**Opening remarks for Workshop Open Mind vs. Hidden Bias**

**Nov 5 2015 SOAR conference :**

Prepared by Lilian Ma , moderator

Welcome to the workshop on Open mind vs. Hidden bias. How many among you here are adjudicators raise your hands? How many of you believe that you always have an open mind when you hear cases, raise your hands? How many believe that you do not necessarily have an open mind when you hear cases, raise your hands? How many of you do not know either ?

I believe that among the first things when we were trained as decision makers would be the rules of natural justice and the right to be heard and flowing from that, the right to a fair hearing which invariably includes the right to be heard by an impartial decision maker. We are told to keep an open mind when we hear cases. In fact Justice Lamer ( and concurred by 6 other judges) in 1997 R. v. S. (R.D.) case law where he stated that

The courts should be held to the highest standards of impartiality. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. The trial will be rendered unfair if the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer. Judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin.

We also learned the caselaws on apprehension of bias. We are familiar with the definition of a reasonable apprehension of bias as proclaimed in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [[1978] 1 S.C.R. 369](http://canlii.org/en/ca/scc/doc/1976/1976canlii2/1976canlii2.html):

...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. . . . [The] test is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude."

And this test had been used for disqualifying judges and administrative decision-makers for [bias](https://en.wikipedia.org/wiki/Bias). Bias of the decision-maker can be real or merely perceived.

However, these case laws are all about appearance. For a litigant to prove bias there must be something in the court proceeding or hearing record, or in the decision given by the decision maker that this “fact” – bias has occurred. What if a decision maker has a strong prejudice against something that is hidden and not necessarily manifested during the hearing and in the written or oral decision, and often times this prejudice was acted upon by the decision maker without their even being conscious of it, how open is the mind of the decision maker when he or she hears that case? In other words, while the proof of the present day definition of reasonable apprehension of bias can impeach the open mind of a judge or decision maker, the lack of it does not necessarily mean that the judge or decision maker actually has an open mind. It is at best a presumption.

Today we are to examine this presumption. Is this presumption supported by science or rather it stands on shaky grounds? In fact, present day neuroscience and psychology had been pointing to the fact that we all have lots of hidden bias that influences how we act and decide all the time, even without our knowledge. This is how nature works. These are information that are never disclosed to the litigants. There is no way that they would have known and therefore make submissions on them. When the decision maker decides, these hidden evidence are taken into account without their even knowing about it. No wonder there is rampant judge shopping in the day to day criminal or provincial offences court and that phenomenon also happens in many administrative tribunals.

Today we are fortunate to have two experts in this areas to discuss with us this important area of open mind vs. hidden bias as our continual professional development.

Introduce Andrew and then Norman

( I will circulate a sheet of paper for people to write down their email in case they want to participate in the CCAT IAT/CRT test)