New Issues in Administrative Law Bias: Reviewing for Bias in Discretionary Contexts

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Introduction

Contextual approaches to administrative law have emerged and played a dominant role in our Supreme Court jurisprudence since the late 1970s. On a substantive level, regard for context has translated into deference to tribunals deciding matters within their area of expertise. Use of the pragmatic and functional approach is now a mainstay of the methodology used to determine the appropriate standard of review. On a procedural level, since *Knight v. Indian Head School Division No. 19*[1], we have been reminded often that the requirements for natural justice are flexible. Supreme Court jurisprudence from *Knight*[2] to *Baker*[3] and *Suresh*[4] have made us aware of the multiplicity of tribunals, the variety of their functions and the necessity of ensuring that any procedural safeguards that are imposed on a tribunal respect the nature and functions of that particular body. We are told that since "one size does not fit all", it

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1 [1990] 1 S.C.R.653[*Knight*].

2 *Ibid*.

3 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817[*Baker*].

4 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 [*Suresh*].

is important for a reviewing court to understand the will of the legislature as expressed through the statutory scheme and to have an accurate sense of the tribunal's daily institutional context before evaluating whether the requirements for procedural fairness have been met. Given that a finding of inappropriate procedural safeguards is usually accompanied by suggestions for correction, the emphasis on understanding the statutory and operational context in which a tribunal functions becomes even clearer.

This paper examines one aspect of procedural fairness: bias. It limits itself further by considering bias in discretionary contexts – that is, it considers how the law on bias has developed in situations where the rules of procedural fairness are not dictated primarily by statute or other governmental instrument but left largely to the discretion of decision-making body. Three types of discretionary context are examined in this paper. The first is the very common situation in which the enabling statute of a decision-making body leaves it with a significant amount of discretion to design its own process.[5] An example is found in the *Canada Labour Code*[6], which provides at ss. 15(a):

> **15**. The Board may make regulations of general application respecting
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> (*a*) the establishment of rules of procedure for its pre-hearing proceedings and hearings;[…]

Generally, the idea behind such statutory provisions is that the decision-making body has or will develop a certain amount of expertise in the regulation of the sector entrusted to it[7] and that this expertise will enable

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5 There are, of course situations where a superseding statute may impose additional guidance or constraints such as the Ontario *Statutory Powers and Procedures Act* R.S.O. 1990 c. S.22.

6 R.S.C., c. L-2.

7 I use the term "regulation" broadly here to denote more than tribunals commonly said to be regulatory due to their rate-setting functions (eg. energy boards). A review of the literature in law and public administration suggests that in picturing the administrative state, it may be best to conceive of all administrative tribunals as first and foremost organs of regulation. Once this is done, it becomes a matter of subdividing them into categories according to function and subject area. The former Economic Council of Canada's approach divided regulation into two distinct

it to decide on procedures allowing it both to protect the rights to fair participation of individual litigants and to further the policy objectives particular to its regulatory domain.[8]

In the second type of discretionary context, a governmental instrument other than a statute, such as an Order-In-Council provides the vehicle through which the decision-maker can create its own process. Such is the case with many Commissions of Inquiry[9]. Finally, the third context is that of ministerial discretion where a Minister of Cabinet is required to design procedures to address decision-making that involves

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categories –economic and social regulation. All tribunals fit into one of these two categories. Economic regulation is the traditional type of regulation and includes the setting of rates, prices and the distribution of licences such as those for broadcasting. One can easily place tribunals such as the National Energy Board, the CRTC and agricultural marketing boards into this group. Social regulation, on the other hand, is a more modern type of regulation that aims to further broad social objectives. Most regulation of this sort addresses four main areas of concern: (i) health and safety; (ii) environmental regulation; (iii) matters of "fairness" (which include consumer protection, protection of personal information and access to it and anti-discrimination); and (iv)"cultural" regulation such as Canadian content requirements in broadcasting. Unlike economic regulation, social regulation is not industry specific and generally cuts across all industries. Worker compensation boards, environmental protection agencies and access to information commissions serve this type of regulatory purpose. They indicate that regulation is effected by government departments and tribunals primarily through the use of statutes and subordinate legislation in the form of regulations. (see Economic Council of Canada, "Regulation and Regulatory Agencies in Canada" in *Responsible Regulation* (Ottawa: Supply and Services, 1979) reprinted in abridged form in Kenneth Kernaghan, ed. *Public Administration in Canada: Selected Readings* 5th ed., (Toronto: Methuen, 1985) 140.).

