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New Horizons: Legal Issues for Tribunals

Administrative Tribunals and Bias: A Practical Perspective

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1. Introduction: bias andthe human condition

> Judges do not descend from heaven. They come from various fields of activities. Some of us are former academics, others were in the public service, others practiced law in small towns or large firms. And some of us were in politics. The variety of our individual careers is a rich source of knowledge and experience for the courts. Once we took our oath of office, we divorced ourselves from our past and dedicated ourselves to our new vocation. Our duty is to render justice without fear or favours.[2]

The principles of natural justice apply to all administrative tribunals,[3] and consist of two pillars: the rule thatboth sides to a dispute will be heard (the *audialterampartem* rule), and the rule that disputes will be judged by an impartial decision-maker (the rule against bias).[4]According to the Canadian Judicial Council, "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary".[5] "Impartiality" has been defined as "a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions."[6]

However,as the quotation above recognizes, all adjudicators are human, and all humans have biases that arise from their experience, education, relationships, and situation within a community. In this regard, the Supreme Court has recognized that "triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place",[7]commenting in*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (per L'Heureux-Dubé J. and McLachlin J., as she then was) at para.38:

> … judges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. … The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.

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[2]*Fogal v. Canada,* [2000] F.C.J. No. 916 (F.C.A.), per Dubé J. at paragraph 10, declining to recuse himself from sitting with respect to an action against the government of Canada because he had been a Cabinet Minister and a Member of Parliament for the party still in power.
[3]*R. v. S. (R.D.),* [1997] 3 S.C.R. 484 at 92 per Cory and Iaccobucci JJ.
[4] On the other hand, the rule against bias does not arise when the parties are not afforded any form of participation in the decision-making process: Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 2010 (loose-leaf)), at §11:3350, p. 11-18
[5]Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998), at p. 30; online at http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_1998_en.pdf
[6]*R. v. S. (R.D.),* [1997] 3 S.C.R. 484 per Cory J. at para. 104
[7]*R. v. S. (R.D.),* [1997] 3 S.C.R. 484 (per L'Heureux-Dubé J. and McLachlin J., as she then was)at para.39.

To borrow a phrase from Authors Donald Brown and John Evans' text *Judicial Review of Administrative Action in Canada,*[8] "an 'open mind' cannot be equated with an empty head." Indeed, for many specialized tribunals that require adjudicators to have specific experience, a form of bias is a qualification for appointment.[9] On the other hand, the notion of judicial integrity "encompasses the expectation that judges will strive to overcome personal bias and partiality and carry out the oath of their office to the best of their ability."[10]In their text *Practice and Procedure before Administrative Tribunals*, McCauley and Sprague[11]suggest that the rule against bias may provide a sense of relief to the adjudicator, because she can feel comfortable that, having consciously excluded impermissible or illegal biases from influencing her mind, her remaining biases will not compromise her impartiality or render her decisions invalid.

What are the "impermissible" biases? The Supreme Court has said that "where the matter is one of identifying and applying the law to the findings of fact, it must be the law that governs and not a judge's individual beliefs that may conflict with the law."[12]This paper will, hopefully, provide a practical explanation of the individual biases, beliefs, relationships, and behaviours that have fallen afoul of the rule against bias.

2. Bias: the basics

Although the specific rules of bias may seem complex, the concept itself is not. The essence of bias is prejudgment, i.e. "a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile".[13]

Unfortunately the accepted legal definition of bias in the Canadian jurisprudence is rather cumbersome. From *Committee for Justice and Liberty v. National Energy Board,* 1976 CanLII 2 (S.C.C.), [1978] 1 S.C.R. 369 per de Grandpré J. in dissent at pp. 394-95:

> . . 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.... [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and

[8] (Toronto: Canvasback Publishing, 2010 (loose-leaf)), at §11:3320, p. 11-13
[9]I,e, see the *Canadian Human Rights Act,* 48.1(2), which says: "Persons appointed as members of the Tribunal must have experience, expertise and interest in, and sensitivity to, human rights", considered in *Zundel v. Citron*, 2001 FCA 212 (CanLII)
[10]*R. v. Teskey*, 2007 SCC 25 per Charron J. for the majority at para. 20.
[11] '*Practice and Procedure before Administrative Tribunals* (Toronto: Carswell, 2004 (loose leaf)) at 39-3.
[12]Ibid., at paragraph 40.
[13]*Old St. Boniface Residents Assn. Inc. v. Winnipeg (City),* [1990] 3 S.C.R. 1170 at p. 1197

> 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."[14]

The test is an objective one, which reflects a very strong presumption in law that a judge is impartial and will act appropriately.[15]This is because judges "are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."[16]The Supreme Court has noted that "[e]ven though there is a presumption that judges will carry out the duties they have sworn to uphold, the presumption can be displaced"through the adduction of "cogent evidence" of bias.[17] As the *National Energy Board* test demonstrates, the onus is high, and it is bourne by the party alleging bias.[18]It is accordingly not sufficient for a party to prove that she sincerely believed that the adjudicator is biased.[19]

A more practical definition of bias was adopted by the Supreme Court in *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, [2003] 1 S.C.R. 884, at para 38 per McLachlin C.J. and Bastarache J. for the Court, at para. 38:

> As Scalia J. pointed out in *Liteky v. United States,* 510 U.S. 540 (1994), at p. 550, the words "bias" and "partiality" "connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess." [emphasis in original]

It must be remembered that to fall afoul of the rule against bias, it is not necessary to demonstrate actual bias; indeed, the absence of evidence of actual bias is irrelevant. In this frequently-quoted passage from *Metropolitan Properties Co. v. Lannon,* [1969] 1 Q.B. 577 (C.A.), Lord Denning M.R. explained, at p. 599:

