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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

CO-EDITORS: ANDREA GONSALVES & JUSTIN SAFAYENI ISSUE 13 • OCTOBER 2017

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Crown immunity offers protection against disclosure obligations: *Canada (Attorney General) v Thouin*, 2017 SCC 46

FACTS: T is the designated member in a class action instituted by the respondent Automobile Protection Association against the appellant oil companies and retailers. The class action alleges a conspiracy to fix gasoline prices. A similar class action, pertaining to a different geographic region, proceeded in parallel.

Independently, the Competition Bureau pursued a 10-year investigation into allegations that certain oil companies and retailers, including the appellants, had conspired to fix gasoline prices. The plaintiffs in the two class actions applied to the court for permission to examine the Bureau's chief investigator and for disclosure of all documents in the Bureau's investigation file.

Debate in the case focused on s 27 of the federal *Crown Liability and Proceedings Act* ("CLPA"),[1] which states: "Except as otherwise provided by this Act or the regulations, the rules of practice and procedure of the court in which proceedings are taken apply in those proceedings."

This provision requires the Crown to submit to discovery in proceedings in which it is a party. At issue was whether s 27 also required the Crown to submit to discovery in proceedings in which it was not a party. Both courts below held that s 27

[1] RSC 1985, c C-50.

lifted the Crown's immunity in the circumstances and therefore the investigation could be examined.

DECISION: Appeal allowed. The Bureau's investigator may refuse to submit to examinations for discovery on the basis of Crown immunity.

At common law, the Crown was historically exempt from several obligations that applied to ordinary litigants, including the obligation to provide documentary or oral discovery. This aspect of the common law presumption of Crown immunity remains, absent a clear and unequivocal expression of legislative intent.

For federal Crown agencies, s 17 of the *Interpretation Act*[2] is the starting point in each case in which the Crown might have immunity. It provides that the Crown continues to have immunity, unless it is lifted by statute.[3]

In enacting s 27 of the CLPA, Parliament made the clear choice to impose the rules of civil procedure on the Crown in proceedings in which it is a party. However, those words do not show a clear and explicit intention to bind the Crown in all proceedings where the Crown may be involved. The interpretation that s 27 applies only to proceedings in which the Crown is a party is bolstered when the provision is considered in light of its legislative history and all of the sections of the CLPA.

While Crown immunity insulates the Bureau from T's request to examine the chief investigator, the Bureau is nevertheless required to submit to an application for disclosure of documents, as if it were an ordinary litigant.[4] The Crown immunity has also been lifted where the Crown is summoned to testify at trial.

COMMENTARY: This unanimous decision is a forceful affirmation of the principle of Crown immunity, as well as the interpretive approach that governs its limits.

The threshold question for any regulator faced with a request for documents or examinations is whether it is a Crown agent. Not all regulators benefit from Crown immunity; only those that are properly characterized as Crown agents. Public bodies may be expressly designated as Crown agents in their enabling legislation, or may fall within the definition of "Crown agency" in provincial legislation.[5] Public bodies may also be considered as Crown agents at common law, depending on their mandate and relationship with government. The function being performed is also relevant, since immunity may be lost if an agency acts outside its statutory purpose.

If an agency is indeed a Crown agent, then it will benefit Crown immunity – albeit under a patchwork and sometimes complicated legal framework. Crown agencies should not be too quick to accede to requests for documents or examinations. At a minimum, the language of the relevant Crown proceedings legislation, interpretation act and rules of court must all be examined in some detail to discern whether and to what extent the immunity applies to the specific request at issue.

Adequacy of reasons where there is a departure from precedent or policy: *2251723 Ontario Inc (cob as VMedia) v Rogers Media Inc.*, 2017 FCA 186

FACTS: This statutory appeal arises from a decision by the Canadian Radio-television and Telecommunications Commission to deny VMedia's application to add a non-Canadian television shopping channel, QVC, to a list of

[2] RSC 1985, c I-21.

[3] Similar language is found in provincial legislation: see, *eg*, s 71 of the *Legislation Act, 2006*, SO 2006, c 21.

[4] See section 8 of SOR/91-604, passed under the CLPA.

[5] See, *eg*, the *Crown Agency Act,* RSO 1990, c C-48.

programming services authorized for distribution in Canada ("List").