8 The question that arises for tribunals is how to deal with these two goals when they come into conflict. This issue tends to becomes even more aggravated by practical questions of budget and efficiency.

9 See for example the Terms of Reference of Order in Council P.C. 2004-110 setting up the Commission of Inquiry into the Sponsorship Program and Advertising Activities (the Gomery Inquiry), available online at www.gomery.ca . Part (e) of the Terms of Reference which are located in the Order in Council states: …and the Committee do further advise that …. (e) the Commissioner be authorized to adopt any procedures and methods that he may consider expedient for the proper conduct of the inquiry […]". On Commissions of Inquiry generally see Allan Manson, and David Mullan, (eds.). *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003) and an earlier article by Roderick A. Macdonald, "The Commission of Inquiry in the Perspective of Administrative Law" (1980) 18 Alta. L.R. 366.

interactions with individuals. These three types are not exhaustive of all the discretionary contexts that exist[10]. However, the bulk of the recent jurisprudence falls within these three categories.

Through a review of the cases emanating from the Federal Court, Ontario and Quebec from May, 2003 to May, 2005, this paper examines the major developments that have occurred in these three discretionary contexts. In part, the aim of this paper is to examine how the courts have handled the dual and somewhat conflicting obligations of paying respect to agency procedure while deciding issues of procedural fairness, including bias, on a correctness standard -- thereby reconciling the conflicting messages of *Baker* and *CUPE v. Ontario(Minister of Labour)*[11]. I find that while the Supreme Court in cases like *Baker* and *Suresh* have opened the door to paying respect to the agency's choice of procedure in procedural fairness matters, a method for doing so has not fully been worked out.

This paper proceeds in three parts. In Part I, I provide an overview of the law on bias, discussing the various tests. Part II outlines recent developments in procedural fairness and reasonable apprehension of bias articulated by the Supreme Court. Then, in Part III, I review a few of the significant cases that have emerged over the past two years, paying attention to new principles that have emerged relating to procedural fairness and reasonable apprehension of bias in the context of particular decision-making bodies. Finally, in my concluding discussion, I reflect on whether the *Baker* approach to contextualism, with its added emphasis on deference to the tribunal's own sense of procedural fairness, could be embraced more fully than it has been in the developing jurisprudence.

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[10] One can think of others such as situations of discretion arising from the exercise of Royal Prerogative.

[11] [2003] 1 S.C.R. 539 [*CUPE*]. In this way, the research question furthers a question raised in the literature by David Mullan. See David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004) 17 C.J.A.L.P. 59.

Part One

Reasonable Apprehension of Bias

The rule against partiality is an element of procedural fairness. As Justice Cory stated in *Newfoundland Telephone*: "The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased."[12] Impartiality refers to the state of mind of the decision-maker in relation to the issues and the parties before her.[13] By seeking to ensure that the decision-maker is not deciding in her own interest or in a manner that favours one of the parties before her, the rule against bias aims to ensure that the decision made in consequence will be a fair one. Impartiality is based on two fundamental ideas in our common law system: that a judge should neither judge her own cause nor have any interest in the outcome of a case before her (*nemo judex in sua causa debet esse*) and the notion that decision-making requires the decision-maker to hear and listen to both sides of the case before making a decision (*audi alteram partem*). The traditional perspective from which we view issues of justice has taught us that for justice to be done, disputes must be decided by those who are disconnected from the matter and have no interest in the outcome.[14] This perspective shows us futility in having a decision-maker resolve a dispute if his or her mind is already made up or if he or she has personal reasons for favouring one party or another. A system with such flaws can only lead to an absence of fairness to one party. Willingness to hear all sides and be fair (*audi alteram partem*) is thus guaranteed by a lack of partiality (*nemo judex*). Indeed, the converse may also be true, as lack of partiality

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[12] *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623.at para. 22.

