

Date: 20141003

Docket: 13/63

Citation: *Cabana v. Newfoundland and Labrador*, 2014 NLCA 34

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
COURT OF APPEAL**

**BETWEEN:**

BRAD CABANA

APPELLANT

**AND:**

HER MAJESTY THE QUEEN IN RIGHT  
OF NEWFOUNDLAND AND  
LABRADOR

FIRST RESPONDENT

**AND:**

NALCOR ENERGY

SECOND RESPONDENT

**AND:**

INNU NATION OF LABRADOR

THIRD RESPONDENT

Coram: Green C.J.N.L., Welsh and Rowe JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador  
Trial Division (G) 201201G5862  
(2013 NLTD(G) 36)

Appeal Heard: May 7, 2014

Judgment Rendered: October 3, 2014

Reasons for Judgment by the Court

Counsel for the Appellant: Self Represented

Counsel for the First Respondent: Rolf Pritchard Q.C. and Mark P.  
Sheppard

Counsel for the Second Respondent: Thomas Kendell Q.C.  
Counsel for the Third Respondent: No Appearance

**By the Court:**

[1] This is an appeal of a decision by a judge of the Trial Division denying an application by Brad Cabana for the judge to recuse herself on the basis of a reasonable apprehension of bias. Three issues are considered: the timing of an appeal of a recusal decision; Mr. Cabana's reasons for requesting the recusal; and disqualification of the judge based on the conduct of the hearing.

**BACKGROUND**

[2] On November 16, 2012, Mr. Cabana filed a statement of claim against Her Majesty the Queen in Right of Newfoundland and Labrador (the "Crown"), Nalcor Energy Inc. and the Innu Nation of Labrador. The focus of the claim is the development of hydro-electric power at Muskrat Falls in Labrador without first holding a provincial referendum (2013 NLTD(G) 115, 340 Nfld. & P.E.I.R. 113, at paragraph 3). Mr. Cabana also filed an interlocutory application seeking an injunction against the Crown and Nalcor.

[3] The application for an injunction was set to be heard on February 21, 2013. On February 20<sup>th</sup>, the parties participated in a teleconference with the judge at her request. One issue discussed was whether notice had been given to the federal Attorney General with respect to Mr. Cabana's challenge to the constitutionality of section 5 of the *Electrical Power Control Act, 1994*, SNL 1994, c. E-5.1. Mr. Cabana indicated that this had been done, but a copy had not been filed with the Court.

[4] At the commencement of the hearing, the judge concluded that an email sent by Mr. Cabana to the Attorney General was not sufficient compliance with the requirement to give notice under the *Judicature Act*, RSNL 1990, c. J-4. Mr. Cabana, who was self-represented, sought a postponement to permit him to give the appropriate notice. This was refused. As a result, Mr. Cabana was precluded from making submissions regarding the constitutional question.

[5] When the hearing resumed the following day, Mr. Cabana advised that he was not ready to proceed. He alleged that the judge was in a conflict of interest and asked that she recuse herself. The matter was then set over to Monday, February 25<sup>th</sup> for submissions on the recusal issue.

[6] By decision dated March 6, 2013, the applications judge dismissed Mr. Cabana's request that she recuse herself (2013 NLTD(G) 36, 334 Nfld. & P.E.I.R. 78). Mr. Cabana took no steps to appeal the decision at the time. Instead, he chose to proceed with the application for an interim injunction. That application was dismissed (2013 NLTD(G) 115, *supra*).

[7] On September 25, 2013, Mr. Cabana filed a notice seeking leave to appeal both the judge's refusal to recuse herself and the dismissal of the application for an injunction. Leave was granted to appeal the recusal decision (2014 NLCA 1, 345 Nfld. & P.E.I.R. 350).

## **ISSUES**

[8] The preliminary issue is whether Mr. Cabana waived his right to appeal the recusal decision by delaying that appeal until a decision had been made on the interim injunction application.

[9] The grounds of appeal on which Mr. Cabana submits that the judge was required to recuse herself are: financial implications related to the judge's spouse as a partner in a law firm; legal work for Newfoundland and Labrador Hydro done by the judge prior to her appointment; and political donations made by the judge prior to her appointment.

[10] The final issue is disqualification of the judge based on the conduct of the hearing.

