Public Utility Regulation in a Developing Country

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I have endeavored to construe the provisions of an Act which has conferred on this Court an unusual jurisdiction of great delicacy, dealing with large interests and involving questions of extreme complexity, some of which I think I can properly say have been left at large by the Act.\(^1\)

The Public Utilities\(^2\) Act,\(^3\) of Barbados is the Act\(^4\) referred to in the above quotation. The Act\(^5\) establishes a Board\(^6\) comprised of five members who are appointed by the Minister.\(^7\) The Minister appoints one of the members as Chairman, who holds the office as long as he remains a member of the Board. The Act provides that if the Chairman is unable to act, or if there is a vacancy in the office, then any other member may act as Chairman.\(^8\) Members of the Board hold office for the period specified in the instrument of appointment, which can be up to five years.\(^9\)

The Board is vested with authority to make regulations governing every rate established, requested or received by any public utility.\(^10\) Further, every public utility must file with the Board the tariffs showing all rates established by such utility.\(^11\) The Board also has power to fix temporary rates pending final determination of any rate inquiry,\(^12\) and may do so if it is of the opinion that temporary rates are required in the public interest.\(^13\)

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\(^*\)The views expressed in this paper are those of the author alone.

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The Board has power to investigate complaints that any public utility is in breach of any law which the Board has jurisdiction to administer, or complaints that any public utility is in breach of any regulation or order of the Board. In the execution of these powers, the Board must ensure that a copy of the complaint is served upon the person against whom it is made, and it must also serve notice on the party concerned requiring him to satisfy the complaint or to answer it in writing specifying a reasonable period of time within which the party must comply.

If the party against whom the complaint has been made satisfies the complaint, the Board must dismiss the complaint. If, on the other hand, the party against whom the complaint is made does not satisfy the complaint within the period of time fixed by the Board, the Board is under obligation to consider all the facts and circumstances surrounding the complaint in order to ascertain whether there are reasonable grounds for investigating the complaint any further. If the Board is of the opinion that such reasonable grounds exist, it is under a duty to fix a time and place for a hearing. In this respect, however, the public interest is paramount, and if the Board is of the opinion that, in the public interest, a hearing is not necessary, then the Board may dismiss the complaint without a hearing. The Act makes all hearings public, and all parties have the right to be heard in person or by Counsel.

RATE FIXING

In fixing rates, the Board has to interpret and apply the Act which is not an easy task. The concept of utility regulation is unknown in England, the source of Barbados common law and indeed the source of the common law of the Commonwealth Caribbean. In search of guidance the Board looked to United States and Canadian utility regulation decisions and drew on these in coming to its own conclusions. The utility concerned in the first rate case under the Act appealed against the Board’s decision, and the case was decided by S.E. Gomes, the Chief Judge. The latter turned unashamedly to American decisions and textbooks for guidance, for there was no history or tradition of utility regulation in England to which he could turn. He was careful to point out however that

... the passages from American judicial decisions and textbooks set out in this judgment are quoted not as authorities binding on this court, but because I have adopted them.
This is clearly correct, for decisions of American courts and Commonwealth courts other than the Judicial Committee of the Private Council in England are of persuasive authority only.

The Chief Judge approached the problem from an impeccable premise. He observed:

The Act is one to provide for the regulation of public utilities . . . It is important to bear in mind that the public utility is privately owned and therefore, it is entitled to manage and conduct its business as it likes except insofar as its activities in those respects are curtailed or are regulated by the Board under the provisions of the Act.\(^3\)

There were, however, some shortcomings in the Act, some areas "left at large,"\(^2\) indeed some of them fundamental. Nevertheless, the ingenuity of S.E. Gomes, C.J. was comparable to the task.

The first question for consideration was:

... is any test or standard prescribed by the Act by which the fairness and reasonableness of the rate is to be determined?\(^3\)

Unfortunately the Act had not specifically and definitively set out a test to be applied, but S.E. Gomes, C.J. was able to spell out from a consideration of a number of the sections of the Act. The test was to be found in subsection (2) of section 21 of the Act. In fact, this subsection really deals with temporary rates, but as S.E. Gomes, C.J. observed:

That subsection provides that whenever the Board . . . considers that the rates of the public utility are producing a return in excess of a fair return upon the fair value of the property of the concern, used and useful in its public service it may prescribe such temporary rates . . . as will produce a fair return upon such fair value, and those rates are to become permanent . . . unless the public utility complains that they are unfair and unreasonable. Although this subsection deals with . . . temporary rates the test or standard prescribed also applies, in my view, to the fixing of non-temporary rates for no other test is provided in the remainder of the provisions of the Act.\(^4\)

This reasoning is patently sound, and if reinforcement for this view was necessary, then his Lordship found it in the fact that according to the subsection in question such temporary rates became permanent unless the utility objected, and he thought it would be strange if some other
test could have been intended to apply to permanent rates which, for example, were fixed as permanent from the outset. There was no need for two or more tests to be applied to permanent rates, whether they had become permanent after having first been temporary, or whether they had originally been intended to be permanent.

As his Lordship pointed out, subsection (1) of section 53 took the matter a step further and authorized the Board to appraise the utility's property from time to time. This would ensure that the Board would be aware at any time of the fair value of any utility's property used and useful in its public services, and would thereby be able to ascertain whether such utility was earning a fair return on such fair value and was thus complying with the Act. Accordingly, "... in determining whether the rates are fair and reasonable, the criterion is that which will produce a fair return on the fair value of the company's property, used and useful in its public services ...".

Establishing a formula is all well and good. However, in any particular case the formula has to be applied to concrete facts, and has to be meaningful in deciding whether or not the facts fit the formula and measure up to the criterion or the criteria. It would inevitably follow that the court would have to decide what was meant by terms such as "fair return" and "fair value" for the concept of fairness is an elusive one and depends on a large number of value judgments and subsidiary concepts which will tend to vary from one society to another. Unfortunately as S.E. Gomes, C.J. pointed out: "The Act does not say what the expression "fair value" means nor does it prescribe any formula or method by which it is to be ascertained." This omission by the Act, admitted the Chief Judge, caused him and the Board some embarrassment. However, the Board had referred to the American case of Smyth v. Ames and had identified the guiding principle followed in the American Courts. Thus with regard to "fair value" the Board had found that:

... the sole principle which has survived from these decisions is what the Company is entitled to ask is a fair return upon the value of that which it employs for the public convenience: on the other hand, what the public is entitled to demand is that no more be exacted from it than the services rendered by it are reasonably worth.

The ascertainment of what is "fair value" is a balancing process, bearing in mind the interests of the company on the one hand and those
of the consuming public on the other, with the Board's concept of what is reasonable as the final arbiter. The court agreed with these observations of the Board.

Clearly, the intended end product of any process of establishing a fair value is a numerical figure, a basis on which to function. As the court pointed out "... it is impossible to value the undertaking of a public utility unless a basis, or what is called a rate base is found; ... there must be a rate base, the base with which the return may be compared and tested to see whether the rate is fair and reasonable." Although the Act did not spell this out, as his Lordship observed, the provisions of the Act were not entirely silent on the point, for the term "rate base" appears in subsection (2) of section 53 of the Act.

Unfortunately, though, this is another matter "left at large" by the Act, for nowhere does it state how the rate base is to be calculated. His Lordship turned to the United States where, among the methods used, were found the following:

(a) historical cost or prudent investment;
(b) replacement cost less depreciation; and,
(c) present fair value—"the value of the property at the time the rate is determined."

His Lordship observed that the American textbook authors had pointed out that the determination of the proper rate base is a most difficult and complex question, and indeed one author had stated that it had been a subject of controversy ever since the rates of public utilities were first regulated. His Lordship pointed out that in any event, a rate base was fundamental in ascertaining the "fair value" of the utility's property used and useful in its public service.

Thus after expressing his awareness of the extremely difficult task of fixing a rate base, his Lordship expressed relief at not being "called upon to attempt to give any pontifical pronouncements" on the matter, and settled for the "ready-made" base that presented itself. As he observed:

... the book value of the property is based on the recent valuation. I consider that that method may well be used, and...
I will therefore employ that method."

