

**SUPREME COURT OF CANADA**

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| **Citation:** Yukon Francophone School Board, Education Area #23 *v.* Yukon (Attorney General), 2015 SCC 25, [2015] 2 S.C.R. 282 | **Date:** 20150514  **Docket:** 35823 |

Between:

Yukon Francophone School Board, Education Area #23

Appellant

and

Attorney General of the Yukon Territory

Respondent

- and -

Attorney General of Quebec, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of the Northwest Territories, Commissioner of Official Languages of Canada, Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique, Fédération des parents francophones de l’Alberta, Fédération nationale des conseils scolaires francophones and Fédération des communautés francophones et acadienne du Canada

Interveners

**Coram:** McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis, Wagner and Gascon JJ.

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| **Reasons for Judgment:**  (paras. 1 to 78) | Abella J. (McLachlin C.J. and Rothstein, Moldaver, Karakatsanis, Wagner and Gascon JJ. concurring) |

Yukon Francophone School Board, Education Area #23 *v.* Yukon (Attorney General), 2015 SCC 25, [2015] 2 S.C.R. 282

Yukon Francophone School Board,

Education Area #23 Appellant

v.

Attorney General of the Yukon Territory Respondent

and

Attorney General of Quebec,

Attorney General of British Columbia,

Attorney General for Saskatchewan,

Attorney General of the Northwest Territories,

Commissioner of Official Languages of Canada,

Conseil scolaire francophone de la Colombie-Britannique,

Fédération des parents francophones de Colombie-Britannique,

Fédération des parents francophones de l’Alberta,

Fédération nationale des conseils scolaires francophones and

Fédération des communautés francophones

et acadienne du Canada Interveners

**Indexed as: Yukon Francophone School Board, Education Area #23 *v.* Yukon (**Attorney General)

2015 SCC 25

File No.: 35823.

2015: January 21; 2015: May 14.

Present: McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis, Wagner and Gascon JJ.

on appeal from the court of appeal for yukon

*Courts — Judges — Impartiality — Reasonable apprehension of bias — Allegation that judge’s comments and interventions at trial as well as his community involvement before and after appointment as a judge gave rise to reasonable apprehension of bias — Whether judge’s conduct and community involvement raised reasonable apprehension of bias.*

*Constitutional law — Charter of Rights — Whether school board can unilaterally decide to admit students who are not covered by s. 23 of the Canadian Charter of Rights and Freedoms.*

The Yukon Francophone School Board is the first and only school board in the Yukon. It has responsibility for one school, École Émilie-Tremblay, a French-language school founded in 1984. In 2009, the Board sued the Yukon government for what it claimed were deficiencies in the provision of minority language education. The trial judge ruled in the Board’s favour on most issues.

The Court of Appeal concluded that there was a reasonable apprehension of bias on the part of the trial judge based on a number of incidents during the trial as well as the trial judge’s involvement as a governor of a philanthropic francophone community organization in Alberta. Accordingly, it ordered a new trial except on three issues, only two of which were appealed to this Court: the trial judge’s conclusion that, under s. 23 of the *Charter*, the Board had the unilateral right to set admission criteria so as to include students who are not covered by s. 23; and the trial judge’s decision that the Yukon is required to communicate with the Board in French.

*Held*: The appeal from the Court of Appeal’s conclusion that there was a reasonable apprehension of bias requiring a new trial is dismissed, but the Board’s claims pursuant to the *Languages Act* should be joined with the other issues remitted by the Court of Appeal for determination at a new trial.

The test for a reasonable apprehension of bias is what would a reasonable, informed person think. The objective is to protect public confidence in the legal system by ensuring not only the reality, but the appearance of a fair adjudicative process. Impartiality and the absence of bias have developed as both legal and ethical requirements. Judges are required — and expected — to approach every case with impartiality and an open mind. Because there is a presumption of judicial impartiality, the test for a reasonable apprehension of bias requires a real likelihood or probability of bias. Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge’s identity and experiences not close his or her mind to the evidence and issues. The reasonable apprehension of bias test recognizes that while judges must strive for impartiality, they are not required to abandon who they are or what they know. A judge’s identity and experiences are an important part of who he or she is, and neither neutrality nor impartiality is inherently compromised by them. Judges should be encouraged to experience, learn and understand “life” — their own and those whose lives reflect different realities. The ability to be open-minded is enhanced by such knowledge and understanding. Impartiality thus demands not that a judge discount or disregard his or her life experiences or identity, but that he or she approach each case with an open mind, free from inappropriate and undue assumptions.

In the present case, the threshold for a finding of a reasonable apprehension of bias has been met. In addition to several disparaging and disrespectful remarks made by the trial judge and directed at counsel for the Yukon, several incidents occurred which, when viewed in the circumstances of the entire trial, lead inexorably to this conclusion.

The first was the trial judge’s conduct during an incident where counsel for the Yukon attempted to cross-examine a witness based on confidential information contained in student files. After hearing some argument on the confidentiality issue, the trial judge told counsel he would entertain additional arguments on the matter the following day. However, he started the next day’s proceedings with a ruling unfavourable to the Yukon and without giving the parties an opportunity to present further argument. While this by itself is unwise, the trial judge’s refusal to hear the Yukon’s arguments after his ruling, and his reaction to counsel, are more disturbing. He both characterized the Yukon’s behaviour as reprehensible and accused counsel for the Yukon of playing games. Viewed in the context of the entire record, the trial judge’s conduct was troubling and problematic.

The trial judge’s treatment of the Yukon’s request to submit affidavit evidence from a witness who had suffered a stroke was also improper. The judge accused counsel for the Yukon of trying to delay the trial, criticized him for waiting half-way through the trial to make the application, suggested that the incident amounted to bad faith on the part of the government, and warned counsel for the Yukon that he could be ordered to pay costs personally if he brought the application. There was no basis for the accusations and criticism levelled at counsel and, viewed in the context of the rest of the trial, this incident provides further support for a finding of a reasonable apprehension of bias.

Moreover, the trial judge’s refusal to allow the Yukon to file a reply on costs is highly problematic in the overall context of the trial. After the release of his reasons on the merits, the trial judge required each party to file their costs submissions on the same day. To the Yukon’s surprise, the Board sought not only solicitor-client costs, but also punitive damages and solicitor-client costs retroactive to 2002. The trial judge’s refusal to allow the Yukon to file a reply factum is questionable, particularly in light of the fact that the Yukon could not have known the quantum of costs sought by the Board at the time it filed its factum. The judge’s refusal is made all the more worrisome by his decision to award a lump-sum payment to the Board, in addition to retroactive costs.

All of these incidents, taken together and viewed in their context, would lead a reasonable and informed person to see the trial judge’s conduct as giving rise to a reasonable apprehension of bias.

However, the Court of Appeal erred when it concluded that the trial judge’s current service as a governor of the Fondation franco-albertaine substantially contributed to a reasonable apprehension of bias. Membership in an association affiliated with the interests of a particular race, nationality, religion, or language is not, without more, a basis for concluding that a perception of bias can reasonably be said to arise. Canada has devoted a great deal of effort to creating a more diverse bench. That very diversity should not operate as a presumption that a judge’s identity closes the judicial mind.

In the present case, it is difficult to see how, based on the evidence, one could conclude that the Fondation franco-albertaine’s vision could be said to “clearly align” with certain positions taken by Board in this case or that the trial judge’s involvement in the organization foreclosed his ability to approach this case with an open mind. Standing alone, vague statements about the organization’s mission and vision do not displace the presumption of impartiality. Although consideration of the trial judge’s current role as governor of the Fondation franco-albertaine was a valid part of the contextual bias inquiry in this case, his involvement with an organization whose functions are largely undefined on the evidence cannot be said to give rise to a reasonable apprehension of bias.

