COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Environmental Appeal Board v. District Director, Metro Vancouver,* 2025 BCCA 303

Date: 20250902
Docket: CA50014

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Between:

Environmental Appeal Board

Appellant
(Respondent)

And

District Director, Metro Vancouver

Respondent
(Petitioner)

And

Michael Dumancic, GFL Environmental Inc., Nathalie McGee, Meaghan Lyall, Margaret Richardson, Foster Richardson, Wendy Betts, Michael W. Betts, David Frame, Carol Ann Lacroix, Joss Rowlands, Shelley Lee, Barry Mah, Patricia Steinwand, Harry Dhaliwal, Joan Hislop, Douglas Burgham, Jennifer Burgham, Douglas McDougall, and City of Delta

Respondents
(Respondents)

And

Attorney General of British Columbia

Respondent

Before: The Honourable Justice Griffin
The Honourable Madam Justice Horsman
The Honourable Justice Edelmann

On appeal from: An order of the Supreme Court of British Columbia, dated June 19, 2024 (*District Director, Metro Vancouver v. Environmental Appeal Board*, 2024 BCSC 1064, Vancouver Docket S215033).

Counsel for the Appellant:	R.J.B. Gage J. Riddle
Counsel for the Respondent, District Director, Metro Vancouver:	D.K. Lovett, K.C. G.J. Nash, K.C. A.G. Little
Counsel for the Respondent, Attorney General of British Columbia:	J.T. Lovell S. Ramdin
Place and Date of Hearing:	Vancouver, British Columbia March 11–12, 2025
Place and Date of Judgment:	Vancouver, British Columbia September 2, 2025

Written Reasons by:
The Honourable Justice Edelmann

Concurred in by:
The Honourable Justice Griffin
The Honourable Madam Justice Horsman

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Summary:

Appeal from the order of a chambers judge on judicial review quashing a decision of the Environmental Appeal Board based on a reasonable apprehension of bias. GFL Environmental Inc. applied for a permit to operate a composting facility from the District Director for Metro Vancouver. The District Director issued the permit with restrictions and requirements. GFL appealed to the Board, which allowed the appeal in part. The District Director sought judicial review. The chambers judge found that the Board's conduct raised a reasonable apprehension of bias, quashed the Board's decision, and ordered costs against the Board. The Board appeals, arguing that the judge erred by holding it to the standard of bias applicable to adjudicative bodies, when the Board says it has an investigative or inquisitorial role. The Board also appeals the award of costs.

Held: Appeal dismissed. The scope of the Board's appeal should be limited to the issue of the costs against it. The judge did not err in characterizing the Board's role as adjudicative rather than investigative or inquisitorial. The statutory powers conferred on the Board do not indicate that the Board is anything but an adjudicative body overseeing adversarial proceedings, and the judge did not err in assessing its conduct on that standard. The chambers judge did not err in finding that the Board's conduct in the hearing created a reasonable apprehension of bias. The nature and extent to which the Board questioned and cross-examined witnesses created an appearance of favouring the position of GFL and went beyond appropriate questioning by an administrative tribunal. Certain comments made by the Board suggested that the Board did not have an open mind with respect to one of the central issues. In the context of this case, the delay in bringing the recusal application did not constitute waiver. Given that the judge found that the Board's conduct raised a reasonable apprehension of bias, it was open to her to award costs against the Board.

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Reasons for Judgment of the Honourable Justice Edelmann:

Overview

[1] This is an appeal from a judicial review of a decision of the British Columbia Environmental Appeal Board (the “Board”) regarding an environmental permit. In August 2018, the District Director for Metro Vancouver (the “District Director”) issued a detailed permit with a number of restrictions and requirements following an application by GFL to operate a large composting facility in Delta. GFL and several residents of Delta filed appeals with the Board. The Board ultimately allowed the appeals in part, ordering various changes to the permit.

[2] The District Director sought judicial review of the decision, alleging a reasonable apprehension of bias arising from the conduct of the panel that heard the appeal. The chambers judge agreed and quashed the decision, ordering costs against the Board. The Board now seeks to appeal both the substantive decision and the costs order. Neither GFL nor the residents who participated in the hearing of the judicial review have participated in the appeal before this Court. For the reasons that follow, I conclude that the scope of the Board’s appeal should be limited to the issue of the costs ordered against it and that the appeal should be dismissed.

[3] In my view, the central issue on this appeal is the nature of the Board’s role in the hearing of an appeal under the *Environmental Management Act*, S.B.C. 2003, c. 53 [*EMA*]. Contrary to the views expressed by counsel on its behalf, I do not accept that the Board plays an investigatory or inquisitorial role in the context of hearings before it, but rather conclude that its role is adjudicative. The conclusion by the chambers judge that the Chair and one of the members on the panel stepped well outside their adjudicative role through their conduct during the hearing was well supported on the record before her, as was her conclusion that the tenor of their overall conduct during the hearing created a reasonable apprehension of bias. Given those conclusions, it was open to the chambers judge to make a costs award against the Board and I see no basis upon which this Court would interfere with that decision.

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[4] In the following sections, I will begin by outlining the procedural and factual background of the hearings below before turning to the Board's standing before this Court and addressing the substantive issues on the appeal.

Background

[5] GFL operates a turf and composting facility on 29 acres of farmland specifically zoned by the City of Delta for composting operations. The facility receives organic solid waste from Metro Vancouver and processes it to produce compost for turf and sod farming.

[6] Under the *EMA,* as well as the *Greater Vancouver Regional District Air Quality Management Bylaw* No. 1082, 2008 [*Bylaw*], GFL is required to obtain a permit from the District Director to conduct its operations. It applied for such a permit on August 3, 2017.

[7] Under s. 11 of the *Bylaw* and s. 14 of the *EMA*, the District Director can permit the discharge of an "air contaminant" by issuing a permit, and may impose "requirements for the protection of the environment that the district director considers advisable." GFL's application included a plan for the renovation of its composting facility by February 28, 2020, to reduce the emission of any air contaminants or corresponding odours by creating an enclosed facility.

