Date: 19980119
Docket: CV 06887

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NORTHERN TRANSPORTATION COMPANY LIMITED

Applicant

- and -

THE WORKERS' COMPENSATION BOARD, APPEALS TRIBUNAL ESTABLISHED PURSUANT TO SECTION 7.1 OF THE *WORKERS' COMPENSATION ACT* and APPEALS REGISTRAR

Respondents

Ruling on an application for disclosure of documents pending an appeal.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J. Z. VERTES

Heard at Yellowknife , Northwest Territories
on December 15, 1997

Reasons filed: January 19, 1998

Counsel for the Applicant: Barry Zalmanowitz

Counsel for the Workers'
Compensation Board: Adrian C. Wright
and Michael Triggs

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NORTHERN TRANSPORTATION COMPANY LIMITED

Applicant

- and -

THE WORKERS' COMPENSATION BOARD, APPEALS TRIBUNAL ESTABLISHED PURSUANT TO SECTION 7.1 OF THE *WORKERS' COMPENSATION ACT* and APPEALS REGISTRAR

Respondents

REASONS FOR JUDGMENT

[1] The applicant, Northern Transportation Company Limited ("NTCL"), brings this motion seeking the court's assistance in an ongoing dispute with the Workers' Compensation Board (the "Board"). The motion is styled as being in the nature of judicial review but it is in fact a request for this court to direct the disclosure of documents in the control of the Board, documents which NTCL says are necessary so as to prepare for upcoming hearings before the Appeals Tribunal (the "Tribunal"), a review body established under the *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6, and amendments thereto (the "Act").

Summary of Facts:

[2] NTCL is a water transportation business. Since 1985 it has been subject to the requirement applicable to all employers that they pay into the workers' compensation fund established by the Act. Each employer is classified under an industry grouping and then the Board sets a rate for each sub-class. The rate is then applied to each employer's

payroll figures so as to calculate what each employer must pay in each year as that employer's assessment to the fund. The purpose and mechanics of the fund are similar to those in other Canadian jurisdictions.

[3] NTCL has complained about its assessments from 1985 up to the present. Its complaint is directed not to the calculation of its particular payment in each year but the manner in which the industry sub-class rate has been set. It says that the Board has continually proceeded on erroneous actuarial principles and has failed to consider what it says are relevant factors. This complaint has been repeatedly taken to the Board in both formal and informal ways.

[4] The Board's response, in general, has been that the rates have been set using appropriate actuarial principles (having regard to the Board's obligation to maintain the compensation fund at adequate levels) and, in any event, an employer such as NTCL has no power to question the rates. An employer may dispute its own assessment, how it is arithmetically calculated etc., but it cannot challenge the Board's decision on what rate is set. The Board's counsel made an analogy to municipal property taxes. A property owner may challenge his or her own property's tax assessment but the owner cannot challenge the mill rate that is set to calculate the assessment. The setting of rates is characterized as a matter of policy in furtherance of the Board's statutory duties.

[5] In 1994 NTCL requested a review of its assessments for the years 1985 through 1994. The thrust of the review request was that the industry rate applied to NTCL was too high. In accordance with s.64(1) of the Act, the request went before a review committee appointed by the Board. I was told that these review committees are generally composed of in-house personnel, that is to say, employees of the Board. The review committee met in September of 1994 and denied the request for variation. In doing so the committee basically said that it had no jurisdiction to review or vary the rate set by the Board:

> As the classification of Northern Transportation Company Limited is correct and the assessment rate has been approved by the Board of Directors, the Review Committee cannot reduce the assessment rate or recognize the value or cost of NTCL sponsored safety and training programs.
>
> Assessment rates for all employers in all sub-classes are approved annually by the Board of Directors based on the recommendations of the administration and actuarial study. The Review Committee does not have the authority to approve an individual rate for NTCL which varies from the sub-class rate.

NTCL then filed an appeal from this decision to the Appeals Tribunal. I will discuss the legislative provisions respecting the Tribunal later in these reasons.