The Court of Appeal’s conclusion that the Board could not unilaterally decide whom to admit to its school should not be disturbed. There is no doubt that a province or territory can delegate the function of setting admission criteria for children of non-rights holders to a school board. This delegation can include granting a minority language school board wide discretion to admit the children of non-rights holders. In this case, however, the Yukon has not delegated the function of setting admission criteria for the children of non-rights holders to the Board. In the absence of any such delegation, there is no authority for the Board to unilaterally set admission criteria which are different from what is set out in the territorial regulation applicable to French-language instruction.

This, however, does not preclude the Board from claiming that the Yukon has insufficiently ensured compliance with s. 23, and nothing stops the Board from arguing that the Yukon’s approach to admissions prevents the realization of s. 23’s purpose.

Finally, it is unclear why the Court of Appeal decided that this case was not a suitable vehicle for determination of rights under the Yukon’s *Languages Act*. The Board’s claims raise significant factual issues that may well lead to a finding that parts of the claims were justified and should be determined at the new trial with the benefit of a full evidentiary record.

**Cases Cited**

**Discussed:** *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; **referred to:** *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539; *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, rev’g on other grounds (2001), 53 O.R. (3d) 641; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Valente v.* *The Queen*, [1985] 2 S.C.R. 673; *Cojocaru v. British Columbia Women’s Hospital and Health Centre*, 2013 SCC 30, [2013] 2 S.C.R. 357; *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851; *Brouillard v. The Queen*, [1985] 1 S.C.R. 39; *Jones v.* *National Coal Board*, [1957] 2 All E.R. 155; *Take and Save Trading CC v. Standard Bank of SA Ltd.*, 2004 (4) S.A. 1; *South African Commercial Catering and Allied Workers Union v. Irvin & Johnson Ltd. (Seafoods Division Fish Processing)*, 2000 (3) S.A. 705; *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.*, [2000] Q.B. 451; *Mahe v. Alberta*, [1990] 1 S.C.R. 342; *Quebec (Education, Recreation and Sports) v. Nguyen*, 2009 SCC 47, [2009] 3 S.C.R. 208; *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66; *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42, [2013] 2 S.C.R. 774.

**Statutes and Regulations Cited**

*Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1.

*Alberta Act*, S.C. 1905, c. 3 (reprinted in R.S.C. 1985, App. II, No. 20), s. 17.

*Canadian Charter of Rights and Freedoms*, s. 23.

*Constitution Act, 1867*, ss. 93, 93A.

*Constitution Act, 1982*, s. 59.

*Constitution Amendment, 1997 (Quebec)*, SI/97-141, s. 1.

*Constitution Amendment, 1998 (Newfoundland Act)*, SI/98-25, s. 1(2).

*Education Act*, R.S.O. 1990, c. E.2, s. 293.

*Education Act*, R.S.Y. 2002, c. 61.

*Education Act, 1995*, S.S. 1995, c. E-0.2, s. 144.

*French First Language Instruction Regulations*, P.E.I. Reg. EC480/98, s. 10.

*French Language Instruction Regulation*, Y.O.I.C. 1996/99, ss. 2, 9.

*Languages Act*, R.S.Y. 2002, c. 133, s. 6.

*Manitoba Act, 1870*, S.C. 1870, c. 3 (reprinted in R.S.C. 1985, App. II, No. 8), s. 22.

*Northwest Territories Act*, S.C. 2014, c. 2 [as en. by the *Northwest Territories Devolution Act*, S.C. 2014, c. 2, s. 2], s. 18(1)(*o*).

*Nunavut Act*, S.C. 1993, c. 28, s. 23(1)(*m*).

*Public Schools Act*, R.S.M. 1987, c. P250, s. 21.15(5).

*Saskatchewan Act*, S.C. 1905, c. 42 (reprinted in R.S.C. 1985, App. II, No. 21), s. 17.

*School Act*, R.S.B.C. 1996, c. 412, s. 166.24.

*Yukon Act*, S.C. 2002, c. 7, s. 18(1)(*o*).

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Minow, Martha.“Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors” (1992), 33 *Wm. & Mary L. Rev*. 1201.

Webber, Jeremy. “The Limits to Judges’ Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger” (1984), 29 *McGill L.J.* 369.

APPEAL from a judgment of the Yukon Court of Appeal (Groberman, Bennett and MacKenzie JJ.A.), 2014 YKCA 4, 351 B.C.A.C. 216, 599 W.A.C. 216, [2014] Y.J. No. 6 (QL), 2014 CarswellYukon 10 (WL Can.), setting aside a decision of Ouellette J., 2011 YKSC 57, [2011] Y.J. no132 (QL), 2011 CarswellYukon 67 (WL Can.), and ordering a new trial. Appeal largely dismissed.

Roger J. F. Lepage, Francis P. Poulin and André Poulin-Denis, for the appellant.

François Baril, Maxime Faille and Mark Pindera, for the respondent.

Dominique A. Jobin, for the intervener the Attorney General of Quebec.

Karrie Wolfe, for the intervener the Attorney General of British Columbia.

Alan F. Jacobson and Barbara C. Mysko, for the intervener the Attorney General for Saskatchewan.

Guy Régimbald, for the intervener the Attorney General of the Northwest Territories.

Pascale Giguère and Mathew Croitoru, for the intervener the Commissioner of Official Languages of Canada.

Robert W. Grant, Q.C., Maxine Vincelette and David P. Taylor, for the interveners Conseil scolaire francophone de la Colombie-Britannique and Fédération des parents francophones de Colombie-Britannique.

Nicolas M. Rouleau and Sylvain Rouleau, for the intervener Fédération des parents francophones de l’Alberta.

Mark C. Power and *Justin Dubois*, for the interveners Fédération nationale des conseils scolaires francophones and Fédération des communautés francophones et acadienne du Canada.

The judgment of the Court was delivered by

1. Abella J. — After a trial involving claims by the Yukon Francophone School Board about minority language education rights, the trial judge found that the Yukon government had failed to comply with its obligations under s. 23 of the *Canadian Charter of Rights and Freedoms*. Based largely on the conduct of the trial judge, the Court of Appeal concluded that there was a reasonable apprehension of bias and ordered a new trial.That conduct is at the centre of this appeal.

