

Swimming with Sharks: Getting in and Out of Trouble (Conflict of Interest / Bias)

Moderator : Christina Sokulsky, Environment and Land Tribunals Ontario

Speakers : Dianne Carter, Environment and Land Tribunals Ontario
David Gavsie, Ontario Civilian Police Commission

Dianne Carter, Environment and Land Tribunals Ontario

Ms. Carter indicated that, in her presentation, she would draw some examples from the procedures and methods used at Environment and Land Tribunals Ontario (ELTO).

She said she would begin by examining the ethical framework provided by The *Public Service of Ontario Act, 2006 (PSOA)*, would then discuss key concepts around conflict of interest and, finally, she would discuss political activity.

PSOA

- Provides the ethical and human resource management framework for public service.
- The amended Act was proclaimed into force in 2007.
- It is intended to achieve greater consistency in conflict of interest rules and political activity rules throughout public service in Ontario.
- The Act introduced the oath or affirmation of allegiance to the Crown.
- The Act also introduced requirements with respect to disclosure of wrongdoing.
- The term “public servant” covers government appointees and employees. Prior to the amendment in 2006, it was not clear whether government appointees were captured by the Act.
- This is now clear.
- The Act established a conflict of interest commissioner. This role is now fulfilled by Sidney B. Linden.
- The Commissioner approves ethics plans for adjudicative bodies.
- The objective of an ethics plan is to describe the steps taken to ensure that members are familiar with their ethical responsibilities and requirements.
- ELTO has an ethics plan, which deals with professional development and training regarding conflict of interest and code of conduct requirements.

Ethics Executive

- PSOA establishes an ethics executive. This executive provides advice and direction to public servants on conflict of interest and political activity.
- Additionally, he or she is responsible for the disclosure of wrongdoing.
- In most public bodies, the ethics executive is usually the Chair.
- Every public servant has an ethics executive.

Conflicts of Interest

- Conflict of interest rules ensure that public servants’ private interests are not at odds with their public service responsibilities.
- Conflict of interest provisions apply to all current and former public servants in both ministries and public bodies, including employees, appointees and ministers’ staff.
- Conflict of interest rules are set out in the regulations. (O. Reg. 381/07).
- A key concept related to conflict of interest is bias. The apprehension has to be a reasonable one held by reasonable and right minded person, applying himself or herself to the issue. The presence of any factor that might cause a reasonable person to think that it is likely to bias a decision-maker’s judgement or cause a person to doubt the objectivity of the decision-maker. Conflict of interest does not only arise in situations where there is a financial gain at stake. Example: a close past relationship.

Conflicts of Interest – CONT'D

- The public can raise concerns. ELTO has a Service Standard Policy and a Complaints Policy. Both are posted on the ELTO website. Members of the public can identify conflict of interest and bias concerns through the complaints procedure. This is different from appeal rights or requests for reconsideration for those who are unhappy with a particular adjudicative decision.
- The driving consideration is that of the public good.
- The conflict of interest rules are a framework for identifying, managing and resolving conflicts.

Application

- All public bodies are covered by the legislation (including employees and appointees), and are expected to adhere to the same standard of integrity as ministries.
- Conflict of interest rules apply to current and former public servants.
- Reg. 381/07 lists prohibitions, including:
 - Benefiting self, spouse and children (s.3)
 - Hiring family members (s.7)
 - Engaging in certain business and undertakings (s.8)
 - Accepting gifts (s. 4)
 - Post-service requirements. (ss.16-20)
- What should you do if you think you are faced with a conflict of interest situation?
 - Check the applicable conflict of interest rules.
 - Seek directions from the ethics executive.
 - If a situation that may cause a conflict or perception of bias arises during a hearing, it should be disclosed to the parties as soon as it is known. What are the objectives of political activity rules?
- The PSOA's political activity provisions balance the need to preserve the integrity and neutrality of public service with an individual's ability to engage in political activity (this is a right which is protected by the Charter but can be limited).

What is political activity?

Public servants participate in political activity when they:

- Do anything in support of or in opposition to a federal or provincial political party
- Do anything in support of or in opposition to a candidate in a federal, provincial or municipal election
- Are or seek to become a candidate in a federal, provincial or municipal election
- Make public comments outside the scope of their duties on matters directly related to their duties that are dealt with in the position or policy of a party (federal or provincial) or candidate (federal, provincial, or municipal)

What is allowed?

- Employees and appointees are entitled to participate in political activity (with some restrictions) or can refuse to participate if they choose to do so.
- No employee or appointee may:
 - Engage in political activity in the workplace.
 - Engage in political activity while wearing an OPS uniform
 - Use government resources for political activity.
 - Associate his/her position as a public servant with political activity.
- Specifically restricted public servants include all appointees to the tribunals listed in O.Reg. 377/07.

