badly. Bias allegations have serious implications for the reputation of the tribunal and in fairness they should be made directly and promptly, not held back as a tactic in the litigation. Such a tactic should, I think, carry the risk of a finding of waiver. Furthermore, the genuineness of the apprehension becomes suspect when it is not acted on right away.

[72] GFL submits that, if the District Director had reasonably concluded that the Panel Chair and the Member's conduct displayed real or apprehended bias, he would not have stayed silent for these many months. Genuinely held beliefs are not sat upon. Further, in *Hearings Before Administrative Tribunals*, Robert W. Macaulay and James L.H. Sprague, 3rd ed. (Scarborough: Thomson Carswell, 2007), at p. 39-40, the authors note that a party is generally deemed to have waived their objections if they had knowledge of the impugned conduct and continued participating in the proceedings without making their objections known[6].

[73] GFL further submits that, despite relying on transcripts of the hearing from June 7, 2019, November 14 and 15[7], 2019, and March 9 to 14 and March 16, 2020, the District Director failed to raise any concerns regarding the real or apprehended bias of the Panel Chair or the Member during the 15-day hearing period commencing June 3, 2019, the further 14-day hearing period commencing October 28, 2019, or during the further hearing period that recommenced March 9, 2020. Neither did the District Director raise any concerns regarding the conduct of these panel members during the two four-month-long breaks between the June 2019 and October/November hearing periods and the November 2019 and March 2020 hearing periods.

[74] GFL notes that during the approximately four month period between the adjournment of the hearing on March 16, 2020 and July 14, 2020 (when the District Director advised the Board that he intended to bring a recusal motion), the parties and the Board were in regular communication regarding the recommencement of the hearing, including by CMCs convened by the Board Chair in April and June 2020. Further, the Board and the Parties were in communication regarding GFL's April 1, 2020 request and June 1, 2020 application for interim relief. Yet, the

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[6] See also, Brown and Evans*, Judicial Review of Administrative Action in Canada (Toronto: Canvasback Publication,* loose-leaf edition, (2003) at 11:5500; *Jackson v. Canada (Minister of Citizenship and Immigration),* [2002] F.C.J. No. 1289 (T.D.).

[7] The November 14 and 15, 2019 dates were not raised in the District Director's recusal motion; they arose for the first time in his application filed on August 7, 2020.

District Director failed to raise any concern at that time regarding the conduct of the panel members in June 2019, November 2019, or March 2020.

[75] GFL submits that this behaviour demonstrates that the District Director seeks to gain a tactical advantage by now raising these allegations of bias or reasonable apprehension of bias.

[76] GFL submits that, by waiting until July 14, 2020, to allege bias regarding conduct by the panel members in June 2019, November 2019 and March 2020, (and by failing to offer any explanation for the significant delay), the District Director waived his objection, and the application ought to be dismissed.

[77] GFL submits that although the District Director has clearly waived his right to raise any objection in these circumstances, the seriousness of his allegations against the Panel Chair and the Member warrant a substantive consideration of the material he relies upon to support the allegations. GFL's submissions on the merits of the material supporting the recusal application are set out next.

b. Affidavit #1 of Ms. Rai

[78] GFL submits that Ms. Rai's Affidavit #1 sets out her wholly subjective views in respect of the Panel Chair and Member's tone and manner on certain dates. She states that she made notes of her observations on March 12 and 13, 2020, but provides no evidence of when she made her notes, why she made these notes, what informed her note taking (whether she received any instructions from the District Director or his legal counsel on what specifically she should look for, or what language she should use to describe her views), and whether she made other notes of observations in the course of the 44-day appeal hearing. Accordingly, GFL has applied to cross-examine Ms. Rai on her affidavit.

[79] Further, Ms. Rai is an employee of the law firm representing the District Director. GFL submits, therefore, that she is neither objective nor been shown to understand the complex issues in these appeals. Little weight should be afforded to her evidence.

c. Transcript evidence

[80] GFL submits that the sole issue to be determined in this application (if the application is not dismissed due to waiver) is whether a reasonable person could - on the basis of the entirety of the record of these appeals and in light of the strong presumption of impartiality - objectively conclude that it is more likely than not that the Panel Chair and the Member would not decide the issues in these appeals fairly. This reasonable person is to be one that is not overly sensitive or scrupulous, but has a thorough and contextualized understanding of the complex issues in the case, the length and difficulty of the proceedings, and the Board's statutory function

[81] GFL submits that the District Director's Recusal Application is based upon purely subjective insinuations, and inaccurate characterizations of selected transcript extracts which disregard both the role of the Board and the full context of the 44-day hearing that occurred over a more than one-year period.

[82] GFL submits that the District Director includes edited and highly selective portions of transcript extracts from only nine days of the 44-day appeal hearing. There is no discussion of the context surrounding these transcript extracts to place them in light of the relevant issues, the facts in dispute, or the conduct of the witnesses on the stand during these nine days of the hearings. Neither is there any discussion of how these transcript extracts relate to the 35 days of hearing that the District Director disregards. Further, the District Director asks the Board to read the isolated transcript extracts "through a conspiratorial lens, ascribing the worst possible motive for each word or question from, or exchange involving, the [Panel Chair and the Member]". Such an approach was rejected in *CK Auto Services Ltd. v. British Columbia (Attorney General),* 2014 BCSC 2359, at paras. 48 to 51.

[83] Further, this approach is contrary to the case authorities which require that impugned behaviour not be viewed in isolation, but in light of the context of the entirety of the proceeding[8].

[84] GFL submits that a party alleging apprehended bias cannot "cherry-pick" exchanges or transcript references to support their subjective characterizations of events. This approach disregards the strong presumption of impartiality that attaches to the Panel Chair and the Member[9]. Given this "strong presumption", the applicant alleging bias must present "clear and unequivocal" evidence[10]. The transcript excerpts referenced by the District Director do not provide such evidence.

[85] It is insufficient to simply allege that a tribunal member "had a skeptical attitude"; one has to demonstrate that the tribunal's manner of proceeding resulted in a denial of natural justice.[11] Neither "sharp exchanges" between a party and a tribunal member nor "sarcastic and harsh language" by a tribunal member will be sufficient to demonstrate that a tribunal member has lost impartiality, as the "well-informed person would likely appreciate that" a party or the party's counsel "must bear some responsibility for" difficulties that may arise during a hearing: *Ramirez v. Canada (Minister of Citizenship and Immigration),* [2012] F.C.J. No. 820 [*Ramirez*], at paras. 19 to 24. Further, the "mere volume of interruptions and interventions" by an adjudicator "does not in and of itself establish a reasonable apprehension of bias": *Van Wieren v. Bush,* [2015] O.J. No. 3412 [*Van Wieren*], at para. 35.

[86] GFL submits that, viewed in their proper context, it is clear that the transcript references relied upon do not disclose any improper behaviour, let alone behaviour that meets the threshold of clear and unequivocal evidence required for the District Director to succeed in his Recusal Application.