> [I]n considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. …The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'[20]

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[14]*Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (S.C.C.), [1978] 1 S.C.R. 369 per de Grandpré J. in dissent at pp. 394-95, as adopted in *Valente v.The Queen,* 1985 CanLII 25 (S.C.C.), [1985] 2 S.C.R. 673; *R. v. Lippé*, 1990 CanLII 18 (S.C.C.), [1991] 2 S.C.R. 114; *Ruffo v. Conseil de la magistrature,* 1995 CanLII 49 (S.C.C.), [1995] 4 S.C.R. 267, etc.
[15]*Wewaykum Indian Band v. Canada*, 2003 SCC 45, *Taylor Ventures Ltd. (Trustee of) v. Taylor,* 2005 BCCA 350; *Zundel v. Citron (C.A.),* [2000] 4 F.C. 225 (F.C.A.)
[16]*United States v. Morgan,* 313 U.S. 409 (1941), at p. 421, as quoted with approval in *R. v. S. (R.D.),* [1997] 3 S.C.R. 484 (L'Heureux-Dubé J. and McLachlin J. , as she then was) at para. 32.
[17]*R. v. Teskey,* 2007 SCC 25, per Charron J. for the majority at para. 21
[18] See also *R. v. S.(R.D.),* [1997] 3 S.C.R. 484 at para.114
[19]*CEP (Local 707) v. Alberta (Labour Relations Board),* 2004 ABQB 63 at para. 235.
[20]As adopted by Major J. for the dissent at para. 11 of *R. v. S. (R.D.),* [1997] 3 S.C.R. 484

Authors Donald Brown and John Evans, in their text *Judicial Review of AdministrativeAction in Canada,*[21]explain that a focus on the appearance of bias recognizes that it would be inappropriate to inquire into the subjective state of mind of the decision-maker, because of the confidential nature of the judicial function and the "unseemliness" of calling an adjudicator as a witness.

Subject to constitutional constraints, the rule against bias tolerates certain degrees of bias in certain tribunals. The Supreme Court has prescribed a "contextual" approach to determining the level of impartiality required of a particular tribunal, taking into account the terms of its constituting legislation, and where it falls on a continuum ranging from quasi-judicial (charged with determining the rights of parties to disputes) to policy-making.[22]Tribunals that are primarily engaged with policy-making, such as a municipal council, are not required to demonstrate a judicial standard of impartiality, and must only appear "amenable to persuasion" and not have "a closed mind".[23]

Generally, an appearance of bias goes to jurisdiction, rendering a decision void, unless the bias can be said to have been waived.[24] If overturned on judicial review because of bias, the matter will not be remitted to the same adjudicator.[25]Finally, "if there is a real likelihood of bias in even one member of a tribunal it is sufficient to disqualify the whole tribunal."[26]

3. Types of Bias

It has been often observed that the categories of bias are never closed, i.e. the kinds of relationships, events, and conduct that may give rise to a reasonable apprehension of bias have endless variation.[27]Author Robert D. Kligman in his 1998 book *Bias*[28]offers a useful taxonomy of five types of bias. Here is a brief discussion of each.

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[21] (Toronto: Canvasback Publishing, 2010 (loose-leaf)), at §11:1200

[22]*Imperial Oil Ltd. v. Quebec (Minister of the Environment),* 2003 SCC 58, [2003] 2 S.C.R. 624; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch),* 2001 SCC 52, [2001] 2 S.C.R. 781

[23]*Save Richmond Farmland Society v. Richmond (Township),* [1990] 3 S.C.R. 1213; *Old St. Boniface Residents Association Inc. v. Winnipeg (City),* [1990] 3 S.C.R. 1170;

[24]*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities),* 1992 CanLII 84 (S.C.C.), [1992] 1 S.C.R. 623, 89 D.L.R. (4th) 289; *Donn Larsen Development Ltd. v. The Church of Scientology of Alberta,* 2007 ABCA 376; *Histed v. Law Society of Manitoba*, 2006 MBCA 89 (CanLII), 2006 MBCA 89

[25]*Elk Valley Coal Corp. v. United Mine Workers of America Local* 1656, 2009 ABCA 407 (CanLII), 2009 ABCA 407

[26]*Weimer v. Symons et al.* (1987), Sask. R. 155 (Sask. Q.B.); *Huerto v. Saskatchewan (Minister of Health)* 1995 CanLII 5807 (SK Q.B.), (1995), 132 Sask. R. 59 (Q.B.),

[27]Brown & Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 2010) at §11:3100, p.11-10

[28]Robert D. Kligman, *Bias* (Toronto: Butterworths, 2001)

1.1 Relational biases

Certain relationships will typically disqualify an adjudicator, i.e. ". . . kinship, friendship, partisanship, particular professional or business relationship with one of the parties, animosity towards someone interested … etc."[29]These relationships fall generally into two categories: personal relationships (e.g. family, friends, colleagues, neighbours) and non-personal relationships (e.g. professional, business and pecuniary associations). Generally speaking, "… a former professional relationship will generally not give rise to a reasonable apprehension of bias if there has been a reasonable lapse of time following the association and the prior association did not relate to the matter in issue."[30]

1.1.1 Personal relational bias

An appearance of favouritism or the possibility of favouritism due to a pre-existing relationship can disqualify a decision-maker. For example, an appearance of bias was found where a town council was asked to review the termination of the employment of a council member's daughter;[31] where an applicant before an employment staffing tribunal was a former subordinate for whom the adjudicator provided an employment reference;[32] where an adjudicator's spouse was employed by a party;[33]where a member of the tribunal was a party's uncle;[34]and where a police disciplinary tribunal member's daughter was a witness against the officer party in a second proceeding.[35] Having a close working relationship with a witness for the prosecution disqualified an adjudicator in *McCormack v. Toronto (City) Police Service,* [2005] O.J. No. 5149 (QL) (Ont. Div.Ct.), as did accepting employment with the firm representing a party in *CUPE et al v. Civic Centre Corp. et al,* 2006 NLTD 169.