## **ANALYSIS**

### **Appeal of a Recusal Decision – the Question of Waiver**

[11] The Crown and Nalcor submit that, by failing to appeal the judge's decision not to recuse herself when that decision was made, Mr. Cabana must be taken to have waived his right to an appeal on that issue. That submission is not persuasive.

[12] The question of when an appeal against a judge's decision on recusal may or must be brought has not previously been determined by this Court.

The issue is not addressed in the *Rules of the Supreme Court, 1986*. Further, there is conflicting jurisprudence from other jurisdictions on this point. For example, in *MacKinnon v. MacKinnon*, 2001 PESCAD 20, 203 Nfld. & P.E.I.R. 355, the Court was inclined to the view that a decision by a judge to deny a recusal application should not be the subject of an immediate appeal, but rather could constitute a ground of appeal on the disposition of the case on the merits. A contrary view was set out in *Middlekamp v. Fraser Valley Real Estate Board* (1993), 83 B.C.L.R. (2d) 257 (BCCA), where an appeal was taken immediately from the denial of an application for recusal. Similarly, in *Geophysical Services Inc. v. Sable Mary Seismic Inc.*, 2012 NSCA 33, 315 N.S.R. (2d) 201, and in *New Brunswick (Milk Marketing Board) v. Mary and David Gesdine Dairy Farms*, 2002 NBCA 38, 257 N.B.R. (2d) 5, the Courts contemplated an immediate appeal from the denial of a recusal application. None of these decisions is binding on this Court, albeit they assist in informing consideration of the issue.

[13] On the one hand, reasons of efficiency may point toward an immediate application for leave to appeal where a recusal application is denied, particularly when this occurs at or near the beginning of a lengthy hearing. Considerable resources may be wasted and costs incurred if, following a disposition on the merits, it is held on appeal that the judge should have recused himself or herself.

[14] On the other hand, where the hearing on the merits is expected to be relatively short, for example, a few days, it may be more efficient to have the hearing proceed to a disposition on the merits, after which the denial of the recusal application may constitute a ground of appeal. The nature of the issues to be adjudicated may also be a relevant consideration.

[15] In short, the approach taken should be guided by practical considerations, with the choice of when to proceed with an appeal to be made by the relevant party. Failure to seek leave to appeal the recusal decision immediately, without more, will not constitute a waiver. Furthermore, rule 57.02(9) works against the application of waiver in this context. That rule provides that “[a]n interlocutory order, from which there has been no appeal, shall not operate so as to bar the Court from giving such decision on the appeal as may be just”.

[16] In this case, the hearing on the application for an interim injunction lasted only three days. Given the nature of such an application, time is usually of the essence. Mr. Cabana would, understandably, have been

concerned about any delay had he been required to deal with an appeal as to the judge's recusal decision before proceeding with the injunction application.

[17] In the circumstances, it was appropriate for Mr. Cabana to proceed as he did. It could not be said, as alleged by the Crown and Nalcor, that he had waived his right to challenge the judge's decision not to recuse herself.

### Appeal of the Recusal Decision

#### Legal Principles

[18] The question of actual or apprehended bias by a judge was the focus of the decision in *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259. The Court began the analysis by stating:

[57] ... Simply put, public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.

[58] The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. ...

[19] In *Wewaykum*, at paragraph 60, the Court adopted "the criterion for disqualification" of a judge expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369:

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[20] In *Wewaykum*, the Court discussed underlying principles which assist in applying the above test, beginning with an evidentiary rationale for reliance on apprehended, in contrast to actual, bias.

[64] First, when parties say that there was no actual bias on the part of the judge, they may mean that the current standard for disqualification does not require that they prove it. In that sense, the "reasonable apprehension of bias" can be seen as a surrogate for actual bias, on the assumption that it may be unwise or

unrealistic to require that kind of evidence. ... As stated by the English Court of Appeal in *Locabail (U.K.)* [[2000] Q.B. 451], at p. 472:

The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.

...

[65] Second, when parties say that there was no actual bias on the part of the judge, they may be conceding that the judge was acting in good faith, and was not consciously relying on inappropriate preconceptions, but was nevertheless unconsciously biased. ...

[66] Finally, when parties concede that there was no actual bias, they may be suggesting that looking for real bias is simply not the relevant inquiry. ... To put it differently, in cases where disqualification is argued, the relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was. In that sense, the reasonable apprehension of bias is not just a surrogate for unavailable evidence, or an evidentiary device to establish the likelihood of unconscious bias, but the manifestation of a broader preoccupation about the image of justice. ...