[87] GFL submits that, a "reasonable person" understands that an adjudicator's alleged conduct needs to be assessed in light of the entire proceedings, and that an adjudicator's conduct may be a direct response to a witness's behaviour:

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[8] For example, see *Chippewas,* at para. 230; *R. v.* S. *(R.D.).*

[9] *R. v. S. (R.D.)*, at para. 32.

[10] *Munoz v. Canada (Citizenship & Immigration),* 2006 FC 1273 [*Munoz*], at para. 59; *Cojocaru* v. *British Columbia Women's Hospital and Health Centre,* [2013] 2 S.C.R. 357, at para. 22.

[11] *Munoz*, at para. 58.

Ramirez, at paras. 19-24. The transcripts quoted or cited by the District Director from when Ms. Hirvi-Mayne was testifying show that the Panel Chair and the Member's conduct was routine conduct by adjudicators performing their gatekeeper function when there is a witness that is refusing to answer questions or focus on relevant matters, or is improperly attempting to give opinion evidence.

[88] For example, GFL submits that a review of the full transcript from March 10, 2020, reveals that the Panel Chair and the Member's conduct was entirely appropriate, as Ms. Hirvi-Mayne was speaking too quickly, repeatedly evaded and refused to answer the question being asked, raised irrelevant issues, or attempted to anticipate questions.

[89] As to March 11, 2020, GFL submits that the District Director also tries to make much of the fact that the two panel members remind Ms. Hirvi-Mayne that she was not qualified as an expert that could provide opinion evidence. GFL submits that in *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23 [*White Burgess*], at paras. 1 and 11 – 25, Cromwell J., writing for the Court, noted that improperly admitted opinion evidence poses "special dangers", and to "guard against" these dangers, the Supreme Court of Canada "has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role". There is nothing inappropriate about any of the exchanges, or the Panel Chair's rulings, noted in the excerpts. They clearly did not prejudice the proper, material, and relevant evidence that the District Director was attempting to tender. A reasonable person would understand that the Panel Chair was performing her gatekeeper function.

[90] Further, although the District Director argues that the "most damning" piece of evidence in the transcripts is the Member's question as to "whose bright idea" was the odour unit provision, GFL submits that, viewed in context, the Member's question would not make a reasonable person think she had lost impartiality. Rather, viewed in context, a reasonable person would understand that the Member's question was a reasonable attempt to get an evasive witness to answer a question that had been repeatedly put to her on an important issue.

[91] As to the transcript excerpts related to March 12 through 16, 2020, much of them relate to Ms. Hirvi-Mayne's evidence on the Air Quality Permit Recommendation Memo which was entered as exhibit 139 in the hearing. This memo was referred to in the hearing and will be referred to in this decision as the "Recommendation Memo". The Recommendation Memo is dated November 6, 2018, and states on its front page "(t)his memo documents the verbal recommendations of a draft permit (attached) presented to the District Director on July 31, 2018 by Trevor Scoffield, Permitting Specialist and Kathy Preston, Lead Senior Engineer".

[92] With respect to the panel members' questioning of Ms. Hirvi-Mayne on the dates referenced by the District Director, GFL submits that a reasonable person would seek clarification on how it could be "that: (a) not a single record of an important July 31, 2018 meeting was created; (b) a document dated November 2018 could somehow accurately reflect a substantive and technical verbal discussion that occurred on July 31, 2018, when there were no documents created to record this discussion; and (c) it was signed by members of the

District Director's team as reflecting that it documents the July 31, 2018 meeting, when one of those members was not even present during the July 31st meeting." A reasonable person would understand that, in this context, some level of concern and probing questions would not only be appropriate but entirely warranted.

[93] GFL submits that a reasonable person would understand that the Board's express statutory power under section 38(3) of the *ATA* to "question any witness who gives oral evidence" empowers the two panel members to do precisely what they are doing in these and other transcript extracts reproduced by the District Director.

[94] As to the transcript excerpts of Mr. Scoffield's evidence, GFL submits that it is unclear what improper conduct by the two panel members is revealed or displayed in the District Director's transcript references. It appears that the District Director hopes the volume of transcript references will support his claim, despite the fact that the contents do not. GFL further submits that if the two panel members' conduct during the November 2019 hearing dates was egregious enough to warrant the allegations now made, then surely the record would show some objection made during November 2019 or in the approximately 13 months that followed.

[95] As to the transcript excerpts of Mr. Vossen's evidence, GFL submits that this portion of the District Director's recusal submissions focuses on a comment by the Panel Chair that was made on June 7, 2019 in respect of n-butanol as a reference material in the European Standard. The District Director now alleges that this comment shows the Panel Chair had "pre-judged" an issue. If the District Director genuinely believed that this comment showed the Panel Chair had closed her mind on an important appeal issue, he would have raised an objection immediately or sometime shortly thereafter, and in any event well before the appeal hearing reconvened in July 2020. Further, viewed in context, it is clear that the comment was not inappropriate. Read in the context of the extensive evidence heard by the panel that suggested the transferability of n-butanol to other odorants, the Panel Chair's reference to the European Standard being "fundamentally flawed" was not a finding. It was a shorthand reference to the evidence before the panel, and it was part of a question to Mr. Vossen about what the panel ought to do if that was, indeed, the case.

d. Procedural unfairness

[96] As to the Director's allegation that the Panel Chair's decision to hear the recusal application in writing was procedurally unfair and further evidence of bias, GFL submits that section 11 of the *ATA* grants the Board broad statutory power to "control its own processes" in order to "facilitate the just and timely resolution of the matters before it". Mr. Justice Willcock, writing for the Court in *Goghari v. ACM Environmental Corporation*, 2016 BCCA 158, at para. 31, held that a tribunal typically enjoys broad discretion as to how it will fulfill the requirements of procedural fairness and there will most often be a range of different procedures that meet the requirements.

[97] GFL submits that the Board has previously found that there is no absolute right to an oral hearing: *Beazer East Inc. v. British Columbia (Ministry of Environment, Lands and Parks),* [2000] B.C.E.A. No. 53 [*Beazer*]. In that case, the Board found that natural justice will normally be met through an opportunity to make written submissions. The critical point procedurally is, as stated by the Supreme Court of Canada in *Kane v. Board of Governors of University of British Columbia* (1980), 18 B.C.L.R. 124 (S.C.C.) [*Kane*]: "(t)he tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity 'for correcting or contradicting any relevant statement prejudicial to their views'".

[98] GFL submits that the District Director has not pointed to any prejudice that he has suffered because of the Panel Chair's July 20, 2020 ruling that the recusal application would be heard based on written submissions.

[99] GFL submits that the Panel Chair's July 20, 2020 ruling was not an acceptance of GFL's motion without a hearing. Rather, the Panel Chair ruled quickly because the District Director waited until the very end of the day on Friday, July 17, 2020, to file his recusal motion, and the hearing of these appeals was set to recommence only two business days later, on Tuesday, July 21, 2020. GFL submits that the Panel Chair did not want the District Director's application to prejudice and further delay the hearing of the appeals (which had already extended over a 14-month period). Further, the Panel Chair noted that the motion was far too vague for the other parties to be able to respond. The other parties would have clearly been prejudiced by proceeding with an oral hearing of the motion on July 21, 2020. GFL notes that, in response to the ruling, the District Director filed a 104-page submission in support of his August 7, 2020 Recusal Application, to which the other parties have responded.

