THE JOURNAL OF

CECM

CANADIAN COLLABORATIVE FOR
ENGAGEMENT & CONFLICT MANAGEMENT

Volume 1
(August 2020 – July 2021)

CONTEMPORARY CONSIDERATIONS OF DECISION MAKER BIAS

Marc Bhalla
LL.M. (DR), C.Med, Q.Arb, MCIArb

Shadow of the Law Publications

Volume One

Made in Canada

ISBN 978-0-9958842-2-9 (ebook)

Contents

ABSTRACT

For public justice system adjudicators and private practice arbitrators alike, there is more to do than deliver justice. They must be seen to do so, free from bias or undue influence.

This does not mean that decision makers cannot have their own thoughts or views. In fact, experience in and understanding of the subject matter of a conflict is often seen as qualifying an adjudicator to determine the outcome of a dispute.

This also does not mean that decision makers cannot have their own lives. There is good reason for adjudicators to have social media connections and relationships beyond their role of determining the outcome of a matter.

From a lawyer appearing before a decision maker on video with a cat filter applied to their appearance to a judge's criticism going viral on social media, the line for decision makers to walk to be seen as impartial is far from clear in this day and age. Does a reasonable apprehension of bias exist if opposing council follows the adjudicator on Twitter? How about if the decision maker and a party before them jointly spoke on a panel at a conference streamed to a limitless audience? Would discouraging adjudicators from writing articles and otherwise expressing opinions mean that they do not have them?

Public perceptions are increasingly difficult to control in view of the reach of social media and the unpredictability of the Internet in this day and age. This paper contemplates key considerations from both a private and public dispute resolution lens, with the view of upholding the integrity of just and fair outcomes.

ABOUT THE AUTHOR

Marc Bhalla, LL.M. (DR), C.Med, Q.Arb, MCIArb (he/him) [biracial] is a mediator, arbitrator and lecturer based in Toronto, who practices online. He has been involved in dispute resolution professionally for almost two decades.

Marc earned a Master of Laws in Dispute Resolution from Osgoode Hall Law School. He has an Executive Certificate in Conflict Management from the University of Windsor's Faculty of Law, an E-Commerce Certificate from New York University and an honour's undergraduate degree from the University of Toronto's prestigious Trinity College.

Marc holds the Chartered Mediator designation of the ADR Institute of Canada, along with domestic and international arbitrator designations.

Marc has presented from coast-to-coast on a variety of conflict management issues. He has had over 100 articles published, including academic journal contributions to the McGill Journal of Dispute Resolution, the Journal of Arbitration and Mediation, the Canadian Arbitration and Mediation Journal and this publication. His book, *The Art of Role Play in Dispute Resolution Training*, was released last year.

Marc guest lectures at the Faculty of Law at Queen's University and Osgoode Hall Law School. He serves on the faculty of the Canadian Collaborative for Engagement & Conflict Management, where he teaches online dispute resolution and arbitration. Marc is also accredited as a trainer by the ADR Institute of Canada and the Law Society of Ontario.

In 2020, Marc was presented with a STAR Award by the ADR Institute of Ontario for his leadership, dedication and contribution to the dispute resolution field.

For more about Marc, please visit 456dr.ca.

JUSTICE & BIAS

> *For the due administration of justice, the foundational principles are that justice must be done substantively and procedurally and justice must also be seen to be done.*[1]

Consideration of decision maker bias is complex. Actual bias is difficult to prove and perceptions of what constitutes bias depends on who is forming them. Advantages of involving adjudicators with subject matter expertise come with risks of perceptions they may pre-judge cases similar to those they have assessed in the past. How an adjudicator conducts themself can influence impressions and this extends beyond their conduct in a hearing. Perceptions of bias can be formed from social media activity, the company an adjudicator keeps and situations beyond their control. To provide a fair experience for all who come before them, decision makers must be aware of their actions and the role they have in the formation of views about justice and fairness.[2]

Historic cases such as *R. v Steele*[3]*, Shrager v Basil Dighton Ltd.*[4] and *The King v Sussex Justices, ex parte McCarthy*[5] established that justice must not only be delivered but be seen to have been delivered. Justice Paul Perell explains that "[b]ias is a predisposition to decide in a particular way that closes the judicial mind to being persuaded."[6] It is not appropriate for adjudicators to be influenced by predispositions; decision makers must be open to persuasion. At the same time, it is not appropriate for decision makers to be easily removed or left vulnerable to false accusations. A delicate balance must be struck for the sake of integrity and procedural fairness.

