THE SAHTÚ RENEWABLE RESOURCES BOARD

IN THE MATTER OF:	Public Hearing on the Management of Bluenose East ʔekwę́ (Barren Ground Caribou)	
REGARDING:	Motion on Conflict of Interest, Bias and Adjournment Issues	
HEARD:	February 25, 2016 Based on Written Motion and Parties' Submissions	
HEARD BY:	Paul Latour, Vice-Chair Lesley Allen, Member George Barnaby, Member	
BASED ON THE WRITTEN SUBMISSIONS OF:	Jennifer Duncan, Legal Counsel	Colville Lake Renewable Resources Council, Ayoni Keh Land Corporation and Behdzı Ahda First Nation (together "Colville Parties"), Applicant
	Sarah Kay, Legal Counsel	Department of Justice, Government of the Northwest Territories, Party ("GNWT")
	Wilfred McNeely Jr. Chief	K'áhsho Got'ıné Community Council, Party

REASONS FOR DECISION

I. INTRODUCTION

1) These are the reasons for the decision of the ʔehdzo Got'ı̨nę Gots'ę́ Nákedı, or Sahtú Renewable Resources Board ("Board"), regarding a February 23, 2016 motion brought by the Applicants, the Colville Lake Renewable Resources Council, the Ayoni Keh Land Corporation and Behdzi Ahda First Nation (together the "Colville Parties").

2) The Colville Parties are parties in a Public Hearing on the Management of Bluenose East ʔekwę́ (Barren-Ground Caribou) ("Hearing") scheduled to commence on March 1, 2016 in Délı̨nę, NWT.

3) The Hearing is a proceeding of the Board, which is established under the *Sahtú Dene and Métis Comprehensive Land Claim Agreement* ("SDMCLCA") as the main instrument of wildlife management in the Sahtú region of the Northwest Territory (SDMCLCA s. 13.8.1).

4) The Colville Parties argue, in their motion, that the Board Chair Michael Neyelle, Board Member Jeff Walker and Board Member Leonard Kenny (together "the three Board Members") are in a conflict of interest in the Hearing and that their participation in the Hearing gives rise to a reasonable apprehension of bias. The Colville Parties request that the three Board Members recuse themselves from the Hearing. The Colville Parties request, furthermore, that if the three Board Members are recused that the Hearing should be adjourned until new Board Members or Alternate Members are appointed to fill currently vacant Board positions.

5) The Board also received and considered submissions from the Government of the Northwest Territories ("GNWT") and K'asho Got'ı̨nę Community Council ("KGCC") in making this this decision on the motion. The Board was unable to consider a letter filed as a late submission from the Norman Wells Renewable Resources Council ("NWRRC"), as it was received after the Board made its decision.

II. THE RELIEF REQUESTED BY THE COLVILLE PARTIES

6) The Colville Parties seek relief under:

- Section 15 of the *Sahtú Renewable Resources Board Rules for Hearings* ("Rules") section 15, which are the Board's procedural rules for motions;
- Section 16 of the Rules, which are the Board's procedural rules for adjournments of hearings;
- Section 4.13 of the *Sahtú Renewable Resources Board Operating Procedures* ("Operating Procedures), which are the Board's operational rules regarding motions of the Board and voting on Board motions; and
- Section 13.8 of the SDMCLCA, which are a number of provisions regarding the jurisdiction and operation of the Board.

7) The Colville Parties seek the following specific relief in their motion:

1. a determination concerning whether the Board Members named in the Motion are in, or are likely to be in, a conflict of interest on matters before the Board for decision in the Public Hearing on Management of Bluenose East ʔekwǫ́ (Barren-Ground Caribou), convened by the Board on January 11, 2016 and to be held in Délı̨nę on March 1-3;

2. a determination concerning whether the participation of the Board Members named in this Motion on matters before the Board for decision in the Délı̨nę Hearing gives rise to a reasonable apprehension of bias;

3. if it is determined that the participation of Board Members named in this Motion on matters before the Board for decision in the Délı̨nę Hearing amounts to a conflict of interest and/or gives rise to a reasonable apprehension of bias, a decision by the Board on whether the Délı̨nę Hearing should be adjourned until such time as Alternate Board members can be appointed to the Board in accordance with the SDMCLCA; and

4. such other determinations, decisions or relief as the Board may grant.

III. PROCEDURAL HISTORY OF THE MOTION

8) The Board issued a Notice of Hearing on January 11, 2015 for a Public Hearing on the Management of Bluenose East ʔekwǫ́ (Barren Ground Caribou) from March 1 to 3, 2016 in Délı̨nę, NWT. The Board invited those interested in participating as Parties to confirm their intentions by January 25, 2016. The Board sent a letter on January 27, 2016 confirming the registered Parties in the Hearing including the Colville Parties.

9) The Colville Parties brought the within motion in writing at 2:20 pm on Tuesday, February 23, 2016 and asked that the Board consider the motion and render a decision on February 25, 2016. Early on February 24, 2016, the Board notified other Parties in the Hearing about the motion and invited Parties to make submissions on the motion by 8:30 AM February 25, 2016, before a meeting of the Board scheduled for 9:00 AM on February 25, 2016 to consider the Colville Parties' motion.

10) The Board received submissions from the GNWT at 7:50AM on Wednesday, February 25, 2016. The Board received a late submission from the KGCC at 12:15 pm on February 25, 2016. The Board received a late submission from the NWRRC at 11:30 AM on Thursday, February 26, 2016.

11) The Board had already met by the time the KGCC submission was received. The Board reopened its proceeding on February 25, 2016 to accept and consider the KGCC submission. The KGCC submission was considered by the Board in its decision. The submission of the NWRRC was received after the release of the Board's decision on the disposition of the motion, and the Board was unable to consider it.

12) The Board released its decision with the Board's disposition (conclusions) on the motion on Friday, February 26, 2016, along with notice that the Board would provide the full reasons for its decision on the motion by March 4, 2016. The Board released its disposition on the motion prior to its written reasons in order to avoid further prejudice to the Parties, the Board, and all participants that could be created by the lack of certainty about whether the Hearing would proceed as scheduled on Tuesday, March 1, 2016.

13) The three Board Members whose actions at issue in the conflict of interest and bias motion were recused from the decision on the Motion. The decision on the motion was made by the three remaining Board Members who still represented a quorum of the Board.

IV. THE ISSUES

14) The following issues are raised in this motion:

1. Are any or all of the three Board Members in a conflict of interest if they participate in making decisions in this Hearing?