[100] GFL further submits that appellate courts have cautioned against giving the objecting party the benefit of the doubt and forcing [adjudicators] to withdraw in doubtful situations[12]. Doing so, presents "danger" including: having litigants engage in judge shopping; the heavy cost of delay due to recusal falling on the opposing parties and the public; tarnishing the appearance and effectiveness of the justice system[13]; and sacrificing important rights to satisfy the anxiety of those who seek to have their own way at any cost or at any price[14].

[101] GFL submits that the District Director has not met his burden, and the application ought to be dismissed.

[102] GFL submits that, in the unlikely event that the Board finds the Panel Chair and the Member should recuse themselves due to the District Director's allegations, GFL respectfully reserves the right to make further submissions in respect of the appropriate relief.

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[12] *Boardwalk Reit LLP v. Edmonton (City),* 2008 ABCA 176 [*Boardwalk Reit*], at paras. 93, 96 to 98, 101 to 103; *G.W.L. Properties Limited v. W.R. Grace & Company of Canada Ltd.* (1992), 74 B.C.L.R. (2d) 283 [*G.W.L. Properties*], at para. 13 (C.A.).
[13] *Boardwalk Reit*
[14] *G.W.L. Properties*

The District Director's Final Reply Submissions

a. Preliminary issue - waiver

[103] The District Director submits that he has not waived his right to bring a recusal application based on the Panel Members' behaviour during the hearing. He submits that the application was brought "at the appropriate point in the proceedings"; i.e., "after the offending Panel Members' conduct had raised a reasonable apprehension of bias against the District Director, his witness and his case, and before the Panel Members heard any further evidence in the proceeding".

[104] The District Director further submits that the allegation here is of attitudinal bias. He submits that evidence of attitudinal bias with a cumulative effect will often reveal itself over the course of a proceeding as a hearing unfolds. In that regard, the District Director cites *R. v. Churchill,* [2016] N.J. No. 221, and *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25. The District Director submits that his actions in bringing the application are consistent with the finding in *Eckervogt* at para. 47, that a party apprehending bias should put the allegation to the tribunal and obtain a ruling before seeking court intervention.

[105] The District Director submits that it was appropriate to bring his recusal application after the Panel Members' questioning of Ms. Hirvi-Mayne and Mr. Scoffield, and before participating further in the hearing. He provided the Panel with the "full opportunity" to deal with the application before the Panel reconvened to hear any further evidence. The Panel declined to do so.

b. Ms. Rai's Affidavit #1

[106] The District Director submits that, in the absence of any evidence to the contrary, Ms. Rai's Affidavit #1 stands for its truth, and there is no reasonable basis for the Panel to reject the evidence or to accord it little or no weight.

[107] The District Director submits that GFL has ignored and mischaracterized the evidence and misstated or wrongly applied the law to this application. Further, the District Director submits that GFL has selectively quoted from sources and attempted to justify, discount, and explain away the Panel Chair's and the Member's "inappropriate and offensive conduct". The recusal application is based not on suspicions, conjecture, insinuation, or impression, but on the "wealth of objective evidence" demonstrating the offending Members'" bias.

[108] The District Director submits that his application is made with a full understanding and appreciation of the seriousness of the allegations and their implications for the Board, the Panel Members, and the administration of justice.

[109] The District Director submits that the Board, as an adjudicative tribunal, is held to the same standard of impartiality as the courts: *Newfoundland Telephone*.

[110] The District Director submits that neither section 38(3) of the *ATA*, nor the culture shift toward proportionality and access to justice, authorizes the Panel Chair and the Member to aggressively cross-examine witnesses or otherwise treat them disrespectfully. The Panel Chair and the Member failed to listen patiently and give witnesses the opportunity to fully express themselves. The District Director submits

that the Ontario Superior Court in *Van Wieren*, relying on *Hryniak v. Mauldin,* 2014 SCC 7, was "out-of-step" with the case law in finding that judges are now entitled to be more interventionist.

[111] The District Director further submits that the bias principles established in criminal proceedings apply equally to civil and administrative tribunal proceedings that involve adjudicative functions.

c. Transcript evidence

[112] The District Director submits that the transcript evidence reveals "clear and convincing evidence of bias on the part of the Panel Chair and the Member". He repeats his submission that the only possible explanation for the Member's question regarding authorship of the one odour unit recommendation is that she had a "pre-determined conclusion that it was not a bright idea". Further, the District Director submits that the Panel Chair "feigned confusion about the Moose Creek facility" when Ms. Hirvi-Mayne referenced the Moose Creek facility in Ladner as the original source of the odour unit concept. He submits that the Panel Members' "obvious tactic in interrupting" Ms. Hirvi-Mayne and feigning confusion about the Moose Creek facility and its relevance to the case was "to try and trip Ms. Hirvi-Mayne up" and to undermine and minimize the significance of her evidence.

[113] An objective, reasonable and fair-minded person examining the Panel Members' line of cross-examination, in the context of all of the evidence, would be compelled to conclude that they are biased, against the odour unit requirement and will not decide this critical issue fairly and impartially.

[114] The District Director submits that it was not a "surprising revelation" (as characterized by GFL) that Metro Vancouver had combined odour complaints from EnviroSmart (now GFL) and West Coast Instant Lawns (a turf farm on the same property as the Facility). In treating the information as such, the Panel Members were "actuated by a blatant bias".

The Panel's Findings

[115] The Panel endorses the importance of the principle of impartiality. As the Supreme Court of Canada stated in *Wewaykum*, at para. 57:

> Simply put, public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law (page reference omitted) must always do so without bias or prejudice and must be perceived to do so.

[116] Further, the Court stated in para. 59 of *Wewaykum* that impartiality "is the key to our judicial process and must be presumed." As a result, the burden lies on the party arguing for disqualification (recusal) to establish that circumstances justify a finding that the judge (decision-maker) must be disqualified. At para. 59, the Court further stated:

> … As was noted by L'Heureux-Dubé J. and McLachlin J. (as she then was) in *S. (R.D.), supra*, at para 32, the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus,

> while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.

a. Preliminary issue - waiver

[117] As a preliminary matter, the Panel considered whether the District Director has waived his right to seek to disqualify the Panel Chair and the Member at this stage of the proceedings.

[118] The law is clear that allegations of bias have serious implications and should be made at the earliest opportunity; failure to do so carries the risk of a finding of waiver: *Eckervogt*, at paras. 48 and 49. At para. 49, *Eckervogt* cites an administrative law textbook as well as *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, where the court rejected a bias allegation as not having been raised in a timely way.

[119] In considering this application, the Panel was struck by the fact that the District Director waited until July 14, 2020, one week before the hearing was set to reconvene for the final block of hearing time, and more than 13 months after the hearing commenced, to first raise his concerns. Although the District Director submits that he could not have made the application sooner because the evidence shows a cumulative pattern of conduct by the Panel Chair and the Member that is not apparent when considering the complained of incidents in isolation, the Panel notes that even after the last hearing date complained of (i.e., March 16, 2020), the District Director failed to raise his concerns at that time. He remained silent for a further four months, until July 14, 2020, before he first gave notice of his intention to bring a recusal application alleging bias. He has provided no explanation for the four-month delay.