Types of Bias

There is a difference between actual and apprehended bias. Jesse Cooper states that a decision maker's mental attitude must be examined to prove actual bias.[7] Apprehended bias does not focus upon the decision maker's mental

---

[1] Paul M. Perell, "The Disqualification of Judges and Judgments on the Grounds of Bias or the Reasonable Apprehension of Bias" (2004) 29 Advoc. Q. 102 at 104. [*Perell*].
[2] This paper will speak to decision makers involved in the public justice system and private dispute resolution.
[3] [1895] 26 OR 540 (HCJ) at 28.
[4] [1924] 1 KB 274 at 284.
[5] [1924] 1 KB 256 at 259.
[6] *Perell*, *supra* note 1 at 105.
[7] Jesse J. Cooper, "Administrative Bias: An Update" (1977) 82 Dick. L. Rev. 671 at 673. [*Cooper*].

state but instead the perceptions that may reasonably be formed in the circumstance.[8] Concerns include the adjudicator having an interest in the decision, a pre-existing relationship with a party that would affect decision-making, an outcome pre-determined or external pressures (such as political pressures) to decide a case in a particular way.[9]

There is potential for a biased adjudicator to not even be aware that they are biased.[10] They may unknowingly make mental shortcuts that are unfair. Gregory Cusimano finds that assumptions made through mental shortcuts are often incorrect and concurs that everyone possesses unconscious bias to some extent.[11] Forms of unconscious bias include confirmation basis (where more consideration is given to confirming existing beliefs than what contradicts them), attribution and affinity bias (the decision maker being favourable to those people and concepts similar to them and their own) and availability bias (embracing what is most immediately familiar).[12] To address this, adjudicators must reflect upon how they come to decisions.[13] In promoting the concept of a bias-free justice system, Michael Franck suggests that awareness alone can help decision makers correct their conduct when certain behaviours risk being, or appearing to be, biased.[14]

A related concern surrounds how a party or their representative experiences the hearing. When a dispute resolution process takes place online, the role of technological literacy can be a factor. An example is the viral incident where a lawyer appeared on video before a judge with a cat filter applied to their appearance. Struggling to remove the filter, the lawyer assured the decision maker that they were not, in fact, a cat.[15] Consider the quality of an Internet connection and how comfort with technology may impact how one presents themselves. Bruce Mann suggests that the technologically unsophisticated user is disadvantaged and expressed concern that wealthy disputants may

---

[8] Matthew Groves, “The Rule against Bias” (2009) 39 Hong Kong L.J. 485 at 494. [*Groves*].
[9] *Cooper, supra* note 7 at 674-686.
[10] Kathleen Nalty, “Strategies for Confronting Unconscious Bias” (2016) 45 Colo. Law. 45 at 45. [*Nalty*].
[11] Gregory S. Cusimano, “Implicit Unconscious Bias” (2018) 79 Ala. Law. 418 at 420.
[12] *Nalty, supra* note 10 a 45-46.
[13] *Ibid* at 47.
[14] Michael Franck, “Toward a Bias-Free Justice System” (1990) 69 Mich. B.J. 366 at 366.
[15] Christina Zdanowicz, “Lawyer tells judge 'I'm not a cat' after a Zoom filter mishap in virtual court hearing” CNN (February 10, 2021), online: <https://www.cnn.com/2021/02/09/us/cat-filter-lawyer-zoom-court-trnd/index.html> [perma.cc/95P9-HJTW].

have advantages online.[16] Tools like virtual backgrounds and platform options with minimal equipment requirements can assist in levelling the playing field. Yet, it is incumbent upon decision makers to be aware of the various ways in which their decision making might be influenced and manage this appropriately.

Decision Maker Empathy

A significant aspect of bias surrounds the decision maker's ability to empathize with those who come before them. The Right Honourable Lord Justice Robin Jacob believes that judges must have an understanding of the world to be seen to deliver justice.[17] He stated that, "from the point of view of public acceptance of what we do, we must seem to be in touch."[18] An example of this is evident in the decision rendered by Justice Molloy in *R. v. John Doe, 2021 ONSC 1258*, wherein the adjudicator expressed understanding of and connection to those impacted by the case.[19]

Lord Jacob references the legendary tale of a judge in the 1960s unfamiliar with The Beatles to criticize decision makers viewed as out of touch.[20] Relatable, actual experience is needed for adjudicators to empathize with all who come before them.[21] As he surpassed records of The Beatles, a contemporary application of this notion considers an adjudicator's familiarity with Drake.[22] Nevertheless, decision makers may be viewed as biased if they cannot relate to those they interact with.

---

[16] Bruce L. Mann, "Smoothing Some Wrinkles in Online Dispute Resolution" (2009) 17 Int'l J. L. & Info. Tech. 83, 112 at 85.
[17] Robin Jacob, "Knowledge of the World and the Act of Judging" (2014) Osgoode Review of Law and Policy 2.1 22-28 at 22. [*Jacob*].
[18] *Jacob, supra* note 17 at 25.
[19] R. v. Minassian, 2021 ONSC 1258.
[20] *Jacob, supra* note 17 at 24. Adjudicators should possess knowledge of the world.
[21] *Ibid* at 28 [emphasis added]. Jacob uses the term "judgitis" to describe an adjudicator's power going to their head. It is difficult for a decision maker to empathize with and relate to those before them if they view themselves as superior or above those they, in truth, serve.
[22] Lisa Respers France, "Drake breaks Beatles historic record", CNN, July 10, 2018, online: <https://www.cnn.com/2018/07/10/entertainment/drake-beatles-record/index.html> [https://perma.cc/CD45-K5VL], Hugh McIntyre, "Drake Passes The Beatles For The Second-Most Top 10 Hits In History," Forbes, June 26, 2019, online: <https://www.forbes.com/sites/hughmcintyre/2019/06/26/drake-passes-the-beatles-for-the-second-most-top-10-hits-in-history/?sh=2782765d7795> [https://perma.cc/3AN3-27AW], Mark Savage, "Drake overtakes Madonna and The Beatles to break US Billboard chart record," BBC News, July 28, 2020, online: <https://www.bbc.com/news/entertainment-arts-53565332> [https://perma.cc/6WZP-4CUH].

