Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
SML Steinecke Maciura LeBlanc Barristers & Solicitors

# A Primer on Bias

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The impartiality of tribunals is essential to public confidence in professional regulation. This principle is encapsulated in the legal concept that an appearance of bias on the part of a member of a tribunal is unfair and can, in some circumstances, nullify the tribunal's decision.

However, courts are also hesitant to permit bald assertions of bias or an overly strict approach to the issue to interfere with the operation of tribunals. That is particularly the case in professional regulation matters where it is likely that adjudicators have had contact with many practitioners in the profession and where the structure of the regulator means that adjudicators have often had regulatory contact with hearing participants.

Courts therefore begin with a strong presumption of impartiality. The grounds for apprehension must be substantial; mere suspicion is not enough. Also regulators tend to be careful to avoid constituting hearing panels where there might be an issue. As a result, judicial findings of bias are rare.

It is still useful to appreciate the principles of bias in adjudicative matters. A helpful resource is the recent background paper published by the Australian Law Reform Commission on *The Law on Judicial Bias: A Primer*. Some care must be taken in reading this document because the test for apprehension of bias in Australia seems to be more rigorous than the one used in Canada, using words like "might" rather than "likely" or "would".

The paper begins by reiterating the perspective that courts bring to bias issues: the hypothetical lay observer. The paper quotes a case in which the observer is said to have the following qualities:

> (1) taken to be reasonable; (2) does not make snap judgments; (3) knows commonplace things and is neither complacent or unduly sensitive or suspicious; (4) has knowledge of all the circumstances of the case; and (5) is an informed one who will have regard to the fact that a judicial officer's training, tradition and oath or affirmation, equip the officer with the ability to discard the irrelevant, the immaterial and the prejudicial.

The paper then goes on to describe the main categories, or circumstances, of bias.

**Interest**

The paper describes what kinds of interest can result in an appearance of bias:

> the mere existence of an interest will not result in automatic disqualification; a party alleging bias must articulate logical connection between the interest of the judge and the prejudicial outcome. … [Those interests] include business, professional or other commercial relationships, such as shareholdings in litigant companies, and even a "strong commitment to a cause relevant to a party or a case".

**Conduct**

The conduct of an adjudicator at, or even outside of, the hearing can create an appearance of bias. This can include private communications with a party, witness

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or legal representative. It can also include a hostile demeanour and comments made during the hearing. It can also include involvement in extra-curricular activities that undermine the appearance of neutrality in the specific case.

**Prejudgment**

The paper indicates that while adjudicators are not expected to enter the proceedings with a blank mind, they must do so with an open mind. However, recent thinking on implicit bias and recognition that we are all the product of our experiences has resulted in a refinement of thinking on this topic.

> Predispositions or inclinations to determine a matter in a particular way are not, however, prohibited by the bias rule, unless they are "sufficiently specific or intense" to amount to prejudgment. Claims of apprehended bias based on a judge's gender or ethnicity (and alleged concomitant unconscious prejudice) have not been upheld. In some cases, litigants have used a judge's prior record of decisions (including by use of statistics) to argue that the judge is predisposed to certain views about particular types of cases or litigants and that it is impossible for the judge to hear the case with an open mind. [footnotes omitted]

**Association**

Some relationships may, in some circumstances, create an appearance of bias: "This includes relationships with family members, personal friends, counsel, witnesses or organisations that may suggest a lack of impartiality". However, whether a relationship meets the hypothetical lay observer test will depend on all of the circumstances including the nature of the relationship, whether it remains active, its intensity and the other surrounding circumstances. As noted above, some leeway is afforded to the reality that professional members will have contact with many colleagues in the profession.

**Extraneous Information**

The paper also identifies appearance of bias concerns where a "decision-maker has knowledge of some prejudicial but inadmissible fact or circumstance that prevents them from bringing an impartial mind to the decision". Again the issue is whether a hypothetical lay observer would reasonably conclude that the information would play on the subconscious of the adjudicator.

**Exceptions**

There are two recognized exceptions to the rule against adjudicators acting when there is a reasonable apprehension of bias. The first is where the affected party waives the objection. However, for a waiver to be effective, the person must have knowledge of all of the relevant facts. Thus full disclosure of the facts by the adjudicator may be required. This may also be difficult where the circumstances creating an appearance of bias emerges in a piecemeal fashion (e.g., a course of conduct by the adjudicator during the hearing). The paper also raises concerns as to whether an implied waiver (by not objecting) is sometimes unfair.

The second exception is where there is no one else to adjudicate the issue who does not have a similar appearance of bias and there is an obligation to make a decision. An example of this is where a complaint is made against a member of the Council or Board of the regulator and all members of the tribunal are appointed by the Council or Board.

**Self-Recusal Procedure**

The paper also raises interesting questions about the usual process for addressing an appearance of bias (i.e., by raising an objection with the adjudicator). The paper says that:

> … behavioural psychology research shows how cognitive biases make it particularly difficult for anybody, including judges "to bring an impartial mind to an application that concerns their own conduct".

The paper also notes:

> The procedure also presents a dilemma for lawyers, who may be deterred from making applications to disqualify judges, as it can be seen as an insult to the honesty and integrity of the judicial officer.

However, requiring other adjudicators to address an appearance of bias concern has a significant potential to disrupt proceedings.

**Conclusion**

The paper provides a useful analysis of the underlying concepts related to bias on the part of adjudicators. It also identifies some areas for possible reform. While the specifics may not be directly applicable in Canada, the discussion can assist regulators in developing policies and procedures to avoid appearance of bias issues arising in the first place.

The paper can be found at: https://www.alrc.gov.au/wp-content/uploads/2020/12/The-law-on-judicial-bias.pdf.