[120] The Panel considered that the District Director's legal counsel regularly raised other issues of concern to him or his client during the hearing. He sought rulings promptly, as the concerns occurred to him. Yet, on the crucial issue of whether the Panel Chair and the Member were biased against his client, he remained silent, even during the March 2020 hearing dates and the four-month adjournment that followed, until the hearing was about to reconvene to hear the final days of evidence. In fact, on three occasions when the hearing was adjourned, during which interim applications were sought by GFL and the Resident Appellants, the Director remained silent on the allegations of bias but filed submissions on the other parties' interim applications.

[121] Further, after Ms. Hirvi-Mayne and Mr. Scoffield's evidence was concluded in March 2020, and prior to the hearing reconvening on July 21, 2020, the Chair of the Board convened two CMCs to discuss reconvening the hearing and to address procedural matters, but the District Director failed to raise this serious allegation. The District Director knew, after the second CMC, that the Chair of the Board intended to reserve eight days for the sole purpose of gathering the remaining evidence in the appeals. The Chair of the Board had made clear to the Parties that he was willing to have the Board incur significant and irreversible expense by securing two large hotel meeting rooms equipped with audio equipment and technical staff, so that the Parties could safely meet and the Panel could gather the

evidence it needed to conclude the hearing during the ongoing pandemic. The Parties unanimously endorsed proceeding in this fashion at the CMCs.

[122] Yet, the first time the Panel knew of the allegations was on July 14, 2020, when the District Director indicated his intention to bring a recusal application. It was not until near the end of the business day on Friday, July 17, 2020, that the District Director filed the initial application with some evidence in support of the allegation, and sought to argue the application prior to reconvening the hearing of the evidence.

[123] In our view, considering the totality of the circumstances, and the requirement that allegations of bias should be brought in a timely manner, the District Director has waived any right that he may have had to seek to recuse two of the three panel members hearing the appeals, by 'sleeping' on his objections for an inordinate and unexplained time. Stating that the application was brought at the "appropriate time" is no answer.

[124] That said, given the seriousness of the allegations and the potential harm that such unanswered allegations cause to the reputation of the panel members in particular and the Board in general, the Panel has determined that it is appropriate that it assess the merits of the District Director's objections as if they were raised in a timely manner.

b. Test/Standard to be applied to apprehension of bias allegations

[125] The Supreme Court of Canada noted in *Wewaykum*, at para. 60, that one standard has emerged as the criterion for disqualification. The criterion, as expressed by Grandpre J. in *Committee for Justice*, at p. 394, is the reasonable apprehension of bias:

> …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. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[126] The courts have further determined that, when applying this standard to allegations of bias involving the behaviour of a decision-maker, the court (or tribunal) is to examine the behaviour in the context of the entire proceeding, and not look to isolated incidents: e.g., *Chippewas*, at para. 230; *R. v.* S. *(R.D.)*. As stated by the Ontario Court of Appeal in para. 230 of *Chippewas*:

> … the trial record must be assessed in its totality and the interventions complained of must be evaluated cumulatively rather than as isolated occurrences, from the perspective of a reasonable observer throughout the trial: [citations omitted].

[127] The Panel applied the reasonable apprehension of bias test, bearing in mind that the appeal hearing should be assessed in its totality, as the courts stated above, to the recusal application.

c. Affidavit #1 of Ms. Rai

[128] In Affidavit #1, Ms. Rai alleges that the Panel Chair exhibited behaviour that caused Ms. Rai to believe that the Panel Chair was biased against the District Director. As the Panel understands it, Ms. Rai attended the hearings from time to time at the direction of her employer, legal counsel to the District Director. GFL has sought to cross-examine Ms. Rai on her motive for attending the hearing, making the observations that she did in the manner that she did and to question whether she made other observations. For the reasons that follow, we find it unnecessary to allow such cross-examination.

[129] In paragraph 2 of Affidavit #1, Ms. Rai attests that she attended "many days" of the hearing of the appeals. Her affidavit addresses only observations that she made of the Panel Chair and the Member on March 12 and 13, 2020. We note, parenthetically, that March 12 and 13, 2020, respectively, were the thirty-third and thirty-fourth days of the hearing. March 12, 2020 was also the third and final day of Ms. Hirvi-Mayne's testimony. Mr. Scoffield's testimony had been interrupted on March 10, 2020, in order to accommodate Ms. Hirvi-Mayne's limited availability. Mr. Scoffield returned to the stand on March 13, 2020, at the conclusion of Ms. Hirvi-Mayne's testimony, to answer questions from the Panel.

[130] Attached as exhibit "A" to Ms. Rai's Affidavit #1 are notes of Ms. Rai's observations. It appears that Ms. Rai used the initials "BE" in reference to the Panel Chair, and "LM" in reference to the Member. Ms. Rai made no notes of any observations of the third panel member or of any other events in the hearing. Several of Ms. Rai's observations are not attributed to a panel member. Ms. Rai made twelve "observations" regarding the conduct of the Panel Chair on March 12, 2020, over the course of the approximate nine-hour hearing day including that the Panel Chair "smirked", "roll(ed) eyes", used a "condescending tone", a "rude tone", "sigh(ed)", and "glare(d)". Ms. Rai also observed that the Panel Chair repeatedly instructed the witness to "listen to" or "wait for" a question and noted that the witness' answer was not responsive to the question. Ms. Rai noted that the Panel Chair made a comment "in smugness" on March 13, 2020. Although it is unclear which Panel member she is referencing, Ms. Rai refers to one of the Panel members making a "slight glare" toward the witness.

[131] Ms. Rai made two observations with respect to the Member's conduct on March 12, 2020. Ms. Rai alleges that the Member shook her head once during the witness' testimony regarding the Recommendation Memo, and "sighed" once after the witness testified that she had no recollection of certain comments. Ms. Rai further observed that on March 13, 2020, the Member "muttered under (her) breath" and "shook her head".

[132] Appended as exhibits "B" to "G" of Affidavit #1 are online news articles regarding "COVID-19" and the "Coronavirus". Further appended as exhibit "H" is a Supreme Court of British Columbia statement regarding "Modified Proceedings" in Court due to the pandemic. The relevance of these exhibits to the recusal application is not apparent and has not been explained in the District Director's submissions. The Panel recognizes that the hearing was continuing in mid-March 2020 during a time when news of the pandemic was spreading to Canada from abroad. Institutions such as the courts and tribunals in British Columbia were

beginning to modify their practices and procedures as the news developed, and in the context of advice from the Province's Medical Health Officer and others. The Panel Chair regularly apprised the Parties of relevant information as it became available and pressed ahead with the gathering of evidence with the Parties consent.