[21] The Court in *Wewaykum* also discussed “automatic disqualification”, which the British courts have applied where “a person sitting in a judicial capacity has a pecuniary interest in the outcome of the proceedings” (paragraph 69). More recently, automatic disqualification was extended by the British courts to “a limited class of non-financial interests, where the judge has such a relevant interest in the subject matter of the case that he or she is effectively in the position of a party to the cause” (paragraph 70). However, in *Wewaykum*, the Court did not adopt the British approach:

[72] Whatever the case in Britain, the idea of a rule of automatic disqualification takes a different shade in Canada, in light of our insistence that disqualification rest either on actual bias or on the reasonable apprehension of bias, both of which, as we have said, require a consideration of the judge’s state of mind, either as a matter of fact or as imagined by the reasonable person. ...

The Court went on to emphasize principles underlying the analysis:

[76] First, it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial

impartiality. In this respect, de Grandpré J. added these word to the now classical expression of the reasonable apprehension standard:

The grounds for this apprehension must, however, be substantial, and I ... refus[e] to accept the suggestion that the test be related to the “very sensitive or scrupulous conscience”.

...

[77] Second, this is an inquiry that remains highly fact specific. ...

[22] The Court also discussed the effect of a judge’s earlier involvement in related litigation, noting that lesser or more indirect involvement or the passage of time are relevant considerations that will weaken an allegation of a reasonable apprehension of bias.

*Litigation - Judge’s Husband as Partner in a Law Firm*

[23] Mr. Cabana is being sued by Alderon Iron Ore Corporation and an individual. They are being represented, not by the judge’s husband, but rather by other lawyers in the firm in which the judge’s husband is a partner. Mr. Cabana says this gives the judge a pecuniary interest arising from her husband’s share of the fees from the Alderon litigation.

[24] In considering this submission, since the automatic disqualification test was not adopted by the Supreme Court of Canada, it is insufficient simply to show some pecuniary or financial gain that the judge may receive, however remote that gain may be. The question is whether the possible financial gain satisfies the reasonable apprehension of bias test.

[25] In this case, it is clear that the judge has had no involvement with the Alderon litigation. Insofar as the judge’s position is concerned, the Alderon case is no different from any other litigation being handled by her husband’s law firm. That is, the fact that the Alderon litigation involves Mr. Cabana does not result in any connection between the judge and that case or the law firm.

[26] Any fees from the Alderon litigation that the judge’s husband may receive as a result of his position as a partner in the law firm are no different from fees earned from any other litigation in which the firm is involved. The fact that the judge’s husband earns money as a partner in the law firm and that a portion of that money comes from litigation undertaken by the firm cannot form the basis for a finding of reasonable apprehension of bias

by the judge in this case. The allegation does not pass muster when the *Wewaykum* test of an informed person, viewing the matter realistically and practically – and having thought the matter through – is applied.

[27] Mr. Cabana also submits that the judge could undermine his ability to defend against the Alderon litigation by awarding costs against him in this case, thereby reducing the amount of money he would otherwise have available to defend against the Alderon case. Indeed, that may be the effect regardless of which Trial Division judge heard Mr. Cabana's application. Mr. Cabana seems to suggest that, applying the reasonable and right-minded person test, the judge would order costs against him with the conscious or unconscious intention of reducing his ability to deal with other unrelated litigation. Such a suggestion is not sustainable. As stated in *Wewaykum*, "the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality" (emphasis added, paragraph 21, above).

[28] Also related to Alderon, Mr. Cabana relies on the fact that John Baker was a partner in the same firm as the judge until 2002 and that Mr. Baker has had extensive involvement in hydro-electric projects. Mr. Cabana makes a similar submission regarding the judge's prior business association with John Neville. The passage of time and the remoteness of a connection, if any, to the matters in issue here militate against any suggestion of a reasonable apprehension of bias.

[29] Finally, Mr. Cabana says that a reasonable apprehension of bias arises from the fact that Nalcor, which is a party to this appeal, is owned by the Provincial government and that the firm in which the judge's husband is a partner represents the Provincial government in litigation involving tobacco companies. It cannot seriously be argued that an informed, reasonable, right-minded person would conclude that these facts should disqualify the judge from hearing Mr. Cabana's case. There is no connection, even remote, between the ownership of Nalcor and its involvement in this case and litigation the Province may have with tobacco companies.