2. Does the participation of any or all of the three Board Members in the Hearing give rise to a reasonable apprehension of bias?

3. Is the Board properly appointed, and is the Board able to function, if some Board positions are vacant?

4. Should the Public Hearing, currently scheduled to commence on March 1, 2016, be adjourned?

V. THE FACTS

15) In 1993, the Sahtú Dene and Métis signed a comprehensive land claim agreement with Canada. At the heart of this agreement, the SDMCLCA, are guarantees that Dene and Métis wildlife harvesting rights will be protected and that the Aboriginal participants in the SDMCLCA have the right to participate in decision-making about land, water and resources. These modern treaty rights are institutionally realized through the co-management boards that bring together equal representation of government and Dene and Métis participants to make decisions about land, water and resource issues. The Sahtú Renewable Resources Board is one of these co-management boards in the Sahtú region.

16) The government and Dene and Métis parties negotiating the SDCMCLA recognized the unique administrative law challenges that the wildlife co-management decision-making structure presents, and agreed to an appropriate standard for assessing whether a conflict of interest would arise:

> 13.8.4 (a) Board members shall not be considered to have a conflict of interest by reason only of being public servants or employees of the organizations of the participants.

17) In June 2015, the GNWT Department of Environment and Natural Resources conducted aerial surveys of various caribou herds in the Northwest Territories to assess population trends. One of the surveys collected data on the caribou herd currently defined by wildlife management

authorities as the Bluenose East herd ("BNE"). An issue in the Hearing is whether these caribou are a distinct herd (a position held by GNWT and wildlife management authorities) or part of a larger herd that includes the caribou currently defined by wildlife management authorities as the Bluenose West ("BNW") herd (a position held by the Colville Parties).

18) The BNE caribou travel through the area east of Great Bear Lake, including through the Délı̨nę District. The people of Délı̨nę are the primary harvesters of this herd in the Sahtú region although other Sahtú communities do harvest caribou from the BNE herd.

19) In August 2015, ENR provided preliminary results of the June 2015 caribou surveys to wildlife management authorities, including the Board, with ENR's assessment that the BNE herd was declining in size. ENR notified the Board that ENR would likely propose harvesting restrictions and other management actions to address the apparent decline. ENR also provided this information to Délı̨nę.

20) At 9:33 AM on September 18, 2015, Ruth Delorme-Roy of the Wildlife Division of the Department of Environment and Natural Resources of the GNWT emailed representatives of the Colville Parties, the Sahtú Secretariat Inc. ("SSI") and the SRRB on the subject of "Bluenose West Barren-Ground Caribou Tag Allocations – Attached – Supporting Documents". This email was provided as Exhibit A to the Motion of the Colville Parties. The email includes a series of internal email exchanges within the GNWT, discussing the Colville Parties' non-compliance with efforts to impose tags on the BNW herd in order to document how many BNW caribou are being harvested, and concerns regarding enforcement of the current regulations which impose limits on the harvesting of BNW caribou. The email exchange includes comments from Jeff Walker, writing as the ENR Regional Superintendent, regarding enforcement of the current GNWT *Wildlife Act* regulations. The letter, to which the 9:33 AM email refers as an attachment, was not included as part of *Exhibit A of the Colville Parties.*

21) GNWT provided a subsequent email from GNWT (Exhibit A of the GNWT*)* sent at 10:22 AM on September 18, 2015, which asks the recipients of the email to "recycle, delete the 9:32 am email message. The 9:33 am email is the intended and right one."

22) The Board met on October 20 – 22, 2015 in Norman Wells, NWT. Among other matters, the Board discussed the probability of a public hearing on BNE harvest management based on the preliminary 2015 caribou survey information provided by ENR. ENR's preliminary analysis was that harvesting restrictions should be applied. The Board is obligated, by Section 13.8.21(b) of the SDMCLCA, to hold a public hearing before establishing new harvesting restrictions (or "total allowable harvest") for wildlife:

> 13.8.21 (b) A public hearing shall be held when the Board intends to consider establishing a total allowable harvest and a Sahtú Needs Level in respect of a species or population of wildlife which has not been subject to a total allowable harvest level within the previous two years

23) At the October 2015 Board Meeting, Board Members discussed steps to be taken to ensure that Board Members were not in a conflict of interest and not subject to a reasonable apprehension of bias in the likely event of a BNE Hearing. The Board discussed steps to be taken by Jeff

Walker to remove himself from participating in the development of the final ENR proposal to the Board with recommendations on BNE harvest management.

24) On November 4, 2015, Dél̨nę community members at a public meeting approved in principle the Dél̨nę proposal for management of caribou in the Dél̨nę District, called *Belarewíle Gots'ę́ ʔekwę́ (Caribou for All Time)*. On November 23, 2015, the Dél̨nę First Nation, Dél̨nę ʔehdzo Got'ı̨nę (Renewable Resources Council) and Dél̨nę Land Corporation (together the "Dél̨nę Parties") filed this draft management proposal with the Board, The Dél̨nę Parties filed a final version of this plan with the Board on January 16, 2016.

25) Board Member Leonard Kenny, in his role as Chief of Dél̨nę First Nation, and Board Chair Michael Neyelle, in his role as President of the Dél̨nę ʔehdzo Got'ı̨nę, were part of the Dél̨nę Working Group that organized community meetings for the Dél̨nę community to discuss the community's concerns about, and options for, addressing a potential decline in the caribou in the Dél̨nę District. This series of community meetings led to the community meeting which approved the *Belarewíle Gots'ę́ ʔekwę́* proposal.

26) In addition, Michael Neyelle participated as one member of the facilitation team that organized and assisted with the community meetings that led to the community approval of the *Belarewíle Gots'ę́ ʔekwę́* proposal.

27) Leonard Kenny signed the *Belarewíle Gots'ę́ ʔekwę́* proposal as Chief of Dél̨nę First Nation. The Dél̨nę First Nation was a signatory to the proposal along with the Dél̨nę ʔehdzo Got'ı̨nę and Dél̨nę Land Corporation, as organizations representing the interests of the Dél̨nę community as a whole.

28) On December 15, 2015, the Government of the Northwest Territories' Department of Environment and Natural Resources ("ENR") filed with the Board its *Proposal on Management Actions for Bluenose East Caribou 2016 – 2019*.

29) Jeff Walker did not participate in the development of the final ENR Proposal and in October 2015 removed himself from further internal discussions within ENR about the recommendations in the final ENR Proposal for BNE management.

