1976 CarswellNat 434, [1978] 1 S.C.R. 369, 9 N.R. 115, 68 D.L.R. (3d) 716

Committee for Justice & Liberty v. Canada (National Energy Board)

IN THE MATTER OF the National Energy Board Act AND IN THE MATTER OF an application by Canadian Arctic Gas Pipeline Limited for a certificate of public convenience and necessity for the construction and operation of a natural gas pipeline AND IN THE MATTER OF applications by Foothills Pipe Lines Ltd., Westcoast Transmission Company Limited and The Alberta Gas Trunk Line (Canada) Limited for certificates of public convenience and necessity for the construction and operation of certain natural gas pipelines AND IN THE MATTER OF an application by Alberta Natural Gas Company Ltd. for a certificate of public convenience and necessity for the construction and operation of certain extensions to its natural gas pipeline AND IN THE MATTER OF a submission by The Alberta Gas Trunk Line Company Limited AND IN THE MATTER OF an application by the National Energy Board pursuant to section 28(4) of the Federal Court Act

The Committee for Justice and Liberty, The Consumers' Association of Canada, Canadian Arctic Resources Committee, Appellants and The National Energy Board, Canadian Arctic Gas Pipeline Limited and The Attorney General of Canada, et al. Respondents

Supreme Court of Canada

Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson and de Grandpré JJ.

Judgment: March 8, 1976
Judgment: March 9, 1976
Judgment: March 10, 1976
Judgment: March 11, 1976
Docket: 1555-C46-1, 1555-F2-3, 1555-W5-49, 1555-A34-1, 1555-A2-10, 1555-A5-2

Proceedings: On appeal from the Federal Court of Appeal

Counsel: Ian Binnie, and R.J. Sharpe, for the appellants.

Hyman Soloway, Q.C., and R.D. McGregor, for the National Energy Board.

G.W. Ainslie, Q.C., for the Attorney General of Canada.

D.M.M. Goldie, Q.C., for Canadian Arctic Gas Pipeline Ltd.

R.J. Gibbs, Q.C., and G.J. Gorman, Q.C., for Foothills Pipe Lines Ltd.

John Hopwood, Q.C., for Alberta Gas Trunk Line Co. Ltd.

W.G. Burke-Robertson, Q.C., for Alberta Gas Trunk Line (Canada) Ltd.

B.A. Crane, for Trans-Canada Pipelines Ltd.

J.R. Smith, Q.C., for Alberta Natural Gas Co. Ltd.

Subject: Natural Resources

Oil and Gas --- Statutory regulation — Judicial review — Grounds

National Energy Board — Natural justice — Bias.

Oil consortium making application to National Energy Board for certificate of public convenience and necessity for construction of Arctic pipeline -- Chairman of Board previously president of member of consortium and participating in decisions related to pipeline 2 years before application -- Chairman to be disqualified because of reasonable apprehension of bias -- Board acting in quasi-judicial manner and required to observe rules of natural justice.

The judgment of Laskin C.J. and Ritchie, Spence, Pigeon and Dickson JJ. was delivered by The Chief Justice:

1 On March 11, 1976, this Court gave judgment in an appeal from a decision of the Federal Court of Appeal which answered in the negative a question referred to it by the National Energy Board pursuant to s. 28(4) of the Federal Court Act, 1970-71-72 (Can.), c. 1. The question so referred was as follows:

> Would the Board err in rejecting the objections and in holding that Mr. [Marshall] Crowe was not disqualified from being a member of the panel on grounds of reasonable apprehension or reasonable likelihood of bias?

This Court allowed the appeal, set aside the decision of the Federal Court of Appeal and declared that the question should be answered in the affirmative. It stated in its formal judgment on March 11, 1976 that reasons of the majority and dissenting judges would be delivered later. The reasons of the majority now follow.

2 The issue referred to the Federal Court of Appeal and which came by leave to this Court arose in connection with the organization of hearings by the National Energy Board to consider competing applications for a Mackenzie Valley pipeline, that is, applications for a certificate of public convenience and necessity under s. 44 of the National Energy Board Act, R.S.C. 1970, c. N-6. One of the applications, filed on March 21, 1974 by Canadian Arctic Gas Pipeline Limited was in respect of a proposed natural gas pipeline and associated works to move natural gas in an area of the Northwest Territories (the Mackenzie River Delta and Beaufort Basin) to markets in southern Canada and also to move natural gas in Alaska to markets in other states of the United States. This application was supplemented by other material filed on January 23, 1975, on March 10, 1975 and on May 8, 1975. The competing application, filed in March, 1975 by Foothills Pipe Lines Ltd., was for a natural gas pipeline to move natural gas only from the area in the Northwest Territories, mentioned above, to southern Canada markets and not from Alaska as well.

3 On April 17, 1975, the National Energy Board assigned Mr. Crowe, Chairman of the Board and two other members (of the eight members in all who then constituted the Board) to be the panel, with Mr. Crowe presiding, to hear the applications, beginning on October 27, 1975. Under s. 45 of its governing statute the Board was empowered to give standing at its s. 44 hearings to "interested persons", and it was then obliged to hear their objections to the granting of a certificate of public convenience and necessity. The three appellants in this case, The Committee for Justice and Liberty Foundation, The Consumers' Association of Canada and the Canadian Arctic Resources Committee were recognized by the Board as "interested persons" as were other organizations and individuals. In all, some 88 parties were represented at the commencement of the hearings, and of these 80 indicated that they had no objection to Mr. Crowe continuing as a member and presiding over the hearings. One of the non-objectors was Canadian Arctic Gas Pipeline Limited, one of the applicants for a certificate. It was its counsel who raised on July 9, 1975 the question of reasonable apprehension of bias on Mr. Crowe's part in favour of his client by reason of Mr. Crowe's association with a Study Group out of whose deliberations and decisions the applicant was born.

4 When the hearings opened on October 27, 1975 as scheduled, Mr. Crowe read a statement detailing his involvement with the Study Group. Objections were then invited. In the result, the question mentioned at the beginning of the reasons was referred to the Federal Court of Appeal on October 29, 1975. I turn now to deal with the facts upon which the issue of reasonable apprehension of bias is raised.

5 Mr. Marshall Crowe became Chairman of the National Energy Board and its Chief Executive Officer on October 15, 1973. Immediately prior to that date he was president of the Canada Development Corporation, assuming that position late in 1971, after first being a provisional director following the enactment of the Canada Development Corporation Act by 1971 (Can.), c. 49. The principal objects of this corporation, then wholly-owned by the Government of Canada, are set out in s. 6(1) of its constituent Act which reads as follows:

> 6. (1) The objects of the company are:
>
> (a) to assist in the creation or development of businesses, resources, properties and industries of Canada;
>
> (b) to expand, widen and develop opportunities for Canadians to participate in the economic development of Canada through the application of their skills and capital;
>
> (c) to invest in the shares or securities of any corporation owning property or carrying on business related to the economic interests of Canada; and
>
> (d) to invest in ventures or enterprises, including the acquisition of property, likely to benefit Canada;
>
> and shall be carried out in anticipation of profit and in the best interests of the shareholders as a whole.

