

Bias in the administrative tribunal context

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Bias – Legal framework

- Overview:
 - Situate the panel discussions in the legal framework for bias/recusal in administrative law
 - Individual independence and Impartiality
 - Tribunals
 - Policy-making and elected boards
 - Institutional independence
 - Institutional impartiality

Bias – Legal framework

- Bias/independence at the individual and institutional level both assessed objectively
- Impartial decision: made w/o bias (or the reasonable apprehension of bias)
- Institutional independence: body is not beholden to government and makes decisions without undue influence

Impartiality of the decision-maker

- Adjudicative tribunals and administrative decision-makers
 - Reasonable apprehension of bias
- Deliberative bodies (elected or policy-setting boards)
 - « open mind » test

Impartiality of the decision-maker

- Like courts, administrative decision-makers enjoy the presumption of impartiality
- « any allegation of bias must be supported by concrete evidence and cannot be raised lightly »
 - Should be raised before the decision-maker (or at the very least at the earliest opportunity)
 - Failure to do so can amount to waiver
- *Keita v Canada*, 2015 FCA 1155 (paras. 1, 27)

Impartiality of the decision-maker

- Reasonable apprehension of bias test
 - What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude?
 - Is it more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly?
 - *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR

Impartiality of the decision-maker

- Not a question of whether there is actual bias/malice, etc.
- And does not mean that evidence of a decision-maker's interests and relationships are not relevant
- What is the objective conclusion to be drawn from that evidence

Bias - factors

- Pecuniary or other material interests
 - « direct » - not too remote, contingent or speculative; comes from the decision itself (*Energy Probe v Atomic Energy Control Board*, [1985] 1 FC 563)
 - « Potential » pecuniary benefits to an indigenous band, as opposed to the tribunal members themselves, not sufficiently « direct » (*Canadian Pacific v Matsqui Indian Band*, [1995] 1 SCR 3)

Bias - factors

- Relationship between the party and the decision-maker
 - Relevant factors will include amount of time that has passed between the end of the relationship said to give rise to the conflict and when the decision-maker is appointed to the board (*Re Marques et al and Dylex Ltd. et al*, 1977 CanLII 1157 (ON SC))

Bias - factors

- Prior knowledge or involvement about a matter
 - *Committee for Justice and Liberty*: Chair of the NEB was a member of a « study group » of corporations discussing issues of economic and financial feasibility that were issues in cases coming before the NEB
 - *Terceira v Labourers International Union of North America*, 2014 ONCA 839: OLB vice-chair's decision not to recuse when had acted for a party 7 years earlier did not rebut presumption of impartiality

Bias – factors

- In-hearing reasons for raising bias/lack of impartiality
 - Aggressive questioning/comments
 - Comments about substantive issues suggesting a predisposition
 - Comments that suggest over-familiarity or close relationships with a party/counsel
 - Can also manifest in the written decision
 - *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817

« Tainting » of a panel

- Cases arise out of the appellate courts
 - Statutory authority to continue to deliberate
- The reasonable apprehension of bias of one member of the panel said to « taint » the remaining members
- Whether the reason for the panel member's recusal, viewed objectively, could lead an observer to conclude the rest of the panel was « tainted » by the bias

Policy-making and elected boards

- Municipalities, also other boards who have both policy and adjudicative functions
- Slightly different test – the « open mind » test
- Whether the mind of the decision-maker is closed such that the issue has been prejudged and any attempt to persuade would be futile
- *Old St. Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170

Policy-making and elected boards

- Rationale: these bodies set government policy and/or « legislate »
 - Are often elected, intended to offer varying opinions/political beliefs, intended to represent those who elected them
 - Purpose of such bodies is to bring those with established opinions/expertise together – representational mandate
 - Reasonable apprehension of bias would almost always be met

Institutional bias

- The tribunal/decision-maker as an institution is biased
 - A labour board biased towards employers
- Must be blatantly obvious ore a trend
 - « reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases » (*R v Lippe*, [1991] 2 SCR 114)
- Turns on the perception of bias

Institutional bias

- *R v Lippe*: whether part-time judges could continue to practice law
 - Analysis equally relevant to part-time tribunal members?
- Concerns:
 - Could be pressured by clients to make a particular decision
 - Appearance of conflict if a lawyer of the judge's firm appeared before the judge
 - Judge may feel pressure based on business interests of the firm
 - Clients of the judge could be called to testify

Institutional safeguards

- Can alleviate an apprehension of bias
 - Oath of office
 - Code of ethics
 - Regulatory restrictions on mandate, procedure, etc.
 - Process for handling conflicts/governing recusal of individual members

Institutional Independence

- While impartiality is focused on whether the decision-maker is open-minded, institutional independence is concerned with the absence of external coercion on the decision-maker
- « not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the executive branch of government, that rests on objective conditions or guarantees » (*Valence v The Queen*, [1985] 2 SCR 673)

Institutional Independence

- Most commonly refers to independence from the executive
- But can also relate to independence from other tribunal members, staff, etc.
- Focus is on the structure of the decision-maker
 - Three structural components of institutional independence

Institutional Independence

- Security of tenure
 - Fixed-term appointments are acceptable, but removal should not be at pleasure (2747-3174 *Quebec Inc. v Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919)
- Financial security
- Administrative independence
 - Ministerial oversight in and of itself not problematic
 - A matter of degree

Institutional Independence

- Developed to address the judiciary
- Apply in some form to administrative decision-making (*Canadian Pacific Ltd. v Matsqui Indian Band*, [1995] 1 SCR 3)
 - Context-specific approach
 - Degree of independence « will depend on the nature of the tribunal, the interests at stake, and other indices of independence such as an oath of office » (*Matsqui*, at para. 83)

Institutional Independence

- Courts will analyze the degree of independence required only where a statute is silent or ambiguous on the degree of independence
 - Common law procedural fairness will guide
- If legislation provides for a particular relationship between a tribunal and the government, it will not violate institutional independence
- Parliament can oust procedural fairness (*Ocean Port Hotel Ltd. v British Columbia*, [2001] 2 SCR 781)

Institutional Independence

- *Saskatchewan Federation of Labour v Saskatchewan*, 2013 SKCA 61
 - Replacement of Chair and Vice-Chair of SLRB
 - Alleged to be political – and lack impartiality
 - SLRB bound by natural justice obligations to adjudicate impartially and decisions subject to judicial review
 - Unwritten constitutional principle of judicial independence did not extend to Chair/Vice-Chair positions, or the SLRB itself



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