[8] The District Director issued the permit to GFL on August 1, 2018. The permit authorized GFL to operate as an outdoor facility until February 28, 2020, and then to operate as a fully enclosed facility from March 1, 2020 to September 30, 2023.

[9] One of the permit terms applicable to the upgraded, fully enclosed facility was a 1.0 odour unit compliance requirement, to be measured in accordance with the European Standard EN13725. Odour units are a measure of odour concentration emitted from industrial sources.

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Appeals to the Environmental Appeal Board

[10] On August 29 and 30, 2018, twenty appeals of the permit were filed with the Board. One, by GFL, sought an order varying the permit terms, arguing they were too stringent. The remainder, brought by self-represented residents of Delta, asked that the permit be quashed or varied to be more stringent. The resident appellants also asked for declarations, which the Board held fell outside the scope of its jurisdiction.

[11] GFL appealed in part on the basis that odour unit requirements were not sufficiently precise or reliable to be used as a compliance standard. Odour units would become a central issue in the hearings before the Board.

[12] The appeals were merged into one hearing before a three-member panel of the Board and set for 15 days between June 3 and 28, 2019. When the hearing did not complete, it was decided a further 14 days were required. The hearing reconvened from October 28 to November 15, 2019. It again did not complete at that time and was reset for a further ten days, beginning on March 9, 2020. On March 16, 2020, the hearing was adjourned due to concerns about the COVID-19 pandemic.

[13] The Board ultimately set dates to continue the hearing of witnesses for eight days commencing on July 21, 2020, reserving two hotel ballrooms that would allow for appropriate social distancing. In the week prior to that hearing, the District Director filed an application for the Chair and one of the panel members to recuse themselves because their hearing conduct had created a reasonable apprehension of bias. The panel decided to hear the recusal application by written submissions and proceeded in the meantime with hearing witnesses in the eight days booked to receive evidence. The hearing concluded on July 30, 2020, after 44 days of evidence.

[14] On October 7, 2020, the panel dismissed the District Director's application for recusal on two bases. First, the panel concluded the District Director had waived his right to raise bias given the length of time that had passed since the incidents giving

rise to the allegations had taken place. Second, the panel concluded that the standard had not been met for reasonable apprehension of bias in any event.

[15] On March 12, 2021, the Board released a unanimous decision revising the permit, granting both GFL and the resident appellants' appeals in part, and issuing a number of recommendations. The revisions to the permit included the removal of odour units as a measurement mechanism and an extension of the permit to September 2026.

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Judicial Review in Supreme Court

[16] The District Director sought judicial review of the Board's decision. The sole ground of review was that the conduct of the panel members had created a reasonable apprehension of bias.

[17] The chambers judge considered extensive oral and written submissions by the District Director, GFL, the Board, and some of the resident appellants. In order to assess the submissions being made, she reviewed the bulk of the 15 printed volumes of transcripts of the 44 days of hearing. She concluded that the panel's conduct gave rise to a reasonable apprehension of bias, in particular, in relation to the central issue of odour units. She found that the Chair, and one of the members in particular, had intervened excessively throughout the proceedings, expressing scepticism about the odour units, including with loaded questions such as "whose bright idea" it was to include them in the permit and describing the odour units as "flawed".

[18] The crux of her findings about the Board's conduct during the hearing were summarized in the following paragraph:

> [52] […] I am satisfied that interventions of the Chair and [one of the members], in particular, would cause a reasonable person watching the whole of the proceedings, to conclude that they were aligned with the position of GFL. The Chair appeared to assist GFL, unduly intervened in the direct examinations conducted by the District Director, subjected the District Director's witnesses to aggressive questioning, including challenges to their credibility and the appearance of skepticism with the answers given by the District Director's witnesses. Taken as a whole, the conduct of the Panel during the hearing of the evidence was not even handed and it appeared that

> the Chair in particular, and to a lesser extent [the Member], entered the fray and adopted positions inimical to the interests of the District Director and the Resident Appellants.

[19] The chambers judge went on to review in detail numerous examples from the transcripts of interactions during the hearings upon which she based her conclusions. She concluded the conduct was “systemic, and not limited to one or two problematic rulings, or a handful of problematic lines of questioning”: at para. 204. In contrast:

> [205] The attitude of the Chair towards the witnesses for GFL was of an entirely different tenor. The GFL witnesses were not subject to intense cross examination, their counsel was not constantly interrupted during their direct examination, and their answers given in direct examination were not systematically curtailed. The cross examination of the GFL witnesses by counsel for the District Director was not assisted by the Chair adopting and pursuing lines of questions posed by the District Director.

[20] The chambers judge ordered the Board’s decision set aside and awarded costs against the Board. By the time of the judicial review, the term of the original permit had expired, but the extended term of the permit as amended by the Board was still in force. In the circumstances, the chambers judge decided to suspend her order for six months so GFL and the District Director could make arrangements to allow the facility to continue operating.

<u>On Appeal</u>

The Board’s Standing and Role on Appeal

[21] In the court below, the Board took no position on the merits of the petition but now seeks to address them on appeal as the sole appellant. It submits the decision has an impact on its ability to control its own process and to fulfill its statutory responsibility and seeks clarity with respect to the way in which it undertakes that responsibility.

[22] The standing of a tribunal to bring an appeal in the context of the judicial review of one of its own decisions was recently addressed by this Court in *British*

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Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd., 2023 BCCA 168 [*Gibraltar Mines*]:

> [27] The standing argument engages two separate questions. The first is whether the Tribunal had the right to appeal the judgment of the chambers judge quashing its own decision. If not, the appeal should be quashed. If the Tribunal had a right of appeal, there is a second standing issue about the scope of submissions it is entitled to make. These two issues, though analytically distinct, are sometimes considered together under the topic tribunal standing.

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[23] The parties before us agree that, as the Board participated in the hearing of the judicial review as a party pursuant to s. 15(1) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, it has a *prima facie* right of appeal (see *The College of Physicians and Surgeons of British Columbia v. The Health Professions Review Board*, 2022 BCCA 10 at para. 93). The only question is the scope of issues it should be allowed to raise before us.