On the other hand, a demonstrable history of animosity between the adjudicator and a party will give rise to a disqualifying appearance of bias.[36]For example, in cases where a party had accused a member of the tribunal of harassment, [37]and had sued members of the tribunal in wrongful dismissal,[38] the tribunals were disqualified for bias. In *Weimer v. Symons et al*. (1987), Sask. R. 155 (Sask. Q.B.), members of the police board

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[29]*Energy Probe v. Atomic Energy Control Board,* [1985] 1 F.C. 563 (C.A.) leave to appeal refused, [1985] 1 S.C.R. viii, Marceau J.A. at p. 580
[30]*Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603 per Ross J. at paragraph 50.
[31]*Derrick v. Strathroy (Town)* (1985), O.A.C. 206 (Div.Ct.)
[32]*N.A.P.E. v. Newfoundland (Treasury Board),* unreported, September 16, 1988 (Nfld. S.C.)
[33]*Ladies of the Sacred Heart of Jesus v. Armstrong's Point Assn.* (1961), 29 D.L.R. (2d) 373 (Man. C.A
[34]*Sudbury v. Canada (Attorney General),* 2000 CanLII 16231
[35]*Spence v. Spencer and Prince Albert Board of Police Commissioners* 1987 CanLII 985 (SK C.A.), (1987), 53 Sask R.35 (Sask. C.A.),
[36]*Keller v. Commissioner of the Saskatchewan Baseball Association, Inc., 1999*CanLII 12735 (SK Q.B.)
[37]*Hnatiuk v. Canada (Treasury Board),*(1994), 170 N.R. 364 (F.C.A.)
[38]*Commandant v. Wahta Mohawks First Nation*, 2007 FC 692aff'd2008 FCA 195

seeking to investigate the matter were alleged to have conspired to remove a police chief, and accordingly disqualified. Fighting with a nominee, however, is not evidence of bias on the part of the Chairperson of a tripartite board; itsjust part of the arbitration process: *Alberta v. AUPE* (1989) 5 LAC 4th 420 (Beattie).

1.1.2 Non-personal relational bias

A direct financial interest in the disposition of a matter is sometimes said to constitute "actual bias" (*Committee for Justice and Liberty et al. v. National Energy Board et al.,* [1978] 1 S.C.R. 369), which automatically disqualifies one from acting. Jones and de Villars in *Principles of Administrative Law* (4th edition) comment, at p. 373:

> The courts have consistently held that the existence of a direct financial interest in the outcome of the matter in dispute almost always disqualifies a statutory delegate from acting. In other words, a pecuniary interest gives rise to a "reasonable apprehension of bias", no matter how open-minded in fact the delegate might be.

A financial interest will give rise to an appearance of bias will disqualify an adjudicator, if it arises from an existing relationship[39] that gives the adjudicator a real potential for business or pecuniary advantage related to the disposition of the proceedings. The business or pecuniary interest must be "direct" not "too remote" or 'indirect" or "contingent".[40] Here are some examples in which a non-personal relationship resulted in the disqualification of the arbitrator for bias:

- A member of the panel was involved with an industry association of which one of the applicants was a member: *Committee for Justice and Liberty v. National Energy Board,* [1978] 1 S.C.R 369
- A member of the commission was a director of a competitor of one of the parties: *Bennett v. British Columbia (Superintendent of Brokers)*, (1992), 6 Admin. L.R. (2d) 268 (B.C.S.C.)
- A Band Council's decision to relocate a person when one of the members of the Council intended to move into the house that the Council had ordered vacated: *Obichon v. Heart Lake First Nation No. 176,* [1989] 1 C.N.L.R. 100 (F.C.T.D.).
- A member of the College of Pharmacy discipline committee was trying to purchase a pharmacy belonging to the person who was suspended: *Moskalyk-Walker v. College of Pharmacy (Ontario)* (1975), 8 O.R. (2d) 609 (Ont.Div.Ct.)
- A securities commission was named in a shareholder class action suit, and was called upon to adjudicate regulatory charges against one of its co-respondents: *Curtis et al. v. Manitoba Securities Commission*, 2006 MBCA 135

[39] *Lewvest Ltd. v. St. John's (City) (*1983), 42 Nfld. & P.E.I.R. 181; 122 A.P.R. 181 (Nfld. & Lab. C.A.)
[40] *Energy Probe v. Atomic Energy Control Board*, [1985] 1 F.C. 563 (C.A.), leave to appeal refused, [1985] 1 S.C.R. viii; *Newfoundland (Treasury Board) v. N.A.P.E.* (2002), 221 D.L.R. (4th) 513 (Nfld. & Lab. C.A.), aff'd on other grounds 2004 SCC 66.

1.2 Informational bias

As a general rule, prior knowledge of a dispute may breach the rule against bias if it was obtained in an *ex parte* manner (i.e. in the absence of one or all parties). For example, where the decision maker had acquired knowledge of the matter through his previous employment, employee, a reasonable apprehension of bias was found:*Lee v. Canada (Correctional Services)* (1994), 80 F.T.R. 90 (FCTD)In addition, past knowledge of a party may give rise to an apprehension of bias, where, for example, a party is appearing before an adjudicator for a second time after being found to be incredible in the prior matter: *Re Hart and R.* (1982), 60 (2d) 474 (Ont.H.C.).