[133] The Panel finds that Ms. Rai's Affidavit #1 is not helpful in determining whether the Panel Chair or the Member ought to recuse themselves from the proceedings. Ms. Rai's notes in Exhibit "A" to her affidavit, represent her subjective interpretation of body language and tone of voice at select moments in time during a lengthy hearing, with little information about their context in the proceedings. Her notes purport to record approximately a dozen facial expressions or tones of voice (used by two of the three panel members at specific times on two days of the 44-day hearing), and attribute malintent to those behaviours. There is no explanation as to why we have been provided with her notes from only two days of the hearing, even though her Affidavit #1 states that she attended "many days of the hearing". Ms. Rai's observations were apparently conveyed to the District Director at some point, but he did not bring them to the attention of the Panel prior to filing the Recusal Motion on July 17, 2020. The Panel members were not afforded the opportunity to consider the allegations at, or near, the time when the observed behaviour occurred. Also, transcripts are not time stamped. Absent more contextual information, it is impossible for the Panel to know what was occurring during the hearing when Ms. Rai made her observations. The Panel must consider what else may have been occurring at the time before determining that a particular "sigh", "eye roll", or tone of voice demonstrates a reasonable apprehension of bias. For instance, the Panel Chair and the Member could have been responding to an inability to hear a witness's testimony due to distracting behaviour by an audience member, external noise, or physical factors such as excess heat or cold in the room. The Panel finds that events such as these may provide an innocent explanation for the type of behaviour observed by Ms. Rai.

[134] What the Panel can say with certainty is that while they, as adjudicators, strive to convey a neutral demeanour, they are human. Their language, tone of voice or body posture may be due to many reasons such as fatigue or bodily discomfort from prolonged sitting or writing, annoyance at a distraction, or frustration when a witness is being evasive or is ignoring a direction.

[135] The Panel finds that without knowing more about the context of Ms. Rai's observations within the proceedings, or why the District Director provided her notes from only two days of the 44-day hearing, her notes do not provide sufficient evidence for a reasonable person to conclude that there was an apprehension of bias on the part of either the Panel Chair or the Member, even if the observations described by Ms. Rai are all accepted as having taken place.

d. Transcript evidence

[136] The Panel finds that the District Director's final reply refers to new transcript evidence from eleven dates in June 2019 and November 2019[15] which was not referenced in the District Director's Notice of Motion or in his submissions in support of his recusal application. The Board's Practice and Procedure Manual, at page 28, expressly prohibits the introduction of new evidence in final reply, as it is unfair to add new evidence in final reply when the other parties have no opportunity to respond to it. As a result, the Panel finds that the new evidence cited by the District Director in his final reply submissions is inadmissible.

[137] The Panel has considered the transcript evidence cited by the District Director in support of the recusal application except that portion which the Panel has found to be inadmissible.

[138] By June 17, 2019, the Panel had heard evidence that there was inherent uncertainty in odour units determined in accordance with the European standard, EN:13725. Further, the Panel heard that the "Klarenbeek study"[16] had revealed that the uncertainty in environmental samples was considerably bigger than the uncertainty noted in the European standard. The Panel heard that EN:13725 was under review and had been subject to revision since 2015. There is now a Draft European Standard that is under review. Mr. Vossen testified that if the Draft European standard is not adopted, it would be questionable whether EN:13725 would continue to be used for environmental purposes and if not, what would replace it. Mr. Vossen testified that, from the composting perspective, the concern was whether an odour panel's sensitivity to n-butanol (measured in odour units) was transferable to other odorous materials, particularly when there is a mix of environmental odours being measured. Mr. Vossen testified that there had been discussion about the transferability for many years but, given the revision of the standard, the issue was now "squarely on the table". The Panel Chair asked what to do with a standard that, based on the evidence in the hearing was known to be flawed, to which Mr. Vossen replied, "that is a good question".

[139] The Panel does not find that the Panel Chair's questioning of Mr. Vossen on June 17, 2019, would lead a reasonable person to believe that the Panel Chair had prejudged a key issue in the appeal; i.e., the appropriateness of the use of odour units in the Permit. The Panel finds that the Panel Chair was legitimately querying Mr. Vossen, as an independent expert, about the options available to the Panel if indeed the odour unit provision terms of the Permit were found to be inappropriate, as alleged by GFL. The Panel finds that a reasonable person would find that it was appropriate for the Panel, hearing the appeal as a *de novo* matter (i.e., where the Panel could make any decision that the District Director could have made), to question an independent expert as to alternate options in the circumstances.

[140] The Panel notes that, following the Panel Chair's questions, the Panel Chair asked the Parties if there were any issues arising from questions that the Panel had put to the expert witness. None were raised. If the District Director had concerns that the Panel Chair's questions indicated that she had prejudged an important

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[15] See Appendix "A" to the District Director's Final Reply submissions where he first references transcript excerpts from June 3, 10, 11, 12, 13, 14, 17 and 27, 2019 and November 8, 12 and 13, 2019.

[16] The Klarenbeek study was referenced by Mr. Vossen in his testimony.

issue in the appeal, that would have been the opportune time to raise the issue. He did not.

[141] Further, the Panel was aware from the outset of the hearing that GFL's position (as stated in its opening comments) was that odour units ought to be rejected as a compliance mechanism for the reasons given by the Board in *West Coast Reduction v. District* Director (Decision Nos. 2007-EMA-007(a); 2008-EMA-005(a) [*West Coast Reduction*]. In *West Coast Reduction*, Dr. Parker, an independent expert, testified that odour units were "fundamentally flawed"[17], and the Board found that it was unreasonable and inappropriate to use odour units as a compliance mechanism as they were "simply too flawed"[18]. The Panel finds that the Panel Chair was entitled to take note of that finding and question expert witnesses about the use of odour units in the Permit, given that this is an issue in the appeals and the District Director submitted that the odour unit requirement is a "reasonable, reliable and in fact the best available method for measuring the quantity of odour emitted from industrial sources".[19]

[142] The Panel does not accept that the Panel Chair or the Member's questioning of the District Director's witness, Mr. Scoffield, demonstrates that they were biased against the District Director and his witnesses, or had prejudged a key term in the Permit. The Panel finds that it had many questions of Mr. Scoffield because he was the Permitting Specialist assigned to GFL's application for an air quality permit, and he was one of three signatories to the Recommendation Memo. This Memo was prepared after the Permit was issued and GFL's appeal was filed, and purported to document the rationale for the Permit. Mr. Scoffield, Dr. Preston, and Ms. Hirvi-Mayne were the three signatories to the Recommendation Memo. Following Mr. Scoffield's evidence in chief and cross-examination, the Panel had many unanswered questions. The Panel knew that, of three signatories to the Recommendation Memo, Dr. Preston's testimony had concluded, Mr. Scoffield's testimony had concluded but for the Panel's questions, and Ms. Hirvi-Mayne was yet to testify; but, the authorship of various recommendations and the rationale for those recommendations, including key provisions such as the recommendation to use odour units as a compliance mechanism in the Permit, remained unclear. Further, the Panel had unanswered questions regarding the decision-making process and the reliability of the Recommendation Memo. The Panel had heard evidence that Mr. Scoffield repeatedly changed the Recommendation Memo after it had been signed and presented to the District Director. In these circumstances, it was reasonable for the Panel to seek clarification of these important matters with both Mr. Scoffield and the District Director's next witness, Ms. Hirvi-Mayne.