The Importance of Decision Maker Immunity

Judicial immunity prevents adjudicators from facing civil damages for being found to be biased.[23,24,25] Former Justice of the Supreme Court of the United Kingdom, Lord Dyson, delivered a lecture in March 2018 at the Worshipful Company of Arbitrators in London, England about the appropriate limits of a private dispute resolution arbitrator's immunity.[26] He stated: "So far as I am aware, judges enjoy absolute immunity for any acts or omissions in the exercise of their judicial functions however egregious they may be."[27] Irrespective of jurisdiction, office or whether the adjudicator has a duty to the state or private parties, Lord Dyson suggested that immunity is important to support adjudicator impartiality.[28]

Introducing further consequences for decision makers found to be biased risks encouraging them to be biased. If there were risk of liability on the part of the adjudicator, they might be inclined to decide cases in a manner they feel lessens their prospective exposure to such. For example, consideration might be given to the wealth of parties and their likelihood of pursuing a claim against the decision maker to unduly influence deliberations. There is good reason to limit the consequences of the prospect of a finding of bias against decision makers. To many adjudicators, reputational damage is the harshest penalty of all in any event.

Questioning Partiality

> *[W]hat would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude? Would the person think that it is more likely than not that the decision maker, whether consciously or unconsciously, would decide fairly?*[29]

---

[23] Jessica A. Clarke, "Explicit Bias" (2018) 113 Nw. U. L. Rev. 505 at 511, 514 & 516.
[24] *Cooper, supra* note 7 at 686-688.
[25] J.M.G. Sweeney, "Lord O'Brien's Doctrine of Bias" (1972) 7 Irish Jurist (N.S.) 17 at 24.
[26] Full analysis of the extent to which an arbitrator should have judge-like immunity is beyond the scope of this paper.
[27] Right Honourable Lord Dyson, "The Proper Limits of Arbitrators' Immunity" (2018), 84 Arbitration, Issue 3 at 196.
[28] *Ibid*.
[29] *Hunt v The Owners, Strata Plan LMS 2556*, 2018 BCCA 159 (CanLII) at 83, referencing *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369.

Perhaps the most important check and balance in maintaining adjudicator impartiality is having a clear way to test it. The test does not require actual bias to be found.[30,31] Established by the Supreme Court of Canada in *Committee for Justice & Liberty v Canada (National Energy Board) et al.,*[32] the test "is not what the court itself thinks, but the court's assessment of how a reasonable person would view the situation."[33] The focus is on the impression others would form.[34]

For the test to be applied, concern about bias must first be raised. While Judith K. Meierhenry suggests that "[a] judge has a duty to disqualify himself when a party could reasonably question the judge's impartiality,"[35] difficulties emerge in considering what constitutes a reasonable concern and how to raise such. A lack of clear process to bring forth a bias allegation can be indicative of systemic bias;[36] yet, challenges extend beyond procedure in both public and private dispute resolution.

Consider that it is typically the adjudicator in question who will address any suggestion that they are biased.[37] Margaret Tarkington has found that "many judges do not appreciate having their impartiality questioned."[38] There is a risk that attempting to disqualify an adjudicator could be perceived by the decision maker as attacking their personal integrity.[39,40] Some decision makers take great offence at the suggestion that they could ever be biased.[41] As a result, repercussion can extend beyond the outcome of the case at hand.

---

[30] *Ibid* at 84.
[31] *Perell*, *supra* note 1 at 106.
[32] [1978] 1 SCR 369 at 394.
[33] Geoffrey S. Lester, "Disqualifying Judges for Bias and Reasonable Apprehension of Bias: Some Problems of Practice and Procedure" (2001) 24 Advoc. Q. 326 at 332. [*Lester*].
[34] *Ibid* at 333-334.
[35] Judith K. Meierhenry, "The Due Process Right to an Unbiased Adjudicator in Administrative Proceedings" (1991) 36 S.D. L. Rev. 551 at 568. [*Meierhenry*]. I do not condone the gendered language used in the quote. Judges can identify as male, female, both or neither.
[36] *Lester, supra* note 33 at 336.
[37] *Ibid* at 338.
[38] Margaret Tarkington, "Attorney Speech and the Right to an Impartial Adjudicator" (2011) 30 Rev. Litig. 849 at 850. [*Tarkington*].
[39] *Ibid* at 851.
[40] *Perell, supra* note 1 at 107. In addition to questioning the personal integrity of the adjudicator, an allegation of bias can be seen as challenging the integrity of the entire justice system.
[41] *Tarkington, supra* note 38 at 871.

While further fallout may be obvious if the representative offends an adjudicator who they may appear before again, some courts have threatened sanctions against legal representatives who claim decision maker bias. These threats might permeate with representatives across cases, jurisdictions, platforms and even adjudicators. The sentiment is that it is unreasonable to ever suggest partiality on the part of a decision maker. As a result, adjudicators "effectively insulate their own actions from… legal scrutiny and challenge."[42] By punishing those who threaten their reputation, decision makers deter others from making similar objections.[43] This discourages raising the potential of adjudicator partiality and serves to maintain longstanding systemic bias.