On the other hand, administrative tribunals are often appointed on the basis of expertise, which recognizes that general information about a particular area of law is an asset to adjudication. Brown and Evans note, in *Judicial Review of Administrative Action in Canada,* that "the quality of a hearing is likely to be enhanced if the decision-maker has some general knowledge and understanding of the matters to be decided."[41]

Again, the rule against bias will be breached only if an adjudicator's prior knowledge of a dispute, party, or issue operates in a wrongful or improper manner, in the sense that the parties are deprived of a fair hearing of the issues. For example, in *CEP (Local 707) v. Alberta (Labour Relations Board),* 2004 ABQB 63,the entire Alberta Labour Relations Board was alleged to be biased as a result of Board officials' confidential consultation with the government on health care reorganization legislation prior to its enactment. The Alberta Court of Queen's Bench rejected an Application brought by the Alberta Federation of Labour and two unions to have the entire Board declared biased, ruling that because there was no litigation pending respecting particulars parties at the time the consultation occurred, contact between the Board Chair and the government was "not lower than a level of generality that a reasonable person would assume might possibly occur from time to time as between Government and the head of a tribunal when legislation affecting that tribunal is about to be tabled."[42] The unions discontinued their action at the Court of Appeal after the Board adopted *Guidelines for Consultation on Legislation* which provide, *inter alia,* that "any pre-enactment involvement with the development of legislation" must be disclosed in advance to parties to a proceeding where that legislation is in issue, and that where confidential consultation has occurred with the government's outside counsel, "the Chair or Vice-Chair will recuse themselves

[41]Brown and Evans, Judicial Review of Administrative Action in Canada (Toronto: Canvasback Publishing, 2010 (loose-leaf)), at §11:4520, p. 11-55
[42]per Watson J. at para. 35

from sitting on any case involving the interpretation of the legislation concerned [in] which that outside counsel appears."[43]

In another notorious informational bias case, the Ontario Superior Court affirmed a decision of the Ontario Labour Relations Board holding that all of the Vice-Chairs of the Board were disqualified for bias, based on an application filed by a union against the provincial government. While the originating application was before the Board, a Cabinet Minister made comments to the media about terminating the appointments of the former Chair and some Vice-Chairs of the Board, which had been shared and discussed at meetings of the current Chair and Vice-Chairs. The Board ruled that because the information was relevant to the dispute, and all the Vice-Chairs had some interest in the information, the entire Board was biased. The Ontario Superior Court granted the union's subsequent application for the appointment of an independent adjudicator pursuant to s. 16 of the *Ontario Public Officers* Act, agreeing that "no O.L.R.B. vice-chair (nor the chair or alternate chair) can hear this matter without creating a reasonable apprehension of bias".[44]

1.3 Attitudinal bias

Allegations of attitudinal bias arise from past statements made by an adjudicator on an issue germane to the case now before her. A useful test was set out by Justice Bastarache in *Arsenault-Cameron v. Prince Edward Island,* [1999] 3 S.C.R. 85. Dismissing a recusal motion brought on the basis of his earlier publications on an issue relevant to the case, Bastarache commented, quoting from*Valenté v. The Queen*, [1985] 2 S.C.R. 673:[45]

> …partiality is 'a state of mind or attitude…in relation to the issues and the parties in a particular case,' a real predisposition to a particular result. The applicant would have to show wrongful or inappropriate declarations showing a state of mind that sways judgment in order to succeed.

The Supreme Court of Canada has acknowledged that "[a]ll members of this Court, past and present, have, to a greater or lesser degree, before appointment to the Bench and to this Court, expressed views on questions which have legal connotations, and this has never been a disqualifying consideration."[46]The Courts are clear that without more, the fact that a decision-maker has previously expressed an opinion on opinions on legal or other matters will not establish a reasonable apprehension of bias.

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[43] Alberta Labour Relations Board, *Guidelines for Consultation on Legislation,* March 29, 2007, online at http://www.alrb.gov.ab.ca/guidelinesA.pdf

[44]*Service Employees International Union, Local 204 v. Johnson*, 1997 CanLII 12280 (Ont.Sup.Ct.), per Lederman J. at para.67.

[45]at paragraph 5.

[46]*Morgentaler v. The Queen*, 2 October 1974, S.C.C. motion No. 13504 (reproduced in (1984), 29 McGill L. J. 369, at pages 405-406), as cited in *Samson Indian Nation and Band v. Canada*, [1998] 3 F.C. 3.

For example, in *Ellis-Don Ltd. v. Ontario (Labour Relations Board)* (1992), 98 D.L.R. (4th) 762 (Ont.Div.Ct.), the Court dismissed a bias allegation against a judge who, as a former chair of the Ontario Labour Relations Board, he had authored a decision on an issue similar to the one before the Court. The Court held that "… a judge has no need to disqualify himself or herself because he or she once took a position in days of yore, before being appointed a judge, on some topic or another."

A past statement will cross the line, however, when it evidences prejudgment of the issue, whether generally or specifically. For example, in *Tatruashvili v. Canada (Minister of Citizenship and Immigration),* [1996] F.C.J. No. 1475 (QL) (T.D.) a decision denying the (Israeli) Applicant refugee status was reversed, based on a comment made by the Adjudicator that as "a matter of personal conscience" he could hear applications from people from Israel without demonstrating bias, because he had "already done so in other cases from Israel, including those of the Palestinians mentioned earlier." And in *E.A. Manning v. Ontario Securities Commission*(1994), 18 O.R. (3d) 97 (Div.Ct.) aff'd23 O.R. (3d) 257, 125 D.L.R. (4th) 305 (C.A.) members of the Ontario Securities Commission who took part in the formulation of a policy dealing with unfair "penny stock" sales practices (which had since been struck down by a Court as *ultra vires*), were barred from taking part in proceedings later instituted against penny stock dealers for alleged unfair sales practices. Not only did the facts show that "in the process of formulating [the policy] they had closed their minds to the issue", the Court held that themanner in which the Commission had defended the policy in Court was evidence of prejudgment. The Court of Appeal confirmed that Commissioners appointed after the Court challenge to the policy were free of "corporate taint", because they had not personally participated in the bias-generating events.

