

**BEFORE THE ENVIRONMENT COURT
CHRISTCHURCH REGISTRY**

ENV 2011-CHC-090

UNDER The Resource Management Act
1991

BETWEEN **MERIDIAN ENERGY LIMITED**

Applicant

AND **HURUNUI DISTRICT
COUNCIL and CANTERBURY
REGIONAL COUNCIL**

Consent Authorities

**MEMORANDUM FOR GLENMARK COMMUNITY AGAINST WIND
TURBINES INCORPORATED
RE: COMMISSIONER SUTHERLAND
Dated this 20th day of August 2012**

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TO: Registrar, Environment Court, Christchurch
And to: The Applicant
And to: The Respondents

Declaration of Interest by Commissioner Sutherland

1. This memorandum is filed in response to the Minute of the Court dated 16 August 2012 inviting parties input into Your Honour's decision about the appropriateness of Commissioner Sutherland sitting on this Court in circumstances where his son has been employed by the Applicant Meridian Energy Limited.

Society Objects

2. The Glenmark Community Against Wind Turbines Incorporated objects to Mr Sutherland sitting as a commissioner on this hearing.
3. Your Honour has raised the issue of conflict of interest in the Minute. With respect it is submitted that strictly the matter for consideration is whether there is any risk of "apparent bias". Counsel stresses from the outset that reliance is placed upon the legal test of apparent bias, and actual bias is not alleged.

Apparent Bias

4. This issue was of course extensively reviewed and ruled upon by the Supreme Court of New Zealand in *Saxmere Company Limited v Wool Board Disestablishment Company Limited* [2010] 1 NZLR 35. At para [3] of the judgment of that Court, the Court said:

"There was no disagreement before us concerning the test for "apparent bias". After some semantic differences, the test in the United Kingdom and the test in Australia have become essentially the same. In *Muir v Commissioner of Inland Revenue*, the Court of Appeal brought New Zealand law into line. In the Australian case of *Ebner v Official Trustee in Bankruptcy* the leading judgment was given by Gleeson CJ and McHugh, Gummow and Hayne JJ. They stated the governing principle that, subject to qualifications relating to waiver or necessity, a Judge is disqualified 'if a fair minded lay observer might reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the question the Judge is

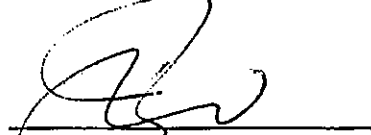
required to decide'. As that judgment proceeds to observe, that principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the Tribunal (in the present case, the Court of Appeal) be independent and impartial. Unless the judicial system is seen as independent and impartial the public will not have confidence in it and the judiciary who serve in it".

5. Tipping J put the test succinctly at para [37]

"The crucial question in this appeal is whether a fair-minded, impartial, and properly informed observer could reasonably have thought that the Judge might have been unconsciously bias in favour of the party represented by Mr Galbraith QC"

6. His Honour noted at para [41] *"the reference in the test to the Judge being unconsciously biased reflects the difference between apparent bias and actual bias. That difference is captured well in the expression 'more apparent than real'"*.
7. It is submitted that given the naturally close relationship between a father and son, particularly a father and son who practice in the same field of expertise, this must give rise to a risk in the mind of an independent lay observer that Commissioner Sutherland might be **unconsciously** biased in favour of Meridian.
8. It is emphasised that the test does not require actual bias, or any evidence of past bias, but rather is a question of the risk that an independent observer might consider that apparent bias could prevail.
9. In those circumstances it is submitted that it is unsafe to proceed with the hearing of this application by Meridian with Commissioner Sutherland sitting as a Commissioner.

Dated at Christchurch this 20th day of August 2012



M J Wallace
Counsel for Glenmark Community Against Wind Turbines Inc