Background

1. The Yukon Francophone School Board was established in 1996 and is the first and only school board in the Yukon. Public schools are generally administered directly by the Yukon government in consultation with school councils. Under the *Education Act*, R.S.Y. 2002, c. 61, school boards have considerably more authority than school councils. The Yukon Francophone School Board has responsibility for one school, École Émilie-Tremblay, a French-language school founded in 1984.
2. In 2009, the Board sued the Yukon government for what it claimed were deficiencies in the provision of minority language education. The trial took place in two phases. A number of incidents occurred during the trial which set the stage for the bias argument in the Court of Appeal. It is worth noting that, even during the course of the trial, the Yukon was concerned about bias and brought a recusal motion on the ground that certain comments and decisions by the trial judge, as well as his involvement in the francophone community in Alberta both before and during his time as a judge, gave rise to a reasonable apprehension of bias. The trial judge dismissed the motion, finding that many of the acts complained of by the Yukon were procedural in nature and involved decisions of a discretionary nature. He also concluded that his involvement in the francophone community created no reasonable apprehension of bias, observing that counsel for the Yukon did not raise the issue when the case was assigned nor at an earlier point in the proceedings.
3. The trial judge’s decision on the merits touched on a number of issues, only two of which remain relevant in this appeal. He concluded that the Yukon had failed to give the Board adequate management and control of French-language education in accordance with s. 23 of the *Charter* and the *Education Act*, and that the Board had the authority to determine which students would be admitted to the French school, including those not expressly contemplated by s. 23 of the *Charter*. He also ordered the Yukon to communicate with and provide services to the Board in French, in compliance with s. 6 of the *Languages Act*, R.S.Y. 2002, c. 133. The Yukon government appealed.
4. On appeal, the Court of Appeal noted that an apprehension of bias can arise either from what a judge says or does during a hearing, or from extrinsic evidence showing that the judge is likely to have strong predispositions preventing him or her from impartially considering the issues in the case. After reviewing the transcript and the trial judge’s written rulings, the Court of Appeal concluded that, based on a number of incidents as well as on the trial judge’s involvement in the francophone community, the threshold for a finding that there was a reasonable apprehension of bias had been met. It referred to a number of problematic occurrences during the trial.
5. The first related to an incident involving the confidentiality of student files. At one point during the trial, counsel for the Yukon, using information in student files, attempted to cross-examine a parent who testified that his children had transferred from the French school because it lacked special needs resources. Counsel for the Board objected, arguing in part that the files were confidential.
6. The trial judge heard general submissions on the issue and expressed concern that the Yukon may have breached its confidentiality obligations by sharing the files with its counsel. He indicated, however, that the issue was very important and that he would entertain additional arguments the following morning. The next morning, rather than invite further submissions, the trial judge instead immediately commenced the proceedings by ruling that, by sharing the files, the Yukon appeared to have violated the *Education Act* and the *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1. In the trial judge’s view, such conduct was [translation] “objectionable and reprehensible”.
7. After the ruling, counsel for the Yukon, who had intended to present further argument on the issue, reminded the trial judge that he had indicated the previous day that he would entertain additional submissions. The trial judge, however, refused to hear further argument, instead repeatedly asking counsel whether he had obtained consent to use the files. When counsel reminded the judge that both parties had disclosed many student records during the discovery process, the trial judge accused him of playing games.
8. In reviewing the incident, the Court of Appeal found that although there was no obvious explanation for the trial judge’s decision to start the proceedings before hearing from counsel with a ruling suggesting that the Yukon had breached its confidentiality obligations by sharing the files, this by itself did not necessarily reflect an animus against the Yukon and its counsel.But his reaction to counsel’s subsequent attempt to raise concerns and draw his attention to statutory provisions which had been overlooked, was more troubling. In the Court of Appeal’s view, “[i]t [did] not appear that the judge’s questions were genuinely directed at obtaining information; rather the impression left by the transcript is that the judge was, in effect, taunting counsel.”
9. Similarly, when another issue involving the confidentiality of student files arose again later in the trial, the Court of Appeal found that the trial judge’s criticism that counsel’s submissions lacked conviction and sincerity, was not justified. It was also concerned more generally that the trial judge’s treatment of counsel “with a lack of respect on many occasions during the trial” contributed to the conclusion that there was a reasonable apprehension of bias.
10. In another rebuke, the Court of Appeal was of the view that the trial judge’s treatment of the Yukon’s request to submit affidavit evidence from one of its witnesses was unwarranted. The Yukon anticipated calling Gordon DeBruyn, an employee with the Department of Education, to testify at the trial. Mr. DeBruyn, however, suffered a stroke just before the trial was to begin. The trial judge refused to grant the Yukon an adjournment, deciding instead to divide the trial into two phases, with the issues related to Mr. DeBruyn’s anticipated evidence deferred to the second phase.
11. Shortly after the second phase of the trial began, counsel for the Yukon told the trial judge that he would be seeking to submit the evidence of Mr. DeBruyn by affidavit because he had not yet fully recovered from his stroke. A letter from a speech pathologist confirmed that Mr. DeBruyn continued to experience mild residual aphasia and that being confronted with questions during cross-examination could cause stress that would exacerbate his communication difficulties.
12. Criticizing counsel for not having determined the witness’s condition earlier, the trial judge saw no basis for granting the request based on the letter from the speech pathologist. He noted that Mr. DeBruyn had returned to work and was present in the courtroom, and questioned whether he was, in fact, a necessary witness. While he told counsel that he could still bring the application, he also warned him that it could be viewed as an attempt to cause a delay in the proceedings which could result in an order for costs against him personally. Counsel accordingly decided not to make the application and Mr. DeBruyn did not testify. In describing the situation in his subsequent costs ruling, the trial judge found that the incident amounted to bad faith on the Yukon’s part.
13. The Court of Appeal disagreed. It found that there was no basis for concluding that Mr. DeBruyn was not an important witness or, given Mr. DeBruyn’s ongoing recovery from his stroke, for criticizing counsel for waiting until the beginning of the second phase before indicating that he would be seeking to submit affidavit evidence. In accusing counsel of engaging in delaying tactics and threatening him with a personal order for costs, the trial judge’s conduct was suggestive of bias.
14. Moreover, the Court of Appeal found the trial judge’s refusal to allow the Yukon to file reply costs submissions and his procedure for awarding costs to be “grossly unfair”. After the release of his reasons on the merits, the trial judge gave each party 14 days to make costs submissions, to be submitted at the same time. When the Yukon got the Board’s submissions, it asked the trial judge if it could file a reply because the Board sought not only solicitor-client costs, but, in addition, [translation] “punitive costs” and costs retroactive to 2002. The trial judge refused the request to make further submissions, instead asking the government provide him with [translation] “the details of and schedule for the concessions [the Yukon] will still make to the [Board]”. Based in part on his view that the evidence demonstrated bad faith and numerous breaches of s. 23 of the *Charter*, the trial judge awarded the Board $969,190 in costs on a solicitor-client basis as well as an additional “lump sum” of $484,595 (50% of the solicitor-client costs).
15. The Court of Appeal set aside the costs order. Acknowledging that a reasonable apprehension of bias with respect to the costs proceeding did not necessarily amount to a reasonable apprehension of bias at trial, it was nonetheless of the view that the Yukon should have been given the opportunity to reply because it could not reasonably have anticipated the unusually expansive costs claim advanced by the Board.
16. As for the Yukon’s bias argument about the trial judge’s involvement in the francophone community in Alberta, the Court of Appeal concluded that the trial judge’s background *before* becoming a judge did not raise a reasonable apprehension of bias:

The fact that the judge in this case had experience in the provision of minority language education was, in fact, a positive attribute. He was able to approach the issues with important insights gained from his experience. [para. 181]

1. On the other hand, the Court of Appeal found his involvement as a governor of the Fondation franco-albertaine while he was a judge on this caseto be inappropriate. The Fondation franco-albertaine promoted a particular vision of the francophone community which, according to the Court of Appeal, would “clearly align it with some of the positions taken by the [Board] in this case”. If the trial judge wanted to remain involved in the Fondation franco-albertaine, he had to refrain from sitting on cases such as the one under appeal. While there was nothing in the record suggesting that the Yukon knew or ought to have known about the judge’s background, in the Court of Appeal’s view, parties are not expected to research a judge’s history and are entitled to assume that the judge will disclose anything of relevant concern about his or her background.
2. Ultimately, the Court of Appeal concluded that the trial judge’s conduct during the trial and his association with the Fondation franco-albertaine gave rise to a reasonable apprehension of bias. A new trial was therefore ordered on most issues. The Court of Appeal, however, did not send back all the legal issues, making determinations about two of them which were appealed to this Court. First, it held that the trial judge erred in interpreting s. 23 of the *Charter* to give the Board the unilateral right to set admission criteria so as to include students who are not covered by s. 23. Second, it concluded that the trial judge erred in ordering all of the Yukon’s communications with the Board to be in French since, in its view, the s. 6 *Languages Act* claims were not appropriately part of the litigation.

Analysis

1. The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:

. . . what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted.]