This observation is clearly right. A recent valuation conducted by experts in the valuation of properties of this kind will normally be ac-
cepted by the Board, provided that the Board is satisfied after the valuation has been put in evidence by the experts who made the valuation and they have been cross-examined at the hearing. Of course a recent valuation by experts is not the only method that need be accepted by the Board. In a recent rate case, the Board arrived at a rate base after hearing exhaustive evidence on the efficacy of various methods of trending in the computation of the rate base for the particular utility. The Board finally fixed a revalued rate base based on the methods advocated before it. In the final analysis, the rate base must be fixed after a careful evaluation of all the circumstances of the particular case.

Finding the rate base is, of course, only half the story. The Board has to allow a fair rate of return on the fair value of the utility’s property used and useful in its public service. Again, unfortunately, this matter is “left at large” by the Act. “Here again the Act does not specify or indicate any scale or formula on or by which it may be ascertained.” The court sought guidance once again from the American experience adopting as its own the following views of Nichols:

The fixing of just and reasonable rates involves a balancing of the investor and consumer interests. From the standpoint of the investor it is required that there be enough revenue for capital costs of the business, including service on the debt and dividends on the stock. The return to the equity owner should be commensurate with return on investments in other enterprises having corresponding risks. The return should be sufficient to assure confidence in the financial integrity of the enterprise so as to maintain its credit and to attract capital.

A fair rate of return therefore will depend on the state of the economy in which the utility operates. Such factors as the cost of capital, whether debt or equity, the level of dividends in enterprises of comparable financial risks operating in the same economy, the capacity to pay of the consumers in that economy, as well as the quality of the service that is provided. For:

The right of the utility is not the only matter deserving attention: there is also the public interest to be considered, for the consumers are entitled to demand that no more is exacted from them than the services rendered are reasonably worth.

Having balanced all the competing interests, ultimately the Board must come to a reasoned conclusion on the basis of the evidence before it.
It is important to note that the utility is entitled to a return only on those assets which are used and useful in the public service. A determination, therefore, has to be made in order to identify which assets satisfy the criteria and which do not. The Act is also silent as to what these criteria are. It is submitted, however, that in the first instance what is involved is a determination of whether or not a particular asset is actually used by the utility in its public service. Then, a second determination is necessary, and this relates to the extent to which the particular asset is used. In other words, what is the level and extent of use? The answer to these questions will be important in determining whether or not the particular asset is useful in rendering public service.

For example, in the United States of America, providing housing accommodations for a number of senior engineering staff near to the utility plant may be salutary, and the value of these accommodations may well be included in the rate base of the utility, the regulatory authority accepting that the properties are used and useful in the public service. Undoubtedly, proximity of engineering staff to the utility plant is vital when there are breakdowns or accidents, especially in a country as large as the United States where great distances exist between parts of the country. However, in a small island just twenty-one miles long and fourteen miles wide the argument for including the value of similar accommodations in the rate base as being assets used and useful in rendering public service diminishes in cogency. Thus, in a recent rate case, the Board ruled:

... [T]he Board is of the opinion that the use of company assets for staff residences is marginally justifiable as property used and useful in rendering electric service to the public. And since use of such property in this case is most uneconomic, will disallow their value ... from the Company's rate base.

Of course, in this case there was the added factor that it was most uneconomic. However, it is submitted that marginally justifiable use and usefulness would in any event not be enough to warrant inclusion in the rate base.

Similarly, whereas it is arguable that cars allocated to some staff members of a telephone company for use in company business may be included in the rate base, nevertheless, if the company allows private use of such cars by said staff, it is submitted that to allow inclusion of all expenses of running such cars under expenses of assets used and useful
in rendering public service would not be in keeping with a correct interpretation of the Act. Thus, in a recent rate hearing, the Board ruled that it would deduct:

... an amount of $28,000, the expenses attributable to private use of motor vehicles which the Company provides for members of its staff. There are twenty-eight such vehicles and the Board imputes $1,000 annually on each vehicle as such expenses.

This, it is submitted, is undoubtedly a correct and clear ruling as to the interpretation of the meaning of allowable and non-allowable expenses of property used and useful in rendering public service. For, by allowing private use of the motor vehicles in this way, a utility would not be distinguishing between use on the company's business and personal use by the staff. Clearly the costs relating to personal use by the staff are hardly costs pertaining to use and usefulness in rendering public service, and it could hardly be argued that such costs should be borne by consumers of the utility's services.

**BURDEN OF PROOF**

Section [22] provides that in any proceeding upon a complaint involving any proposed increase in rates the burden of proof to show that the rates involved are fair and reasonable shall be upon the public utility. (Italics added).

This requirement of the Act is most desirable, not only on the basis of the doctrine that he who asserts must prove, but because the utility is in possession of the relevant information relating to its costs, past, present and future. It alone has full details of the demand for its services and potential growth of that demand, as well as on proposed plans for expansion, equipment in use, and similar matters.

The Act makes it clear, therefore, that if anyone thinks that a proposed increase in rates is not fair and reasonable, the appropriate course of action is to complain to the Board. It is then up to the Board to decide whether or not to hold a hearing in which case the burden of proof rests on the utility.

On the other hand:

Where the complaint is in respect of an existing rate, the burden is on the complainant on the principle that he who asserts must prove... (Italics added).
Of course, this proposition of law only governs complaints other than those made by the Board, for where the Board is the complainant:

... the burden is on the public utility irrespective of whether the proceedings are in respect of an existing or proposed rate. 68

There is wisdom in the adoption of these principles by the Act. Clearly, when the Board complains, whether against an existing or a proposed rate, the burden of proof ought not to be placed on the Board, for the latter's function is primarily judicial69 and not accusatorial. In relation to rates, the clear intention of the Legislature was to confer on the Board discretion whether to complain or not;70 also whether to hold a hearing or not.71 Of course, anyone having an interest in the subject matter may complain,72 but if the complainant is not the Board and the complaint relates to an existing rate, then the complainant undertakes the task of shouldering the burden of proof.

In relation to existing rates, therefore, a potential complainant has at least two courses of action. He can either try to persuade the Board to complain, and if the Board complains the burden of proof will fall upon the utility in the resulting proceedings; alternatively he can complain himself and seek to discharge the burden of proof which will fall on him. The apparent intention of the Legislature was undoubtedly to ensure that the Board played the central role in the regulation of public utilities. If the Board is satisfied that the circumstances justify a complaint, then one would assume that the Board would complain. If, on the other hand, the Board is not convinced that a complaint should be made, then any person who wishes to complain will have to file the complaint. Thus, while the Act does not prevent anyone from complaining, by imposing the burden of proof on the complainant the Act ensures that unwarranted complaints will be unlikely. Moreover, if one remembers that normally in civil matters costs follow the event,73 a potential complainant will hardly act rashly.

ASSESSORS,74 MEMBERS AND BIAS75

Section 4(2) of the Act provides for the appointment of two assessors—one from the Public Utilities Panel76 and the other selected to represent the users of the particular public utility involved in the proceedings. Assessors can be appointed for any complaint, hearing or other proceeding of the Board. The appointments may be requested by the
Board or may be effected as a result of an application by any of the parties concerned. Alternatively, assessors are appointed if the Minister thinks it expedient to do so. The section states:

In selecting such assessors, regard shall be had to the particular class of case or proceeding to be heard so that as nearly as the circumstances may permit, the persons selected as assessors shall be conversant with and have knowledge of the technicalities that may arise in considering such particular complaint, hearing or other proceeding.\(^7\)

This is infinitely reasonable, for the functions of the Board go beyond those of a court of law. In a court of law, the legal rules relating to evidence govern the material and the manner in which such material can be presented. Further, the court relies on the adversary principle, and, therefore, must decide on the basis of the evidence presented under oath, taking such evidence at face value.\(^7\) Proceedings before the Board are not intended to be restricted to the rigidity and formality of a court of law, and the adversary principle does not apply as such, for there may be no objectors to an application for an increase in rates. In such a situation, had the ordinary adversary principle applied, the particular utility would have been entitled to prevail in every respect in relation to its application on a similar basis to judgment in default of defense.\(^9\) Proceedings before the Board are, therefore, to some extent, inquisitorial.