Attitudinal bias can also be inferred from conduct rather than statements. For example, in *Benedict v. Ontario* (2000), 51 O.R. (3d) 147 (C.A.), a recently-appointed judge was disqualified for bias because she had an ongoing action against the Crown in wrongful dismissal, and the court proceeding before her involved an action by an entirely unrelated party against the government of Ontario for wrongful dismissal, but was found, in the circumstances, to have a "relevant interest in the outcome" of the case. See also *Re Great Atlantic & Pacific Co. of Canada, Ltd. and Ontario Human Rights Commission et. Al.,* (1993) 13 O.R. (3d) 824 where a human rights adjudicator's status as a complainant in a (settled) systemic gender discrimination complaint was found to disqualify her from sitting on a similar complaint.

It bears noting that the contextual bias test tolerates significant apparent attitudinal bias in certain tribunals, because, as Cory J. explained in *Newfoundland Telephone Co. v.*

Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623[47]policy-making tribunals "unlike judges, do not have to apply abstract legal principles to resolve disputes" and therefore"no useful purpose would be served by holding them to a standard of judicial neutrality." As a result of the "flexible approach" to the impartiality standard, "a member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing."

1.4 Institutional bias

Institutional bias may be alleged where a tribunal, in addition to adjudicating a dispute, performs the role of investigator, prosecutor, or party to the same proceeding. A classic example arose in the case of *MacBain v. Lederman,* (1985), 22 D.L.R. (4th) 119 (F.C.A.), where an appearance of bias was found to arise from the fact that the Human Rights Commission, which accepted, investigated, and prosecuted human rights complaints, also selected the adjudicator to act as a Tribunal. Although this appointment scheme was authorized by the *Canadian Human Rights Act,* the Federal Court of Appeal found that it breached the principles of fundamental justice as provided for by the *Canadian Bill of Rights.*As a result, the Tribunal appointment procedures set out in the *Canadian Human Rights Act* were declared inoperative,and later amended.

Subject to constitutional constraints, institutional bias may be legitimized by statute. For example, in *Brosseau v. Alberta Securities Commission* (1989), 57 D.L.R. (4th) 458 (S.C.C.), the Supreme Court ruled that absent a *Charter* challenge, no appearance of bias arose from the fact that members the Alberta Securities Commission could be involved in both the investigatory and adjudicatory functions, because the Tribunal's constituting statute specifically authorized this overlap of function: "So long as the Chairman did not act outside of his statutory authority … a 'reasonable apprehension of bias' affecting the Commission as a whole cannot be said to exist."[48] Contrast*2747-3174 Québec Inc. v. Quebec (Régie des permisd'alcool),* [1996] 3 S.C.R. 919, in which a decision of an administrative tribunal was quashed because, *inter alia,* the Chairman initiated the investigation, convened the hearing, and selected the panel to hear the case, which included himself. The top court ruled that the Commission's structure did not meet the requirements of s.23 of the *Quebec Charter of Human Rights and Freedoms,* which guarantees a right to a public and fair hearing by an independent and impartial tribunal (but that no legislative amendment was required, because the statute did not specifically oust the common law rule).

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[47]at page 639, quoting from Hudson Janisch's*Case Comment on Nfld. Light & Power Co. v. P.U.C. (Bd.)* (1987), 25 Admin. L.R. 196.
[48]perL'Heureux-Dubé J. at para. 37.

1.4.1 Adjudicative Independence

An institutional bias objection may also rest on an argument that the Tribunal lacks independence, which is a *sine qua non*of natural justice.[49] Independence may be described as freedom from "restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[50]Put another way,

> … the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider -- be it government, pressure group, individual or even another judge -- should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.[51]

In *R. v. Valente*, [1985] 2 S.C.R. 673, the Supreme Court ruled that judicial or adjudicative impartiality is assured by "the essential conditions of independence" including "security of tenure, financial security and administrative control." [52]The Supreme Court has confirmed that the *Valente* conditions attach to some administrative tribunals, from *Canadian Pacific Ltd. v. Matsqui Indian Band,* [1995] 1 S.C.R. 3 per Lamer C.J. wrote:

> …. it is a principle of natural justice that a party should receive a hearing before a tribunal which is not only independent, but also appears independent. Where a party has a reasonable apprehension of bias, it should not be required to submit to the tribunal giving rise to this apprehension. Moreover, the principles for judicial independence outlined in *Valente* are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties.

Again, because legislation may displace the common law rules of procedural fairness, the criteria of adjudicative independence can be altered by statute within Constitutional limits.[53]As the Supreme of Canada observed in *Ocean Port Hotel Ltd. v.British Columbia (General Manager, Liquor Control and Licensing Branch),* [2001] 2 S.C.R. 781, "…the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional restraints, this choice must be respected."At the same time, however, the Supreme Court has clarified that "[i]n the case of tribunals established … to adjudicate 'interest' disputes between parties, it is particularly important to insist on clear and unequivocal

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[49]*Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R.3
[50]From *Universal Declaration on the Independence of Justice, First World Conference on the Independence of Justice*, Montréal, June 10, 1983, in S. Shetreet and J. Deschênes, eds., *Judicial Independence: The Contemporary Debate* (1985), 447, at p. 450, as quoted with approval in *R. v. Lippé,* [1991] 2 S.C.R. 114
[51]*Beauregard v. Canada,*[1986] 2 S.C.R. 56, per Dickson J. at p. 69:
[52]*R. v. Valente*, [1985] 2 S.C.R. 673
[53]*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch),* 2001 SCC 52 (CanLII), 2001 SCC 52, [2001] 2 S.C.R. 781; *Saskatchewan Federation of Labour v. Saskatchewan,* 2010 SKCA 27

legislative language before finding a legislative intent to oust the requirement of impartiality either expressly or by necessary implication."[54]