(*Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, per deGrandpré J. (dissenting))

1. This test — what would a reasonable, informed person think — has consistently been endorsed and clarified by this Court: e.g., *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, at para. 60; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at para. 199; *Miglin v. Miglin*, [2003] 1 S.C.R. 303, at para. 26; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 46; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 11, perMajor J., at para. 31, per L’Heureux-Dubé and McLachlin JJ., at para. 111, per Cory J.; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, at para. 45; *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 143; *Valente v.* *The Queen*, [1985] 2 S.C.R. 673, at p. 684.
2. The objective of the test is to ensure not only the reality, but the *appearance* of a fair adjudicative process. The issue of bias is thus inextricably linked to the need for impartiality. In *Valente*, Le Dain J. connected the dots from an absence of bias to impartiality, concluding“[i]mpartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case” and “connotes absence of bias, actual or perceived”: p. 685. Impartiality and the absence of the bias have developed as both legal and ethical requirements. Judges are required — and expected — to approach every case with impartiality and an open mind: see *S. (R.D.)*, at para. 49, per L’Heureux-Dubé and McLachlin JJ.
3. In *Wewaykum*, this Court confirmed the requirement of impartial adjudication for maintaining public confidence in the ability of a judge to be genuinely open:

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

The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. [Emphasis added; paras. 57-58.]

1. Or, as Jeremy Webber observed, “impartiality is a cardinal virtue in a judge. For adjudication to be accepted, litigants must have confidence that the judge is not influenced by irrelevant considerations to favour one side or the other”: “The Limits to Judges’ Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger” (1984), 29 *McGill L.J.* 369, at p. 389.
2. Because there is a strong presumption of judicial impartiality that is not easily displaced (*Cojocaru v. British Columbia Women’s Hospital and Health Centre*, [2013] 2 S.C.R. 357, at para. 22), the test for a reasonable apprehension of bias requires a “real likelihood or probability of bias” and that a judge’s individual comments during a trial not be seen in isolation: see *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851, at para. 2; *S. (R.D.)*, at para. 134, per Cory J.
3. The inquiry into whether a decision-maker’s conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific, and there is a correspondingly high burden of proving the claim on the party alleging bias: see *Wewaykum*, at para. 77; *S. (R.D.)*, at para. 114, per Cory J. As Cory J. observed in *S. (R.D.)*:

. . . allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding. [Emphasis added; para. 141.]

1. That said, this Court has recognized that a trial judge’s conduct, and particularly his or her interventions, can rebut the presumption of impartiality. In *Brouillard v. The Queen*, [1985] 1 S.C.R. 39, for example, the trial judge had asked a defence witness almost sixty questions and interrupted her more than ten times during her testimony. He also asked the accused more questions than both counsel, interrupted him dozens of times, and subjected him and another witness to repeated sarcasm. Lamer J. noted that a judge’s interventions by themselves are not necessarily reflective of bias. On the contrary,

it is clear that judges are no longer required to be as passive as they once were; to be what I call sphinx judges. We now not only accept that a judge may intervene in the adversarial debate, but also believe that it is sometimes essential for him to do so for justice in fact to be done. Thus a judge may and sometimes must ask witnesses questions, interrupt them in their testimony and if necessary call them to order. [p. 44]

1. On the other hand, Lamer J. endorsed and applied the following cautionary comments of Lord Denning in *Jones v.* *National Coal Board*, [1957] 2 All E.R. 155 (C.A.):

Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been. In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large . . . . [p. 159]

(See also *Take and Save Trading CC v. Standard Bank of SA Ltd.*, 2004 (4) S.A. 1 (S.C.A.), at para. 4.)

1. Although Lamer J. was not convinced that the trial judge was actually biased, there was enough doubt in his mind to conclude that a new trial was warranted in the circumstances of the case.
2. In *Miglin*, another case where the allegation of bias arose because of the trial judge’s interventions, this Court agreed with the Court of Appeal for Ontario that while many of the trial judge’s interventions were unfortunate and reflected impatience with one of the witnesses, the high threshold necessary to establish a reasonable apprehension of bias had not been met. The Court of Appeal observed:

The principle [that the grounds for an apprehension of bias must be substantial] was adopted and amplified in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, . . . to reflect the overriding principle that the judge’s words and conduct must demonstrate to a reasonable and informed person that he or she is open to the evidence and arguments presented. The threshold for bias is a high one because the integrity of the administration of justice presumes fairness, impartiality and integrity in the performance of the judicial role, a presumption that can only be rebutted by evidence of an unfair trial. Where, however, the presumption is so rebutted, the integrity of the justice system demands a new trial.

The assessment of judicial bias is a difficult one. It requires a careful and thorough review of the proceedings, since the cumulative effect of the alleged improprieties is more relevant than any single transgression . . . . [Citations omitted; (2001), 53 O.R. (3d) 641, at paras. 29-30.]

1. As for how to assess the impact of a judge’s identity, experiences and affiliations on a perception of bias, Cory J.’s comments in *S. (R.D.)* helpfully set the stage:

Regardless of their background, gender, ethnic origin or race, all judges owe a fundamental duty to the community to render impartial decisions and to appear impartial. It follows that judges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was predetermined or that a question was decided on the basis of stereotypical assumptions or generalizations. [para. 120]

1. But it is also important to remember the words of L’Heureux-Dubé and McLachlin JJ. in *S. (R.D.)*, where they compellingly explained the intersecting relationship between a judge’s background and the judicial role:

. . . judges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.

It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function. [paras. 38-39]

1. Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge’s identity and experiences not close his or her mind to the evidence and issues. There is, in other words, a crucial difference between an open mind and empty one. Bora Laskin noted that the strength of the common law lies in part in the fact that

the judges who administer it represent in themselves and in their work a mix of attitudes and a mix of opinions about the world in which they live and about the society in which they carry on their judicial duties. It is salutary that this is so, and eminently desirable that it should continue to be so.

(“The Common Law is Alive and Well — And, Well?” (1975), 9 *L. Soc’y Gaz.* 92, at p. 99)

1. The reasonable apprehension of bias test recognizes that while judges “must strive for impartiality”, they are not required to abandon who they are or what they know: *S. (R.D.)*, at para. 29, per L’Heureux-Dubé and McLachlin JJ.; see also *S. (R.D.)*, at para. 119, per Cory J. A judge’s identity and experiences are an important part of who he or she is, and neither neutrality nor impartiality is inherently compromised by them. Justice is the aspirational application of law to life. Judges should be encouraged to experience, learn and understand “life” — their own and those whose lives reflect different realities. As Martha Minow elegantly noted, the ability to be open-minded is enhanced by such knowledge and understanding:

None of us can know anything except by building upon, challenging, responding to what we already have known, what we see from where we stand. But we can insist on seeing what we are used to seeing, or else we can try to see something new and fresh. The latter is the open mind we hope for from those who judge, but not the mind as a sieve without prior reference points and commitments. We want judges and juries to be objective about the facts and the questions of guilt and innocence but committed to building upon what they already know about the world, human beings, and each person’s own implication in the lives of others. Pretending not to know risks leaving unexamined the very assumptions that deserve reconsideration.

(“Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors” (1992), 33 *Wm. & Mary L. Rev.* 1201, at p. 1217)

1. This recognition was reinforced by Cameron A.J. of the Constitutional Court of South Africa in *South African Commercial Catering and Allied Workers Union v. Irvin & Johnson Ltd. (Seafoods Division Fish Processing)*, 2000 (3) S.A. 705:

. . . “absolute neutrality” is something of a chimera in the judicial context. This is because Judges are human. They are unavoidably the product of their own life experiences and the perspective thus derived inevitably and distinctively informs each Judge’s performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality . . . . Impartiality is that quality of open-minded readiness to persuasion — without unfitting adherence to either party or to the Judge’s own predilections, preconceptions and personal views — that is the keystone of a civilised system of adjudication. Impartiality requires, in short, “a mind open to persuasion by the evidence and the submissions of counsel”; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding. [Citations omitted; para. 13.]

