

From Rawls to Habermas: Towards A Theory of Grounded Impartiality in Canadian Administrative Law

Laverne Jacobs

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From Rawls to Habermas: Towards A Theory of Grounded Impartiality in Canadian Administrative Law

Abstract

At the same time that Canadian public law jurisprudence has grappled with some key cases on bias, a vibrant debate has also raged over the meaning and scope of the notion of impartiality within political and moral philosophy. Spurred by Rawls' view of liberalism, and culminating in the theory of deliberative democracy, this debate evolved over a span of more than four decades. Yet this philosophical literature is rarely, if at all, referred to in the public law jurisprudence dealing with impartiality. This article asks whether the debates surrounding impartiality in political and moral philosophy and those in Canadian public law share common ground and explores the ways in which these discourses might speak to one another. The author argues that knowledge of the two debates challenges us to reconsider the judicial methods by which decision-making impartiality is established. This is particularly so in administrative law. The author proposes a theory of grounded impartiality in Canadian administrative law, which requires courts and administrative actors to pay close attention to factors such as administrative actor provenance, shared and local understandings, and the possibility for genuine discourse. While certain political and moral philosophers have advocated for similar factors as ideal means for assessing an individual's claim to the good life, a parallel approach has faced ambivalent reception in Canadian administrative law impartiality jurisprudence. Nevertheless, this article argues that a theory of grounded impartiality would allow for better-informed, more meaningful, and transparent decision making with respect to allegations of bias.

Keywords

Administrative discretion; Fairness; Administrative law--Interpretation and construction; Administrative law--Philosophy; Canada

From Rawls to Habermas: Towards A Theory of Grounded Impartiality in Canadian Administrative Law

LAVERNE JACOBS *

At the same time that Canadian public law jurisprudence has grappled with some key cases on bias, a vibrant debate has also raged over the meaning and scope of the notion of impartiality within political and moral philosophy. Spurred by Rawls' view of liberalism, and culminating in the theory of deliberative democracy, this debate evolved over a span of more than four decades. Yet this philosophical literature is rarely, if at all, referred to in the public law jurisprudence dealing with impartiality. This article asks whether the debates surrounding impartiality in political and moral philosophy and those in Canadian public law share common ground and explores the ways in which these discourses might speak to one another. The author argues that knowledge of the two debates challenges us to reconsider the judicial methods by which decision-making impartiality is established. This is particularly so in administrative law. The author proposes a theory of grounded impartiality in Canadian administrative law, which requires courts and administrative actors to pay close attention to factors such as administrative actor provenance, shared and local understandings, and the possibility for genuine discourse. While certain political and moral philosophers have advocated for similar factors as ideal means for assessing an individual's claim to the good life, a parallel approach has faced ambivalent reception in Canadian administrative law impartiality jurisprudence. Nevertheless, this article argues that a theory of grounded impartiality would allow for better-informed, more meaningful, and transparent decision making with respect to allegations of bias.

* Associate Professor, Faculty of Law, University of Windsor. I am grateful to William Conklin, Lesley Jacobs, Mary Liston, and the anonymous reviewers for their valuable feedback, and also to the Social Science and Humanities Research Council of Canada and the Law Foundation of Ontario for their generous support. Thanks to Cynthia Morgan and Krina Mahaisuria for their excellent research assistance.

Alors que la jurisprudence du droit public canadien était aux prises avec certaines causes majeures sur le parti pris, un vif débat faisait rage sur le sens et la portée de la notion d'impartialité dans le cadre de la philosophie politique et morale. Alimenté par l'opinion de Rawls sur le libéralisme et culminant avec la théorie de la démocratie délibérative, ce débat a évolué depuis plus de quatre décennies. Il est pourtant rarement – sinon jamais – fait référence à ces documents philosophiques dans la jurisprudence du droit public traitant de l'impartialité. Cet article soulève la question à savoir si les débats sur l'impartialité dans le domaine de la philosophie politique et morale et ceux sur le droit public canadien ont un terrain commun et s'ils explorent les façons dont ces discours pourraient communiquer. L'auteur fait valoir que la connaissance de ces deux débats nous met au défi de réexaminer les méthodes judiciaires permettant la prise de décisions impartiales. Cela s'applique tout particulièrement au droit administratif. L'auteur propose une théorie d'impartialité fondamentale en droit administratif canadien, exigeant que les tribunaux et les intervenants administratifs se penchent sur des facteurs tels la provenance de l'intervenant administratif, des ententes partagées et locales et la possibilité d'un discours authentique. Bien que certains philosophes politiques et moraux préconisent de tels facteurs comme excellents moyens d'évaluer la revendication d'une bonne qualité de vie de la part d'un particulier, une approche parallèle a reçu un accueil mitigé en jurisprudence de l'impartialité en droit administratif canadien. Quoi qu'il en soit, cet article soutient qu'une théorie d'impartialité fondamentale permettrait de prendre des décisions mieux informées, plus significatives et transparentes en ce qui a trait aux allégations de parti pris.

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I. INTRODUCTION

IMPARTIALITY IS OFTEN TREATED as an insular concept in Canadian public law jurisprudence.¹ The Supreme Court of Canada (SCC or the Court) cases dealing with the disqualification of public decision makers for reasonable apprehension of bias have centred on common law concerns about whether certain conditions said to guarantee impartiality have been satisfied. Interestingly, at the same time that Canadian public law has grappled with some key cases on bias, a vibrant debate has also raged over the meaning and scope of the notion of impartiality within political and moral philosophy. Spurred by John Rawls's view of liberalism and culminating in the theory of deliberative democracy, this debate evolved over a span of more than four decades, starting in the 1970s. Yet, public law jurisprudence dealing with impartiality rarely, if at all, refers to this philosophical literature.

Political and moral philosophy is the branch of philosophy that sets “the tradition of political thinking on a foundation of moral argument.”² It maintains that political deliberation in a democracy can and should start from the moral judgments of ordinary citizens, and concerns itself with the ways that these judgments can attain a common public good without bias towards the special interests of any individual or group. The ideals of political and moral philosophy have gained purchase in contemporary discussions over public policy and social justice. This article goes beyond those spheres to inquire into the ways in which the debates surrounding impartiality in moral and political philosophy and those in Canadian public law share common ground. More specifically, this article asks how political and moral philosophy may prove useful in understanding and furthering the Canadian administrative law jurisprudence on impartiality. In this article, I argue that comparing the philosophical and jurisprudential discourses challenges us to reconsider the judicial methods by which decision-making impartiality is established, and that this challenge is particularly pertinent in administrative law.

In this article, I develop a theory of grounded impartiality to be used in Canadian administrative law. Grounded impartiality refers to the use of inquiry and close inspection during judicial review in order to ensure impartiality on the part of decision makers and their institutions. The theory relies on a set of

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1. This article refers to constitutional and administrative law. The intricacies of criminal law, tax law, and other specialized autonomous public law areas are not addressed.
 2. See Martha Nussbaum, “The Enduring Significance of John Rawls”, *Chronicle of Higher Education* (20 July 2001) B7 at B9. Although the branch of philosophy is termed “political and moral philosophy,” this article at times uses the shorthand of “political philosophy.”

generative conceptual factors drawn from the impartiality debates in political and moral philosophy that can serve to guide judicial inquiry into whether a reasonable apprehension of bias exists in any given set of circumstances. An approach to impartiality that reflects concerns emphasized in political and moral philosophy can already be seen in public law cases in which the bias of individual judges is alleged. However, a similar approach has yet to crystallize fully in administrative law.

In Part II of this article, I provide an overview of the major debates regarding impartiality that have arisen in political and moral philosophy. John Rawls's *A Theory of Justice*³ is chosen as a starting point⁴ because his work conveys contemporary originating ideas of how the State should maintain impartiality among the many moral doctrines that may arise in public decision making, public-policy making, and, more generally, in the creation of public institutions. Rawls's work also provides a procedure (albeit one that is strongly contested) for determining what is socially just amidst competing conceptions of the good. I then briefly examine some of the major responses to Rawls's theory from communitarian, contextualist, feminist, and discourse theorists.

Part III of the article begins by outlining the main analytical approaches to ascertaining impartiality in judicial and administrative decision making in Canadian public law jurisprudence. It then draws on the philosophical foundation set out in Part II to show that the use of the conceptual factors of grounded impartiality can lead to decisions about impartiality that are better-informed, more meaningful, and more transparent. Ultimately, I conclude that examining issues of administrative law impartiality through this philosophical lens can serve to inspire greater public confidence in our public institutions.

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3. John Rawls, *A Theory of Justice* (Cambridge: Belknap Press of Harvard University, 1971). Rawls initially revised his work in preparation for German translation in 1975, though the final body of revisions incorporated changes made in response to criticisms and a revised second edition was published in English in 1999. The revisions touched on the substance of some of Rawls's ideas including the formulation of the two principles of justice as fairness. (Rawls's first principle of justice as fairness was reworked several times, including in 1973 and 1993, to adjust the meaning of "extensive basic liberty".) This article refers to the 1971 edition of the text. I have chosen the earlier edition because many of the major schools of thought that replied to or critiqued Rawls's theory did so before 1999 and their responses are therefore to the original version of this work.
 4. Although this article starts with the contemporary work of John Rawls, this is not to discount the important role that earlier philosophers such as Immanuel Kant also played in asserting a necessary connection between the moral judgment of ordinary citizens and good political deliberation. The work of these earlier philosophers, however, is beyond the scope of this article.

II. IMPARTIALITY IN POLITICAL AND MORAL PHILOSOPHY: FROM RAWLS TO HABERMAS

A. RAWLS AND IMPARTIALITY

John Rawls's *A Theory of Justice* deals with the political question of how to maintain State impartiality among a plurality of moral doctrines when designing the public institutions responsible for distributing social goods. The concern was prompted by the deep inequalities in social position that are brought about by birth and socio-economic circumstances and that are unmeritoriously favoured by the political system. These inequalities may lead to the creation and distribution of rights, duties, and advantages that similarly reflect unequal social participation. Rawls therefore outlined a set of principles for identifying the considerations relevant to determining the proper balance between competing claims of "the good life."⁵

Although created as a hypothetical construct not necessarily designed to be put in action, the procedure outlined in *A Theory of Justice* provides an avenue through which citizens can determine substantive principles of justice impartially. In Rawls's procedure, citizens abstract themselves from their moral commitments, obligations, community ties, and worldviews in order to agree on the first principles of justice. Moreover, each person "exclud[es] the knowledge of those contingencies which sets men at odds and allows them to be guided by their prejudices,"⁶ including age, race, gender, and degree of wealth. In this hypothetical situation, the parties are said to be in the "original position" and under a "veil of ignorance." The process of choosing principles of justice under these conditions, said Rawls, was one of rational justification—meaning that after reflecting on feasible alternatives, the individuals should select the principles they wish to govern the distribution of social goods for all.⁷ According to Rawls, individuals who have distanced themselves from their immutable personal characteristics and socio-economic circumstances are the ones who should decide the distribution of social goods. Theoretically, this citizen participation would give rise to an egalitarian or *impartial* assignment of rights, duties, and benefits and receive citizen approval on that basis.

5. Rawls, *supra* note 3 at 9-10.

6. *Ibid* at 19.

7. See *ibid* at ss 20-21 (for the list of alternative conceptions of justice from which those in the original position are to choose).

Rawls asserts, however, that two substantive principles of justice will always naturally guide those in the original position. These principles are: first, that each person should equally possess the greatest liberty that is compatible with similar liberty for others (the liberty principle); and second, that inequalities in the distribution of advantages be allowed only if they work to the benefit of the worst-off members of society (the difference principle).⁸

B. THE SUBJECT OF RAWLSIAN JUSTICE AND DECISION-MAKING INSTITUTIONS

Rawls's theory is generally known for its application to public-policy making, but to what extent can it address adjudicative decision-making institutions such as courts and tribunals? In this section, I discuss the scope of Rawls's concept of justice, highlighting aspects of Rawls's theory that shed light on his understanding of impartiality in legal decision-making contexts.

Rawls begins his theory with an express indication of the scope of its application, explaining what constitutes the subject of justice. For Rawls, the subject of justice is the basic structure of society. It concerns "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation."⁹ The "major social institutions" are ones that play the fundamental role of defining an individual's "rights and duties" and "influence their life-prospects, what they can expect to be and how well they can hope to do."¹⁰ Rawls's ideal is meant to be pervasive. It is clear that the institutions he contemplated not only encompass traditional political institutions but economic institutions, competitive markets, private property, and the family as well.¹¹

8. *Ibid* at ss 11, 60-61.

9. *Ibid* at 7. Another useful formulation of the subject of justice is given later in section 14: "[T]he first distributive problem is the assignment of fundamental rights and duties and the regulation of social and economic inequalities and of the legitimate expectations founded on these" (*ibid* at 84).

10. *Ibid* at 7.

11. *Ibid*. In Rawls's words:

Our topic ... is that of social justice. For us the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. By major institutions I understand the political constitution and the principal economic and social arrangements. Thus the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family are examples of major social institutions.

Rawls's delineation of the subject of justice invites questions about the extent to which courts and other public decision-making bodies would be similarly encompassed. Rawls's theory is addressed primarily at societal decision making in a broad sense: It aims to provide a way for members of society to reach agreement on principles of justice without favouring a particular conception of the good in the process. It is clear that Rawls's project is relevant to public debate leading to the creation of laws. Less clear is the degree to which it would address competing conceptions of justice that become manifest during the application and judicial review of these laws. In other words, more emphasis is placed on impartiality in defining the elements of institutional design leading to the creation of just laws than on the impartial application and review of such laws.¹²

Rawls refers to common public decision-making institutions (courts, tribunals, and other entities of public administration), though they are not the central focus of his work.¹³ Nevertheless, courts and other adjudicative bodies implicitly fall within the tapestry of "social institutions [that] distribute fundamental rights and duties and determine the division of advantages from social cooperation."¹⁴ Indeed, there are two significant instances where judging and impartiality are discussed in *A Theory of Justice*—with respect to the rule of law and the impartial sympathetic observer. The next section outlines Rawls's view on judging as seen through his commentary on these two ideas. This discussion will serve as a useful background against which to consider how critiques of Rawlsian

See also Shane O'Neill, *Impartiality in Context: Grounding Justice in a Pluralist World* (Albany: State University of New York Press, 1997) at 13. O'Neill asserts that the main elements of the basic structure of society include aspects of life that earlier liberals would have considered beyond the scope of public concern such as economic institutions—including the competitive market and private property—and social institutions such as the family.

12. See Andreas Schedler, "Arguing and Observing: Internal and External Critiques of Judicial Impartiality" (2004) 12:3 J Pol Phil 245 at 248. Schedler explains the distinction between the two types of impartiality in this way:

Impartial institutions are ethically neutral insofar as they do not discriminate between competing conceptions of the good. Impartiality as a principle of argumentation and decision-making is epistemically neutral insofar as it gives a fair hearing to all points of view involved in a conflict.