Assessors, and indeed Board members as well, are under obligation to cross-examine witnesses whenever they feel it necessary in order to obtain the fullest information on which the Board is to base its decision. The expertise of the assessors, therefore, becomes crucial, for only if they are conversant with the issues involved in any particular proceeding can they effectively assist the Board in extracting information from the witnesses in the deliberations of the Board when all the evidence has been taken, and in the analysis and evaluation of the decision of the Board when made.

A high degree of close questioning by the assessors and the Board members may, therefore, be necessary in any particular proceeding depending, of course, on whether or not there are objectors, and depending upon the extent to which the assessors and the Board are satisfied that the fullest information is before the Board. To persons unfamiliar with an inquisitorial process the extent to which the assessors and the Board members question witnesses may seem unusual,\(^8\) and they may form the
view that the assessors and the Board are overparticipating in the proceedings, bearing in mind that judges must not only be impartial but must also seem to be impartial.

To counsel accustomed only to the expectation of silent implacable observation by the judge, the participation of the assessors and the Board might well be novel and startling; but the inquisitorial nature of the proceedings requires participation of this nature, and indeed it is the bounden duty of the assessors and the members of the Board to ensure that all necessary facts and information are before the Board. Otherwise, they would not be complying with their obligations under the Act.

Assessors are not judges in the strict sense of the word; as they are, as the ordinary dictionary states, advisers. However, the role of the assessor appointed to represent the interests of the users of a particular utility is somewhat analogous to that of arbitrators in a commercial arbitration, although the analogy is not perfect. In a commercial arbitration,

... once the arbitrators have disagreed and appointed an umpire they are *functus officio* as arbitrators. If they attend, as they do, the hearing before the umpire, it is as advocates for the parties who appointed them...

Assessors, however, retain their judicial/advisory role throughout the proceedings, and only the assessor appointed to represent the interests of the users of the utility can be said to become, in addition, an advocate for one side. Both assessors have to be aware of the interests of the particular utility and the interests of the users of the utility. They both act as judges in the proceedings in relation to the evidence presented to the Board, observing the demeanor of witnesses, reaching conclusions on the competency of experts called as witnesses, and similar matters.

This view, it is submitted, interprets fully and accurately the intention of the Legislature in drafting the Act. For, the Act states that one of the assessors must be selected from the Public Utilities Panel, and the other must be selected to represent the users of the particular utility. The composition of the Public Utilities Panel is also prescribed by the Act. It states that the panel shall consist of not more than six persons to be nominated by the Minister after consultation with such public utilities as he shall see fit.

The reason for giving the Minister power to consult with a utility or utilities as he shall see fit is to secure for the utilities a sense of participating in the appointment of the person or persons who comprise the
panel, who, after all, are to some extent expected to represent their interests. The Legislature was careful, however, to reserve to the Minister the right to decide whether or not to consult with any of the utilities, inasmuch as the Minister need only consult with such public utilities as he shall see fit. The clear intention of the Legislature, it is submitted, is not to give any utility or utilities a power of veto. It is further submitted that the Legislature has made it clear that the primary obligation of the assessor selected from the Panel is to carry out his judicial/advisory functions. In relation to the assessor chosen to represent the interests of the users of the utility, his primary obligation is to act as advocate for the interests of the users of the particular utility. The Legislature has excluded both of them from the decisions of the Board, thus reserving the decisions of the Board to its members.

The differing nature of their obligations delimits the parameters within which the principles governing bias apply to members and assessors when the Board is acting judicially or quasi-judicially. Thus, conduct of the members of the Board which shows obvious partiality for one party to the proceedings would render the Board's Order voidable. Similarly, affiliation with one party or the other would have the same effect. In this respect, the rules governing bias in courts and tribunals when acting judicially or quasi-judicially are the same. However, normally, the rules governing bias in courts are clearer and more fully established, and the standards governing all courts are essentially the same. In relation to tribunals in general, the problem is more intractable. Tribunals vary considerably, and the problem may well be one of considering what is the correct standard to apply to a particular tribunal, rather than what standard applies to tribunals simpliciter.

In considering bias in courts, the fundamental principle is the judge's neutrality. This is of such crucial importance that it must exist in appearance and in fact. There must be freedom from even the appearance of bias. The standard which applies to courts does not, therefore, necessitate proof of bias in fact. If it can be shown that an apprehension of bias is reasonably justified, then the decision of the particular court will be set aside.

In relation to the Board members, the principles are clear. The enunciation by Viscount Cave is lucid and instructive:

If there is one principle which forms an integral part of the English law it is that every member of a body engaged in a
judicial proceeding must be able to act judicially; and it has been held over and over again that if a member of such a body is subject to a bias (whether financially or other) in favor of or against either party to the dispute or in such a position that a bias must be assumed, he ought not to take part in a decision or even sit upon the tribunal. This rule has been asserted not only in the cases of Courts of Justice and other judicial tribunals but in the case of authorities which, though in no sense to be called 'Courts' have to act as judges of the rights of others.\textsuperscript{96}

The common law requires the Board to be disinterested and impartial. Such principles are necessary if public confidence in the administration of justice is to be ensured.\textsuperscript{97} Freedom from the likelihood of bias, however, is a different matter from the situation where there is an allegation of actual bias. Where, for instance, there is, in fact, freedom from the likelihood of bias but there is an allegation that the Board or a member of the Board is, in fact, biased because of what he has said or done or because he has associated with a party to the proceedings before the Board, bias would then have to be proved. It would have to be established as a fact that there was a real likelihood of bias; whereas in the situation under discussion it is accepted that because bias is possible, given a particular set of circumstances, then the courts will hold that the possibility of bias taints the particular decision. The decision is then set aside because of the possibility of there having been bias, i.e., because bias could have occurred, not because they are satisfied that bias did, in fact, occur or was likely to have occurred. Indeed, the consideration of whether or not bias did, in fact, occur is an irrelevant consideration in the circumstances. The only consideration is whether or not, in these circumstances, it is possible that bias could have occurred. If the answer is yes, then the decision will be set aside for potential bias.\textsuperscript{98}

The principles governing potential bias in relation to courts are perfectly clear, and it is submitted that the same principles apply to a tribunal such as the Board when acting judicially or quasi-judicially and, of course, to its members. In \textit{Dimes v. Grand Junction Canal Proprietors},\textsuperscript{99} the Lord Chancellor of England presided over a case in which one of the parties was a company in which the Lord Chancellor owned a number of shares. In spite of the fact that the Lord Chancellor is the Head of the Judiciary in England, and in spite of the eminence of this officer, nevertheless, the decision was set aside. It was set aside not on the basis of any allegation of bias in the Lord Chancellor himself, for, indeed, it was accepted by the Court that the Lord Chancellor was of impeccable
character and renowned impartiality. The House of Lords set the decision aside on the basis of potential bias. The principle being that the fact that the circumstances created a situation of potential bias, then the decision must be set aside. In spite of the fact that the decision might be perfection itself in terms of objectivity and impartiality, it will be nevertheless set aside. Lord Campbell is transcendent in this passage:

... No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest ... And it will have a most salutary influence on these tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence.100

Indeed, each member of the Board has to make a declaration prior to his appointment that he does not have any pecuniary interest in any of the public utilities governed by the Act. Thus, if a member of the Board who takes part in a decision has a pecuniary interest in any of the parties to the hearing, this would normally render the decision voidable.101

Being a member of an entity, whether incorporated or not, which is a party to the proceedings may also give rise to an allegation of bias. The allegation being that mere membership in the entity per se would fall foul of the principle of potential bias, namely that once it is shown that a member of the Board is a member of one of the parties to the proceedings, then the decision of the Board would be voidable, without more.

It has been held that mere membership of one of the parties to the proceedings before a tribunal is not necessarily enough to make a decision of the tribunal voidable.102 The court seems to have drawn a distinction between: mere membership on the one hand, and being a member of the governing body of the particular organization, i.e., being a member of the nucleus which directs the operations of the particular
organization. If, therefore, a member of a tribunal is also a member of the directing nucleus of an organization taking part in proceedings before that tribunal, this fact, it is submitted, would render the tribunal’s decision voidable. However, if a member of the tribunal is merely a member of the organization which is a party to the proceedings, it is submitted that the simple fact of membership in such organization will not necessarily render the tribunal’s decision voidable.