30) On January 8, 2016 the Board met by teleconference to decide whether to call a Public Hearing on BNE caribou management. The management proposals received from ENR and Dél̨nę included recommended limits on the harvest of the caribou (and other caribou conservation measures). The recommended harvesting limits triggered the SDMCLCA Section 13.8.21(b) requirement for a public hearing and the Board therefore made a decision to publicly call the Hearing. At this January 8, 2016 meeting of the Board, the Board again discussed the steps that would be taken by Board Members to ensure that no conflict of interest or apprehension of bias issues would compromise the fairness of the Hearing.

31) Based on this January 8, 2016 discussion, Board Chair Michael Neyelle stepped aside from leadership functions as President of the Dél̨nę ʔehdzo Got'ı̨nę for the duration of the Hearing. Jeff Walker continued to refrain from participating in ENR's preparation of its materials and presentation for the Hearing. Michael Neyelle and Leonard Kenny stepped aside from participating in Dél̨nę's preparation of the Dél̨nę presentation for the Hearing.

32) On January 11, 2016, the Board issued a Notice of Hearing for a Public Hearing on the Management of Bluenose East ʔekwę́ (Barren Ground Caribou) from March 1 to 3, 2016 in Délı̨nę, NWT.

33) On February 4, 2016, Chief Wilbert Kochon of Colville Lake contacted Deborah Simmons, the Board's Executive Director, to inquire about how the Board would deal with a statement of concern about potential conflict of interest on the part of the three Board Members. Dr. Simmons described the Board's discussions and conclusions regarding conflict of interest issues in the Hearing and the Board's expectation that the three Board Members must be rigorous in demonstrating open-minded and fairness in weighing evidence. Dr. Simmons told Chief Kochon that, if a conflict of interest concern was delivered to the Board in writing, the Board would consider the matter again very carefully and would prepare a formal response.

34) On February 12, 2016, Délı̨nę community members approved, at a public meeting, the decision to close the 2016 caribou harvest for Délı̨nę community members. By that date, Délı̨nę community members had harvested 150 caribou, which was the proposed limit for 2016 under the *Belarewíle Gots'ę́ ʔekwę́* plan passed by the community. Leonard Kenny participated in this meeting as Chief of Délı̨nę. Michael Neyelle attended this community meeting, but did not participate as SRRB Board Chair or as Délı̨nę ʔehdzo Got'ı̨nę President.

35) On February 15, 2016, to respond to Chief Kochon's stated concerns about the potential for conflicts of interest in the Hearing, the Board published *Conflict of Interest Guidelines* ("SRRB COI Guidelines") to clarify for the public the process used by the Board to ensure independence and fairness in its Hearing processes. The *SRRB COI Guidelines* supplement the Board's *Rules* and *Operating Procedures*.

36) Section 3.8.3 of the SDMCLCA provides that the Board shall consist of seven members (six Board Members or their six Alternates) plus one Chair. The Board currently has six members plus one Chair. The SDMCLCA provides that a vacancy in the membership of the Board does not impair the right of the remainder to act (section 13.8.3), and that a majority of the members from time to time in office constitutes a quorum of the Board (section 13.8.12).

37) The current Board Chair and voting Board Members are:

1. Michael Neyelle, Chair (who votes only in the event of a tie)
2. Lesley Allen, Board Member (Fisheries and Oceans Canada [DFO] Nominee)
3. Paul Latour, Alternate Member (Canadian Wildlife Services [CWS] Nominee)
4. Jeff Walker, Board Member (GNWT Nominee)
5. Leonard Kenny, Board Member (SSI Nominee for Délı̨nę District)
6. George Barnaby, Board Member (SSI Nominee for K'áhsho Got'ı̨nę District)

There are two Alternate Members who are currently appointed and vote only if the corresponding Board Member is unavailable:

1. Patrick Bobinski, Alternate Member to Lesley Allen (DFO Nominee)

2. Camilla Rabisca, Alternate Member to George Barnaby (SSI Nominee for K'áhsho Got'ı̨nę District)

There are currently five vacant Board Member and Alternate Member Positions:

1. The Board Member nominated by CWS
2. The Board Member nominated by SSI for Tulít'a District
3. The Alternate Member nominated by GNWT
4. The Alternate Member nominated by SSI for Délı̨nę District
5. The Alternate Member nominated by SSI for Tulít'a District

38) All of the current Board Members and Alternate Members have all sworn the following oath before an officer of the law, as required by SDMCLCA section 13.8.4(b) :

> I do solemnly affirm (or swear) that I will faithfully, truly, impartially and honestly, and to the best of my judgement, skill and ability, execute and perform the duties required of me as a member of the Board.

VI. ARGUMENTS OF THE PARTIES

A. Arguments of the Colville Parties

39) The Colville Parties submit that the three Board Members are in a conflict of interest, or could be reasonably apprehended to be biased, because of their role and actions as employees or leaders of the organizations making management proposals to the Board in the Hearing. The Colville Parties argue that the three Board Members should be recused. The Colville Parties also argue that the Hearing should be adjourned as the remaining Board Members do not constitute the proper balance of Dene/Métis to federal and territorial government representatives required to meet the SDMCLCA's objective of ensuring meaningful Dene and Métis participation in decision-making by the Board.

40) The Colville Parties argue that the appropriate test for determining whether a conflict of interest or bias exists is that laid down in *Committee for Justice and Liberty v. National Energy Board,* [1978] 1 S.C.R. 369 at 394*:*

> What would an informed, reasonable and right-minded 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?

41) The Colville Parties argue that section 13.8.4(a) of the SDMCLCA, which provides that it is not a conflict of interest for a Board Member to also be a public servant or an employee of a Sahtú organization, recognizes the Board's representative mandate and policy-oriented nature but does not "give its members carte blanche to make decisions even where they may be seen [to] have prejudged or having conflicting interests in the Board decision."

42) The Colville Parties rely on *Imperial Oil v. Quebec*, [2003] 2 S.C.R. 624 at para. 28 for the argument that:

> it is not sufficient that the decision-maker be impartial in his or her own mind, internally, to the satisfaction of his or her own conscience. It is also necessary that the decision-maker appear impartial in the objective view of a reasonable and well-informed observer.

43) The Colville Parties argue that the Board's *Operating Procedures*, which are one of the by-laws of the Board, require a Board Member with a conflict of interest to remove himself or herself from discussion of the matter in respect of which he or she has a conflict. The Colville Parties argue that, based on the evidence, the three Board Members had a conflict of interest and should have recused themselves from the Hearing in compliance with the *Operating Procedures*.