[6] NTCL also requested a review of its 1995 assessment. This review committee, like the one before it, did not convene a formal hearing but instead conducted its work solely on the basis of documents. This committee also refused to vary the rate set by the Board. In doing so, however, this committee, unlike the first one, considered the merits of the rate set by the Board. It did not conclude that it had no jurisdiction; on the contrary, it purported to examine how the rate was set (by reference to, among other things, studies not made available to NTCL) and then went on to conclude that the rate was reasonable:

> The Review Committee next turned to the components considered by the Board's actuary and the Board of Directors when setting and approving annual assessment rates. In order to determine a subclass' required rate, the Board's actuary compiles and analyzes financial data for each subclass. This data includes, but is not exclusive to, the claims costs previously experienced by all employers in that subclass as well as the projected cost of claims expected to be paid in future years.
>
> Further components include administration expenses incurred to maintain the Board's operations and a provision for the Catastrophe and Operating Reserves.
>
> The Committee reviewed the 1995 actuarial evaluation for Subclass 55, Water Transportation used as part of the 1995 rate setting process and has determined that, based on this evaluation, the 1995 rate for Subclass 55, Water Transportation, is fair and reasonable.

NTCL appealed this decision to the Tribunal and requested that it be heard together with the first appeal.

[7] Both before and after the second review committee disposition, NTCL sought disclosure of what it regarded as necessary and relevant material so as to prepare for the Tribunal hearings. The information sought was described in two letters, one dated March 6, 1996, and the other dated September 18, 1996, addressed to the Board but to the attention of Lynne Green, the Registrar of the Appeals Tribunal. Ms. Green is an employee of the Board. She has a number of functions. She is the executive assistant to the Chairman of the Board; she serves as Secretary of the Board; and, she acts as Registrar of the Appeals Tribunal. Her job description in the latter role includes

responsibility for providing what is termed "senior technical advice" to Tribunal members.

[8] The requests for disclosure sought two types of information: (1) information in the Board's files directly related to NTCL as an employer; and (2) information of a more general nature relating to the methodology by which the Board set the industry rates for 1985 through 1995. This second type includes actuarial worksheets, calculations and projections, financial and claims experience for other employers (either individually or together) in the same sub-class as NTCL, and actuarial consultants' reports of funding policy methods and assumptions. Some of this type of information, particularly consultants' reports, had been provided on other occasions. Some of the information apparently is not kept by the Board although it could be generated from the Board's files. With respect to information relating to other employers, the Board is concerned that such information would enable NTCL to obtain information that was provided to the Board in confidence by NTCL's competitors.

[9] Ms. Green forwarded the first request to the Board. In doing so she purported to rely on a policy adopted by the Board in January of 1996. The pertinent parts of what is labelled as Policy No. 07.02 state:

> This policy authorizes the Workers' Compensation Board (WCB) to release information related to an employer's account. Any other requests for information must be referred to the Board.
>
> . . .
>
> The employer, a person who the WCB considers to be the employer, or the representative of an employer is entitled to examine all relevant information in the WCB assessment file.
>
> . . .
>
> Any request for access to WCB information regarding assessment matters under review or appeal must be submitted in writing. Information obtained from the WCB file can only be used for the purpose of pursuing the review of appeal of an assessment matter.

[10] Some sections of the Act are also pertinent to an understanding of the background to the policy and the Board's response to the disclosure request. Section 7(4) deals with precedent:

> 7. (4) The Board is not bound to follow any previous decision of the Board as a precedent in reaching its decisions or making its rulings.

[11] Subsections 67(11) and (12) deal with confidentiality of information:

> 67. (11) No member, officer or employee of the Board and no person authorized to make an examination or inquiry under this Act shall divulge or allow to be divulged, except in the performance of his or her duties or under authority of the Board, any information obtained by him or her or that has come to his or her knowledge in making or in connection with an examination or inquiry under this Act.
>
> (12) No member, officer or employee of the Board shall divulge information respecting the business of an employer or a worker obtained by him or her in his or her capacity as a member, officer or employee unless it is divulged under the authority of the Board to the persons directly concerned or to agencies or departments of the Government of the Northwest Territories, the Government of Canada or of the government of a province or the Yukon Territory.

[12] On April 18, 1996, the Board met and decided to release information in the files maintained by the Board but specifically only that relating to NTCL. This decision was communicated to NTCL by Ms. Green in her capacity as Appeals Registrar.