What is allowed? – CONT'D

- Specifically restricted employees and appointees are entitled to engage in only:
 - Voting
 - Attending all-candidates meetings.
 - Contributing money to a party (federal or provincial) or candidate (federal, provincial, or municipal).
 - Being a member of a political party (federal or provincial).
- Part-time adjudicators (appointees) may apply to the Conflict of Interest Commissioner for authorization to engage in certain additional activities.

David Gavsie, Ontario Civilian Police Commission

- In the past 6 years as an adjudicator, he has learned to expect the unexpected. He comes from Bay Street corporate and commercial (M&A) practice which had no adjudication element.
- You can imagine the consternation and anxiety when he ran into some of the situations that he was not previously used to: unrepresented parties, motions (adjournments, disclosure, bias), whether or not there is a conflict of interest matter for a panel member etc.
- The fact scenario today will describe a situation where people get themselves into hot water because of conflict of interest and because of their refusal to disclose things early on.
- Conflicts of interest are three-fold: actual, potential and perceived. The media often picks up on the third type.
- Sometimes, conflicts are created by statute. Example: in the *Police Services Act*, there are different appointees to police service boards, i.e., municipalities and provincial government. Although Members come from diverse backgrounds there needs to be a uniformity of interest, namely that of the board, not their appointees.

Example of a Bias motion: Alcohol and Gaming Commission of Ontario (AGCO)

1. Decision of AGCO Panel in *Restaurant Innovations Inc. (Moose Winooski's)* (Re:) 2010 CanLII 81007
2. Decision on Appeal to the Divisional Court dated February 13, 2012 *Moose Winooski's v. AGCO et al* 2011 ONSC 543

Set up of AGCO and Appeals

- Registrar of AGCO issued a Notice of Proposal to suspend licensee's Liquor License for 45 days due to a specific event. The Licensee appealed this.
- At the time, appeals from decisions of the Registrar were heard by the Board of the AGCO.
- The roles of Registrar and the CEO of the AGCO were performed by the same person. The CEO reported to the Board.
- The hearing regarding the Notice of Proposal appeal is on-going.
- On the Bias Motion, references were made by excellent counsel on both sides to the following leading cases. The speaker read the pertinent quotations from these leading cases:

Committee of Justice and Liberty v. National Energy Board [1978] 1 S.C.R. 369

- "The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".
- This is the proper approach which, of course, must be adjusted to the facts of the case. The question of bias in a member of a court of justice cannot be examined in the same light as that in a member of an administrative tribunal entrusted by statute with an administrative discretion exercised in the light of its experience and of that of its technical advisers."

Brosseau v. Alberta (Securities Commission) [1989] 1 S.C.R. 301, para. 22

- “In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of “reasonable apprehension of bias” *per se*.”

2747-3174 Québec Inc. v. Québec (Régie des permis d’alcool) [1996] 3 S.C.R. 919

- “Although the Act and regulations do not define the duties of these jurists, the Regie's annual report and the description of their jobs at the Regie show that they are called upon to review files in order to advise the Regie on the action to be taken, prepare files, draft notices of summons, present arguments to the directors and draft opinions. The annual report and the silence of the Act and regulations leave open the possibility of the same jurist performing these various functions in the same matter. The annual report mentions no measures taken to separate the lawyers involved at different stages of the process. Yet such measures seem essential in the circumstances. The possibility that a jurist who has made submissions to the directors might then advise them in respect of the same matter is disturbing, especially since some of the directors have no legal training. Such a lack of separation of functions in a lawyer raises a reasonable apprehension of bias. Prosecuting counsel must never be in a position to participate in the adjudication process. The functions of prosecutor and adjudicator cannot be exercised together in this manner.”

Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch) [2001] 2 S.C.R. 781

- “Ultimately, it is Parliament or the legislature that determines the nature of a tribunal’s relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator’s intention in assessing the degree of independence required of the tribunal in question.”

Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour) [2003] S.C.J. No. 28 at para. 195

- “The test for institutional impartiality is whether a well-informed person, viewing the matter realistically and practically and having thought the matter through, could form a reasonable apprehension of bias in a substantial number of cases.”

Wewaykum Indian Band v. Canada [2003] 2 S.C.R. 259

The facts of the case are as follows:

- Two Aboriginal bands were involved in proceedings against each other and the government, each claiming exclusive entitlement to a reserve.
- In December of 2002, the Supreme Court of Canada dismissed the bands’ appeals.
- Several months later, one band made access to information request seeking copies of all records which make reference to Justice Binnie concerning the bands claims against the crown.
- Justice Binnie used to serve as associate ministry deputy of justice and was responsible for all litigation in the federal government at that time. He had supervisory authority over thousands of cases. He had received some info concerning one of the bands claims and attended a meeting about it. Does this amount to bias or not?
- Justice Binnie took himself out of this proceeding and he also gave a statement that he had no recollection of personal involvement in the case. The court found that the motion should be dismissed, no reasonable apprehension of bias was established and Justice Binnie is not disqualified for having heard the appeal.