Arguments discouraging challenges of decision maker neutrality suggest it is a matter of public interest. Public confidence is heightened when impartiality is not questioned.[44] It would be a problem if adjudicators were disqualified easily; the integrity of the public justice system could suffer if it was viewed as incapable of offering fair and clear closure.[45] Similar sentiments apply to the confidence parties offer to their arbitrator in private dispute resolution.

Manipulation Vulnerability

In the public justice system, parties do not select their adjudicator. An allegation of bias could be used as a tool of manipulation for adjudicator selection.[46] Related concerns extend to provoking the decision maker, creating false bias perceptions and threatening an allegation of partiality. Underlying intentions also apply to private dispute resolution and include goading the adjudicator and unfairly influencing the outcome in one's favour.[47] The impact of and potential for such tactics must be considered and safeguarded against. It is, in part, in the interest of safeguarding against this prospect of manipulation[48] that Graeme Broadbent suggests decision makers "should not simply accede to every objection."[49]

---

[42] *Ibid* at 880.
[43] *Ibid* at 850, 863, 872 & 868.
[44] *Ibid* at 868-869.
[45] *Perell, supra* note 1 at 107.
[46] *Ibid* at 107-108.
[47] Michael J. Lefow, "Judicial Disqualification for Bias or Prejudice" (1993) 72 Mich. B.J. 684 at 685, 687.
[48] *Ibid* at 685. Concern that parties will be tempted to "judge shop" if not restrained and the risk such would pose to the independence of the judiciary.
[49] Graeme Broadbent, "Judicial Bias" (2000) 34 Law Tchr. 335 at 340. [*Broadbent*].

Support of establishing a clearer path for raising legitimate partiality concerns comes with much apprehension about the opportunities such would also offer to enable a broad range of ulterior motives. Disingenuous allegations of adjudicator bias can create undue delays, the incurrence of unnecessary cost and provide unwarranted influence over the process that risks undermining both the integrity of such and the very purpose of the decision maker's involvement.

Duty to Sit

There have been occasions where Canadian courts have determined that a reasonable apprehension of adjudicator bias did not exist.[50,51] In support of this, Geoffrey Lester shares concern about the undue influence parties would have if they could too easily remove their decision maker.[52] Lester suggests that adjudicators have a "duty to sit where not disqualified."[53] This indicates that justice would not be served if an adjudicator recused themselves due to unfounded bias allegations. However, many decision makers are inclined to recuse themselves at any suggestion that they may not be impartial. This is particularly the case if a concern is expressed at the outset of a proceeding or it otherwise becomes clear that the adjudicator's decision will be appealed regardless of what transpires.

The concept of having a *duty to sit* includes appreciation of the time and cost impact of switching adjudicators that extends to the burden granting meritless claims would place on others waiting to access the backlogged justice system, or arbitrators' full schedules.[54] Holding parties to the high threshold of proving a reasonable apprehension of bias may be especially warranted once resources (in a public justice system context) or costs (in a private dispute resolution context) have already been invested into the decision maker tasked with providing an outcome.

Responsibility to Raise Partiality Concerns

In *Blake v Blake*,[55] the Ontario Superior Court of Justice found that a lawyer intentionally did not bring a detrimental case to the judge's attention which was

---

[50] *Lester, supra* note 33 at 334-335.
[51] *Perell, supra* note 1 at 111.
[52] *Lester, supra* note 33 at 328.
[53] *Ibid* at 327.
[54] *Ibid*.
[55] 2019 ONSC 4062 (CanLII) [*Blake*].

featured in a blog of the lawyer's small firm. The lack of disclosure resulted in a finding of breach of duty of the lawyer and an award of costs against their client on a substantial indemnity basis.[56] This highlights the professional obligations that lawyers have to share relevant information they are aware of.

The same principle could apply to disclosing information that forms an apprehension of adjudicator bias. Section 11(3) of the *Arbitration Act, 1991* and Rule 3.3.3 of the ADR Institute of Canada's Arbitration Rules require that an arbitrator disclose any knowledge they have around apprehensions of bias; however, a decision maker may not be aware of why one might perceive them to be partial.[57] Principles of natural justice, ethical obligations and a broad interpretation of Chapter 2 of the Law Society of Ontario's Rules of Professional Conduct concerning acting with integrity suggest legal representatives have a duty to raise legitimate concerns about adjudicator partiality.[58,59]

Apprehensions of bias must be raised promptly. Lester explains that "allegations of bias or suspicion of bias can be used … as an excuse for delay, or in an attempt to ensure that a decision is not reached."[60] This relates to the previously expressed concerns about manipulation. It is important for a legitimate partiality apprehension to be raised as soon as it is known, otherwise it could be viewed as having been waived[61] or kept unexpressed inappropriately - for example, as grounds to appeal only in the event an unfavourable decision is rendered.