[13] In response to the second request, this too was forwarded by Ms. Green to the Board. The Board's in-house counsel wrote to NTCL's solicitors on September 30, 1996, referring to the earlier Board decision in April. This letter stated:

> Subsections 67(11) and (12) of the *Workers' Compensation Act* deal with the issues of confidentiality and disclosure of information. Pursuant to subsection 67(12) of the Act, the Board has discretion with respect to the release of information and has established policy [Policy 07.02].
>
> Since part of your client's request for information did not fall within Board policy, it was referred, by Ms. Green, to the Board for consideration. Enclosed is a copy of a letter written by Ms. Green to Mr. Jim Giesinger dated April 30, 1996, outlining the decision made by the Board.
>
> The Board's decision on this matter is final. The Appeals Tribunal is bound by this decision by virtue of subsection 7.7(1) of the Act.

[14] It is undisputed that the Appeals Tribunal, as a body, did not formally address the request for disclosure. Indeed NTCL took no formal steps to convene a hearing of the Tribunal although its counsel emphasized that NTCL thought it was dealing with the Tribunal by corresponding with Ms. Green as the Appeals Registrar.

[15] I was informed by counsel that, although it was never expressly articulated, the Board takes the position that the general type of actuarial information sought by NTCL on the Board's rate-setting policies and methods are not producible because they are irrelevant to any issue that could be addressed by NTCL before the Appeals Tribunal. In other words, the Board's position is that the Tribunal has no jurisdiction to examine how rates are set and in what amounts; their jurisdiction is limited to whether the specific assessment is accurately calculated based on the rate set by the Board. Therefore, if the Tribunal has no jurisdiction to entertain this issue, then the documents requested are both irrelevant and unnecessary for NTCL's appeals. Hence they are not producible.

[16] The jurisdictional question was not placed directly as an issue before me. Both counsel kept touching on it, however, because it is fundamental to a resolution of the disclosure issue. It is also relevant to the question of whether this application is premature. I should note that this is not a mere academic exercise over regulatory powers. NTCL says it has been paying assessments that are calculated on an unfair and overly high rate. It wants reimbursement of a significant amount of money.

Legislation:

[17] The *Workers' Compensation Act* of the Northwest Territories is similar to that of other jurisdictions in that it places the Board in the central position within the compensation system. The Board is given an extensive jurisdiction to deal with almost any question coming within the purview of the Act:

> 7. (1) Subject to section 7.3, the Board has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act, and the action or decision of the Board on them is final and conclusive and is not open to question or review in any court and, except where there has been a denial of natural justice or an excess of jurisdiction exercised by the Board, no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceedings in any court or be removable by *certiorari* or otherwise into any court, nor shall any action be maintained or brought against the Board in respect of any act or decision done or made by the Board in the honest belief that it was within the Board's jurisdiction.

[18] Section 7.3 (reproduced below) gives the Appeals Tribunal the exclusive jurisdiction to determine all questions arising in an appeal from a review committee.

[19] Among the Board's powers is the division of any industry into classes or sub-classes and the levying of assessments on employers. The wide ambit of the assessment power is reflected in sections 62(2) and 63(1):

> 62. (2) In accordance with and for the purposes specified in this Act and the regulations, the Board shall from time to time assess and levy on the employers such percentage of the payroll or other rate, or such specific sum as, allowing for any surplus or deficit in the class or subclass, the Board may require.
>
> 63. (1) Assessments may be made in the manner and form and by the procedure that the Board considers to be adequate and expedient and may be general as applicable to any class or subclass or special as applicable to any employer or industry or part or department of an employer or industry.

[20] The Board may vary rates and assessments at any time and there are various provisions respecting employers' obligations to provide accurate information and enforcement of payments.

[21] The employer's right of review is contained in s.64:

> 64. (1) Where an employer is dissatisfied with the amount of an assessment the employer may request that a review committee appointed by the Board review the assessment.
>
> (2) Where an employer is dissatisfied with the decision of the review committee, the employer may appeal to the appeals tribunal established by section 7.1.

[22] One of the points discussed by counsel was the meaning of the term "assessment" as used in subsection 64(1) above. Counsel for NTCL argued that it includes rates; the Board's counsel maintained that it refers only to the actual assessment payable by the employer since that is the context of this part of the Act. The definition of "assessment", in section 1 of the Act, is that the term "includes rates, levies, assessments, surcharges, penalties and all other charges imposed by the Board".