[13] See *R v. Valente*, [1985] 2 S.C.R. 673 at para. 15.

[14] Nathalie DesRosiers notes that the idea of conferring power on a stranger to decide disputes is not universally accepted but traditionally Anglo-European. She observes that in Aboriginal tribal laws, for example, "peacemaking courts stress the connections between the parties and the peacemaker as a guarantee that the solution reached will work in the long run and will satisfy both parties and society." See N. DesRosiers, "Toward an Administrative Model of Independence and Accountability for Statutory Tribunals" in Madam Justice G.A. Smith & H. Dumont, eds., *Justice to Order: Adjustment to Changing Demands and Co-ordination Issues in the Justice System in Canada* (Montreal: Thémis, 1999) at 61.

to any one party to a dispute may inspire a greater openness to hear all sides of the dispute.

The test for bias relies on the perception of the reasonable person. This is because the theory underlying the rule against bias deals with fostering public confidence in the justice system. The mere appearance of partiality in the decision-making process to a reasonable and well informed person can destroy trust in the system. Justice must therefore not only be done but must "manifestly and undoubtedly be seen to be done"[15] in order to maintain public confidence in the administration of justice. Thus perception of bias alone is enough to render a decision invalid, regardless of whether bias exists in fact.

The test of what "an informed person viewing the matter realistically and practically – and having thought the matter through –" would decide is thus the general test used to determine if there is lack of impartiality on an individual and institutional sense[16]. This test, which was set out in *Committee for Justice and Liberty v. National Energy Board*[17] has been applied in a range of fact situations giving rise to allegations of bias such as: personal conflict of interest[18], attitudinal bias[19], procedural hearing matters(eg.. aggressive questioning and antagonism during hearing)[20], institutional concerns including lack of

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15 As we have been reminded in cases dating back to *R. v. Sussex Justices, Ex Parte McCarthy* [1924] 1 K.B. 256, case from which this quote comes.

16 This test was set out in the dissenting reasons of Justice de Grandpré in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394.

17 *Committee for Justice and Liberty*, *ibid*.

18 See, for example, *Energy Probe v. Canada (Atomic Energy Control Board)* (1984), 8 D.L.R. (4th) 735; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3.

19 See for example, *Great Atlantic & Pacific Co. of Canada v. Ontario (Human Rights Commission)* (1993), 12 Admin. L.R. (2d) 267.

20 See for example, *Yusuf v. Canada(Minister of Employment and Immigration)* (1991), 7 Admin L.R. (2d) 86.

independence[21] and overlapping functions absent statutory or (quasi)-constitutional authorization[22].

Amenability to Persuasion

A second test for bias has also arisen in the jurisprudence. This test considers the degree to which a decision-maker has a "closed mind" to an issue before her. This approach has been used in situations where the decision-maker has had a previous engagement with an issue, such as those involving municipal councillors who have advocated for a position during their election campaigns and are then asked to consider opposing views during public hearings. For example, in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*[23] , the Supreme Court of Canada held that a municipal councillor who advocated quite strongly for a development project to move ahead (advocacy which included arguing on behalf of the developer before a Council committee) was not possessed of disqualifying bias. The court reasoned that some degree of pre-judgment is inherent in the role municipal councillors. It is quite conceivable that a councillor will have taken a stand as part of an election platform on an issue that they must later decide. In circumstances like these, where pre-judgment is a natural part of the decision-maker's work, the appropriate test to apply is to ask whether the decision-maker is so wedded to his position that he is not capable of being persuaded otherwise. As Justice Sopinka, writing for the majority, held:

> In my opinion, the test that is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor is one which requires that the objectors or supporters be heard by members of Council who are capable of being persuaded… The

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[21] See for example, *Bell Canada v. Canadian Telephone Employees Association*, [2003], 1 S.C.R. 884.

[22] See for example, *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)* [1996] 3 S.C.R. 919. Generally, on all of these categories see the very thorough work of David Mullan in *Administrative Law: Cases Text and Materials* (5th ed.) (Toronto: Emond Montgomery, 2003).