While the argument exists that "if the judge was in fact unaware of the circumstances giving rise to the reasonable apprehension, the danger is eliminated",[62] it is important to ascertain if an adjudicator is aware of an issue. Neglecting to do so risks assumptions undermining both the reputation of the decision maker and the dispute resolution process overall.

---

[56] *Ibid* at 21-26, 36-37.
[57] *Lester, supra* note 33 at 345.
[58] Law Society of Ontario, *Rules of Professional Conduct*, Toronto: Law Society of Ontario, 2018, online: <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct> [perma.cc/A5VC-A89Q].
[59] Rule 5.1-2(i), cited in *Blake*, speaks only to raising with the court any binding authority that is on point in respect of a case which is known and not mentioned by the other party.
[60] *Lester, supra* note 33 at 327.
[61] *Cooper, supra* note 7 at 688.
[62] *Lester, supra* note 33 at 341.

To overcome the potential of negative consequences for both raising a bias concern and also for failing to do so, Tarkington suggests that it is "important that disqualification be separated from reputational harm – in the eyes of all involved."[63] Doing so will align the contemplation of adjudicator bias with the public interest of preserving the perceived integrity of the dispute resolution process. Bias considerations raised would then not be viewed as reflective upon the particular adjudicator. So long as they are merited, concerns of bias should be raised without fear of repercussion.[64]

ADJUDICATOR CONDUCT AT HEARINGS

> *Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.*[65]

As introduced earlier through sentiments expressed by the Right Honourable Lord Justice Robin Jacob, the way that a decision maker carries themselves can impact perceptions about their delivery of justice. "[G]iven the reality that litigation under an adversarial system is not a "tea party", a judge's impatience, annoyance, anger, sarcasm, derision, rudeness or sharp remarks,"[66] Perell notes, are not usually sufficient to establish bias. Adjudicators are not required to be polite to maintain perceptions of their neutrality; however, their tone, body language and treatment of participants during a hearing can imply bias.[67] While the threshold for proving a reasonable apprehension of bias is high, decision makers should be cognizant of the cues they offer through their conduct and treat people with kindness and respect.

In Saskatchewan, Justice Danyliuk's response to an improperly filed consent order went viral as a result how the adjudicator chose to express "disappointment".[68] When it was revealed that a court clerk mistakenly rejected

---

[63] *Tarkington, supra* note 38 at 876.
[64] *Lester, supra* note 33 at 326.
[65] *Szilard v Szasz,* [1955] SCR 3 at 7. While this case pertained to private arbitration, the same principles apply to the public justice system, and across the gender spectrum.
[66] *Perell, supra* note 1 at 111.
[67] Christine M. Venter, "The Case Against Oral Arguments" (2017) 14 Leg Communications & Rhetoric: JALWD 45 at 48-49. This research focuses on confirmation bias, including the notion that adjudicators decide cases based on written submissions and oral arguments either are without value or serve only to allow decision makers to confirm the decision that they have arrived at. Cues that may be taken as bias may not factor into deliberations.
[68] Dan Zakreski, "'Fetch, Judgey! Get it boy!!!': Language in Sask. Queen's Bench ruling sends ripple through legal circles," CBC News, March 1, 2021, online:

additional submissions that would have offered context and clarify the situation, Danyliuk attempted to walk back criticism that damaged the lawyer's reputation:

> *The wording of my initial fiat — while unintended to be harmful in any way and intended to soften my criticism with humour — has blown up in my face. As noted, I have known him for many years — decades, in fact. He was my student in a class I taught in law school. He is highly capable counsel. He has appeared before me many times, doing high quality work. He enjoys an excellent reputation within the practicing bar and before this Court. I regard him as a valuable member of the profession. He is a very good lawyer and a great guy.*[69]

While the incident serves as a reminder of the reach and unpredictability of the Internet, one can wonder how the decision maker's subsequent endorsement of a party's legal representative would have been received in different circumstances. How would the connections mentioned have impacted perceptions of bias if disclosed at the outset of a hearing? Would it be reasonable to have concern about the lawyer-judge connection if prior interactions between the two were stated in this way by the decision maker? It certainly is not unheard of for such sentiments to create obstacles for the appointment of an arbitrator in a private dispute resolution setting.

Pre-Existing Knowledge

In the Supreme Court of Canada case of *R. v S. (R.D.)*,[70] a youth court judge drew upon their own general knowledge of "the well-known racial tension in the local area and police behaviour"[71] while coming to a decision that was appealed. Despite this general knowledge falling beyond the particular

---

<https://www.cbc.ca/news/canada/saskatoon/language-queens-bench-ruling-ripples-legal-circles-1.5931836. [perma.cc/X7M6-2VFY]. I question the purpose of this approach. What was being accomplished? The judge was not auditioning for a role alongside Judge Judy. Courts of law are not comedy clubs. The adjudicator may not appreciate all the representative is facing - resorting to embarrassment only stands in the way of empathy.

[69] Courts of Saskatchewan, "A fiat ruling worth reading, issued March 4, 2021" (5 March 2021 at 10:22am), online: *Twitter* <https://twitter.com/SKCourts/status/1367858023230701569>, [perma.cc/9WKZ-DWPX], "Saskatoon judge apologizes to lawyer for colourful language in note from the bench," CBC News, March 5, 2021, online: <https://www.cbc.ca/news/canada/saskatoon/saskatoon-judge-apologizes-viral-ruling-1.5938310> [perma.cc/5V73-37SJ].