[24] The issues a tribunal will be permitted to raise will be assessed by the reviewing court as a matter of discretion, balancing the need for fully informed adjudication against the importance of maintaining tribunal impartiality: *Gibraltar Mines* at para. 37. In *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494 [*Thibeau*], this Court set out the following non-exhaustive list of factors to consider in assessing the appropriate level of tribunal participation on judicial review:

> [52] The need to maintain tribunal impartiality will generally be more important, and it will be less likely to be appropriate for a tribunal to argue the merits, if:
>
> a) the tribunal is strictly adjudicative in function, rather than also inquisitorial or investigative (*Leon's Furniture* at paras. 20-21);
>
> b) the matter will be referred back to the tribunal for reconsideration if the petitioner is successful; or,
>
> c) the tribunal seeks to make arguments on review which are not grounded in, or which are inconsistent with, the published reasons for its decision (*Children's Lawyer* at para. 42);
>
> [53] On the other hand, the need to facilitate fully informed adjudication will generally be more important, and it will be more likely to be appropriate for a tribunal to argue the merits, if:
>
> a) there is no other respondent able and willing to defend the merits (*Pacific International Securities* at para. 41);

> b) there is a challenge to the legality of procedural policies or guidelines that have been formally adopted by the tribunal;
>
> c) a detailed analysis of matters within the specialized expertise of the tribunal is necessary and the court is unlikely to be able to comprehend or analyze those matters without the assistance of counsel for the tribunal.

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[25] This is not a circumstance where a party has brought an appeal and there is no one before the Court to defend the tribunal's decision. To the contrary, despite being notified of the appeal, neither GFL nor the residents who participated in the hearing before the Board and in the judicial review proceedings in the court below decided to participate in the appeal before this Court.

[26] The Board does not assert a direct interest in upholding the result of its decision. The parties who do have such an interest are not before this Court, and it is unclear how the order sought by the Board might affect their interests. The original permit was set to expire on September 30, 2023, but the decision of the Board amended the effective period to run until September 1, 2026 under modified terms. The order of the chambers judge on June 19, 2024 quashing the decision of the Board was suspended for a period of six months. That period would have expired in December of last year and it would appear none of the parties sought to extend the effect of the suspension.

[27] Presumably, the parties have arranged their affairs in accordance with the decision of the chambers judge. Given the expiry of the original permit in September 2023, it may well be that the matter is now moot from their perspective. In the circumstances, I am not persuaded that this Court should hear an appeal by the Board on the validity of the underlying decision.

[28] I do accept, however, that the Board has a direct interest in the order awarding costs against it and, as such, has standing to appeal that order. The chambers judge noted the usual rule that a tribunal is not liable for costs on judicial review. However, she found this case to be exceptional because of her conclusion that the Board's hearing process was procedurally unfair due to the reasonable apprehension of bias. Thus, the Board's standing to challenge the costs award also

engages the merits of the chambers judge's finding of an apprehension of bias that underpinned the costs award. The District Director conceded as much in the course of the appeal hearing.

Standard of Review

[29] In my view, there are two aspects to the decision of the chambers judge on costs that attract differing levels of deference.

[30] The first is the conclusion that the panel's conduct created a reasonable apprehension of bias, which is a question of natural justice and procedural fairness. No deference is owed in determining whether the duty of procedural fairness has been met: *Murray Purcha & Son Ltd. v. Barriere (District)*, 2019 BCCA 4 at para. 28. As I will set out in more detail below, the finding of reasonable apprehension of bias was the basis upon which a costs award against the Board was available.

[31] The second aspect of the decision is whether, if a costs award was available given the finding of reasonable apprehension of bias, costs should be awarded in the circumstances. The standard of review with respect to a costs order is highly deferential: *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 at para. 126. This Court will only interfere with a costs order if the judge below misdirected themselves on the applicable law, erred in principle, ignored or misapplied a relevant factor, made a palpable error in assessing the facts, or came to a decision so clearly wrong that it amounted to an injustice: *Gichuru v. Purewal*, 2021 BCCA 91 at paras. 13–14, citing *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329 at para. 33.

Is the Board's Role Adjudicative or Investigative?

[32] The modern administrative state is composed of a wide variety of statutory decisionmakers with different functions in their relevant areas. Some entities may be strictly adjudicative, prosecutorial, or investigative, while others may have a role that encompasses all three functions. The nature of a tribunal and its statutory role will inform an assessment of procedural fairness and reasonable apprehension of bias. A commission of inquiry or a board dealing with policy matters may not be held to as

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strict a standard of bias as an adjudicative body overseeing an adversarial process (see *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *Gagliano v. Gomery*, 2011 FCA 217 at para. 23).

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[33] The starting point for assessing the nature of the Board's role is its constituting legislation. The Board accepts that it does not have the same role as a commission of inquiry, a view confirmed by the structure of the *EMA* itself. Under s. 113, the Minister has the power to order an inquiry and appoint a person to conduct an inquiry who will have various powers and protections set out in the *Public Inquiry Act*, S.B.C. 2007, c. 9 [*Public Inquiry Act*]. The Board's authority to conduct appeals is governed by Part 8 of the *EMA*, which does not include s. 113 or refer to the *Public Inquiry Act*.

[34] Under the *EMA*, the Board's role is to hear and determine appeals from the decisions of directors or district directors. An appeal is initiated when a person aggrieved by a decision of a director or district director files an appeal (s. 100(1)). The Board may conduct an appeal by way of a new hearing (s. 102(2)). Its remedial powers include remitting the matter back to the decision-maker with directions or substituting its own decision (s. 103). The Board may hear the evidence of any person, including a person it invites to appear before it (s. 94). Board members have the right to enter any property (except a private residence) for the purposes of an appeal (s. 98).

