



ALBERTA
ENVIRONMENTAL APPEALS BOARD

2021 ABEAB 17

June 23, 2021

Via Email

Mr. Richard Harrison
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(*Counsel for the Appellants*)

Ms. Nicole Hartman
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Mr. James Zelazo
CFO & Development Manager
Mr. Jay Zelazo, CEO
Badlands Recreation Development Corp.

[REDACTED]
(*Approval Holder*)

Dear Gentlemen and Ms. Hartman:

**Re: Decision* (19-066-070-ID2) - Badlands Recreation Development Corp.
Water Act Approval No. 00406489-00-00/Our File Nos.: EAB 19-066-070**

By letter dated May 4, 2021, the Board advised that Ms. Meg Barker and Ms. Tamara Bews will not be recusing themselves and will remain on the panel hearing the appeals. In addition, the Board directed that if any party intends to bring a recusal motion, they must do so by noon on Friday, May 7, 2021. None of the parties filed a recusal motion.

The reasons of Ms. Barker and Ms. Bews for their recusal decisions are set out below.

Ms. Barker's Disclosure

By email dated January 11, 2021, the Board advised that Ms. Barker had disclosed a potential concern of conflict or bias:

"...Ms. Meg Barker, the Panel Chair for these appeals and hearing, knows Mr. Rick Grol, a witness for Badlands. Ms. Barker worked for Mr. Grol for 8 years when he was the Chair and she was the Vice-Chair of the Calgary Subdivision and Development Appeal Board. The parties are requested to advise the Board by 4:30 pm on January 14, 2021 if they have any concerns with Ms. Barker continuing on these appeals."

* *McMillan et al. v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Badlands Recreation Development Corp. (23 June 2021), Appeal Nos. 19-066-070-ID2 (A.E.A.B.), 2021 ABEAB 17.*

In response to Ms. Barker's disclosure, the Board received the following submissions from the parties:

- Brander Law's letter dated January 14, 2021; and
- Wilson Laycraft's letter dated January 14, 2021.

By letter dated January 28, 2021, the Board responded to the request of Mr. Harrison, Appellants' counsel, for further information on when Ms. Barker ceased to be a member of the Calgary Subdivision and Development Appeal Board (CSDAB). In this letter, the Board wrote:

"... Ms. Barker has advised that she ceased to be a Vice-Chair and Member of the CSDAB in mid-2016, and to her recollection this was the same time that Mr. Grol ceased to be the Chair of the CSDAB.

The Board would like to receive any final comments regarding Ms. Barker being the panel chair dealing with these appeals, and then she will make a decision on whether to recuse herself. Please provide these comments by noon on February 5, 2021."

By letter dated February 2, 2021, Mr. Harrison responded to the Board, "... we have no further comments regarding Ms. Barker's potential conflict."

Ms. Bews' Disclosure

In a letter dated April 21, 2021, the Board advised the parties that Ms. Bews was replacing one of the previously assigned panel members; and that the parties could view the panel members' background in the attached brochure "About the Environmental Appeals Board Members." In addition, this letter advised that Ms. Bews had disclosed the following potential concern of conflict or bias:

"...she had contact with Mr. Brander in January 2020. Based on the recommendation of a mutual friend, Mr. Brander contacted Ms. Bews for some advice on how to conduct a Court of Appeal action in a regulatory matter. The extent of their contact was one telephone call and email. The matter discussed between Ms. Bews and Mr. Brander was not related to these appeals."

The Board issued a further letter on April 23, 2021, retracting the Board's letter of April 21, 2021, and stating:

"...in January 2020, Mr. Bruce Brander was introduced to Ms. Bews by another lawyer as a potential resource for him to use. Mr. Brander communicated with Ms. Bews by telephone and email regarding potential assistance on a Court of Appeal matter. The matter discussed between Ms. Bews and Mr. Brander is not related to these appeals and not related to the Environmental Appeals Board. Ms. Bews has not had any subsequent contact with Mr. Brander.

The parties are requested to advise the Board by April 28, 2021 if they have any concerns with Ms. Bews remaining on the Board panel hearing these appeals.”

In response to Ms. Bews’ disclosure, the Board received the following submissions from the parties:

- Brander Law’s letter dated April 27, 2021;
- Wilson Laycraft’s letter dated April 28, 2021;
- Brander Law’s letter dated April 29, 2021; and
- Wilson Laycraft’s letter dated April 30, 2021.

The Director did not respond.

Analysis

A. Legal Test for a Reasonable Apprehension of Bias

The definitive statement concerning recusal is found in the Supreme Court of Canada decision in *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (CanLII), which references the test for the apprehension of bias as previously stated by the court in *Committee, for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC):

“...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.’”