[23] [1990] 3 S.C.R. 1170 [*Old St. Boniface*].

> party alleging disqualifying bias must establish that there is a pre-judgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council, while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged.[24]

The "open-mind" test has raised several questions. On the one hand, one wonders if it is to be understood as a parallel test for bias or if it is a subset of the reasonable apprehension test. It seems that a closed mind can never be determined with certainty. Regardless of what a person says, how can one ever be certain if a decision-maker has an open or closed mind? It also seems likely that the test of determining whether a decision-maker in not open to persuasion would have to be met on a reasonableness standard. In other words, a reasonable apprehension of a closed mind should suffice.

The impossibility of accurately "gauging the openness of a person's mind"[25] has led to further concerns. In *Save Richmond Farmland Society v. Richmond(Township)*[26], decided the same year as *Old St. Boniface*, the authors of the Supreme Court's minority decision expressed concern that the closed mind test may simply lead to "posturing" by politicians in order to avoid being disqualified for bias. In the minority's opinion, the main purpose of the public hearings described under the provision of the municipal statute in question was to allow members of the public an opportunity to express their views. The public hearings were matters of policy that fell in line with the legislative objectives of the council. The councillors who participated in these hearings were there primarily to respond to the concerns of their constituents, but not in a "judicial" capacity. In the final analysis, the minority argued that a closed mind should not generally disentitle an alderman from participating in such a process so long as "the closed mind is the result not of corruption, but of honest opinions strongly held".[27] The minority's approach is

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[24] *Old St. Boniface*, *ibid*., at para 57.

[25] *Save Richmond Farmland Society v. Richmond (Township)* [1990] 3 S.C.R. 1213.

[26] *Ibid.*

interesting as it aims to speak more broadly to the question of political behaviour as opposed to simply addressing the narrow issue within the province of judicial review.

The open mind test has also been used to determine whether decision-makers who have made statements to the public about matters before them are able to continue and render a decision impartially. For example, in *Newfoundland Telephone*[28], the Supreme Court held that a reasonable apprehension of bias arose from comments made by a Commissioner of the Public Utilities Board. The Commissioner had made several statements to the press, both at the investigation stage and during the hearing stage of a high profile party that they were investigating. The Court divided the comments that had been expressed into two timeframes. Those made during the investigative stage completed prior to the hearing, were found not to compromise the commissioner's appearance of impartiality. However, the hearing stage itself called for a higher level of discretion. The Court found that the Commissioner's comments to the press during the hearing indicated that he had made up his mind before having heard all the evidence. His comments included stating repeatedly that there was "absolutely no justification" for the party's actions and that there was "clearly […] a significant level of executive over compensation".

The facts in *Newfoundland Telephone* of course bring to mind the recent Federal Court challenge to have Mr. Justice Gomery removed from the position of Commissioner of the Commission of Inquiry into the Sponsorship Program and Advertising Activities. Although the challenge has been withdrawn for the moment[29], it may resurface, possibly enabling us to see further developments in the test for closed mindedness.

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[27] LaForest J. for the minority. (The minority group of judges comprised LaForest, Lamer and L'Heureux-Dubé JJ.) The majority, by contrast, simply applied the reasoning they had used in *Old St. Boniface* and held that alderman was amenable to persuasion.

[28] *Supra* note 9.

[29] "Chrétien backs down on challenging Gomery" *The Globe and Mail* (31 May 2005) A1.

Tribunal Standing & Reconciling the Two Tests

Finally, one fact situation dealing with the possibility of bias, the test for which has not been addressed yet explicitly or definitively by the courts, is whether the issue of allowing tribunals standing on judicial review of their own decisions should be evaluated through a reasonable apprehension of bias or a closed mind test. Arguably, the reasoning behind the debate over the standing issue brings in a mixture of both tests. Fear of a closed mind is undoubtedly one concern as recent jurisprudence reflects on the tribunal's "ability to act impartially in future cases" involving the same issues and the same parties.[30] However, even the mere appearance of losing the ability to decide impartially has given rise to concern – early cases to address the issue deal with the question of whether the tribunal's appearance on review will "discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties"[31]. Perhaps, ultimately, the closed mind test is really just a way of contextualizing the reasonable apprehension of bias test. It may simply be the result of adapting the reasonable apprehension of bias test to the nature of a decision-making context. This would explain the ability of the courts to address the substantive question of the right of tribunals to appear on review without need to be bogged down in a classification of tests.[32]