Thus, in *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour),* [2003] 1 S.C.R. 539 the Supreme Court struck down the Ontario government's unilateral appointment of four retired judges to act as interest arbitrators within a statutorily imposed scheme of compulsory arbitration in the healthcare sector, ruling that the legislation required arbitrators that were impartial and independent, and that the Government's appointees did not qualify. On the other hand, the Saskatchewan Court of Appeal recently upheld the mid-term cancellation of the appointments of the Saskatchewan Labour Relations Board by a newly elected Saskatchewan Party Government in 2008, because a provision in the Saskatchewan *Interpretation Act* specifically permits the Province to cancel all administrative tribunal appointments following a general election.[55]

1.4.2 Independence requirements in Tripartite Boards

Allegations of bias are rare against consensual arbitration boards,[56] for the simple reason that the parties themselves either select the arbitrator jointly, or appoint their own representatives or nominees who in turn select a mutually-agreeable, neutral chairperson.

The tests for bias are accordingly significantly modified for arbitrators. There is tolerance of pre-existing bias if known to the parties and agreed to at the time of appointment. On the other hand, once the arbitrator is appointed, the same tests respecting operational bias (discussed *infra*) will apply:

> "Unless the parties have agreed, with full knowledge of the position, to accept the decision of a person whose position with regard to them or to the matters referred to him is otherwise, they are entitled to expect from an arbitrator complete impartiality and indifference, both as between themselves and with regard to the matters left to the arbitrator to decide, and they are entitled to expect from him a faithful, honest and disinterested decision. . . . any personal interest which will tend to bias an arbitrator's mind, which was unknown to either of the parties at the time when the dispute concerned was agreed to be referred, will unfit a person to act as arbitrator.[57]

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[54] *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour*), [2003] 1 S.C.R. 539 per Binnie J. for the majority at para.121.

[55] *Saskatchewan Federation of Labour v. Saskatchewan,* 2010 SKCA 27; a *Charter* challenge to the legislation was rejected in *Saskatchewan Federation of Labour v. Saskatchewan Government and General Employee's Union*, 2010 SKQB 390 an appeal of which is pending before the Saskatchewan Court of Appeal.

[56] *Communication, Energy and Paperworkers Union of Canada Local 60N v. Abitibi Consolidated Company,* 2008 NLCA 4 per Roberts J.A. at para. 38.

[57] *FlinFlon Division Assn. No. 46 v. FlinFlon School Division No. 46 (*1964), 47 D.L.R. (2d) 87 , 1964 CLB 346 (Man. Q.B.), at p. 89, citing A. Walton, *Russell on the Law of Arbitration* , 17th ed. (London: Stevens

As for nominees, it has been held that the tripartite model "implicitly allows for a degree of partiality in the representative members of the board … allowing them to act as arbitrators even though they be pre-disposed, generally, in favour of the party that nominated them and even though they be expected, to some extent, to advocate the interests of that party."[58]

At the same time, however, even nominees are required to be at least notionally independent. The Supreme Court's decision in *Szilard v. Szasz*, [1955] S.C.R. 3 is often cited as authority for the proposition that each party to an arbitration "is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs."[59]Thus, a union nominee who was a member of the party union's national executive was disqualified in *Saskatoon Chemicals Ltd. and the Energy Chemical Workers Union, Local 609 et al.*[1988] S.J. No. 304 (QL) (Q.B.). See also *Waiward Steel Fabricators Ltd. v. IABSRI (Shopmen's Local Union No. 805*), 2005 ABQB 269, in which the reviewing court held that a disqualifying appearance of bias arose where the union nominee was employed by the party's parent union. Similarly, an employer nominee was disqualified in *Abitibi Consolidated Inc*. (2004), 130 L.A.C. (4th) 129 (Oakley),[60] where, as a former manager of the employer party, he had developed the collective agreement language at issue in the arbitration. And in *Simmons v. Manitoba* (1981), 129 D.L.R. (3d) 694(Man.C.A.) in an arbitration where the government was the employer, the management nominee was disqualified because he had accepted an appointment to a government position, but had not disclosed the fact of his employment to the parties.

In addition to basic independence, nominees are required, once appointed, to be "able, in good faith, to bring informed, mature, and responsible judgment to bear on the matters in controversy".[61]The Alberta Court of Appeal has said that a nominee is required to be and appear "intellectually honest".[62]The Saskatchewan Court of Appeal has commented:

> As for the outermost limits, neither nominee may be so pre-disposed to a particular result, or so closed-minded in respect of particular issues, as to reduce the role of arbitrator to a sham.[63]

& Sons Ltd., 1963), p. 119, as quoted in Brown and Beatty, *Labour Arbitration in Canada* (4th), online edition (at www.canadalawbook.ca) at §1:5210.

[58]*Yorkton (City) v. Yorkton Professional Fire Fighters Assn. Local 1527,* 2001 SKCA 128 per Cameron J.A. at para. 43.

[59]Per Rand J. at 4.

[60]aff'd on other grounds 2008 NLCA 4.

[61]*Yorkton (City) v. Yorkton Professional Fire Fighters Assn. Local 1527,* 2001 SKCA 128 per Cameron J.A. at para. 43

[62]: *Re Bethany Care Centre and U.N.A., Loc. No. 91*(1983), 5 D.L.R. (4th) 54 (Alta.C.A.), leave to appeal to S.C.C. refused 50 A.R. 160n

[63]Ibid., at para. 41.

