Bias and Conflict of Interest in Administrative Proceedings

Session 3

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# Introduction

- Administrative Tribunals or boards are a part of the Executive Branch of government. These institutions are most frequently created by statute.

- Tribunals may also be established by land claim and settlement legislation.

- Tribunals act in the public interest in various roles as advisors and decision-makers.

- Tribunals are “statutory delegates”. Their authority is prescribed by the statute that establishes them and their activities are supervised by the Courts.

- Administrative Tribunals play a central role in Canadian society. They are part of our justice system.
Purpose

- This Session will provide an overview of administrative law principles related to conflict of interest and apprehension of bias.
- We will focus on the law from the perspective of a Tribunal with limited consideration of what happens in a Court in a Judicial Review.
- We will talk about conflict and bias in the context of a Tribunal’s duty to be fair, Tribunal members' ethics and Tribunal governance.
Bias or Conflict
Who Cares?

- Administrative Tribunals are bound by the rules of fairness – they have a duty to be fair.

- Tribunal members must be free of conflict of interest in making their decisions.

- The rule against Bias – a Tribunal must only base its decision on admissible evidence – applies to all administrative tribunals.

- How the rule against bias will affect a Tribunal will depend on the circumstances.
If a Tribunal makes decisions on environmental assessments, land use permits or water licences or conformity with a land use plan it may affect multi-million dollar developments.

These decisions can affect the exercise of vested rights such as mineral or water rights or aboriginal rights.

A Tribunal decision can thus affect the economic, aboriginal, cultural and environmental rights of parties to its proceedings.

The combination of statutory powers vested in a Tribunal and its ability to affect the rights and other interests of participants gives rise to a duty to be fair.
One of the most important aspects of a fair decision is that it must be made by a decision-maker that is impartial (free from conflict and unbiased).

The duty to be fair results in scrutiny of both the procedure used by a Tribunal and of the conduct of the decision-makers themselves.

Thus the public, communities, developers and other participants in Tribunal proceedings can be adversely affected when the process is not fair.

Administrative Tribunals play an important role in the legal decision-making system. We are all affected if these decisions are not fair.
The rules addressing bias and conflict of interest may derive from either the common law (case law) or from Parliament or the Legislature (statutes). If these rules conflict, the statutory rules will prevail.

For example, s. 16 of the MVRMA prohibits a board member from acting while in a “material conflict of interest”.

Thus, in order to participate in a decision a member of an MVRMA board must be free of conflict of interest.
- Being a participant in a land claim, however, is not a material conflict of interest (ss.16(2) MVRMA).

- The MVRMA has thus eliminated the possibility that an allegation of conflict can be raised simply because a board member is a participant in a land claim.

- This is an important provision in a co-management system.

- The N.W.T. has a *Conflict of Interest Act* which applies to members of boards, councils and municipalities. Members who contravene the Act are subject to removal and to fines. These remedies go beyond those available at common law.
Conflict of Interest

- A Tribunal member with a direct financial or personal interest in a matter before a Tribunal would be in a material conflict of interest. Likewise, if someone in the member’s family has such an interest.

- Tribunal members must disclose any potential conflicts or any circumstances which might result in an apprehension of bias in advance a member’s participation in the making of a decision.

- The N.W.T. Conflict of Interest Act even requires disclosure of conflicts that arise within a limited period after a decision (see s.2(2)).
There is also a federal Conflict of Interest Act which might apply to members of federal tribunals. This is because many of the Northern Tribunals have been created under federal statutes.
Distinguishing Bias from Conflict of Interest

- A conflict of interest is more straightforward to determine than bias. It arises from a direct involvement or relationship of a Tribunal member.

- The rule against bias requires a great deal more caution to apply. This is because the Courts have set a high standard. Not only must a decision-maker be free of real or direct bias, but he/she must also be free from any apprehension of bias.

- The reach of the “apprehension of bias” concept is much wider than that of a conflict of interest.

- The *Concise Oxford Dictionary of Current English* defines bias as “a predisposition or prejudice”.
In *McKenzie v. Canada (Canadian Human Rights Commission)* McNair, J. stated that bias is “an attitude or state of mind” but that the real question, in a legal context, is whether the circumstances point, both *realistically* and *substantially* to either the real likelihood or a reasonable suspicion of bias. (That is, to an *apprehension of bias*.)

The Court cannot look into a Tribunal member’s mind to determine the presence of bias, so the Court must answer such question by inference, drawn from the circumstances or by the outward appearance of the decision-making process.
Categories or Types of Bias

Brian Crane has suggested that the following types of bias can be identified from the case law:

- Institutional bias;
- Pecuniary interest in the outcome;
- Other relationships;
- Pre-judgment;
- Interference with the Hearing.
We would add that the interference of others in the decision-making process is also a common form of bias addressed by the Courts.

