

Notes on Reasonable Apprehension of Bias

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Common Law Standard

The common law doctrine of reasonable apprehension of bias is premised on the proposition that: “[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done”.¹

Public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so. The common law duty of fairness obliges a tribunal hearing a matter to perform its functions free from bias, or reasonable apprehension of bias.

In principle, the standard is objective. The question is not whether there is evidence of actual bias but whether a reasonable person would perceive bias: “*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.*”²

The practical basis for an objective standard was articulated by Justice Cory in *Newfoundland Telephone*: “[i]t is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness.”³

Notwithstanding the foundational nature of the common law standard, it has received a restrained application in Canada in recent decades. In particular, there is little chance of precluding an adjudicative tribunal from proceeding based on a reasonable apprehension of bias absent evidence of actual bias on the part of one or more members of the tribunal.

The current approach of the courts in Canada is a departure from its classic application as illustrated by the decision of the English Court of Appeal in *Hannam v. Bradford City Council*, wherein Lord Justice Widgery reasoned as follows:

¹ *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at para. 11; *King v. Sussex Justices*, [1924] 1 K.B. 256

² *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394-395

³ *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623

So far as bias is concerned, I, like Sachs LJ, am satisfied that there was a real likelihood of bias in this case ... I am much impressed by the fact that when the staff sub-committee sat down to consider what the plaintiff would regard as an appeal, the chairman was a member of the governors against whose decision this so-called appeal was being brought. I think that if it had been disclosed at the outset that no less a person than the chairman of the staff sub-committee was a member of the governors in question, the immediate reaction of everyone would have been that some likelihood of bias existed. I say that with every respect to the distinguished gentleman who chaired the staff sub-committee on this occasion; but when one is used to working with other people in a group or on a committee, there must be a built in tendency to support the decision of that committee, although one tries to fight against it, and this is so although the chairman was not sitting on the occasion when the decision complained about was reached.⁴

In *Hannam* the Court recognized the possibility of an apprehension of bias existing as a result of factors such as institutional or personal loyalties of the members of an adjudicative tribunal conflicting with their duty to provide a fair hearing. As outlined below, this notion has been abandoned in Canada.

Displacement of the Common Law by Statute

Adjudicative independence is recognized as critical to maintaining an appearance of impartiality.⁵ Therefore, in considering whether specific circumstances or conduct give rise to a reasonable apprehension of bias, the institutional protections to adjudicative independence of a particular tribunal are of importance. However, the principles of adjudicative independence do not apply with full force to adjudicative tribunals in multi-functional administrative agencies established by statute.

The common law principle that a tribunal loses jurisdiction if there exists a reasonable apprehension of bias can be displaced by statute. In *Brosseau v. Alberta Securities Commission*⁶, the Supreme Court of Canada held that, in general, an apprehension of bias on the part of an administrative tribunal will not affect the lawfulness of the tribunal where what is alleged to give rise to bias is authorized by statute. This allows multi-functional statutory agencies with overlapping policy, investigation, prosecutorial and adjudicative functions to operate, even if this structure contributes to a reasonable apprehension of bias. The Court in *Brosseau* relied on a line of authority that the legislature overrides common law principles of natural justice, including reasonable apprehension of bias.

In a case in which the adjudicative tribunal is shielded by the principle outlined in *Brosseau*, the common law standard only applies where the conduct which gives rise to an apprehension of bias is outside of a legislatively mandated duty or function.

⁴ *Hannam v. Bradford City Council*, [1970] 2 All ER 690 at pg 698.

⁵ See *R. v. Lippé*, [1991] 2 S.C.R. 114 re criteria for adjudicative independence.

⁶ *Brosseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301.

However, even this limitation is subject to judicial interpretation and recent cases indicate that the courts may take a broad interpretation of legislatively mandated duties or functions. For example, in *Xanthoudakis v. Ontario Securities Commission*⁷, the Divisional Court concluded that the comments made by the Chair of the Commission in a CBC Television interview, in which he described the respondents in an OSC hearing as “dishonest”, were made pursuant to the exercise of a legislatively mandated duty or function.