1. Impartiality thus demands not that a judge discount or disregard his or her life experiences or identity, but that he or she approach each case with an open mind, free from inappropriate and undue assumptions.It requires judges “to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies”: Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991), at p. 12. As Aharon Barak has observed:

The judge must be capable of looking at himself from the outside and of analyzing, criticizing, and controlling himself. . . .

The judge is a product of his times, living in and shaped by a given society in a given era. The purpose of objectivity is not to sever the judge from his environment [or] to rid a judge of his past, his education, his experience, his belief, or his values. Its purpose is to encourage the judge to make use of all of these personal characteristics to reflect the fundamental values of the society as faithfully as possible. A person who is appointed as a judge is neither required nor able to change his skin. The judge must develop sensitivity to the dignity of his office and to the restraints that it imposes. [Footnote omitted.]

(*The Judge in a Democracy* (2006), at pp. 103-4)

1. But whether dealing with judicial conduct in the course of a proceeding or with “extra-judicial” issues like a judge’s identity, experiences or affiliations, the test remains

whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge’s conduct gives rise to a reasonable apprehension of bias . . . . [T]he assessment is difficult and requires a careful and thorough examination of the proceeding. The record must be considered in its entirety to determine the cumulative effect of any transgressions or improprieties. [Citations omitted; *Miglin*, at para. 26.]

1. Applying this test to the trial judge’s conduct throughout the proceedings, I agree with the Court of Appeal that the threshold for a finding of a reasonable apprehension of bias has been met.
2. As noted, the Court of Appealidentified several incidents which, when viewed in the circumstances of the entire trial, lead inexorably to this conclusion. The first was the trial judge’s conduct during the incident relating to the confidentiality of student files. When a parent testified that two of his children had left the school as a result of the school’s lack of resources for addressing special needs, counsel for the Yukon attempted to cross-examine the parent based on information in the children’s school files. Counsel for the Board objected, primarily on the grounds that the files were confidential, leading the trial judge to express concern that the Yukon may have breached the students’ confidentiality rights by sharing the information with its counsel:

[translation]

THE COURT: My concern and my more direct point, I’ll say it again, is the basic fact that you may have taken improper advantage of having obtained confidential documents without the witness’s permission.

1. Both parties had already made extensive use of information from student files. The trial judge, after hearing some argument after the confidentiality issue was raised, said that he would await further argument the following morning because he thought the issue was a very serious one:

[translation]

THE COURT: . . . However, I believe you are -- I’ll wait for the, for further argument tomorrow morning about the access your client gave to confidential documents. I think there’s a much more fundamental issue involved here, namely whether you should have. And then, since you’ve done it, what are the consequences? If it’s something your client did that it shouldn’t have done. And so with that, we’ll start again tomorrow morning.

1. The next morning, and before any argument, the trial judge ruled that the Yukon appeared to have violated the *Education Act* and the *Access to Information and Protection of Privacy Act*, characterizing its behaviour as [translation] “objectionable and reprehensible”. Immediately after the unexpected ruling, counsel for the Yukon asked to make further submissions:

[translation]

MR. FAILLE: Before, before the witness is recalled, I’d like to make submissions, Your Honour, if I may.

THE COURT: About what?

MR. FAILLE: About what you just said, Your Honour.

THE COURT: No.

MR. FAILLE: I would’ve liked to be able to make submissions before you could make the decision you just made, because, with all due respect, we believe that, that there’s no legal basis for it and, and I -- I had assumed that this morning we’d be able to make submissions about this. That was what I’d understood from what you said yesterday afternoon.

1. When counsel for the Yukon tried to draw the trial judge’s attention to certain provisions of the *Education Act* and the *Access to Information and Protection of Privacy Act* in support of his position, the trial judge asked counsel if he had obtained consent to use the files and refused to hear additional arguments:

[translation]

MR. FAILLE: . . . We’ve done legal research into this. We’re perfectly familiar with the provisions of section 20 of the *Education Act*. We’re also familiar with the provisions of the *Access to Information Act*, section 2 of which provides:

This act does not limit the information available by law to a party to a proceeding in court or before an adjudicative body.

THE COURT: I have a question.

MR. FAILLE: Yes.

THE COURT: Did you or your client, did you obtain the permission required by section 20, subsection 3, of the *Education Act*?

MR. FAILLE: We’re saying, Your Honour, that permission --

THE COURT: Yes or no.

MR. FAILLE: Your Honour, we believe --

THE COURT: The answer is no?

MR. FAILLE: Your Honour, the answer is that permission is implied, that confidentiality is waived. We know very well that the information is confidential and, if I may, Your Honour, I’d like to make submissions on this point.

THE COURT: No. I’ve made my ruling, and if you don’t want to give a direct answer about whether you obtained permission from the parents, from either of them, or from [the older child], as he seems to be 17 years old now, for the children’s student records to be used in -- not for the purposes contemplated in the section but for the trial, I don’t need to hear any other submissions.

1. When counsel for the Yukon suggested that the Board may have breached its confidentiality obligations as well, the trial judge acknowledged this possibility and then accused counsel of playing games:

[translation]

MR. FAILLE: In that case, Your Honour, if I may, Ms. Taillefer, in the context of this case, gave us 170 student registration forms, which are also -- part of the student record. With the name of the physician of each student registered at École Émilie-Tremblay, the health insurance number, medical information about each student. That is what was given to us by the plaintiff in the context of this case without the parents’ written permission. Is the plaintiff also guilty under section 20?

THE COURT: Maybe. Maybe.

MR. FAILLE: I think maybe so, in fact, because there was no reason to do so. We did so because we didn’t raise the question of confidentiality. The first person to raise questions of confidentiality about medical information, dealing with [the two children], was the witness. It wasn’t us, and we believe we’re entitled to defend ourselves against the allegations that have been made against us, and the law on this is clear. That when the question of medical questions is raised, that the opposing party is entitled to, that the, the right to confidentiality is implicitly waived as a result. I would’ve made submissions on this point, but you say, Your Honour, that you are -- that you don’t want to allow it, but before you find the defendant’s conduct improper, I would like to file in evidence the 170 student registration forms sent to the defendant by Ms. Taillefer, clearly in violation of section 20 of the Act. Unless it’s decided instead that, in the context of this case, there’s information that’s going, that’ll be shared.

THE COURT: It seems to me that a little game is being played here.

MR. FAILLE: It’s not a game, Your Honour. It’s not a game.

1. The Court of Appeal criticized the trial judge for telling counsel he would entertain additional arguments on the matter the next day, yet starting the proceedings with his ruling without giving the parties any opportunity to present further argument. While this by itself is unwise, his refusal to hear the Yukon’s arguments *after* his ruling, and his reaction to counsel, were more disturbing.Viewed in the context of the entire record, the Court of Appeal properly concluded that the trial judge’s conduct was troubling and problematic.
2. The Court of Appeal also held that the trial judge’s conduct was improper in connection with the Yukon’s request to submit affidavit evidence from Mr. DeBruyn, the witness who had suffered a stroke. When counsel for the Yukon advised the trial judge early in the second phase of the trial that he intended to bring an application to have the evidence admitted by affidavit but had not yet completed the supporting documentation, the trial judge asked to see the letter circulating among the lawyers from a speech pathologist explaining Mr. DeBruyn’s condition. The letter stated in part:

Although Mr. DeBruyn has recovered extremely well, he continues to experience mild residual aphasia. Aphasia is a language difficulty that can affect a person’s understanding of spoken and/or written language as well as verbal and/or written expression. Mr. DeBruyn continues to make paraphasic speech errors occasionally; that is, he sometimes uses an unintended word related in meaning or form to the intended word.