[23] There are no statutory provisions respecting the review committee other than the above references in section 64. The Appeals Tribunal, on the other hand, is the subject of a distinct Part of the Act (Part I.1):

> 7.1. (1) An appeals tribunal is established composed of five members appointed by the Minister, including
>
> (a) one member appointed on the recommendation of the Board from among the members of the Board;
>
> (b) two members appointed on the recommendation of representatives of workers; and
>
> (c) two members appointed on the recommendation of representatives of employers.
>
> (2) A member of the appeals tribunal
>
> (a) is appointed for a term not exceeding three years as specified in the appointment; and
>
> (b) may be reappointed on the expiration of his or her term of office.
>
> . . .
>
> (5) The appeals tribunal may only hear an appeal if it is constituted as a panel consisting of the chairperson or the acting chairperson and one member appointed under each of the paragraphs (1)(b) and (c).
>
> . . .
>
> 7.3. Subject to section 7.7, the appeals tribunal has exclusive jurisdiction to examine, inquire into, hear and determine all matters arising in respect of an appeal from a decision of a review committee under section 24 or 64, and it may confirm, reverse or vary a decision of the review committee.

[24] It seems clear to me that the Act establishes the Tribunal as an independent board. The members are appointed by the cabinet minister responsible for the Act. While the Tribunal's jurisdiction is restricted to appeals from decisions of review committees, there is a broad scope to this jurisdiction since, in the words of s.7.3 above, the Tribunal may examine "all matters" arising on such appeals.

[25] The Tribunal has power to set its own procedures and compel witnesses to testify. It is bound to follow the principles of natural justice. All this is made clear by sections 7.5 and 7.6:

> 7.5. (1) The appeals tribunal shall
>
> (a) sit at the times it considers necessary to perform its duties under this Act; and
>
> (b) conduct its proceedings in a manner it considers appropriate.
>
> (2) The appeals tribunal may
>
> (a) make rules respecting its procedure and the conduct of its business;
>
> (b) exercise the powers of a board appointed under the *Public Inquiries Act*; and
>
> (c) cause depositions of witnesses residing in or outside the Territories to be taken in a manner similar to that set out in the Rules of the Supreme Court before any person appointed by the appeals tribunal.
>
> 7.6. The appeals tribunal shall give the appellant and any other interested person an opportunity to be heard and to present evidence.

[26] There is an inter-relationship between the Board and the Tribunal. On the one hand, the Board must assist the Tribunal by providing relevant documents:

> 7.4. The Board shall supply the appeals tribunal with any documents in the possession of the Board that relate to a matter under appeal.

[27] On the other hand, the Tribunal must apply the "policies" of the Board to the determination of any appeal. The Board has power to call for a rehearing by the Tribunal if the Board considers that the Tribunal has failed to properly apply a Board policy:

> 7.7. (1) The appeals tribunal shall, in determining an appeal, apply the policy established by the Board.
>
> (2) Where the Board considers that the appeals tribunal has failed to properly apply the policy established by the Board, or has failed to comply with the provisions of this Act

> or the regulations, the Board may, in writing, direct the appeals tribunal to rehear the appeal and give fair and reasonable consideration to that policy and those provisions.
>
> (3) The Board may stay a decision, ruling or order of the appeals tribunal pending a rehearing of the appeal.
>
> (4)The chairperson of the appeals tribunal shall not participate in any decision of the Board as to whether
>
> (a) the appeals tribunal has failed to properly consider the policy established by the Board;
>
> (b) the appeals tribunal should be directed to rehear an appeal; or
>
> (c) the Board should stay a decision, rule or order of the appeals tribunal.

The Tribunal itself may vary any decision made by it or rehear an appeal: s.7.8.

[28] Subject to the Board's power to require a rehearing by the Tribunal, the decisions of the Tribunal are protected by a very powerful privative clause:

> 7.9. (1) Subject to sections 7.7 and 7.8, a decision of the appeals tribunal on an appeal is final and conclusive.
>
> (2) A decision of the appeals tribunal on an appeal may not be questioned or reviewed in any court.

[29] These provisions make clear that while the Tribunal must apply the Board's policies, it is not an instrument of the Board. It is not under the "direction" of the Board (save and except the limited authority of the Board to direct a rehearing). The Tribunal must make its own decisions on the matters before it. It must make those decisions having regard to the legislation, the Board's policies, and the principles of natural justice. The policies of the Board, however, do not replace the decision-making by the Tribunal. It is the Tribunal that must decide whether a policy applies and, if so, how it applies. It cannot abdicate that responsibility to the Board itself or to some automatic application of any policy. I will explain why further in these reasons when I discuss the relevant jurisprudence.

Issues:

[30] There is really only one issue raised by this application: Is the application premature? This is the position of the respondents. Their argument, in turn, has two facets.