[35] Section 93.1 of the *EMA* makes most provisions of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*] applicable to the Board. Exceptions include standard of review provisions and certain procedural or jurisdictional provisions. The Board points out that under the *ATA* the powers conferred on the Board include those to:

- Control its own processes and make rules for practice and procedure (s. 11);

- Require a person to attend a hearing to give evidence or to produce a document or other thing in their possession or control (s. 34(3));
- Question any witness who gives oral evidence (s. 38(3)); and
- Receive and accept relevant, necessary and appropriate information, even if that information would be inadmissible in a court, unless it is privileged (s. 40).

In addition to the general principles of administrative law, s. 30 of the *ATA* explicitly requires the tribunal members to faithfully, honestly, and impartially perform their duties.

[36] The Board argues that it "is conducting its own investigation in reviewing a decision under the *EMA*" because it may conduct *de novo* hearings and call its own witnesses, enter property, order production of documents, question witnesses, and make whatever decision it "considers appropriate in the circumstances," regardless of what the parties asked it to do. As noted by both the District Director and the Attorney General of British Columbia, the powers granted to the Board under the *ATA* are conferred on a wide range of tribunals that exercise adjudicative functions. In effect, they reflect many of the trappings of a judicial process, as most courts (including the British Columbia Supreme Court) have the power to control their own process, order production of documents, require witnesses to attend a hearing, and question witnesses when appropriate.

[37] While s. 98 of the *EMA* gives the Board the power to enter property other than a private residence, the Board itself does not appear to view this as an investigative power. Section 12.1 of the Board's *Practice and Procedure Manual* does not frame the purpose of the power as investigatory:

> The purpose of a site visit is to provide the panel with the opportunity to learn more about the appeal and better understand the evidence, not to gather evidence. The panel's observations during a site visit are not evidence. A site visit is not to be used as a fact-finding expedition. New evidence will normally not be accepted, unless in accordance with the rules of procedural fairness and in the presence of the official recorder. Examples of when a site visit would be appropriate include situations where the proximity of certain

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> features on the site to each other, or to neighbouring properties, is an issue, or where an appreciation is needed of the size or scope of an undertaking or natural feature.
>
> [Emphasis added.]

Other adjudicative bodies, including courts, have the ability to undertake site visits when appropriate (see, for example, s. 652(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, addressing viewing of a place by a jury).

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[38] The Board argues that, unlike trial courts, the ultimate question before it is what is appropriate and advisable for the protection of the environment. It relies on s. 103 of the *EMA*, which gives the Board the power to "make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances." I am not persuaded these provisions indicate that the Board has an investigatory role. I would note that the structure of these provisions are not unusual for an appellate body, and are similar to those in s. 24(1) of the *Court of Appeal Act*, S.B.C. 2021, c. 6, granting this Court the power to "make any order that the court appealed from could have made" along with "any additional order that it considers just". I would also note that part of the adjudicative function of trial courts routinely requires the consideration of interests beyond those of the parties before them, such as the best interests of the child in family law or privacy concerns in various aspects of criminal law. Such considerations do not make trial courts into inquisitorial or investigative bodies.

[39] The Board also argues that after a complaint is filed and a hearing is initiated the parties "are no longer fully in control of what happens." While this may be true of certain procedural elements of an appeal, crucial aspects of the process set out by the *EMA* are party driven. As noted, an appeal is initiated when a person aggrieved by a decision of a director or district director files an appeal under s. 100(1). Under s. 17 of the *ATA*, once the appellant withdraws all or part of an appeal, the Board must accordingly dismiss all or part of the appeal. I would note that this is consistent with the interpretation set out in s. 15 of the Board's own *Practice and Procedure Manual*, which states that an appellant may withdraw an appeal before or at a

hearing. The ability of an appellant to end the process at any time prior to a decision is not indicative of an investigative or inquisitorial function.

[40] The chambers judge described the Board's statutory role in the following terms:

> [42] The [Board], in conducting a hearing *de novo*, is not conducting its own investigation. It is responding to a dispute between the permit issuer, in this case the District Director, and one or more interested parties. It receives the evidence and rationale of the District Director justifying the permit and its requirements, the evidence of interested members of the public as to impacts on the environment, and the evidence of the permittee in relation to the requirements in a permit necessary to adequately and properly protect the environment. Having heard all of the interested parties, the [Board] then is in a position to determine if the permit as issued by the District Director is adequate and proper, or to make any changes to the permit it deems appropriate after hearing all of the evidence. While it does conduct a hearing *de novo*, it is nevertheless exercising a quasi-judicial, or adjudicative, role in determining the adequacy of the permit under appeal.

[41] I have reached the same conclusion as the chambers judge on this issue. The Board's role is an adjudicative one. It follows from this conclusion that the chambers judge did not err in holding the Board to that standard in assessing its conduct during the hearing.

Reasonable Apprehension of Bias

[42] The Board argues, in the alternative, that even if it is subject to the standard for reasonable apprehension of bias applicable to an adjudicative body, the chambers judge erred in finding that its conduct crossed the line. The Board says that even adjudicative tribunals may question witnesses, and indeed its ability to do so is expressly bestowed by s. 38(3) of the *ATA*. However, the Board's ability to question witnesses is not in issue on appeal. It is common ground that Board members may question witnesses, provided that they do so in a manner that is consistent with their duty of impartiality. The only issue is whether the Board created a reasonable apprehension of bias by the manner in which it questioned witnesses, particularly those witnesses led by the District Director.

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[43] The chambers judge extensively reviewed the jurisprudence addressing questioning by the decision maker in an adjudicative context. She summarized the test for a reasonable apprehension of bias in the following terms:

> [23] […] The test before me on the question of bias is: would a reasonable and right-minded person, applying themselves to the question and obtaining the required information, conclude that the decision maker, whether consciously or unconsciously, would not decide the matter fairly.

[44] The parties agree this is an accurate articulation of the well-established test, first set out along similar lines in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 at 394 [*Committee for Justice and Liberty*], 1976 CanLII 2 per de Grandpré J. (dissenting) and subsequent cases. The objective of the test is to ensure not only the reality, but the *appearance* of a fair adjudicative process: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at para. 22 [*Yukon*].