[70] [1997] 3 SCR 484 (CanLII).

[71] *Groves, supra* note 8 at 511.

circumstances and facts of the case, the Supreme Court determined that it was not pre-judgment, as alleged,[72] and that "experiences and associated preconceptions… were an entirely permissible influence."[73]

Lester supports this, stating that "[t]he requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes."[74] As with subject matter expertise and empathy, traits that make a capable decision maker also risk introducing grounds for bias allegations.

ADJUDICATOR CONDUCT BEYOND HEARINGS

> *Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.*[75]

Bias perceptions can be formed as a result of prior or existing professional relationships between the adjudicator and those who come before them - including legal representatives whom an adjudicator knows and regularly interacts with, as demonstrated by Danyliuk's comments. Matthew Groves acknowledges, however, that life beyond the bench can justify an adjudicator's connections and relations.[76] When adjudication is one of several roles that a decision maker fulfills professionally, reasonable cause for concern may be reduced through the expansion of plausible reasons for an adjudicator's connections unrelated to a case at hand. Consideration must be given to the motive for and purpose of such associations and interactions - including if they directly influence deliberations of the decision maker in any particular case.

In *Hunt v The Owners, Strata Plan LMS 2556*,[77] private communications between one party's lawyer and the arbitrator served to set aside the arbitrator's decision due to bias perceptions. The British Columbia Court of Appeal acknowledged that such professional relationships are not unheard of and, "[i]n such context, the legal professionals involved must be especially

---

[72] *Perell, supra* note 1 at 103.
[73] *Groves, supra* note 8 at 511.
[74] *Lester, supra* note 33 at 329.
[75] *Broadbent, supra* note 49 at 337. Quoting the Court in *Locabail (UK) Ltd. v Bayfield Properties [2000] 1 All E R 65 at 69.*
[76] *Groves, supra* note 8 at 501.
[77] 2018 BCCA 159.

vigilant to maintain appropriate professional distance in order to properly perform their roles."[78] Personal relationships play a role as well. This includes those whom decision makers socialize with – a sentiment captured in a lyric of the aforementioned Drake, as he boasts "I did brunch with the judge we appearin' before"[79] to imply that a prior interaction with an adjudicator would garner favour.

Practically, the timing of an interaction and nature thereof makes a difference. A decision maker discussing an active case privately with one party's legal representative or having a close personal relationship with a party appearing before them is entirely inappropriate; yet, there may be nothing untoward about an adjudicator and legal representative sharing a meal or otherwise encountering one another before they become involved in the same case together. Otherwise, a claim of bias apprehension could be made if a legal representative previously appeared before a particular decision maker or if they both have subject matter expertise and related experience in overlapping circles.

Robert F. Reid considered the notion of appropriate professional distance, questioning the extent of contact beyond a hearing that tribunals should have with those who come before them. There may be a need to temporarily distance relationships during a hearing to avoid appearing biased.[80] "This overriding need for neutrality, in appearance as well as in fact, dictates a standard requiring freedom from even the appearance of bias."[81] This consideration gets complicated when hearings take place on an asynchronous basis, are available for the public to access online or otherwise when keeping appropriate distance requires more than the decision maker not sharing an elevator ride with a party before them as they go for lunch.

Adjudicators who are aware of circumstances that may give rise to perceptions of bias can refuse a case or raise concerns with parties prior to becoming involved. Where circumstances warrant, with private arbitration especially, it could be acceptable for parties to waive potential conflict concerns and pass on the prospect of alleging bias.[82] "[D]isclosure should be made only if the judge

---

[78] *Ibid* at 137.
[79] Drake feat. Rick Ross. "Lemon Pepper Freestyle," *Scary Hours 2*. March 9, 2021 at 02:44.
[80] Robert F. Reid, "Bias and the Tribunals" (1970) 20 U. Toronto L.J. 119 at 119 (footnote #3).
[81] *Ibid* at 121.
[82] In an administrative tribunal context, this practice risks being perceived to offer parties a role in adjudicator selection. This approach applies more to private adjudicative processes.

thinks waiver is possible."[83] An adjudicator need not provide a detailed explanation as to why they are not taking on a case. In the public justice context, parties may not even be aware that another adjudicator was ever considered.

Broadbent considered the notion of judicial bias extending beyond the adjudicator themselves, through what is described as *chains of connection* surrounding those with whom a decision maker is linked.[84] The extent and nature of such chains should be kept reasonable to avoid a sentiment of "[m]y best friend's sister's boyfriend's brother's girlfriend heard from this guy who knows this kid who's going with a girl…"[85] from going too far in this respect.

It is important to remember that the "expansion of the media has meant greater publicity for, and public scrutiny of, judicial activities both on and *off* the bench."[86] These considerations expand how perceptions of bias, pre-judgment and conflict can be formed, giving rise for a need to safeguard against leaving decision makers vulnerable to complications surrounding unreasonable bias apprehensions and clarify the types of connections that are appropriate in this age of greater transparency.