In other words, whatever their preexisting biases, nominees are expected to act judicially once appointed. Thus, in *King-Yonge Properties Ltd. v. Great-West Life Assurance Co.*[1989] O.J. No. 452 (QL) (Ont. H.C.); aff'd [1989] O.J. No. 1097 (QL) (Ont. C.A.), a reasonable apprehension of bias was found when the landlord's representative on a three-person board communicated with a nominating party about matters concerning how to speed up the process of going to arbitration, what to emphasize in its presentation and general strategy. While preliminary communications dealing with qualifications and remuneration are acceptable, nominees should avoid contact with their nominating parties once the hearing begins.

An exception to the impartiality requirement is made for nominees in interest arbitration (to conclude the terms of a collective bargaining agreement), as opposed to rights arbitration, where the nominee is expected to continue the collective bargaining process on behalf of the nominating party:

> It is an error in principle to equate an interest arbitration with a grievance or rights arbitration and seek to force the former into the quasi-judicial framework appropriate to the latter. An interest arbitration is neither a court of justice or a quasi-judicial body, but simply a labour relations device.[64]

1.5 Operational bias

Finally, an appearance of operational bias may arise from the adjudicator's conduct during the hearing, procedural rulings, and reasons. Here are some examples of hearing conduct that has led to the disqualification of the adjudicator for bias:

- Communicating with one party without the knowledge or inclusion of the other: *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391
- Aggressive cross-examination of claimant with questioning veracity based on demeanour: *Hagi-Mayow v. Canada (Minister of Employment and Immigration)* (1994), 74 F.T.R. 63. See also *Thiara v. Canada (Minister of Citizenship and Immigration)* (1997), 127 F.T.R. 209 (aggressive questioning) and *Zheng v. Canada (Minister of Employment & Immigration)* (1994), 28 Imm.L.R. (2d) 191 (Fed.T.D.) (members of the tribunal questioned the applicant for almost a whole day)
- Refusing to hear evidence, constantly interjecting and making derisive remarks: *Shoppers Mortgage and Loan Crop. V. Health First Wellington Square Ltd.* (1995), 23 O.R. (3d) 362 (C.A.)

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[64] *Hudson's Bay Co. v. British Columbia Labour Relations Board,* 1996 CanLII 1499 (BC S.C.), (1996), 31 BCLR (3d) 317 per Henderson J. at para. 31; see also *Simmons v. Manitoba* (1981), 129 D.L.R. (3d) 694(Man.C.A.) and *Re Gypsumville District Teachers' Association No. 1612 of The Manitoba Teacher's Society, et al.* [1980] 2 S.C.R. 179.

- Sexist, gratuitous and insulting comments combined with aggressive questioning:*Yusuf v. Canada (Minister of Employment and Immigration),* [1991] F.C.J. No. 1049 (F.C.A.)
- Negative comments about "Indians": *Sawridge Indian Band v. Canada* [1997] 3 F.C. 580 (C.A.)
- Jeering, laughing and making exasperated noises during a party's testimony: *Lee v. Gao* (1992), 65 B.C.L.R. (2d) 294 (S.C.)
- Treating counsel for a party with excessive familiarity – *United Enterprises Ltd. v. Saskatchewan (Liquor and Gaming Licencing Commission)* [1997] 3 W.W.R. 497 (Sask.Q.B.)
- Suggesting that a party was abusing the process (by asking for adjournments for illegitimate reasons): *R. v. Gerlach*, [1994] O.J. No. 1236 (QL)
- Interfering with cross-examinations and exhibiting hostility toward counsel: *United Steelworkers of America, Local 4444 v. Stanley Steel Co.* (1974), 53 D.L.R. (3d) 8 , 1974 CLB 577 (Ont. Div. Ct.).
- Assisting a party with questioning a witness and advising on revision of pleadings: *Griffin v. Murnaghan* (1994), 70 O.A.C. 236 (C.A.)
- Interrupting evidence to raise an objection (the parole evidence rule) to restrict the respondent's evidence: *Taylor v. Eisner*, [1993] 4 W.W.R. 98 (Sask C.A.)
- Questioning the competence of a non-lawyer representatives and criticizing her for the manner in which she presented the case: *McKeon v. Canada (A-G)* (1996), 114 F.T.R. 205

Finally, the use of inflammatory and sarcastic language in a preliminary ruling has been found to raise an appearance of bias,[65] as has the tone and content of reasons, where the decision conveyed that the arbitrator was "very interested in issues that are not before him" and "emotionally invested in using this award as an opportunity to influence general health policy."[66]

4. <u>Practice points: If you are accused of bias</u>

The Alberta Labour Relations Board's *Guidelines for Consultation on Legislation*[67] provide guidance to adjudicators that may be subject to challenge for bias due to prior knowledge or involvement with a dispute, party or issue. An adjudicator in this circumstance has two options: disclose the fact and manner of the acquisition of the information to the parties so that they may raise objection if they choose to, or decline to

[65]*Toromont Industries Ltd. v. International Union of Operating Engineers, Local 904,* [2008] N.J. No. 235, 280 Nfld.& P.E.I.R. 157, (N.L.S.C.T.D.)
[66]*Concordia Hospital v. Manitoba Nurses Union, Local 27,* 2004 MBQB 261
[67]*Service Employees International Union, Local 204 v. Johnson*, 1997 CanLII 12280 (Ont.Sup.Ct.), per Lederman J. at para.67.

sit. Three practice points are here offered to manage (or avoid) bias objections within an administrative tribunal or adjudicative practice.