[45] The courts enjoy a strong presumption of judicial impartiality, which is not easily displaced: *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at paras. 14–22; *Yukon* at para. 25. The chambers judge accepted that the same presumption applies to administrative tribunals such as the Board: at para. 25. The application of the presumption of impartiality to tribunals exercising an adjudicative function mandated by statute is consistent with the law as set out by this Court and other appellate courts: *Finch v. Assn. of Professional Engineers & Geoscientists of British Columbia*, 18 B.C.L.R. (3d) 361 (1996) at para. 26; *Aroma Franchise Company, Inc. v. Aroma Espresso Bar Canada Inc.,* 2024 ONCA 839 at para. 134; *Zündel v. Citron*, [2000] 4 FC 225, 2000 CanLII 17137 (FCA).

[46] The chambers judge recognized that a party alleging bias must meet a high burden of proof, and that allegations of bias arising through the conduct of an adjudicator must be examined in the context of the entire proceeding: at para. 27, citing *Yukon* at para. 27.

[47] One of the primary grounds raised by the District Director was the nature of the questioning of witnesses by the Board. The chambers judge reviewed the

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jurisprudence in this area, citing the following passage from *James v. Canada*, 190 F.T.R. 159, 2000 CanLII 16700 (FCA), setting out the limits of appropriate questioning by an adjudicator:

> The general rule is that a judge may ask a witness questions of clarification and amplification, but should not intervene in the questioning of a witness to such an extent as to give the impression of taking on the role of counsel. A judge who does so necessarily will be seen as having adopted a position in opposition to one of the parties. That diminishes the appearance of impartiality that is critical to the goal of ensuring that justice is not only done, but is seen to be done. It may also interfere with the effective presentation of the case by counsel.

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[48] The above statement is consistent with the jurisprudence in this province and is equally applicable to the members of a tribunal with an adjudicative function like the Board. As the Court went on to note in *James*, an allegation of undue intervention in the questioning of a witness must be assessed in the context of the proceedings as a whole. The ultimate question is whether the interventions would cause a reasonable and well-informed observer to apprehend that the mind of the adjudicator was closed to a fair and impartial consideration of the case.

[49] Following her conclusion that the Board was acting as an adjudicative body rather than in an inquisitorial or investigative role, the chambers judge turned to the context of the hearing before the Board:

> [49] The fact there was a hearing *de novo* does not also mean that the [Board] may enter the fray, or give the appearance of supporting the position of one of the parties. The [Board] must maintain impartiality as a decision maker. In the case before me, the Panel had before it representatives of the permit issuer, the company seeking the permit, and interested citizens. This was not a case where one side was missing from the appeal, and there might have been an obligation on the [Board] to ensure all sides were adequately canvassed.

[50] I agree with the chambers judge's description of the scope of the Board's role in the hearing at issue. While there may be circumstances where an adjudicative tribunal might take on a more active role because certain interests are not adequately canvassed, this was not one of those circumstances. In particular, there

was no reason for the Board to undertake extensive questioning, furthering positions advanced by an appellant actively represented by counsel throughout the hearings.

[51] The extent and nature of the questioning of witnesses was addressed in some detail in the decision of the chambers judge. She concluded that the scope and tenor of the questioning went well beyond what was appropriate for an adjudicative body in the circumstances. I find it unnecessary to repeat the chambers judge's thorough analysis of the record. Having reviewed the voluminous transcripts of the hearing before the Board, I find myself in agreement with the assessment of the chambers judge that the lengthy questioning of the District Director's witnesses went well beyond the role of an adjudicative body, at several points veering into cross-examination appearing to favour the position taken by GFL.

[52] By way of illustrative example, the failure to maintain an appearance of impartiality was particularly stark in the questioning of Ms. Hirvi Mayne, a senior project engineer for Metro Vancouver involved in regulation of emissions including assessing odour complaints. Ms. Mayne had been involved in the process leading to the issuing of the terms in the permit under review. Ms. Mayne began her testimony in chief on March 10, 2020 and went on to testify for several days of hearings. The chambers judge outlined a number of issues that arose during Ms. Mayne's testimony in chief, which was interrupted by the Chair multiple times.

[53] Following cross examination by counsel for GFL and the resident appellants, the panel's examination of Ms. Mayne took place over more than a day and half of hearing time. The chambers judge describes aggressive cross examination by the Chair and one of the members, challenging Ms. Mayne's credibility and professionalism as an engineer. The following excerpt is an example of the nature of the questioning by the Chair:

> Q Thank you. And under the table there, I think you've been asked to refer to this before, the first phrase that's in italics there, could you read that, please?
>
> A This memo documents the verbal recommendation of a draft permit attached presented to the District Director on July 31st, 2018 by

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Trevor Scoffield, Permitting Specialist, and Kathy Preston, Lead Senior Engineer.

Q Why did you sign this document?

A Because I reviewed this document and I agreed with the recommendations.

Q But you weren't at the July 31st meeting that this documents, were you?

A No, I wasn't.

Q So you're confident then, in what was recommended at that meeting, is contained in this document then? Because it says "it documents the recommendation of July 31st" —

A I —

Q — that you weren't at.

A I guess I'm making an assumption that — that what is in — this — they all tie together, to me. This — the permit reflects what's in here, and so I have no reason to believe —

Q And "here" being?

A Oh, sorry, in the permit recommendation memo, and— the permit recommendation and the permit are tied together, so I — I have no — I have no reason to believe that this isn't what was discussed at that meeting.

Q Do you usually sign off on contents of a document that documents a meeting you weren't in attendance at? If someone sent you minutes ––

A Mm-hm.

Q — from a meeting and you weren't at those — at that meeting, would you say I approve these minutes —

A Point —

Q — as accurately reflecting what happened in that meeting?

A Yeah, point taken.

Q So is that a "no"?

A So I — I signed this and I wasn't at that meeting, you are correct.

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Q	Okay. So if Dr. Preston said, in her testimony, that she couldn't say why you signed it when you weren't there, what would you say about that?
A	I — I don't know. I — again, I had — I had no reason to believe that the meeting didn't do anything other than recommend — or make the same recommendations that are in here, so that was just— that was my — my belief, I guess.
Q	That was —
A	That was —
Q	— your assumption?
A	— yeah, my assumption.