Consideration of an adjudicator's relationships are further complicated when one looks online. Susan Nauss Exon found that "the mere fact that a judge maintains a social connection does not create a conflict of interest because many reasons exist for a judge to participate in social media."[87] Yet, Exon notes that "judges "friending" lawyers on social media… could project an appearance that the lawyer in some way may influence the judge."[88] Guidelines that suggest decision makers should participate on social media in a more reserved manner than the general public are sensible in this respect.[89] I suggest this is especially the case on platforms that exist to facilitate personal, rather than professional, relationships – such as Facebook as compared to LinkedIn.

---

[83] *Lester, supra* note 33 at 337.
[84] *Broadbent, supra* note 49 at 336.
[85] *Ferris Bueller's Day Off*. Dir. John Hughes. Paramount Pictures, 1986. Film at 06:18. This exaggerates looking into chains of connection with unreasonable apprehensions of bias. As implied in the film, such may distort reality.
[86] *Broadbent, supra* note 49 at 336 [emphasis added].
[87] Susan Nauss Exon, "Ethics and Online Dispute Resolution: From Evolution to Revolution" (2017) 32 Ohio St. J. on Disp. Resol. 609 at 641. [*Exon*].
[88] *Ibid*.
[89] *Ibid*.

Interactions on social media alone, however, are usually not enough to create a reasonable apprehension of bias. In the case of *Toronto Standard Condominium Corporation No. 1466 v. Weinstein*, the Ontario Superior Court of Justice found that an arbitrator liking tweets circulated by a law firm appearing before them did not suffice to constitute bias. The court agreed with the arbitrator that "merely having online connections or making comments on social media, do not imply the level of relationship enough to imply bias."[90] The breadth of an adjudicator's social media connections may also be a factor. Consider the perception that could be formed if a lawyer appearing before an adjudicator is one of only twenty connections as compared to one of a thousand connections the adjudicator has on a social media platform.

There is good reason for a decision maker to be more reserved on social media than an ordinary user.[91] However, their role as an adjudicator does not ordinarily warrant preventing the decision maker from having an online presence at all. Former Dean of Osgoode Hall Law School, Justice Lorne Sossin, has demonstrated this by continuing to be active on Twitter after ascending to the bench.[92]

Subject Matter Expertise

There can be great benefit in involving an arbitrator who specializes in the area of law applicable to the dispute.[93,94] An advantage of administrative tribunals – with a more focused jurisdiction than the courts – is the benefit of adjudicators offering subject matter expertise. Yet, such expertise can also complicate considerations of partiality. If a decision maker expresses views about issues related to their area of knowledge, they risk the formation of perceptions that they will pre-judge cases involving those issues.[95]

Meierhenry notes that "[d]isqualification based on an adjudicator's pre-judgment usually hinges upon a public statement or expressed opinion."[96] Yet, Broadbent expresses that "[i]t would be unfortunate if the judgment were to inhibit valuable judicial contributions to debates on matters of law and policy."[97]

---

[90] 2021 ONSC 1306 (CanLII) at 25.
[91] *Exon, supra* note 87 at 643.
[92] https://twitter.com/lornesossin (@lornesossin) [perma.cc/XU3G-XQYF].
[93] *Broadbent, supra* note 49 at 344.
[94] Subject matter expertise can extend beyond the practice of law in a particular field.
[95] *Broadbent, supra* note 49 at 343-344.
[96] *Meierhenry, supra* note 35 at 555.
[97] *Broadbent, supra* note 49 at 344.

Accordingly, decision makers should be free to share their valuable insights and expertise by speaking at conferences and contributing articles of interest to their field without being accused of bias for having views. This embraces the same sentiment as that related to social media activity in terms of judicial contributions being appropriately guarded; yet, supports the notion that adjudicators should not be prevented from participating at all. Decision makers keeping opinions to themselves would not stop them from having related bias in any event. Thus, in addition to enlightening their audience, judicial and quasi-judicial participation in debates and presentations offers greater transparency.

The solution to concerns of adjudicator bias is not for decision makers to just keep their opinions to themselves. Still, a decision maker should be guarded in their commentary. While contributions of this nature help establish one as an expert in their field and lend support to confirming capability and qualification, adjudicators have good reason to exercise caution. Especially while actively adjudicating, adjudicators must give thought to how they present their views - so as not to give off the impression that they have a closed mind.[98,99]

Ultimately, an adjudicator is unlikely to be disqualified for having rendered prior decisions or public opinions on similar matters to those which are before them.[100] A decision maker is not expected to be a *tabula rasa*.[101] Such would be indicative of a "lack of qualification, not lack of bias."[102] An adjudicator can possess thoughts and understanding; they must be open to persuasion by the facts, the law and the arguments made in the case at hand.[103]

Subject matter expertise, particularly coupled with the notion of *active adjudication*,[104] can promote adjudicator empathy. This supports decision

---

[98] *Ibid* at 343-344.

[99] There is a distinction between commentary shared prior to an adjudicator being empowered to impose a decision and that expressed while sitting as the decision maker of an issue.

[100] *Cooper, supra* note 7 at 677.

[101] *Meierhenry, supra* note 35 at 556. Quoting the Court in *Laird v Tatum, 408 (1972) U.S. 1 at 835.* An adjudicator should not be a "blank slate", they should be qualified to decide the case.