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[30] See *Children's Lawyer for Ontario v. (Information and Privacy Commissioner)* [2005] O.J. No. 1426 (OCA April 18, 2005, Docket # C41313).

[31] See *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684. See generally on the issue of tribunal standing and its implications for tribunal impartiality: Laverne A. Jacobs, "Recent Developments in Tribunal Standing: *Bransen Construction Ltd.* and Tribunal Impartiality" (2003) 50 Admin. L.R. (3d) 123 and Laverne A. Jacobs & Thomas S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing before the Courts" (2002) 81 Can. Bar Rev. 616.

[32] Some recent decisions have provided very thoughtful, measured and sustained analysis of the issue of tribunal standing without worrying about the different tests for bias. See for example *Ontario Children's Lawyer supra* note 27 and *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction* (2002), 39 Admin. L.R. (3d) 1. At the Federal Court level, see the decision dealing with standing of Justice Gomery to intervene on the application to have his recusal decision quashed: *Chrétien v. Canada(Attorney General)*, [2005] F.C.J. No. 684

Part Two

Recent Developments in the Supreme Court of Canada

Baker, *Suresh* and *CUPE* are three recent cases that touch on procedural fairness and have implications for determining reasonable apprehension of bias. In *Baker*, Madam Justice L'Heureux-Dubé, speaking for the majority of the Court, outlined five factors that are relevant to determining the content of the duty of fairness. These five factors are:

i. the nature of the decision being made and the process followed in making it;
ii. the nature of the statutory scheme and the statutory provisions under which the body operates;
iii. the importance of the decision to the individual or individuals affected;
iv. the legitimate expectations of the person challenging the decision
v. *respect for the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures , or when the agency has an expertise in determining what procedures are appropriate in the circumstances* [emphasis added][33]

Justice L'Heureux-Dubé also noted that this list is not exhaustive. The fifth factor represents a significant and notable change in administrative law development. Never before had it been suggested that a form of deference be owed to the tribunal's conception of what constitutes reasonable procedures. On one level, it was not surprising that this development should occur: it was well in keeping with the Court's increased desire to recognize expertise that had become prevalent since *Pushpanathan* in the standard of review jurisprudence. It was also very much in step with the overall move toward contextualism in judging that is spanning many areas of public law.[34]

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[33] *Baker supra* note 3 at paras. 23-27.

[34] See for example *R. v. R.D.S.*, [1997] 3 S.C.R. 484. One thinks also of the rules of statutory interpretation which emphasize interpretation in context. The move to

In addition to being applied in *Baker*, these factors were taken up by the court in *Suresh*. In both cases, respect for the agency's choice of procedure entailed directing attention to the fact that Parliament, through statute, had left considerable discretion to the Minister to design an appropriate process under the *Immigration Act*. In balancing the five factors, this discretion weighed toward less strict requirements of procedural fairness. In *Suresh*, however, the need for deference to the agency's practices had to be counter-balanced with the elevated level of procedural protections demanded by the seriousness of the situation, a situation which had possible consequences of torture and human rights violations.

As Mullan has noted[35], at this point in time, after Suresh had been decided, it was not clear if the jurisprudence was moving towards introducing a pragmatic and functional approach to determining the amount of deference to accord to a tribunal's procedural decisions. However, the decision in *CUPE* clarified that the deference that courts were to pay to agency procedure did not attract a standard of review analysis. Instead, the Court in *CUPE* asserted that questions of procedural fairness are to be determined by the courts. Nevertheless, although courts are to have the final say on appropriate procedures, they are to make this final determination with consideration of the agency's way of designing its process and presumably with reference to the reasons underlying its choice of procedure. Mullan has termed this a "modified correctness test"[36].