Another potential limitation on the immunity afforded by the principle in *Brosseau* is in cases in which there is evidence of a possible conflict of interest on the part of the institution, of which the adjudicative tribunal is part, in the outcome of a hearing and the duty to give a fair hearing.⁸ On this issue, it is interesting to note the different results before the Manitoba Court of Appeal in *Curtis v. Manitoba Securities Commission* and the Ontario Divisional Court in *Xanthoudakis*. The alleged conflict of interest was similar in both cases and stemmed from a perceived incentive on the part of each Commission to deflect responsibility for the failure of investment funds which resulted in massive investor losses. In *Curtis* there was a pending class action against the Manitoba Securities Commission related to the failure. In *Xanthoudakis* there was no lawsuit against the Ontario Securities Commission. However, there was public criticism, including in the CBC television interview in which the Chair blamed the “dishonest” respondents for the failure of the fund. A conflict of interest was found to exist in *Curtis* but not in *Xanthoudakis*.

Erosion of the Common Law Doctrine

When the common law principles do apply to an adjudicative tribunal, the trend in Canadian cases has been to collapse the objective test for a reasonable apprehension of bias into a requirement of demonstrating actual bias. This has occurred through the following methods of judicial analysis:

- (a) Applying a presumption of impartiality in favour of members of administrative tribunals;
- (b) Assuming that the theoretical “reasonable person” would be both informed and satisfied by any internal procedures and aspirational statements of principle designed to uphold the independence of the adjudicative tribunal; and
- (c) Repudiating the proposition that a manifest bias on the part of one member of an administrative agency can be imputed to its other members (“corporate taint”).

⁷ *Xanthoudakis v. Ontario Securities Commission*, 2011 ONSC 4685 (CanLII). Note that the Court proceeded to apply the test for a reasonable apprehension of bias even though, by its analysis, the comments made by the Chair would be shielded from the application of the common law standard.

⁸ *Brosseau*, *supra* at para 39; *Curtis v. Manitoba (Securities Commission)*, [2006] M.J. No. 490 (C.A.).

The result is that without evidence of bias on the part of a member of the adjudicative panel, there is little prospect of demonstrating a reasonable apprehension of bias.

A Presumption of Impartiality

As a practical matter, applying a legal presumption of impartiality to the members of an adjudicative tribunal makes it difficult to establish a reasonable apprehension of bias as the members will be presumed to be impartial even if the surrounding circumstances suggest pre-judgment or a competing interest. In effect, some evidence of an actual bias is required.

The concept of applying a presumption of impartiality for members of administrative tribunals is of dubious origin. A presumption of impartiality for administrative tribunals does not appear prior to 1995, in the case of *E. A. Manning v. Ontario Securities Commission*.⁹ In that case, while the Court of Appeal stated: “[i]t must be presumed, in the absence of any evidence to the contrary, that the Commissioners will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of each case”, there is no explanation for why members of an administrative tribunal attract a presumption of impartiality. No institutional safeguards or prior jurisprudence are cited.

Judges are afforded such a presumption; however, the judiciary are protected by institutional safeguards to judicial independence. The safeguards in place to provide judges with institutional independence to support a presumption of impartiality include:

- judicial training;
- the judicial oath;
- a disciplinary process;
- formal separation from the prosecution;
- security of tenure; and
- security of remuneration.

In general, those safeguards are lacking in administrative tribunals.

The Reasonable Bureaucrat

In those cases in which the courts apply the reasonable apprehension of bias test to an administrative tribunal, the objective nature of the test has been collapsed into a largely subjective test. This has been accomplished by imbuing the fictional “reasonable person” with the knowledge and uncritical acceptance of any internal institutional procedures and statements of policy designed to protect the independence of the tribunal and its members.

⁹ See for e.g. *E.A. Manning Ltd. v. Ontario Securities Commission* [1995] O.J. No. 1305 at p. 10.

In *E. A. Manning v. Ontario Securities Commission*¹⁰ and *Xanthoudakis v. Ontario Securities Commission*¹¹, it was held by the Ontario Court of Appeal and Divisional Court respectively that statements made by the Chair of the Commission that either exhibited a bias (*Xanthoudakis*) or, for the sake of analysis were presumed to exhibit a bias (*Manning*) against the respondents, would not disqualify other members of the Commission from conducting adjudicative proceedings against the respondents. The rationale provided by both courts was that a reasonable person would recognize the distinct role of the Chair of the Commission from the members of the hearing panel and would therefore not apprehend any bias on the part of the hearing panel.