The infinite good sense of the principles of potential bias based on pecuniary interest is patent and needs no further elaboration. As to the principles governing membership in organizations appearing before a tribunal, it is submitted that they are salutary. Clearly, where a member of a tribunal is also a member of the governing nucleus of an organization appearing before that tribunal, he falls squarely within the principle of being “prosecutor” or “defendant” and judge in the same cause, and such action should indeed render the tribunal’s decision voidable. However, mere membership in an organization appearing before a tribunal should not be a disqualifying feature rendering the decision of every tribunal voidable. For mere membership does not necessarily identify the member so closely with the decision of the directing nucleus of the organization as to render him “prosecutor” or “defendant” and judge in the same cause. This makes it possible for the courts to make further inquiry into the circumstances of the particular case to determine whether, in the light of all the circumstances, the decision of the tribunal should be set aside.

As regards the Board, however, because of the “large interests” with which it has to deal in the course of construing and applying the Act, its impartiality must be above reproach. It is submitted, therefore, that if a member of the Board is also a member of an organization which is taking part in proceedings before the Board, without more, this will render the Board’s decision voidable. It is the nature of the functions of the Board which renders this submission decisive.

If, on the other hand, there is an allegation of bias against the Board consisting of a broad allegation of favoring one side or the other, or association with either side, the onus of establishing bias will rest on the party that alleges it. Proof would have to reach the ordinary standard in civil cases, namely, proof on a preponderance of probability. It seems, however, that what might amount to bias in relation to the conduct of a court will not necessarily be sufficient to support an allegation of bias in relation to every tribunal, when acting judicially or quasi-
judicially. For example, the presence of the acting clerk with the justices when they were considering their decision in *R. v. Sussex Justices, ex parte McCarthy* was fatal to that decision in the light of the acting clerk's association with one of the parties to the litigation. Whereas, similar circumstances have been held not to support an allegation of bias in relation to a tribunal acting judicially or quasi-judicially. Nevertheless, it is submitted that the strict principles applied by the court in *R. v. Sussex Justices, ex parte McCarthy* would also apply to the Board on the strength of my previous arguments.

Of course, a statute may authorize a tribunal to act as both prosecutor or, rather, accuser and judge. In such an event, an allegation of bias on that ground will not succeed. Under section 30(1) the Act authorizes the Board to complain against any utility operating under the Act in the circumstances set out in the section, and section 32(2) authorizes the Board to enter upon a hearing if as a result of such a complaint reasonable ground exists for investigating such complaint. Clearly, an allegation of bias arising from the fact that the Board was complainant and also judge in the proceedings arising out of the same complaint would not succeed, for the Legislature can, by clear words to this effect, empower a tribunal to act in derogation of the rule that no one shall act as judge in his own cause, and it is submitted that the Legislature has in fact done so here.

Bias in relation to assessors is of far less importance. It is submitted that its only relevance would be in relation to deciding whether or not a particular person may sit as an assessor if, for example, he is challenged by one of the parties to the proceedings. In other words, it would relate to the question as to whether or not a particular person ought to be disqualified from sitting with the Board. However, it is submitted that this has no bearing whatsoever on the question as to whether or not a decision of the Board ought to be set aside for bias, for, indeed, assessors are not members of the Board nor do they participate in the decisions of the Board.

It may be arguable that an assessor may not have any pecuniary interest in any public utility. Such an argument could be based on the wording of section 14 of the Act which states that "no member, or officer of the Board shall directly or indirectly . . ." have any pecuniary interest in any public utility. The use of the word "officer" in this section is probably broad enough to embrace an assessor appointed under
the Act, for "Any assessor so appointed shall . . . exercise all the powers and functions of a member of the Board . . .". However, the Act does not specify any sanction for breach of this section.

The Act has specifically barred assessors from taking part in any decisions of the Board. Section 4(4) states "... the decision of the Board shall be the decision of the members only excluding any such assessor . . .". Assessors are, therefore, not judges in the full sense of the term in relation to any proceedings before the Board, for it is submitted that to hold otherwise would be untenable.

The principles governing bias, therefore, are not applicable to assessors in the same manner as to members of the Board, for the Act does not envisage strict impartiality on the part of the assessors. On the contrary, the Act envisages that at least one assessor may be partial. It states that one of the assessors is to be "... selected to represent the users of the Public Utility concerned." It is difficult to fly in the face of the clear wording of the Act. It is submitted that the clear meaning of "to represent" is to exert oneself to protect the interests of the particular party one represents. In relation to the assessor selected to represent the users of the public utility, the question of bias based on having a pecuniary interest in one of the parties opposing the utility might be moot, for one would think that the representation might well be the more vigorous if the representative is financially interested in the outcome. Similarly, membership in the directing nucleus of an organization before the Board, or ordinary membership, or association with or an appearance of favoring a party who is also representing the interests of the users of the particular utility would be irrelevant, for the question of bias in favor of the interests of the users of the particular utility is what is placed in issue by the Act.

Of course, if the assessor chosen to represent the interest of the users of the utility seemed to be biased in favor of the utility, or if it could be proved that he was so biased, it is submitted that this would constitute sufficient ground for preventing him from sitting if the proceedings had not yet commenced. If the proceedings had, then it is submitted that it would be a sufficient ground for his removal.

A pecuniary interest in a utility could, on the earlier arguments, infringe section 14 of the Act. It is submitted, however, that this would only be relevant in deciding whether or not a particular person may sit as an assessor either to represent the interests of the users of the partic-
ular utility or as an appointee from the panel. If such a person did sit, it is submitted that the decision of the Board would nevertheless not be assailable, for assessors are not judges under the Act. However, it is submitted that it would be sufficient ground to disqualify such assessor from sitting either as an appointee from the panel or to represent the users of the Public Utility concerned.

By giving one assessor a specific mandate and the other none, the Legislature might have been recognized the economic power of utilities and might have been seeking to redress the balance in terms of the representation of the interests of the users of the utility. Further support for this view arises from the fact that the Act places no limit on the number of parties who may oppose a utility in relation to any proceedings before the Board.

POWERS OF INVESTIGATION AND PENALTIES

The Board has power to subpoena witnesses, to administer oaths, and to examine witnesses. If the Board deems it necessary or proper in any proceeding, investigation or hearing, it can compel the production of such books, records, papers and documents as it sees fit. Under the same section, the Board can perform all necessary and proper acts in the lawful exercise of its powers or the performance of its duties.

In Re The Barbados Telephone Co. Ltd., counsel for one of the objectors made an application under the above section for the production of the minutes of four directors' meetings. Counsel for the Telephone Company opposed the application on the grounds that said books are of a privileged and confidential nature and, therefore, should not be disclosed generally. He, of course, recognized the Board's power to examine any document of the company. After deliberation, the Board ruled that the objection was sustained on the stated grounds, but that in the public interest the Board itself would examine the stated minutes and would determine whether any matters relevant to the hearing were contained therein and whether such matters ought to be disclosed in the public interest. The Board ruled that such relevant matters, if any, would then be copied and made available at the hearing.

This ruling was clearly right. It has been stated in a recent case:

There are some things which may be required to be disclosed in the public interest in which no confidence can be prayed in aid to keep them secret.
Clearly, the only way to ascertain whether any information in the minutes was relevant to the hearing was to actually examine the minutes in question.

The Board examined the minutes relating to the specified directors’ meetings and then ruled that certain matters therein were relevant to the hearing. The Board then ordered that copies of the relevant passages be made and that the copies be made available to the parties who were objecting to the proposed increase in rates. Recognizing the confidentiality of the contents of the minutes, the Board ordered that proceedings relating to matters contained in the minutes be held in closed session. By adopting this solution, therefore, not only was the public interest which required the examination of the minutes safeguarded by the Board, but the confidential nature of the minutes was also respected.

The Act makes obstruction or interference with any member of the Board, or any officer or person in the exercise of the rights conferred or duties imposed by or under the Act an offense. However, the offense is a summary one, and the penalty imposed on anyone convicted of this offense is a maximum fine of one hundred dollars.