Since bias is an aspect of procedural fairness, one would expect that the question of whether a reasonable apprehension of bias exists should be determined after the appropriate level of procedural fairness has been decided, as was done in *Baker*. Yet, a review of the cases decided since *CUPE* reveals that for the most part, *Baker* is not considered in any significant way when questions of reasonable apprehension of bias arise. Often, the approach to determining whether a reasonable apprehension of bias exists contains some reference to context but certainly not in the

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contextualism in public law is one part of a greater move within the public sphere that is reflected also in political philosophy. See generally, Shane O'Neill, *Impartiality in Context: Grounding Justice in a Pluralist World* (Albany: State University of New York Press, 1997).

35 *CUPE* at para. 100. See Mullan's interesting discussion , *supra* note 9 at 86 -7.

36 Mullan, *supra* note 9at 87.

robust manner undertaken in *Baker*, involving first determining the appropriate level of procedural fairness using the five factors and then determining bias within that context. Instead, a simple test of correctness (with the court re-reading transcripts and substituting its own opinion, for example) is often used. Interestingly, this occurs sometimes even in "new" contexts where the court cannot simply refer back to what it has done in the past.

Moreover, in cases where the Court's analytical approach is premised on the reasoning of *Baker*, the Court's manner of dealing with "respect for agency procedure" is often hesitant and cursory. Below, I discuss two cases. *Fetherston* is a Federal Court of Appeal case that takes a robust contextual approach to bias and procedural fairness. It contrasts with other cases such as *Sound v. Swan River First Nation*[37], a decision that shows the awkwardness of the analysis that it is called upon to perform. It seems as though the Supreme Court may have to provide further guidance on how to intertwine this factor while maintaining a correctness standard.

Part Three

Review of Research Findings – Cases from 2003 - 2005

This section provides a summary of my case research, which is preliminary at thtis stage. In light of the fact that *CUPE* was decided in 2003, an examination of the cases dealing with bias from the time of that decision to May of this year was conducted. Over 100 cases came up for the relevant time period using search terms of "bias" and "administrative law" ("partialité and "droit administratif"). I examined these cases for the methodology used by the court. As I note above, not many cases were found where a robust, *Baker*-type analysis of context was performed before the test for bias was applied. In most cases, the courts took context into account to some degree but in most cases, a simple test of correctness was applied. In the few cases where a *Baker*- type analysis was used, the incorporation of the choice of procedure factor was often awkward.

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[37] [2004] 1 F.C.R. 336 (F.C.C.).

The number of cases dealing with administrative law bias decided by jurisdiction is as follows):

• 2 cases were decided by the **Supreme Court of Canada**. Both addressed the question of impartiality in a contextualized manner, reminiscent of *Baker*: *Bell Canada v. Canadian Telephone Employees Association*, [2003], 1 S.C.R. 884; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624.

• 110 cases were found at the **Federal Court** level (Federal Court of Appeal and Federal Court of Canada combined). The Federal Court by far had the largest number of cases, owing most likely to the nature of the work performed by the court (i.e. having judicial review of federal boards, tribunals etc as one of its primary functions). One also has a sense from reading these cases that "reasonable apprehension of bias" has become a common or popular argument to make, especially in relation to perceived unfairness in the way an oral hearing has been conducted; Of these cases, ones that dealt with *Baker* factors in a significant way, either explicitly through reference to *Baker* or implicitly through the manner of reasoning include: (*Canada (Attorney General) v. Fetherston* [2005] F.C.J. No. 544 (C. A.); *Democracy Watch v. Canada (Attorney General)* , [2004] 4 F.C.R. 83 (F.C.C.); *Lapointe v. Canada (Treasury Board)*, [2004] F.C.J. No. 283 (QL); *Shephard v. Canada (Royal Canadian Mounted Police)*, [2004] F.C.J. No. 1188) (F.C.A.), rev'g [2003] F.C.J. No. 1638 (F.C.C.); *Sound v. Swan River First Nation*, [2004] 1 F.C.R. 336 (F.C.C.);(See also the annotated bibliography at the end of this paper which provides additional cases on bias decided by the Federal Court during this two year period, although not necessarily using the *Baker* factors);

• 10 cases were decided in **Ontario** (all levels of court); none used the *Baker* principles in any significant way;

• **Quebec** (all levels of court): 8 cases were found one uses an approach that is rigorous in context – *Demers-Dion c. St-Pierre*, [2005] J.Q. no. 3319.

