

WHAT'S THE PROBLEM WITH BIAS?

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What is “bias” in the context of local government, and why does it matter?

INTRODUCTION TO BIAS

Introduction to Bias

- Elected officials act as **policy-makers** and **administrative decision-makers**
- Must strike a balance between taking **vocal stances** on policy and **impermissible bias**
- **The line is not always clear:** two separate but overlapping standards – closed mind, and reasonable apprehension of bias

What can the statute tell us about bias?

CONFLICT OF INTEREST IN THE *COMMUNITY CHARTER*

Conflict of Interest in the *Community Charter*

■ Non-pecuniary conflict of interest:

- **In the *Charter*:** “another interest in a matter that constitutes a conflict of interest”
- **Generally:** relational; not pertaining to finances, but circumstances of special relations and interests

■ Relevant *Community Charter* provisions:

- **S. 100(2):** must declare any (a) direct and indirect pecuniary and (b) non-pecuniary conflict of interests
- **S. 101(2):** must not remain in a meeting, discuss, vote, or attempt to influence a vote on the conflicted matter
- **S. 101(3):** violating s. 101(2) results in disqualification (for pecuniary conflicts only, not non-pecuniary conflicts)

How is bias assessed in law?

TWO STANDARDS

Two Standards

Schlenker v. Torgrimson, 2012 BCSC 41:

- Two distinct but interrelated tests for addressing possible non-pecuniary conflicts of interests:
 - **The closed mind test:** “applies when the official has expressed opinions in advance of a decision to such a degree that he or she might have bias”
 - **Reasonable apprehension of doubt:** two stages
 - 1) Is the interest particular to the official, or held in common with other citizens in the elector area?
 - 2) If the interest is particular, would a reasonably well-informed person conclude the interest **might** influence the official’s exercise of their duty?

The Closed Mind Standard

- **Save Richmond Farmland Society v. Richmond (Township)**,
[1990] 3 S.C.R. 1213:
 - Bylaw passed that would convert area of land from agricultural to predominantly residential zoning; extensive public hearings
 - Alderman Mawby gave an interview, printed with the title “MAWBY WON’T CHANGE MIND”; residents argued Mawby’s vote tainted bylaw
- **Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)**,
[1990] 3 S.C.R. 1170:
 - Residents association challenged a rezoning bylaw authorizing high-rise development
 - Councillor Savoie spoke before the City’s Finance Committee on behalf of the developer; residents argued that Savoie was biased

The Closed Mind Standard

- The Supreme Court of Canada decided both cases on the closed mind standard, which requires:
 - “that the objectors or supporters be heard by **members of Council who are capable of being persuaded**. The Legislature could not have intended to have a hearing before a body who has **already made a decision which is irreversible.**”
- Not relegated to conflict of interest - you can have no conflict, but still have a closed mind

The Reasonable Apprehension of Bias Standard

Newfoundland Telephone Company v. Newfoundland, [1992] 1 S.C.R. 623:

- Commissioner Wells made several highly critical statements to the press about the Telephone Company's pay policies:
 - "If they want to give [the Company's CEO] and the boys extra fancy pensions, then the shareholders should pay for it, not the rate payers"
 - "Who the hell do they think they are? The guys doing the real work, climbing the poles never got any 21 per cent increase"
 - "I'm not having anything to do with salary increases and big fat pensions"
- Company objected to Wells' participation in the commission's decision making process; Wells did not recuse himself

The Reasonable Apprehension of Bias Standard

Newfoundland Telephone Company v. Newfoundland,
[1992] 1 S.C.R. 623:

- The Court found that Wells' statements before and during the hearing process **raised a reasonable apprehension of bias**
 - Wells' statements prior to the hearing, while colourful, did not indicate that he had a closed mind
 - Statements became at issue once the hearing process was initiated; standard changed, not having a close mind is no longer enough
 - "Once the hearing date had been set, the parties were entitled to expect that the conduct of the commissioners would be such that it would not raise a reasonable apprehension of bias. The comment of Mr. Wells did just that."

Do these two standards inform the interpretation of the *Community Charter*, and if so, how?

INTERPLAY BETWEEN STANDARDS AND STATUTE

Interplay Between Standards and Statute

- Conflict of interest is not defined in the *Community Charter*
 - As a result, non-pecuniary interests are often approached as a common law conflict, rather than one governed by statute
 - Non-pecuniary interests are perhaps best understood as a distinct species of bias

How have these principles and standards been applied to municipal law?

RECENT DECISIONS

Remedial Action Requirements

- ***McLaren v. Castlegar (City)***, 2011 BCCA 134:
- Property containing derelict businesses and residence
- City was in the process of inspection, had not initiated the remedial action requirement process
- On the day of inspection, the Mayor made statements to the media:
 - “The City of Castlegar has decided to take the necessary steps to demolish the City Centre Motel ... we’re just waiting. We’ll file a (resolution) and give all notifications.”
- **Reasonable apprehension of bias** standard applied
- Mayor’s comments **did not** indicate bias on this standard

Remedial Action Requirements

- **Beaverford v. Thorhild, 2013 ABCA 6:**
 - A Councillor opposed quarrying in certain areas
 - Councillor made Facebook posts and fliers against gravel pits, which referenced resolutions he'd proposed to prohibit gravel pits
 - Court found **a reasonable apprehension of bias**
 - Drew in part from the Councillor's prior legislative proposals
 - Notably different approach than in *McLaren*
 - *McLaren* draws a clear line between "closed mind" and "reasonable apprehension of bias". Division less clear here

Development Variance Permits

- ***113652 B.C. v. Whistler (Resort Municipality), 2018 BCSC 1806:***
 - The case does not deal with bias directly, but with related notions of procedural fairness
 - Applicant sought to have the setbacks for their property varied significantly through a DVP
 - Applicant argued they should have been afforded an opportunity to make an oral submission to council
 - Court found that the DVP decision-making process is **legislative** not **adjudicative**

Regional Growth Strategies

- ***3L Developments Inc. v. Comox Valley (Regional District)***, 2019 BCSC 1342:
 - Regional District denied a proposed amendment to an RGS
 - 3L alleged the board’s staff and board member’s actions gave rise to a reasonable apprehension of bias, including:
 1. Staff member saying it would be a “frosty Friday in hell” before the CVRD approved the application
 2. Director writing an email to a constituent discussing “my case when I speak to the board” and that he will be more outspoken against the motion than previously
 - Court finds **no reasonable apprehension of bias**

Codes of Conduct and Censure Motions

- **Kissel v. Rocky View (County), 2020 ABQB 406:**
 - Council passed a resolution disciplining three of its members for breaching its code of conduct
 - The County had a law firm conduct an investigation which led to the disciplinary action; disciplined counsellors argued bias in the investigation
 - Allegation of bias was raised during the investigation process, and not responded to by the law firm or County
 - Court found that while there wasn't evidence to determine there had been a reasonable apprehension of bias, failing to consider the possibility of bias led to an unfair hearing

Key Takeaways

- **Context matters:** different standards for bias with different thresholds will apply depending on the circumstances
- **Advocacy and argument allowed:** fairness is important, but being fair does not require blanket neutrality on all matters
- **Balance is essential:** there is a middle ground between expressing views and pre-deciding

Questions?



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