The Board is not empowered to punish anyone for contempt. It cannot imprison anyone who disrupts the proceedings, or who shows disregard or disrespect for them. This point was made by counsel in a recent rate hearing, and suggestions were made as to proposals for remedying this lacuna in the law. Counsel said in his opening address to the Board:

I am submitting that the Board should draw [the] attention of Government to . . . statutory tribunals such as the Public Utilities Board, . . . when [there] is an attempt to bring the Board and its functions [in] to public contempt, [the] Government should take action to protect members of the Board.

Unfortunately, the sub judice rule does not apply to the proceedings of the Board. The question of comment on current proceedings is normally dealt with in a voluntary way, whereby the Board obtains an assurance from the utility and the other parties that they will not indulge in comment on the proceedings. Counsel for the utility in the same recent rate case regretted the fact that:

. . . [W]hile companies cooperate with the Board by making no public comment once proceedings have begun, . . . other people make all kinds of remarks.
Of course, there may be arguments for not interfering with a voluntary procedure once it is observed by all the parties to whom it applies. However, if the procedure is not observed by some of the parties, then the arguments supporting a strict legally formulated procedure tend to gain precedence.

The ultimate penalty which can be imposed upon any utility operating under the Act is pretty severe. The court can order that it be wound up. If a utility fails to comply with an order of the Board within the time specified by the Board, the Board can take over the full and complete management of the utility for up to six months, unless the Board's order is complied with within this period.

JUDICIAL REVIEW

Substantively, judicial review is governed by section 45 of the Act. It states in subsection (1):

An appeal shall lie on a question of law to a Judge of the High Court from a decision or order of the Board.

The good sense of such an appeals procedure is only matched by incredulity when one discovers that this appeals procedure was only introduced in February 1974.

Previously, appeals were governed by the Public Utilities Appeals Rules 1957, and appeals against the Board's decisions were by way of re-hearing in open court. The real effect of the Appeals Rules 1957 was to give marginal importance to the Public Utilities Board, and utilities, desiring to do so could consider hearings before the Board as a mere warming-up exercise before going to the court where the real hearing would take place. Since the procedure before the court was a re-hearing, new evidence could be produced, the evidence given before the Board could be re-organized and presented differently, and really the procedure before the Board was no more than a formality.

It is exceedingly difficult to understand why the Legislature should have gone to such pains to establish the Board and in the same breath emasculate it. However, the current judicial review procedure is salutary. It is similar to the procedure in force in several states in the United States of America. The High Court of Barbados has rendered one decision since the new judicial review procedure came into force, and the fundamental nature of the change has been clearly pointed out. As Justice Williams said:
It is to be noticed that these grounds of appeal are based on alleged errors of law. Under the new subsection (1) of section [45] of the Public Utilities Act . . . as contained in section 4 of the Public Utilities (Amendment) Act, 1974 No. 3, appeals to this court are now restricted to those on matters of law . . .

It is incumbent, therefore, on the appellant company, before it can secure any relief on a ground of appeal, to show that a question of law is involved and the court is only granted authority to intervene where this is shown.\textsuperscript{156}

Whereas previously the High Court was free to review findings of both fact and law, it is submitted that by virtue of the change, the court’s revisory power in relation to findings of fact will be severely curtailed. It is further submitted that provided there is evidence before the Board on which it can base a finding of fact, the decision of the Board will be conclusive unless it can be shown that it is tainted with fraud,\textsuperscript{157} or that no tribunal could reasonably have come to such a conclusion in the light of all the evidence presented.\textsuperscript{158} It is also submitted that the court cannot, therefore, substitute its own decision for that of the Board simply because the court might have come to a different conclusion;\textsuperscript{159} the Board’s decision would have to be unreasonable before it can be set aside.

Questions of law can be reviewed; the pertinent section states this in subsection (1). This, it is submitted, relates not only to straightforward questions of law as, for example, whether consideration is necessary in the formation of a valid contract according to the common law of Barbados, but also to situations where the decision of the Board in relation to findings of fact are so interwoven with or dependent upon questions of law as to render the whole question one of law.\textsuperscript{160}

Whereas substantively judicial review is now more satisfactory, procedurally it is still decidedly anaemic. There is a gaping lacuna in public utility regulatory law in Barbados, for it is possible—and indeed it has happened—for a utility to appear before the Board unopposed\textsuperscript{161} and then appeal against the Board’s decision if the Board does not give it all it asks for, appearing before the High Court unopposed.\textsuperscript{162} Such occurrences make a mockery of a system based on the adversary principle. It is submitted that the Act is wholly unsatisfactory in this respect.\textsuperscript{163} Only if someone other than the Board\textsuperscript{164} complains will there be adversaries to the utility in relation to any proceedings before the Board.
Moreover, the prospect of bearing the costs of opposing the utility before the Board and of an appeal, plus the risk of having to pay the costs of the proceedings\textsuperscript{165} may act as a powerful deterrent to potential complainants.\textsuperscript{166}

It is submitted that the Act ought to be amended to provide that counsel to the Board\textsuperscript{167} shall appear in the defense of any decision of the Board against which an appeal is made.\textsuperscript{168} This amendment is absolutely necessary in the public interest.

**CONCLUSION**

It is now some twenty-one years since the Public Utilities Act commenced in Barbados. However, it may be argued that if it was the objective of the Legislature that regulation of the public utilities operating in Barbados was to be done primarily by the Board, then that objective has yet to be achieved.

Of the six decisions of the Board that have been appealed, the High Court has overturned or substantially modified all except the last one which was decided under the new appeals procedure. For all practical purposes, therefore, the High Court has been the regulator of rates for the public utilities in Barbados, and the result of each appeal, other than the most recent, has been that the utilities concerned were awarded more or less what they asked for.

However, in February 1974,\textsuperscript{169} the Legislature made an effort\textsuperscript{170} to confer on the Board the real power to regulate public utilities in Barbados. The clear intention of the Legislature was that the High Court should exercise supervisory powers limited to the correction of any errors of law that might occur in the course of proceedings before the Board. Thus, the Board now potentially has the real legal power to play the central role in the regulation of public utilities operating in Barbados under the Act.

Desirably too, many of the matters "left at large"\textsuperscript{171} by the Act have been satisfactorily resolved by the interpretative and improvisory ingenuity of the High Court of Barbados.

Nevertheless, a fundamental weakness remains. It is in the judicial review procedure. The fact that a public utility in Barbados can appeal a decision of the Board and argue its case before the High Court un-
opposed is intolerable. An amendment to the Act along the lines suggested earlier in this paper is crucial in the public interest. Its urgency cannot be exaggerated. Public utility regulation by the Board shall not be really effective in Barbados until the Legislature cures this fatal flaw.

NOTES

1Per S.E. Gomes, C.J. in Re The Barbados Light & Power Company Limited, No.1 of 1956 (unreported) at p.14 of the transcript of the judgment.


4As amended by the Public Utilities (Amend.) Act 1974-3.

5In S.5(1).

6The Public Utilities Board (hereinafter the Board); S.5 of the Act enacts that the Board shall be a body corporate with perpetual succession and a common seal and that such seal shall be judicially noticed.

7The Minister for Trade, Industry and Commerce.

8S.3(2).

9S.6.


11S.16(1).

12S.21(1).

13Id.

14Part VI of the Act SS.30-36. Of course the complainant must have *locus standi* under the Act. S.30(1) gives *locus standi* to the Board, any person or company having an interest in the subject matter, and any public utility concerned. Presumably by "company" the Act means a partnership acting under the firm name, for it is a well settled legal principle that a company incorporated under the Companies Act 1910 is a person in law, *Salomon v. Salomon* (1879) A.C. 22, and would therefore be included in the term "person" used earlier in the subsection.

15Id.

16S.31. Usually the Board gives the party 14 days within which to comply.

17The decision as to whether or not a complaint has been satisfied is to be made by the Board after a consideration of all the facts and circumstances surrounding the particular complaint.

18S.32(1).

19*Supra*, note, 17.

20S.32(2).
The subsection, therefore, gives the Board tremendous power in this respect, power which must be used wisely and well.

In England the telecommunications, electricity, transport and gas industries are all nationalized and the appropriate Minister has ultimate responsibility for them and is answerable to Parliament. See generally: S.J. Leacock, "Financial Obligations of the Nationalized Industries in the United Kingdom", 1969 mimeo, School of Business Studies, City of London Polytechnic, London.