Feeling stressed or nervous and being presented with questions verbally in a courtroom situation may exacerbate Mr. DeBruyn’s communication difficulties during his cross examination. He may hence make aphasic speaking errors. Therefore, it is recommended that Mr. DeBruyn be given questions in writing instead of being questioned in a courtroom. It would also be helpful, if Mr. DeBruyn could write down his responses and review them several times before being asked to submit his answers. This will allow him to confirm their accuracy and correct any potential language errors.

1. After reviewing the letter and asking counsel about the process for communicating information to include in the affidavit, the trial judge questioned whether Mr. DeBruyn was even a necessary witness. When counsel for the Yukon explained that Mr. DeBruyn was in charge of education facilities and could testify about how decisions concerning the school’s facilities were made, including the Board’s role in such decisions, the trial judge continued to express skepticism about the necessity of having Mr. DeBruyn testify:

[translation]

THE COURT: So you’re telling me, as an officer of the court, that Mr. DeBruyn is the only person at the Department of Education who has knowledge of this information?

MR. FAILLE: I think I’ve told you, Your Honour, to the best of my knowledge and as an officer of the court, what the information is, what sharing there is, what the responsibility is for the information. I did say that Mr. DeBruyn was, as far as I know, the primary person involved, that he wasn’t the only person involved. So it’s a matter of knowing what -- will it be helpful for the Court to receive that information without it being the only information? We also intended to call Mr. Callas anyway to add to Mr. DeBruyn’s evidence and also so Mr. Lepage could cross-examine a witness on that question.

1. The trial judge then noted that in seeking an adjournment at the beginning of the trial, counsel had stated that Mr. DeBruyn was not only an essential witness in the trial itself, he was a necessary advisor to the government during the proceedings. When counsel told the trial judge that Mr. DeBruyn was in the courtroom and advising him, the trial judge expressed surprise that counsel had not informed him of Mr. DeBruyn’s presence.
2. The trial judge then returned to the letter and asked counsel about the other steps he had taken earlier to ascertain Mr. DeBruyn’s medical condition and ability to testify:

[translation]

THE COURT: . . . So this letter is dated January 17, 2011. It had been known since May, or at least the end of June, that we were coming back here on January 17. What other steps were taken before that date, the first day of the trial, to obtain reports concerning Mr. DeBruyn’s ability or inability to testify?

MR. FAILLE: No other steps were taken, Your Honour. We wanted to wait and see what his state of health was. And at that time, if it turned out that he wasn’t able to testify, to bring the motion that -- that we’ve said we might bring.

THE COURT: You didn’t make any preparations to find out which witnesses you’d have to call, knowing that he was the main witness, before January 17, the first day of this trial? To find out whether he could testify?

MR. FAILLE: Well, it’s that we were expecting it to be, to be Mr. DeBruyn, if he was able to testify. Or, of course, if he couldn’t, that we’d sort it out and that it would be Mr. Chic Callas or a combination of the two.

THE COURT: Knowing that this witness is an essential witness, you didn’t even take steps to find out whether he could testify to avoid the problem we have now, and the waste of time we have now, before January 17, the first day of the trial? That’s what you’re telling me?

MR. FAILLE: No. I took -- we took steps before the trial, but it wasn’t until after getting the information we got about his state of health that we then asked, that we said, well, we’ll have to get the medical report. If we want Mr. DeBruyn to testify by affidavit, then obviously we need supporting evidence, so we requested it and we took the steps. So during the two weeks before the trial, I’d say.

THE COURT: If you wanted to make a motion to have him testify by affidavit, don’t you think it would’ve been more appropriate to make that application before the trial started?

MR. FAILLE: No, Your Honour, it didn’t occur to me. And as you may know, Mr. Lepage and I were very involved in another case until mid-December, and we then returned to Yellowknife and came directly from Yellowknife to Whitehorse. But I --

THE COURT: Are there three of you I see at the table as counsel for the government? I wonder whether Mr. DeBruyn’s condition was better in October or September, when it was known that there was a trial date in January, that is, whether he was going to testify?

MR. FAILLE: I don’t know, Your Honour, but I would have -- in my mind, it was necessary to wait, in fact, to find out what his state of health was at the time of the trial, not a few months before, since his health -- obviously, his state of health has changed a lot in the past few months.

1. The trial judge asked about Mr. DeBruyn’s return to work and then heard submissions from the Board’s counsel. He concluded the discussion by noting that the speech pathologist’s letter did not suggest that Mr. DeBruyn was incapable of testifying, only that he could experience difficulties in expressing himself on cross-examination. He proceeded to tell counsel for the Yukon that he could still make the application, but warned him that he could be ordered to pay costs personally:

[translation]

THE COURT: . . . So I -- if you still want to make your motion, you can. But at some point, my dear colleague, you’re going to realize that, if someone tries to delay proceedings with letters saying that a person can testify, then that maybe they’ll have problems on cross-examination, that that kind of motion could be seen as obstruction and quite simply to cause delays. And maybe it won’t even be -- and sometimes this is dealt with through costs. And sometimes, if it’s obviously an act, not necessarily of the client, but of counsel, costs might awarded be against counsel.

1. Counsel decided not to submit the evidence by affidavit and Mr. DeBruyn did not testify. In his costs ruling, the trial judge, in a part of the judgment entitled “Bad faith — at trial”, suggested that the incident amounted to bad faith on the part of the government, stating:

It seemed that Mr. DeBruyn was able to testify. He had been back at work since the fall of 2010 and the Speech-Language Pathologist’s letter simply indicated that he “may” have difficulty expressing himself in “cross-examination”. However, the Court gave counsel for the [Yukon] the opportunity to bring his application . . . . It is interesting to note that the [Yukon] presented Mr. Charles George Callas as a witness in place of Mr. DeBruyn, as suggested by the [Board] in May 2010. Indeed, Mr. Callas and Mr. DeBruyn shared the responsibility for 29 school buildings. The Court finds that Mr. DeBruyn’s testimony was neither essential nor unique. In fact, the [Yukon] relied on Mr. Callas’ evidence. Putting over part of the trial resulted in a much longer trial and the Court was required to render a decision on an interim injunction application presented at the end of the first part of the trial.

1. In analyzing this incident, the Court of Appeal, reasonably in my view, concluded that the trial judge’s treatment of the matter was inappropriate. There was no basis for accusing counsel of trying to delay the trial, criticizing him for waiting to make the application, or threatening him with an order for costs. When viewed in the context of the rest of the trial, this incident provides further support for a finding of a reasonable apprehension of bias.
2. Moreover, the Court of Appeal was rightly troubled by the trial judge’s disparaging remarks directed at counsel for the Yukon on several other occasions, which it found to be disrespectful. On one occasion, for example, the trial judge, in chastising counsel, accused him of making submissions that [translation] “lack[ed] conviction and/or sincerity”. The Court of Appeal noted that there were several other occasions during the trial where the trial judge was discourteous towards counsel without apparent reason.
3. In addition, the trial judge’s refusal to allow the Yukon to file a reply on costs is highly problematic in the overall context of the trial. The Court of Appeal concluded that there were sufficient other indicia of a reasonable apprehension of bias in respect of the trial, so it was unnecessary to determine whether the trial judge’s conduct with regard to the costs proceedings could also support the finding of bias at trial. But in my view some comment on the costs proceedings in this case is warranted. The trial judge’s refusal to allow the Yukon to file a reply factum, particularly in light of the fact that it could not have known the quantum of costs sought by the Board at the time it filed its factum, is questionable, made more so by his decision to award a [translation] “lump sum” payment to the Board, in addition to solicitor-client costs going back to 2002.
4. Appellate courts are rightfully reluctant to intervene on the grounds that a trial judge’s conduct crossed the line from permissibly managing the trial to improperly interfering with the case. Reprimands of counsel, for example, may well be appropriate to ensure that proceedings occur in an orderly and efficient manner and that the court’s process is not abused. But as the Canadian Judicial Council’s *Ethical Principles for Judges* (1998) suggest:

Unjustified reprimands of counsel, insulting and improper remarks about litigants and witnesses, statements evidencing prejudgment and intemperate and impatient behaviour may destroy the appearance of impartiality. . . . A fine balance is to be drawn by judges who are expected both to conduct the process effectively and avoid creating in the mind of a reasonable, fair minded and informed person any impression of a lack of impartiality. [Emphasis added; p. 32.]