The List includes non-Canadian broadcasters that do not have a licence to carry on a broadcasting undertaking in Canada, but instead have a licensed Canadian broadcasting distribution undertaking (like VMedia) acting as their distributor.

The respondent, Rogers Media Inc., opposed the application on the grounds (among others) that adding QVC to the List would result in QVC carrying on a broadcasting undertaking in Canada without a licence or being subject to a valid exemption.

In accepting this argument, the Commission first asked whether QVC was "carrying on business in whole or in part in Canada". QVC's business and intended retail activities led the Commission to conclude that it had a real and substantial nexus with Canada. On that basis, the Commission determined that, if QVC were added to the List, it would be carrying on a broadcasting undertaking in Canada, without a licence or exemption.

DECISION: Appeal allowed (per Near and Webb JJ.A.; Gleason J.A., dissenting).

Writing for the majority, Near J.A. found the Commission's decision unreasonable. It marked a departure from the Commission's previous decisions, as well as from the Commission's own guidelines, both of which focused on the degree of competition with Canadian pay or specialty services as the principal determination. No previous decision or policy suggested that it would be appropriate to consider whether an entity would be a broadcasting undertaking if added to the List.

Against this backdrop, the majority found that the Commission's unexplained decision to examine whether QVC was engaged in a broadcasting undertaking undermines the justification, transparency and intelligibility of its decision. Although the Commission may have had the authority to depart from precedent and policy guidelines, the reasonableness of the decision here cannot be reviewed because the Commission offered no reasons for its choice. Reviewing courts must avoid being unduly formalistic in reviewing the reasons of administrative decision-makers, but that does not protect a decision that cannot be discerned without engaging in speculation or rationalization. As the Federal Court of Appeal previously put it in *Lloyd v Canada (Attorney General)*, reviewing courts may "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page."[6]

In addition, the majority found the decision to be unreasonable because, in examining the broadcasting undertaking issue, the Commission asked itself the wrong question (*i.e.* whether QVC was "carrying on business in whole or in part in Canada"). Absent from the Commission's analysis is any explanation as to why, if QVC were to be carrying on business in Canada, this would necessarily lead to a conclusion that QVC would be carrying on a "broadcasting undertaking" within Canada. Neither past decisions, nor the record, can be relied on to support the conclusion that the Commission's reasoning on this issue is implicit.

In dissent, Gleason J.A. found the Commission's decision to be reasonable. Relying heavily on the Supreme Court's decision in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*,[7] she focused on the reasons that could have been offered for the decision in question. The Commission did provide reasons, although perhaps not as fulsome as one might wish. Nothing turned on the Commission's failure to be

[6] 2016 FCA 115 at para 24.

[7] [2016] 2 SCR 293 at paras 36-38. In *Edmonton East,* a narrow majority upheld a tribunal decision without any reasons, on the basis of reasons that could have been offered in support. The decision was summarized in Issue No 8 of this Case Review.

more explicit about why QVC was fundamentally different from all other foreign services added to the List. None of those other services existed solely to sell products and their finances did not flow solely from product sales; thus, it was not unreasonable to afford QVC different treatment. There is also nothing unreasonable in the Commission's interpretation of "broadcasting undertaking" or its conclusion that QVC would fall within that definition if added to the List.

COMMENTARY: The disagreement between the majority and the dissent in this case highlights the difficulty between determining how – or, perhaps more fundamentally, whether – a line can be drawn between, on the one hand, saving deficient or non-existent tribunal reasons by way of speculation, and on the other hand, looking to the record or other sources to determine what reasons *could have been* offered to support a tribunal's decision.

For Gleason J.A., *Edmonton East* effectively eliminates any reluctance courts should have to offer reasoning in support of tribunal decisions that have deficient or non-existent reasons. In other words, the line-drawing exercise between what the majority would call impermissible speculation, and discerning a tribunal's 'implicit reasons', is a distraction, if not a fiction. The real question for reviewing courts is whether there are reasons that could have been offered to support the decision at issue.

Justice Gleason's view is arguably more consistent with the law as it currently stands. *Edmonton East* seems to leave little room for reviewing courts to declare decisions unreasonable without exploring reasons that could have been offered in support. To paraphrase the *Lloyd* decision, even if there are no lines on the page, reviewing courts must still strive to find and connect the dots.