[31] First, the respondents submitted that NTCL should have initially gone to the Appeals Tribunal to ask for disclosure. The response by NTCL was that they thought they had done so by going to the Appeals Registrar (who then on her own referred the request to the Board). The position of NTCL was that the Board usurped the Tribunal's function in this regard. There is no point in now going before the Tribunal because there is a reasonable apprehension of bias since, as counsel put it, the Board "dominates" the Tribunal on this question.

[32] Second, the respondents argued that NTCL should first put the jurisdictional issue before the Appeals Tribunal. Does the Tribunal have jurisdiction to hear an appeal with respect to rate-setting by the Board? It was submitted that only by a determination of that initial question can one ascertain if the documents sought are relevant. And, if they are not relevant, they need not be produced. NTCL replied that the documents should be produced since they may assist the Tribunal in determining the jurisdictional question. Also, it would be a more efficient procedure to have the documents produced now so that all issues may be addressed at one time as opposed to a piece-meal basis.

[33] As I noted before, the jurisdictional issue was not placed before me. It is not an issue I should decide since I think, as do counsel, that this issue is one that is within the power of the Tribunal to decide. The issue before me is whether I should order disclosure of the requested documents <u>now</u> before the Tribunal hears anything.

<u>Discussion:</u>

[34] I will start with a general opinion concerning this application. If it was clear-cut that the Tribunal had jurisdiction to address the rate-setting question raised by NTCL, then I would have no hesitation in saying that the Board's refusal to release the information sought by NTCL (save perhaps any information which may have been provided to the Board in confidence by NTCL's competitors) amounts to a denial of natural justice. As such the court could intervene because (a) the Board is not protected by its privative clause in s.7(1) from a denial of natural justice and (2) the standard of review for natural justice issues, being "jurisdictional" in nature, is one of correctness. It is axiomatic that a party is entitled to know, to review and question, any information in the possession of the decision maker that may affect the decision. This point is particularly apt with respect to the second review committee proceedings where the

decision reveals that the committee made reference to a report that was not then, and is still not, made available to NTCL.

[35] The disclosure of information necessary to one's case, especially in a situation where there are potentially adverse consequences either personal or, as here, economic, is undoubtedly an aspect of the rules of natural justice and procedural fairness. Those rules may vary depending on the context in which they have to be applied. But, as a general proposition, I think it is beyond doubt that tribunals should disclose all information relevant to the case. This applies equally to bodies such as the Board, in this case, whose decisions are under attack and who control the relevant information. This standard cannot be met by a blanket application of some general policy without due consideration of the circumstances and issues in the specific case.

[36] Much of the argument before me related to the effect of s.7.7(1) whereby the Appeals Tribunal is bound to apply policies established by the Board. As I stated previously, this proviso does not make the Tribunal subject to the direction of the Board. To do so, and especially to do so with respect to an individual case before the Tribunal, would mean that the appeal procedure is a complete sham. That cannot be the intent of the legislation.

[37] Counsel for NTCL made the point, one with which I agree, that the terminology employed in s.7.7(1) — "policy established by the Board" — implies established policies, not ad hoc decisions made in response to a specific case. The policy decisions, formulated with respect to the governance responsibilities of the Board, must be applied by the Tribunal. But, whether any particular policy is relevant to an appeal, and if it is what effect it has on the appeal, is strictly up to the Tribunal to decide on a case-by-case basis.

[38] The first point assumes some significance because of something the Board's counsel alluded to in argument. He stressed that, since the rates are set by the Board, and since those rates may be, but do not have to be, published in the Northwest Territories Gazette, then those are "policies" of the Board. Hence, even if the Tribunal possessed the jurisdiction to review industry rates (as opposed to simply reviewing the particular assessment to an individual employer), the Tribunal would still not be able to affect the rates since it would have to apply the Board's "policies" in this regard.

[39] I have a great deal of difficulty with this argument. To my mind the setting of rates from time to time, that being an obligation of the Board pursuant to s.62(2) of the Act, is an operational decision made from time to time. What principles guide the Board

in setting rates may be the subject-matter of an established policy but not the specific rates. Accordingly, if the Tribunal has the jurisdiction to review rate-setting (for the sake of argument), the particular rate would not be binding on the Tribunal although any Board policy respecting methodology may be. But that is for the Tribunal to consider.