Contexts of Discretion

How has the jurisprudence on bias developed in the past two years? In this last section, I provide a few examples that illustrate the issues relating to bias and contextualism that have been discussed. The cases are divided into each of the three discretionary contexts outlined at the outset of this paper.

i) Statutory Contexts

Canada (Attorney General) v. Fetherston [38] is an decision that applies the *Baker* factors with an interesting and robust contextualized approach. In *Fetherston*, a veterinarian sought judicial review of a decision of an adjudicator established under the *Health of Animals Act*[39]. The decision had suspended his licence. The Federal Court of Appeal's decision was concerned primarily with the issue of whether the adjudication process had been fair and, more specifically, whether it gave rise to a reasonable apprehension of bias.

In determining bias, the court first looked to the non-exhaustive set of factors for determining procedural fairness that had been set out by Justice L'Heureux-Dubé in *Baker*. The court noted that adjudication for the purposes of cancelling the accreditation of veterinarians like Mr. Fetherston, who were working by agreement with the Canada Food Inspection Agency was an ad hoc process. There was little by way of statutory scheme. After considering the importance of the decision to Mr. Fetherston and the legitimate expectations that he may have had, the Court turned its attention to the Food Inspection Agency's choice of procedure. The Court noted that the statute leaves it to the agency to choose its own procedure. It then moved to examine the agency's procedure, the fifth *Baker* factor, and noted that in an earlier decision, the Court had approved of this process[40] and thus shown it deference. Finally, the Court addresses the question of bias, asking whether the proximity between the adjudicator and the person who initially suspended the veterinarian "create[d] a

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[38] [2005] F.C.J. No. 544 (C.A.) (QL).

[39] R.S. 1990, c. 21.

[40] *Ibid*. at para 28.

reasonable apprehension of bias, having regard to the level of procedural fairness requirements applicable in the circumstances?".

Unlike the case of *Fetherston*, it seems thatin some situations the element of deference to the agency's procedure is not applied as easily. In *Sound v. Swan River First Nation*, for example, the court also applied the *Baker* factors before analyzing the question of bias. However, when it came to applying the fifth factor, the Court outlined the procedure of the decision-making body (in this case, the Election Appeal Committee of a First Nation Band), but did not go into any explanation of why the process chosen was used. Although the process may have appeared to violate the rules of natural justice *prima facie*, one is left wondering if there was any reason specific to the group or relating to the fact that that a political endeavour was under scrutiny, that would counter or explain this appearance. The reasons in *Swan River* raise the question of the degree to which obtaining adequate information can be a challenge to applying the fifth *Baker* factor.

ii) Non-legislative Contexts

Non-legislative contexts are situations in which discretion is created for a decision-maker through governmental instrument other than statute. A typical situation of this sort is the Commission of Inquiry. The most common type of Commission of Inquiry is created under the federal or provincial *Inquiries Act* with the actual exercise of discretion to create procedures being granted to the Commission by way of Order in Council.

Few significant cases dealing with bias have come up in this context in the past year. In *Democracy Watch v. Canada (Attorney General)*[41] , the federal Ethics Counsellor (a position that has now undergone considerable change and takes the name of Ethics Commissioner) was challenged for breach of the principles of procedural fairness and for reasonable apprehension of bias, both on an institutional and individual level. Unlike the decisions discussed above, this was not a decision in which the *Baker* principles were used. As with many of the cases on bias that I have come across in my research, this case offered a

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[41] [2004] 4. F.C.R. 83 (F.C.C.).

little bit about the context of the Counsellor's office and moved simply to determine what a reasonable person would think. Here, the allegations were that the Counsellor showed bias through his delayed responses to the inquiries of Democracy Watch.