That being said, there may be a way to reconcile the majority's view in this case with *Edmonton East* – at least insofar as the majority relies on the fact that the Commission departed from its previous decisions and guidance documents.

The starting point is to recognize that there are cases where a reviewing court is simply not well-equipped to discern reasons that "could have been offered" in support of a decision. One such circumstance may be where a tribunal's decision marks a departure from previous tribunal decisions, policies and/or guidelines on a critical point. Just as a decision that is entirely consistent with previous tribunal decisions on the same point may require less (or no) explanation in order to be reasonable,[8] a decision that is inconsistent with previous tribunal jurisprudence or guidance may require at least some rationale from the tribunal itself in order to meet the requirements of transparency, intelligibility and justification.[9]

This distinction – based on the nature and importance of the question before the tribunal – could help explain both why the Supreme Court was willing to uphold a decision without reasons on a pure question of law that was essentially uncontested before the tribunal in *Edmonton East,* and why Near and Webb JJ.A. reached a different result in this case given the Commission's departure from prior practice and the centrality of the issue.

Ultimately, this case demonstrates that the implications of *Edmonton East* are still being sorted out in reviewing courts. A good deal of jurisprudence (particularly in the federal courts) still considers that there are firm limits on when reviewing courts should attempt to justify a tribunal's unexplained decision. Whether those limits exist and how they should be discerned will have to await further Supreme Court guidance.

[8] See, for example, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association* [2011] 3 SCR 654.

[9] See, for example, *Ontario Medical Assn v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div Ct), which is discussed further below.

Importance of reasons where the record is limited: *Canada (Minister of Transport) v. Canadian Union of Public Employees*, 2017 FCA 164

FACTS: The *Aeronautics Act*[10] ("Act") allows the federal government to make regulations regarding aviation security. The *Canadian Aviation Regulations* ("Regulations"), promulgated under the Act, require air operators to keep a flight attendant manual ("Manual") containing instructions necessary for flight attendants to perform their duties.[11] The Minister must approve of parts of a Manual that relate to the safety and emergency of passengers. This function is delegated to Cabin Safety Inspectors.

In June 2013, Sunwing applied for an exemption from the minimum staffing requirements under the Regulations. A condition for exemption required Sunwing to show that flight attendants could complete a partial evacuation simulation within 15 seconds. Sunwing flight attendants failed to execute the required procedures within 15 seconds.

One of the partial evacuation procedures under Sunwing's Manual required flight attendants to issue "blocking commands" to get passengers to assist in crowd control during evacuation procedures. After failing the 15-second evacuation simulations, the Cabin Safety Inspector suggested making the "blocking command" procedure discretionary. This allowed the flight attendants to successfully complete a partial evacuation within the 15-second time limit.

The Inspector advised Sunwing to make a formal application for approval of a change to its Manual to make the "blocking command" discretionary, and stated that Sunwing should conduct an internal risk assessment as part of that process. Sunwing undertook a risk assessment, but did not describe how it reached the conclusion that passengers are unlikely to be blocking doors that flight attendants must access during an evacuation. Sunwing also conducted no reliable testing to verify the conclusions drawn from the risk assessment.

Sunwing submitted an approval request to Transport Canada in the form of a Cabin Safety Bulletin. The Inspector approved the Bulletin and the amendment to Sunwing's Manual. The Inspector's reasons simply stated that the Bulletin met the Manual standards and was therefore in accordance with the Regulations.

The Canadian Union of Public Employees applied for judicial review of the Inspector's initial verbal amendment to the Manual and the subsequent Transport Canada approval. The Federal Court accepted that there were two decisions made, both reviewable on the reasonableness standard. The Court held that the verbal approval was reasonable, but the written approval was not. The Minister of Transport appealed.

DECISION: Appeal dismissed. Inspector's decision set aside.

Reasonableness is the proper standard of review, but there is only one reviewable decision in this case: the Inspector's written approval, required under the Regulations. The Inspector's earlier verbal approval came prior to Sunwing applying for approval of a Manual amendment.

The Inspector's written decision failed to meet the requirements of transparency, intelligibility, and justification. Under the Regulations, the Inspector was required to be satisfied that the proposed change to the Sunwing's Manual would not compromise the safety of passengers. To uphold the Inspector's decision under the reasonableness standard of review, a reviewing

[10] RSC 1985, c A-2.
[11] SOR/96-433, section 705.139.

court must be able to assess whether the Inspector made that determination.