1. While the threshold for a reasonable apprehension of bias is high, in my respectful view, the “fine balance”was inappropriately tipped in this case. The trial judge’s actions in relation to the confidentiality of student files, the request to have Mr. DeBruyn testify by affidavit, the disparaging remarks, and the unusual costs award and procedure, taken together and viewed in their context, would lead a reasonable and informed person to see the trial judge’s conduct as giving rise to a reasonable apprehension of bias.
2. That said, I respectfully part company with the Court of Appeal when it concluded that the trial judge’s current service as a governor of the Fondation franco-albertaine substantially contributed to a reasonable apprehension of bias. The trial judge had been appointed to the Alberta Court of Queen’s Bench in 2002 and the Supreme Court of Yukon in 2005. Before being appointed to the bench, the trial judge played a key role in the creation of École du Sommet in St. Paul, Alberta and served as a school trustee on the Conseil scolaire Centre-Est de l’Alberta from 1994 until 1998. From 1999 to 2001, he served as a member of the executive of the Association canadienne-française de l’Alberta, an organization that lobbies on behalf of and promotes the francophone community in Alberta. He was a governor of the Fondation franco-albertaine while he was a judge.Its “mission” is to [translation] “[e]stablish charitable activities to enhance the vitality of Alberta’s francophone community”, and its “vision” is for “[a] francophone community in Alberta that is autonomous, dynamic and valued”. It is this latter affiliation that triggered the Court of Appeal’s admonition.
3. While the Court of Appeal acknowledged that the Fondation franco-albertaine was not directly involved with the community whose rights were being determined in the litigation and had no affiliation with any organization implicated in the trial, it concluded that

[t]he parallels between the situations of s. 23 rights-holders in Alberta and those in Yukon are direct and obvious. Further, the expressed visions of the [Fondation franco-albertaine] would clearly align it with some of the positions taken by the [Board] in this case. We are unable, therefore, to accept that the judge’s position as governor of the [Fondation franco-albertaine] was innocuous. [para. 199]

1. It also acknowledged, however, that the Fondation franco-albertaine “appears to be largely a philanthropic organization rather than a political group”, and that its goals are primarily charitable, not partisan. Nevertheless, it was of the view that

the organization’s mission statement and philosophy shows that it has a particular vision of the francophone community. In continuing to be a governor of the organization, the judge was, in effect, publicly declaring his support for that vision. [para. 193]

1. While I fully acknowledge the importance of judges avoiding affiliations with certain organizations, such as advocacy or political groups, judges should not be required to immunize themselves from participation in community service where there is little likelihood of potential conflicts of interest. Judges, as Benjamin Cardozo said, do not stand on “chill and distant heights”: *The Nature of the Judicial Process* (1921), at p. 168. They should not and *cannot* be expected to leave their identities at the courtroom door. What they *can* be expected to do, however, is remain, in fact and in appearance, open in spite of them.I find the following observations by Lord Bingham of Cornhill C.J., Lord Woolf M.R. and Sir Richard Scott V.-C. in *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.*, [2000] Q.B. 451 (C.A.), to provide a persuasive instructional template on how to view the relationship between a judge’s identity, organizational affiliation, and impartiality:

We cannot . . . conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge’s social or educational or service or employment background or history, nor that of any member of the judge’s family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers . . . . By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person’s evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind . . . ; or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. [Citations omitted; para. 25.]

(See also *S. (R.D.)*, at paras. 38-39, per L’Heureux-Dubé and McLachlin JJ.)

1. The *Ethical Principles for Judges* provide guidance to federally appointed judges.They advise that while judges should clearly exercise common sense about joining organizations, they are not prohibited from continuing to serve their communities outside their judicial role:

A judge is appointed to serve the public. Many persons appointed to the bench have been and wish to continue to be active in other forms of public service. This is good for the community and for the judge, but carries certain risks. For that reason, it is important to address the question of the limits that judicial appointment places upon the judge’s community activities.

The judge administers the law on behalf of the community and therefore unnecessary isolation from the community does not promote wise or just judgments. The Right Honourable Gerald Fauteux put the matter succinctly and eloquently in *Le livre du magistrat* (translation):

[there is no intention] to place the judiciary in an ivory tower and to require it to cut off all relationship with organizations which serve society. Judges are not expected to live on the fringe of society of which they are an important part. To do so would be contrary to the effective exercise of judicial power which requires exactly the opposite approach.

The precise constraints under which judges should conduct themselves as regards civic and charitable activity are controversial inside and outside the judiciary. This is not surprising given that the question involves balancing competing considerations. On one hand, there are the beneficial aspects, both for the community and the judiciary, of the judge being active in other forms of public service. This needs to be assessed in light of the expectations and circumstances of the particular community. On the other hand, the judge’s involvement may, in some cases, jeopardize the perception of impartiality or lead to an undue number of recusals. If this is the case, the judge should . . . avoid the activity. [Citations omitted.]

(*Ethical Principles for Judges*, at p. 33)

1. Membership in an association affiliated with the interests of a particular race, nationality, religion, or language is not, without more, a basis for concluding that a perception of bias can reasonably be said to arise. We expect a degree of mature judgment on the part of an informed public which recognizes that not everything a judge does or joins predetermines how he or she will judge a case. Canada has devoted a great deal of effort to creating a more diverse bench. That very diversity should not operate as a presumption that a judge’s identity closes the judicial mind.
2. In this case, the Court of Appeal found that the trial judge’s involvement as a governor of the Fondation franco-albertaine was problematic. There is, however, little in the record about the organization. In particular, it is difficult to see how, based on the evidence, one could conclude that its vision “would clearly align” with certain positions taken by the Board in this case or that the trial judge’s involvement in the organization foreclosed his ability to approach this case with an open mind. Standing alone, vague statements about the organization’s mission and vision do not displace the presumption of impartiality. While I agree that consideration of the trial judge’s current role as a governor of the organization was a valid part of the contextual bias inquiry in this case, I am not persuaded that his involvement with an organization whose functions are largely undefined on the evidence, can be said to rise to the level of a contributing factor such that the judge, as the Court of Appeal said, “should not have sat on [this case]” (at para. 200).
3. This brings us to the two legal issues which were appealed to this Court and which the Court of Appeal did not send back for a new trial. The first is whether the Board can unilaterally decide whom to admit to the French school.
4. The admission criteria to the French school in the Yukon are set out in the *French Language Instruction Regulation*, Y.O.I.C. 1996/99. The *Regulation* states that only “eligible students” are entitled to receive French-language instruction at a school in the Yukon: s. 9. “[E]ligible student” is defined in the *Regulation* to mean:

. . . a student whose parent or parents are citizens of Canada who have the right under section 23 of the Charter to have their children educated in the French language and include those students whose parents or siblings would have the right under section 23 if they were citizens of Canada or if the instruction referred to in section 23 was not limited to Canada; [s. 2]

1. Notwithstanding the *Regulation*, from the time of the Board’s creation in 1996 until the trial, the Board had decided which students could be admitted to its school, whether or not they were the children of s. 23 rights holders. On the first day of the trial, however, the Yukon sent a letter to the Board’s president notifying him of its intention henceforth to enforce the *Regulation*:

[translation] . . . [the] *Regulation* specifies the eligibility requirements for students in Education Area #23. The *Regulation* also states that residents must file a declaration with the Yukon Francophone School Board so the Minister of Education can make the final determination on the eligibility of a citizen to be a resident of Education Area #23. . . .