13. See *Ibid.* Schedler observes that the implications of Rawls's work for adjudicative impartiality have not been given much attention. Impartiality as a function of designing institutions is treated at length in Rawls's work and its exegesis. However, impartiality as a normative principle of action is not prominent. Schedler states that the idea of "justice as impartiality" has been concerned with impartial institutions, rather than impartial actors.
14. Rawls, *supra* note 3 at 7.

liberalism may be aligned with the need for a more expansive and concrete understanding of impartiality in administrative decision-making contexts.

C. THE RULE OF LAW AND THE IMPARTIAL SYMPATHETIC OBSERVER

Rawls defines the rule of law as the consistent application of public rules within the legal system. This idea of justice as regularity was described in *A Theory of Justice* as “formal justice.”¹⁵ It stems from Rawls’s view that an institution is a public system of directives in which everyone subject to the system and administering it is aware of the rules. Rawls points out that treating like cases in a similar manner by applying “the correct rule as identified by the institutions”¹⁶ does not necessarily ensure that substantive justice will result. The degree to which regular application will render justice in a substantive sense depends, first, on the principles of substantive justice on which the laws and institution rest and, second, on the possibility of reforming these principles. For Rawls, the useful aspect of formal justice, and the reason why it should be preserved, is simply that it secures legitimate expectations. People subject to a regularized system will know what to expect and will govern themselves accordingly, even if the substantive principles on which the law is built are unfair.¹⁷

However, the rule of law entails not only consistency but also impartiality in the application of the law. Rawls states explicitly that judges must be “independent and impartial” in order to preserve the rule of law.¹⁸ In this sense, the authorities administering the law should not be influenced by “personal, monetary or other

15. *Ibid* at 58.

16. *Ibid.*

17. *Ibid* at ss 14, 83-87. Rawls’s description of formal justice also brings to mind his discussion of pure, perfect, and imperfect procedural justice. These comments are made in expounding on the second part of the second principle of justice—fair equality of opportunity. Rawls asserts that the role of the principle of fair opportunity is to ensure that the system of cooperation is one of pure procedural justice. In brief, pure procedural justice means simply that following a procedure deemed to be fair produces a necessarily fair result. In explaining this concept, Rawls contrasts it with perfect and imperfect procedural justice. Perfect procedural justice, which is rare, exists where there is an independent standard for deciding which outcome is just as well as a procedure guaranteed to lead to it. Imperfect procedural justice exists when there is an independent criterion for the correct outcome but no feasible procedure sure to lead to it. Criminal trials are given as an example of imperfect procedural justice. Colin Kaufman summarizes Rawls’s ideas on the different forms of procedural justice in one of the earlier works to address the concerns raised by communitarians, feminist theorists, and others. See Colin K Kaufman, “The Nature of Justice: John Rawls and Pure Procedural Justice” (1979-1980) 19:2 *Washburn LJ* 197.

18. Rawls, *supra* note 3 at 239.

irrelevant considerations in their handling of particular cases.¹⁹ Violations of the rule of law can occur as a result of bribery, corruption, and the abuse of the legal system to punish political enemies, as well as through subtler means like bias against certain groups.²⁰ Rawls's comments on formal justice and the rule of law focus on independent conditions that verify, by their presence or absence, whether an official's decision making has been prejudicially influenced. But, with respect to a process for deciding matters between two or more competing claims, the notion of impartiality is elaborated more fully in Rawls's criticism of the utilitarian notion of the impartial sympathetic observer.

The impartial sympathetic observer theory maintains that the most effective way to come to a decision about what is just is for a rational spectator to place him or herself in the position of each person affected. Rawls describes the impartial sympathetic observer in the following way:

[H]e is equally responsive and sympathetic to the desires and satisfactions of everyone affected by the social system. His own interests do not thwart his natural sympathy for the aspirations of others and he has perfect knowledge of these endeavors and what they mean for those who have them. Responding to the interests of each person in the same way, an impartial spectator gives free reign to his capacity for sympathetic identification by viewing each person's situation as it affects that person. Thus he imagines himself in the place of each person in turn, and when he has done this for everyone, the strength of his approval is determined by the balance of satisfactions to which he has sympathetically responded.²¹

Thus, the approach taken by the impartial sympathetic observer is characterized by an ability to identify with each claimant's situation and with his or her understanding of what is good. Rawls denounced this approach, however, for bringing sympathy into the standard of justice. Using sympathy as determinative, Rawls argued, is akin to adopting a view of the good and imposing it on others.²² Instead, he favoured an approach based on mutual disinterest. In keeping with his central liberal idea that those making decisions about the good of society must be disembodied, Rawls argued that these actors best exercise their discretion

19. *Ibid* at 59.

20. *Ibid* at 235.

21. *Ibid* at 186.

22. It is ironic that Rawls prefers the approach of mutual disinterest because it "leads to the two principles of justice" (*ibid* at 187). It is interesting that he does not elaborate why these liberalist principles should be seen as any less partial than the guiding principle of sympathy.

by viewing the possibilities in a general way. As Seyla Benhabib has put it, for Rawls, the process of moral decision making:

involves the capacity to take the standpoint of the other, to put oneself imaginatively in the place of the other, but under the conditions of the 'veil of ignorance,' ... the other is not constituted through projection, but as a consequence of total abstraction from his or her identity.²³

In conclusion, Rawls addresses impartiality and judging by painting a picture in which decision-making fairness is encased in objective guarantees. This universalist approach uses the criteria of distance and objectivity to determine if fairness can be achieved. The use of abstraction and distance as means of guaranteeing impartiality in decision making is, in many ways, a fundamental ideal of classic liberalism. Most notably, it pervades the work of Ronald Dworkin, who, as a counterpart to Rawls in the realm of jurisprudence, also espoused the liberal notion of a neutral, disinterested, and objective judge who could balance his or her own political morality against the requirements of jurisprudential fit.²⁴ In other words, the idea that impartiality requires objectivity, abstraction, and disinterest resonates with liberalism as a political ideology and finds support in both political and legal theory.

Nevertheless, engaging with the more subjective, “messier” aspects of legal and factual analysis may, in some cases, provide more authentic and fair results.²⁵

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23. Seyla Benhabib, “The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory” in Seyla Benhabib & Drucilla Cornell, eds, *Feminism as Critique: On the Politics of Gender* (Minneapolis: University of Minnesota Press, 1987) 77 at 89 [Benhabib, “The Generalized and the Concrete Other”].
24. See Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986) [Dworkin, *Law's Empire*]. The notional judge referred to as “Hercules” is discussed in *Taking Rights Seriously* (London: Duckworth, 1978). See also Anne Barron, “Ronald Dworkin and the Challenge of Postmodernism” in Alan Hunt, ed, *Reading Dworkin Critically* (New York: Berg, 1992) 141. Barron carefully and usefully delineates Dworkin's connection to liberalism. See also generally Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Belknap Press, 2011).
25. Canadian equality jurisprudence has shown as much with its doctrinal shift from formal to substantive equality. For an illustration of this shift, see *Bliss v Canada (AG)*, [1979] 1 SCR 183, 92 DLR (3d) 417 [*Bliss*]; *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219, 59 DLR (4th) 321 [*Brooks*]. In *Bliss*, the SCC held that a benefit plan that was disadvantageous to women on maternity leave did not discriminate on the basis of gender. The Court went on to state that “[a]ny inequality between the sexes in this area is not created by legislation but by nature” (*ibid* at para 14). In *Brooks*, the Court recognized the need for a more substantive approach to equality. On similar facts, but notably during the era of the *Charter of Rights and Freedoms*, a discrepancy in benefits between those unemployed because of maternity as opposed to sickness or accident was held to be discriminatory. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [*Charter*].

Indeed, communitarians, feminist theorists, and others have critiqued Rawls's liberal approach for its lack of appropriate sensitivity to context. This call for contextualization asks for attention to the specific characteristics of those making the decision and, at other times, to the contextual circumstances of those being judged. The critiques of Rawlsian liberalism are particularly helpful in revealing contextual elements that may fruitfully be explored when a lack of impartiality is alleged in administrative law. In the next section, I present an historical overview of significant critiques of Rawlsian liberalism as a means of highlighting some of the key ideas that have arisen as more context-sensitive approaches to social justice were proposed in moral and political philosophy.

D. CHALLENGES TO RAWLSIAN IMPARTIALITY

Since the publication of *A Theory of Justice*, several schools of thought have emerged proposing more contextual approaches to determining impartiality in the public policy realm, in an attempt to better serve the ends of social justice. These critiques of Rawlsian liberalism were launched by, among others, communitarians, contextualists, feminist theorists, and discourse theorists. One of the central challenges has been with respect to the plausibility of Rawls's veil of ignorance. Communitarians, for example, assert that community, character, and friendship are necessary for a true definition of the self and question whether it is possible to choose among conceptions of justice without reference to a prior commitment to the good life that stems from one's intersubjective existence.²⁶ The communitarian critique has served as a prelude to the criticism, launched by contextualist scholars, that justice is intimately connected to context and that there may be a plurality of contexts to consider simultaneously in reaching a conception of the good life.²⁷ Feminist critiques have also been quite strong in asserting that gender is a critical aspect of context that must be taken into account.²⁸

These debates bear some resemblance to the evolution of the Canadian public law jurisprudence dealing with the issue of adjudicative bias. Both the discussions in political and moral philosophy and those in the courts show movement from an approach to justice that centres on blind, universal principles to one that is more context-driven. Both also struggle with the tensions that arise when

26. Michael J Sandel, *Liberalism and the Limits of Justice*, 2d ed (New York: Cambridge University Press, 1998).

27. Michael Walzer, *Spheres of Justice: A Defence of Pluralism & Equality* (New York: Basic Books, 1983).

28. Susan Hekman, "The Embodiment of the Subject: Feminism and the Communitarian Critique of Liberalism" (1992) 54:4 J Pol 1098.

the resolution of specific situations requires both contextualized and universal elements. Finally, the movement in both realms towards more situated contextual methodologies shows the promise of providing a more rigorous, transparent, and authentic understanding of impartiality. In this section, I outline the debates that have arisen over the course of more than four decades in political philosophy with respect to the notion of impartiality in the public policy realm.

1. COMMUNITARIANISM

Communitarians challenged the notion of the deontological self driven by acontextual moral duties, which lies at the heart of Rawls's liberal theory of impartiality.²⁹ Michael Sandel, who launched one of the most memorable communitarian critiques of Rawls's *A Theory of Justice*,³⁰ found the deontological ethic implausible. He argued that Rawls's unencumbered self does not allow for intersubjective conceptions of the individual that are essential to the definition of a person:

Intersubjective conceptions allow that in certain moral circumstances, the relevant description of the self may embrace more than a single, individual human being, as when we attribute responsibility or affirm an obligation to a family or community or class or nation rather than to some particular human being. . . . But we cannot regard ourselves as independent in this way without great cost to those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable

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29. The debate between the communitarians and Rawlsian liberalists took place primarily in the 1980s. It has been said that communitarianism died out in the 1990s. See *e.g.* Matt Matravers, "Review of Contexts of Justice: Political Philosophy beyond Liberalism and Communitarianism by Rainer Forst" (2004) 113:451 *Mind* 539. Further, Michael Walzer wittily likened the communitarian critique to a fashion trend: transient but certain to return. Walzer considers communitarianism to be an intermittent feature of liberal politics and social organization. See "The Communitarian Critique of Liberalism" (1990) 18:1 *Pol Theory* 6 [Walzer, "Communitarian Critique"].
30. See Michael J Sandel, *Liberalism and the Limits of Justice*, 2d ed (New York: Cambridge University Press, 1998). By far, this is the most-referenced communitarian critique. Shane O'Neill refers to it as possibly one of the most celebrated critiques of Rawls's work from a communitarian perspective. See O'Neill, *supra* note 11 at 22. Other communitarians include Alasdair MacIntyre and Charles Taylor—whose work is said to be inspired by Aristotelian notions that shared understandings of the good for the person and his or her community is the foundation of any concept of justice, and Roberto Unger, whose critique of liberalism is said to find its inspiration in the Hegelian conception of man as a historically conditioned being. Alasdair MacIntyre *After Virtue* (Notre Dame: Notre Dame University Press, 1981); Roberto Unger, *Knowledge and Politics* (New York: Free Press, 1975). These communitarians, their inspirations and approaches are discussed by Amy Gutmann. See "Communitarian Critics of Liberalism" (1985) 14:3 *Phil and Pub Affairs* 308.

from understanding ourselves as the particular persons we are – as members of this family or community or nation or people, as bearers of this history, as sons and daughters of that revolution, as citizens of this republic.³¹

In other words, the good of the community often figures as a constitutive dimension of a person. The liberal insistence that individuals be extracted from all moral commitments does not allow for an authentic picture of the self. At its heart, the liberal-communitarian debate centres on how we should conceive of the person.³²

Communitarians attack the Rawlsian idea that the principles of justice that guide our rights do not depend on any particular notion of the good life.³³ It seems impossible that one's reflections on justice should be divorced from one's understanding of the good life. Politically speaking, "our deliberations about justice and rights cannot proceed without reference to the conceptions of the good that find expression in the many cultures and traditions within which those deliberations take place."³⁴ We need something to guide our choices in the original position.³⁵

Another important aspect of the communitarian critique centres on the voluntary element embedded in the original position. Some communitarians express scepticism about whether we can truly limit ourselves to being bound by the ends and roles that we choose for ourselves.³⁶ On the contrary, we are sometimes obligated to fulfill ends that we have not chosen but that are imposed

31. Sandel, *supra* note 30 at 63, 179.

32. *Ibid* at 186.

33. See Charles Taylor, "Cross-Purposes: The Liberal-Communitarian Debate" in Derek Matravers and Jon Pike, eds, *Debates in Contemporary Political Philosophy: An Anthology* (London: Routledge, 2005) 195 at 198. Taylor notes that liberalism faces the charge of being unrealistic and appropriate only to certain western societies as a result of its exclusion of a socially endorsed conception of the good.