See generally Professor K.W. Patchett, "Reception of Law in the West Indies" J.L.J. 1973, 17, 55 at p.30 where he states: "... the basic law for the peoples of the Commonwealth Caribbean other than St. Lucia is the common law of England." It is submitted that in St. Lucia English common law would be of the strongest persuasive authority.

Per S.E. Gomes, C.J. in Re The Barbados Light & Power Co. Limited, No.1 of 1956 (unreported) at p.2 of the transcript of the judgment. "... [C]ounsel stated that ... the Board, in its reasons for its findings, appears to have relied on one or two such authorities ..."

Re The Barbados Light & Power Co. Ltd. This case is dealt with in some detail in this article as it has been followed by the later cases.

Under what is now S.45 of the Act.

The term Chief Judge has since been changed to Chief Justice.

Id.

P.14 of the transcript of the judgment.

Id. p.2.

Supra, note 1.

Id. p.4.

Id. pp.4-5. (Italics added.)

Id. p.5.

Id.

Id.

Supra, note 28.

Supra, note 35.

169 U.S. 466.

This applies whether the utility is a private enterprise or a nationalized industry; Walcott Lime Works and the Barbados Potteries Ltd. v. The Natural Gas Corporation (1959) 1 W.I.R. 214, per Stoby, C.J. at p.218 "... do these principles mean that the rate base formula is inapplicable to nationalized undertakings? ... in the fixing of rates some method has to be devised and the textwriters to whom I have been referred both agree that while there may exist a difference of opinion as to how the rate base should be arrived at there is no disagreement that the rate base formula is the recognized and accepted method." (Italics added.)

Id. p.8.

Id. p.9.
His Lordship selected method (c) and thereby established Barbados as a "fair value" jurisdiction.


In *Re The Barbados Light & Power Company Limited*, No.1 of 1956 (unreported) the Board had in fact found a rate base but it had arrived at the rate base after a consideration of the capital structure of the Barbados Electric Supply Corporation which had in fact sold its assets to the Barbados Light and Power Company Limited. The rate hearing had been entered upon by the Board as a result of an application of the Barbados Light and Power Company Limited for an increase in its rates and did not involve the Barbados Electric Supply Corporation at all. As S.E. Gomes, C.J. pointed out at p.7 of the transcript, the concept of a company as a separate legal entity had been settled by the House of Lords in England long ago in *Salomon v. Salomon & Co.* (1879) A.C. 22. He pointed out that the Board ought to have addressed itself, therefore, to the valuation of the Barbados Light and Power Company Limited. "The Board ought to have realized that an entirely new and independent entity would arise," once the assets had been bought by the Barbados Light and Power Co. Ltd.

In the recent rate hearing *Re Barbados Light & Power Co. Ltd.* before the Board on March 14, 1974, a valuation of the Company's property as at December 31, 1972 done by the expert utility valuing company of International Middle West Service Company was accepted by the Board as the proper rate base for the utility in that hearing. The Barbados Light & Power Co. Ltd. is a subsidiary (75% equity owned) of Canadian International Power Ltd., a multinational corporation incorporated in Canada.

*Re The Barbados Telephone Co. Ltd.* Before the Board, May 3, 1974. The Barbados Telephone Co. Ltd. is a subsidiary (86% equity owned) of Continental Telephone International Corporation, a multinational corporation incorporated in the United States of America.

In fact they were not accepted until the Board was satisfied that they were the "... least unreliable guide ..." p.8. of the transcript of the Board's decision.

Per S.E. Gomes, C.J. *Id.* p.10.

E. Nichols, op.cit. p.91.


*Id.* p. 6. of the transcript.

*Supra*, note 53.

*Id.* at p.12 of the transcript.

proposed rate is fair and reasonable. In my view the burden of proving a positive and
the burden of proving a negative is not, or is not necessarily, the same: nor is the
method of proof necessarily the same. I, therefore, consider that the Board ought
not to have put the company to proof that the present rates were unjust and un-
reasonable but to proof that the proposed rate was fair and reasonable . . .”

63S.30(1).

64S.19(2) states that the Board may enter upon a hearing. The Board is, there-
fore, given a discretion in this respect by the subsection.

65Per Sotby, C.J. Id.

66Whether the complainant is the utility or some other person.

67Supra, note 65.

68Id.

69Re The Barbados Light & Power Co. Ltd., No.1 of 1956 (unreported at p.2. of
the transcript.

70S.30.

71Ss.31-32; S.19(2).

72A person having an interest in the subject matter has been defined in America
as:
“One who has a legal right which will be injuriously affected.” See Black
River Electric Cooperation Inc. v. Public Service Commission, 238 SC 282;
120 SE 2d 6 (1961); Hammon Lumber Co. v. Public Service Commission,
96 0, 595; 185 P.639 (1920); American Jurisprudence 2nd ed. (1972) Vol
64 §287, complaints should only be made after careful consideration, for
s.56 of the Act confers on the Board discretion in relation to the award of
costs. The Board may award a fixed sum, or may tax the costs; it may
prescribe a scale under which the costs will be taxed and may order by
whom they will be taxed. Further, under s.30(3) the Board may require
any complainant to give security for the costs of any hearing or investi-
gation that arises out of his complaint.

73Id.

74S.4.

75“... an operative prejudice whether conscious or unconscious.” R. v. Queen’s
County, JJ. [1908] 2 I.R. 294, per Lord O’Brien, L.J.

76This panel is established under S.4(1) of the Act and consists of not more
than six persons to be nominated by the Minister after consultation with such
public utilities as he shall see fit.

77S.4(3).

78Unless, of course, perjury is established.

79Under Order 19 r.7 of the Rules of the Supreme Court (U.K.) which applies
in Barbados by virtue of s.13 Supreme Court of Judicature Act 1956 (1956-56)
which states:
“... where no special provision is contained in this Act or in rules of court
with reference thereto, every such jurisdiction shall be exercised as nearly
as may be in accordance with the practice and procedure for the time being
in force in the Supreme Court of Judicature in England.”

There being no special provision on this point enacted in Barbados.
In *R. v. Perks* [1973] Crim. L.R. 388 the defendant was convicted of theft. During the defendant's examination-in-chief, the judge had asked 147 out of a total of 700 questions and had interrupted the defendant's counsel during his final address. On appeal, the Court of Appeal in England allowed the appeal, holding that the interruptions were of a hostile nature and hindered the development of the defendant's evidence-in-chief.

*R. v. Sussex JJ., exp. McCarthy* [1924] 1 K.B. 256. It is submitted that "seem" to be impartial is more logical than "seen" to be impartial, and indeed use of the word "seen" in the judgment might well have been a mistake in the report. See S.A. de Smith, "Judicial Review of Administrative Action" 3rd ed., London, 1973 p.218, footnote 28. Besides, "seem" is to be preferred because it would tend to preserve a greater degree of skepticism and, therefore, a greater degree of wariness as to whether it is actually being done or not. Of course whether "seem" or "seen" is used the idea is the same. Impartiality is intangible; it is a state of mind or of the intellect. It is an inner fact and thus invisible and cannot be perceived through the use of any of the five senses. The appearance of impartiality can certainly be perceived through the behavior of the particular individual. If, for example, an aggressive and belligerent manner of questioning is adopted, or nodding in apparent approval when one party is speaking and grimacing and looking threatening when the other party speaks, or, of course, stating that one will decide in favor of one of the parties before all the evidence has been heard would clearly tend to show absence of impartiality. But see also, *R. v. Hircock* [1969] 1 All E.R. 47, where at the trial of four accused, each of whom was separately represented, it was alleged that the judge showed considerable impatience. It was alleged that when the last of the four defence counsel to address the jury said that he would review the cases for the other defendants, as well as his client, the judge exclaimed in a loud voice "Oh God", laid his head across his arm and made groaning noises. However, none of these matters appeared in the transcript. The English Court of Appeal drew a distinction between interruptions and conduct by the judge which might prevent a defendant from developing his case (see: *supra* note 80), and conduct which might be discourteous and unbecoming. The former might well amount to a valid ground of appeal but the latter would not. The conduct in this case fell into the latter category, thus the appeal was dismissed.