[143] In addition, the transcript shows that the Panel Chair interrupted both Mr. Scoffield and Ms. Hirvi-Mayne when their answers were not responsive to the questions put to them or were unduly elaborate. For example, the transcript reveals

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[17] *West Coast Reduction,* at para. 309.

[18] *West Coast Reduction,* at para. 331.

[19] See the District Director's Statement of Points at p. 19, para. 53(d).

this exchange on March 10, 2020, during cross-examination of Mr. Scoffield by Mr. Letcher[20]:

> Q So is there anything in writing that -- that stipulates how an approved person is selected? Anything in writing?
> A That's a very broad question meaning like anything in writing is very broad. My -- my recollection is that we have the procedure that outlines how an approved person is to do an odour tour so I -- I can't -- I don't know.
> THE CHAIRPERSON: Again, you're answering something that wasn't asked. You're answering how they do an odour tour. You're asked how do you select the person who would do the odour tour?
> A So the people that are needed to be approved as approved persons are -- generally are officers who are involved in on-call -- the on-call --
> THE CHAIRPERSON: You were asked, is there anything in writing that goes to how the approved person is selected?
> A Not that I'm aware that connects those two things.
> THE CHAIRPERSON: Thank you.

[144] The transcript reveals a further exchange later the same day when Mr. Scoffield continued to be questioned by counsel for GFL[21]:

> Q Okay. And you say that there was some approved person training.
> A Yes.
> Q With respect --
> A Well, assessment by the District Director to -- to be able to -- for his own benefit, answer the Part 2 of the approved person.
> Q And how'd he do that?
> A In my case, it was a group -- small group that went in a Metro Vancouver vehicle to the Ladner area and we drove around various parts of Ladner with -- windows were down so that odour was prevalent inside the vehicle. And my recollection was we all had odour survey forms that we were filling out, as the trip was progressing and Mr. Robb, if I recall, was the driver. And at the end of the, call it, session, the forms were -- were collected and, after that, I'm not sure what -- how Mr. Robb reviewed them or -- or how -- when or how he assessed them. Ultimately, there is a list of approved persons that is -- in my -- I presume is based on the training that I just described.
> Q The training that you just described is driving around Ladner in the car and -- with the windows open.
> A Odour -- that is one of the -- as we've -- the human nose is what we use to smell odours. And having the windows down ensures that you are being exposed to the -- the odours in the community, as you drive around. And when something was noted, the -- the participants would make their assessment on the odour survey sheet and I don't know how -- as I said, I don't know how Mr. Robb ultimately --

[20] See transcript at page 48, lines 30-47 and page 49 at lines 1-3.
[21] See transcript at pages 60-61, lines 43-47 and 1-44.

> THE CHAIRPERSON: Again, Mr. Scoffield, and I do appreciate you're trying to help but you're really not answering the question. You're answering what the process was and how you filled out data that went to Mr. Robb that he did something with. You were asked what was the training? So what trained you to become an approved person? You're telling me how he assessed information you wrote down that you smelled. How were you trained to make those observations? How were you trained to fill in that form? How were you trained to make the assessment? I haven't heard anything about training and that's what you were asked about.

[145] Ms. Hirvi-Mayne began her testimony on March 10, 2020, the thirty-first day of the hearing that had originally been set for fifteen days. Ms. Hirvi-Mayne was not in attendance at the July 31, 2018 meeting where the District Director was briefed regarding staff's recommendations for permit terms. The Recommendation Memo purports to document the content of that meeting.

[146] Examples from the transcripts reveal that when Ms. Hirvi-Mayne was testifying, the Panel Chair repeatedly reminded her to wait for, and answer, the question put to her. As the Panel Chair was reminding Ms. Hirvi-Mayne to be patient, the witness spoke over top of the Panel Chair. The following examples from March 12, 2020, are illustrative[22]:

> MR. LETCHER:
> Q So where is the record of your contributions to the recommendations memo?
> A I guess it is in the verbiage that's in the recommendations memo. You can also look back at the -- I mean, it's not here -- I don't think it's in the documents here, but the Harvest recommendation memo which is a memo that I drafted --
> THE CHAIRPERSON: We're talking about --
> A -- has very similar terminology, so --
> THE CHAIRPERSON: I know. But, Ms. Hirvi Mayne, I'm going to remind you what I did yesterday. Even more important when you're under cross-examination because you may be led through evidence --
> A Mm-hm.
> THE CHAIRPERSON: -- by your own counsel but when you're under cross-examination and this goes to the whole time estimate issue --
> A Right.
> THE CHAIRPERSON: -- that I saw you acknowledging when there was some comment about how long Mr. Letcher's cross-examination would take, how long it takes depends on if you listen to the question and just answer the question.
> A Okay. So can I just ask a clarifying question on that? So Mr. Letcher asked where -- where is it, so it's --
> THE CHAIRPERSON: Where your -- contribution to --
> A Yes.

[22] See transcript at pages 6-7, lines 43-47 and 1-40

> THE CHAIRPERSON: -- this recommendation memo is. So starting to talk about how you contributed to Harvest --
> A Mm-hm.
> THE CHAIRPERSON: -- is not answering where your contribution to this technical recommendation memo is.
> A I guess just so I'm -- perhaps I'm not understanding, but so the -- my contribution to this memo is --
> THE CHAIRPERSON: Where is it recorded he said.
> A Okay. I -- it's -- it's not explicitly recorded in a memo or anything like that.
> THE CHAIRPERSON: Thank you.

[147] Later the same day, the transcript reveals that the Panel Chair intervened again to focus the witness' response to a question posed to her during cross-examination about another industrial facility's permit to discharge air contaminants[23]:

> MR. LETCHER:
> Q So if you would agree with me that what we have here is a permit for a hazardous waste treatment facility?
> A Yes.
> Q And it has a term extending from March 31, 2015 to December 31, 2025?
> A That's correct. That's actually more than a ten-year permit.
> Q Thank you. And on page 2, there's reference to maximum emission quality?
> A Yes.
> Q And it includes particulate matter? Numbered paragraph 9?
> A Yes, I see that.
> Q And particulate matter is a serious issue for Metro Vancouver?
> A Particulate matter is considered one of the criteria air contaminants and it is certainly a common air contaminant that is regulated in many, many permits.
> THE CHAIRPERSON: The question was is it an area of concern for Metro Vancouver.
> A It's -- it -- particulate -- particulate matter concentrations in the ambient air are a concern, so the exposure of people to particulate matter is a concern.

[148] The Panel finds that the courts have recognized the important role that judges and adjudicators play in acting as "gatekeepers" to weigh the risk versus the benefit of admitting "expert evidence" of dubious value. Mr. Justice Cromwell, in *White Burgess*, stated at para. 16:

> Since at least the mid-1990s, the Court has responded to a number of concerns about the impact on the litigation process of expert evidence of dubious value. The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure

[23] See transcript of March 12, 2020, at page 67, lines 18-44.

> reliability, particularly of novel scientific evidence, and emphasized the important role that judges should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.