34. *Ibid.*

35. This is not to say that all communitarians argue that rights should be based on the values or preferences that prevail in a given community at any given time. Sandel notes that the label "communitarianism" is misleading for this reason. Sandel, *supra* note 30 at 186. While some communitarians espouse this view, the more robust debate between the liberalists and the communitarians centres on whether the right can truly exist prior to the good—that is, whether it is possible to define and defend rights without presupposing any particular conception of the good life. Sandel's new closing chapter in the second edition of *Liberalism and the Limits of Justice* discusses the liberalism-communitarian debate that arose after the original publication of his book. See *ibid.*

36. See e.g. Charles Taylor, "Atomism" in Alkis Kontos, ed, *Powers, possessions, and freedom: Essays in Honour of CB Macpherson* 39.

by our identity as members of a family, a people, a culture, et cetera.³⁷ Nevertheless, some have defended liberalism against this communitarian challenge. Will Kymlicka, for example, has argued that our ultimate goal is to rethink our present life projects so that we may live a life that is better than the one we are currently pursuing. In this way, we do not necessarily aim to accept that our present circumstances are pre-determined, either as individuals or as part of a community—rather, they are open to reconsideration, revision, or rejection.³⁸

Communitarians maintain that use of the deontological self as an ideal limits the pursuit of justice in a few ways.³⁹ First, doing so denies the self of character. To imagine a person without constitutive attachments is to imagine a person who is “wholly without character, without moral depth,”⁴⁰ and who is incapable of self-knowledge in any morally serious way. This may make self-reflection impossible and may consequently render the ends sought by the self to be preferential but morally irrelevant.⁴¹ By contrast, a person in the original position is able to reach a choice of ends that is less arbitrary when he or she can take preferences into account while assessing their suitability in light of his or her constitutive and authentic identities.⁴² Second, the denial of character in the constitutive sense also denies friendship. Because it involves receiving and contemplating someone else’s perception of them, friendship can help bring one’s self-image to light and facilitate knowledge of self.⁴³ Finally, the unencumbered self is an unworkable

37. *Ibid* at 187.

38. See Will Kymlicka, “Liberalism and Communitarianism” (1988) 18:2 Can J of Phil 181.

39. See e.g. Sandel, *supra* note 30; MacIntyre, *supra* note 30; Charles Taylor, “The Nature and Scope of Distributive Justice” in Charles Taylor, *Philosophical Papers* (Cambridge UK: Cambridge University Press, 1985).

40. Sandel, *supra* note 30.

41. *Ibid* at 180.

42. *Ibid*. But see Charles Larmore, Book Review of *Liberalism and the Limits of Justice* by Michael J Sandel, (1984) 81:6 J of Phil 336 at 339. Larmore asserts that Sandel’s argument about character is unclear. He points out that Sandel does not specify whether an individual is unable to conceive of her or himself in the absence of constitutive attachments to the community or whether he or she is unwilling to do so. He further notes that Sandel offers no support for his assertion that commitments of character are related to moral depth. Gutmann similarly argues that Sandel and other communitarians do not defend communitarianism directly and that their critiques of liberalism do not succeed in demonstrating that it has a weak foundation. See Gutmann, *supra* note 30. Walzer additionally observes that the communitarians present two main critiques of liberalism that conflict fundamentally with one another. One suggests that liberal political theory reflects liberal social practice. The other suggests that liberal political theory largely misinterprets real life. See Walzer, “Communitarian Critique,” *supra* note 29.

43. Sandel, *supra* note 30 at 181.

model. Rawls states that “the self is prior to the ends which are affirmed by it.”⁴⁴ However, communitarians insist that a person who is divorced from his or her community ties cannot choose a conception of the good, because she or he is atomistic. They also argue that our personhood is partly made up of our conception of a good life and that more emphasis should therefore be laid on “constitutive projects and attachments.”⁴⁵

With respect to role played by legal decision makers, communitarianism offers a more imaginative understanding of the importance of constitutive attachments as well as community and community-shared norms.

2. CONTEXTUALISM

The contextualists conceptualize the concerns raised by the communitarians differently. Both stress the importance of community, but whereas communitarians focus on the constitutive role that community plays with regard to the self, contextualists argue that the principles of justice themselves are dependent on the shared understandings that exist within particular communities. Michael Walzer, one of the foremost thinkers in contextualism, advocated for a conception of justice that he called “complex equality.”⁴⁶ Since justice depends on local understandings and is pluralistic in nature, it is not possible to have a universal principle or set of principles that lead to justice. As Walzer put it:

It’s not only a matter of implementing some singular principle or set of principles in different historical settings. ... I want to argue for more than this: that the principles of justice are themselves pluralistic in form; that different social goods ought to be distributed for different reasons, in accordance with different procedures, by different agents; and that all these differences derive from different understandings of the social goods themselves – the inevitable product of historical and cultural particularism.⁴⁷

At issue is the plurality of cultures and the particularity that each culture shows in understanding and distributing its goods. The only way to produce principles of justice that reflect these aspects is for each community to interpret their shared understandings of the goods to be distributed and the most just way of doing so. Although Walzer’s method aimed to provide a more authentic, context-sensitive understanding of justice, it has also been criticized for rejecting

44. Rawls, *supra* note 3 at 560.

45. Sandel, *supra* note 30 at 181.

46. Michael Walzer, *Spheres of Justice: A Defence of Pluralism & Equality* (New York: Basic Books, 1983).

47. *Ibid* at 6. See also Michael Walzer, “Philosophy and Democracy” (1981) 9:3 *Pol Theory* 379. For an overview of Walzer’s work generally see William A Galston, “Community, Democracy, Philosophy: The Political Thought of Michael Walzer” (1989) 17 *Pol Theory* 119.

universal principles in favour of an approach that is overly context-dependent.⁴⁸ As discussed in the next section, feminist critiques have countered concerns about context dependency by reconceiving the nature of the relationship between particularity and universalism. Overall, contextualism is relevant to legal decision making insofar as it stresses the value of local understandings and the shifting or flexible nature of impartiality depending on the communities being judged.

3. FEMINIST CRITIQUES

There are similarities between the feminist and communitarian critiques of liberalism, including that both advocate for a subject that is constituted rather than constituting⁴⁹ and connected rather than autonomous. However, aspects of the feminist critique are distinct.⁵⁰ Several major arguments can be taken from a reading of the feminist literature responding to Rawlsian liberalism.⁵¹ When read alongside discourses of impartiality in adjudication, feminist theory is especially useful for its emphasis on connection (a holistic appreciation of those engaged in discourse) and on the value that it places on grounded universalization.

Feminist theorists tend to discuss the themes of gender and essentialism.⁵² One idea that prevails in the feminist critique is that the Rawlsian approach favours

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48. For critiques of Walzer's approach see O'Neill, *supra* note 11 at ch 3 ("Hermeneutics and Justice"); Rainer Forst, *Contexts of Justice: Political Philosophy beyond Liberalism and Communitarianism*, translated by John MM Farrell (Berkeley: University of California Press, 2002).
49. That is, a subject that is embedded in a community's principles of social justice rather than one that is creating them.
50. See generally, Susan Hekman, "The Embodiment of the Subject: Feminism and the Communitarian Critique of Liberalism" (1992) 50:4 J Pol 1098 [Hekman, "The Embodiment of the Subject"].
51. The following significant feminist critiques and discussions have been considered: Benhabib, "The Generalized and the Concrete Other," *supra* note 23 at 77; Iris Marion Young, "Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory" in Seyla Benhabib & Drucilla Cornell, eds, *Feminism as Critique: On the Politics of Gender* (Minneapolis: University of Minnesota Press, 1987) 56 [Young, "Impartiality"]; Brian Barry, *Justice as Impartiality* (New York: Oxford University Press, 1995) (especially "Part III – Some Mistakes about Impartiality"); Susan Hekman, *ibid*; O'Neill, *supra* note 11 (especially the section "The Feminist Challenge"); Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1993); Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (Berkeley: University of California, 1978); Dorothy Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements and Human Malaise* (New York: Harper & Row, 1976).
52. Hekman, "The Embodiment of the Subject," *supra* note 50 at 1099. Essentialism and the related notion of identity, especially group identity, have developed into important themes of their own. See Charles Taylor, *Multiculturalism: Examining the Politics of Recognition*

a way of reasoning that is associated, implicitly or explicitly, with masculinity. Iris Marion Young, for instance, highlighted the distinction between reason and desire that is inherent in the process of impartial reasoning. The Rawlsian subject is a rational one that has removed itself from desire, affectivity, and the body. Young suggests that, as a consequence, desire is seen as irrational. Furthermore, to the extent that women are affected by these elements or incorporate them in their judgment, their decision-making processes are seen as impure and inferior.⁵³ Academics such as Carol Gilligan, Nancy Chodorow, and Dorothy Dinnerstein furthered the theory that rationality is a trait more strongly associated with male than female development. They concluded that women are discouraged from developing the traits of rationality, separation, and autonomy while men are encouraged to do so. As a result, women become connected subjects, constituted through an ethics based on caring and their connections with others.⁵⁴ Since these traits are viewed with suspicion in a world of objective rationality, the reasoning processes associated with them are rejected. Affect, emotion, and connections with others are therefore limited to the private sphere, segregated from public fora of deliberation, despite potentially providing valuable insights for judging.

Another significant feminist challenge to liberalism focuses on the use of a generalized other in creating universal principles of justice. Theorists such as Benhabib have criticized the universality that liberalism defends because it generalizes from the experiences of non-human (or fictitious) selves. The individuals placed behind the theoretical veil of ignorance have had all their individuating characteristics removed, with no qualities to distinguish one from the other. In Benhabib's words: "[W]hat we are left with is an empty mask that is everyone and no one."⁵⁵ As she suggests, this removal of difference means that there is no true human plurality in the original position. Because the Rawlsian process involves making decisions by placing oneself in the position of another disembodied self, the process appears incoherent: There is no other behind the veil of ignorance, just several selves similarly constituted. For this reason,

(Princeton: Princeton University Press, 1994); Iris Marion Young, "Difference as a Resource for Democratic Communication" in James Bohman & William Rehg, eds, *Deliberative Democracy: Essays on Reason and Politics* (Cambridge: MIT Press, 1997) 383 [Young, "Difference for Democratic Communication"].

53. Young, "Impartiality," *supra* note 52 at 62-63.

54. See Gilligan, *supra* note 52; Chodorow, *supra* note 52; Dinnerstein, *supra* note 52; Barry, *supra* note 52 at 236-37.

55. Benhabib, "The Generalized and the Concrete Other," *supra* note 23 at 89.

Benhabib termed the Rawlsian process “substitutionalist.”⁵⁶ Not requiring those behind the veil of ignorance to speak from a perspective that stresses their commonalities and differences denies the opportunity to gain the rich intersubjective insights that would result from being forced to address what it is that makes us different. Doing so would allow for more grounded attempts at universalization.⁵⁷ Understanding how individuals are different requires incorporating their varying viewpoints in the original position. In identifying the desires of individuals in the original position, it is necessary to know something about the person who holds these desires. In other words, it is important to account for difference in deducing universal principles.

Theorists such as Benhabib have argued that if universalization entails grouping similar situations together and extracting general principles from them, then it is necessary to know more about the individuals in the original position, including their histories and moral attitudes, in order to determine if the moral situations about which they are deciding are like others:

While every procedure of universalizability presupposes that ‘like cases ought to be treated alike’ or that I should act in such a way I should also be willing that all others in a like situation act like me, the most difficult aspect of any such procedure is to know what constitutes a ‘like’ situation or what it would mean for another to be exactly in a situation like mine. Such a process of reasoning, to be at all viable, must involve the viewpoint of the concrete other, for situations ... do not come like ‘envelopes and golden finches,’ ready for definition and description...⁵⁸

Rawls’s theory presupposes a singular self who imagines himself or herself in the position of the other, an approach that Benhabib terms “monological.”⁵⁹

56. A term coined by Benhabib to describe the theories of Kant and Rawls in which rational agents, placed behind epistemic strictures of ignorance, would agree. Substitutionalists treat individuals in a generalized fashion in order to point to universal truths. See Benhabib, *supra* note 23 at 82.

57. See also Shane O’Neill’s discussion of this question. O’Neill, *supra* note 11 at 52-54.

58. Benhabib, “The Generalized and the Concrete Other,” *supra* note 23 at 90-91.

59. Interestingly, the feminist challenges to liberalism have been countered by the argument that feminists and liberalists are not addressing the same issue. Brian Barry, for instance, maintains that feminists and liberalists are parties to an ill-joined debate. Feminists are concerned with using impartiality as a basic principle of everyday life. They believe that moral situations exist in which it is legitimate to favour one person over another. Often such situations deal with the claims that can be made between family members and others in close relationships. Their critique is therefore of the notion that all must be treated the same way. Barry suggests, however, that the notion of impartiality espoused by liberalists and others in the impartialist camp is not designed to make impartiality a complete rule for everyday living. Barry concludes that not only is the debate between the liberalists and feminists ill-joined in this respect, but both parties have valid points of view. See Barry, *supra* note 51.

Instead, she argues that moral decisions should be based on mediations between concrete individuals, insisting that it is necessary to assume “the standpoint of the concrete other”⁶⁰ in order to reach meaningful conclusions about what would be acceptable by all.

4. DISCOURSE THEORY

As an alternative to the original position (which is founded on autonomous, generalized, constituting agents) and building on the relational ideas of feminist theorists, many critics have proposed a theory of justice based on genuine rather than hypothetical discourse. Discourse theory conceives of actual dialogue among participants involved in developing principles of justice. It thereby offers a means of avoiding the pitfalls of liberalism identified by communitarians, contextualists, and feminists. The work of Michel Foucault and Jürgen Habermas has inspired the move towards discourse. Foucault’s ideas of resistance and the discursive subject draw attention to the ways in which contending discourses interact to produce differing identities, whereas Habermas’s theory of communicative action is a strong source for the notion that discussion and consensus are key to a political democracy.

Foucault’s conception of the discursive subject furthers his theory of resistance by challenging spaces that have been constructed for groups in society by those who are more powerful.⁶¹ Described as “both constructed and creative,”⁶² the discursive subject takes from the manifold discourses that exist in society—such as liberalism, femininity, motherhood, equality, and rationality—in order to constitute itself. The subject is constantly creating itself “out of the resources available to members of the culture, to speakers of the language and the multiplicity of discourses that comprise a language and culture.”⁶³ When considered within the context of the challenges that liberalism and communitari-

Mendus responds to Barry by arguing that although the differences between impartialists and their critics run very deep, reconciliation is possible and “its possibility lies in a form of impartialism which accords centrality to partial concerns.” Susan Mendus, *Impartiality in Moral and Political Philosophy* (New York: Oxford University Press, 2002) at 2. Mendus suggests that it is important to consider the origin and extent of impartialism’s motivational power, which she argues is its ability to accommodate the partial concerns we have for others.

60. Benhabib, “The Generalized and the Concrete Other,” *supra* note 23 at 91.

61. See Michel Foucault, *Power/Knowledge* (New York: Pantheon Books, 1980); Michel Foucault, *Language, Counter-Memory, Practice* (Ithaca: Cornell University Press, 1977). See also Susan Hekman’s discussion of Foucault and his use of the discursive self in addressing feminist challenges to liberalism. Hekman, *supra* note 51 at 1113-17.

62. *Ibid* at 1113.

63. *Ibid* at 1116.

anism pose to gender, for example, the discursive subject is a progressive step. As compared to liberalism, there is no essential masculine-oriented self that is seen as standard and that relegates difference (including the difference of femininity) to a lower hierarchical level. Similarly, the notion of the discursive self eliminates the communitarian concern with respect to determinism: The danger of adopting a fixed, pre-conceived role for women and other groups that has been constituted by community or society can be avoided. Groups are thus able to create a new discourse or, given the plurality within any one group, even a multiplicity of discourses.