Sam Lévy and Associés Inc. v. Canada (Superintendent of Bankruptcy) [2005] F.C.J. No. 882

- “That said, according to the majority opinion of the judges who participated in *Canadian Pacific Ltd. v. Matsqui Indian Band*, supra, it is not advisable to formulate final conclusions on the functioning of an institution based only on the general wording of legislative provisions. On the contrary, knowledge of the operational aspects of these missing points can offer a much more ample background in which it is possible to make an objective assessment of the institution in question and the relations pertaining to it. Thus, a fully informed person who has thought the matter through in a realistic and practical way is someone who assesses the situation of an administrative tribunal not only based on the law and regulations governing it, but also on the practice of the tribunal. Often it is only by looking at the operational aspects and practices of the tribunal that its impartiality and independence become apparent and may be fully assessed (2747-3174 Québec Inc., supra; *Katz v. Vancouver Stock Exchange* (1995), 128 D.L.R. (4th) 424, aff'd [1996] 3 S.C.R. 405).”

See Fact Scenarios 1 and 2 attached.

Fact Scenarios

Scenario No. 1

Don Smith is a full time member of the Ontario Land Use Tribunal (“OLUT”). Among its powers, OLUT hears disputes about municipal undertakings, whether public and/or private. Mr. Smith is a long time member and has adjudicated many cases for OLUT.

Mr. Smith owns all of the shares of 321 Ontario Inc. (the “Company”). The Company owns a small building situated at 32 Jones Street in Mississauga. Jones Street is a busy mixed use arterial road. There are two tenants in the building. A nurse rents the residential unit on the top floor. Mr. Smith’s son, Jeff Smith, operates a restaurant on the ground floor called “Jeff’s Place”. Rent from both tenants covers all expenses related to the building and generates a modest profit. The equity in the building is an important part of Don Smith’s retirement plans. If the building continues to generate its current net rent, an existing mortgage will be paid off in a few years, and at that point, Mr. Smith plans to retire from the OLUT.

The City of Mississauga has proposed a major reconstruction of Jones St. including new sewer lines, express bus lanes and extended sidewalks. These plans will take a minimum of 2 years to implement including disruption due to construction in the area of 32 Jones St. For example, during construction there will be no street parking. While Jeff’s Place has been successful financially, Jeff Smith is worried that disruption caused by construction will harm his business and may even cause the restaurant to fail. If that happened, it could take Don Smith up to a year to find a new tenant. Don Smith’s loss during that period could be significant.

Jeff Smith has become involved with a community group opposed to the City’s plans. Don Smith speaks to his son Jeff about the legal and administrative processes available by which the group can oppose the City’s plans. They talk about the powers of OLUT and how the community group might access OLUT to oppose or at least reduce the scope of the planned City construction especially in the vicinity of Jeff’s Place. Jeff Smith persuades his father to sign a petition supporting the opposition to the planned City undertaking. Don Smith also writes two lengthy letters to the editor of a leading Toronto newspaper in response to articles in that newspaper in support of the plan. In his letters, Don Smith advances a proposal that the scope of Mississauga’s plan should be reduced in a way that, among other things, would minimize reduction in front of and around 32 Jones St.

The community group initiates a hearing before the OLUT. The Chair of OLUT is not aware of Don Smith’s interest in the Company or indirectly in 32 Jones St., or that Mr. Smith’s son, Jeff, is one of the leaders of the applicant community group. The Chair designates Don Smith to sit on a panel of 3 members of OLUT to hear the challenge to the proposed Mississauga plan. Don Smith is confident that he will bring the required impartiality to adjudicating this dispute as he has done many times in the past. Accordingly he does not disclose his interest in the Company or the building or his involvement assisting his son, to the Chair or to the other 2 OLUT panellists.

The hearing gets underway. On the second day of the hearing, while reviewing disclosure materials, junior counsel for the supporters of the plan see Don Smith’s signature on the petition opposing the plan, and also finds copies of the two letters Don Smith had sent to the editor of the Toronto newspaper editor. The lawyer’s clients were not aware of Don Smith’s interest in the building or that his son, Jeff, is a leader in the community group opposing the City’s plan.

The supporters of the plan bring a motion before the OLUT panel that (i) Don Smith, on the grounds of bias, recuse himself, (ii) to quash the present proceeding and (iii) to re-start the proceeding before a different panel of OLUT Members.