[30] None of the above allegations, taken alone or together, would support a finding of reasonable apprehension of bias by the judge.

Legal Work for Hydro

[31] In 2007, the applications judge represented Newfoundland and Labrador Hydro in hearings before the Public Utilities Board. The hearings related to setting rates for electricity, which the Board regulates. Representing Hydro may be characterized as akin to representing Nalcor, which is a party to this proceeding, because Hydro is a wholly-owned subsidiary of Nalcor.

[32] As discussed in *Wewaykum*, whether the judge's involvement in earlier litigation may give rise to a reasonable apprehension of bias will depend on the particular facts. Factors such as the nature and extent of involvement by the judge in the litigation and the passage of time are relevant considerations.

[33] In *Wewaykum*, the Court summarized:

[79] As the parties acknowledged, Binnie J.'s past status as Associate Deputy Minister is by itself insufficient to justify his disqualification. The same can be said of his long-standing interest in matters involving First Nations. The source of concern, for the bands in these motions to vacate the judgment, is Binnie J.'s involvement in this case, as opposed to his general duties as head of litigation for the Department of Justice in the mid-1980s.

[80] In this respect, the bands relied, among other arguments, on the following statement of Laskin C.J., in *Committee for Justice and Liberty v. National Energy Board*, *supra*, at p. 388:

Lawyers who have been appointed to the Bench have been known to refrain from sitting on cases involving former clients, even where they have not had any part in the case, until a reasonable period of time has passed. *A fortiori*, they would not sit in any case in which they played any part at any stage of the case. This would apply, for example, even if they had drawn up or had a hand in the statement of claim or statement of defence and nothing else.

[81] This dictum must be understood in the context of the principle of which it is but an illustration. It does not suggest that any degree of earlier participation in a case is cause for automatic disqualification. This statement provides sensible guidance for individuals to consider *ex ante* [before the matter is heard, rather than in hindsight]. It suggests that a reasonable and right-minded person would likely view unfavourably the fact that the judge acted as counsel in a case over which he or she is presiding, and could take this fact as the foundation of a reasonable apprehension of bias.

[82] However, contrary to what has been argued, it cannot realistically be held that Binnie J. acted as counsel in the present case, and the limited extent of his participation does not support a reasonable apprehension of bias. To repeat, what is germane is the nature and extent of Binnie J.'s role. The details of Binnie J.'s involvement in this case, as outlined in the earlier part of these reasons and which should be viewed in the context of his broad duties in the Department of Justice, would convince a reasonable person that his role was of a limited supervisory and administrative nature.

[83] Admittedly, Binnie J.'s link to this litigation exceeded *pro forma* management of the files. On the other hand, it should be noted that he was never counsel of record, and played no active role in the dispute after the claim was filed. ...

[34] After recognizing the nature of Binnie J.'s role as Assistant Deputy Minister in the federal Department of Justice, with overall responsibility for litigation generally, the Court continued:

[85] To us, one significant factor stands out, and must inform the perspective of the reasonable person assessing the impact of this involvement on Binnie J.'s impartiality in the appeals. That factor is the passage of time. Most arguments for disqualification rest on circumstances that are either contemporaneous to the decision-making, or that occurred within a short time prior to the decision-making.

[86] In *Locabail (U.K.)*, *supra*, at p. 480, the English Court of Appeal stated:

... every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

[35] In *Wewaykum*, the passage of time had been more than fifteen years and Binnie J. stated that, when the appeals were heard and decided, he had no recollection of his involvement, which the Court found to be a limited administrative and supervisory role. The Court also referred to the decision in *Panton v. Minister of Finance*, [2001] 5 L.R.C. 132, [2001] UKPC 33, where a five year lapse of time occurred which the Privy Council found was "of some significance in diminishing to some degree the strength of any objection which could be made to his qualification to hear the case" (*Wewaykum*, at paragraph 87).

[36] Regarding the passage of time, reference has been made by this Court to “Ethical Principles for Judges”, a publication by the Canadian Judicial Council, which states under the heading “Former Clients”:

(c) with respect to the judge’s former ... clients, the traditional approach is to use a “cooling off period”, often established by local tradition at 2, 3 or 5 years ...

(*Barrett v. Glynn*, 2001 NFCA 70, 207 Nfld. & P.E.I.R. 213.)