As for the questions of structural bias, the decision is somewhat unusual in that the Court compares the new Office of the Ethics Commissioner as a benchmark to find lack of independence and impartiality.

iii) Ministerial Contexts

Finally, the Supreme Court decision in *Imperial Oil* offers some insight on how the question of impartiality should be treated when dealing with Ministers acting with broad discretionary powers. In *Imperial Oil*, the duty of impartiality governing work of the courts was held not to apply to an Environment Minister while he was performing a discretionary political function under Quebec *Environment Quality Act.* The Court held that the Minister was performing a mainly political in deciding (under a broad discretion accorded to him by statute) to ask an individual company to prepare a contamination report and provide corrective work at its expense. It was enough that he follow the procedural requirements set out in the applicable statutes, a level of impartiality similar to that of the courts was not necessary.

Conclusion

In conclusion, with the decision in *Baker*, the door opened to a shift in the way that we conceive of the concept of bias in administrative law. We tend to think of bias in terms of the various ways in which it arises – through lack of independence, through antagonistic conduct in a hearing etc. Instead, the recent approach of the Supreme Court highlights a more fluid and integrated approach: one that considers whether bias exists only after a rigorous examination of the statutory and institutional context and a consideration of the procedural fairness requirements appropriate to that context.

Perhaps it is not so much that this idea is new as it is that it has been <u>emphasized</u> and <u>sharpened</u> . It has been emphasized by the

consistent use of context by the Supreme Court; sharpened by the development of the five factors in *Baker* to help determine the appropriate composition of procedural fairness, especially through the fifth factor requiring respect to be paid to the agency's choice procedure. Indeed, the requirement to pay deference to the choice of agency procedure reminds us of the debate in administrative law theory that was inspired by *Nicholson*, the case that broadened the duty of procedural fairness beyond bodies said to be "quasi-judicial". The debate arose between those who feared too much intervention in the workings of public administration by judges who were not expert in such administration and those who felt that broadening the fairness requirements allowed a chance for fairness to be guaranteed across a wider range of situations. It seems that the idea behind respect for agency procedure is another step toward resolving this debate.

The challenge that remains to be faced is how to integrate this factor with a correctness standard. From the cases that have come up in the two year sample seen in this research, it seems that not as many courts are adopting the *Baker* approach as could be and that those that do use the approach do not always use this factor to its fullest. Possibly this may be due to lack of information from the agency, questions of efficiency, reliance on arguments made by the parties and/or the adoption of alternative ways of reasoning through procedural fairness issues based on what is most appropriate in any given case.

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Points of Reflection

1. The minority concurring decision on the "open mind test" in *Save Richmond Farmland Society* (SCC, 1990) is interesting because it aims to speak more broadly to the question of political behaviour as opposed to simply addressing the issue of the strict legality of administrative action. The minority's impetus for avoiding the closed mind test is that it may lead to political posturing and hypocrisy among politicians. To what extent are these concerns valid ones? Are they rightly the concerns of the judiciary? Are they concerns that are appropriate to consider only in the context of politicians or are concerns of posturing and hypocrisy ones that should be considered with other decision-makers as well?

2. Some see the closed mind test as offering a higher threshold to meet within the test for reasonable apprehension of bias. In other words, in situations where the closed mind test is appropriate, it does not matter what result a mere reasonable apprehension of bias would give. Is it possible, however, to conceive of the closed mind test as an effect of taking a contextualized approach to procedural fairness and bias?

3. Are judges receiving enough information about tribunals to make the contextualized decisions that the Supreme Court advocates?

4. Would it ever be feasible to have a standard of review inquiry on questions of procedural fairness? Since at least one element of fairness, the test for bias, reposes on the reasonable person's perception, one could argue that a formal exercise of review to pay deference to an agency's expertise and sense of is what is procedurally fair is really not that much of a leap.

5. On a broader level, are we facing, in administrative law, what has been termed in other contexts a "regress of specificity" – are the overarching principles of administrative law being replaced by context? Is there room for both administrative law and subject-matter statutory (or other governmental instrument) law or have we moved to an era where administrative law is fuelled by subject matter contexts?