Scenario No. 1 – CONT'D

Mr. Smith is on the panel which dismisses the motion, finding that in signing the petition and writing letters to the Toronto newspaper editor, Don Smith reasonably exercised his right to free speech as a private citizen, and that an informed reasonable person would not be of the view that as a result of his personal involvement, Don Smith was in a disqualifying conflict.

Discussion Points:

1. If you were Don Smith, would you have done anything differently
 - (a) Prior to the date of the hearing?
 - (b) At the beginning of the hearing?
 - (c) When the Motion was raised before the panel?
2. Is this situation any of an actual conflict of interest, a potential conflict of interest, or a potential conflict of interest. If so, what would you do to deal with such a conflict?
3. If you were a fellow panel member of Don Smith when the bias motion was raised, what action, if any, would you take?
4. If you were the Chair of the OLUT and you heard about the bias motion from the panel, what action, if any, would you take?

Review of main issues raised by Scenario 1 (David Gavsie)

The ethics executive, usually the Chair of the adjudicative body, when he or she gets a problem that needs outside input, can always get in touch with the Commissioner. He is helpful and timely.

This fact scenario is somewhat based on true events but has been embellished by the addition of the son, Jeff Smith, and the restaurant. The panel was a panel of three Divisional court justices. Don Smith was one of them. The panel heard an application for judicial review of the city's decision to proceed with construction. The panel granted the right to proceed. The opponents brought a bias motion and asked for a disqualification and newly constituted new panel to rehear it. The application was brought back to the same panel that had given the decision about a week after the decision. Smith was asked to recuse himself, the original panel was struck, and a new hearing requested before a new panel.

Smith wrote a 28 page judgment dismissing the motion. The other two judges refused to say whether he should recuse himself but they did find an apprehension of bias and ordered a new panel to rehear the matter.

Scenario 2

A part-time adjudicator is considering taking on the job of campaign manager to a candidate in an upcoming provincial election.

She anticipates that the activities of the campaign manager will include:

- Speaking to media/conducting interviews
- Issuing press releases
- Fund-raising
- Selling party memberships
- Producing and distributing campaign information
- Speaking to special interest groups
- Using social media to access potential supporters
- Speech writing

Scenario 2 – CONT'D

In addition, the candidate (who is a personal friend of the adjudicator) is championing an issue as part of his campaign that will likely come to before the tribunal to which the adjudicator is appointed.

What are the obligations of the adjudicator? What do you think the advice of the Ethics Executive should be? Should the advice of the Ethics Executive change in the case of a full-time adjudicator?

Review of main issues raised by Scenario 2 (Dianne Carter)

- You should ask yourself whether the adjudicator is a specifically restricted public servant. Is she a government appointee, a member of tribunal under Reg. 377/07? (51 tribunals are prescribed under the regulation listed above).
- Next, consider whether the activity in question is political activity (look to s.72 of PSOA for that).
- All of the proposed activities seem to be in support of a political party (is there a difference between acting as a manager and being a candidate?)
- Ask yourself whether the activity is permitted under s. 89 of PSOA. The proposed activity is not permitted.
- Is she a part time appointee? Yes, so there are special rules that apply to her. She can seek authorization from the conflict of interest commissioner.
- Here, the conduct is not captured by the two exceptions. If the part-time adjudicator wants to engage in this activity, she should seek authorization from the conflict of interest commissioner.
- Remember that there is a prohibition against preferential treatment and participating in decision making where a public servant could benefit.
- This conduct could raise a reasonable apprehension of bias.
- What should she do? She should think about abandoning the plans to act as campaign manager at all. She should also think about requesting a leave of absence.
- In any event, in dealing with these issues, she should consult with her ethics executive.

Questions and Answers:

Question: In the second scenario, how would a leave of absence be a remedial measure against the perception of future bias? The perception is still there when she gets back. Is this really a viable solution?

Answer: It may not be, this is something to consider and discuss with ethics executive.

Question: If a panel member declares potential or actual conflict and the parties agree to proceed for procedural reasons (example: they cannot get another hearing date for a long time), can they proceed anyways?

Short Answer: Yes. This happened to David before (former law partner came before him, representing a licensee). He disclosed it right away. The two parties were asked if it's ok to proceed and both consented and the hearing proceeded in a normal fashion. It is prudent to deal with that issue in the reasons for the decision as well.

Question: Conflict of interest and bias issues are constantly headline news lately. Does this undermine public confidence in government?

- **David:** This is a big perception that is out there. This has been an issue since the G20 summit and even before that event. Short answer: yes. He cringes when he sees headlines titled "Exclusive."
- **Dianne:** The perception of conflict is really important, figuring out the actual conflict is important to do but the potential is also really important and people need to be aware of this. The perception of a conflict, real or not, can undermine the legitimacy of any decision making process.