[37] The duration of a “cooling off period” can vary having regard to the extent of the solicitor-client relationship. If a judge had been intimately involved in the legal affairs of a client company over an extended period, that would point toward a longer “cooling off period”. In some circumstances, the closeness between the judge, when a lawyer, and the client may be such that the judge should not hear a case involving the former client, even after a lengthy “cooling off period”.

[38] In this case, the judge did work for Hydro six years before Mr. Cabana raised the issue of apprehension of bias in this case. The work the judge did had no direct relationship to the issues at play in this case. The judge was not an employee of Hydro, having done the work on a contractual basis, and there was no evidence of an on-going solicitor-client relationship. This situation is very different from the circumstances in *Barrett v. Glynn* in which the judge had a minor, but direct involvement in the matter when he witnessed a deed of conveyance several years prior to commencement of the litigation.

[39] An additional consideration raised in *Barrett* is the judge’s responsibility to disclose a possible conflict. In *Barrett*, where the judge had, some years earlier, witnessed a deed of conveyance relevant to the matter being litigated, this Court concluded that he should not have heard the matter. Steele J.A. explained:

[65] It was the responsibility of the trial judge, not that of legal counsel, to raise the matter of his familiarity with the case and his connection with the immediate vendor and the conveyance of the property in question. A “cooling off period” of up to 5 years, or any number of years, did not and could not erase or abrogate his former association, partnership with Mr. O’Dea while in the practice of law, and his participation, as minor as it was, in the sale and conveyance of the property. As long as this circumstance existed, there was a burden to disclose the association and involvement. With respect, the circumstances of this case required full disclosure. The trial judge had a measure of identification with Mr. O’Dea, the law partnership, and the actual conveyance of the property that was

not possible to overlook; it necessitated an acknowledgment at the commencement of the proceedings. In the situation existing it was not possible to surmise or take it for granted that counsel and their clients were cognizant about the trial judge's status or position and thus able to infer a waiver or consent from their silence. There was no disclosure followed by a waiver or a consent to continue. A disclosure and discussion between the bench and bar should have been in open court, in front of the litigant, and have formed a part of the record of the trial.

[40] In this case, the length of the “cooling off period”, the limited extent of the solicitor-client relationship and the fact that the subject matter of the legal work done for the client was different from the matter at hand, all lead to the conclusion that no reasonable apprehension of bias arises from these factors. That said, it would have been preferable for the judge, at the outset, to disclose these facts, to give the parties an opportunity to consider their positions.

### Political Donations

[41] Mr. Cabana sought to put into evidence information concerning political donations the judge made prior to her appointment as a judge. The judge correctly refused to allow the evidence. A lawyer is free to engage in political activity and to make donations to political parties. This changes upon appointment as a judge. The publication, “Ethical Principles for Judges”, states under the heading “Political Activity”:

D.2 Commentators are unanimous that “all partisan political activity and association must cease absolutely and unequivocally with the assumption of judicial office.”

[42] A judge is precluded from making donations to a political party, but only upon appointment as a judge. Accordingly, evidence of donations made by the judge prior to her appointment could not form the basis of a reasonable apprehension of bias.

### Whether the Judge Should Have Recused Herself

[43] None of the bases discussed above on which Mr. Cabana submits that the judge should have recused herself, taken separately or together, satisfies the reasonable apprehension of bias test. A reasonable, well-informed, right-minded person would not have concluded, for these reasons, that the judge consciously or unconsciously, would not decide Mr. Cabana's application for an interim injunction fairly.

[44] However, that is not the end of the matter. While Mr. Cabana has not established an error in the judge's analysis of the bases on which he relied to request her recusal, a reasonable apprehension of bias may arise from the manner in which the judge dealt with Mr. Cabana.

Manner in which the Judge Dealt with Mr. Cabana

[45] The manner in which a judge conducts a hearing may result in a reasonable apprehension of bias disqualifying the judge from hearing proceedings involving a particular litigant. As a general rule, the patient and courteous treatment of all litigants will serve to maintain the community's confidence in and respect for the courts and the justice system (*Ethical Principles of Judges, supra*, under "Adjudicative Duties"). In this context, the fact that a litigant is not represented by counsel may be a relevant consideration.

[46] In this case, Mr. Cabana submits that the judge exhibited hostility towards him and did not appear to approach his case with an open mind. He submits that this was particularly exhibited in the judge's response to his attempt to present evidence to support his request that she recuse herself.