Aspects of Habermas's communicative action theory have been even more influential than Foucault's discursive subject in developing a dialogic alternative to Rawlsian liberalism. Habermas's theory is premised on the notion that public deliberations in which consensus is reached constitute the process through which norms can be democratically created.⁶⁴ Unlike Rawls, Habermas opposed the idea that universal guiding principles can be developed from an abstracted point of view. The principles that are developed through communicative action are said to be universal precisely because they represent a collective, consensual expression of will brought about through real dialogue. Furthermore, under the Habermasian approach, even the rules of discourse themselves can be questioned and reconstructed by the participants. This can be valuable in addressing power imbalances in the deliberations caused by gender, culture, or other differences. While his approach shares common ground with contextualism in that both stress sensitivity to context, Habermas believes more strongly in the potential for the principles of social justice to have a universal reach if developed using his dialogic model. His project also aims to be more sensitive to the fact that there are plural viewpoints within a community.⁶⁵

64. Habermas expounds his theory in works including *Moral Consciousness and Communicative Action*, translated by Christian Lenhardt & Shierry Weber Nicholsen (Cambridge: MIT Press, 1990); *The Philosophical Discourse of Modernity: Twelve Lectures*, translated by Frederick Lawrence (Cambridge: MIT Press, 1987); *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge: MIT Press, 1998) [Habermas, *Between Facts and Norms*]. See also Thomas McCarthy, *The Critical Theory of Jürgen Habermas* (Cambridge: MIT Press, 1978); William Rehg, *Insight and Solidarity: A Study in the Discourse Ethics of Jürgen Habermas* (Berkeley: University of California Press, 1994).

65. Shane O'Neill provides an excellent discussion of the values of Habermasian discourse ethics over the approaches proposed by Rawls and Walzer. See O'Neill, *supra* note 11. Rainer Forst also lauds the Habermasian approach. See Forst, *supra* note 48. A rich literature—that this article can hardly begin to engage with, let alone do justice to—has grown around the Rawls-Habermas debate. See *e.g.* James Gordon Finlayson & Fabian Freyenhagen, eds,

Habermas has also expanded his theory of communicative action to address legal adjudication and institutional design. In *Between Facts and Norms*, Habermas set out to examine, among other things, the plausibility of his discourse theory from the perspective of legal theory.⁶⁶ His aim was to determine whether law in the narrow sense, which he defines as incorporating “all interactions that are not only oriented to law but also geared to produce and reproduce law,”⁶⁷ is capable of supporting a discourse theory, particularly with respect to the process of adjudication. The perspective he examines within the legal system is that of the judge, which Habermas considers the privileged point of view in legal theory.⁶⁸

In developing his theory, Habermas takes issue with Dworkin’s idea of a “Herculean” judge, who has mastered all the jurisprudence and has knowledge of all the valid principles and policies at his disposal.⁶⁹ As an expert in the field of law, he is thus able to unearth a single right answer for every legal problem brought before him.⁷⁰ Habermas’s main critique of Dworkin’s Herculean judge is that his

Habermas and Rawls: Disputing the Political (New York: Routledge, 2011); Todd Hedrick, *Rawls and Habermas: Reason, Pluralism, and the Claims of Political Philosophy* (Stanford: Stanford University Press, 2010).

66. See Habermas, *Between Facts and Norms*, *supra* note 64 at 195. Habermas outlines his discourse theory of law primarily in chapter 5.
67. *Ibid* at 195. Habermas observes that several institutions are involved in the production and reproduction of law, including courts and administrative agencies “insofar as they exercise a rather broad discretion” (*ibid* at 195-96). He considers political legislation to have a central function. As some, including Hugh Baxter, note, this makes his choice to examine legal discourse from the perspective of judges somewhat strange. I would argue even further that highlighting the centrality of political legislation opens the door invitingly to using administrative agencies as sites for examining whether discourse theory is plausible within the legal system. See Hugh Baxter, “Habermas’s Discourse Theory of Law and Democracy” (2002) 50:1 *Buff L Rev* 205.
68. But Habermas notes that legal theory is wider than adjudication and extends to legislation and administration. As well, he asserts that legal theory takes into account the perspectives of the other participants of the legal order such as political legislators, administrators, private legal persons, citizens, and judges. See Habermas, *Between Facts and Norms*, *supra* note 64 at 196-97.
69. He also critiques Hart’s positivist notion of primary and secondary rules and the legal realist notion that law cannot be separated from the political values of individual judges (thereby demolishing, in its entirety, the notions of certainty and rational acceptability).
70. See Dworkin, *Law’s Empire*, *supra* note 24. An interesting critique of Dworkin’s legal theory, as it would pertain to administrative tribunals, is given by Margaret Allars. See “On Deference to Tribunals with Deference to Dworkin” (1995-1996) 20:1 *Queen’s LJ* 163.

approach to decision making is monological.⁷¹ Hercules converses with no one but himself in reaching his decisions—not even other judges, as would be the case on an appellate bench. Habermas acknowledges that a society generally wants its judges to reach their own opinions and to defend them. However, this can only succeed if the judge, due to “professional knowledge and skills and thanks to her personal virtues,” can act as the “citizens’ representative.”⁷² Habermas believes that more is needed to incorporate community representation into adjudication. As a solution, Habermas proposes an intersubjective discourse theory that ensures communication between the citizenry and the legal community.⁷³ It is not sufficient for a single judge to rely on an expertise that stems solely from the standards and practices of a legal community. Rather, it is necessary to bring the community’s self-understanding into dialogue with the legal expertise of the judge. To this end, Habermas offers a procedure for argumentation within the courtroom that allows for more public interest contributions.

While Habermas’s notion of public interest intervention is not new, his ideas invite reflection on how a theory of legal discourse that builds on fundamental notions of participation, intersubjective dialogue, community, and consensus could be further developed. It is compelling not only to examine the question of legitimacy and impartial decision making in traditional judicial settings but also to do so with respect to a wider array of public law decision-making contexts in our own society. Certainly, bringing a wider plurality of perspectives to bear on any given issue can serve to reach a more legitimate conception of social justice, whether in the courtroom or in the socio-political arena.

E. SUMMARY

In conclusion, the philosophical question of how best to determine the guiding principles of social justice has evolved significantly over the past four decades. At its core, the question has remained one about impartiality: how to decide impartially between competing conceptions of the good espoused by members of a pluralistic society. There has been a movement away from addressing this concern through liberal theories based on disembodied autonomy to theories based on embodiment and discourse. While these theoretical debates started broadly as theories of justice in political and moral philosophy, one sees, particu-

71. See Habermas, *Between Facts and Norms*, *supra* note 64 at s 5.3.1.

72. *Ibid* at 222.

73. Habermas states that legal theory should be an exercise of “expanding relations of mutual recognition among natural persons into the abstract juridical relationship of mutual recognition among legal persons.” See *ibid* at 223.

larly with Habermas's work on discourse theory, that these debates have entered legal theory as well. The first part of this article has addressed the theoretical aspects of impartiality and justice. But what about the concrete functioning of courts and administrative bodies on a day-to-day basis? Generally, deliberations about allegation of bias within judicial and administrative law are a site where liberal values come up against a desire to find contextual understandings. In the next Part, I argue that drawing on the contextualized movement from Rawlsian liberalism to Habermasian legal discourse theory can provide a promising start to resolving this tension, and I propose a theory of grounded impartiality as a means of reconciling the issues at play in the administrative law context.

III. IMPARTIALITY IN CANADIAN ADMINISTRATIVE LAW JURISPRUDENCE

A. A THEORY OF GROUNDED IMPARTIALITY

In this part, I argue that the current approach to determining impartiality in administrative law would benefit from principles derived from the context-driven critiques of Rawlsian liberalism made by critical political and moral theorists. A fresh approach would ground the inquiry into reasonable apprehension of bias in a set of clear, prescriptive indicia. These indicia encompass five factors, though the presence of any one of these factors does not automatically mean that an apprehension of bias is reasonable. Each factor may be scrutinized for what it shows about the impartiality of a particular administrative actor's⁷⁴ decision making and in light of the factual circumstances that have given rise to the allegation. Some factors may be more relevant than others and it may be that not all five factors will be useful or necessary, depending on the factual situation. An assessment of which factors are most relevant may be made at the outset of the analysis. In addition to their use by judges on judicial review, the five factors may also be useful to administrative actors themselves in assessing whether a reasonable apprehension of bias exists when litigants before them make such allegations.

74. These decision-making bodies will be synonymously termed "administrative actors" and "administrative decision makers" throughout this article. "Administrative actor" and "administrative decision maker" are global terms used to denote decision makers in both their institutional and individual senses. See, generally WA Bogart, "The Tools of the Administrative State and the Regulatory Mix" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context* (Toronto: Emond Montgomery, 2008).

The first factor is the provenance of the administrative actor, including its policy origins, legislative framework,⁷⁵ and family likenesses. This factor stems from the communitarian critiques of Rawlsian liberalism that stressed the importance of considering the constitutive attachments of a decision maker in determining questions of fairness. The contemplation of the legislative or other origins of an administrative body, its policy goals, and any significant traits that it may share with other administrative actors of the same nature (for example, Ministers of the executive and legislative/parliamentary officers, investigatory agencies, and arms-length independent agencies of the executive branch of government) may prove useful in deciding whether or not an allegation of disqualifying bias is reasonable. As the communitarians have noted, assessing the decision-maker's preferences in light of its constitutive identity or identities can assist a determination of fairness.

The second factor is the shared understandings and institutional culture (including institutional practices) in which the individuals who perform the work of the administrative body are embedded. This factor, which also originates from the communitarian critique of liberalism, suggests that one should strive to comprehend the norms within the institution, which may have a significant role in shaping an administrative body's collective conception of the work that it does. Institutional norms, which are often implicit rather than express, develop through the repeated discretionary actions of an administrative agency or other administrative body and form part of its ethos. Knowledge of institutional norms may facilitate an evaluation of whether a particular conception of fairness should be given credence. The main issue to be addressed will be whether the institutional norms can be legitimized by the legislative framework that enables the administrative actor either by express legislative wording or as a development of the administrative body's expertise in light of its enabling legislation.⁷⁶ A shared understanding of what is appropriate may not, in and of itself, excuse situations that would otherwise clearly lead to a reasonable apprehension of bias, but it may offer avenues for additional exploration of the administrative body's understanding of procedural fairness. Institutional norms may or may not act as barriers to fairness, but a frank assessment of their presence in the administrative body and the impact they have will inevitably lead to a more thorough and transparent engagement with the question of impartiality.

75. Other constitutive sources outside of legislation may equally be pertinent (*e.g.*, crown prerogative or executive discretion).

76. *Ibid.*

The third factor consists of local understandings—that is, those jointly held by the administrative actor and the regulated community it is empowered to oversee. Local understandings may concern technical subject matter as well as notions of fairness within that community. In line with the contextualists' suggestions, local understandings highlight the fact that the principles of justice—namely, what may constitute impartiality in any administrative law context—may be flexible. What this factor adds to current principles of administrative law, however, is the idea that one should look to understandings of fairness that are shared between the administrative actor and the relevant regulated community as part of the determination of what impartiality should mean within that decision-making context. However, in considering local understandings, a reviewing court should pay equal attention to the potentially problematic issue of agency capture disguised as local understandings.

The fourth factor, which concerns any connections that exist between the administrative actor and the litigants or their counsel, has traditionally been flagged in the administrative law jurisprudence as a potential reason to doubt a decision-maker's impartiality. Nonetheless, the feminist response to Rawls's theory of justice suggests that connections can cut both ways. Connections between administrative decision makers and litigants may raise impartiality concerns, but they may also lead to relationships that are fair. It may be that prior knowledge of the litigant prompts the decision maker to consider issues more carefully. Feminist analysis gives a more sophisticated spin to the reason for examining the connections, if any, that exist between the administrative actor and the litigants or their counsel, the nature and extent of those connections, and their impact on the process.

Lastly, the fifth factor, discourse—or the extent to which a meaningful exchange about the issue(s) at hand can take place between the administrative actor and the parties—is of prime importance to the question of impartiality, though it has not been identified as such in Canadian administrative law jurisprudence. The critiques of classic liberalism brought by discourse theorists suggest that impartiality is furthered by the participation of a plurality of relevant perspectives. A grounded approach to administrative impartiality will always aim to examine the central question of whether the circumstances giving rise to the allegation of disqualifying bias will act as a hindrance to a meaningful dialogue among parties, administrative actors, and any interveners. Furthermore, drawing on Foucault's notion of the discursive subject, a person alleging disqualifying

bias, especially attitudinal bias, should recognize that individuals are constantly re-creating themselves, drawing from the multiple discourses around them and the cultures with which they engage. This poses a particular challenge to the way in which attitudinal bias is examined. The notion that one who has held a past position—be it an affiliation with a particular group, a scholar who has promoted a school of thought, et cetera—is incapable of having an open mind should be tested more rigorously in light of the constant re-creation of the self suggested by discourse theorists.⁷⁷

The ultimate objective of the theory of grounded impartiality is to encourage a more rigorous and complete analysis of reasonable apprehension of bias claims by providing a set of factors with which to probe and examine such claims in a more nuanced, contextualized manner. The five factors are non-exhaustive; depending on the circumstances, others may also be relevant. In the sections that follow, I first briefly explain that a context-sensitive approach has been endorsed for traditional situations in which an individual judge's actions may be scrutinized for reasonable apprehension of bias. I then move to the central preoccupation of this Part of the article, which is to illustrate how the factors of the grounded theory apply and what their impact on judicial review would be. To do this, I consider critically five key SCC cases on reasonable apprehension of bias in administrative law.

B. THE IMPARTIALITY OF JUDGES AND CONTEXTUALIZATION

The 1997 case of *R v RDS*⁷⁸ was significant for establishing the Court's position on bringing social context into the evaluation of the impartiality of judges. In *RDS*, the Court found contextualized decision making to be acceptable both where judges decide matters of fairness before them and in judicial review of a judge's discretion where their contextualized judging may be perceived as bias. The case considered the degree to which a trial judge could take contextual factors into account in evaluating evidence. The decision clarified the case law and offered normative guidance to lower court judges. *RDS* is interesting from a philosophical standpoint because, like the debate between Rawlsian liberals and communitarians, it shows movement towards embodied decision making and highlights the pitfalls of determinism.

77. See e.g. Bill C-520, *An Act supporting non-partisan agents of Parliament*, 1st session, 51st Parl, 2014. This private member's bill proposes that every person applying for a position in the office of an agent of Parliament declare whether they occupied specified politically partisan positions in the ten years leading up to their application for that position.

78. [1997] 3 SCR 484, 161 NSR (2d) [*RDS*].