6 As president of the Canada Development Corporation and as its representative, Mr. Crowe became associated with the Gas Arctic-Northwest Project Study Group which, pursuant to an agree ment of June 1, 1972 (hereinafter referred to as the Study Group Agreement) embarked on a consideration of the physical and economic feasibility of a northern natural gas pipeline to bring natural gas to southern markets.

7 The Study Group Agreement brought together two groups of companies which had previously been exploring separately the feasibility of a natural gas pipeline. The participating companies merged their efforts and

resources to that end, and pursuant to the Study Group Agreement they set up two companies, Canadian Arctic Gas Study Limited and Canadian Arctic Gas Pipeline Limited. The first-mentioned company was the vehicle for seeing to the various studies involved in carrying out the pre-construction purposes of the Study Group, and the second company, which was incorporated on November 3, 1972, was to be the operating vehicle which would apply for permission to build the pipeline in implementation of the project. Article 1, s. 2 of the Study Group Agreement set out the purposes of the association of the participating companies as follows:

> 2. The principal purpose of the Study Group shall be: (a) the conduct of research, experimental and feasibility studies, testing and planning to determine whether the construction and operation of a gas pipeline from Northern Alaska and Northwestern Canada to locations on the border between Canada and the lower 48 states of the United States (hereinafter referred to as the Project) are feasible and desirable in light of relevant physical, environmental and economic data, terms and conditions of available financing, applicable legal requirements and governmental considerations; and if so, (b) the preparation and completion of such studies, exhibits and other data as may be required for the filing of applications with government agencies in Canada and the United States for authority to construct and operate the Project; and (c) the filing and prosecution of such applications. These activities are hereinafter referred to as the Pre-construction Activities.
>
> In connection with the foregoing the Study Group shall study and consider all reasonably feasible gas pipeline configurations, routes and facilities and methods of ownership of any thereof, including (i) those serving eastern, central and western market areas, (ii) various routes and facilities appropriate to such purpose, including wholly new facilities and the utilization of the whole or any portion of any presently existing system as it may now be or as it may be expanded or otherwise adapted for such purpose and (iii) ownership of such facilities and the various portions thereof, whether by one or more entities to be established at the instance of the Participants or at the instance of others or by the present owner of any portion thereof which is now in existence or by any combination of the foregoing, it being acknowledged by the Participants that in connection with each such determination as to such ownership the effect thereof upon financing and future decision-making ability, upon the effective operation of the overall pipeline system and upon regulatory matters will be relevant but that at the date hereof the Participants have made no judgment as to the nature, extent or significance of such effect.

Article IV, ss. 1 and 2 dealt with implementation as follows:

> 1. The Participants may, upon authorization by the Management Committee, cause one or more corporations to be organized or utilized for the purpose of implementing the Project, including the filing of applications for requisite governmental authorizations in the United States and Canada and constructing, owning and operating Project pipeline facilities following the issuance of satisfactory authorizations. Application for the incorporation of a Canadian pipeline corporation shall be filed promptly after the date hereof. Pending formulation of a practicable overall permanent financing plan, the initial issued and outstanding shares and other securities of each such corporation shall be beneficially owned by the Participants in equal undivided interests as provided relative to the Service Company in Section 4 of Article II and shall be held by the minimum required number of directors as nominees of the Study Group, until and to the extent that the Management Committee shall otherwise determine.
>
> 2. It is recognized that, inasmuch as financing plans for the Project are still in the development stage and the total capital requirements of the Project depend upon various contingencies, the question of ultimate owner-

> ship of any corporation referred to in Section 1 of this Article IV cannot be decided at this time. However, it is agreed that in the determination of such ownership the following principles will apply. It is agreed that in recognition of the substantial expenditure of funds, employee time and effort, and initiative by the Participants, and their knowledge of and interest in the Project, it is desirable and appropriate that the Participants have some reasonable opportunity to acquire ownership interests in each such corporation. In addition, shares and other securities shall be offered to investors who are not Participants....

8 The Study Group Agreement provided for the establishment of a Management Committee, consisting of one representative from each of the participating companies, and it was charged with the steering or direction of the activities of the Study Group and of the companies incorporated pursuant to the Study Group Agreement. There was also an executive committee of the Management Committee, consisting of three representatives of each of the three participant groups into which the participating companies were classified; and although it discharged certain functions by delegation from the Management Committee, the latter was the main directing force of the Study Group. The three Participant groups were as follows:

> Participant Group A: United States Companies other than producers
>
> Participant Group B: Canadian Companies other than producers
>
> Participant Group C: Canadian and United States producers

Section 5 of art. III charged the Management Committee to seek additional participants "who have an interest in the Project and whose participation may contribute to the objectives of the Project, as stated herein, and who have the ability to and agree to carry out the obligations under this Agreement".

9 Participants could withdraw upon notice being given and, indeed, the participating companies varied between fifteen and twenty-seven. So long as they remained participants, the companies were subject to the terms of the Study Group Agreement under which they were to be responsible for an equal share of obligations, including the expenses of carrying out the activities of the Study Group and of the companies incorporated under the Study Group Agreement. The Agreement contained provisions for its termination which had in view the likelihood of approval of a pipeline, but overriding power was reserved to the Management Committee to fix a termination date.

10 The Canada Development Corporation became a member of the Study Group on November 30, 1972. Mr. Crowe was its designated representative and, as such, became, on December 7, 1972, a member of the Management Committee. He had attended a meeting of the executive committee as an observer on October 25, 1972 when the participation of the Canada Development Corporation was being worked out, but he did not later become a member of that Committee, although he attended two other meetings thereof. In addition to being a member of the powerful Management Committee, Mr. Crowe became also a member of its finance, tax and accounting committee, and was elected vice-chairman thereof on January 25, 1973. During the period of his membership of the Management Committee, from December 7, 1972 until October 15, 1973 he participated in the seven meetings that it held in that span of time and joined in a unanimous decision of that Committee on June 27, 1973 respecting the ownership and routing of a Mackenzie Valley pipeline.

11 The decision of June 27, 1973 came about as a result of the establishment by the Management Committee of an Ad Hoc Committee on May 30, 1973 to look into ownership and routing and to report to the Manage-

ment Committee at its next meeting, fixed for June 18, 1973. On June 11, 1973, the Ad Hoc Committee approved a report (with one dissent) which was presented to the Management Committee at its meeting of June 18, 1973. The report contained the following paragraphs:

> On the understanding that this Project will be filed at the earliest possible date the Ad Hoc Committee supports the concept of single ownership for the Project, subject to the following provisions:
>
> 1. The routing of the Project will follow existing corridors and gas pipeline routes of AGTL, Alberta Natural and TCPL.
>
> 2. A policy of incremental expansion and common use of existing pipeline facilities will be followed wherever it is economically sound to do so. This means that until complete through lines are constructed, whenever the economics of the situation warrant, and engineering conditions permit, incremental looping (under single ownership) will be used.
>
> 3. As a policy CAGSL will not apply for expansion of its system whenever adequate long term unused capacity is economically available in the Alberta Gas Trunk, Alberta Natural, and/or TC systems.
>
> 4. As a policy the tariffs for transmission across Alberta will be calculated on a "one zone" basis beginning and ending at the Alberta borders.