[54] Earlier in the hearing, the panel had heard testimony from another witness about the meeting referenced in the document and had been told that Ms. Mayne was not present. The questions being asked were not in the nature of clarification, but were clearly framed as a series of closed questions in the form of cross examination. The questioning leaves the distinct impression that the goal of the cross examination is to elicit evidence to challenge the recommendation made by Ms. Mayne in relation to the odour units.

[55] Following the exchange above, one of the members pursued the issue, challenging Ms. Hirvi Mayne's professionalism in signing the memo:

MEMBER:	Okay, thank you. Madam Chair, if you're finished, may I ask one follow–up on this?
THE CHAIRPERSON:	Yes.
MEMBER:	So Ms. Hirvi Mayne, this is a memo you signed off as a P.Eng?
A	Yes.
MEMBER:	And are you concerned that a document to which you affixed your signature was later changed?
A	I — I guess I'm an engineer, not a lawyer, and so —
MEMBER:	So as an engine — that's okay.

A	So as — yeah. So — so I -- I don't — I don't think it was changed enough for to — me to be concerned about.
MEMBER:	Okay.
A	I don't think the — the — the general recommendations are still the same, in — in my opinion.
MEMBER:	Okay.
A	So —
THE CHAIRPERSON:	So you're not concerned?
A	I'm — I'm sorry?
THE CHAIRPERSON:	So your answer was you're not concerned?
A	I'm not concerned.
THE CHAIRPERSON:	Thank you.
MEMBER:	And has it been brought to your — have any other documents that were changed after your signature, as a P.Eng, was affixed within your office — in other words, is this a common practice —
A	I —
MEMBER:	— in your office?
A	I'm not aware of that.

[56] As reviewed by the chambers judge, the questioning included extensive interventions in the evidence of witnesses for the District Director that created the impression that the Chair and one of the members were effectively acting as co-counsel for GFL. As the chambers judge noted, the lines of questioning frequently strayed from any attempt to get to the substance of the issues before the Board, focussing instead on peripheral matters. For example, the District Director's witnesses were questioned at length about the process through which the final recommendations for the permit were formulated, and the authorship of various drafts of the recommendations. Yet these issues appeared irrelevant to the real issue before the Board—whether the permit adequately protected the environment—

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and were not even referred to in GFL's closing submission. Furthermore, the tenor of the questioning was seemingly directed at undermining the credibility of the District Director's witnesses, particularly Ms. Mayne.

[57] In order to resolve the issues on appeal, there is no purpose in repeating the detailed analysis of the chambers judge. The issue in this case is not simply that the Board questioned witnesses. Rather, the issue is that the Board aggressively cross-examined the District Director's witnesses, seemingly aligning itself with GFL's positions. GFL's witnesses, by contrast, did not face the same nature or extent of questioning by the Board. The interventions, rather, were one-sided, giving rise to the apprehension that the Board favoured GFL's position on the appeal. I agree with the chambers judge that, in the result, the Board failed to maintain a demeanour of neutrality and impartiality, which tainted the fairness of the hearing process.

[58] In addition to the nature of questioning, the chambers judge addressed various other elements of the panel's conduct during the hearing. The Board takes issue with various aspects of the approach taken by the chambers judge. I will address each in turn.

Assessment of Comments by the Panel

[59] The Board submits that the chambers judge erred in the manner she assessed comments made by the chair and one of the members.

[60] As noted above, one of the central issues at the hearing was the use of "odour units" as a compliance mechanism. The issue of odour units had been the subject of a 2010 decision of the Board finding that, based on the evidence then before it, the use of odour units as a compliance mechanism to regulate an East Vancouver rendering plant was unreasonable because it was a "fundamentally flawed method": *West Coast Reduction Ltd. v. District Director of the Greater Vancouver Regional District,* 2010 BCEAB 6, Decision Nos. 2007-EMA-007(a); 2008-EMA-005(a) at paras. 309, 331 [*West Coast*]. It was clear from the outset of the hearing that the District Director was aware of the Board's earlier ruling and was of the view that the evidence to be adduced in the hearing would now support the

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use of odour units. It was clear that different evidence about odour units would be presented than what had been before the Board a decade earlier.

[61] It was in this context that the chambers judge considered comments made by both the Chair and one of the members during the hearing. While questioning an environmental scientist called by GFL to give expert evidence in areas including odour unit guidelines, the Chair framed one of her questions as follows:

> 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? […]
>
> [Emphasis added.]

[62] In its recusal decision, the panel suggested that the reference to the standard being "fundamentally flawed" was simply a shorthand reference to the evidence before the panel. As noted by the chambers judge in her decision, this comment taken on its own would not be sufficient to establish a reasonable apprehension of bias, and in effect the District Director made no such allegation at the time it was made. However, in the context of what transpired over the course of the hearing as a whole, I agree with the chambers judge that the "shorthand" would be seen by a third-party observer as one indication among others that the Chair appeared not to be approaching the question of odour units with an open mind.

[63] The following interaction occurred during the examination in chief of Ms. Mayne:

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 –
A	Sorry.
THE CHAIRPERSON:	-- did you make the recommendation?

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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 –
MEMBER:	Whose bright idea was it? That's the question.
A	Whose –
MEMBER:	Who said there should be an odour unit in this permit?

[Emphasis added.]

[64] The Board submits that the term “bright idea” is neutral in this context and that the chambers judge erred in reading it is as an indication that the member was expressing a particular view about odour units at that point in the hearing. I disagree. Asking “whose idea was it?” would perhaps have been neutral. However, by adding the adjective “bright” the member was either indicating that adding odour units was in fact a “bright idea” or was being sarcastic. To a neutral observer aware of the full context, the adjective would clearly be understood as sarcasm. The use of sarcasm in questioning a witness on its own is inconsistent with the Board’s adjudicative function, but it was particularly problematic when it indicated the member already had a well-entrenched view of on one of the central issues in dispute.