At issue in *RDS* was whether a trial judge's comments on the racial dynamics of policing in Nova Scotia, made during the course of her reasons for decision, gave rise to a reasonable apprehension of bias.⁷⁹ Corrine Sparks, a black judge, had heard conflicting testimony about the arrest of a black youth by a white officer in Nova Scotia. The officer and the young man were the only ones to testify at trial, and their stories diverged significantly. Ultimately, the judge found the testimony of the young man to be more credible. In delivering her reasons, she addressed a rhetorical comment made by the Crown while questioning why the officer would have recounted the events the way he did if they were not true. Among other statements, Judge Sparks said that while she was not saying that this police officer had misled the court, officers had been known to do so in the past. She added that she knew that police officers do overreact, especially when dealing with non-white groups. Finally, she stated that she believed the evidence of *RDS* that he had been told to "shut up" or he would be under arrest because it was in keeping with the prevalent attitude of the day.⁸⁰

Impartiality in the public law realm requires the decision maker to have an open mind and not to decide in his or her own interest, in a manner that unduly favours one of the parties, or pursuant to irrelevant factors. The issue is ultimately about fairness to the litigants. The test for reasonable apprehension of bias considers what a reasonable observer, who is fully informed of all the

79. The *RDS* decision generated much discussion in the academic literature as it wound its way through the courts. See e.g. Carol A Aylward, "'Take the Long Way Home' *R.D.S. v. R. The Journey*" (1998) 47 UNBLJ 249; Christine Boyle et al, "*R v. R.D.S.*: An Editor's Forum" (1998) 10:1 CJWL 159; April Burey, "No Dichotomies: Reflections on Equality for African Canadians in *R v. R.D.S.*" (1998) 21:1 Dal LJ 199; Richard F Devlin, "We Can't Go on Together with Suspicious Minds: Judicial Bias and Racialized Perspective in *R v. R.D.S.*" (1995) 18:2 Dal LJ 408; Allan Hutchinson & Kathleen Strachan, "What's the Difference - Interpretation, Identity and *R v. R.D.S.*" (1998) 21:1 Dal LJ 219; Sherene Razack, "*R.D.S. v. Her Majesty the Queen: A Case about Home*" (1997-1998) 9:3 Constitutional Forum 59; and Jennifer Smith, "*R v. R.D.S.*: A Political Science Perspective" (1998) 21:1 Dal LJ 236.

80. Judge Sparks also made ambiguous comments about whether this officer had overreacted and about his state of mind:

I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [*R.D.S.*] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day. ... At any rate, based upon my comments and based upon all the evidence before the court, I have no other choice but to acquit.

RDS, *supra* note 79 at para 4.

circumstances and is not overly sensitive, would think upon viewing the situation realistically and practically, and after having thought the matter through.⁸¹ In *RDS*, the lower courts found that Judge Sparks' comments gave rise to a reasonable apprehension of bias. At the Supreme Court, however, the majority found that the impugned comments did not attract a perception of bias. The Court was divided, however, with majority and minority concurring reasons for judgment as well as a dissent.⁸²

Essential to determining the bias issue was the question of whether it was reasonable for Judge Sparks to have referred to her understanding of the social context and the racial dynamics at play in Nova Scotia at the time. In other words, to what extent should a judge allow her life experiences to assist her in determining matters of credibility? One might equally see this question as probing the degree to which a judge can be embodied—that is, reflective of the community to which she belongs and the experiences that she has lived.

A liberal perspective would suggest that the only way for a judge in Corinne Sparks' position to render a fair decision would be to strip her decision making of all influences that stem from being a black woman in Nova Scotia. From a liberal viewpoint, such experiences would be inimical to an impartial finding. By paying attention to race, Judge Sparks was potentially favouring a particular perception of what is just (namely, equality for African-Canadians) at the expense of other valid claims (for example, equality for other racialized groups).

Nevertheless, *RDS* exemplifies the value of contextualized judging. The approach taken by Judge Sparks reflects the theory of the communitarians who highlight the impossibility of seeing oneself other than as constituted by one's own community. By extension, one's opinions on what constitutes justice are rooted in community links as much as they are in individualism. Judge

81. The test originated in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369, 68 DLR (3d) 716 [*Committee for Justice and Liberty*]. Although originally formulated in dissent, it has since been adopted consistently in Canada as the test for determining if a reasonable apprehension of bias exists.

82. Four members of the majority (Justices La Forest, L'Heureux-Dubé, Gonthier, and McLachlin) agreed that an awareness of the context in which a case takes place is consistent with the highest tradition of judicial impartiality and found that the comments were appropriate. Two members of the majority (Justices Cory and Iacobucci) found that the comments were close to the line but acceptable when read within the context of the entire trial. They also found that Judge Sparks had conducted an acceptable review of all the evidence before making the impugned comments. Finally, the three dissenting judges (Chief Justice Lamer, and Justices Sopinka and Major) found that the comments gave rise to a reasonable apprehension of bias since they had been substituted for evidence.

Sparks' approach to justice was guided by a conception of equality informed by her identity as a member of the black community. Her conception of justice accounted for the difficulty in achieving equality without an initial recognition of the fact that incidents, including interactions between police and the public, do not always take place on a level playing field. Immutable personal factors such as race can have an impact on interpersonal or intra-community relationships. An analysis drawn from the communitarian critique of liberalism would suggest that taking social factors into account in this way does not necessarily suggest bias; by contrast, it can help to render better informed decisions.

In *RDS*, both the majority and the dissenting justices agreed that life experience can be useful in judicial decision making. However, the majority concurring opinion is much more forceful in its approval of the use of this type of contextual adjudication and reference to life experience. As a general principle, the majority found that the concept of judicial impartiality recognizes that the different experiences of judges will assist them in their decision making and be reflected in their judgments.⁸³ They found that conscious, contextual inquiry actually furthers judicial impartiality because judging genuinely involves an "enlargement of the mind."⁸⁴ The better able a judge is to take into account the perspectives of all those involved, the more successful he or she becomes at escaping the blindness of her subjective, private perspective.⁸⁵

In applying these principles to the facts of this particular case, the four justices of the majority concurring opinion⁸⁶ were careful to note that Judge Sparks' comments had been made "after she had found R.D.S. to be credible, and [had] accepted a sufficient portion of his evidence to leave her with a reasonable doubt as to his guilt."⁸⁷ The implication seems to be there may have been a different result if the comments had been made before her conclusions on credibility had been reached. With respect to one specific comment made by Judge Sparks—that the officer probably overreacted—the four justices showed openness to the

83. *RDS*, *supra* note 79 at para 29.

84. *Ibid* at paras 42-44.

85. In reaching this opinion, the court adopted the views of Jennifer Nedelsky. See "Embodied Diversity and the Challenges to Law" (1997) 42:2 McGill LJ 91. For a critique of the decisions reached by both the majority and dissenting judges, see Richard Devlin & Dianne Pothier, "Redressing the Imbalances: Rethinking the Judicial Role after *R. v. R.D.S.*" (1999-2000) 31:1 Ottawa L Rev 1.

86. By "majority concurring" I mean the concurring judgment with the most judges signed onto it. Likewise, a "minority concurring" judgment is the concurring judgment with fewer judges signed onto it.

87. *RDS*, *supra* note 79 at para 53.

possibility of using social context in helping to determine credibility and assess evidence:

While it seems clear that Judge Sparks did not in fact relate the officer's probable overreaction to the race of the appellant R.D.S., it should be noted that if Judge Sparks had chosen to attribute the behaviour of Constable Stienburg to the racial dynamics of the situation, she would not necessarily have erred. As a member of the community, it was open to her to take into account the well-known presence of racism in that community and to evaluate the evidence as to what occurred against that background.⁸⁸

The approach is quite different from that of the minority concurring justices and of dissenting justices, who strongly opposed comments that give even the appearance that a judge has made a finding based on “generalization” or “propensity.”⁸⁹ The majority and minority reasons highlight lines where contextualism may slip into determinism. Distinct from Rawls's concern that an embodied perspective will bring about self-preference, the minority concurring and dissenting opinions in *RDS* display apprehensiveness about introducing contextual factors that allow pre-judgments based on stereotypes. At the same time, the majority concurring opinion emphasizes the importance of contextual factors not just with respect to the decision maker (here, in the sense of encouraging reference to relevant life experience of the judge) but also with regard to the litigant whose case must also be understood in light of its factual, social, and psychological background.⁹⁰ In *RDS*, the Court moved towards contextualized appreciations of impartiality in the judicial context. The shift towards accepting contextualized appreciations of impartiality is murkier, however, in administrative law. This is ironic as administrative law is founded on the idea that flexibility in judicial review is crucial given the myriad contexts in which administrative actors operate.⁹¹ Nevertheless, the SCC remains overwhelmingly liberal in its

88. *Ibid* at para 56.

89. *Ibid* at para 7.

90. *Ibid*. Post-*RDS*, there was continued interest in the academic literature on how to incorporate context in a principled manner. See, for example, Robert J Currie, “The Contextualised Court: Litigating ‘culture’ in Canada” (2005) 9:2 Int'l J Evid & Proof 73.

91. See e.g. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) (proposing a multifactor test for determining the appropriate level of procedural fairness); *Canada Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3, 37 DLR 283 [*Matsqui*] (holding that “tribunals” should be conceived as a basket that incorporates a wide

approach to determining questions of impartiality in the administrative law context. In the next section, I examine this paradox more closely.

C. APPLYING A THEORY OF GROUNDED IMPARTIALITY TO ADMINISTRATIVE ACTORS

The concept of impartiality refers to the decision-maker's state of mind... The decision-maker must approach the issue submitted to him or her with an open mind, not influenced by personal interests or outside pressure. It is not sufficient that the decision-maker be impartial in his or her own mind, internally, to the satisfaction of his or her own conscience. It is also necessary that the decision-maker appear impartial in the objective view of a reasonable and well-informed observer... The duty of impartiality, which originated with the judiciary, has now become part of the principles of administrative justice.⁹²

Drawing on the theory of grounded administrative impartiality outlined above, this section examines the current approach to determining impartiality in Canadian administrative law and how an awareness of Rawlsian liberalism and its critiques can contribute to the development of our administrative law jurisprudence. I complete this analysis, in large part, by critically re-reading five major SCC decisions on reasonable apprehension of bias through the lens of the theory of grounded impartiality.

Impartiality is unequivocally of fundamental importance in Canadian public law. The right to trial by an impartial tribunal is constitutionally enshrined in the *Charter*.⁹³ Similarly, in administrative law, the principles of natural justice and procedural fairness offer parallel protection to litigants in contexts where constitutional and quasi-constitutional guarantees may not apply. The guarantee of an impartial decision maker is said to maintain public confidence in our public decision-making institutions. It therefore serves the wider public as much as it does the litigants.⁹⁴ As in the judicial sphere, the test for reasonable apprehen-

variety of administrative bodies and that the concept of reasonable apprehension of bias must therefore be flexible); *Dunsmuir v New Brunswick*, 2008 SCC 9, 1 SCR 190 (for the SCC's most recent attempt to fully re-articulate the appropriate standards of review).

92. *Imperial Oil Ltd v Québec (Minister of the Environment)*, 2003 SCC 58 at para 28, 2 SCR 624 [*Imperial Oil*].

93. *Charter*, *supra* note 25 at ss 7, 11(d).

94. See *R v Sussex Justices, ex parte McCarthy*, [1924] 1 KB 256; *Valente v The Queen*, [1985] 2 SCR 673 at para 22, 52 OR (2d) 779 [*Valente*].

sion of bias in administrative law centres on the perception of a right-minded and well-informed person who has thought the matter through.⁹⁵ But, whereas judicial impartiality is determined by the strictest standards of the adversarial system,⁹⁶ the test used to determine the impartiality of an administrative actor depends on the role the actor plays and the way it functions.⁹⁷ Context, therefore, plays a central role in administrative law bias cases.

The need for attention to context is largely due to the nature of the Canadian administrative state, which includes many types of decision-making bodies that straddle the executive and judiciary.⁹⁸ The different types of administrative decision makers range from adversarial, court-like adjudicative bodies such as human rights tribunals and labour boards, to broad-based, polycentric decision and policy makers such as energy regulators and communications licensing boards.⁹⁹ As a result of this spectrum, it has become standard practice for courts to take account of the way that a particular tribunal functions in order to determine if disqualifying bias has been shown during the decision-making process. The test for impartiality that is applied to administrative actors therefore exhibits flexibility, in comparison to its judicial counterpart, to account for the

95. See the test as articulated in *Committee for Justice and Liberty*, *supra* note 82.

96. *RDS*, *supra* note 79 at para 93.

97. See, *Matsqui*, *supra* note 92; 2747-3174 *Québec Inc v Québec (Régie des permis d'alcool)*, [1996] 3 SCR 919, 140 DLR (4th) 577 [Régie]; *RDS*, *supra* note 79 at para 32; *Imperial Oil*, *supra* note 93. The use of flexibility in determining issues of impartiality within administrative law is discussed in Laverne Jacobs, "Caught between Judicial Paradigms and the Administrative State's Pastiche: 'Tribunal' Independence, Impartiality, and Bias" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2 ed, (Toronto: Emond Montgomery, 2012) [Jacobs, "Caught between Judicial Paradigms and the Administrative State's Pastiche"]; and Gus Van Harten et al, "Bias and Lack of Independence" in G Van Harten, G Heckman & D Mullan, eds, *Administrative Law, Cases, Text and Materials*, (Toronto, Emond Montgomery: 2010) [Van Harten, "Bias and Lack of Independence"]. The academic debate over whether the independence and impartiality of administrative tribunals should more closely mirror the courts is beyond the scope of this paper. For discussion of that issue see Ron Ellis, *Unjust by Design: Canada's Administrative Justice System* (Vancouver: University of British Columbia Press, 2013).

98. For discussion of the ways in which administrative bodies straddle the judiciary and executive, please see *Ocean Port Hotel Ltd v British Columbia*, 2001 SCC 52, 2 SCR 781 [*Ocean Port Hotel*].

99. The nature of the Canadian administrative state and the varying structures of administrative bodies are discussed in Laverne Jacobs, "A Wavering Commitment?: Administrative Independence and Collaborative Governance in Ontario's Adjudicative Tribunals Accountability Legislation" (2010) 28:2 Windsor YB Access Just 285. See also Bogart, *supra* note 74.

administrative actor's nature and functions. Nevertheless, there is room for more methodological rigour in the SCC's current contextual approach.

There are generally two conceptual paradigms within which questions about reasonable apprehension of bias arise in administrative law. The first relates to the independence of administrative actors and addresses, indirectly, the question of impartiality. Independence is said to be a threshold guarantee to assure that the decision maker has an appropriate state of mind. This paradigm will be elaborated in more detail below. The second conceptual paradigm encompasses questions about the state of mind of the administrative actor within the decision-making process and, as such, concerns impartiality directly.¹⁰⁰ With respect to both independence and impartiality, the theory of grounded administrative impartiality can result in a more rigorous and complete analysis of situations in which disqualifying bias has been alleged. The next section presents some examples by revisiting the analysis of key SCC cases.