The standard for alleging bias is high,¹ and the onus of demonstrating bias lies with the person alleging its existence:²

“The standard is the reasonable observer, not one with a very sensitive or scrupulous conscience: *Committee for Justice and Liberty v. National Energy Board* at page 395. The grounds must be serious, substantial and based on a real likelihood or probability, not mere suspicion: *Boardwalk Reit LLP v. Edmonton (City)*, 2008 ABCA 176 (CanLII) at 29. Bald assertions of bias or apprehension of bias are not sufficient: *Ironside v. Alberta (Securities Commission)*, 2009 ABCA 134 (CanLII) at 103. In light of its legislative mandate, there is a strong presumption that the Commission and its panels will properly

¹ *Boardwalk Reit LLP v. Edmonton (City)* 2008 ABCA 176 (CanLII), paragraph 2.

² *R v. S. (R.D.)* 1997 CanLII 324 (SCC), paragraph 114, and *Wewaykum*, 2003 CanLII 45 (SCC), paragraph 59.

discharge their duties and are not tainted by bias merely due to their proximity to the superintended industry: *Ironside* at 103.”

From the perspective of administrative law, the author of *Administrative Law in Canada*, 5th Edition, LexisNexis Canada Inc. 2011, Sara Blake, had this to say on the question of the independence of the decision-maker from the parties appearing before him or her:

“A past connection with a party, before the party had any interest in the matter at hand, does not give rise to a reasonable apprehension of bias. Members of tribunals are often drawn from among experts in the field who, before their appointment, appeared before the tribunal on behalf of parties. **The prior professional association does not give rise to a reasonable apprehension of bias unless the member, before being appointed to the tribunal had some involvement in the matter before the tribunal.**” [Emphasis added]

In addition, Board members are subject to section 6(4) of the *Environmental Appeal Board Regulation*, Alta Reg 114/1993. Section 6(4) states:

“No Board member who has an interest in the subject matter of a notice of appeal, whether directly or because of his position, affiliation or involvement in or with an organization, firm or business, shall participate in the panel that will conduct the hearing of the appeal.”

B. Application of the Legal Test to Chair and Panel Member: Ms. Barker

The Appellants have not argued that an actual bias exists with Ms. Barker, only that an apprehension of bias is raised by Ms. Barker’s prior relationship with Mr. Grol at the CSDAB. Concerning Ms. Barker, the Appellants submit in their January 14, 2021 letter that:

“We thank the Board for providing details relating to Ms. Barker’s former term with Mr. Grol. Prior to advising of their position, the Appellants ask for information when Ms. Barker ceased her term of engagement with Mr. Grol. The Appellants do have concerns about Ms. Barker’s involvement, however note that it is Ms. Barker who is ultimately required to decide whether she is in conflict.

Given the lack of disclosure on what areas Mr. Grol will testify (Mr. Grol ‘will testify to the Project Overview and related matters’), we are in no position to determine whether Mr. Grol’s testimony will involve matters related to his relationship with Ms. Barker. For example, the Approval Holder states that. No will say statement was provided.”

However, in their counsel’s letter dated April 30, 2021, the Appellants refer to their previous three submissions relating to Ms. Barker and Ms. Bews that:

“...it was up to those two board members to first determine, on their own, whether they are in a conflict.

At this juncture, the Appellants do not take a position on whether either board member is in a conflict. We have noted that there are two members who have raised concerns, however we have not yet heard from either on whether they will recuse themselves.”

Given the test outlined in the *Wewaykum* case, two questions must be addressed:

1. What would a reasonable, informed person, viewing the matter realistically and practically – and having thought the matter through – conclude?
2. Would this person think that it is more likely than not that Ms. Barker, whether consciously or unconsciously, would not decide the appeals fairly?

As previously disclosed to the parties, Ms. Barker's prior involvement with the CSDAB and her professional relationship, as CSDAB Vice-Chair, with Mr. Grol ended in 2016, and Ms. Barker has not had contact with Mr. Grol since then. In addition, the matters dealt with by the CSDAB were entirely unrelated to the subject appeals. The CSDAB is an administrative tribunal with a quasi-judicial function.

The Appellants bear the onus of establishing a reasonable apprehension of bias.

Although the Appellants make statements that they have “...concerns about Ms. Barker's involvement...” and that they are in no position to determine whether Mr. Grol's testimony will involve matters related to his relationship with Ms. Barker given “...the lack of disclosure on what areas Mr. Grol will testify...”, the Appellants have not provided any evidence to rebut the presumption that Ms. Barker will properly discharge her duty-free of bias. Rather, the Appellants' claims are no more than mere suspicions or possibilities of bias. In addition, the Appellants have provided no evidence at all, let alone evidence that would lead a reasonable person to conclude that there is a real likelihood or probability that Ms. Barker's ability to make an impartial decision on the appeals is somehow impaired.