[149] The Panel finds that the Panel Chair interrupted Ms. Hirvi-Mayne frequently, in an exercise of the gatekeeper function (i.e., not as part of a tactic to disrupt the District Director's evidence) to ensure that her evidence did not stray into areas where she had no expertise and did not risk the confusion, time and expense that might result from admitting such evidence. It was entirely appropriate for the Panel Chair to limit the witness' testimony to matters that were relevant and within her purview; she was neither tendered nor qualified as an "expert", and yet she frequently opined on areas of expertise despite being repeatedly reminded to refrain from doing so. Her answers were often unhelpful in that they were unduly protracted or vague, and frequently strayed far afield from the question. Further, Ms. Hirvi-Mayne frequently spoke rapidly, sometimes speaking over counsel or the Panel Chair. Her answers frequently required follow-up questions from the Panel or the Parties, to obtain relevant and omitted detail or to clarify vague comments.

[150] Ms. Hirvi-Mayne's answers also frequently digressed from the question asked, such that the Parties or the Panel needed to return her to the relevant area of discussion, in order to efficiently use the time available for the hearing. For example, on March 11, 2020, in response to a question from the Member about odour units in the Permit, Ms. Hirvi-Mayne's answers (beside "A" in the transcript excerpt below) referred to another facility, and then the Panel Chair sought clarification:

> MS. MICHALUK: Who said there should be an odour unit in this permit?
> A The odour unit really originally came from this concept of the Moose Creek model. GFL is going to build the **Moose Creek facility in Ladner** and it has --
> THE CHAIRPERSON: That's not the question. Let's not go there.
> A Okay.
> THE CHAIRPERSON: I'm not going to start talking about another facility that's not involved with this.
> MR. NASH: Well, no, it is involved with this.
> THE CHAIRPERSON: **Moose Creek in Ladner**?
> MR. NASH: No, not Moose Creek in Ladner. Moose Creek in Ontario.
> THE CHAIRPERSON: **Isn't that what you just said?**
> **A No, I said it's the Moose Creek model.**
> THE CHAIRPERSON: Yes.
> A So --
> THE CHAIRPERSON: And then you said GFL is going to build...?
> A The Moose Creek -- they're going to build -well, okay. I've probably phrased it poorly. They're going to build a facility in Ladner according to the Moose Creek model. That's what they said.
> THE CHAIRPERSON: Okay.
> A And so the tie-in for me is --
> THE CHAIRPERSON: I don't have --
> MR. NASH: **What's your problem, Madam Chair?**

[Emphasis added]

[151] The Panel rejects the District Director's allegation that a reasonable person would conclude, based on the transcript, that the Panel Chair "feigned confusion" about Ms. Hirvi-Mayne's testimony regarding the Moose Creek facility. The evidence demonstrates that Ms. Hirvi-Mayne had testified and been cross-examined extensively regarding her role in the recommendations in the Recommendation Memo prepared for the District Director regarding the Permit. The transcripts demonstrate that the Member was asking questions of Ms. Hirvi-Mayne to seek clarity on the source of the recommendation to use odour units in the Permit. When Ms. Hirvi-Mayne testified that GFL was building "the Moose Creek facility in Ladner", the Panel Chair questioned whether another facility was being introduced into the discussion, as GFL's Facility in Delta and the Moose Creek facility in Ontario had already been extensively discussed. When the Panel Chair asked the witness whether she had "just said" Moose Creek in Ladner, she said she had not and then stated that she had phrased her response poorly. A reasonable person would find the exchange confusing. The Panel finds that the confusion was evident by the District Director's counsel's query, "What's your problem, Madam Chair?"

[152] To the extent that Ms. Hirvi-Mayne's testimony appeared to be evasive, unclear, or was tangential, the Panel finds that a reasonable person observing the whole of the proceedings would conclude that the Panel Chair was exercising a gatekeeper function to ensure that the witness was responsive to the questions posed to her, and that her testimony was not unduly protracting the proceedings. Further, to the extent that Ms. Hirvi-Mayne's testimony contradicted that of Mr. Scoffield or Dr. Preston, the Panel members were entitled to question her to obtain clarity. Still further, to the extent that Ms. Hirvi-Mayne endorsed a recommendation to use odour units as a compliance mechanism, and given the Board's past decision regarding the inappropriateness of such use in *West Coast Reduction*, it was sensible for the Panel members to question her about the use of odour units in the Permit.

[153] Finally, it was logical for the Panel members to question Ms. Hirvi-Mayne as to how she came to sign off on the Recommendation Memo that purportedly documents the content of a meeting that she did not attend.

[154] For the above reasons, the Panel finds that the transcript excerpts, viewed by a reasonable person in the context of the entire hearing and considering the Panel Chair's role as the "gatekeeper" of the process, do not provide evidence that the Panel Chair or the Member acted inappropriately or demonstrated an apprehension of bias against the District Director or his witnesses, or prejudged a key issue in the appeal.

e. Alleged procedural unfairness

[155] The Panel rejects the District Director's submission that the Panel Chair's direction to hear the recusal application and GFL's application to cross-examine in writing, is evidence that the Panel Chair showed a reasonable apprehension of bias against the District Director. The Board controls its own process, and nothing in the Board's governing statutes requires that a panel to hear applications orally. Whether a matter will be heard orally or in writing depends on the duty or

procedural fairness in the circumstances of the case: *Kane*. There is no absolute right to have a matter heard orally before the Board: *Beazer*. Indeed, the Panel has ruled on numerous applications during these appeal proceedings based solely on written submissions by the Parties.

[156] The circumstances leading up to the District Director's recusal application, and the decision to hear it in writing, are as follows. Following two CMCs, the Board Chair, in consultation with the Panel Chair and the Parties, reserved eight days in July 2020 to hear the remaining evidence in the appeals. In determining that eight days were needed, the Board Chair considered the Parties' initial and updated time estimates to submit the evidence in their respective cases, and the Panel Chair's experience with the pace at which evidence had been gathered in the hearing to date. In making her recommendation to the Board Chair, the Panel Chair considered that the hearing might take longer than anticipated to conclude due to the additional measures which were planned to address health concerns due to the ongoing COVID-19 pandemic. In light of these circumstances, the Panel finds that when the District Director brought his recusal application, the Panel Chair was obliged, as a matter of procedural fairness, to consider that if the recusal application and cross-examination application were to be argued during the time reserved for the hearing, there would be insufficient time to conclude hearing the evidence, and a fourth adjournment and re-scheduling of the appeal hearing would likely be required. Still further, had these applications been argued during the hearing time, this may have triggered further requests for amended or extended interim relief. Such repeated applications run counter to the essence of administrative law, to provide simplified, accessible, and efficient quasi-judicial functions.

[157] Further, the Panel finds that the Panel Chair was also obliged, as a matter of procedural fairness, to consider that the recusal motion was filed two business days before the hearing was scheduled to reconvene on July 21, 2020, and the other Parties would have had insufficient information and time to prepare responses to the District Director's application (and GFL's application to cross-examine Ms. Rai), if those applications were heard at the start of the reconvened hearing.