1. ADMINISTRATIVE INDEPENDENCE

Arguments about reasonable apprehension of bias sometimes concentrate on whether an administrative actor's structure or relationships appear sufficiently free of inappropriate interference. Administrative law theory upholds the idea that an administrative body will be empowered to decide all cases before it impartially if inappropriate interferences are limited. In this way, independence and impartiality are separate but related concepts, with independence acting as a guarantee or a threshold to ensure impartiality.¹⁰¹

100. These situations arise when the decision maker may reasonably be perceived to have: (1) a pecuniary or material interest in the outcome of the matter being decided; (2) personal relationships with those involved in the dispute; (3) prior knowledge or information about the matter in dispute; or (4) an attitudinal predisposition towards an outcome. The first three situations are forms of conflict of interest. See generally, Jacobs, "Caught between Judicial Paradigms and the Administrative State's Pastiche," *supra* note 97 at 258.

101. See *e.g.* Justice L'Heureux-Dubé in her separate concurring reasons in *Régie*, *supra* note 97. On judicial review, Canadian courts often evaluate whether an administrative tribunal is sufficiently independent by analyzing the factors that have been determined to affect the independence of courts and members of the judiciary. These factors are security of tenure, financial security, administrative control, and adjudicative independence. The first three are often termed "objective conditions" of independence because they concern the structural relationship that has been put in place between the decision maker or decision-making institution and the government with which it maintains an arm's length relationship of accountability. The fourth, adjudicative independence, relates to institutional practices, organization, and relationships within the administrative body, as well as the ways in which they may affect a decision-maker's ability to reason fairly. Reference to these factors is used to gauge whether a reasonable, well-informed person would perceive that an administrative body or its individual members have sufficient independence to fulfill their decision-

At the same time, the Court's method of analysis for determining if there is a lack of independence giving rise to reasonable apprehension of bias is, unfortunately, underdeveloped and has led to conflicting results in the jurisprudence.¹⁰² The main difficulty is that the test for lack of independence, which is the same test used to determine if there is a reasonable apprehension of bias, as it currently stands, offers little guidance to a reasonable observer in deciding whether there is a lack of independence that merits concern. There is a discernible absence of direction for determining the contextual information that should be examined when questions of independence arise. In the next section, the Court's analyses in *Matsqui* and *Ocean Port Hotel* are contrasted to illustrate the SCC's ambivalence to context in determining administrative independence cases. *Bell* is then discussed to show how the factors of a grounded approach can assist in this regard.

I. SCRUTINIZING OPERATIONAL CONTEXT—*MATSQUI*, *OCEAN PORT HOTEL*

The SCC has vacillated on the issue of how closely, if at all, reviewing courts should look at the operational context or daily workings of an administrative body when determining if there is a lack of independence causing a reasonable apprehension of bias. In large part, this inconsistency occurs because the Court has failed to ground its consideration of contextual data in specific questions that it seeks to answer about reasonable apprehension of bias. Two of the most significant SCC cases on structural independence—namely, *Matsqui* and *Ocean Port Hotel*—illustrate this point well.

In 2001, the administrative independence jurisprudence underwent a significant development when the SCC held in *Ocean Port Hotel* that clear legislative language indicating the degree of independence of an administrative actor should take precedence over common law principles of natural justice.

making mandates with impartiality. For example, a court might inquire into the ability of government to arbitrarily change the administrative actor's length of appointment, pay, or the cases that an adjudicator may hear. However, administrative bodies are not expected to meet the same standard of independence as courts. The SCC has held that it is necessary to allow some flexibility for the various ways that tribunals function. See *e.g. Valente*, *supra* note 94; *Matsqui*, *supra* note 91; and Jacobs, "Caught between Judicial Paradigms and the Administrative State's Pastiche," *supra* note 97.

102. I discuss the divergent outcomes with respect to operational context in *Matsqui* and *Ocean Port* as well as the conflicting approaches to adjudicative independence in *Bell* and *Consolidated Bathurst* in Laverne A Jacobs, "Tribunal Independence and Impartiality: Rethinking the Theory After *Bell* and *Ocean Port Hotel*—A Call for Empirical Analysis" in Laverne A Jacobs & Justice Anne L Mactavish, *Dialogue Between Courts and Tribunals: Essays in Administrative Law and Justice 2001-2007* (Montreal: Les Éditions Thémis, 2008) at 43.

The Court left unsettled, however, the question of how to determine whether independence was compromised (and, if so, how to rectify it) when the relevant legislation was ambiguous. In this regard, the earlier SCC case of *Matsqui* is useful for illustrating the value of referring to a tribunal's operational context in determining if a reasonable apprehension of bias exists due to lack of independence. This section first contrasts the minority and majority opinions on the issue of independence in *Matsqui*, showing that the majority's analysis reflects many elements of the theory of grounded administrative impartiality. It next outlines some of the advantages brought to bear by scrutinizing operational context, particularly through the contextual factors of the theory.

In *Matsqui*, issues of independence and impartiality arose with respect to certain First Nations tax assessment boards that were not yet in operation but whose enabling legislation had been enacted when the litigation began. The Court stressed the value of seeing a tribunal in operation before determining if its decision-making process gives rise to a reasonable apprehension of bias due to insufficient independence. The majority decision on the issue of independence exemplifies the high water mark of the contextual approach to assessing independence in administrative law.¹⁰³ There was significant divergence, however, between the minority and majority with respect to how to analyze the issue of independence.

Writing in the minority on the issue of independence, Chief Justice Lamer argued that the nature of the tribunal, the interests at stake, and "other indices of independence" are to be taken into consideration in assessing whether an administrative body possesses sufficient independence to avoid raising a reasonable apprehension of bias. The Chief Justice dealt with the last two of these factors—namely, the interests at stake and "other indices of independence"—quickly.

103. Four justices (Justices L'Heureux-Dubé, Sopinka, Gonthier, and Iacobucci) were of the view that the issue of independence could not be determined until the tribunal could be assessed in operation. These four formed the majority on the issue of independence, though they ended up in dissent on the main issue of whether the matter should be sent back to the First Nations tax assessment boards. Two (Lamer Chief Justice and Justice Cory) held that the tribunal exhibited a lack of independence, which gave rise to a reasonable apprehension of bias. They therefore concluded that the tribunals did not represent an adequate alternative remedy for CP Rail and Unitel to exhaust before applying for judicial review. Justices LaForest, McLachlin, and Major were also of the opinion that the tribunals were not an adequate alternate remedy. However, they focused their discussion on the lack jurisdiction of the tribunal and did not address the independence issue at all. In summary, six of the nine addressed the issue of independence and, of the six justices in majority, four were of the view that operational context was important to observe prior to forming an opinion. It is for this reason that these four justices are considered to hold the majority's view on the issue of independence. See *e.g.* *Matsqui*, *supra* note 91.

As for the interests at stake, he noted that tax appeals were important but could not be considered among the most significant interests held by an individual (unlike security of the person, for example). Something less than the highest level of independence would therefore be appropriate. As for the “other indices of independence,” the only one he noted, without explanation, was the oath of office that the members were to swear, affirming that they would act impartially.

Chief Justice Lamer devoted more attention to the nature of the tribunal. In determining the nature of the tribunal, he looked specifically at the tax assessment boards’ primary and secondary enabling legislation. His analysis focused on the statutory language outlining how appointments were to be made to the tribunals and describing the tribunals’ powers. His greatest concern was that the enabling bylaws did not guarantee remuneration or fixed terms of appointment.¹⁰⁴ At most, the permissive language of the legislation indicated that members of the tribunal “may” be paid reasonable remuneration.¹⁰⁵ Moreover, there was no guarantee of security of tenure. In Justice Lamer’s opinion, the bylaws ambiguously left decisions regarding the length of appointment terms to the chief and council of each First Nations group.¹⁰⁶ The Chief Justice would have preferred to have seen provisions outlining fixed terms of appointments within the language of the enabling statute.¹⁰⁷ Finally, there was a concern that since the chiefs and councils of the bands that were to appoint the board members would also appear regularly before the tribunals, a party could face a tribunal appointed and paid by members of the opposing party. The Chief Justice found the entire structure to be inadequate for an adjudicative body performing court-like functions. He therefore concluded that the possibility of arbitrariness in pay and dismissal was evident and held that a reasonable person would have an apprehension of bias due to the insufficient legislative guarantees of independence. As he put it, “[i]ndependence premised on discretion is illusory.”¹⁰⁸

By contrast, the majority of the justices who addressed the issue of independence in *Matsqui* held that the issue could not be determined until one had an opportunity to see the tax assessment tribunals up and running. Writing for the majority on this issue, Justice Sopinka noted that it is not safe to form conclusions based on the wording of the legislation alone, as knowledge of the operational

104. For the relevant bylaw provisions, see *Matsqui*, *supra* note 91 at paras 88-91.

105. Although they would be paid for travelling and out of pocket expenses incurred in the course of their duties. *Ibid* at para 90.

106. *Ibid* at para 98.

107. *Ibid* at paras 99-100.

108. *Ibid* at para 104.

reality may provide “a significantly richer context for objective consideration of the institution and its relationships.”¹⁰⁹ Otherwise, he stated, referring to the fact that the test for independence is based on the impression of a reasonable, well-informed person, “the administrative law hypothetical ‘right-minded person’ is right minded, but uninformed”¹¹⁰ and that conclusions about independence are generally not formed until after a tribunal is in operation.¹¹¹ Finally, Justice Sopinka was particularly interested in preserving both aboriginal rights and the policy of self-government that had been initiated through the First Nations tax assessment tribunals. He found that the principle that statutes relating to aboriginal rights should be construed liberally, with doubtful expressions resolved in favour of their preservation, applied equally in the context of evaluating the institutional independence of the tax assessment boards. It was within this larger context that the majority of judges who addressed the issue found it inappropriate to form conclusions about the aboriginal tax assessment boards’ independence without first having the benefit of seeing how they would operate. These judges therefore took the notion of context beyond what was available in the statutory language to incorporate broader contextual elements about the reason for the tribunal’s creation, the importance of preserving aboriginal tax rights that already existed in the case law, the social policy goals it aimed to fulfill, and how discretion would be employed once it was up and running.

In *Matsqui*, the majority opinion on the issue of institutional independence consisted of a discussion of administrative actor provenance and institutional practices, the first two of the five factors of the theory of grounded impartiality. The majority decision on this issue illustrates how these two factors may be useful in analyzing the question of reasonable apprehension of bias. The majority did not discuss the other factors related to a theory of grounded impartiality. If

109. *Ibid* at para 123.

110. *Ibid* at para 123. Justice Sopinka held:

That institutional independence must be considered “objectively” does not preclude considering the operation of a legislative scheme which creates an administrative tribunal, but only vaguely or partly sets out the three *Valente* elements, as in this appeal, where the taxation by-laws in issue are silent with regard to details relating to tenure and remuneration. It is not safe to form final conclusions as to the workings of this institution on the wording of the by-laws alone. Knowledge of the operational reality of these missing elements may very well provide a significantly richer context for objective consideration of the institution and its relationships. Otherwise, the administrative law hypothetical “right-minded person” is right minded, but uninformed.

111. The cases that the majority referred to as support were: *Alex Couture Inc v Canada (Attorney-General)* (1991), 83 DLR (4th) 577, 41 QAC 1, leave to appeal to SCC refused, [1992] 2 SCR v; *MacBain v Lederman*, [1985] 1 FC 856, 22 DLR (4th) 119 (CA); *Mohammad v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 363, 21 FTR 240 (CA).

pushed further, however, it would appear that the analysis could also usefully address the question of discourse and, specifically, whether meaningful dialogue between the assessment board members and non-band litigants could actually take place once the tribunals were up and running.

There are valid reasons for incorporating aspects of operational context into the determination of independence. A consideration of contextual factors—such as the origins and purpose of the administrative actor, any family likenesses, the institutional culture, institutional practices, shared understandings between the administrative actor and the industry, connections between decision makers and litigants, and the possibility for meaningful discourse during proceedings—can yield a fuller picture of whether barriers to fair and meaningful decision making are present. They ground the analysis of reasonable apprehension of bias by focusing the inquiry on concrete areas where barriers to independence may exist.

Moreover, the nature of the reasonable apprehension of bias test, and its emphasis on the perception of a reasonable person, itself speaks to why a grounded analysis is preferable. The test should enable this reasonable observer to provide balanced opinions—that is, to be neither hasty nor otiose in reaching conclusions about the existence of disqualifying bias in administrative action given the interests at stake. On the one hand, the analysis of reasonable apprehension of bias should avoid hurried, uninformed, and therefore unmerited disruptions of the administrative state, though there are certainly instances where criticism and disruption of administrative actors are necessary. A decision that is not fully informed risks working against the legitimate policy goals of the administrative actor, which, as was the case in *Matsqui*, may have been developed collaboratively to further a social policy in the public interest. Alternatively, it may be that an administrative body has gone to great lengths to use its discretion to protect decision-making independence and procedural fairness in its proceedings in light of statutory shortcomings. These administrative actions may be unnecessarily defeated by an uninformed decision about disqualifying bias.

At the same time, in reaching a conclusion about disqualifying bias, the reasonable person must take the interests at stake into account in deciding how far to go in searching for justifications. Considering operational context in light of ambiguous statutory language may be justifiable in circumstances related to tax appeals. However, in the context of individual liberty—for example, with respect to detention of individuals alleged to be a threat to national security, where the information shared about the individual's case is limited and risks to individual liberty are high—the reasonable person would understandably be less amenable to wait for an administrative procedure to be put into operation

in order to analyze any possible discretionary contextual safeguards.¹¹² When there are risks to individual liberty and security of the person, statutory analysis alone may be sufficient to trigger concerns about independence, and, therefore, procedural fairness, in the administrative state.

Reading the statute alone to determine independence, as the minority in *Matsqui* chose to do, is in keeping with a liberal view. Rawlsian impartiality requires disengagement from the realities of everyday life. But determining administrative independence solely by way of statutory analysis does not accord weight to the various practices, norms, and self-understandings that may present barriers or render a perception of bias caused by lack of statutory independence more or less reasonable.¹¹³ What is needed is an analysis derived from the open-ended question of whether any barriers exist that would hinder the decision maker from adjudicating fairly. The approach of the minority in *Matsqui*, therefore, unfortunately suggests shutting the door to the much richer set of information brought by the exploration of operational context. Moreover, as emphasized by feminist theorists, grounding decision making in concrete realities as opposed to abstract ideals allows for more authentic generalization. In a field as pluralistic as the Canadian administrative state, an appreciation of operational realities would allow for a more faithful incorporation of general principles of administrative independence.¹¹⁴ Justice

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112. For an example of this, see the US Supreme Court (US Court) case of *Hamdan v Rumsfeld, Secretary of Defense et al*, 548 US 557. Although this case did not concern the issue of independence, it dealt with the safeguards of procedural fairness required for an individual detainee tried by military commission. Specifically, the US Court concluded that it could condemn such commissions for lack of procedural fairness, even before trial, so long as the relevant legislative material provides a basis to presume that a hearing meeting basic tenets of fairness would not be held.
113. While there are certainly approaches to statutory interpretation that are contextual in nature within Canadian public law jurisprudence, these approaches focus on understanding statutory provisions within the broader statutory language and its historical purpose(s). See e.g. *Québec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*; *Québec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, 2000 SCC 27, [2000] 1 SCR 665. What distinguishes the grounded approach to impartiality is that the contextual elements examined do not only include an appreciation of the greater statutory scheme but, more importantly, it aims to take into account aspects of the day-to-day operational realities of the administrative body in question.
114. Two ways in which a tribunal's practices, norms, and self-understandings can be brought before the court on judicial review are through an examination of documents produced by the tribunal (e.g., annual reports) and by allowing the tribunal to appear before the court to discuss them. Both offer a much richer dialogue with the tribunal than a simple reading of the statute. One is reminded of Habermas's discourse theory employed in a context where the interlocutors are the courts and the tribunal under review. However, the courts have been wary to adopt methods of review that foster such a dialogue. While documents emanating

Sopinka's insistence on seeing the tribunal in operation comports with this view.