44) The Colville Parties contend that recusal of the three Board Members would impair the ability of the Board to proceed in a manner which complies with the objectives of the SDMCLCA and that the Hearing should therefore be adjourned. The Colville Parties are not arguing that there is a quorum issue, but rather that the reduced number of Board Members in combination with the high number of current vacancies in Board Member and Alternate Member positions means that the SDMCLCA objective of meaningful participation of Dene and Métis participants would not be met.

B. Arguments of the Government of the NWT

45) With respect to the allegation of conflict of interest, the GNWT submits that the three Board Members are not in a conflict of interest. The GNWT argues that section 13.8.4 (a) of the SDMCLCA creates a presumption that there is no conflict of interest between activities undertaken by Board Members acting in their capacity as employees of government or Sahtú organizations and their role as Board Members. GNWT argues that, given this presumption of no conflict of interest, a conflict of interest must be demonstrated based on actual evidence that a Board Member has lost the ability to be impartial. GNWT relies *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 119 for the principle that:

> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon a different point of view with an open mind.

46) GNWT argues that the emails of Jeff Walker, in *Exhibit A of the Colville Parties*, does not demonstrate adequate evidence of a conflict of interest. GNWT asserts that the email demonstrates that Mr. Walker was acting in his capacity as a GNWT employee (with employment obligations for wildlife management including enforcement of regulations restricting caribou harvesting), and not as a Board Member. GNWT also questions the evidentiary weight of the *Exhibit A of the Colville Parties* as it refers to and is based on a draft letter not attached to the email, and because the GNWT subsequently sent a follow-up email indicating that it was sent in error and was recalled (*Exhibit A of the GNWT*).

47) With respect to the allegation of reasonable apprehension of bias, the GNWT submits that the facts alleged by the Colville Parties do not meet the legal threshold for a reasonable apprehension of bias. GNWT argues that a reasonably informed member of the public would

understand the unique role of the Board created pursuant to the SDMCLCA and would recognize the benefit of the diverse views and expertise of all the Board Members. GNWT submits that there is no evidence to sustain the argument that the three Board Members are unable to act with an open mind and consider all of the evidence before them. GNWT relies on the NWT case of *McMeekin v. GNWT*, 2010 NWTSC 56 which assessed the appropriate test for bias in the case of a NWT Board, and concluded:

> [15] This test [for bias] recognizes that the grounds for the apprehension must be substantial. There must be a probability or reasoned suspicion of biased appraisal and judgement, unintended though it may be. This is to be determined on an objective, rational and informed basis. A mere suspicion of bias is not sufficient; there must be some factual bias to sustain the allegation. The party alleging bias has the onus of proving it on a balance of probabilities. And, it is important to reiterate that the test is not whether a party to the proceeding (such as the applicant) would apprehend bias but whether the reasonable and informed member of the public would apprehend it.

48) With respect to the question of Board position vacancies and the request for an adjournment, the GNWT argues that the SRRB is properly constituted, and that the current appointments comply with the requirements of the SDMCLCA. The GNWT argues that the Hearing should not be adjourned as an adjournment would be highly prejudicial to all parties.

C. Arguments of K’asho Got’ı̨nę Community Council

49) Chief McNeely of KGCC submitted a one-page letter to the Board. Chief McNeely asks the Board to seek “a resolution that fully benefits the public's interest in deciding the Motion of the respective Colville Lake Parties'.” Chief McNeely wrote that it had come to his attention that a “number of Board Members are acting in dual roles with an apparent conflict of interest.” KGCC asks the Board to “take serious consideration in deciding whether or not you are able to hear the submissions of the Colville Lake Parties' with an unbiased opinion that is not representative of your outside interests as SRRB members.”

50) The Board received the KGCC submission after its initial decision on the motion. The Board relied on its authority under Sections 3.4 and 15.6 of the *Board Rules for Public Hearings* to be flexible in its procedures in order to waive the time requirements for responses to motions. The Board reopened its proceeding in order to consider the KGCC submission.

51) The KGCC submission does not provide additional evidence, nor does it provide legal submissions. It asks the Board to “take serious consideration in deciding whether or not you are able to hear the submissions of the Colville Lake Parties' with an unbiased opinion that is not representative of your outside interests as SRRB members.”

VII. ANALYSIS

A. Applicable Legislation

52) The provisions of the SDMCLCA are the starting point for any analysis of the jurisdiction and obligations of the Board. The Board derives its legal authority from the SDMCLCA, which is a constitutionally protected land claim agreement.

53) The SDMCLCA parties explicitly addresses the question of what would constitute a conflict of interest for Board Members and agreed that:

> 13.8.4 (a) Board members shall not be considered to have a conflict of interest by reason only of being public servants or employees of the organizations of the participants.
>
> (b) Each member shall, before entering upon his or her duties as such, take and subscribe before an officer authorized by law to administer oaths, an oath in the form set out in schedule III to this chapter.

54) The ability of Members of the SRRB to "wear multiple hats" and not be in a conflict of interest is explicitly contemplated in the SDMCLCA. Section 13.8.4 should be understood or interpreted in the context of looking at the entire SDMCLCA scheme, the objects of the land claim agreement, and the context in which it functions. The SDMCLCA modifies the common law standard for determining a conflict of interest in a manner appropriate for the distinctive circumstances of a northern, land claim co-management board. The ability of Board Members to hold concurrent roles as government or as Sahtú employees also engaged in wildlife management in the context of employment recognizes the unique circumstances which arise in a co-management decision-making structure. The co-management structure established by the SDMCLCA is meant to be highly collaborative, flexible and inclusive of Dene/Métis and federal and territorial government perspectives.

55) With respect to the appointment of Board Members and the authority of the Board to act when positions are vacant, the SDMCLCA provisions are clear. There are seven Board positions, including the Chair. Board quorum is a majority of the Board Members in office from time to time. The Board has the obligation to act in event of a vacancy:

> 13.8.3 The Board shall consist of seven members appointed as follows:
>
> (a) six members and six alternate members to be appointed jointly by the Governor in Council and Executive Council of the Government of the Northwest Territories ("Executive Council"), of whom three members and three alternate members shall be appointed from nominees put forward by each of the Sahtú Tribal Council and government, provided that government shall ensure that the Board shall include at least one resident of the Northwest Territories who is not a participant; and
>
> (b) a chairperson, resident in the settlement area, to be nominated by the members of the Board appointed under (a) and appointed jointly by the Governor in Council and Executive Council.
>
> 13.8.8 A vacancy in the membership of the Board does not impair the right of the remainder to act.

> 13.8.12 A majority of the members from time to time in office constitutes a quorum of the Board.