[47] On the Friday before the hearing on recusal, set to commence on the following Monday, the judge advised Mr. Cabana to assemble his facts. Mr. Cabana did not have legal counsel. He was left to determine what facts he should marshal and how he should obtain them. This was not an obvious or easy task.

[48] When Mr. Cabana sought to enter the information regarding the judge's pre-appointment political donations, the judge could have explained to Mr. Cabana why the information was not relevant and would not be considered, or she could have received the information and dealt with it in her recusal decision. Instead, the judge responded to Mr. Cabana using intemperate and hostile language. Key quotations from the transcript of proceedings at the February 25<sup>th</sup> hearing are as follows:

THE COURT:

Q. ... It seems to me that you spent a great deal of energy on the weekend researching my prior life and you now want to seek to rely on political donations that were either made by me personally or that are being made or have been made by my husband's firm as part of the assertions relative to the impartiality claim.

...

THE COURT:

Q. ... Now I want to caution you, Mr. Cabana, that I think you've crossed the line here, okay?

...

THE COURT:

Q. ... While judges are subject to appropriate scrutiny, what I expect from you and from all the counsel that are here from you today and every day is a focus on what's relevant ... . So when documents are forwarded to the Court or when statements are made that become vexatious, scandalous or embarrassing, there are consequences, but if somebody gets out of line in a courtroom, there are other types of consequences ... . Findings of contempt can be made. ...

...

THE COURT:

Q. I want you to treat this as a warning from me ...

...

THE COURT:

Q. ... I'm not going to entertain any reference from you of contributions made by anybody to political parties as far back as 1996 ... I became a Justice of this Court in March of 2007 and I consider these types of things to be irrelevant, pre-appointment matters that suggest – I'm going to say suggest for the moment – a vendetta. Okay, and this is where I think you crossed the line.

...

THE COURT:

Q. A vendetta. So that's where I think you crossed the line, so do not in your arguments or any further submissions that you are going to make on this issue of impartiality, get into that, ...

(Emphasis added.)

[49] Clearly, the judge was offended that Mr. Cabana sought to use her pre-appointment political donations as a basis for reasonable apprehension of bias. That is understandable, but by her words she demonstrated what could reasonably be considered to be an animus against Mr. Cabana. Impartiality and an open ear are critical for the judicial role.

[50] If the judge had briefly adjourned and upon returning to the bench received Mr. Cabana's submissions on donations, if she had indicated that she had spoken in haste and assured Mr. Cabana that his application would be impartially dealt with, the reasonable and right-minded person at the back of the courtroom that day would have had their concerns assuaged. No such "rescue" of the situation was made.

[51] In the circumstances, an informed person, viewing the matter realistically and practically, having thought the matter through, would conclude that the test to establish a reasonable apprehension of bias was satisfied. While Mr. Cabana failed to establish a basis on which to conclude that the judge should have recused herself, the manner in which she dealt with Mr. Cabana disqualified her from hearing the substantive matters arising from his application for an interim injunction or the statement of claim.

[52] In the result, the judge is disqualified from hearing or dealing with any litigation involving Mr. Cabana. That being so, the judge's subsequent decision on the merits of Mr. Cabana's interim injunction application, and any other decisions she may have made, must be set aside.

### **SUMMARY AND DISPOSITION**

[53] In summary, Mr. Cabana cannot be said to have waived his right to proceed with an appeal of the judge's recusal decision. Whether a challenge to a recusal decision should be made immediately, or may be delayed pending disposition of the substantive issues, will depend on the circumstances.

[54] There is no basis on which to conclude that the judge should have recused herself in response to Mr. Cabana's application. However, portions of the hearing involving intemperate and hostile comments by the judge towards Mr. Cabana lead to the conclusion that a reasonable apprehension of bias was established.

[55] Accordingly, the judge's subsequent decision on the merits of Mr. Cabana's interim injunction application and any other decisions she may have made are set aside. Further, the judge is disqualified from hearing or dealing with any future litigation involving Mr. Cabana.

[56] Mr. Cabana shall have his costs in this Court, including the decision regarding leave to appeal (2014 NLCA 1), and in the Court below, including the decisions regarding the recusal application (2013 NLTD(G) 36), and the interim injunction application (2013 NLTD(G) 115) as against the Crown and Nalcor. The Innu Nation of Labrador shall bear its own costs in both Courts.

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J. D. Green C.J.N.L.

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B. G. Welsh J.A.

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M. H. Rowe J.A.