To summarize, in cases where legislative language pertaining to the independence of administrative actors is ambiguous, the SCC has sent unclear messages about whether an administrative body's operational context should be examined and, if so, which elements should be scrutinized. These unclear messages are the inevitable result of an approach that is not firmly rooted in a principled search for contextualized diagnostic data. Moreover, although the majority of the judges who addressed the independence issue in *Matsqui* articulated an approach that favours looking at the tribunal in operation, this could be further refined to ensure the use of specific factors to guide the analysis. Adopting a grounded approach will empower the hypothetical reasonable person to reach conclusions about the sufficiency of independence that are neither uninformed and hasty, nor overly tolerant.

II. APPLYING A GROUNDED APPROACH IN THE GAP OF STATUTORY AMBIGUITY: *BELL*

This section focuses on how the theory of grounded impartiality would prompt a different set of analytical considerations in a case concerning the sufficiency of independence under a statutory provision that gives a public official discretion with respect to an administrative decision-maker's security of tenure. In *Bell Canada v Canadian Telephone Employees Association*,¹¹⁵ a case decided shortly after *Ocean Port Hotel*, Bell Canada argued that the independence of the Canadian Human Rights Tribunal (the Tribunal) had been compromised by the Canadian Human Rights Commission's power to issue guidelines binding on the Tribunal in relation to classes of cases, and by the power of the Tribunal Chair to extend

from the tribunal are usually accepted, the Court has opened the door only tentatively to allowing tribunals to appear on judicial review of their own decisions to discuss their policies and practices. The seminal case on the issue is *Northwestern Utilities Ltd v City of Edmonton*, [1979] 1 SCR 684, 89 DLR (3d) 161. For another case dealing with this issue, see *Ontario, (Children's Lawyer) v Ontario (Information and Privacy Commissioner)* 75 OR (3d) 309, 253 DLR (4th) 489 (CA). For literature on granting tribunals standing on judicial review of their own proceedings see: Laverne A Jacobs & Thomas S Kuttner, "Discovering What Tribunals Do: Tribunal Standing before the Courts" (2002) 81:3 Can Bar Rev 616. Noel Semple, "The Case for Tribunal Standing" (2007) 20:3 Can J Admin L & P 305; Frank AV Falzon, "Tribunal Standing on Judicial Review" (2008) 21:1 Can J Admin L & P 21.

115. 2003 SCC 36, 1 SCR 884 [*Bell*].

the terms of Tribunal members if they expired during an ongoing inquiry. Both powers were discretionary and found their source in the enabling legislation.¹¹⁶

The Court rejected both arguments. It was convinced neither that the Human Rights Commission's guideline power posed a potential threat to independence,¹¹⁷ nor that the Chairperson's discretionary power to extend the appointments of tribunal members compromised the members' security of tenure and, therefore, independence.¹¹⁸ In finding no breach of the members' security of tenure, the Court put forward two main justifications for the Chairperson's discretionary power. Interestingly, neither justification simply followed *Ocean Port* by holding that the legislation was clear in requiring the Chair to take on this discretionary role. By contrast, it appears that this was a situation where the statute was sufficiently ambiguous to warrant the Court stepping in to illuminate the precise standard of independence. The Court's first justification was that the power did not infringe upon independence because it was a necessity: Someone had to be able to extend appointments when they expired before a hearing was complete.¹¹⁹ The Tribunal Chairperson was in a good position to take on this role in light of his or her knowledge of the situation and because of his or her separation from the Human Rights Commission, which would be a party to the litigation. The second justification was that the Court in *Valente* had already approved legislation endowing the head of a decision-making body with a discretionary power to extend appointments.¹²⁰ Beyond these two justifications, the Court also held that a high level of independence was required because of the adjudicative nature of the Canadian Human Rights Tribunal.¹²¹

116. *Canadian Human Rights Act*, RSC 1985, c H-6, ss 27(2), 27 (3), 48.2(2).

117. The SCC found that the guideline power did not infringe the independence of the Tribunal members because it was a legitimate form of law that had to be applied; there was nothing to indicate that the Tribunal would favour the Commission as a party before it simply because it had the power to create guidelines; and there was no evidence that the Commission had attempted to use the guidelines to influence the Tribunal in its favour.

118. See *e.g. ibid*, s 48.2(2):

(2) A member whose appointment expires may, with the approval of the Chairperson, conclude any inquiry that the member has begun, and a person performing duties under this subsection is deemed to be a part-time member for the purposes of sections 48.3, 48.6, 50 and 52 to 58.

119. See *Bell*, *supra* note 115 at para 52.

120. *Ibid* at para 53. See *Valente*, *supra* note 94.

121. The Court posited the now familiar idea of a spectrum, with some administrative tribunals closer to the executive with the aim of developing policy and others closer to the judicial end with the primary purpose of adjudicating disputes through a form of hearing. The latter set of tribunals are said to require a higher degree of independence. The Court also noted that the tribunal may have a number of different functions and that all functions are to be considered in determining the degree of independence.

Yet, none of these justifications engages directly with the issue of whether a decision maker, whose term was precariously waiting for renewal, could reasonably be perceived not to be deciding independently. Use of the factors suggested by the grounded theoretical approach would have prompted the Court to inquire about a different set of elements in the administrative actor's surroundings that might, in perception or in reality, have prevented it from deciding freely. The factors suggested by the grounded theory concern the administrative actor's provenance—that is, the statutory and policy reasons for creating the tribunal and whether they are being implemented appropriately in the institution's work; institutional self-understandings, culture and practices that have developed within the tribunal organically as it has taken on its own existence over time and which may fall in the way of adjudication according to one's conscience; and a consideration of the local understandings among the administrative actor and other members of its immediate external community, such as executive branch ministers, industry, and the public, for an understanding of the impact on decision making that these local understandings have. Lastly, the factors of connection and discourse may also be relevant for the issue of whether the guidelines prevented the parties from participating as fully as they should in the decision-making process. Each of these factors will likely exist to some extent for every administrative actor, and the presence or absence of any one of these factors does not automatically indicate that independence is hindered. Rather, each factor should be examined for what it reveals about decision-making independence in the context of the administrative actor in question and in light of the factual circumstances that have given rise to the allegation.

Applying a grounded theoretical approach, the Court in *Bell* might first have reflected on the policy goals behind the creation of the Human Rights Tribunal and asked whether the attainment of these goals would legitimate the discretion vested with the Chair to extend appointments.¹²² In its analysis, the Court could have considered evidence regarding the history of the Tribunal, including its

122. The Tribunal Chairperson's power to extend appointments originated in the enabling statute of the Tribunal, which prevented its decisions from being overturned by common law principles of fairness, including independence. Instead of relying on this grant of authority by the enabling statute, a principle reiterated in *Ocean Port Hotel*, the Court duly explored Bell's argument, providing the two responses that I have outlined. In light of *Valente*, the Court concluded that:

[i]f the discretionary power of the Chief Justice and Judicial Council of the provincial courts to extend the tenure of judges does not compromise their independence in a manner that contravenes the requirements of judicial independence, then neither does the discretionary power of the Tribunal Chairperson compromise the independence of Tribunal members in a manner that contravenes common law procedural fairness.

place, alongside the Human Rights Commission, in the statutory network aimed at resolving human rights claims as expeditiously as possible.

Continuing with this grounded inquiry, the Court might then have assessed whether the extension power posed a perceived or real barrier to fair and independent adjudication on fact and law. To do so, the Court could have explored a series of questions about the shared understandings that exist within the human rights tribunal. These questions would necessarily be tethered to the arguments put forward by the party alleging a reasonable apprehension of bias due to insufficient independence, and could vary from case to case. But, as an example, if the concern were that the Chair might withhold the extension of a member's expiring appointment because of disagreement with the decision the member planned to render in the pending case, evidence showing statistical patterns regarding renewal might be useful. Any available information (for instance, mission statements, annual reports, academic or other studies done on the tribunal or its members) might also be helpful in identifying the norms and values underlying the tribunal's culture and whether the Chair's discretion is auspicious against this backdrop. The internal practices of the Tribunal that stem from this institutional culture could also be accessed in this way. Although it might be challenging to pierce and draw conclusions from the internal norms of a group of co-workers within an organization like an administrative tribunal and their connections to those that regulate them, a grounded theory would at least open the door to considering in a systematic fashion internal culture, practices, and self-understandings as possible barriers to independence. Local understandings could have a role to play as well, if only to document what legitimate expectations (if any) a litigant might have in this instance. Finally, since this particular institutional issue did not involve a specific hearing involving the litigants' rights, it is unlikely that connection and discourse would have been particularly probing factors in this case.

In sum, while we do not have enough evidence to determine if *Bell Canada* would have been decided differently under a grounded theory approach, it is clear that such an analysis would have been more transparent and centred on identifiable guideposts of operational context.

2. ADMINISTRATIVE IMPARTIALITY

The test of whether a reasonable person with full information who has thought the matter through would apprehend bias is equally dissatisfying as a test for lack of impartiality as it is for lack of independence. As with the Court's doctrine

Bell, *supra* note 115 at para 53.

on administrative independence, the administrative impartiality jurisprudence is founded on a methodology that requires more robust development. Cases in which conflicts of interest are alleged illustrate some of the main difficulties in applying the test and offer an opportunity to consider how a grounded approach to impartiality could provide a different perspective.

I. CONFLICTS OF INTEREST—IMPERIAL OIL, RÉGIE

Conflicts of interest relate to perceptions that arise from the actions or relationships of a decision maker and may be present on an individual or institutional level. Disqualifying bias resulting from a conflict of interest can occur in situations where a pecuniary or other material interest of a decision maker appears reasonably to have jeopardized a fair hearing in a matter, or when personal or professional relationships between the administrative actor and parties, counsel, or witnesses compromise the perception that an unbiased process has been or will be followed.¹²³

When alleged conflicts arise on an individual or institutional level there are three main issues: (1) how direct and immediate the apparent conflict or conflicting relationship is; (2) the existence of any legislative sanction; and (3) the nature of the functions performed by the administrative actor and, in particular, how closely they mirror those of a court. Because the notion of impartiality relates fundamentally to how well litigants and decision makers can engage in open and meaningful dialogue within the decision-making context, one would assume that an assessment of how direct and immediate the conflict is would occupy a primary role in the evaluation. However, the SCC and lower courts have shown a tendency to focus more closely on legislative exemptions that may allow the conflict to stand as well as the nature of the functions performed by the administrative actor.¹²⁴ This problematic approach has left a vacuum in the Canadian administrative law doctrine of impartiality because of its lack of engagement with

123. On the legal doctrine of disqualifying bias in Canadian administrative law, see generally Van Harten, “Bias and Lack of Independence”; Jacobs, “Caught between Judicial Paradigms and the Administrative State’s Pastiche”; David P Jones & Anne de Villars, *Principles of Administrative Law*, 5th ed (Toronto: Carswell, 2009).

124. See e.g. *Brosseau v Alberta Securities Commission*, [1989] 1 SCR 301, 57 DLR (4th) 458 [*Brosseau*]; *Imperial Oil*, *supra* note 92; *Global Securities Corp v British Columbia Securities Commission* (1998), 56 BCLR (3d) 237, 162 DLR (4th) 601 (CA) [*Global Securities* cited to BCLR]; *Lambert v College of Physicians and Surgeons* (1992), 101 Sask R 81, 31 ACWS (3d) 1296 [*Lambert*]; *Broers v Real Estate Council of Alberta*, 2010 ABQB 497, [2010] AWLD 4787 [*Broers*]; *Anne & Gilbert Inc v Prince Edward Island (Minister of Finance and Municipal Affairs)*, 2011 PESC 15, 311 Nfld & PEIR 264 [*Anne & Gilbert*].

the central issues that would preoccupy a reasonable observer concerned about the decision-maker's state of mind. These central issues include the possibility of genuine discourse throughout the proceeding and any connections between the decision maker and others that may foil this discourse. A grounded approach to impartiality could, on the other hand, offer a more piercing analysis than what is presently found in the jurisprudence.

For example, consider the administrative law doctrine that a reasonable apprehension of bias is deemed not to arise as long as the conflicting functions of an administrative body are prescribed by constitutionally valid enabling legislation.¹²⁵ Under the rule of law, democratically created legislation may authorize a single administrative body to perform functions such as prosecution and adjudication even though the performance of both functions by the same entity would otherwise contradict the principles of natural justice. The difficulty with the doctrine is that it has been interpreted in some instances to permit conflicting functions to survive without scrutiny even in cases where the legislation has not expressly sanctioned the specific type of conflict at issue. In other words, it fails to deal with the discretionary pockets that may exist within the legislation where the conflicting actions are not entirely covered by the legislation's sanction. *Imperial Oil* offers an example of this conundrum and enables us to explore how a qualitative assessment of the existence of impartiality using a grounded approach can be useful in assessing whether a reasonable apprehension of bias exists in such circumstances.