The categories set out above are simply presented for discussion purposes. The facts which may lead a Court to a finding of bias are varied and a Court is not constrained by any categories.
An allegation of a conflict of interest or bias could give rise to an application for judicial review of the Tribunal’s decision.

- The Courts supervise the actions of administrative tribunals. The MVRMA grants such jurisdiction to the NWT Supreme Court (NWTSC) through its judicial review provision (s.32).

- Other Northern Tribunals established by federal law (like the NWT Water Board) are subject to the supervision of the Federal Court and judicial review of their actions would take place there.
Tribunals established by territorial law are also subject to the supervision of the NWTSC.

The Courts can provide a range of remedies upon a successful application for judicial review.

In a case of conflict of interest or bias, the remedy is *certiorari* or quashing the board’s decision – the decision is held to be void and the proceeding must be restarted from the beginning.
The new decision would have to be made without the participation of the member with the conflict or bias.

This result is likely to mean significant delay and expense for all concerned.

Thus if a Tribunal member acts while in conflict or while subject to an apprehension of bias and the Tribunal’s decision is successfully challenged, the whole proceeding is invalidated. The Tribunal would have to start the whole decision-making process again.
Apprehension of Bias and the Test for Bias

The test for reasonable apprehension of bias was originally set out by Justice de Grandpré of the SCC:

“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 [board member], whether consciously or unconsciously, would not decide fairly?”

Committee for Justice and Liberty v. Canada (National Energy Board)
In *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* the Supreme Court of Canada dealt with allegations of bias arising because a board member commented to the media on matters before the board.

The court’s *test for fairness* in this context was to ask whether a reasonably informed bystander would think that the Commissioner was biased.

The evidence needed to make out an apprehension of bias must only show a *reasonable likelihood of bias* and can be based on appearances.
In *Newfoundland Telephone*, the Supreme Court established a "sliding scale" bias test. The test is most lenient for Tribunals involved in legislative and policy making activities and most stringent when boards are involved in adjudicative activities (hearings).

When the decision-maker has an adjudicative function, (makes decisions which may affect the legal rights and interests of a party based on choosing between different points of view) the stringent standard is imposed.
Therefore, the stringent standard would likely apply to most Tribunals that make decisions affecting the rights and interests of parties.

When a Tribunal is dealing with an application which will lead to a hearing, the test applied is whether there is likely to be a reasonable apprehension of bias.

Tribunal staff actions can also result in a finding that an apprehension of bias exists. The tests applicable to the activities of staff are generally the same as those applied to Tribunal members.
The Unique Circumstances of Northern Tribunals

- Northern Tribunals make their decisions in a very large territory characterized by small communities and populations. The likelihood of a Tribunal member having some relationship to parties appearing before him/her is high. Where do we draw the limits? How does southern case law accommodate the Northern context?

- Mere familiarity between the Tribunal members and the parties, lawyers or witnesses has not generally been sufficient to create a reasonable apprehension of bias in a proceeding.
Case law suggests that this familiarity must be considered in light of the context of the proceeding and the particular Tribunal. If the industry, group or profession being regulated is fairly small it may be impossible to establish a hearing process where those involved have no familiarity with each other.
Bias Arising from the Involvement of Others in Tribunal Decisions

- One of the central rules of administrative decision-making is that the decision-maker cannot delegate its duty to make a decision.

- It is also necessary that Tribunal’s decisions be made only by those members who participated in the proceeding: “He or she who hears must decide”. (Discussed in Session 2)

- Bias of decision-makers can arise when their views are affected by consultation with others before a decision is made, either before or after a hearing.
For example: This problem resulted in the quashing of a Yukon Territory Water Board decision in 1982. The Board had held private meetings (consultations) with the applicant before the hearing, of which no notice was given. The applicant offered technical assistance to the Board before the hearing.

Likewise, meetings after a hearing but before a decision is made can raise the issue of bias in relation to the Tribunal’s decision. The key is that the decision must be made by the Tribunal itself, not by others.

Staff and Legal Counsel can help with decision writing as long as the Tribunal makes the decision. (Session 7)
Bias in a Tribunal – Objections and Waiver

- If a party to a proceeding wants to raise a bias (or an apprehension of bias) objection related to a particular Tribunal member, that party should **raise the objection as soon as possible**.

- It is best if the party raises the objection either before or during the hearing to avoid the extra cost and delay if it is raised afterwards and the hearing is declared void.