1.6 Prehearing disclosure and waiver

The first practical consideration is whether one should advise the parties, prior to the commencement of the hearing, of the existence of relationships or circumstances that could give rise to a perception of partiality. A bias objection may not be avoided if the parties are advised, in advance, of these circumstances; however, prehearing disclosure is advised for two reasons. First, a party's failure to object at the outset of the hearing, if it has knowledge of the facts relevant giving rise to an appearance of bias, will likely be taken as acquiescing or waiving objection.[68]Second, a prehearing recusal, if required, obviates the danger of a decision reversed on judicial review and accompanying reputational damage and waste of time and resources.

1.7 Jurisdiction and procedure for raising bias objections

An administrative tribunal has jurisdiction to rule on its own bias. Although there may have been controversy in this regard in the past, it has been resolved in recent years.[69]

It is accordingly incorrect for an adjudicator to advise a party to go to Court to raise a bias objection, i.e. by application for a prerogative writ. As Slatter J. noted in*Robertson v. Edmonton (City) Police Service (No. 10),* 2004 ABQB 519, quoting from David Mullan and Martha Boyle, "Raising and Dealing with Issues of Bias and Disclosure" (2005), 18 C.J.A.L.P. 37:

> As for responding to a challenge, the general position is that the tribunal should deal with the matter and make a ruling, and not, for example tell the challenger to apply for an order in the nature of prohibition from the court.[70]

Indeed, given the common law limitation on adducing evidence extrinsic to the record on a judicial review application,[71]issuing a decision on a bias objection may be the only chance the adjudicator gets to set out the facts for a reviewing court, a point made by

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[68]Brown and Beatty, *Labour Arbitration in Canada* (4th), online edition (at www.canadalawbook.ca) at §1:5210, citing *Ghirardosi v. British Columbia (Minister of Highways*) (1966), 56 D.L.R. (2d) 469 , 1966 CLB 456 (S.C.C.).

[69]*Communication, Energy and Paperworkers Union of Canada Local 60N*, 2008 NLCA 4; *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services),* [2000] F.C.J. No. 1946(C.A.); *Eckervogt v. British Columbia (Minister of Employment and Investment)* 2004 BCCA 398; *Bajwa v. B.C. Veterinary Medicine Association,* 2010 BCSC 848; *Robertson v. Edmonton (City) Police Service (No. 10),* 2004 ABQB 519 (CanLII), [2005] 11 W.W.R. 656 (ABQB).

[70] At p. 48

[71]*Brar v. College of Veterinarians of British Columbia*, 2011 BCSC 215; *Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74.

the British Columbia Court of Appeal in *Eckervogt v. British Columbia (Minister of Employment and Investment)* 2004 BCCA 398: [72]

> If, during the course of a proceeding, a party apprehends bias he should put the allegation to the tribunal and obtain a ruling before seeking court intervention. In that way the tribunal can set out its position and a proper record can be formed.

In his often-quoted decision in*Robertson v. Edmonton (City) Police Service,* 2004 ABQB 519 Slatter J. also makes the point that not only does "an application directly to the adjudicator allow him or her to place on the record the facts relevant to the bias application",it can prevent the "unhappy effect of requiring the Respondent [adjudicator] to actually testify on the judicial review application, and be subjected to cross-examination as to whether or not he was biased", which "is a practice to be avoided."[73]In addition to having "a tempering effect on the type of allegations of bias that are made", requiring a tribunal to rule on a bias application in the first instance "respects the jurisdiction of the tribunal and the adjudicator over the issue [and] prevents unnecessary interference by the Court of Queen's Bench in the work of the tribunal."[74] Finally, ruling on a bias objection instead of requiring judicial intervention promotes the efficient resolution of disputes, which is a fundamental objective of legislation establishing administrative tribunals. [75]

1.8 Recuse only for good reason

Finally, there is clear recognition in the caselaw that one should not simply step down because a litigant has raised an allegation of bias.It has been said that, as "[j]udges have a duty to hear the cases to which they are assigned",[76] adjudicators should refuse "to create the impression that they are disqualified when in law they are not." [77]Disqualifying oneself for convenience or to avoid controversy can set a "dangerous precedent",[78] because

> … disgruntled, unhappy litigants or their counsel to make whatever allegations they wished…. If the allegations failed to provide a proper foundation for a finding of bias or a reasonable apprehension of bias, the litigant could nevertheless take comfort in the knowledge that the mere making of the allegations would, by their very nature, taint the process and force the disqualification of the judge.

Judges agree that "[l]itigants should not be encouraged to make unsubstantiated allegations in order to force the disqualification of a judge who has ruled unfavourably

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[72]Per Donald J.A. at para. 47.
[73]At para. 121.
[74]At para. 120.
[75]*Communication, Energy and Paperworkers Union of Canada Local 60N*, 2008 NLCA 4
[76]*Johnson v. WCB*, 2008 BCSC 1386 per Gray J. at para. 39.
[77]*R. v. Quinn,* 2006 BCCA 255at para. 53.
[78]*Middelkamp v. Fraser Valley Real Estate Board*, [1993] B.C.J. No. 2965 (S.C.), at para. 26.

against them in the past, or to 'taint' the proceedings with an air of bias." [79]Hasty recusal could, it is recognized, lead to a form of judge- or adjudicator- shopping that "tends to bring the administration of justice into disrepute."[80]

5. Conclusion

As noted above, regardless of how flexible the requirements of bias may be for adjudicative tribunals, even the most relaxed standard of impartiality requires a decision-maker to be and appear "intellectually honest".[81] The application of intellectual honesty to questions of bias will not only protect the reputation of the decision-maker, it will safeguard public confidence in the system of adjudication in which she practices.

[79]Ibid.
[80]*De Cotiis v. De Cotiis*, 2004 BCSC 117, perGroberman J at para. 10.
[81]*Re Bethany Care Centre and U.N.A., Loc. No. 91*(1983), 5 D.L.R. (4th) 54 (Alta.C.A.), leave to appeal to S.C.C. refused 50 A.R. 160n.