The report was discussed at the meeting of June 18, 1973 as was a counter-proposal presented by the dissenting member of the Ad Hoc Committee on behalf of United States pipeline members of the Study Group. It was decided that an engineering study of the two southerly legs of the proposed route would be made and a report would be made to the Ad Hoc Committee "of the optimum manner of moving the contemplated gas volume south of Caroline". The study and report were considered by the Management Committee at a meeting on June 27, 1973. The chairman of the Ad Hoc Committee (according to the minutes of the June 27 meeting) "confirmed that the committee intended the proposal to be not only a basis for the filing of regulatory applications but also to embody the fundamental concept for completion of the project — although the Study Group should retain sufficient flexibility of approach in order to be able, through appropriate future resolutions of the Management Committee, to react to changes in facts and circumstances". The Ad Hoc Committee's revised report was then unanimously approved. Its provisions were as follows:

> The Ad Hoc Committee on Ownership and Routing respectfully recommends to the Management Committee that it request the CAGSL management to proceed forthwith with the preparation and submission of all necessary applications covering the Arctic Gas Pipeline on the following bases:
>
> **OWNERSHIP**
>
> 1. All new Arctic Gas Pipeline facilities in Canada will be owned by a single entity.
>
> **SIZE AND ROUTING**
>
> 1. From Prudhoe Bay and the Mackenzie Delta to the 60th Parallel the line will be 48" and will follow the routes previously agreed.
>
> 2. From the 60th Parallel to Caroline, Alberta the line will be 48" and will follow the existing route of

AGTL.

3. From Caroline to Kingsgate the line will be 42" and will follow the routes of AGTL and ANG.

4. From Caroline to Empress the line will be 42" and will follow route of AGTL.

5. From Empress to the U.S. border the line will be 42" and will follow a direct route.

POLICY GUIDELINES

1. As noted above, the routing of the project through Alberta will follow the existing gas pipeline routes of AGTL and ANG whenever technically feasible.

2. Within the basic concept of single ownership of a complete, integral pipeline system to be constructed within a reasonable period of time advantage will be taken over the short term of surplus capacity in existing systems provided any significant engineering, operating, financing, and legal problems inherent in the utilization of such capacity can be overcome.

3. After completion of the initial Arctic Gas system full consideration will be given to the use of any long-term unused capacity if economically available in the AGTL or ANG systems as a preferred alternate to direct expansion provided undue engineering or operating problems are not thereby introduced.

4. Tariffs for transmission across Alberta will be calculated on a "one zone" basis beginning and ending at the Alberta borders.

5. Gas destined for Canadian markets East of Alberta will be delivered to TransCanada at Empress, Alberta.

12 In his statement at the opening of the Mackenzie Valley Pipeline hearing on October 27, 1973 Mr. Crowe referred to his involvement in the Study Group and in the decisions of the Management Committee thereof in the following terms:

Pursuant to the terms of the Study Group Agreement, each of the Participant companies owned equal shares in the Study Group assets which consisted mainly of studies and reports on the feasibility of the Arctic Gas Project. Subject to the provisions of the Study Group Agreement a participant could on notice withdraw from the Study Group.

During the period I represented the CDC in the Study Group, I attended seven monthly meetings of the Management Committee, and in the months when the Management Committee did not meet, the three meetings of the Executive Committee to which I previously referred.

At the September 26th, 1973 meeting of the Management Committee, I moved the resolution appointing the Project's Banking Advisors. Also I was on a Steering Committee which recommended the Project Financial Advisors and Accounting Advisors and in the meetings of the Executive Committee which I attended, the appointment of these consultants was approved.

Between December 7th, 1972, and June 27th, 1973, the Study Group considered a number of possible routing alternatives for that portion of the pipeline south of the 60°N parallel. One issue forming part of this decision was whether the Arctic Gas Project would construct new facilities in Alberta as opposed to using ex-

> isting facilities owned by Trunk Line and expanding those facilities as needed to carry volumes of gas from the Mackenzie-Beaufort Area and Prudhoe Bay. This question was the subject matter of technical analysis by Arctic Gas Financial and Engineering Advisors and was reviewed and discussed in six meetings of the Management Committee.
>
> The final decision was that the facilities in Alberta would be owned by Arctic Gas and that the route would parallel the existing Trunk Line system on a separate right-of-way.
>
> In addition to the foregoing the Management Committee dealt with routine matters such as the Chairman's Report, Management Reports, and other Consultant Appointments.

13 Although Mr. Crowe resigned from the presidency of the Canada Development Corporation as of October 15, 1973 when he became chairman and chief executive officer of the National Energy Board, the Canada Development Corporation continued as a full participant in the Study Group until October 31, 1975, becoming an associate member as of November 1, 1975 pursuant to a resolution of the Management Committee. As such, it had the following rights (as stated by counsel for the Canadian Arctic Gas Pipeline Limited to the Federal Court of Appeal on December 8, 1975):

> 1. For so long as an Equity Commitment Letter dated April 22, 1975 remains in effect CDC will be entitled to receive notice of, and attend, through a non-voting representative all meetings of all Committees of the Study Group except the Executive Committee of the Management Committee.
>
> 2. To receive all materials that a full participant would be from time to time entitled to receive.
>
> In turn the CDC agrees to be bound by the confidentiality rules binding all participants.
>
> This relationship may after 31 December, 1975, be terminated by either party.
>
> The equity commitment letter of April 22, 1975 indicates a provisional interest in subscribing for $100 million of [equity] in the capital of CAGPL subject to the terms and conditions set out in that letter.

In brief, the Canada Development Corporation remained a full participant long after the applications were made for certificates of public convenience and necessity and after the hearings thereon commenced, and, in effect, until the National Energy Board referred to the Federal Court of Appeal the question concerning reasonable apprehension of bias in Mr. Crowe. During the period of Mr. Crowe's association with the Study Group as the representative of the Canada Development Corporation the latter contributed a total of 1.2 million dollars to the activities of the Study Group as its share of expenses.

14 Section 44 of the National Energy Board Act, the central provision respecting certificates of public convenience and necessity, reads as follows:

> 44. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline or an international power line if the Board is satisfied that the line is and will be required by the present and future public convenience and necessity, and, in considering an application for a certificate, the Board shall take into account all such matters as to it appear to be relevant, and without limiting the generality of the foregoing, the Board may have regard to the following:

(a) the availability of oil or gas to the pipeline, or power to the international power line, as the case may be;

(b) the existence of markets, actual or potential;

(c) the economic feasibility of the pipeline or international power line;

(d) the financial responsibility and financial structure of the applicant, the methods of financing the line and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the line; and

(e) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.