This is an important step . . . . That is why I am asking you to ensure that the Department of Education receives . . . the declarations filed with the Board for all students registered at École Émilie-Tremblay.

1. The issue, therefore, is whether s. 23 grants the Board the unilateral power to admit students other than those who are “eligible” according to the *Regulation*. This raises questions about the allocation of constitutional powers.
2. Section 23 of the *Charter* establishes the general framework for the minority language educational rights of Canadian citizens: *Mahe v. Alberta*, [1990] 1 S.C.R. 342; see also *Quebec (Education, Recreation and Sports) v. Nguyen*, [2009] 3 S.C.R. 208, at para. 23; *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 82; and *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R. 201, at paras. 5-10. Where numbers warrant, ss. 23(1) and 23(2) give certain Canadian citizens the right to have their children receive education in a province or territory’s minority language at the government’s expense.[[1]](#footnote-1)
3. That said, this Court recently reaffirmed that while “the *Charter* reflects the importance of language rights, it also reflects the importance of respect for the constitutional powers of the provinces”: *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2013] 2 S.C.R. 774, at para. 56. Pursuant to s. 93 of the *Constitution Act, 1867*, provincial legislatures have authority to make laws in relation to education.[[2]](#footnote-2) Federalism remains a notable feature in matters of minority language rights. As this Court stated in *Solski*, a case upholding Quebec legislation requiring a student to have received the “major part” of his or her education in English in order to qualify for access to publicly funded English-language schools:

As education falls within the purview of provincial power, each province has a legitimate interest in the provision and regulation of minority language education . . . .

. . .

. . . The latitude given to the provincial government in drafting legislation regarding education must be broad enough to ensure the protection of the French language while satisfying the purposes of s. 23. As noted by Lamer C.J. in *Reference re Public Schools Act (Man.)*, at p. 851, “different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province”. [Citation omitted; paras. 10 and 34.]

1. There is no doubt that a province or territory can delegate the function of setting admission criteria for children of non-rights holders to a school board. This delegation can include granting a minority language school board wide discretion to admit the children of non-rights holders.
2. There is also no doubt that a province or territory may pass legislation which offers protections higher than those protected by the *Charter*. Section 23 establishes a constitutional minimum: *Mahe*, at p. 379. Two important corollaries flow from this. First, because the *Charter* sets out minimum standards with which legislation must comply, any legislation which falls below these standards contravenes the *Charter* and is presumptively unconstitutional. Second, because the *Charter* sets out only *minimum* standards, it does not preclude legislation from going beyond the basic rights recognized in the *Charter* to offer additional protections. This fact was recognized by Dickson C.J. in *Mahe*, where he explained that s. 23 establishes “a minimum level of management and control in a given situation; it does not set a ceiling”: p. 379. Provincial and territorial governments are permitted to “give minority groups a greater degree of management and control” than that set out in the provision: p. 379.
3. Some provinces have accepted this invitation and granted school boards wide discretion to admit the children of non-rights holders. In Ontario, for example, s. 293 of the *Education Act*, R.S.O. 1990, c. E.2, provides in part that a French-language school board may admit the child of a non-rights holder if the admission is approved by a majority vote of an admissions committee. In Manitoba, s. 21.15(5) of the *Public Schools Act*, R.S.M. 1987, c. P250, allows the francophone school board to admit any other child beyond those entitled to admission under the act upon written request for admission to the board.
4. Other provinces have given minority language school boards generous authority over admissions, but imposed specific limitations on the exercise of the power. In Prince Edward Island, for example, the French-language school board may admit children whose parents are not s. 23 rights holders, but any such child must first be released by the English-language board: *French First Language Instruction Regulations*, P.E.I. Reg. EC480/98, s. 10. A similar regime exists in Saskatchewan: *The Education Act, 1995*, S.S. 1995, c. E-0.2, s. 144.
5. Still other provinces have given limited authority to minority language school boards to admit the children of non-rights holders. In British Columbia, the French-language school board has the discretion to admit the child of an immigrant who, if the parent were a Canadian citizen, would be a s. 23 rights holder: *School Act*, R.S.B.C. 1996, c. 412, s. 166.24.
6. In this case, however, the Yukon has not delegated the function of setting admission criteria for children of non-rights holders to the Board. In the absence of any such delegation, there is no authority for the Board to unilaterally set admission criteria which are different from what is set out in the *Regulation*. This does not preclude the Board from claiming that the Yukon has insufficiently ensured compliance with s. 23, and nothing stops the Board from arguing that the Yukon’s approach to admissions prevents the realization of s. 23’s purpose: see *Mahe*, at pp. 362-65. But that is a different issue from whether the Board has, in the absence of delegation from the Yukon, the unilateral right to decide to admit children other than those who are covered by s. 23 or the *Regulation*.
7. This bring us to the second issue decided by the Court of Appeal, namely, whether the Yukon is required, by virtue of s. 6(1) of the *Languages Act*, to communicate with and provide services to the Board and its employees in French. Section 6(1) provides:

**6(1)** Any member of the public in the Yukon has the right to communicate with, and to receive available services from, any head or central office of an institution of the Legislative Assembly or of the Government of the Yukon in English or French, and has the same right with respect to any other office of any such institution if

(a) there is a significant demand for communications with and services from that office in both English and French; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be in both English and French.

1. The Court of Appeal decided that this case was not a suitable vehicle for the determination of rights under s. 6 of the *Languages Act*. In my respectful view, it is unclear to me why this should be so. The Board’s *Languages Act* claims raise significant factual issues that may well lead to a finding that parts of the claims were justified. Whether a particular communication is covered by s. 6(1) may depend both on the nature of the communication and the capacity in which it is communicated. As the Court of Appeal observed, it is unlikely that the question has a simple answer given that the Board and its personnel engage in various types of communications with the government. This argues, it seems to me, for a determination at the new trial with the benefit of a full evidentiary record, not for a dismissal of the claims.
2. The appeal from the Court of Appeal’s conclusion that there was a reasonable apprehension of bias requiring a new trial is accordingly dismissed, but the *Languages Act* claims are to be joined with the other issues remitted by the Court of Appeal for determination at the new trial.
3. In the circumstances, I would make no order for costs.

Appeal largely dismissed.

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Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

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1. Section 59 of the *Constitution Act, 1982* provides that s. 23(1)(*a*) does not apply in Quebec. It may come into force only with the authorization of the legislative assembly or government of Quebec. Such authorization has not yet been given. [↑](#footnote-ref-1)
2. Section 93 applies directly to Ontario, Nova Scotia, New Brunswick, British Columbia and Prince Edward Island. Section 93 also applies to Quebec, but not ss. 93(1) to 93(4): *Constitution Amendment, 1997 (Quebec)*, SI/97-141, s. 1; s. 93A of the *Constitution Act, 1867*. Modified versions of s. 93 apply in the other provinces and the territories: *Manitoba Act, 1870*, S.C. 1870, c. 3, s. 22; *Saskatchewan Act*, S.C. 1905, c. 42, s. 17; *Alberta Act*, S.C. 1905, c. 3, s. 17; *Constitution Amendment, 1998 (Newfoundland Act)*, SI/98-25, s. 1(2); *Northwest Territories Act*, S.C. 2014, c. 2 [as en. by the *Northwest Territories Devolution Act*], s. 18(1)(*o*); *Yukon Act*, S.C. 2002, c. 7, s. 18(1)(*o*); *Nunavut Act*, S.C. 1993, c. 28, s. 23(1)(*m*). [↑](#footnote-ref-2)