PRACTICE AND PROCEDURE

BEFORE

Administrative Tribunals

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by

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and

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> cause. As I have said earlier, and on other occasions, suspicion is not enough. (Emphasis added.)[91]

Having sounded that note for integrity the below outlines the proper practice where concerns may arise that a reasonable apprehension of bias exists.

An agency member should not accept an assignment to participate in a proceeding where he or she is aware of circumstances which give rise to a reasonable apprehension of bias.

Similarly, parties who are concerned with potential bias claims should advise the agency in advance to assist it in the assignment of decision-makers. In any event, in order to avoid the operation of waiver, where a hearing has already commenced, a party should advise the decision-maker (or the relevant decision-maker) (as discussed below in more detail) of his or her bias concerns as soon as reasonably possible.[91.1] Sitting in the bush with bias allegations can result in the

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91 See also *Ontario Provincial Police Commissioner v. MacDonald* (2009), 2009 CarswellOnt 1242 (Ont. Div. Ct.), additional reasons at (2009), 2009 CarswellOnt 3330 (Ont. Div. Ct.); affirmed 2009 CarswellOnt 7018, 2009 ONCA 805 (Ont. C.A.), where the Ontario Divisional Court stated that:

> It is inappropriate for a party to bring a disqualification motion if the essential purpose of that step is a form of reverse "judge shopping" because of subjective dissatisfaction with the arbitrator. A reviewing Court should be vigilant in examining the motive for bringing a motion to ensure that it is not brought for a purely tactical advantage.

The truly egregious practitioner who believes in the use of bias allegations for purely tactical reasons may wish to remember that in *Duncan, Re*, 1957 CarswellOnt 68, [1958] S.C.R. 41, 11 D.L.R. (2d) 616 (S.C.C.) a preconceived and deliberate attack on the personal integrity of a member of the Supreme Court of Canada through a wholly unwarranted allegation of bias was found to have been in contempt thereby.

> There is no doubt that a counsel owes a duty to his client, but he also has an obligation to conduct himself properly before any Court in Canada. That applies particularly to one who, like Mr. Duncan, has been practising for many years and who has had an extensive experience in the Courts of Ontario and in this Court. It has been stated by Lord Russell of Killowen C.J. in *Regina v. Gray*, that judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. However, Lord Russell had already pointed out that any act done calculated to bring a Court into contempt or to lower its authority is a contempt of Court and belongs to that category which Lord Chancellor Hardwicke had as early as 1742 characterized as "scandalising a Court or a judge". The matter is put succinctly in the 3rd edition of Halsbury, vol. 8 (1954), at p. 5:
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> > The power to fine and imprison for a contempt committed in the face of the court is a necessary incident to every court of justice. It is a contempt of any court of justice to disturb and obstruct the court by insulting it in its presence and at a time when it is actually sitting ... It is not from any exaggerated notion of the dignity of individuals that insults to judges are not allowed, but because there is imposed upon the court the duty of preventing *brevi manu* any attempt to interfere with the administration of justice.

91.1 See, for example, *Eckervogt v. British Columbia (Minister of Employment & Investment)* (2004), 241 D.L.R. (4th) 685 (B.C.C.A.):

> Bias allegations have serious implications for the reputation of the tribunal and in fairness

party having been found to waive the concern.[91.2]

Where an oral proceeding is already underway and a member becomes aware of circumstances which may give rise to a reasonable apprehension of bias he or she should advise the participants of the circumstances and invite submissions. This will enable the participants to waive any bias which might potentially exist or convince the decision-maker that there is no reasonable apprehension.

If, after listening to the submissions of the participants, the decision-maker concludes that there is a reasonable apprehension of bias which the participants either will not or cannot waive he or she should step down from the proceeding which, if the decision-maker was sitting alone, will have to begin again. If the member was part of a panel and his or her presence is necessary for quorum at an oral hearing the hearing will also have to start again before a new panel with quorum.[92]

Where a party at a hearing becomes aware of circumstances which may give rise to a reasonable apprehension of bias the party should advise the concerned decision-maker — i.e. the decision-maker presiding over a single member hearing, or the particular decision-maker of a panel who is the subject of the potential concern and suggest that in light of the potential for a reasonable apprehension of bias the decision-maker step down.[92.1]

The matter should not be treated as a formal application or motion for a formal decision respecting bias. It does not, for example, even where the member agrees that there is a reasonable apprehension of bias result in a formal order or decision of the agency requiring the member to step down. The member simply steps down from the proceeding.

Rather, this is more of an informal procedure in which the alleged circumstances are brought to the attention of the relevant decision-maker (the decision-maker in the case of a single member hearing or the particular decision-maker in the case of a panel).

A request for a member of a multi-member panel to step down due to bias concerns should be addressed to that member — not the panel and not the Chair

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they should be made directly and promptly, not held back as a tactic in the litigation. Such a tactic should, I think, carry the risk of a finding of waiver. Furthermore, the genuineness of the apprehension becomes suspect when it is not acted on right away.

91.2 See the earlier discussion of waiver in chapter 12.22.

92 It goes without saying that a decision-maker who does not believe that the circumstances give rise to a reasonable apprehension of bias should not step down. See the discussion earlier under heading 39.1 respecting a decision-maker's duty to sit on assigned hearings in the absence of disqualifying bias.

92.1 *C.E.P., Local 60N v. Abitibi Consolidated Inc.*, 2008 CarswellNfld 10, 2008 NLCA 4 (Nfld. C.A.). However, see *SOS – Save Our St. Clair Inc. v. Toronto (City)* (2005), 204 O.A.C. 63, 78 O.R. (d) 331, 2005 CarswellOnt 6298 (Ont. Div. Ct.) where, after a judge of a panel of the Divisional Court declined himself to step down for bias, the rest of the panel granted a motion to refer the entire matter to a newly constituted panel. I do not recommend this approach as it amounts to doing indirectly what is not proper to do directly. It also has the panel sitting in the place of a judicial review court.