[65] The chambers judge recognized that there was nothing improper with the panel exploring the usefulness of odour units and the implications of the decision in *West Coast*. She also noted that, had the comments above been the only issues raised, she would not have found the threshold for reasonable apprehension of bias to have been met. However, in the context of the rest of the hearing, she concluded the comments created the impression of having adopted a position on the use of odour units and contributed to a reasonable apprehension of bias. I am not persuaded she erred in doing so.

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Equation of Alleged Substantive and Procedural Errors with Bias

[66] As part of her analysis on reasonable apprehension of bias, the chambers judge considered a number of procedural and evidentiary decisions that were made by the panel in the course of the hearing.

[67] The Board submits that, even if the chambers judge properly found one or more of the decisions to be unreasonable or procedurally unfair, she erred in equating that with an apprehension of bias. Applying the presumption of impartiality, the fact that a tribunal makes procedural decisions, right or wrong, against a particular party does not on its own indicate bias.

[68] While I do not disagree with the principle articulated by the Board, I do not read the reasons of the chambers judge in the manner alleged. In my view, the analysis of the chambers judge with respect to the procedural decisions is much more nuanced and contextual than a bare conclusion that a decision against the District Director was indicative of bias. To the contrary, the chambers judge did not engage in a tally of decisions for or against the District Director. Moreover, of the eight decisions against the District Director that she considered, in three she found them not to be indicative of a reasonable apprehension of bias at all. It will be helpful to look more closely at her analysis of the other five, although I will not address them in the same order as the chambers judge.

[69] The first was a decision to exclude portions of the evidence of one of the District Director's expert witnesses, which she described in the following terms:

> [126] The decision to exclude significant portions of Mr. van Harreveld's evidence, without providing discernible reasons, was procedurally unfair to the District Director. On the face of the evidence before the Panel, the decision to strike out portions of evidence from a leading world-wide expert on odour, odour units, and the EN13725 standard which formed part of the Permit, is wholly irrational. It had the further effect of significantly limiting important and relevant evidence which the District Director intended to call in support of the odour unit compliance mechanism, which was a central issue in the appeals.

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[70] The relevance of the ruling to the reasonable apprehension of bias was not simply the fact that the ruling went against the District Director, but its connection to the odour units, the very issue that underpinned the perceived apprehension of bias throughout the hearing. I am not persuaded it was inappropriate for the chambers judge to consider the ruling in that context.

[71] The second was in relation to a ruling on demonstrative aids. The chambers judge explicitly stated that it was not the ruling itself that was problematic, but the failure to allow submissions:

> [169] In the case before me, the difficulty arises not with respect to the Chair's decision to not allow the demonstrative aids to be marked. I agree that that is a matter generally within the purview of the Chair in an appeal. The difficulty, and the fairness concern which is raised by this conduct, is the failure to allow counsel for the District Director to make submissions on the matter before the decision was made. […]

[72] The main issue for the chambers judge was not, however, the procedural fairness of the decision but the subsequent threat to hold counsel in contempt for pursuing the issue:

> [172] […] I agree with the District Director that, implicit in the statements made by the Chair, was a threat to apply for an order holding counsel for the District Director in contempt. Given that the District Director was simply attempting to make submissions on the entry of certain exhibits, as he had advised several times over a number of days that he intended to at the end of Mr. Robb's evidence, I agree that this statement by the Chair was high handed and unjustified. I agree that this conduct contributes to a finding of a reasonable apprehension of bias.

[73] The interaction in question took place on July 30, 2020, the final day of a hearing that had extended to 44 days. It is clear that the relationship between the Chair and counsel for the District Director had become more fraught over time, and there was a pending application seeking recusal that had still not been heard. The tensions were undoubtedly compounded by the fact that the hearings were taking place at the height of a global pandemic under challenging conditions. That being said, while it is important for a tribunal to maintain control of its process and the legislature has provided tools to do so, the threat of citation for contempt was wholly

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unwarranted. I agree with the chambers judge that the nature of the Chair's conduct was relevant to assessing a reasonable apprehension of bias in the circumstances.

Recusal and Waiver

[74] The other rulings against the District Director had to do with the timing and evidence on the recusal motion and were intimately tied to the raising of the issue of apprehension of bias itself and the manner in which the panel dealt with it.

[75] A week before the hearing was set to reconvene on July 21, 2020, the District Director wrote to the Board advising that he intended to bring a recusal application. The Board responded that a formal application was required, which the District Director filed on July 17, 2020, seeking to make oral submissions when the hearing reconvened. GFL responded on July 20, 2020 seeking, among other things, to have the hearing continue on July 21 and that the recusal application be addressed afterwards by way of written submissions. The Chair wrote to the parties the same day saying the request to hear the recusal motion at the oral hearing was denied and that the Board would set a schedule for the parties to provide written submission on the motion. On July 21, 2020 at the commencement of the hearing, the Chair read her letter into the record. The Chair had in effect acceded to the process sought by GFL without offering the opportunity for submissions from the other parties prior to the decision. As noted by the chambers judge:

> [154] […] [I]t is possible that, had the Panel received full submissions from the parties on the timing of the recusal application, a decision could have been made on the timing of the application which addressed the concerns of the parties. However, that did not happen. Instead, the decision of the Chair appeared to grant two of the orders sought by GFL, without receiving full submissions from the District Director in response. In making this decision, the process was procedurally unfair, the Chair appeared to align herself with GFL, and this contributes to the reasonable apprehension of bias in this case.

[76] When counsel for the District Director sought reconsideration of the decision and to make submissions on the procedure to be followed, the Chair interrupted him before he could complete his submissions. As noted by the chambers judge, the request for reconsideration would have provided an opportunity to address the breach of procedural fairness, but instead the conduct of the Chair only served to

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reinforce the appearance that her mind was not open to the position of the District Director, contributing to an apprehension of bias.