Here, the Inspector's cursory reasons did not allow for that assessment to be made. Nor could a reviewing court rely on the record before the Inspector, which provided no evidentiary basis to support the assumption that passengers would not be likely to block a Sunwing flight attendant needing to open an emergency exit during an evacuation.

COMMENTARY: This decision serves as an important reminder that the absence of substantive reasons, coupled with insufficient evidentiary support in the record, can be fatal – even in the case of highly expert decision-makers.

For a decision to be reasonable, it must be transparent, intelligible, and justifiable. Although reasons are not always required, they go a long way in allowing a reviewing court to discern how and why a decision was reached. In situations where it may not be practical to provide lengthy reasons for a decision (as may have been the case here), even brief reasons addressing the key conclusions made could be the difference between a decision that is found reasonable and one that cannot survive judicial review.

The need for reasons is of paramount importance where the record before a decision-maker is silent on a given issue or points in conflicting directions. Indeed, this may be seen as a situation where a reviewing court's search for reasons that "could have been offered" in support of a decision – as mandated by the Supreme Court in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd* [12] – is less appropriate, or at least less likely to provide a basis that will allow a decision to survive reasonableness review.

No automatic 'bias by association' amongst tribunal members: *Ontario Medical Assn v Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div Ct)

FACTS: A reporter sought physician billing information for an article she was writing about the medical system in Ontario. In particular, she wanted the names, annual billing amounts, and medical field of specialization (if applicable) of the top 100 physicians in the province.

She filed a freedom of information request to obtain the data from the Ministry of Health and Long-Term Care. The Ministry refused to disclose the identities of the physicians, but did disclose the amounts paid in rank order. The reporter appealed this decision to the Information and Privacy Commissioner of Ontario.

The Commissioner himself was originally set to hear the appeal, but he had made certain public statements that led the Applicants to complain that he had prejudged the matter. As a result, the Commissioner recused himself and the matter was referred to the Adjudicator. The Adjudicator ordered that the records be disclosed in full, since the information was not "personal information" and the privacy exemption in s 21(1) of the *Freedom of Information and Protection of Privacy Act*[13] did not apply.

The Ontario Medical Association and two different groups of doctors affected by the Adjudicator's order subsequently brought applications for judicial review.

DECISION: Applications dismissed.

The Divisional Court addressed several issues in the course of its decision, two of which are of particular interest from an administrative law perspective.

[12] [2016] 2 SCR 293 at paras 36-38.

[13] RSO 1990, c. F.31

First, the Court rejected the argument that the Adjudicator did not justify his departure from earlier decisions dealing with the definition of "personal information". *Stare decisis* does not apply to the decisions of administrative tribunals. Moreover, the Adjudicator did make reference to the earlier decisions through his concerns about a "dichotomy" between how the Commissioner dealt with payments to physicians as opposed to other professionals. It was open to the Adjudicator, having identified an anomaly in the tribunal's own jurisprudence, to address it. He was not bound to follow those earlier decisions, and rather than simply "embarking on his own path", the Adjudicator explained the reasons why he was departing from them.

Second, the Court rejected the argument that there was a reasonable apprehension of bias on the part of the Adjudicator, due to a reasonable apprehension of bias on the part of the Commissioner. Even assuming that a reasonable apprehension of bias existed with respect to the Commissioner, there was no merit that this attached to the Adjudicator as well. The result of the Applicants' argument would be that every decision at the Information and Privacy Commissioner of Ontario's office would then be tainted – an absurd result. There was no basis to conclude that the Adjudicator reached anything other than his own personal decision based on the record that was before him.

COMMENTARY: At first glance the Court's treatment of the *stare decisis* argument seems to merely re-affirm the Supreme Court of Canada's holding in *Weber v Ontario Hydro*.[14]

But the fact that the Adjudicator was free to depart from prior tribunal jurisprudence does not automatically mean that his decision to do so was reasonable in the circumstances. For that reason, the Court went further than simply relying on *Weber,* and asked whether the Adjudicator's departure from previous decisions was reasonable. The Court's analysis on this point suggests that surviving reasonableness review may require an administrative decision-maker to offer some kind of acknowledgment of, and explanation for, a break from previous decisions.