15 It was contended by counsel supporting the judgment of the Federal Court of Appeal that Mr. Crowe's involvement in the Study Group and in the work and decisions of the Management Committee did not touch all the considerations expressly delineated in items (a) to (e) of s. 44. Indeed, the position urged was that on a question of reasonable apprehension of bias the character and degree of involvement must be considered and, if it was minimal or did not touch the major elements of concern under s. 44, then a different conclusion would have to be reached than would be the case if, so to speak, all the bases were touched. It was also contended, and of this there can be no doubt, that the National Energy Board has a variety of functions which interlock; for example, it has broad advisory functions under s. 22 of its Act, as well as the more specifically directed function under s. 44. It is said, and properly so, that the Board cannot compartmentalize its knowledge, acquired through studies which it commissions or through experience of its members or otherwise, and relate that knowledge only to the particular function out of which it has emerged.

16 It was pointed out in this connection that the Board conducted a public inquiry, with Mr. Crowe presiding over the three-member panel, into the supply and requirements for natural gas, pursuant to powers which it has under s. 14(2) of the National Energy Board Act to inquire, of its own motion, into matters within its jurisdiction. The inquiry began in November, 1974 and a report was published in April, 1975, following which the panel was constituted for the Mackenzie Valley Pipeline hearing, with two members thereof (Mr. Crowe and Mr. Farmer) having been on the panel for the public inquiry. Nothing, in my opinion, can be drawn from the report of this inquiry that would blunt the effect of Mr. Crowe's participation in decisions leading to the Canadian Arctic Gas Pipeline Limited application for a certificate filed on March 21, 1974. The fact that the report indicated there were problems in estimating supply, that more information was needed, and that other matters as well that would be relevant on a s. 44 application were in an uncertain state, does not go any farther than it would if these problems and matters had been raised initially before the Board and it considered them for the first time at the pipeline hearing. That the holding of the inquiry may have prepared Mr. Crowe for the pipeline hearings does not provide support for his participation in those hearings.

17 What must be kept in mind here is that we are concerned with a s. 44 application in respect of which, in my opinion, the Board's function is quasi-judicial or, at least, is a function which it must discharge in accordance with rules of natural justice, not necessarily the full range of such rules that would apply to a Court (although I note that the Board is a court of record under s. 10 of its Act) but certainly to a degree that would reflect integrity of its proceedings and impartiality in the conduct of those proceedings. This is not, however, a prescription that would govern an inquiry under ss. 14(2) and 22.

18 I am of the opinion that the only issue here is whether the principle of reasonable apprehension or reasonable likelihood of bias applies to the Board in respect of hearings under s. 44. If it does apply — and this was accepted by all the respondents — then, on the facts herein, I can see no answer to the position of the appellants.

19 Before setting out the basis of this conclusion I wish to reiterate what was said in the Federal Court of Appeal and freely conceded by the appellants, namely, that no question of personal or financial or proprietary interest, such as to give rise to an allegation of actual bias, is raised against Mr. Crowe. The Federal Court of Appeal founded its conclusion against disqualification on the following statement of principle:

> It is true that all of the circumstances of the case, including the decisions in which Mr. Crowe participated as a member of the study group, might give rise in a very sensitive or scrupulous conscience to the uneasy suspicion that he might be unconsciously biased, and therefore should not serve. But that is not, we think, the test to apply in this case. It is, rather, 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 Mr. Crowe, whether consciously or unconsciously, would not decide fairly.

This was followed by an encompassing factual conclusion which was as follows:

> On the totality of the facts, which have been described only in skeletal form, we are all of the opinion that they should not cause reasonable and right minded persons to have a reasonable apprehension of bias on the part of Mr. Crowe, either on the question of whether present or future public convenience and necessity require a pipeline or the question of which, if any, of the several applicants should be granted a certificate.

20 The Federal Court of Appeal supported this factual conclusion by emphasizing that Mr. Crowe participated in the Study Group as merely a representative, that he had nothing to gain or lose by his participation or by any decision he might reach in the course of his duties as chairman of the National Energy Board in connection with the applications that were before it. I do not think that Mr. Crowe's representative capacity is a material consideration on the issue in question here, any more than representative capacity would be a material consideration if the president or chairman of one of the other participants in the Study Group had been appointed chairman of the National Energy Board and had then proceeded to sit on an application which he had a hand in fashioning, albeit he was divorced from the Study Group at the time the application was filed. Mr. Crowe was not a mere cipher, carrying messages from the board of directors of the Canada Development Corporation and having no initiative or flexibility in the manner and degree of his participation in the work of the Study Group. Nowhere in the Study Group Agreement nor in the minutes of proceedings of the Management Committee is there any indication that the representatives came to the meetings with fixed instructions from which they could not depart without a reference back. The nature of the exercise carried on under the Study Group Agreement required the representatives to apply their own judgment and their own talents to the joint project, with of course concern for the interests of the companies that they represented and subject, of course, to such directions as the companies might give. Since the representatives were all high officials of the companies, they had latitude in their participation that would not have been open to a junior employee.

21 Nor do I think that anything turns in this case on the fact that Mr. Crowe (according to the Federal Court of Appeal) had nothing to gain or lose either through his participation in the Study Group or in making decisions as chairman of the National Energy Board. The Federal Court of Appeal appears here to have moved over into the area of actual bias and that is not an issue.

22 The additional factor which underlay the Federal Court of Appeal's factual conclusion is, in its own words, as follows:

> It must, we think, be borne in mind that two years have passed since that participation came to an end and that the issues to be resolved by the Board, with which there is no reason to think he is not familiar, are widely different from those to which the study group devoted its attention. Theirs were problems of assessing the economic feasibility of a pipeline project as a method of moving gas from the Arctic over long distances to southern markets and planning the project in the interests of establishing a viable and profitable operation. In the issues to be considered by the Board the interest involved is that of the Canadian public, whether it will be well served by the construction and operation of such a system and if so which, if any, among competing applicants should be accorded the opportunity. On the material before us there appears to be no valid reason for apprehension that Mr. Crowe, who is not fettered by any interest of his own in any of the applicant companies or any proprietary interest in the result of any decision in which he participated and is no longer in the service of the study group or the Canada Development Corporation, cannot approach these new issues with the equanimity and impartiality to be expected of one in his position.

23 The passage of time referred to by the Federal Court of Appeal — two years since Mr. Crowe resigned as president of the Canada Development Corporation — is related to the date of the opening of the actual hearings on the competing applications. The application of Canadian Arctic Gas Pipeline Limited was filed five months after that resignation and the consequent departure of Mr. Crowe from the Study Group. Be that as it may, we are not dealing with a case where Mr. Crowe's association with the Study Group is by virtue of that fact alone urged as a disqualification, for example, in relation to some application that the Study Group has initiated or promoted after Mr. Crowe's termination of his relationship with the Group. While I would not see any vice in Mr. Crowe sitting on an application coming from or through the Study Group in relation to a matter in which he was not involved, even though it was decided upon shortly after his dissociation from the Study Group, that is not this case.