56) The Board's Members are also subject to the federal *Conflict of Interest Act*, SC 2006, c 9, s 2 ("*COI Act*), and fall within the definition of "public officer holders" in the *COI Act.* The COI Act frames a "conflict of interest" as a situation where someone is exercising their power to further private interests:

> 4. For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests. [

57) The *COI Act* prohibits a public office holder from making decisions while in a conflict of interest and from giving preferential treatment. In addition, the *COI Act* requires public office holders to recuse themselves from decisions where those decisions are related to the exercise of their official powers while knowing that the decision could give "preferential treatment to any person or organization based on the identity of the person or organization that represents the first-mentioned person or organization":

> 6 (1). No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or function if the public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest.
>
> 7. No public office holder shall, in the exercise of an official power, duty or function, give preferential treatment to any person or organization based on the identity of the person or organization that represents the first-mentioned person or organization.
>
> 21. A public office holder shall recuse himself or herself from any discussion, decision, debate or vote on any matter in respect of which he or she would be in a conflict of interest.

58) The provisions in the *COI Act* must be interpreted in light of the conflict of interest provisions in SDMCLCA. The SDMCLCA provides for a more specific standard regarding conflict of interest, within the context of a constitutionally protected land claim agreement. This is also in keeping with the judicial principle that the specific provisions of one statute dealing with a specialized tribunal take precedence over the general provisions of another, more general statute (*Levis v. Fraternité des Policiers*, [2007] 1 S.C.R. 591).

59) The SDMCLCA also provides the Board with authority to enact by-laws, to regulate its operations:

> 13.8.11 The Board may make by-laws:
>
> (a) respecting the calling of meetings of the Board; and
>
> (b) respecting the conduct of business at meetings of the Board, including in-camera meetings, and the establishment of special and standing committees of the Board, the delegation of duties to such committees and the fixing of quorums for meetings of such committees.

The SRRB has used this authority to create two sets of by-laws, both of which include provisions about conflicts of interest: the Board's *Operating Procedures* ("*Operating Procedures"*), and the Board's *Hearing Rules* (*"Rules"*).

60) Section 2.2.3 of the *Operating Procedures*, in section 2.2.3 reiterates the SMDCLCA provision that "Members are not considered to have a conflict of interest if they are public servants or a member of a Sahtú organization (13.8.4.[a])". Section 2.2.6(a) of the *Operating Procedures* requires that "Board Members shall conform to the principles outlined in the Government of Canada's Conflict of Interest Code (June 1994). This Code was repealed and replaced with the *COI Act*, discussed above. The *Operating Procedures* place the onus on Board Members to self-assess, and to alert the Board, of any conflict of interest:

> 2.2.6 (b) It is the responsibility of Board Members to assess their activities with respect to potential conflict of interest, and
>
> (c) Board Members will make every attempt to advise the Board of any and all activities that have the possibility of being construed as in conflict of interest.

61) The Board's *Hearing Rules* provide additional context for understanding how to determine whether a conflict of interest arises in a Board hearing:

> 1.8 The Board Members and Board Chairperson shall approach every Hearing and every issue arising at a Hearing with an open mind, and base decisions upon the submissions and evidence presented during the Hearing process.

Hearing Rule 1.8 echoes the common law test for a conflict of interest in the context of a policy-type board (discussed below), namely, that a Board Member must approach every Hearing and issue in a Hearing with an open mind and remain capable of persuasion.

B. The Legal Test for Bias

1. THE CJL FOUNDATION TEST

62) The Colville Parties allege that the three Board Members are in a conflict of interest, that their conduct gives rise to a reasonable apprehension of bias, and that they have not been impartial in their dealing with the issues in this Hearing to date. The leading legal test for bias in Canadian law was established by the Supreme Court of Canada in *Committee for Justice and Liberty v. National Energy Board, Foundation v. NEB,* [1978] 1 SCR 369. That test for bias is*:*

> 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 whether a reasonable person, viewing the matter realistically and practically, and after having obtained the necessary information and thinking the matter through, would conclude that it was more likely than not that the decision was not or would not be decided fairly (at page 394, emphasis added).

In other words, if a 'reasonable and right-minded person' would sense bias on the part of the decision-maker and/or the decision-making process, then the test for reasonable apprehension of bias would be met.

63) The grounds for finding that a tribunal member is biased must be substantial and more than a suspicion of bias, and the onus of proving bias falls on the party alleging the bias, based on a balance of probabilities (*McMeekin v. GNWT*, 2010 NWTSC 56). For the purpose of this test, the 'reasonable person' is not a party to the proceeding, but rather is a reasonable and informed member of the public with knowledge of the specific context in which the decision is made. The inquiry is how the 'reasonable person,' as defined, would view the situation (*McMeekin*).

2. THE MODIFIED TEST FOR POLICY BOARDS

64) The general legal test for bias was refined by subsequent Supreme Court decisions that modified the test, particularly for Boards that do not have a court-like structure or make court-like decisions.

65) *CJL Foundation v NEB* established the principle that the test for bias depends on the nature of the tribunal in question:

> 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.
>
> 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*, 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 .
>
> (*CJL Foundation v NEB* at page 395).

66) The Supreme Court examined the relevance of the question of the type of tribunal, in determining the standard for a finding of bias, in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities),* [1992] 1 S.C.R. 623. The Court confirmed that the extent of a tribunal's duty of fairness depends on the nature and function of the tribunal and found that the test for bias exists on a sliding scale.

67) Where boards are primarily court-like in their functions, they are expected to comply with the most stringent standard that is applicable to courts. At the other end of the scale are land use planning or policy boards, for instance. With these boards, the standard will be much more lenient:

> In order to disqualify the members a challenging party must establish that there has been a prejudgment of the matter to such an extent that any representations to the contrary would be futile. (*Newfoundland Telephone* at page 638, emphasis added).

68) In other cases, the Supreme Court has confirmed that tribunals dealing with policy and land use planning, for instance, have a minimum standard relating to bias, and that the test is whether the tribunal members are still "capable of persuasion." (*Old St. Boniface Residents Assn. Inc. v. Winnipeg (City),* [1990] 3 S.C.R. 1170 *and Save Richmond Farmland Society* v. *Richmond (Township),* [1990] 3 S.C.R. 1213 at p. 1224).

3. THE TEST FOR IMPARTIALITY OF DECISION-MAKERS

69) The Colville Parties also assert that the conduct of the three Board Members shows that they are not able to be impartial in the Hearing. The legal standard for impartiality was established by the Supreme Court of Canada in *R. v. S. (R.D.),* [1997] 3 S.C.R. 484 at para. 119:

> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon a different point of view with an open mind.