- If the party delays in making an objection, the right to object may be found to have been **waived**, or given up, by that party.
The legal writers do not agree on all the aspects of waiver of bias but they do agree that:
1. there can only be a waiver of the right to object to bias if the party making the bias allegation has full knowledge (or the means of full knowledge) of the potential bias situation; and.
2. the party must have the opportunity to object.

A party can either expressly waive the right to object to bias or the party’s waiver can be implied by a failure to object at the earliest opportunity.

However, a Tribunal might need to advise an unrepresented party of the party’s right to object to bias (so that waiver is not implied by a lack of objection.)
The objection to bias must be “clearly raised”.

The failure to make a timely objection to bias is usually fatal to a later objection made by that party. Most of the legal writers agree that a party’s later objection to bias could not be raised in a judicial review. The later objection to bias should not appear to have been held “in reserve” in case the party does not agree with the Tribunal’s decision.
Response to a Bias Challenge

- A Tribunal member who has been challenged on grounds of bias should address the matter before a hearing. Then if a legal challenge occurs, the matter can be resolved before the hearing.

- According to Macaulay and Sprague, the objection should be heard by the member about whom the objection of bias has been made. That member can best assess the objection. They also write that only the challenged member should hear the objection and it should be heard informally.

- However, Mullan and Boyle state that the motion of bias should be heard formally by the Tribunal panel. A formal motion process also creates a “record” of the issue which could be useful to a court on judicial review. (“Raising and Dealing with Issues of Bias and Disclosure” 2005)
However, the objection is heard, the Tribunal or the member may decide that there is no bias and decide that the member will not step down.

If a Tribunal member will not step down, the Chairperson may decide to step in to protect the Tribunal’s interests.

After raising the objection, the party making the objection to bias should still continue to participate in the hearing. The party does not need to repeat the bias objection. The party’s continued participation does not indicate acceptance or waiver of the bias.
The party who has raised the issue of bias before the Tribunal can later raise it on appeal or judicial review.

Tribunals must be proactive in dealing with bias objections. They should establish a process to determine whether a conflict, an apprehension of bias or actual bias exists before any decision-making.

Given the down side, a Tribunal must err on the side of caution. A member must step down if there is any reasonable likelihood of conflict or bias.
Effect of Disqualification of a Member

- As indicated, the disqualification of one member of a Tribunal for bias after the decision has been made with that member disqualifies all – the decision is quashed.

- Loss of a Tribunal member may mean the loss of quorum or an adjournment. These matters should be addressed as early as possible in a proceeding.
The concepts of bias and conflict are applicable to a Tribunal’s internal governance, not just its public decision-making. In this regard, co-management Tribunals are no different than corporate boards.

The bylaws and code of conduct established for a Tribunal must address the possibility of conflict or bias.

Problems can arise when bias or conflict issues are clear to the Tribunal but a member refuses to declare the problem and step aside.
This issue is particularly sensitive in the co-management context where quorum requirements mandate a certain number of government AND a certain number of aboriginal nominees in order for the Tribunal to make a valid decision. (Also discussed in Session 2.)

Where Tribunal Counsel is available, a member should always be encouraged to seek advice on such issues in confidence.

Where a problem is evident but is not acknowledged, the Tribunal must act to protect the integrity of its proceeding and reputation.
If on the advice of Counsel, the Tribunal determines that a real problem exists, we suggest that it has the authority to prevent a member from participating in a decision where bias or a conflict of interest exists.

The Tribunal should make sure that its bylaws and Code of Conduct address these issues and ensure that the orientation and training of Tribunal members advise caution if the issues of bias or conflict of interest arise.
Conclusion

Summary on Bias and Conflict of Interest:

- The rules of fairness and the rule against bias protect the integrity of the administrative decision-making system.

- The sliding scale test means that Tribunal members have more latitude in their behaviour before an application is received. Once the application is filed, the strict test of “reasonable apprehension of bias” applies.

- To avoid an apprehension of bias requires more care than avoiding a conflict of interest.
A Tribunal member’s personal behaviour and circumstances may lead to an apprehension of bias.

Any concern about either conflict of interest or bias can be discussed with Legal Counsel. The conflict or bias must be disclosed before the decision is made. A biased decision is void.

The conduct of a hearing or the manner in which the Tribunal makes its decision after a hearing may also lead to an apprehension of bias.
The Board must make a decision itself.

Avoiding the problems of bias, apprehension of bias and conflict of interest requires vigilance and the establishment of an ethical framework for Tribunal governance.

We will now discuss Scenario #2 on Conflict of Interest/Apprehension of Bias.