In particular, it was held that the reasonable person would recognize the separation of the duties of the Chair of the Commission from the adjudicative role of the other members of the Commission who sit as members of the tribunal. Reference was also made to the OSC's Charter of Governance Roles and Responsibilities, which states that members of adjudicative panels conduct hearings and render decisions independently of the Commission as a whole.

Notwithstanding the decisions of the courts, it is open to question whether a fair minded and reasonably informed member of the public would be satisfied that internal procedures and aspirational statements of principle would prevent the members of an adjudicative panel from being influenced by the publicly expressed views of the Chair of their organization, with whom they serve as Commissioners and as the board of directors of the Commission.

One could argue that the courts have transformed the "reasonable person" to a "reasonable bureaucrat"; conditioned to accept at face value the written procedures and policies of an administrative agency and to presume that those written procedures and policies are actually being followed in any individual case.

Corporate Taint

The courts in Canada have steadfastly embraced the proposition that the opinion of an individual member of an administrative agency who demonstrates a bias or prejudgment will not be imputed to other members of the same agency, thereby "tainting" the organization.¹²

The so-called "corporate taint" doctrine effectively holds that the other members of the administrative agency are afforded a presumption of impartiality notwithstanding the possibility of influence by other members of the organization or of competing

¹⁰ *E.A. Manning Ltd. v. Ontario Securities Commission* [1995] O.J. No. 1305.

¹¹ *Xanthoudakis v. Ontario Securities Commission*, 2011 ONSC 4685 (CanLII).

¹² See for e.g. *Bennett v. British Columbia (Securities Commission)* (1992), 94 D.L.R. (4th) 339 (B.C.C.A.); *Hamilton Street Railway Co. v. (Ontario) Human Rights Commission*, [2006] O.J. No. 4662 (Ont. Div. Ct.) at para. 19; *Zündel v. Citron*, [2000] 189 D.L.R. (4th) 131 (F.C.A.) at paras. 49-50; application for leave to appeal dismissed, [2000] S.C.C.A. No. 322.

institutional loyalties. Applied in this context, the presumption of impartiality means that the concept of a “reasonable apprehension of bias” no longer exists – what is required is “actual bias” on the part of members of the adjudicative tribunal.

None of the authorities reviewed adequately explain the co-existence of the doctrines of corporate taint or a presumption of impartiality with the well-established common law principles of a reasonable apprehension of bias.

Administrative Expediency versus the Appearance of Fairness

In recent decades the courts have backed away from intervening in administrative tribunal proceedings on both procedural and substantive grounds.

The substantive approach to the doctrine of reasonable apprehension of bias, outlined above, is an important part of this trend. It is open to debate whether the courts have given priority to the prompt determination of administrative proceedings (particularly against respondents who are perceived to be unsympathetic) over the appearance of fairness. This approach in the administrative law context is interesting in comparison with the criminal law, in which individuals charged with more serious offences are afforded a far more complete range of protections. While this is understandable due to the serious consequences of a criminal conviction, in some spheres of activity the targets of administrative proceedings have become exposed to very serious sanctions. In addition to the loss of a professional livelihood, a respondent in an administrative proceeding can face substantial fines enforceable as a court order¹³. The financial exposure, high costs of mounting a defence and the damage to reputation can be ruinous.

From a procedural perspective, the hurdles have also increased. For example, in Ontario the Divisional Court has developed its own jurisprudence regarding the prematurity of applications for judicial review. As a result, the Court will generally not intervene prior to the completion of an administrative proceeding, even in a challenge based on an alleged reasonable apprehension of bias, which if successful would result in the tribunal losing jurisdiction. Complaints of inadequate disclosure are also deferred to after the completion of the proceeding even though it is obviously too late to fix the problem at that juncture.

As a practical matter, the relevance of the common law protections to preserve fairness and the appearance of fairness are significantly diminished if the issues will only be decided after the impugned proceeding has been completed and a final decision rendered on the merits. At that stage the tendency will be to let the proceeding stand absent some manifest error or unfairness in the decision of the tribunal.

It is fair to ask whether forcing a respondent to appear before a hearing panel that may be biased or has otherwise proceeded without conferring procedural fairness to a respondent,

¹³ For example, the OSC can impose a fine on a respondent of up to \$1 million per breach of the *Securities Act*.

accords with the principle that, “[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done”.