[102] *Ibid.*

[103] *Ibid* at 557.

[104] Michelle Flaherty, "Best Practices in Active Adjudication" *Ottawa Faculty of Law Working Paper Series* No. 2015-23 (July 17, 2015), online: https://ssrn.com/abstract=2631175. The concept of offering active adjudication in a more inquisitorial form of hearing includes applying the knowledge adjudicators have to each case before them. This could help address

makers being inquisitorial, to allow for a fair proceeding and just result. The adjudicator's subject matter expertise may combat biases that emerge when there is a lack of understanding, pertaining to procedure and otherwise, in support of justice and fairness.

A SUPREME COURT VIEW

For context surrounding the threshold of what constitutes a reasonable apprehension of decision maker bias, the prior involvement of an adjudicator in a matter before them was addressed by the Supreme Court of Canada in *Wewaykum Indian Band v Canada*.[105,106,107]

An apprehension of bias allegation was made as Justice Binnie was involved in claims before the Supreme Court prior to sitting at the nation's highest court. When assessed, the prior involvement was considered to be "supervisory and administrative and insufficient to cause a reasonable person to have an apprehension of bias."[108] Justice Binnie did not recall being previously involved in the matter and this "was accepted as a relevant factor in determining whether a reasonable person would conclude that the adjudicator had a conscious or unconscious bias."[109]

If a decision maker's direct prior involvement in a matter did not suffice to create a reasonable apprehension of bias, it would seem a stretch for an adjudicator having common circles, engaging in social interactions, also earning their living through other endeavours, speaking at conferences or being present on social media – unrelated to a case – to constitute such. This is not to disregard legitimate concerns about apprehension of bias, it serves to clarify that a high threshold must be met for an apprehension of bias to be reasonable. So long as a decision maker is cognizant of these considerations and conducts themselves fittingly, they are likely capable of behaving appropriately.

---

potential systemic bias, such as that which ties a party's chances of success to the amount of legal costs they can afford to spend on their case.

[105] 2003 SCC 45.

[106] In this spirit of this paper, I feel inclined to disclose that my undergraduate studies at Trinity College overlapped those of Justice Binnie's daughter, Allie. While we had *chains of connection* and attended the same social gatherings in the mid-1990's, in no way do I feel that this impacts how I have presented the cited case or influenced my research deliberations in the course of writing this paper. Any suggestion that this connection would have done so offers what I consider to be an example of an unreasonable apprehension of bias.

[107] *Wewaykum Indian Band v Canada*, 2002 SCC 79.

[108] *Perell, supra* note 1 at 115.

[109] *Ibid*.

CONCLUSION

> *[T]he point at which desirable experience becomes unacceptable baggage remains unsettled.*[110]

While the threshold to prove a reasonable apprehension of bias is high, decision makers are wise to be aware of the potential impact of their actions during and beyond hearings, both in-person and online, to preserve and promote perceptions of justice being done. It is important to recognize the impact of social media and that the reach of the Internet can give rise to perceptions of adjudicator bias. Decision makers must manage these contemporary considerations and maintain appropriate distance in the course of hearing, deliberating upon and deciding a case. This is not to suggest that adjudicators are not allowed to give presentations, write articles, maintain a social media presence or have lunch. It means that they must participate in such activities on a more guarded basis than those who are not involved in decision-making, aware of how such may impact perceptions of partiality. To that end, timing is crucial.

Decision makers should be less sensitive to receiving legitimate expressions of concern surrounding their partiality than many have been historically. Particularly as it can be considered a duty of a legal representative to raise any apprehension of bias that they are aware of, the mere act of expressing a concern should not be considered forbidden or to automatically come with risk of repercussion. It should not be considered to be a poor reflection on a decision maker for an apprehension to be raised – allowing for legitimate concerns to be considered maintains the integrity of dispute resolution processes and the decision makers governing them.

The challenge of addressing the historical stigma of expressing a concern of adjudicator partiality is that it comes with greater opportunities for manipulation. False claims of decision maker bias can be made in bad faith, in a number of ways, and serve to both stand in the way of justice for the case at hand and threaten the integrity of the entire dispute resolution process generally – frustrating endeavours to correct systemic bias and preventing the offering of a fair process to all. Still, it must be remembered that a high threshold exists to actually constitute a reasonable apprehension of bias.

---

[110] *Groves, supra* note 8 at 510.

Consideration must be given to the circumstances and who the decision maker serves. In the public justice system, there is a duty to the public-at-large that does not exist in the same manner in private dispute resolution. Ultimately, a decision maker has a duty to sit when a reasonable apprehension of bias does not actually exist; however, the adjudicator's role in determining this - and the increased transparency offered in this day and age - make the management of perceptions surrounding the delivery of just and fair outcomes complex and challenging.

Conflict concerns must be assessed practically, realistically and in the interest of equipping adjudicators to fulfill their role appropriately – without being left vulnerable to tactics of manipulation that risk bringing them into disrepute or sitting where they should not sit. As demonstrated by the various adjudicators cited in this paper, decision makers offer valuable contribution and insight into matters of interest; it is simply that they must contribute appropriately to ensure that they deliver justice and are seen to do so, open to persuasion in the course of rendering decisions.