24 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. There is, at the lowest, a parallel here between being involved in taking instructions or drawing up pleadings for litigation and being involved in helping to plan the terms of a contemplated s. 44 application which is in fact made.

25 I cannot agree with the conclusion (if it be that) of the Federal Court of Appeal or with its observation that "the issues to be resolved by the Board, with which there is no reason to think he is not familiar, are widely different from those to which the Study Group devoted its attention", as if that provided an answer, whether wholly or partially, to an allegation of reasonable apprehension of bias. A considerable point was made of this by counsel for the Attorney General of Canada and counsel for the Canadian Gas Arctic Pipeline Limited, and I wish to deal with it in some detail.

26 Of course, the functions of the Board are different from the functions of an applicant or group of applicants for a board certificate, just as the functions of a court are different from those of a litigant seeking a favourable decision. It does not matter whether or not there is a lis inter partes, in a traditional court sense, in a Board

hearing for the grant of a certificate, so long as the Board is required to apply statutory standards to any application, and, indeed where there are, as here, competing applications the resemblance to a lis is increased. An applicant seeking a certificate must inevitably direct itself to the statutory prescriptions by which the Board is governed, taking into consideration of course, the scope of discretion which those standards permit. To say, therefore, that the issues before the Board are different than those to which the Study Group directed itself is not entirely correct, save as it reflects the different roles of the Board and of the Study Group. Moreover, it does not meet the central issue in this case, namely, whether the presiding member of a panel hearing an application under s. 44 can be said to be free from any reasonable apprehension of bias on his part when he had a hand in developing and approving important underpinnings of the very application which eventually was brought before the panel.

27 There was some inconsistency in the approaches taken by counsel for the Attorney General of Canada and counsel for the Canadian Arctic Gas Pipeline Limited, who made the main submissions in support of the position of all the respondents. The former asserted at one point in his submissions that the decision to seek a pipeline had already been made by the Study Group before Canada Development Corporation became a participant. It was his further contention that Mr. Crowe participated only in the decisions as to routing and as to single ownership of the proposed pipeline and as to the appointment of auditors and bankers. In his view, these decisions fell short of an involvement in the crucial considerations of economic and finan cial feasibility which, presumably, were either determined before Mr. Crowe became a representative member of the Study Group or were redetermined after he ceased to be such a member. This is an untenable position. Economic and financial feasibility were involved in the very decision to pursue the pipeline project by an application to the Board, and the fact that the proposed application was later refined or revised did not make it one to which Mr. Crowe was a stranger before it came to the Board.

28 Counsel for Canadian Arctic Gas Pipeline Limited appeared to say that there was no concluded decision to apply for a certificate while Mr. Crowe was a representative member of the Study Group. He did agree that economic and financial feasibility were involved in decisions made by the Study Group in which Mr. Crowe participated, but he contended that, in so far as this affected a decision to apply for a certificate, it was not conclusive on the question whether public convenience and necessity existed or would exist two years hence. This submission either begs the question of reasonable apprehension of bias or makes it depend on whether the Study Group can be said to have made the very decision which the Board is called upon to make. There can be no such dependence. Any application under s. 44 would, of course, be pitched to securing a favourable decision, but the Board's powers are wide enough to entitle it to insist on changes in a proposal as a condition of the grant of a certificate. The vice of reasonable apprehension of bias lies not in finding correspondence between the decisions in which Mr. Crowe participated and all the statutory prescriptions under s. 44, especially when that provision gives the Board broad discretion "to take into account all such matters as to it appear to be relevant", but rather in the fact that he participated in working out some at least of the terms on which the application was later made and supported the decision to make it. The Federal Court of Appeal had no doubt that Mr. Crowe (to use its words) "took part in [the] meetings and in the decisions taken which ... dealt with fairly advanced plans for the implementation of the pipeline project".

29 I come then to the question whether the Federal Court of Appeal's negative answer to the question propounded to it is supportable. I have already indicated that that Court introduced considerations into its test of reasonable apprehension of bias which should not be part of its measure. When the concern is, as here, that there be no prejudgment of issues (and certainly no predetermination) relating not only to whether a particular application for a pipeline will succeed but also to whether any pipeline will be approved, the participation of Mr.

Crowe in the discussions and decisions leading to the application made by Canadian Arctic Gas Pipeline Limited for a certificate of public convenience and necessity, in my opinion, cannot but give rise to a reasonable apprehension, which reasonably well-informed persons could properly have, of a biased appraisal and judgment of the issues to be determined on a s. 44 application.

30 This Court in fixing on the test of reasonable apprehension of bias, as in Ghirardosi v. Minister of Highways for British Columbia[FN1], and again in Blanchette v. C.I.S. Ltd.[FN2], (where Pigeon J. said at p. 842-43, that "a reasonable apprehension that the judge might not act in an entirely impartial manner is ground for disqualification") was merely restating what Rand J. said in Szilard v. Szasz[FN3], at pp. 6-7 in speaking of the "probability or reasoned suspicion of biased appraisal and judgment, unintended though it be". This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and I think that emphasis is lent to this concern in the present case by the fact that the National Energy Board is enjoined to have regard for the public interest.

31 For these reasons, the appeal is allowed and the question submitted to the Federal Court of Appeal is answered in the affirmative. As stated in the formal judgment of this Court, delivered on March 11, 1976, there will be no order as to costs.

The judgment of Martland, Judson and de Grandpré JJ. was delivered by de Grandpré J. (dissenting)**:**

32 As mentioned in the formal judgment of March 11, 1976, I hold the dissenting view that the Federal Court of Appeal was right in coming unanimously to the conclusion that a negative answer should be given to the question referred to it by the National Energy Board:

> Would the Board err in rejecting the objections and in holding that Mr. Crowe was not disqualified from being a member of the panel on the grounds of reasonable apprehension or reasonable likelihood of bias?

33 This question submitted pursuant to subs. 28(4) of the Federal Court Act was the result of a concern expressed during the pre-hearing conference on July 9, 1975, by counsel for one of the applicants, namely Canadian Arctic Gas Pipeline Limited (hereinafter referred to as "Arctic Gas"), that if Mr. M.A. Crowe were a member of the panel chosen to deal with the competing applications, a reasonable apprehension of bias in favour of Arctic Gas might be feared. As expressed in the Order of the National Energy Board, dated October 29, 1975, referring the question to the Federal Court of Appeal, the basis of this concern was the fact that the Chairman of the National Energy Board was, prior to that appointment, Chairman of the Canada Development Corporation. That corporation at that time and at all relevant times was wholly owned by the Government of Canada and was one of some 25 or 26 members of the Arctic Gas — Northwest Project Study Group, a consortium of companies which had brought about the incorporation of Canadian Arctic Gas Pipeline Limited. In his capacity as Chairman of Canada Development Corporation, until his resignation in 1973, Mr. Crowe had participated in certain determinations and decisions of the Study Group concerning relevant issues now the subject matter of the application, including the routing of the proposed Canadian Arctic Gas pipeline.