Although any assessor appointed under the Act "shall . . . exercise all the powers and functions of a member of the Board," the Act specifically states that "the decision of the Board shall be the decision of the members only excluding any such assessor . . ." (Italics added.)

See Professor C.M. Schmitthoff, *The Export Trade*, 5th ed., London, 1969 at p.348. "The two arbitrators in a commercial arbitration have often an unusual dual role in so far as they are judges and advocates in the same person." The assessors' dual role is that of judge during the presentation of the evidence and advisor during the deliberations after all the evidence has been taken, he is judge and advisor in the same person. Of course, the assessor selected to represent the interests of the users of the particular utility has a third role, that of advocate for the users of the particular utility. Thus he has a treble role.


The Act does not give the assessor chosen from the panel a mandate to represent the interests of the utility which is before the Board, it stops short of that.
The reasons for the exclusion are self-evident.


Infra, note 98.

"They consist essentially of a neutral judge deciding contests brought before him by others upon facts which are revealed only in a hearing attended by all persons having an interest." R.F. Reid op. cit. 221.

Being necessary to help engender respect for, confidence in, and satisfaction in the operation of the law, thereby reducing desires for self-help.

Supra, note 24.


Per Lush J. in Serjeant v. Dale (1877) 2 Q.B.D. 558, 567 “One important object at all events is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of Justice which is so essential to social order and security.”


Id.

Id. per Ld. Campbell 10 E.R. 301, at p.315.

S.14 does not state that a declaration has to be made but in practice such a declaration has to be made before the instrument of appointment is effected by the Minister concerned.

Per Blackburn J. in R. v. Hammond (1863) 9 L.T. (N.S.) 423. “The interest . . . may be less than a farthing but still it is an interest.”

S.14 prohibits any member or officer of the Board from having any pecuniary interest such as those set out in the section in any public utility. The section does not limit itself to pecuniary interests in public utilities governed by the Act, but it is submitted that it does carry this limitation, for it is difficult to see how a pecuniary interest in a public utility not governed by the Act would be relevant. The section has a proviso which excludes the mere user of the services of any public utility (e.g., being a telephone subscriber or using the bus service) from falling within the definition of prohibited pecuniary interests for the purposes of the section. S.8 of the Act makes provision for a member who is interested in any matter before the Board to be replaced by a temporary appointee not so interested.

Id. per Ld. Brougham 10 E.R. 301 at p.315. “The learned Judges . . . have come to a clear opinion . . . that the decree is not void, but only voidable;”

If a member or officer has a pecuniary interest falling specifically within s.14, it is submitted that this would be directly in breach of the section which is drafted in mandatory terms and would, therefore, render any decision of the Board involving the participation of such member or officer void. However, if the pecuniary interest falls outside s.14, then the ordinary principle of voidability would apply.

Leeson v. General Council of Medical Education and Registration (1889) 43 Ch. D. 366.
107R v. Allan 4 B & S 915. Where one of the convicting justices was a member of the committee of the Tees Salmon Fishery Landowners Association and had been present at a meeting of the Association which authorized proceedings to be taken against one Joseph Hodgson who was later convicted by the said justices.


... Of course, the rule is very plain that no man can be plaintiff, or prosecutor, in any action, and at the same time sit in judgment to decide in that particular case...

Ought these two gentlemen ... to be considered as complainants in this case?

... (T)his complaint made against Dr. Leeson was a complaint brought forward by the Council to which neither of these two members of the General Medical Council belonged...

[A]s regards the question whether they are to be considered as complainants here, we ought to look to substance, and not, because this complaint is brought by the Council in the name of the Union, to say that a person, a member of a union, who has nothing to do and can have nothing to do with bringing forward this complaint, is to be treated as a prosecutor or as one of the persons who is bringing forward this complaint. The term ‘prosecutor’ is sometimes objected to, but I use it for the sake of simplicity. Therefore, it cannot be said that these two members were incompetent to act because they were adjudicating upon a complaint brought forward by themselves;

[.] They are not to be considered as complainants here—as persons who are bringing forward this charge—and there was hardly any contention that their position as members of the Union did actually involve a bias which would prevent them from adjudicating on this case. (Italics added.)

109Depending on the circumstances.

110Id.

111Supra, note 1. These “large interests” include the public interest S.32.

112Per Denning J. (as he then was) in Miller v Minister of Pensions [1947] 2 All.E.R. 372, 374.

“That degree is well settled. It must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say; ‘we think it more probable than not’, the burden is discharged, but if the probabilities are equal it is not.”

113[1924] 1 K.B. 256.


115Supra, note 113.

116See supra, note 111 and the arguments in the text.

117If a quorum cannot be formed without allowing a member subject to disqualification for bias to sit, it may be necessary for him to do so. See: S.A. de Smith op. cit. 244 and the cases there cited. Under S.3(5) of the Act as amended, three members constitute a quorum. The right to impugn the decision of a tribunal for bias may also be waived, either expressly or impliedly. See: R.F. Reid op. cit. 236-237 and the cases there cited.


"... [interest or no interest this is expressly what the Board is authorized to do by the plain terms of the Act, and no such limitation can be imposed on the plain meaning of the Act."

120 Supra, note 82.

121 Supra, note 103.

122 Italic added.

123 Supra, note 103.

124 S.4(4).


126 Supra, note 122.

127 They are only judges to the extent stated earlier in this article. See: Supra, note 82 and the body of the text following.

128 S.4(2). Italic added.

129 The Act does not state the circumstances in which an assessor may be removed. It does state the circumstances in which a member of the Board may be permanently removed, see: S.6(6); or may be temporarily replaced by a new appointee if such member has an interest in a matter before the Board, see: S.8. However, it is submitted that assessors may be removed on grounds similar to those on which a member may be removed: Viz. that the assessor was "... from any just cause unfit to continue in office." See: S.6(6). It is submitted that bias in an assessor in these circumstances would amount to "just cause" and would, therefore, be a sufficient ground for his removal. This would be effected by the appropriate Minister. A new appointment could then be made through the appointments mechanism in S.4(2) and the new appointee could familiarize himself with any previous proceedings through reading and studying the transcripts of those proceedings as well as through discussions with the members of the Board, the attorney to the Board and the other assessor if they sat during the proceedings.

130 Supra, note 103.

131 Supra, note 82.

132 Because the Act does not give such an assessor a mandate to represent the interests of any utility.

133 On the previous arguments in the text.

134 They can presumably afford to retain counsel whereas the objectors may not be able to do so or indeed there may be no objectors at all.

135 S.35 of the Act.

136 Before the Board May 3, 1974 (unreported).


139 S.43 of the Act.

140 S.42 of the Act imposes a similar fine on summary conviction on any officer, employee or agent of any public utility (presumably governed by the Act) who willfully refuses or fails to furnish any information or similar matter required of him by the Board. S.39(2) imposes a $100 fine on summary conviction on every
director and manager of a public utility which has failed to obey any order of the Board unless he proves that he took all necessary steps to obey the order himself and to secure obedience of the order by the public utility concerned, and that he was not at fault for the failure to obey the order.

\[141\] *Re The Barbados Telephone Co. Ltd.* before the Board May 3, 1974. (unreported).

\[142\] P.14 of the transcript of the evidence taken on the first day of the hearing.

\[143\] *Supra*, note 141.

\[144\] *Supra*, note 142.

\[145\] S.38(2). This can only be done, in accordance with the procedure set out in S.38(1), if the utility has failed to comply with an order made by the Board, and the Board is of the opinion that no effectual means exist whereby it can enforce compliance with the order. Normally, where a public utility fails or refuses to obey an order of the Board, under S.39(1) it is liable on summary conviction to a fine of up to $1,000. Under Ss. 40, 41 similar fines of $1,000 can be imposed on summary conviction for breach of those sections.

\[146\] S.37(1). In such circumstances the Board must act for and in the interests of the utility's shareholders, its creditors and the public.

\[147\] Proviso to S.37(1). After six months, the Board must then proceed under S.38 and seek a winding up order from the court.