70) The need for impartiality on the part of an administrative decision-maker is an aspect of the prohibition on bias. Tribunal members can hold their own opinions, even empathically, without necessarily leading to a conclusion that they were not impartial (*Township of Vespra v Ontario (Municipal Board)* (1983), 2 DLR (4th) 303). Even when a tribunal member expresses a tentative opinion about what the evidence has shown to that point, in the middle of a hearing, there is not necessarily a finding of bias (*Construction & Specialized Workers' Union; Windsor (City) Commissioners of Police v Langlois* (1972), 24 DLR (3d) 377).

4. THE ABILITY TO CONSIDER CONTEXTUAL FACTORS

71) The standard for what constitutes a reasonable apprehension of bias will vary, depending on the context of the administrative decision-maker involved (*Newfoundland Telephone*). For instance, in the context of a decision-making body operating in an Aboriginal context, the court found that the decision makers must be free to express their personal opinions and the opinion of the families they represent, and so should only be held to the minimum standard relating to bias, namely whether its members were still capable of persuasion (*Roseau River Anishinabe First Nation v. Atkinson*, 2003 FCT 168).

72) The practicalities of the context in which a tribunal is operating, such as whether the role being played by a tribunal member 'typically' overlaps with other related roles, is also relevant. For example, in a case involving a tribunal member who had overlapping roles dealing with land use planning both as an elected councillor and a tribunal board member, the Alberta Court of Appeal found that the practicalities of local governance – including the expectation of overlapping roles – must be kept in mind when determining whether bias exists (*Beaverford v Thorhild, (County No. 7),* 2013 ABCA 6).

C. Application to the Facts

1. WHAT IS THE APPROPRIATE LEGAL STANDARD?

73) The SDMCLCA establishes the Board as a wildlife co-management structure that is meant to enable collaborative decision-making between government and Sahtú Dene and Métis communities in a manner which integrates Dene/Métis cultural norms with Canadian administrative law principles of fair procedure. The Board is, by its very nature, intended to bring together the diverse perspectives and experiences of government and Sahtú Dene and Métis Board Members in a collaborative decision-making process that recognizes their different perspectives while empowering a collective voice as one Board.

74) The negotiators of the SDMCLCA turned their minds to the question of what would constitute a conflict of interest for Board Members in the unique context of the Sahtú region and the modern land claim agreement in the region. Section 13.8.4 sets out a presumption that there will *not* be a conflict of interest between Board Members' roles as employees, or members of government and Dene/Métis organizations, and their role as Board Members. By doing so, the SDMCLCA modifies the common law standard for determining a conflict of interest in a manner appropriate for the distinctive circumstances of a northern land claim co-management board. The SDMCLCA explicitly enables Board Members to hold concurrent roles as government or Sahtú employees, also engaged in wildlife management in the context of employment. This structure recognizes the unique circumstances which arise in a co-management decision-making structure meant to be highly collaborative, flexible and inclusive of both government and Dene/Métis perspectives.

75) By the same logic, leaders of Sahtú organizations, such as Band Councils and Renewable Resources Councils, would also fall under the category of those who are "public servants or employees of the organizations of the participants" and would not be in a conflict while performing duties normally associated with their roles in these organizations while serving on the Board.

76) The SDMCLCA provisions make sense in the context of the SDMCLCA and the Sahtú region. Section 13.8.4 ensures that there are available Dene/Métis and government representatives with perspectives and expertise who are able to participate together to make decisions about Sahtú wildlife and wildlife habitat. It respects the goal of the land claim agreement to ensure that Dene and Métis participate in decision making where almost every decision of the board directly affects one or all Dene/Métis communities in the region. The alternative – that Board Members would be forced to recuse themselves each time a Board decision touched on the wildlife or habitat interests of any specific Sahtú Dene/Métis community – would undermine the goal of Dene/Métis participation in the wildlife co-management structure and would render the decision-making structure impractical.

77) Section 13.8.4 should also be understood or interpreted in the context of looking at the entire SDMCLCA scheme, the objects of the land claim agreement, and the context in which it functions. The Board's decisions affect important and constitutionally protected Aboriginal harvesting rights. These rights are highly important to the Sahtú Dene and Métis, and are at the centre of the bargain made between the government and the Dene and Métis parties to the SDMCLCA. The Board is not, however, a judicial or quasi-judicial tribunal. Its decisions are

of a policy and land use planning nature. Its decisions are not "final" decisions for administrative law purposes. The Board provides its decisions and recommendations to the Minister, who retains ultimate jurisdiction over wildlife management (SDMCLCA, section 13.3.1). These are factors which would also point toward a context-sensitive interpretation of when a conflict of interest is such that a Board Member should step aside.

78) Accordingly, the Board should be considered to be at the lower end of the spectrum of procedural fairness obligations, and should attract the modified version of the *CJL Foundation v. NEB* bias test which has been applied on many occasions to policy and land use planning tribunals—namely, the requirement that Board Members must "keep an open mind" (*R. v. R.D.S.)*, remain "capable of persuasion" (*Old St. Boniface)* and "not have prejudged the matter to such an extent that any representations to the contrary would be futile" (*Newfoundland Telephone*).

79) The Board should therefore operate on the assumption laid down in the SDMCLA, namely, that where Board Members are engaged in actions that are part of the normal course of their duties as public employees or members of Sahtú organizations, this conduct should presumed *no*t to be a conflict of interest, as long as Board Members keep an open mind and are capable of persuasion on the matters before them when they act as "one voice" in making decisions.

80) Finally, in order to make an actual finding that a conflict of interest or bias situation exists for an NWT Board, there must be sufficient evidence, proven on a balance of probabilities, and assessed based on the perceptions of the reasonable member of the public who is not a party to the matter but aware of the particular circumstances of the Board (*McMeekin v. GNWT*).

2. IS MICHAEL NEYELLE BIASED?

81) Michael Neyelle is the Chair of the Board. He is also the President of the Délı̨nę Ɂehdzo Got'ı̨nę. These roles are presumed not to be in conflict when he is performing functions that are part of the normal course of duties as President of the Délı̨nę Ɂehdzo Got'ı̨nę.