34 As a result of this expression of concern, counsel for Arctic Gas, at the direction of the Board, forwarded in mid-September to all interested persons a number of documents, the relevant ones being correspondence between Canadian Arctic Study Group and Canada Development Corporation, the relevant minutes of the Management and Executive Committees of the Canadian Arctic Gas Study Group, (all irrelevant entries, namely reports and discussions where no action was taken, having been blanked out), minutes of the Finance, Tax and Ac-

counting Committee of the Study Group, the Study Group agreement itself.

35 In addition, on the 17th of October, a copy of the written statement to be read at the opening of the hearing by Mr. Crowe was addressed to all interested persons.

36 The hearing of the applications commenced on the 27th day of October 1975. Mr. Crowe at the outset read his statement. Of the 88 interested persons recognized by the Board either as applicants or under s. 45 of the Statute, only 5 objected and 3 of these are appellants before this Court. All of the competing applicants were satisfied that no reasonable apprehension of bias could be entertained.

37 On this bare outline of the facts, the following preliminary points may be made:

(1) there is no suggestion that there exists any actual or pecuniary bias on the part of Mr. Crowe;

(2) the reasonable apprehension of bias, if it exists, could refer to

(a)

the need for a pipeline, and

(b)

if point (a) is decided in the affirmative, the identity of the party who should receive the certificate;

inasmuch as all of the competing applicants are satisfied with the presence of Mr. Crowe on the panel, this last point is not before us; of course, it is common ground that all applications might be turned down;

(3) the question must be studied in the sole light of the documents submitted to the Court which, in addition to those already mentioned, are:

(a)

the proceedings before the Board on October 27, 1975;

(b)

the guidelines for northern pipelines issued by the Canadian Government on August 13, 1970;

(c)

a report of the National Energy Board, dated April 1975, entitled 'Canadian Natural Gas — Supply & Requirements' following public hearings held pursuant to Part 1 of the National Energy Board Act, from November 1974 to March 1975.

38 It is on this material that the Federal Court of Appeal unanimously came to its conclusion:

On the totality of the facts, which have been described only in skeletal form, we are all of the opinion that

> they should not cause reasonable and right minded persons to have a reasonable apprehension of bias on the part of Mr. Crowe, either on the question of whether present or future public convenience and necessity require a pipeline or the question of which, if any, of the several applicants should be granted a certificate.

39 I have already stated my concurrence with this reading of the facts.

I

40 The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, 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 Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

41 I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

42 This is the proper approach which, of course, must be adjusted to the facts of the case. The question of bias in a member of a court of justice cannot be examined in the same light as that in a member of an administrative tribunal entrusted by statute with an administrative discretion exercised in the light of its experience and of that of its technical advisers.

43 The basic principle is of course the same, namely that natural justice be rendered. But its application must take into consideration the special circumstances of the tribunal. As stated by Reid, Administrative Law and Practice, 1971, at p. 220:

> ...'tribunals' is a basket word embracing many kinds and sorts. It is quickly obvious that a standard appropriate to one may be inappropriate to another. Hence, facts which may constitute bias in one, may not amount to bias in another.

To the same effect, the words of Tucker L.J., in Russell v. Duke of Norfolk and others[FN4], at p. 118:

> There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

44 In the case at bar, the test must take into consideration the broad functions entrusted by law to the Board. These are numerous and it is sufficient for our purpose to refer to the two main classes:

> (1) the advisory functions under Part II of the Act; s. 22 imposes upon the Board the obligation to make continuous studies and reports, on its own and at the request of the Minister; to that end, "the Board shall, wherever appropriate, utilize agencies of the Government of Canada to obtain technical, economic and statistical information and advice";

> (2) the issuance of certificates of public convenience and necessity under Part III; s. 44 enacts that in the discharge of this duty, "the Board shall take into account all such matters as to it appear to be relevant and without limiting the generality of the foregoing, the Board may have regard ..." to five factors listed in the section.

While, under s. 22, there is no obligation to take into account the submissions of third parties, s. 45 states that "the Board shall consider the objections of any interested person". Finally, it is to be noted that both these duties culminate in conclusions which are submitted in the first case to the Minister who may decide to act or not to act and, in the second case, to the Governor in Council who may decide to approve or not to approve.

45 It follows that the National Energy Board is a tribunal that must be staffed with persons of experience and expertise. As was said by Hyde J. of the Quebec Court of Appeal in R. v. Picard et al.[FN5], at p. 661:

> Professional persons are called upon to serve in judicial, quasi-judicial and administrative posts in many fields and if Governments were to exclude candidates on such ground, they would find themselves deprived of the services of most professionals with any experience in the matters in respect of which their services are sought. Accordingly, I agree with the Court below that this ground was properly rejected.

The same thought is to be found in the decision of the Court of Appeal of Nova Scotia in Tomko v. N.S. Labour Relations Board et al.[FN6], where one MacNeil, a member of the Board, had actively participated in meetings attended by representatives of the employer and representatives of the unions respecting the subject matter on the very point to be adjudicated before the Board. In particular, in a meeting five days before the Order was issued, he had said that the facts gave no excuse to the men to be on strike. Studying the allegation of bias, MacKeigan, C.J., said (at p. 298):

> One of the principles of 'natural justice' that must be observed by the Panel and its members in exercising power under s. 49 is to act fairly, in good faith, and without bias. The rules which disqualify judges for personal interest in the result or likelihood of bias thus apply. See: de Smith on Judicial Review of Administrative, Action 3rd ed., c. 5, and Reid on Administrative Law and Practice, c. 7.
>
> This does not mean, however, that the standards of what constitutes disqualifying interest or bias are the same for a tribunal like the Panel as for the courts. The nature and purpose of the Trade Union Act dictate that members 'bring an experience and knowledge acquired extra-judicially to the solution of their problems' (Lord Simonds in John East, supra, A.C. at p. 151, D.L.R. at p. 682).
>
> The many unions and many subcontractors and suppliers involved in any single construction project make it inevitable that union representatives on the Panel and most employer representatives would each have at least an indirect interest, much knowledge and many preconceptions and prejudgments respecting any matter coming before the Panel. Thus mere prior knowledge of the particular case or preconceptions or even prejudgments cannot be held per se to disqualify a Panel member.

And he concluded (at p. 299):

> I cannot find on the evidence that MacNeil had the kind of interest or displayed the kind of bias that should disqualify him as a member of the Panel. He obviously knew all about the walkout and its causes, thought it was an illegal work stoppage, knew that the plaintiff was involved in it and had 'condoned' it, and was fully aware of the plaintiff's commanding position in the Labourers' Union. I cannot see, however, that such

> knowledge and opinions show likelihood of bias, likelihood that MacNeil would be unable to exercise his duties impartially as a member of the Board.

This judgment was confirmed by our Court on December 19, 1975 where Laskin, C.J.C., speaking for the majority, said:

> There was also an allegation of bias against a member of the Panel but this Court did not require the respondents to meet it, holding the allegation to be without substance.

