

Foundation of Administrative Justice
New Horizons: Legal Issues for Tribunals

Bias: Is the Circle Getting Smaller?

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The Rules of Natural Justice

- *Audi alteram partem*:
 - “Hear the other side”
 - Both sides to a dispute must be heard
- *Nemo iudex in propria causa*:
 - “No man may be a judge in his own cause”
 - The rule against bias

The Rule Against Bias

- Applies to all administrative Tribunals
- Requires *impartiality*:
 - “a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.”

R. v. S. (R.D.), [1997] 3 S.C.R. 484 per Cory J. at para.

Who isn't biased?

- “an ‘open mind’ cannot be equated with an empty head.” Brown and Evans, *Judicial Review of Administrative Action in Canada*
- “... 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.” *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (per L’Heureux-Dubé J. and McLachlin J., as she then was) at para.38

What degree of bias is impermissible?

- “a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile”. *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 at p. 1197

The legal test

- . . . the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.... [T]hat test is “what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”
- *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 per de Grandpré J. in dissent at pp. 394-95

The legal test

- Is objective – the claimant can't just adduce evidence of a belief that there is bias
- This is because judges “are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.” *R. v. Teskey*, 2007 SCC 25, per Charron J. for the majority at para. 21.
- The presumption can be displaced” through the adduction of “cogent evidence” of bias. *United States v. Morgan*, 313 U.S. 409 (1941), at p. 421, as quoted with approval in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (L’Heureux-Dubé J. and McLachlin J. , as she then was) at para. 32.

Actual bias vs. the appearance of bias

- The focus is properly on the appearance of bias, not the actual state of mind of the adjudicator. This is because:
 - “Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: ‘The judge was biased.’” *Metropolitan Properties Co. v. Lannon*, [1969] 1 Q.B. 577 (C.A.), per Lord Denning M.R. p. 599, as adopted by Major J. for the dissent at para. 11 of *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484
 - The confidential nature of judging, and the unseemliness of having an adjudicator testify: Brown & Evans, *Judicial Review in Canada*

The impartiality continuum

- The degree of impartiality required of a particular tribunal varies based on the terms of its constituting legislation, and where it falls on a continuum ranging from quasi-judicial (charged with determining the rights of parties to disputes) to policy-making.
- Tribunals that are primarily engaged with policy-making, such as a municipal council, are not required to demonstrate a judicial standard of impartiality, and must only appear “amenable to persuasion” and not have “a closed mind”.

Legal effect of bias

- An appearance of bias goes to jurisdiction, rendering a decision void, unless the bias can be said to have been waived.
- If overturned on judicial review because of bias, the matter will not be remitted to the same adjudicator.
- "if there is a real likelihood of bias in even one member of a tribunal it is sufficient to disqualify the whole tribunal."

Types of bias

- The categories are never closed, but here are five types of bias recognised in the cases:
 - Relational bias
 - Personal relationships
 - Non personal relationships
 - Informational bias
 - Attitudinal bias
 - Institutional bias
 - Operational bias

Robert D. Kligman, *Bias* (Toronto: Butterworths, 2001)

Relational bias

- “. . . kinship, friendship, partisanship, particular professional or business relationship with one of the parties, animosity towards someone interested ... etc.”
Energy Probe v. Atomic Energy Control Board, [1985] 1 F.C. 563 (C.A.) leave to appeal refused, [1985] 1 S.C.R. viii, per Marceau J.A. at p. 580
- A financial interest will give rise to an appearance of bias will disqualify an adjudicator, if it arises from an existing relationship that gives the adjudicator a real potential for business or pecuniary advantage related to the disposition of the proceedings. The business or pecuniary interest must be “direct” not “too remote” or “indirect” or “contingent”.

Informational bias

- Knowledge of a dispute may breach the rule against bias if it was obtained in an *ex parte* manner (i.e. in the absence of one or all parties).
- The rule against bias will be breached only if an adjudicator's prior knowledge of a dispute, party, or issue operates in a wrongful or improper manner, in the sense that the parties are deprived of a fair hearing of the issues.

Attitudinal bias

- past statements made by an adjudicator on an issue germane to the case now before her.
- “...partiality is ‘a state of mind or attitude...in relation to the issues and the parties in a particular case,’ a real predisposition to a particular result. The applicant would have to show wrongful or inappropriate declarations showing a state of mind that sways judgment in order to succeed.” *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 85 at para.5, quoting from *Valenté v. The Queen*, [1985] 2 S.C.R. 673

Institutional bias

- Arises where an adjudicator is also investigator, prosecutor, or party to a dispute
- May be authorized by statute ... within Constitutional limits
- An institutional bias objection may also rest on an argument that the Tribunal lacks independence, which is a *sine qua non* of natural justice. *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R.3

Adjudicative independence

- Freedom from "restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."
- An independent tribunal has "the essential conditions of independence" including "security of tenure, financial security and administrative control." *R. v. Valente*, [1985] 2 S.C.R. 673
- These criteria can be altered by statute, within Constitutional limits

Independence in Tripartite Boards

- it has been held that the tripartite model “implicitly allows for a degree of partiality in the representative members of the board ... allowing them to act as arbitrators even though they be pre-disposed, generally, in favour of the party that nominated them and even though they be expected, to some extent, to advocate the interests of that party.”
- But, each party to an arbitration "is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs." *Szilard v. Szasz*, [1955] S.C.R. 3 Per Rand J. at 4.
- Nominees are expected to act judicially once appointed. Communicating with the nominating party during the hearing may result in disqualification: *King-Yonge Properties Ltd. v. Great-West Life Assurance Co.* [1989] O.J. No. 452 (QL) (Ont. H.C.); aff'd [1989] O.J. No. 1097 (QL) (Ont. C.A.)

Operational bias

- Conduct during the hearing, procedural rulings, and reasons.
 - Communicating with one party without the knowledge or inclusion of the other
 - Interfering with examinations
 - Excessive familiarity with parties or their counsel
 - Facial expressions, sighing, etc.
 - Inflammatory language in preliminary reasons
 - Tone and content of reasons

A bias objection: what to do

- A tribunal has jurisdiction to rule on a bias objection.
 - Don't say: tell a judge.
- Disclose in advance
 - a party's failure to object at the outset of the hearing, if it has knowledge of the facts relevant giving rise to an appearance of bias, will likely be taken as acquiescing or waiving objection
- Recuse only for good reason
 - Hasty recusal could promote judge- or adjudicator-shopping that "tends to bring the administration of justice into disrepute."