In other words, where an administrative decision-maker reaches a conclusion that goes against the grain of established tribunal jurisprudence, the safest course of action is for the decision-maker to grapple with the rationale for the departure directly in his/her reasons. (The Federal Court of Appeal's recent decision in *VMedia v Rogers Communications Inc*, summarized above, may be seen as a case where a tribunal offered an inadequate explanation for breaking from past decisions.[15])

The Court's rejection of the Applicants' bias-by-association argument means in future cases, applicants should come to court armed with an evidentiary basis to show how a reasonable apprehension of bias arises from the conduct of a particular decision-maker. The rejection of the bias-by-association argument will be a welcome relief to all manner of regulators and agencies: their capacity to make decisions through delegation or use of other tribunal members will remain protected in the rare event that a chair, commissioner or other tribunal "leader" makes a statement that gives rise to a reasonable apprehension of bias. ⚖

Reviewability of and bias in decisions about high school sports: ***Capelli v Hamilton Wentworth (Catholic School Board)***, 2017 ONSC 5442 (Div Ct)

FACTS: C is a high school student. In January 2017 she transferred from one high school in the

[14] [1995] 2 SCR 929 at para. 14.

[15] 2017 FCA 186 (as discussed earlier in this Case Review).

Hamilton-Wentworth Catholic District School Board to another school in the same Board. The Board has a policy that precludes students from playing on any sports team for one year after a transfer to a new school. The policy allows for certain exceptions, including where the transfer occurred due to bullying.

C wishes to play basketball for her new high school's team for the 2017/2018 school year. She applied to the Board for an exemption from the transfer policy on the basis that she had been bullied by JD, another student at her previous school, and by JD's father Mr D, who was both a teacher and the basketball coach at that school. The Board denied C's request on the basis that there was insufficient evidence of bullying. The Golden Horseshoe Athletic Conference ("GHAC") reviewed and upheld the Board's decision.

C sought judicial review on an urgent basis before a single judge of the Divisional Court. Though the GHAC's decision could be appealed to the Ontario Federation of School Athletic Associations ("OFSAA"), the OFSAA's next meeting was not until two weeks after the basketball season was set to start. The judicial review application was brought on the basis of reasonable apprehension of bias and breach of procedural fairness. The procedural fairness arguments were not pressed at the hearing.

DECISION: Application dismissed.

The respondents argued that the issues raised in the application are not amenable to judicial review because the decisions being challenged do not arise from the exercise of a statutory power and do not engage matters of public law. Justice Favreau noted that the Court of Appeal has clarified that s 2(1)1 of the *Judicial Review Procedure Act*, which focuses on the nature of the relief sought, does not require that the decision under review arise from the exercise of a statutory power.[16] Rather, the focus of the inquiry is on whether the decision has a public law character. In this case, a number of factors influenced Favreau J's finding that the court has jurisdiction to hear the application:

- While the decisions under the transfer policy are not directly governed by statute, s 171(1)27 of the *Education Act*[17] empowers the Board to "provide for the promotion and encouragement of athletics and for the holding of school games."
- The Board is a public body created by statute. While it delegates some of its authority regarding school athletics to voluntary associations such as the GHAC and the OFSAA, that power originates with the Board.
- The powers of the Board and the GHAC are compulsory. If they do not permit an exemption under the transfer policy, a student cannot play on a school team (unless the OFSAA reverses the decision).
- Courts have acknowledged the importance of high school athletics.
- The powers exercised by the Board and the GHAC have a public law character and are amenable to public law remedies such as *certiorari*.

Justice Favreau observed that this case is not unique. There have been a number of cases in which Ontario courts have intervened on the issue of whether a student should be eligible to play on a high school sports team. C is seeking *certiorari* and raises issues of bias and procedural fairness. Besides the public law character of the decisions, some of the remedies sought are uniquely available in the Divisional Court. Thus, Favreau J concluded that the court has jurisdiction over the issues raised.

On the merits of the application, C argued that the Board's decision was biased because Mr D

[16] See *Setia v Appleby College*, 2013 ONCA 753.

[17] RSO 1990, c E.2.

improperly influenced the Board's decision, the Board Superintendent had previously participated in meetings concerning earlier incidents between C and JD, and C's previous school did not properly deal with the issues required to be addressed under the transfer policy when the school wrote a letter stating it did not support C's application.