46 Members of administrative boards acquire their expertise by virtue of previous exposure to the industry which they are appointed to regulate. The system would not work if it were not premised on an assertion of faith in those appointed to adjudicate:

> It is to be assumed that a body of men entrusted by the Legislature with large powers affecting the rights of others will act with good faith.
>
> Re Schabas et al and Caput of the University of Toronto et al (1975), 52 D.L.R. (3d) 495 at page 506.
>
> Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.
>
> United States v. Morgan (1940), 313 U.S. 409 at page 421, per Mr. Justice Frankfurter.

47 That good faith is not shaken by the fact a member of the Board may have held tentative views. Not only is this the situation in Canada as appears from the judgment in Tomko, above but it is the situation in England — 1 Halsbury (4th edition) at pp. 83-84:

> In a wide range of other situations the impression may be received that an adjudicator is likely to be biased. A person ought not to participate or appear to participate in an appeal against his own decision, or act or appear to act as both prosecutor and judge; the general rule is that in such circumstances the decision will be set aside. Normally it will also be inappropriate for a member of a tribunal to act as witness. Likelihood of bias may also arise because an adjudicator has already indicated partisanship by expressing opinions antagonistic or favourable to the parties before him, or has made known his views about the merits of the very issue or issues of a similar nature in such a way as to suggest prejudgment because he is so actively associated with the institution or conduct of proceedings before him, either in his personal capacity or by virtue of his membership of an interested organisation, as to make himself in substance, both judge and party, or because of his personal relationship with a party or for other reasons. It is not enough to show that the person adjudicating holds strong views on the general subject matter in respect of which he is adjudicating, or that he is a member of a trade union to which one of the parties belongs where the matter is not one in which a trade dispute is involved.
>
> The fact that an administrator may incline towards deciding an issue before him one way rather than another, in the light of implementing a policy for which he is responsible, will not affect the validity of his decision, provided that he acts fairly and with a mind not closed to argument; and similar standards may be applied to other persons whose prior connection with the parties or the issues are liable to preclude them from

> acting with total detachment.

and in Australia, in Ex parte The Angliss Group[FN7], at p. 151 (A.L.J.R.):

> It is therefore important to bear in mind that the Commission does not sit to enforce existing private rights. Amongst other things, it is its function to develop and apply broad lines of action in matters of public concern resulting in the creation of new rights and in the modification of existing rights. It is not necessarily out of place, and indeed it might be expected that a member of the Commission from time to time in the course of discharging his duties should express more or less tentative views as to the desirability of change in some principle of wage fixation. The very nature of the office of a member of the Commission requires that he should apply his mind constantly to general questions of arbitral policy and consider the lines along which the processes of conciliation and arbitration for the prevention and settlement of industrial disputes ought to move.

and in the United States — New Hampshire Milk Dealers Association v. New Hampshire Milk Control Board [FN8], at p. 198:

> It is a well-established legal principle that a distinction must be made between a preconceived point of view about certain principles of law or a predisposed view about the public or economic policies which should be controlling and a prejudgement concerning issues of fact in a particular case. 2 Davis, Administrative Law Treatise, s. 12.01, p. 131. There is no doubt that the latter would constitute a cause for disqualification. However 'Bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification.' (...) If this were not the law, Justices Holmes and Brandeis would have been disqualified as would be others from sitting on cases involving issue of law or policy on which they had previously manifested strong diverging views from the holdings of a majority of the members of their respective courts.

It is obvious that the considerations which underlie the operations of the Board are policy oriented. Section 91 imposes upon the Board the obligation through the Minister to report to Parliament on a yearly basis and the Act establishes numerous points of contact between the Minister and the Board. This policy orientation is the joint effort of the Minister and of the Board. The guidelines announced by the Government on August 13, 1970 for northern pipelines are relevant and I quote them at length:

> 1. The Ministers of Energy, Mines and Resources, and Indian Affairs and Northern Development will function as a point of contact between Government and industry, acting as a Steering Committee from which industry and prospective applicants will receive guidance and direction to those federal departments and agencies concerned with the particular aspects of northern pipelines.
>
> 2. Initially, only one trunk oil pipeline and one trunk gas pipeline will be permitted to be constructed in the north within a 'corridor' to be located and reserved following consultation with industry and other interested groups.
>
> 3. Each of these lines will provide either 'common' carrier service at published tariffs or a 'contract' carrier service at a negotiated price for all oil and gas which may be tendered thereto.
>
> 4. Pipelines in the north, like pipelines elsewhere which are within the jurisdiction of the Parliament of Canada, will be regulated in accordance with the National Energy Board Act, amended as may be appropri-

ate.

5. Means by which Canadians will have a substantial opportunity for participating in the financing, engineering, construction, ownership and management of northern pipelines will form an important element in Canadian government consideration of proposals for such pipelines.

6. The National Energy Board will ensure that any applicant for a Certificate of Public Convenience and Necessity must document the research conducted and submit a comprehensive report assessing the expected effects of the project upon the environment. Any certificate issued will be strictly conditioned in respect of preservation of the ecology and environment, prevention of pollution, prevention of thermal and other erosion, freedom of navigation, and the protection of the rights of northern residents, according to standards issued by the Governor General in Council on the advice of the Department of Indian Affairs and Northern Development.

7. Any applicant must undertake to provide specific programs leading to employment of residents of the north both during the construction phase and for the operation of the pipeline. For this purpose, the pipeline company will provide for the necessary training of local residents in coordination with various government programs, including on-the-job training projects. The provision of adequate housing and counselling services will also be a requirement.

48 Thus the basic principle in matters of bias must be applied in the light of the circumstances of the case at bar. The Board is not a Court nor is it a quasi-judicial body. In hearing the objections of interested parties and in performing its statutory functions, the Board has the duty to establish a balance between the administration of policies they are duty bound to apply and the protection of the various interests spelled out in s. 44 of the Act. The decision to be made by the Board transcends the interest of the parties and involves the public interest at large. In reaching its decision, the Board draws upon its experience, upon the experience of its own experts, upon the experience of all agencies of the Government of Canada and, obviously, is not and cannot be limited to deciding the matter on the sole basis of the representations made before it. It is not possible to apply to such a body the rules of bias governing the conduct of a court of law.

II

49 Such being the legal principles involved, what would a reasonable and right minded person have discovered if he had taken the time and trouble of informing himself of the true situation?

50 He would first have discovered in the words of the representative of the Committee for Justice and Liberty Foundation before the Board on the 27th October 1975 that the industry "had foreseen the need to transport northern natural gas south several years ago" and that "Mr. Crowe was actively involved in a sequence of decisions based on the presupposition that a pipeline was required". In other words, the basic decision to build a pipeline or at least to make an application to the National Energy Board was taken in principle long before Mr. Crowe became involved in the Study Group and for that matter in the CDC. As already noted, on August 13, 1970, the Canadian Government published guidelines for northern pipelines; the press release prepared jointly by the Department of Energy, Mines and Resources and by the Department of Indian Affairs and Northern Development underlines:

The guidelines relate to pipelines tapping oil and gas resources north of the 60th degree of latitude in the Yukon Territory and the Northwest Territories and from Alaska. They establish requirements ranging from

environmental protection, pollution control and Canadian ownership and participation to training and employment of residents of the north. Initially, only one trunk line each for oil and gas will be permitted in the north within a 'corridor' to be established at a future date.