82) The Délı̨nę Ɂehdzo Got'ı̨nę is the primary local body dealing with the needs and interest of local harvesters. In his role as President of the Délı̨nę Ɂehdzo Got'ı̨nę, Michael Neyelle played a role in facilitating multiple community discussions between August 2015 and January 2016 about the community's views on the survey information showing potential declines in the BNE caribou herd. His community members are primary harvesters of this caribou herd and their Ɂehdzo Got'ı̨nę is the vehicle through which they are able to make decisions on these matters under the SDMCLCA. The Délı̨nę community discussions led to the approval of the *Belarewíle Gots'ę́ Ɂekwę́* plan at a community meeting. The Plan was developed and approved by the Délı̨nę community members who were present. The plan is not one developed by Michael on his own nor did he "approve" it in his personal capacity.

83) Michael Neyelle turned his mind to whether a conflict of interest could arise with respect to a public hearing on BNE harvest management. He discussed his overlapping roles as Board Chair and Délı̨nę Ɂehdzo Got'ı̨nę President with the Board on several occasions including at Board meetings in October 2015 and January 2016. His conduct conformed to the Board's *Operating Procedures* which require such self-assessment and disclosure.

84) In order to find that Michael Neyelle is in a conflict of interest or that there is a reasonable apprehension that Michael is biased in the Hearing, there must be sufficient evidence to counter the presumption under the SDMCLCA that he is not in a conflict of interest by mere reason of holding the positions of SRRB Chair and Délı̨nę President at the same time, and performing functions in the normal course of duties of these two roles. This finding would require evidence to prove, on the balance of probabilities, that he does not have an open mind, that he is incapable of being persuaded by evidence in the Hearing or that he has prejudged the matter to such an extent that any representations to the contrary would be futile.

85) The actions of Michael Neyelle have not, to date, demonstrated a conflict of interest or a reasonable apprehension of bias that meets this standard. He has been diligent in self-assessing whether a conflict of interest could arise. He sought guidance from the rest of the Board regarding his overlapping roles as Board Chair and Délı̨nę Ɂehdzo Got'ı̨nę President, and took steps to avoid a conflict of interest, notably by stepping aside from his responsibilities as Délı̨nę Ɂehdzo Got'ı̨nę President from the time of the calling of the BNE Hearing in January 2016 until the Board delivers its final report. There is no evidence that Michael Neyelle has closed his mind to any positions or ideas or that representations made to him would be 'futile' in changing his mind.

3. IS LEONARD KENNY BIASED?

86) Leonard Kenny is the Chief of the Délı̨nę First Nation, as well as a Board Member of the SRRB. The provisions of the SDMCLCA presume that these duties as Chief are not to be in conflict with his role as a Board Member absent some evidence that the standard set by the SDMCLCA should be overridden. Leonard Kenny's perspective and experience as a leader of a Sahtú Dene community is highly valuable in the Board's understanding of issues and decision-making process.

87) Over the fall of 2015 and in early 2016, Leonard Kenny participated in Délı̨nę community meetings about apparently declining caribou herd in the Délı̨nę District and the community's plan for living with this potential decline. Leonard Kenny was part of the Délı̨nę Working Group work which organized the community meetings to discuss the community's plan. Caribou are a critical issue for Leonard Kenny's community, and as Chief of the community it is reasonable for him to lead efforts to assist his community in coming together to discuss caribou issues. When the community approved the *Belarewíle Gots'ę Ɂekwę (Caribou for All Time)* plan, Leonard Kenny signed the plan as Chief of Délı̨nę First Nation. The Délı̨nę First Nation was a signatory to the proposal along with the Délı̨nę Ɂehdzo Got'ı̨nę and Délı̨nę Land Corporation, who together formally represent the interests of the Délı̨nę community. It is reasonable to expect that a Chief (along with representatives of other relevant authorities) would sign a proposal approved by the majority of his community members at a community meeting. In January and February 2016, when it became clear that the community harvest of caribou was reaching the numbers that the community had internally agreed upon as a threshold for their annual harvest, Leonard Kenny took steps to ensure that his community members remembered and followed the guidelines that the community members had set for themselves in the *Belarewíle Gots'ę Ɂekwę* plan. This act of leadership was appropriate for a Chief acting on the decision made by his community members.

88) Leonard Kenny turned his mind to whether a conflict of interest could arise with respect to the Public Hearing on BNE harvest management. He discussed his overlapping roles as Board Chair and Délı̨nę Ɂehdzo Got'ı̨nę President with the Board at the October 2015 and January 2016 Board meetings. This conduct conformed to the Board's *Operating Procedures* which require such self-assessment and disclosure. The Board discussed that matter at the time and determined that Leonard Kenny was not in a conflict of interest.

89) In order to find that Leonard Kenny is in a conflict of interest or that there is a reasonable apprehension that Leonard Kenny is biased in the Hearing, there must be sufficient evidence – proved by the applicant on the basis of a balance of probabilities – to counter the presumption under the SDMCLCA that he is not in a conflict of interest by mere reason of holding the positions of SRRB Chair and Délı̨nę Chief at the same time and performing functions in the normal course of duties of these two roles.

90) The actions of Leonard Kenny have not, to date, demonstrated a conflict of interest or a reasonable apprehension of bias that meets the legal standard for this Board. He has been diligent in self-assessing whether a conflict of interest could arise in this Hearing, he sought guidance from the rest of the Board regarding his overlapping roles as Board Chair and Délı̨nę Chief, and took steps to avoid a conflict of interest. None of Leonard Kenny's actions provide an evidentiary basis for finding that he has closed his mind to other caribou management alternatives and that any attempt to persuade him would be "futile." The Board therefore finds that Leonard Kenny is not in a conflict of interest.

4. IS JEFF WALKER BIASED?

91) Jeff Walker works for the GNWT Department of Environment and Natural Resources as the Regional Superintendent for the Sahtú Region. He is also a Board Member of the SRRB.

92) In his capacity as Regional Superintendent, Jeff Walker has various responsibilities which include responsibility for overseeing enforcement of the GNWT's wildlife laws in the Sahtú region. He has legal authority and obligations as a conservation officer to uphold territorial laws. Enforcement of GNWT wildlife regulations that limit the harvesting rights of Aboriginal communities is a contentious matter in the Sahtú region and particularly in Colville Lake.

93) The September 18, 2015 email provided as *Exhibit A* to the Colville Parties' motion materials relates to ongoing and contentious issues between Colville Lake, ENR, the SRRB, the Inuvialuit Wildlife Management Advisory Committee, the Inuvialuit Game Council and the Gwichin Renewable Resources Board regarding the application and enforcement of current regulations restricting harvesting of BNW caribou. The GNWT and wildlife authorities currently manage the BNW herd separately from the BNE herd.