[158] Finally, the Panel finds that the Panel Chair was entitled to conclude that the procedural fairness considerations would be appropriately balanced if the hearing proceeded, as agreed to by the Parties at the most recent CMC (i.e., with the gathering of evidence from the District Director's remaining two witnesses), and the recusal application and the application for cross-examination were heard based on written submissions from all the parties, pursuant to a schedule to be set by the Panel. The District Director has not pointed to any prejudice that he incurred by arguing the recusal application in writing rather than in person. After the District Director filed his Notice of Motion, he filed a 104-page Recusal Application with references to specific portions of the transcript, and a 32-page Final Reply submission. He has been afforded every opportunity to be heard. The Panel finds that the requirements of procedural fairness were met by providing a written hearing process for the applications, followed by rulings with respect to each application, prior to a determination on the merits of the appeals. We find no merit to the procedural unfairness argument.

f. Cumulative assessment of the District Director's evidence supporting the application

[159] Given the District Director's argument that the recusal application was made only after he had identified a cumulative pattern of behavior and/or statements by the Panel Chair and the Member, the Panel has considered whether a reasonable person would consider that the District Director's evidence, viewed cumulatively, meets the threshold for a reasonable apprehension of bias. We find that it does not.

[160] The Panel considered that a determination of whether an adjudicator's interventions give rise to a reasonable apprehension of unfairness is a fact-specific inquiry and must be assessed based on the facts and circumstances of a particular hearing in its entirety. The test is an objective one. The hearing record must be assessed in its totality and the interventions complained of must be evaluated cumulatively, rather than as isolated occurrences, from the perspective of a reasonable observer throughout the hearing: *Chippewas,* at para. 230.

[161] The Panel finds that the District Director's evidence offered in Ms. Rai's notes attached to her Affidavit #1 is not that of "a reasonable observer throughout the hearing". Instead, her observations are subjective, and it is impossible to establish the context of her observations with any degree of certainty. Even if accepted as having taken place, the observations are insufficient to give rise to a reasonable apprehension of bias because of this lack of contextual appreciation. Further, the news articles appended to her Affidavit #1 have limited relevance and no discernible evidentiary value.

[162] The Panel further finds that the evidence from the transcript excerpts relied upon by the District Director depict 'snapshots' in time and represent a small portion of the 44-day hearing. They are insufficient to be representative of "the hearing record in its totality". The law is clear that an adjudicator's behaviour is not to be viewed as a series of isolated incidents; rather, it is to be viewed contextually and understanding the impossibility of judicial neutrality: *R. v. S (R.D.)*, at para. 48. The Panel adopts the reasoning of Justices L'Heureux-Dubé and McLachlin in their reasons concurring with the majority in *R. v. S. (R.D.)*, at paras. 34 and 35, commenting on the important distinction between judicial neutrality and impartiality:

> In order to apply this (reasonable apprehension of bias) test, it is necessary to distinguish between the impartiality which is required of all judges, and the concept of judicial neutrality. …
>
> … As the Canadian Judicial Council noted in *Commentaries on Judicial Conduct* (1991), at p. 12, "[t]here is no human being who is not the product of every social experience, every process of education, and every human contact". What is possible and desirable, they note, is impartiality…:

[163] Similarly, in *Chippewas*, at para. 243, the Ontario Court of Appeal emphasized the need for a contextual analysis before finding that isolated expressions of impatience or annoyance as a result of frustration are evidence of bias.

[164] The Panel finds that, viewed contextually by a reasonable observer of the entire proceedings, and understanding that the Panel Chair and the Member are not required to be "neutral" in order to be impartial and unbiased, the examples of

behavior that the District Director relies upon are insufficient to establish an apprehension of bias on the part of the Panel Chair or the Member. To the contrary, the Panel finds that they provide evidence that the Panel members took seriously their obligation to ensure that the Panel was not distracted by a witness answering in a manner that was hard to follow and included information that did not seem to address the question being asked, while ensuring that the evidence on record was clear. A reasonable observer would conclude that the Panel Chair and Member were entitled to be skeptical of the evidence that they were hearing, given the Board's previous ruling in *West Coast Reduction*, the timing of and signatories to the Recommendation Memo, and the post-signing changes to that Memo. Skepticism does not equate to bias. To use the language of the Ontario Superior Court of Justice in *Van Wieren* at para. 20, these Panel members were engaged in "very active involvement in [their] quest for all of the evidence that [they] needed" to determine the issues in the appeals.

[165] Finally, the Panel finds that the District Director's evidence, viewed by a reasonable observer of the entire appeal proceeding, does not establish that the Panel Chair's ruling, that the recusal application would be heard in writing rather than at the reconvened the oral hearing, shows an apprehension of bias against the District Director. The Panel has already found that the requirements of procedural fairness were met, and a proper balance of fairness considerations between the parties was established, by proceeding in that way.

[166] For all the above reasons, the Panel finds that the evidence tendered by the District Director, viewed cumulatively by a reasonable observer and in the context of the full appeal proceeding, does not meet the threshold to prove a reasonable apprehension of bias.

[167] In sum, to paraphrase the language of the Supreme Court of Canada in *Wewaykum* at para. 74, we find that the District Director has failed to establish that an informed person, viewing the matter realistically and practically – and having thought the matter through – would conclude that it is more likely than not that that the Panel Chair and the Member are biased against the District Director or his witnesses, or have prejudged a key issue in the appeals. Based on the District Director's submissions and the evidence offered in support of those submissions, we find that the District Direct has not discharged his onus of establishing that the presumption of impartiality ought to be set aside. For all of these reasons, we find that the District Director has failed to discharge his burden of justifying the disqualification of either panel member.

Application to Cross-Examine

[168] The Panel recognizes that GFL applied to cross-examine Ms. Rai on her Affidavit #1, and asked the Panel to order that the District Director provide particulars with respect to paragraph 5 in his Notice of Motion. GFL also asked that the recusal motion be heard in writing.

[169] The Panel finds that GFL's request to hear the recusal application in writing became moot once the Panel decided, for its own reasons, to proceed in writing. Further, the request for particulars became moot because the District Director's

August 7, 2020 Recusal Application provided particulars to paragraph 5 of his Notice of Motion.

[170] The Panel also finds that having reached the conclusion that, even if Ms. Rai's Affidavit #1 is accepted at face value, the District Director has failed to meet his burden of proof, it unnecessary to consider GFL's application to cross-examine Ms. Rai. As a result, the Panel finds that the orders sought by GFL are moot, and GFL's application to cross-examine Ms. Rai is denied.

DECISION

[171] In making this decision, the Panel has considered all of the relevant and admissible evidence and the submissions of the parties, whether or not specifically reiterated in this decision.

[172] For the reasons provided above, the District Director's recusal application is denied. Neither the Panel Chair nor the Member will recuse themselves from considering the evidence and determining the issues in the appeals. In addition, GFL's application to cross-examine Ms. Rai is denied.

[173] Having reached these decisions, the issue of whether and how the remaining panel member ought to determine the issues under appeal, need not be addressed.

"Brenda L. Edwards"

Brenda L. Edwards, Panel Chair
Environmental Appeal Board

"Linda Michaluk"

Linda Michaluk, Panel Member
Environmental Appeal Board

"Reid White"

Reid White, Panel Member
Environmental Appeal Board

October 7, 2020