[40] The other point is with respect to the independent decision-making power of the Tribunal even if there is a Board policy on the particular subject-matter. This broaches general administrative law principles respecting the fettering of discretion. It is inherently contradictory to have an independent decision-making body and then impose requirements on that body to exercise its discretion in a certain way. It is, however, accepted that since many administrative tribunals work in areas that have broad public policy implications, legislation may permit or require such tribunals to either adopt policies on their own as guidance or to follow policies set by some other (usually superior) authority. The important point, however, is that no administrative policy can be so inflexible as to result in no independent exercise of discretion.

[41] Statutory provisions such as s.7.7(1) of the Act were the subject of the following commentary in Jones & de Villars, Principles of Administrative Law (2nd ed., 1994), at pages 172 - 173:

> A statutory delegate sometimes exercises his or her discretion by reference to a policy articulated by some other governmental body. On the one hand, such an external policy must clearly be relevant to the statutory question in issue. If it is irrelevant or improper, the exercise of the delegated power is invalid for this reason. On the other hand, even if the external policy is relevant, the rule against fettering requires the delegate to exercise his own discretion in deciding whether and how to accept the policy. In particular, the delegate cannot simply treat the external policy as a given, and may be required to permit cross-examination and refutation of that policy. The expectation that a delegate will exercise his or her discretion in a manner so as to accommodate other governmental policies raises difficult legal issues about the relationship between apparently independent administrative bodies and more centralized government agencies, which are only occasionally dealt with specifically by the legislature.
>
> In theory, all fetters on the ability of a delegate to exercise his or her discretion are an abuse, and result in a loss of jurisdiction which can be reviewed by the courts, even in the face of a privative clause. (citations omitted)

The references above to "delegate" and "government agency" can be transposed in our context to read "Tribunal" and "Board".

[42] The leading case in this area is *Innisfil v Vespra*, [1981] 2 S.C.R. 145. That case arose from hearings conducted by the Ontario Municipal Board into a proposed municipal annexation. During the course of the hearing, the provincial cabinet minister responsible for municipal policy forwarded a letter to the Board regarding a decision taken by government relevant to the annexation. The Board ruled that is was bound by the policy as communicated in the letter and it refused to allow cross-examination of a ministerial representative on the policy. The Board issued its ruling based on the policy. On appeal the ruling was set aside on the basis that the Board erred in its conclusion that it was bound by the policy and in its refusal to allow cross-examination on it. There are a number of points made in the Supreme Court judgment that are relevant to this application.

[43] The Court recognized that it was open to the legislature to make a board or tribunal subject to external directions or policies. Such legislative intent must be in clear language (at pages 171 - 173):

> The relationship of "independent" agencies to the executive branch of government, in so far as that relationship affects the procedural rights of parties before the tribunal, can only be determined by reference to the agency's parent statute, and other relevant statute or common law prescribing procedural norms. It is not for a court to go behind these ground rules or modify them because of perceived far-reaching effects. If on its face an agency is held out in the constituting legislation as "independent" of the executive, that is with functions independent of the executive branch, it remains that way for all purposes until the Legislature exercises its undoubted right to alter, by providing for policy directions for example, the position and procedure of the agency.
>
> . . .
>
> A court will require the clearest statutory direction along the lines, for example, of the *Broadcasting Act, supra*, to enable the executive branch of government to give binding policy directions to an administrative tribunal and to make such directions immune from challenge by cross-examination or otherwise by the objectors. It is, of course, open to the Legislature at any time to make provision for the issuance of binding directions by the executive branch to the Board whereby the Board would be required to conform strictly to the announced policies of the executive branch or its agent, a Minister; and thereby to withdraw the subject of the policies so announced from the hearing procedure.

[44] In the present case, the Act requires the Tribunal to apply the Board policies in determining an appeal. Does this remove, as phrased above, the subject of the policies from the hearing procedure? I think not. The Tribunal is given the exclusive jurisdiction to hear and determine all matters arising in respect of an appeal: s.7.3. Its decisions, subject to direction for a rehearing, are "final and conclusive" and may not be questioned in any court: s.7.9. This is a stronger privative clause than that enjoyed by the Board. In my opinion the legislation intends that the Tribunal make independent decisions subject only to the obligation to apply, where applicable, Board policies. This means that it is up to the Tribunal to decide (a) if there is a relevant policy; and (b) how, if at all, that policy applies to the specific appeal before it.