In *Imperial Oil*, environmental contamination was found in the soil of a housing development formerly owned and operated by Imperial Oil for several decades as a petroleum products depot. In 1998, the Québec Minister of the Environment (the Minister) issued a characterization order against Imperial Oil. The order, which followed the polluter-pays principle, required Imperial Oil to produce and submit, at its own expense, a site characterization study ascertaining the nature of the contamination and outlining appropriate decontamination measures. Under the same statutory provision, the entity responsible for the contamination could also be held responsible for the costs and execution of the

125. This doctrine is most clearly articulated by the SCC in *Brosseau*, *supra* note 125. For cases that have discussed or have applied the doctrine, see: *Imperial Oil*, *supra* note 92; *Global Securities*, *supra* note 125; *Lambert*, *supra* note 125; *Broers*, *supra* note 125; *Anne & Gilbert*, *ibid.* For SCC cases dealing with the issue of seemingly conflicting interests but in the very politicized context of elected municipal councilors, see *e.g.* *Old St Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170, [1991] 2 WWR 145; *Save Richmond Farmland Society v Richmond (Township)*, [1990] 3 SCR 1213, 52 BCLR (2d) 145.

decontamination work. In issuing the order, the Minister acted under broad powers bestowed upon him by the *Environment Quality Act*.¹²⁶

Imperial Oil challenged the order on grounds of procedural fairness, alleging that the Minister was in a conflict of interest and that the conflict should invalidate the order. The Ministry of the Environment (the Ministry) had, in fact, supervised decontamination of the site in the 1980s and had approved the decontamination methods used so that the housing development could be built. The Ministry approved the decontamination despite the fact that its own precondition requiring the involvement of an independent consultant had not been met. When the pollution problem resurfaced in the 1990s after the housing development had been built, owners of contaminated lots filed three court actions against the Minister, among others, alleging negligence in supervising and approving the decontamination work. Imperial Oil argued that a conflict of interest existed because the Minister had ordered it to undertake the characterization study in the wake of these three pending court actions and with knowledge that additional court actions were forthcoming. The Minister, therefore, appeared to have a financial interest in reducing the costs that the Ministry would incur as a result of these lawsuits.

The SCC and all the courts and tribunals below (except the Québec Superior Court) dismissed the concerns about impartiality primarily through an analysis of the Minister's multiple roles under the enabling statute. The Tribunal Administratif du Québec (TAQ), for example, found that impartiality concerns were not engaged because the Minister was invested with overlapping and inherently conflicting functions by the enabling legislation. Specifically, the Minister was given the powers of providing information, participating in preservation and decontamination work, overseeing the application of the statute, issuing authorizations and permits, and making various categories of orders prescribing corrective measures.¹²⁷ In a similar vein, the SCC held that the duty of impartiality does not apply to a Minister exercising what is essentially a discretionary and political power. The Court acknowledged the Minister's broad discretion under the statute, his multiple functions, and the essentially political nature of this decision, which it viewed as a choice among three possible broad routes that could be taken to resolve the issue. The Minister had three statutorily authorized options in this case: (1) not to act at all; (2) to order the removal of the contaminants and attempt later to recover the costs; or (3) to pursue those responsible under

126. RSQ, c Q-2.

127. See *Cie pétrolière Impériale Ltée c Québec (Ministre de l'Environnement)*, [1999] TAQ 1256 at paras 82-85.

the polluter-pays provision, as he chose to do. The Court focused exclusively on the Minister's choice of options under the statute, indicating that the choice to pursue the polluter-pays principle was not, in and of itself, indicative of partiality. The analysis performed by both TAQ and the SCC to determine whether there was any appearance of partiality on the Minister's part, therefore, rested at a macro level of scrutiny.

Indeed, beyond discussing the decision to pursue the polluter-pays principle, the Court barely touched on the question of whether the process for determining if Imperial Oil should be ordered to perform a characterization study had been executed with an appropriate level of impartiality. The Court noted that there were procedural protections in place in the statute, but nowhere in the decision did it examine closely how the Minister executed these procedural protections. The *Environmental Quality Act* and *The Act Respecting Administrative Justice* allowed any entity that may be subject to a characterization order to present observations on the fairness of the order to the Minister.¹²⁸ These observations were to be contemplated before the order was made. *The Environmental Quality Act* also required the Minister to provide reasons for a characterization order. There was no qualitative inquiry into the manner in which these obligations were fulfilled and, in particular, whether any improper purpose could reasonably be perceived in their execution. Given that the Minister was involved in live litigation at the time over his role in the decontamination of the very site in question, it is particularly surprising that the Court did not examine his receipt and contemplation of the observations presented by Imperial Oil or the reasons he supplied for ordering the characterization study.¹²⁹ It is equally surprising that the Court did not explore functional necessity. More specifically, the Court did not examine the extent to which it could be said that any financial advantage that might occur as a result of the issuance of the characterization order was not attributable to the Minister's design but merely to the fact that the enabling statute required him both to be involved in decontamination work and pursue the polluter-pays principle in appropriate circumstances. Even more importantly, it would have been useful to explore whether the reasons given for the order indicated that the Minister might have been catering to self-interest and financial savings. It would also have been useful to examine whether, by contrast, the

128. See the *Environmental Quality Act*, *supra* note 127, s 31.44. See also *The Act Respecting Administrative Justice*, RSQ c J-3, s 5. For a discussion of the procedural requirements, see *Imperial Oil*, *supra* note 92.

129. Under the *Environmental Quality Act*, the Minister is required to provide reasons for issuing a characterization order. *Supra* note 127, s 31.42.

Minister's reasons focused on proper considerations within the statutory context, including whether the process followed allowed Imperial Oil to make its case adequately and fully and whether the Minister appropriately and fully considered the case before making the order. Instead, the Court found perfunctorily that the statutory requirements with respect to the proceedings had been met. As the Court stated:

The record confirms that the necessary notices were given. The appellant had an opportunity to present its observations, which the Minister reviewed before issuing a decision, for which reasons were given. The procedural framework established by the Act was therefore followed.¹³⁰

Imperial Oil demonstrates that once an administrative actor with potentially conflicting, but statutorily authorized, roles has decided to perform one of those roles, the question of whether it meets the standard of impartiality in executing that role is not always well examined.

Even more disappointing is the fact that the standard of impartiality for an administrative body performing one of its multiple conflicting roles is rarely articulated fully.¹³¹ In *Imperial Oil*, the Court stated that the content of the duty of impartiality “like that of all of the rules of procedural fairness, may vary in order to reflect the context of the decision-maker’s activities and the nature of its functions.”¹³² Yet, at no point does the Court identify what impartiality should look like for a Minister within the fact scenario of the case. All that is given is a reference to the procedural protections in place pursuant to the statute,¹³³ but no guarantee that these protections contemplated the particular fact scenario at hand.

130. *Imperial Oil*, *supra* note 92 at para 27.

131. *Ibid.* See also *Newfoundland Telephone v Newfoundland, (Public Utilities Board)*, [1992] 1 SCR 623, 89 DLR (4th) 289 [*Newfoundland Telephone*].

132. *Imperial Oil*, *supra* note 92 at para 31.

133. Writing for the Court, Lebel J, in dicta, calls simultaneously for context while showing a clear aversion to the task of contextually establishing the nature of impartiality, instead deferring to statutory language:

Given these circumstances, we need a concrete definition of the nature and extent of the rules of procedural fairness that apply to the Minister’s decision. Is the Minister bound by a duty of impartiality, in its full scope and rigour, as are judges or administrative tribunals that essentially perform adjudicative functions, such as the ATQ or grievance arbitrators in the case of labour law? On this point, the decisions of this Court stress the crucial importance of a careful examination of the applicable legislation in order to determine the nature and scope of the rules of procedural fairness that apply to action taken by an administrative decision maker.

Ibid at para 32.

A theory of grounded impartiality would have inquired into factors relevant to the Minister's ability to engage fairly and openly in the decision-making process and whether he had so engaged in the prescribed process. By focusing on the concepts of discourse and connection, this approach would ascertain the extent to which there is room for genuine dialogue between the decision maker and litigants. A genuine dialogue is one in which the parties are heard by a decision maker whose mind is open to persuasion. Any considerations undermining the Minister's ability to engage in appropriate discussions would, therefore, be brought forward for further examination. In this light, more attention might have been given to the report by the Ministry engineer indicating the Ministry's desire to offset the legal costs occasioned by the lawsuit.¹³⁴ The notion of connection can also ground questions about impartiality in cases where relationships appear to give rise to conflicts of interest. Active relationships, like those arising in live litigation, might reasonably cast a pall on the state of mind of the decision maker regardless of whether the administrative function is more political in nature. The degree to which any connections are sanctioned by valid enabling legislation must also be taken into account.

Administrative actor provenance is clearly also fruitful in this scenario. The nature of the Minister's political, discretionary, and other functions, as well as the extent to which his statutory obligations conflict, provide a backdrop for understanding the standard of impartiality that can reasonably be expected in fulfilling the statutory procedural protections.

I would suggest that the Minister's connection to Imperial Oil prior to litigation gave rise to a reasonable cause for concern about impartiality. Even within the broad framework of multiple and conflicting functions, the active litigation and the Minister's prior connection to Imperial Oil raise reasonable concerns about the state of mind of the Minister in determining whether Imperial Oil should be ordered to perform a characterization study at its own expense. At this point, it may be that the question of necessity should arise and an exploration as to whether any other public official could perform the role of the Minister should have been explored.

Ultimately, legislation alone cannot resolve allegations of conflict of interest. Rather, context beyond the statute is valuable in determining whether a reasonable apprehension of bias exists in such cases. *Imperial Oil* illustrates that there are additional elements within the operational context of administrative bodies, such as discourse, connection, and provenance, that are worthy of examination in

134. See *Cie pétrolière Impériale Ltée c Québec (Ministre de l'Environnement)*, JE 2000-442, REJB 2000-17249.

determining impartiality. A brief additional example can be used to show how the two remaining factors of the grounded analysis—namely, shared and local understandings—may play a role in determining whether impartiality has been met. In *Régie des permis d'alcool (Régie)*,¹³⁵ the SCC found that the possibility that lawyers and directors might perform the conflicting roles of prosecutor and adjudicator within Québec's liquor licensing board raised a reasonable apprehension of bias at the institutional level that could not be countenanced by enabling legislation. The job descriptions had largely been left to the discretion of those managing the Régie, as the legislation did not define the roles of the lawyers and left open the possibility of the directors playing multiple and conflicting roles on the same file. Further, the Régie's annual report showed that one individual could participate in the prosecution and adjudication of the same file.¹³⁶

In the *Régie* fact scenario, beyond examining the provenance of the tribunal, its ability to engage in discourse, and any connections it may have with litigants, it would also have been useful to examine the shared understandings among those in the administrative agency about the agency's role as well as the shared normative values guiding its design of procedural safeguards. A grounded analysis could serve to raise pertinent questions relating to why the conflicting roles may have been chosen and why they may or may not have been appropriate. Moreover, in determining fair and just outcomes, an administrative body may need to draw upon its knowledge of the community or industry it has been tasked with administering in order to interpret the relevant legislation. This expert knowledge may relate to technical subject matter, but it may also relate to documented expectations of what the community and the decision maker have considered to be fair in the past.

135. See *Régie*, *supra* note 97.

136. The Régie's decision was quashed for lack of impartiality. See *ibid* at para 48. Even if the legislation had defined the conflicting roles, the decision still would have given rise to a reasonable apprehension of institutional bias at minimum, as the conflicting functions would have been found contrary the Québec *Charter of Human Right and Freedoms*. RSQ c C-12 at s 23. The existence of constitutional (or, in this case, quasi-constitutional) restrictions is a point of distinction from cases such as *Brosseau*. *Supra* note 124. In that case, it was alleged that there was a reasonable apprehension of bias because the Chair of the Alberta Securities Commission had received the results of an investigation conducted by the Commission prior to conducting a hearing relating to the same company. Despite the conflicting investigatory and adjudicative roles, which permitted those in the Commission to essentially act as both prosecutor and judge, the Chair's actions were not found to pose a threat to impartiality because they fit within the limits of a constitutionally valid enabling statute. On the notion of conflicting types of functions, see also *Newfoundland Telephone*, *supra* note 131. This was an administrative impartiality case dealing with attitudinal bias as opposed to conflict of interest.

In addition to whatever authorization a statute may offer, focusing the impartiality analysis on the ideal of genuine dialogue, the connections between actors and litigants, the shared understandings within it, the provenance of the administrative agency, and the shared and local understandings within the community of decision maker and litigants, puts one in a better position to argue for or against a reasonable apprehension of bias. This information will not exonerate behaviour that clearly violates procedural fairness, but it opens the door to more transparent, robust, and complete determinations about allegations of bias.

IV. CONCLUSION

In conclusion, valuable insight can be gleaned from reading the Canadian administrative law jurisprudence on impartiality alongside political and moral theory. The evolution of the notion of impartiality in political and moral philosophy shows a move towards an embodied appreciation of justice. In Canadian public law, by contrast, a trend in this direction is less certain. When it comes to evaluating judges for their impartiality, courts have accepted the need to consider the judge under scrutiny as a contextualized being and to consider the social realities surrounding a factual situation. However, in determining whether a reasonable apprehension of bias has been shown with regard to administrative actors, courts have been ambivalent in their commitment to a contextual analysis and unclear in identifying what it should look like.

In this article, I have presented the beginnings of a conceptual framework for addressing allegations of reasonable apprehension of bias in administrative law. This conceptual framework, which I have termed a theory of grounded impartiality, requires the consideration of specific contextual factors when administrative impartiality is under scrutiny. It also aims to create a dialogic space in which tribunals can explain their shared institutional understandings, cultures, and norms, as well as local understandings, before a reviewing court. The focus is on elaborating factors that aid the analysis of reasonable apprehension of bias. Identifying these factors pushes the analysis towards more concrete questions about the nature of the administrative actor and provides a richer understanding of why disqualifying bias should or should not be perceived. I argue that the factors of administrative actor provenance, institutional culture, shared understandings, local understandings, connection, and discourse can be relied upon to develop a more grounded, less inchoate articulation of why an apprehension of bias should or should not be considered reasonable.

Why should context matter? I suggest that at least two reasons can be put forward. The first deals with authenticity. As in political and moral philosophy, a contextualized analysis of impartiality in the administrative law sphere offers a more authentic understanding of what being impartial means. Schools of thought critical of Rawlsian liberalism expressed unease about the abstract and universal way in which principles of social justice were being developed. The same is true in administrative law. As opposed to using universal principles that can be discerned from largely abstract and theoretical legislation, the determination of whether impartiality exists should involve a true appreciation of the background and characteristics of the administrative bodies and litigants involved. However, a degree of caution and balance necessarily runs alongside this idea. Political theorists who fought for more concretized and embodied understandings of impartiality were equally aware of the dangers of simply substituting the perspective of one group of individuals as the norm by which impartiality should be measured. In particular, feminist theorists fought for grounded understandings of universality. Grounded understandings do not mean simply turning the focal point of so-called universal principles of justice from the hegemonic group to a group with a particular set of political aspirations.¹³⁷

This brings us to the second reason for contextualized judging. Translated to the context of impartiality in public law, contextualized approaches to impartiality serve to fulfill the aspirational goal of questioning from whose perspective impartiality can be said to be legitimate. Ultimately, one would hope that this questioning will bring about dialogue as different conceptions of impartial decision making are brought to the fore and are shared and justified. In the end, it may be that by considering factors such as provenance, shared and local understandings, connection, and discourse, new norms of impartiality will develop that are contextualized to fit more authentically with the decision-making circumstances involved. This is especially true in administrative law, where the jurisprudence has maintained that context and flexibility are central. Embracing a move towards grounded impartiality in judicial review of administrative action will go far in providing decisions that are fair to individuals and that promote the public interest.

137. This was a theme grappled with by feminist scholars and other critical scholars. See *e.g.* Young, "Difference for Democratic Communication," *supra* note 52.