Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
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How Close is Too Close?

by Richard Steinecke
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A recurring problem for regulators, particularly for professions with fewer numbers, is to try to constitute panels to deal with complaints or discipline. Too often all available professional panel members know the practitioner or a key witness. Regulators frequently seek guidance as to which connections are too close, thus creating an appearance of bias, and which are sufficiently remote. Despite the formulation of legal tests over the years describing the boundary where an apprehension of bias begins, the decision usually amounts to a "gut feeling" as to what a court would permit.

From *Heffel v. Registered Nurses Association*, 2015 NWTSC 16, regulators can obtain a sense of where that boundary might lie. In that case, a nurse was disciplined for blocking the airway of a patient resisting emergency treatment, apparently as a means of controlling the patient. The nurse denied blocking the patient's airway. One of the panel members knew one of the key witnesses to the incident. The relative credibility of the witness, compared to the credibility of the practitioner facing discipline was going to have to be assessed by the panel. The Court's description of the connection is as follows:

> The information before the Board was that [the panel member] met and worked with the witness Flood approximately ten years prior to the hearing. Although they worked at the same hospital in Yellowknife, they were not on the same unit. During the time they worked at the hospital, which appears to have lasted for a year or two, they had some mutual social engagements which included attending each other's weddings, along with most of the other staff and colleagues from the hospital. [The witness] Ms. Flood left the hospital 8 or 9 years prior to the hearing and from that time [the panel member] had almost no contact with her aside from what were described as very occasional, chance encounters where pleasantries were exchanged.
>
> On cross-examination during the hearing, [the witness] Ms. Flood stated that she and [the panel member] were on each other's Facebook pages but had never communicated on them.

The Court set out the usual test for assessing whether there was an appearance of bias:

> The accepted test for reasonable apprehension of bias was stated by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 (at p. 394): "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."

The Court also repeated the now routine caution that there is a presumption of neutrality:

> The cases note that there is a strong presumption of judicial impartiality and the

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Facsimile: 416-593-7867, E-Mail: rsteinecke@sml-law.com

> threshold for a finding of real or apprehended bias is high, requiring that there be cogent grounds. Mere suspicion is not enough. As Vertes J.A. noted in *Werner*, the test is not whether a party to the proceeding would reasonably apprehend bias, but whether the reasonable and informed member of the public would apprehend it (at paragraph [14]). The member of the public is one who is reasonable, not a person of "very sensitive or scrupulous conscience".

In concluding there was no reasonable apprehension of bias, the Court reasoned as follows:

> The fact that the decision-maker knows a witness involved in the proceedings is not a ground to disqualify a judge from hearing a trial on the basis of apprehension of bias….
>
> The passage of time has been held to be an important factor in determining whether a past relationship or circumstance would give rise to a reasonable apprehension of bias in the mind of a reasonable and informed member of the public….
>
> In this case, [the panel member] and the witness Flood knew each other and on occasion attended the same social functions eight to nine years prior to the Board of Inquiry's hearing. Their connection in the intervening period before the hearing was limited to a few instances of brief, public encounters where pleasantries were exchanged. Even if there is any taint of bias because of their earlier association through the hospital, in my view the passage of time would operate to expunge it such that the reasonable person would reasonably think that it would not prevent [the panel member] from deciding the case fairly.
>
> While the Appellant did not place any emphasis on the evidence that [the panel member] and the witness Ms. Flood were "friends" on the social network website Facebook, I will comment on that aspect of the relationship…. My review of cases where the issue has been dealt with indicates that while Facebook "friendship" indicates that the parties know each other, it does not, without more, establish that there is a relationship which would result in a reasonable apprehension of bias according to the accepted test. More evidence is needed.

Certainly some lawyers advising tribunals would have found concerning this relationship between a key witness and a panel member. Many panel members would have removed themselves, where feasible, in these circumstances. It is not clear from the decision whether the panel member realized who the key witness was before the hearing started. To avoid this sort of issue some regulators advise panel members of the identity of witnesses before the hearing begins.

The *Heffel* case deals with a number of other interesting issues including whether the reinstatement of the practitioner to her position in a labour arbitration should affect the subsequent discipline hearing on the same series of events.