[45] The Court in *Innisfil* also made some comments regarding the right of parties to make representations respecting any policies that may affect the hearing. After reviewing the statutes in that case, and noting that the principles of natural justice apply, the Court said (at page 166):

> In my view, all the statutes discussed above combine to establish a clear code of rights in the parties and obligations in the Board which require here the opportunity in the objector-

> appellant to meet by cross-examination the case being put against the position of the appellant. This is so whether the proceeding can or cannot be classified as a "*lis*" or whether the function of the Board, upon the completion of the hearing and in disposing of the application, is legislative, administrative, quasi-judicial, ministerial or fits into any of the other traditional compartments into which tribunals' functions have been placed.

[46] In the present case the Act requires the Tribunal to "give the appellant and any other interested person an opportunity to be heard and to present evidence": s.7.6. This clearly mandates procedural and substantive fairness. It means that the appellant who is confronted by a Board policy must be given, as phrased above, an opportunity to meet "the case being put against the position of the appellant". Thus if there is a Board policy the appellant should be allowed to present evidence or argument as to whether the policy applies and, if so, how it applies. It may not challenge the policy since that is a Board matter; it may, however, argue that the policy should not be applied or applies in a certain way to the appeal before the Tribunal.

[47] For these reasons I conclude that Ms. Green was in error in taking it upon herself to forward the applicant's disclosure request to the Board instead of having it addressed by the Tribunal. I do not want to be overly critical of Ms. Green, however, since I think the problem has its genesis in the multiple roles assigned to her by her job description. I do not know if there are written and known rules of procedure for the Appeals Tribunal and its officials. Section 7.5(2) allows the Tribunal to make rules respecting its procedure and the conduct of its business. This implies that if such rules are made they would be written down and publicly disseminated. At least if there were some there would be greater certainty as to the procedures in any particular situation.

[48] I also conclude that the Board's motion of April 18, 1996, dealing with the disclosure of information was made without jurisdiction. It usurped the decision-making powers of the Tribunal. As such it is quashed as being an act in excess of jurisdiction.

[49] It is no answer to say that the policy would have required the Tribunal to defer to the Board. The policy says that, other than information in the employer's file, requests for all other information must be referred to the Board. If the Board's counsel is correct that the Tribunal has the power to determine questions as to its jurisdiction on any appeal — and I think counsel states the proposition accurately — then surely the Tribunal must also possess the power to determine what documents are necessary and relevant for the determination of any appeal. After all, the documents are in the control of the Board. If the Board were allowed to decide on disclosure requests in a particular appeal, then the Tribunal cannot fully exercise its independent decision-making power. I think this

conclusion flows naturally from the stipulation in s.7.4 that the Board shall supply the Tribunal with documents in the Board's possession that "relate to a matter under appeal". The Board must supply those documents that the Tribunal concludes are relevant to the appeal before it. The policy numbered 07.72 relates to Board release of information to third parties (such as employers or workers); it cannot preclude demands from a decision-making body to whom, by legislation, the Board must supply documents.

[50] This discussion relates to the Board's decision to deny disclosure. It of course does not predetermine the manner in which the disclosure request is to be treated by the Tribunal. Once that request is before it then of course it will have to look at the legislation and any applicable Board policies. I note only that, on the face of it, there does not appear to be anything that absolutely forbids such disclosure. And, if there are concerns about confidentiality, the Tribunal would have the power to fashion some protective measures.

[51] Having concluded that the Board acted in excess of jurisdiction in refusing to make disclosure does not mean that I have concluded that disclosure should be made. That is something for the Tribunal to decide. In this sense I agree with the Board's counsel in his argument that the request that this court order disclosure is premature (with one exception which I will note below).

[52] The jurisdictional issue, that is, whether the Appeals Tribunal may entertain an appeal as to how rates are set by the Board and the applicable rate for NTCL (as opposed to the assessed payment due from NTCL), is very much an open one. It is an issue fundamental to the disclosure issue. I am not satisfied that disclosure must or should be made prior to a decision on that jurisdictional issue. The question of jurisdiction and the question of disclosure can be argued at the same time but I am not convinced that the requested documents are necessary for either the arguments or the decision-making process on the jurisdiction question.