94) The email includes comments from Jeff Walker, in his capacity as ENR Regional Superintendent, regarding enforcement of the current GNWT *Wildlife Act* regulations. The Colville Parties' motion states that Jeff Walker will not be able to consider the ENR Caribou plan with an open mind on the merits, given his "expressly stated views on the need for a TAH or the enforcement of quota allocations in his role as regional manager in the government department that is putting forward proposals for a TAH and quota allocations in the ENR Caribou Plan…" Jeff Walker's emails, when read in context, are about compliance and

enforcement of existing BNW regulations arising from CL's rejection of caribou tags in the BNW area. The emails show no "expressly stated views on the need for a TAH" for BNE, but do demonstrate Jeff Walker's opinion that, in light of the current regulations, compliance is necessary to the conservation efforts. The emails also reveal Jeff Walker's views that co-management is key to the approach taken by ENR, and his view that there is a need to work with CL to find common ground.

95) The Colville Parties' motion also alleges that Jeff Walker is biased on the basis that he has "acted, approved, implemented, or supported positions in respect of the ENR Caribou plan." The Board is aware that Jeff Walker did not participate in the development of the final ENR proposal for BNE management. He has not played no direct role in finalizing or approving the ENR proposal.

96) The emails attached as evidence do not reasonably support a claim that Jeff Walker took steps that were inappropriate. The email chain demonstrates that he was aware of and performing his obligations as the Regional Superintendent and as a Conservation Officer with peace officer obligations. Jeff Walker's emails demonstrate that he was committed to "work with the Colville Parties on this to find common ground" and that "co-management partnerships are key to our approach and we are willing to work with them."

97) The actions of Jeff Walker do not demonstrate sufficient evidence to meet the legal standard for a determination of a conflict of interest or a reasonable apprehension of bias for this Hearing. He self-assessed whether a conflict of interest could arise in this Hearing, sought guidance from the rest of the Board regarding his overlapping roles, and took steps to avoid a conflict of interest including removing himself from participation in development of the final ENR proposal. The emails about the BNW herd issues provided by the Colville Parties demonstrate that Jeff Walker was interested in finding common ground despite the contentious issues involved including compliance with existing laws. The evidence, in fact, demonstrates that he had not closed his mind on these issues. There is not evidence that Jeff Walker has closed his mind on this issues in this Hearing, nor that any attempt to persuade him on certain issues would be "futile."

5. IS THE BOARD PROPERLY CONSTITUTED?

98) The Colville Parties also raise an argument that the Board is not currently properly constituted. Section 13.8.3 of the SDMCLCA provides that there shall be a seven member Board (six Board Members or their Alternates plus a chair). There is currently a Board of six (five Board Members or their Alternates plus the Chair). The SDMCLCA unambiguously states that a vacancy does not impair the ability of the remainder to act (Section 13.8.8) and that quorum is the majority of Members in office from time to time (Section 13.8.12).

99) The Board, like many tribunals established under the northern land claim agreements, has a nominating and appointment process that is time-consuming, requiring nominating decisions by three different governments (SSI, GNWT and Canada) and cabinet approval by two (GNWT and Canada). In order to ensure timely appointments of Board Members, the SDMCLCA obligates the nominating organizations (in Section 13.8.7) and appointing government bodies (in Section 13.8.6) to perform their obligations in a timely way (within 90 days of triggers for these respective obligations).

100) These are, however, obligations of the nominating and appointing bodies, and not this Board itself. The Board is legally obligated by the SDMCLCA to act if there is quorum and despite any vacancy in the Board.

101) The Board finds that the Board is currently properly constituted. The Board urges the Parties to the SDMCLCA (Canada, GNWT and SSI), however, to ensure that Board vacancies are filled in a timely way in order to meet the objectives of the SDMCLCA.

6. SHOULD THE HEARING BE ADJOURNED?

102) The Colville Parties request that the Hearing be adjourned if the three Board Members were recused. Although Board quorum would be maintained in this scenario, the Colville Parties argue that the resulting imbalance of government to Dene and Métis Board Members available to make a decision "would not be in accordance with the key objectives of the SDMCLCA to ensure that Sahtú Dene and Métis perspectives and needs are fully integrated into decision-making about resources…"

103) The Board finds that it does not need to make a decision on this matter as the three Board Members are not found to be in conflict of interest or reasonably apprehended to be biased in the Hearing. The three Board Members were therefore not recused from the Hearing. Even if the three Board Members were recused and the Board would be forced to continue with the only three remaining available Board Members, the Board agrees with the GNWT's submission that adjournment at such a late date would be highly prejudicial to the Parties, particularly in view of the opportunities that Colville Lake had to bring this motion at an earlier date.

VIII. CONCLUSION

104) The Board has decided the following, based on a review of the Motion materials, Parties' submissions and an analysis of the facts and applicable law:

1. The Board finds that Michael Neyelle, Leonard Kenny and Jeff Walker are not currently in a conflict of interest on matters before the Board for decision in the Hearing.

2. The Board finds that Michael Neyelle, Leonard Kenny and Jeff Walker's participation to date in the Hearing does not give rise to a reasonable apprehension of bias.

3. Based on the above findings, it is not necessary for the Board to rule on the Colville Parties' request that the Hearing be adjourned until such time as Board Members or Alternate Members are appointed by Canada.

4. The Board will allow Parties to bring a motion at any time during the course of the Hearing, should any Party have concerns about whether the conduct of any Board Member gives rise to a concern about a potential conflict of interest or a reasonable apprehension of bias, and the Board will consider the matter at that time.

5. The Board will take the following additional steps to ensure that the Hearing remains procedurally fair:

   a. During that portion of the Hearing where Dél̨nę's management proposal is presented to the Board, Michael Neyelle will step aside as Chair and the proceedings will be chaired by Vice-Chair Paul Latour.

   b. During that portion of the Hearing where Dél̨nę's management proposal is presented, Michael Neyelle and Leonard Kenny will not participate in the Dél̨nę panel to present, nor take questions about, the Dél̨nę plan but will remain in the room to hear the evidence and will participate in the Board's final deliberations regarding all evidence in the Hearing.

   c. During that portion of the Hearing where ENR's management proposal is presented, Jeff Walker will not participate in the ENR panel to present, nor take questions about, the ENR plan but will remain in the room to hear the evidence and will participate in the Board's final deliberations regarding all evidence in the Hearing.

DATED this 7th day of March, 2016.

SAHTÚ RENEWABLE RESOURCES BOARD

_____

Paul Latour, Vice-Chair

On behalf of the Board: Lesley Allen, George Barnaby