

PROTOCOL FOR DETERMINING BIAS ISSUES

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Contact the Appeals Commission

For more information, contact the Appeals Commission for Workers' Compensation

- by calling our office in:
 - Edmonton (780) 412-8700
 - Calgary (403) 508-8800
- by picking up information from our office in Edmonton at:
 - 901, 10109 – 106 Street
 - Edmonton, AB T5J 3L7
- by picking up information from our office in Calgary at:
 - 206, 1701 Centre Street North
 - Calgary, AB T2E 7Y2
- through our website at www.appealscommission.ab.ca

This is one of a series of Practice Guidelines issued by the chief appeals commissioner to help parties who are involved in an appeal to the Appeals Commission. To get other Practice Guidelines, the Appeals Commission's Appeal Rules, or other information, please contact the Appeals Commission in one of the ways described above.

(See other side)

A. Introduction

One of the main principles of natural justice is sometimes referred to as “the rule against bias”. The rule itself means that decisions must be based on nothing but the relevant law and evidence presented in the case. The underlying policy in support of this rule is that justice must not only be done, but it must be seen to be done.

The Appeals Commission is committed to ensuring that its decisions are free from bias and has implemented a number of checks and balances to support this commitment in order to identify issues at the earliest opportunity.

Appeals commissioners are expected to keep the issue of bias in mind and inquire into any situation which might suggest a reasonable apprehension of bias.

All appeals commissioners are required to disclose potential bias issues and the Appeals Commission keeps an updated record of exclusions to avoid assigning appeals commissioners to appeals that would give rise to a potential apprehension of bias.

B. Determining bias

- Actual bias exists where the decision maker is influenced by improper factors (financial interest, relationship with one of the parties, etc.).
- More commonly, the consideration is whether the circumstances of the decision maker give rise to a reasonable apprehension of bias. The legal test for reasonable apprehension of bias is an objective test. The objective test adopted by the Appeals Commission is stated, in its decision number 2007-818, as follows:

"The objective evidence test is whether a reasonable and informed observer would have a reasonable apprehension of bias from that objective evidence. If the objective evidence indicates that the informed observer concluded that there was a concern that the state of mind of the panel member was closed or predisposed to a particular result on the material issues and, therefore, not likely to be impartial or fair in making a decision, then a reasonable apprehension of bias would exist."

Further in Appeals Commission decision number 2009-1103, the panel noted the following:

"Recently, the Alberta Court of Appeal in Beier v. Vermilion River (County) Subdivision and Development Appeal Board 2009 ABCA 338 (CanLII), 2009 ABCA 338 considered the test of apprehension of bias in the context of a quasi-judicial tribunal in Alberta. It refined the test, holding that the test to determine whether an apprehension of bias has been established is whether an informed person, viewing the matter realistically and practically, would have a reasonable apprehension of bias. In the case of administrative tribunals, the context must be taken into account, including the role and function of the tribunal, the requirements of natural justice and institutional constraints faced by the administrative tribunal."

- Circumstances potentially giving rise to a reasonable apprehension of bias include an apparent lack of impartiality due to:
 - an apparent interest in the outcome of the appeal
 - conduct showing favour or hostility towards one of the parties
 - conduct demonstrating an actual or a reasonable appearance of predetermination or prejudgment and an unwillingness to maintain an open mind
 - a prior relationship with a participant
- Not every past relationship or connection gives rise to bias concerns. Only those that a reasonable person would reasonably conclude might interfere with the impartiality of the decision maker are of concern (for example: because of the strength of the relationship, or proximity in time).

C. Before the hearing

- Most problems can be avoided before the hearing starts, as appeals commissioners are expected to decline assignments that may give rise to a reasonable apprehension of bias.
- At the very least, if an appeals commissioner has any doubt about whether a reasonable apprehension of bias exists, the appeals commissioner will consult the chief appeals commissioner (or designate).
- Where an appeals commissioner becomes aware, before the hearing, of circumstances that suggest a reasonable apprehension of bias, the chief appeals commissioner should be informed. The chief appeals commissioner, in consultation with the appeals commissioner, will decide whether it is necessary to appoint a replacement appeals commissioner. If the chief appeals commissioner determines that the circumstances are insignificant, the appeals commissioner may continue with the hearing.

D. At the hearing

- Parties must raise allegations of bias at the earliest opportunity to do so. If a party recognizes an issue of bias but fails to raise it immediately, the party may be seen to have waived their right to rely upon bias.
- The hearing panel must deal with the issue immediately.
- In order to determine whether a reasonable apprehension of bias exists, the panel, including the appeals commissioner in question, will hear submissions from the parties regarding the allegation, adjourn to the caucus room and make a decision.
- If the panel decides that a reasonable apprehension of bias does not exist, the panel will return to the hearing room and advise the parties that the panel has decided against the allegations with reasons in writing to be included in the decision on the merits. The concerned appeals commissioner shall accept the panel's decision on the issue and

continue to serve on the panel unless, notwithstanding the panel's decision, the appeals commissioner remains personally satisfied that there is in fact a significant doubt as to be impartial in the case. In such a case the appeals commissioner may be removed from the panel.

- If the panel decides in favour of the bias allegation, the appeals commissioner will be excused and the hearing will proceed with the remaining panel members. The decision on the merits will contain reasons for the decision regarding bias.

E. After the hearing

- Given that allegations of bias affect the credibility and integrity of the Appeals Commission as a whole, the chief appeals commissioner should be informed of the nature of any bias allegations after the decision has been issued.

F. Outside the hearing process

- Where an appeals commissioner has a potential apprehension of bias not specific to a matter assigned to the appeals commissioner but rather in respect of any matter before the Appeals Commission (including a general allegation), the appeals commissioner will not participate in any discussion of the matter until the chief appeals commissioner has been advised of the circumstances. The chief appeals commissioner has the authority to make a decision regarding the allegation. If the appeals commissioner becomes aware of the potential bias issue during a meeting, the appeals commissioner must leave for that portion of the meeting. If there are minutes, the appeals commissioner should ask that the absence be noted in the minutes and any discussion of the issue be deleted from the appeals commissioner's copy.

G. Chief Appeals Commissioner

- Where the chief appeals commissioner becomes aware of facts which may give rise to a reasonable apprehension of bias, with respect to a matter the chief appeals commissioner is adjudicating, the procedural protocol will be followed with appropriate adjustments.
- Where the chief appeals commissioner determines a possible reasonable apprehension of a bias in respect of a matter before the Appeals Commission, which the chief appeals commissioner is not adjudicating, the chief appeals commissioner will instruct Appeals Commission staff that all communications regarding the matter are to be directed to one of the Vice Chairs of the Appeals Commission. The file will be marked "No Access to Chief Appeals Commissioner". All decisions regarding the choice of appeals commissioner, the scheduling and conduct of the hearing and the release of the decision will be made without the participation of the chief appeals commissioner.

For more information

For more information on conflicts of interest, see the Appeals Commission Code of Conduct which is available on the Appeals Commission's website (www.appealscommission.ab.ca) or upon request.

Let the Appeals Commission know –

- *if your address or contact information changes*
- *if your representative changes*
- *if you cease to be a representative for a party to an appeal.*