C argued that the appropriate test for disqualifying bias is that of a reasonable apprehension of bias. Relying on *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*,[18] Favreau J expressed the view that, given the administrative nature of the decision, the test that should more likely be applied is the "closed mind" test. That test has been applied in cases where the decision marked is not engaged in the type of adjudication undertaken by courts and tribunals.

In any event, even on the reasonable apprehension of bias test, an informed person viewing the matter realistically and practically would not think that the decision-makers would act unfairly, either consciously or unconsciously. Mr D was not the decision-maker and there is no evidence that he was involved in the decision-making process. The Superintendent's participation in the earlier incidents was in his capacity as superintendent. There is no evidence that he had a personal interest in the matter or that there was anything improper about his participation. The former school's letter does not support an argument of reasonable apprehension of bias. The decision-makers did not author the letter and it was one of several factors considered in the decisions reached.

COMMENTARY: The most notable aspects of Favreau J's decision are her ruling on the court's jurisdiction to hear the judicial review application and her *obiter* comments about the appropriate test for disqualifying bias for administrative decision-makers.

On the former issue, Favreau J's decision continues a growing line of cases confirming the availability of judicial review of decisions that do not involve the exercise of statutory powers. This recent trend has seen courts consider applications for judicial review from the decisions of minor sports associations,[19] political parties,[20] and, in this case, school boards – to name but a few. Many of these cases rely on a non-exhaustive list of factors first articulated by Stratas JA in *Air Canada v Toronto Port Authority*[21] and subsequently adopted by the Ontario Court of Appeal in *Setia*, to determine whether the decision has a sufficient public character to attract the public law remedies available on judicial review.

The question of judicial review jurisdiction over non-statutory decisions will be squarely before the Supreme Court of Canada in a case to be argued this fall: *Judicial Committee of the Highwood Congregation of Jehovah's Witnesses v Wall*.[22] That case involves an application for judicial review of the decision of a religious organization to expel a member of the congregation. The case will likely set the direction in this area going forward. While some might embrace the reviewability of "public" but not statutory decisions, there may be others concerned that the recent trend pushes judicial review too far from its origins in the prerogative writs. Even if the Court affirms the reviewability of such decisions, they may do so without endorsing the list of factors from *Air Canada* and *Setia* (which is how the Alberta Court of Appeal majority decided the issue), potentially calling into question the continuing relevance of those

[18] [1992] 1 SCR 623 at para 27.

[19] *West Toronto United Football Club v Ontario Soccer Association*, 2014 ONSC 5881 (Div Ct).

[20] *Graff v New Democratic Party*, 2017 ONSC 3578 (commented on in Issue No. 12 of this Case review).

[21] 2011 FCA 347.

[22] The Alberta Court of Appeal's decision is at 2016 ABCA 255 and was commented on in Issue No. 7 of this Case Review.

factors in Ontario, the Federal Court and other jurisdictions that have applied them.

On the issue of bias, Favreau J's comments are thin but her suggestion that the "reasonable apprehension of bias test" is limited to courts and adjudicative tribunals, and that the "closed mind" test applies to administrative decisions seems to be a departure from the jurisprudence.

In *Newfoundland Telephone*, the Supreme Court noted the great variability of administrative boards. At one end of the continuum are those boards that are primarily adjudicative in their functions, which will be held to the standard of bias applicable to courts – that of a reasonable apprehension of bias. At the other end are boards with popularly elected members such as municipal councilors, who deal with planning and development decisions. The "closed mind" test applies to those boards. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors and the "closed mind" test may be appropriate. But many boards will fall between those two ends of the spectrum. It was not necessarily the Supreme Court's intent in *Newfoundland Telephone* that the "closed mind" test applies to every decision-maker that is not primarily adjudicative in its functions.

At a minimum, for the "closed mind" test to apply there should be some explanation of why the decision-maker's functions are primarily policy-oriented, and why the application of a reasonable apprehension of bias test might undermine the very role that has been entrusted to the decision-maker. Justice Favreau does not provide that explanation, and it is not readily apparent why the "closed mind" test is more appropriate for the Board and the GHAC than the reasonable apprehension of bias test. Perhaps unintentionally, Favreau J's suggestion that the "closed mind" test applies to all administrative decisions goes beyond the principles in *Newfoundland Telephone*, and caution should be used before relying on her *obiter* comments.

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