[53] I have not forgotten the applicant's further argument that there would be no point in putting the disclosure request before the Tribunal since the Tribunal has obviously deferred to the Board on this point. It is argued that this deference creates a reasonable apprehension of bias because it suggests an unacceptably close relationship between the Tribunal and one of the parties to the proceedings before it, namely the Board. Counsel submitted that not only does the Tribunal appear to be acting under the direction of the Board with respect to disclosure, but that the inappropriately close relationship creates the apprehension that the Tribunal may be unduly deferential to the Board on the merits of the applicant's appeals.

[54] Counsel referred me to the Supreme Court of Canada judgment in *Newfoundland Telephone Co. v Board of Commissioners of Public Utilities* (1992), 89 D.L.R. (4th) 289. That case dealt with a concern about bias as the result of public statements expressed by a member of a regulatory board both before and during a rate hearing. The board found against the company. The Court set aside the decision after finding a reasonable apprehension of bias. In doing so, however, it reinforced the concept that the standard to be applied must be flexible to account for the particular circumstances of each case.

[55] Cory J., writing on behalf of the Court, noted (at page 297) that all administrative bodies owe a duty of fairness to the regulated party whose interests are at stake. The extent of that duty, however, will depend on the nature and function of the particular body. One of the essential components of fairness is a lack of bias, not actual but the appearance of bias. The conduct of administrative decision-makers is therefore measured against a standard of reasonable apprehension of bias: "The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator."

[56] Cory J. went on to discuss some of the variables that may be taken into account in applying this test. He wrote (at pages 299 - 300):

> It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a prejudgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature. . .
>
> Further, a member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing. This does not, of course, mean that there are no limits to the conduct of board members. It is simply a confirmation of the principle that the courts must take a flexible approach to the problem so that the standard which is applied varies with the role

> and function of the board which is being considered. In the end, however, commissioners must base their decision of the evidence which is before them.

[57] In the present case the Appeals Tribunal is not charged with making policy but it is required to apply policies set by another body, the Board. But the Tribunal nevertheless deals with policy questions. The standard therefore, as noted above, will be more lenient.

[58] Further, the composition of the Tribunal implicitly recognizes that the individual members may have some biases. The chairperson is appointed from the Board; two members are appointed from recommendations made by workers' representatives; two members are appointed from recommendations made by employers' representatives. The legislation specifically contemplates that these members will bring their respective interests to bear on their work so long as those interests do not result in decisions being made without due regard to the merits of the particular issue.

[59] In this case the Tribunal has not been compromised by the actions of any of its members. It has not yet had the opportunity to consider either the jurisdictional issue or the disclosure request. The Board usurped that function. But there is no reason to conclude that the Tribunal, once faced with those issues, will not be able to decide on the merits. I do not think that a reasonable observer, knowing the composition of the Tribunal and the protection afforded to the Tribunal by the statutory privative clause, and knowing the obligation on the Tribunal to hear the parties, would perceive the appearance of bias in the Tribunal.

[60] Accordingly I conclude that the parties should put the jurisdiction issue squarely before the Appeals Tribunal for determination. The request for disclosure made to this court is therefore premature.

[61] There is, as I hinted above, one exception. It will be recalled that the second review committee purported to review the "reasonableness" of the rate structure. In doing so it had available to it actuarial compilations and analyses regarding the 1995 evaluation for NTCL's subclass. Whether or not the review committee was correct in doing so is irrelevant. Once it did so, and once it relied on this material against the position of the applicant, I think it had an obligation to divulge the material to the NTCL. It is a question of fundamental fairness.

[62] Therefore, I direct the Board to release to NTCL all material relied on and referred to by the review committee in its decision of August 6, 1996. In all other respects the application for disclosure is dismissed as premature.

Conclusions:

[63] The results are mixed. I have quashed the Board's decision refusing disclosure. I have directed limited disclosure relating to documents considered by the second review committee. But, to a great extent, I have denied the relief sought in this application.

[64] The question of costs was not addressed. Counsel may make submissions on costs if they are unable to agree.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 19th day of January, 1998

Counsel for the Applicant: Barry Zalmanowitz

Counsel for the Workers'
Compensation Board: Adrian C. Wright
and Michael Triggs

CV 06887

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

NORTHERN TRANSPORTATION COMPANY LIMITED

Applicant

- and -

THE WORKERS' COMPENSATION BOARD, APPEALS TRIBUNAL ESTABLISHED PURSUANT TO SECTION 7.1 OF THE *WORKERS' COMPENSATION ACT* and APPEALS REGISTRAR

Respondents

REASONS FOR JUDGMENT OF THE
HONOURABLE J. Z. VERTES