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Dealing with Government - Harry Lipetz

Bias & Officials in a Decision-making Process

Canadian courts have had to consider many instances where allegations of bias were advanced to disqualify an elected official from participating in a decision-making process. It is clear that persons who seek public office will have views on varying issues. To express those views before or after being elected is not, in itself, offensive. However, once a process has been commenced on such things as a bylaw amendment, those charged with making the ultimate decision on the adoption of the bylaw must not be seen to be biased.

The Supreme Court of Canada stated '... all that can be required ... is to put aside ... tentative views individually and collectively, hear the objections, consider them honestly and fairly, see if they can be accommodated and then make the final decision. On this standard, persons who stand to be affected by the decisions will be entitled to object, and the courts to intervene, if council members by their words or actions raise a reasonable apprehension that they are entering the process with a closed mind.'

In another decision, the same court stated '... bias denotes a state of mind that is in some way predisposed to a particular result or that it is closed with regard to particular issues. Whether a decision-maker is impartial depends on whether the impugned conduct gives rise to a reasonable apprehension of bias.'

The courts have held that it is virtually impossible to prove actual bias unless a politician is naïve enough to make the admission. In dealing with the issue of proof, the court held 'Actual bias need not be established because it is usually

impossible to determine whether the decision-maker approached the matter with a truly biased state of mind. 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 contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension itself must also be reasonable in the circumstances of the case'.

In Summary

- a) Bias denotes a state of mind that is in some way predisposed to a particular result.
- b) Impartiality depends on whether the impugned conduct gives rise to a reasonable apprehension of bias.
- c) Actual bias need not be established.
- d) The apprehension of bias must be a reasonable one held by reasonable and right-minded persons.

The elected official making public statements to the effect that he is not biased; has not made up his mind; is open to submissions and will keep an open mind does not, in law, remove the public perception of bias. Once the public perception of bias has been created it is very difficult if not impossible for it to be undone by way of explanations of motives or intention. The only answer at that point is for a principled politician to recognize his error and withdraw from the decision-making process respecting the issue in question or be removed by the courts. ☺

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