The Appellants have not filed a recusal motion or any evidence to suggest that Ms. Barker's prior professional association with Mr. Grol on the CSDAB, a quasi-judicial tribunal, which ended approximately five years ago, is sufficiently close or of such a nature that a reasonably informed person would have concerns about Ms. Barker's ability to make an impartial decision on the Appeals (i.e., based on the evidence and the submissions of the parties).

In light of the above precedents and based on the facts of this matter, Ms. Barker finds that there is neither any real or perceived conflict of interest nor any apprehension of bias.

C. Application of the Legal Test to Panel Member: Ms. Bews

The Appellants have not argued that an actual bias or an apprehension of bias exists with Ms. Bews. However, concerning Ms. Bews, the Appellants submit in their counsel's April 28, 2021, that:

“...it is for Ms. Bews to determine whether she is in conflict. The Appellants note that there are now two panel members who have raised concerns as a result of their contacts with the Approval Holder or its counsel.”

In their counsel's April 30, 2021 letter, the Appellants submit:

“...it was up to those two board members to first determine, on their own, whether they are in a conflict.

At this juncture, the Appellants do not take a position on whether either board member is in a conflict. We have noted that there are two members who have raised concerns, however we have not yet heard from either on whether they will recuse themselves.”

Again, given the test outlined in the *Wewaykum* case, two questions must be addressed:

1. What would a reasonable, informed person, viewing the matter realistically and practically – and having thought the matter through – conclude?
2. Would this person think that it is more likely than not that Ms. Bews, whether consciously or unconsciously, would not decide the appeals fairly?

As noted in the Board's brochure “About the Environmental Appeals Board Members,” a copy of which was provided to the parties, Ms. Bews is:

“... a lawyer who has practiced primarily in the areas of administrative law, commercial law, and regulatory compliance for over twenty-five years. Over the course of Ms. Bews' legal career, she has gained a broad range of experience on energy, transportation, and agricultural issues. She has worked as a lawyer in both private practice and as in-house legal counsel for TransCanada Pipelines Limited, the Alberta Energy and Utilities Board, and Canadian Pacific Railway Company. Ms. Bews has represented clients in significant regulatory applications before provincial and federal administrative tribunals, and in judicial review applications before the Alberta Court of Appeal...”

As a practicing lawyer, Ms. Bews has professional relationships with other lawyers. In this role, Ms. Bews disclosed to the parties her professional contact with Mr. Brander:

“...in January 2020, Mr. Bruce Brander was introduced to Ms. Bews by another lawyer as a potential resource for him to use. Mr. Brander communicated with Ms. Bews by telephone and email regarding potential assistance on a Court of Appeal matter. The matter discussed between Ms. Bews and Mr. Brander is not related to these appeals and not related to the Environmental Appeals Board. Ms. Bews has not had any subsequent contact with Mr. Brander.”

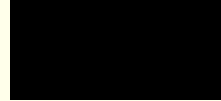
The Appellants have not filed a recusal motion or any evidence to suggest that Ms. Bews' professional contact with Mr. Brander in January 2020 was sufficiently close or of such a nature that a reasonable, informed person would have concerns about Ms. Bews' ability to make an impartial decision on the Appeals (i.e., based on the evidence and the submissions of the parties).

Having regard to the two questions posed above, Ms. Bews finds that:

1. A reasonable, informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that there is no evidence of an apprehension of bias present in the circumstances.
2. A reasonable, informed person would not conclude that Ms. Bews would decide the appeals unfairly.

Please do not hesitate to contact the Board if you have any questions. We can be reached toll-free by first dialing 310-0000 followed by 780-427-6569 for Valerie Myrmo, Registrar of Appeals, 780-427-7002 for Denise Black, Board Secretary, and 780-427-4179 for Gilbert Van Nes, General Counsel and Settlement Officer. We can also be contacted via email at valerie.myrmo@gov.ab.ca, denise.black@gov.ab.ca, and gilbert.vannes@gov.ab.ca.

Yours truly,



Gilbert Van Nes
General Counsel and
Settlement Officer

cc: Mr. R. Bruce Brander, Brander Law

The information requested by the Environmental Appeals Board is necessary to allow the Board to perform its function. The information is collected under the authority of the *Freedom of Information and Protection of Privacy Act*, section 33(c). Section 33(c) provides that personal information may only be collected if that information relates directly to and is necessary for the processing of these appeals. The information you provide is a public record.

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