\[148\] In the United States of America the law governing judicial review ranges from some jurisdictions which provide that findings of a public service commission on questions of fact shall be final and not subject to judicial review except in relation to constitutional questions see: *Napa Valley Electric Co. v. Railroad Commission*, 251 US 366 (1919) (California statute); to jurisdictions in which judicial review governs questions of both fact and law, see: *United Gas Pipe Line Co. v. Louisiana Public Service* 241 La. 687; 130 So. 2d. 652 (1961).

\[149\] As amended by the Public Utilities (Amend.) Act 1973 (1974-3). In reality, this amending statute rewrote the whole judicial review procedure. Before the amendment, S.45(3) had empowered the Chief Judge to appoint not more than two persons who, in his opinion, were well qualified by reason of their knowledge and experience to assist in the determination of any question arising before him. The subsection was invoked in *Re The Barbados Telephone Co. Ltd.* 1970 (unreported); and in *Re The Barbados Telephone Co. Ltd.* 1973 (unreported). This subsection has now been repealed by the Public Utilities (Amend.) Act 1973 (1974-3).

\[150\] The above amendment came into force on February 7, 1974.

\[151\] Rule 3 of the Public Utilities Appeals Rules 1957 (no longer in force).

\[152\] See: S.E. Gomes, C.J. in *Re Barbados Light & Power Co. Ltd.* No.1 of 1956. (unreported) at p.2 of the transcript:

This . . . caused counsel to refer to four American text books on the subject of public utilities as decisions of the Court there are not available here. *Those authorities were not referred to in the proceedings before the Board . . .* (Italics added.)

In an American case it was held that the parties may not withhold evidence from the Commission and then produce it in court. See: *New England Tel. & Tel. Co. v. Dept. of Pub. Utilities* 292 Mass 137, 159 NE 743 (1928).

Of course if the trial before the court is a trial de novo, new evidence can be introduced, see: *United Gas Pub. Serv. Co. v. Tex.* 303 US 123 (1927); reh.den. 303 US 667 (1937).

In “Public Utility Regulation and Management in the Government of Trinidad and Tobago” A Survey Report, Chicago, 1961, The Report had recommended at p. A-11 that:
On an appeal no additional evidence should be introduced: [if] new evidence has developed, the matter should be remanded to the Commission for consideration. (Italics added.)

This recommendation, it is submitted, is entirely reasonable and could usefully be adopted by the Barbados legislature.

Of nine rate hearings held before the Board since 1955 (B'dos. Light & Power Co. Ltd. 1956, 1974; B'dos. Tel. Co. Ltd. 1957, 1970, 1972, 1974; The Natural Gas Corp. 1959; B'dos. Transport Corp. 1972, 1975), in six of them the utilities appealed and in five of the appeals the High Court set aside the decision of the Board. On the sixth occasion (Re The B'dos. Tel. Co. Ltd. No.416 of 1974 (unreported)) the appeal had to be considered under the new judicial review procedure. It was the first appeal since the new procedure came into force. The utility succeeded on one ground and one sub-ground of eight grounds of appeal on which it sought to rely. Of the remaining three rate hearings, in Re The B'dos. Light & Power Co. Ltd. before the Board Mar. 1974 (unreported) the utility was granted all the increases it sought and no appeal was made; and in Re The B'dos. Transport Corp. before the Board 1972, and 1975 (unreported) no appeals were made.

See generally, American Jurisprudence, 2nd.3d. (1972), Vol. 64 §276-291.


Id. at p.5 of the transcript of the judgment. (Italics added.)

For the American position see: Salt Lake City v. Utah Light & Traction Co. 52 Utah 210: 173, p.556 (1918) where it was held that, unless it is expressly empowered by statute, the power of the court to review the decision of the Public Service Commission in fixing a rate for a public service corporation is limited to determining whether or not there is any evidence to sustain the finding of fact made by the commission.

This would make the matter, it is submitted, a question of law. See: Denning J. (as he then was) in Bracegirdle v. Oxley [1947] K.B. 349, 358:

The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is a distinction that must always be kept in mind, namely the distinction between primary facts and conclusions from those facts . . . The determination of primary facts is always a question of fact . . . The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law . . . The court will only intervene if the conclusion cannot reasonably be drawn from the primary facts . . . (Italics added.)

Per Lord Reid in Griffiths v. J.P. Harrison (Watford) Ltd. [1963] A.C. 1, 16. Where . . . the question is a question of fact, that means that the decision . . . cannot be reviewed by the court. But if the decision of any tribunal on a question of fact is unreasonable, looking to the facts on which it is based, the court can and must intervene . . . [T]he question . . . is, therefore, not whether [the tribunal was] wrong, but whether their decision was unreasonable. (Italics added.)

Per Justice Williams in Re The Barbados Telephone Co. Ltd. No.416 of 1974 (unreported), at p.9 of the transcript of the judgment.

Determination of the primary facts is not a matter of law, but to make a finding unsupported by any evidence is an error of law. (Italics added.)

See: State ex rel. North Carolina Utilities Comm. v. Southern R. Co. 267 NC. 317; 148 SE 2d. 210 (1966). See too Justice Williams in Re The Barbados Telephone Co. Ltd. supra, where in relation to vehicle expenses disallowed by the Board his Lordship said at p.29 of the transcript of the judgment:

This is a matter on which the Board has made a decision not to allow certain amounts as operating expenses. Opinions will differ on whether or not it is a good decision in the light of modern business practice but in
my view it is a decision well within the functions of the Board in supervising utilities in the public interest and no question of law has been shown which would entitle this court to interfere. (Italics added.)

169 This principle is also recognized by some American courts: See: Hocking Valley R. Co. v. Public Utilities Commission 92 Ohio St. 9; 110 NE 521 (1915).

161 The utility appeared unopposed in: Re Barbados Light & Power Co. Ltd. 1956; in Re The Barbados Telephone Co. Ltd. 1957; and in Re The Barbados Light & Power Co. Ltd. 1974. Of course if assessors are appointed for the hearing, then the interests of the users of the public utility concerned will have fuller representation, through cross-examination of the witnesses by the assessors, as well as advice to the Board. There is also the cross-examination and advice of the attorney to the Board.

162 In Re The Barbados Light & Power Co. Ltd. No.1 of 1956 (unreported); and in Re The Barbados Telephone Co. Ltd. 1957 (unreported).

163 In the United States appeals against the decision of the public utilities regulatory authority are brought against the regulatory authority, which then has to defend its decision. This ensures that decisions of the regulatory authority are defended when appealed against. The idea of allowing regulatory authority decisions to be assailed on appeal undefended is really such a ridiculous proposition in a system based on the adversary principle that in the United States it is unthinkable, and the structure of the judicial review procedure makes it for all practical purposes impossible.

164 Per S.E. Gomes C.J. in Re The Barbados Light & Power Co. Ltd. No.1 of 1956 (unreported) at p.2 of the transcript of the judgment: 

... [T]he Board ... having given a judicial or quasi-judicial decision, could not be heard as advocate in the matter.

Indeed the Board has no accusatorial function except to complain under S.30(1) if in the circumstances it thinks fit to do so; or to apply for a winding up order under S.38(2). In California "a public service commission with power to determine controverted facts between private litigants and decide thereon, exercises judicial powers . . ." American Jurisprudence, 2nd.ed. (1972) Vol. 64 §276; also Pacific Telephone & Telegraph Co. v. Eshelman 166 Cal. 640; 137 P.1119 (1913).

165 The award of the costs of proceedings before the Board lies in the discretion of the Board s.56; and on appeal, in the discretion of the judge S.45(5).

166 Undoubtedly the risk of bearing costs would tend to deter frivolous complaints, and this is certainly highly desirable.

167 Duly supported by other attorneys where necessary.

168 Alternatives such as e.g. having the Attorney-General or Solicitor-General appear as amicus curiae are less satisfactory, for counsel to the Board would have been present throughout the hearing and during the deliberations of the Board and would, therefore, be more conversant with all the facets of the issues. In any event, no appearance of this kind has apparently yet occurred and there is little reason to think that it might happen in the future. Besides, a formal statutory procedure is to be preferred.

169 The date when the Public Utilities (Amend.) Act 1973 (1974-3) came into force.

170 The future will show whether it has been successful or not.

171 Supra, note 1.