At that time, the industry had already not only expressed interest in constructing pipelines but had already plans and research underway. It is not surprising therefore that when the separate groups decided to join forces on June 1, 1972 in order to conform with the guidelines, they had already spent $17,000,000 in these plans and research. When the CDC became a member of the Study Group at the end of November 1972 and Mr. Crowe became the representative of the Corporation on the Management Committee grouping representatives of each of the participants, the problem was that of routing and of ownership and it is to these two points and to these two points only that Mr. Crowe gave his attention. This is the only inference that can be drawn from the records and it is sufficient to refer to the following:

1) the application itself submitted by Arctic Gas states that the need to transport northern natural gas to the southern markets had been foreseen several years before;

2) the routing by October 25, 1972 when Mr. Crowe for the first time was present as a guest, had already given rise to various studies;

3) that very same question of routing was the major matter discussed at subsequent meetings attended by Mr. Crowe;

4) the timing, not the advisability of regulatory filings, was officially discussed on February 28, 1973;

5) this discussion had been preceded by a letter of February 27, 1973, describing the project scheduling "up to the time of application" in late 1973;

6) on May 30, 1973, the minutes mention that "preparations for filings could continue";

7) one of the memoranda studied at the meeting of June 27, 1973 states that the application to the National Energy Board is "to be filed this Fall" and underlines "the question that must be resolved now is what kind of an application is to be filed".

51 What else would the reasonable and right minded person have discovered had he decided to inform himself of the true situation? He would have found that

— the CDC, a corporation wholly owned by the Government of Canada, has by statute a number of corporate objects which "shall be carried out in anticipation of profits";

— that two of its directors at the relevant time are the Deputy Minister of Industry, Trade and Commerce and the Deputy Minister of Finance;

— when the CDC joined the Study Group, more than $23 millions had been invested in the project and the eventual share of the CDC stood at a figure in the neighbourhood of $1 million;

— the Study Group which during the participation of Mr. Crowe had decided only two things, namely routing and ownership, had split and that the applications now before the Board, competing as they are for the obtaining of the certificate under s. 44 of the Act, are in fact being made by parties who during Mr. Crowe's

> participation in the work of the Study Group, had expressed concurrence in the decision of June 27, 1973 which is the major gun in appellant's arsenal.

Thus it follows that to a considerable degree the sole decision taken by Mr. Crowe and his partners, namely that relative to routing and ownership, was now being contested by some of the participants who at the time agreed therewith.

52 Obviously, the parties to the agreement could have a change of heart and decide not to continue with the project. Such a possibility is always present in a proposal of such a magnitude and of such a complexity where the relevant factors are numerous and subject to change practically on a daily basis. In that sense and in that sense only, nothing was definite during the period that Mr. Crowe participated in the work of the Study Group. Apart from this ever present possibility to change one's mind, and this possibility was not discussed between December 1972 and November 1973, the project was on the rails prior to Mr. Crowe joining the group. It is obvious that this ticklish problem of ownership and routing having been settled on June 27, 1973, albeit by a compromise that did not last too long as appears from the competing applications now before the Board, the petition to the National Energy Board had to be prepared. But Mr. Crowe did nothing else but reiterate the decision taken before his coming into the picture to proceed therewith.

53 The reasonable and right minded person would also have learned that the applications had been from time to time modified so that the proposal put forth by Arctic Gas and which the Board was to examine in the course of the hearings which started on October 27 last would be different from that examined by the Study Group between December 1972 and November 1973.

54 He would also have discovered that the report of April 1975 on the supply and requirements of Canadian Natural Gas discloses that Mr. Crowe and the other members of the Board have many question marks on the various points which by s. 44 of the Act may be considered by the Board, namely availability of gas, existence of market, economic feasibility, methods of financing and other public interest matter. It is sufficient here to quote from the conclusions of that study:

> Improving deliverability is a complex national problem requiring the cooperation and coordinated planning of producers, gathering and transmission companies and distribution utilities, as well as the governments of producing and consuming provinces and the federal government. Furthermore, short term improvements will have to come from gas already found, but there is a lead time generally of about three years between the initiation of development activity and the delivery of the gas in the market place. It therefore seems imperative to mobilize a concerted effort to bring about appropriate action if any significant improvement in deliverability is to be achieved in the remainder of the 1970's. If Frontier gas were connected — assuming adequate reserves are discovered and suitable transportation arrangements made — the need for and reliance on improved deliverability of gas from the Western Provinces would be reduced after that date.

It is interesting to note that two of the appellants before this Court, namely Canadian Arctic Resources Committee and Consumers' Association of Canada appeared before the Board at the hearing that preceded the publication of this study.

55 He would also have learned that the Government of Canada as well as the Governments of British Columbia, Saskatchewan, Manitoba, Ontario and Quebec have expressly recognized that they cannot entertain any reasonable apprehension of bias on the part of Mr. Crowe. Nothing has been heard from the Province of Alberta but considering its vital interest in the subject matter, it is reasonable to infer that its silence is a complete

acceptance of Mr. Crowe's ability to render justice. It is not unreasonable to assume that these seven governments together would look after the public interest and would be the first to raise the question of bias if any reasonable apprehension existed that the basic principles would be offended by the presence of Mr. Crowe.

56 In my opinion, the Court of Appeal was right in concluding that no reasonable apprehension of bias by reasonable, right minded and informed persons could be entertained.

57 For all these reasons, as well as for those of the Court of Appeal, I would dismiss the appeal with costs.

Appeal allowed, no order as to costs, Martland, Judson and De Grandpré JJ. dissenting.

Solicitors of record:

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Solicitor for the appellant Consumers' Association of Canada: T. Gregory Kane, Toronto.

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Solicitor for the Attorney General of Canada: D.S. Thorson, Ottawa.

Solicitor for the National Energy Board: F.H. Lamar, Ottawa.

Solicitor for Canadian Arctic Gas Pipeline Limited et al.: D.G. Gibson, Ottawa.

Solicitors for Foothills Pipe Lines Ltd.: McLaws & Company, Calgary.

Solicitors for The Alberta Gas Trunk Line (Canada) Limited et al.: Burke-Robertson, Chadwick & Ritchie, Ottawa.

Solicitors for Alberta Natural Gas Company: MacKimmie, Matthews, Calgary.

Solicitor for Westcoast Transmission Company Limited: C.D. Williams, Vancouver.

FN1 [1966] S.C.R. 367.

FN2 [1973] S.C.R. 833.

FN3 [1955] S.C.R. 3.

FN4 [1949] 1 All E.R. 109.

FN5 (1968), 65 D.L.R. (2d) 658.

FN6 (1974), 9 N.S.R. (2d) 277 affd. [1977] 1 S.C.R. 112.

FN7 (1969), 122 C.L.R. 546, 43 A.L.J.R. 150. (H. Ct.).

FN8 (1967), 222 A. (2d) 194.

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