[77] Later, as part of the case he sought to present on the recusal motion, the District Director requested copies of the audio recordings of certain days of the hearing to show the tone and demeanour of certain interactions. The Chair denied the request, noting that such evidence was already included in an affidavit presented by the District Director. However, in the decision on recusal, the Chair determined the affidavit in question was not helpful, in part as it lacked context. The chambers judge addressed the denial of access to the audio recordings in the following terms:

> [179] In the context of the hearing as a whole, the decision of the Chair to exclude audio tapes which might have been able to prove the speaking volume of witnesses, the tone of voice of the panel members, and any other auditory features of the hearing is problematic in light of the criticisms made by the Panel in the Recusal Decision. To exclude the auditory evidence sought by the District Director, only to then discount the evidence of the District Director for not providing the kind of contextual evidence which the audio tapes might have provided, does not suggest impartiality on the part of the Chair and the Panel. This ruling contributes to a reasonable apprehension of bias.

[78] I agree with the chambers judge that, in the context of the hearing as a whole, the conduct of the Chair surrounding the application for recusal reinforced a reasonable apprehension of bias when it came to positions taken by the District Director.

[79] Both GFL and the District Director sought to rely on the Board's recusal decision before the chambers judge. She concluded that it was not helpful in assessing the reasonable apprehension bias. As the Board argues that the chambers judge ought to have deferred to the panel's decision on recusal, it will be helpful to look at it more closely. The parties made extensive submissions on the motion to have the Chair and one of the members recuse themselves. The Board issued a decision denying the application, concluding it ought to be dismissed on the basis of waiver because the District Director did not raise the bias allegations until July 14, 2020, over a year after some of the events relied on as allegations of bias. As noted by the chambers judge, the allegations by the District Director were not of

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a conflict of interest, but of attitudinal bias arising in the conduct of the hearing. This is not a case where there was knowledge in advance of the hearing that could have triggered an application for recusal. While, in retrospect, some of the conduct giving rise to a reasonable apprehension of bias took place much earlier, the point at which the overall conduct had clearly crossed the line was during the testimony of Ms. Mayne, which I have addressed above. Ms. Mayne's testimony took place at the inception of the Covid-19 pandemic and the issue of bias was raised before the hearing had resumed. I agree with the chambers judge that this could not, in the context of this hearing, be construed as a waiver of the bias issue.

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[80] In addition to the finding of waiver, the panel went on to conclude that, in any event, the District Director had not established a reasonable apprehension of bias. GFL argued that the chambers judge ought to defer to the panel's conclusion that its conduct did not give rise to a reasonable apprehension of bias. The chambers judge declined to do so and assessed the matter herself based on the record. The Board submits that she erred in doing so. I disagree. While in some circumstances, a recusal decision may include relevant factual findings to which a reviewing court might defer, no such findings were relevant in the present case. As noted in my discussion of the standard of review above, no deference is owed to the Board when reviewing questions of procedural fairness.

[81] In summary, I find myself in agreement with the assessment of the chambers judge that the conduct of the Chair and one of the members created a reasonable apprehension that they were biased against the positions being taken by the District Director. I am not persuaded that she erred in the manner in which she relied on various rulings made during the hearing, nor that she ought to have deferred to the Board's own ruling on the issue.

Costs

[82] The default under the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 is that costs of a proceeding are awarded to the successful party. In this case, the District Director was the successful party. The chambers judge decided that costs should be

awarded against the Board. The alternative would have been either that the petitioner (the District Director) bear his own costs, or that the respondent (GFL) pay costs to the District Director.

[83] Generally, an administrative tribunal will neither be entitled to nor ordered to pay costs in the context of judicial review. One of the exceptions to the general rule is where the tribunal exhibited misconduct or perversity in the proceedings before it: *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244 at para. 2. This Court has made it clear that conduct that gives rise to a reasonable apprehension of bias can amount to "misconduct or perversity" sufficient to justify an award of costs against a tribunal, even without evidence of actual bias: *Thibeau* at para. 68. The Court in *Thibeau* went on to comment as follows:

> [69] As noted, all costs awards are discretionary. I do not mean to suggest that a finding of a breach of natural justice or procedural fairness will automatically result in an award of costs against the responding tribunal. The context of the particular case must be considered. However, it seems fair to say that the closer the case is to one of a significant breach of the rules of procedural fairness in a case where those rules clearly apply, the stronger will be the case for a costs award.

[84] The Board's principal argument is that the reasons on costs fail to account for the fact that this judicial review was a first instance consideration of when the Board can be taken to display bias in the exercise of its investigative function. The Board points to comments from the Court of Appeal for Ontario in *R. v. Ontario (Review Board)*, 2009 ONCA 16 at para. 62, overturning a costs award against the Ontario Review Board in part because it was "the first time the [Ontario Review Board] had to deal with the issues relating to the exercise of its inquisitorial role." In my view, the decision is of little assistance as it addresses a finding that the Court below had erred in awarding costs under the *Criminal Code*, a circumstance very different from the one that was before the chambers judge.

[85] Moreover, in this case the Supreme Court of British Columbia had already considered the statutory scheme of the *EMA* and opined on the level of procedural fairness required before the Board in *Shawnigan Residents Association v. British Columbia (Director, Environmental Management Act),* 2017 BCSC 107:

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> [91] I conclude that the statutory scheme in this case contemplates a formal adversarial type of hearing before the Board. When read together with the Board's Procedure Manual, the EMA clearly contemplates that a high degree of fairness, akin to that of a court proceeding, should apply to appeals.

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[86] I find it difficult to reconcile the above comments with anything but an adjudicative function. The comments are clearly consistent with the conclusions reached by the chambers judge about the role of the Board.

[87] Ultimately, while it may well have been open to the chambers judge to take a different view of the Board's failure to understand its function, I cannot say the exercise of her discretion reflects an error in principle or was so clearly wrong that it amounted to an injustice.

[88] I would therefore dismiss the appeal.

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Conclusion

[89] In summary, I conclude that the Board has standing to appeal the decision of the chambers judge but that this Court should, in its discretion, limit the appeal to the costs award. I would dismiss the appeal on costs.

"The Honourable Justice Edelmann"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Madam Justice Horsman"