From Rawls to Habermas: Toward a Theory of Grounded Impartiality in Canadian Administrative Law

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

Laverne Jacobs

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Abstract:
At the same time that Canadian public law jurisprudence has grappled with some very 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 deliberative democracy, this debate evolved over a span of more than four decades, yet, rarely, if at all, is this philosophical literature referred to in the public law jurisprudence dealing with impartiality. This paper inquires into whether the debates surrounding impartiality in political and moral philosophy and those in Canadian public law share common ground. In what ways might this literature and jurisprudence 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 to be used in Canadian administrative law. The theory 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, to allow for more well-informed, meaningful, and transparent decision-making about allegations of bias. While these factors have been advocated by certain political and moral philosophers as an 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.

Keywords:
administrative law, impartiality, moral and political philosophy, reasonable apprehension of bias test, liberalism, Rawls, Habermas

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Introduction

In Canadian public law jurisprudence\(^1\), the concept of impartiality is often treated with insularity. A reading of the Supreme Court of Canada cases dealing with the disqualification of public decision-makers for reasonable apprehension of bias reflects 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 very 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’ view of liberalism and culminating in deliberative democracy, this debate evolved over a span of more than four decades, starting in the 1970s. Yet, rarely, if at all, is this philosophical literature referred to in the public law jurisprudence dealing with impartiality.

Political and moral philosophy is that 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 knowledge of the two discourses challenges us to reconsider the judicial methods by which decision-making impartiality is established. This is particularly so 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 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.

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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 will not be addressed.

\(^2\) See Martha Nussbaum, “The Enduring Significance of John Rawls” (2001) 47(5) Chronicle of Higher Education at 3. Although the branch of philosophy is termed "political and moral philosophy", this article at times uses the shorthand of "political philosophy".
In the first part of this paper, I provide an overview of the major debates regarding impartiality that have arisen in political and moral philosophy. John Rawls’ *A Theory of Justice*\(^3\) is chosen as a starting point\(^4\) because his work is often cited as conveying the contemporary originating ideas on how the State should maintain impartiality amongst the many moral doctrines that may arise in public decision-making and public policy-making, and more generally, within the creation of public institutions. Rawls’ work is also broadly cited as providing a procedure for determining social justice amidst competing conceptions of the good. I then move to examine briefly some of the major responses to Rawls’ theory, launched from communitarian, contextualist, feminist and discourse theorists.

The second part of the paper 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 I to show that the use of an analytical approach to administrative law bias cases that is founded on the conceptual factors of grounded impartiality can lead to decisions about impartiality that are better-informed, meaningful, and more transparent. Ultimately, I conclude that examining issues of administrative law impartiality through the lens of the philosophical discourse can serve to inspire greater public confidence in our public institutions.

Part I - Impartiality in Political and Moral Philosophy: From Rawls to Habermas

1. Rawls and Impartiality

John Rawls’ *Theory of Justice* dealt with the political question of how to maintain State impartiality among a plurality of moral doctrines when designing the public

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3 John Rawls, *A Theory of Justice* (Cambridge, Mass: Belknap Press of Harvard University, 1971) [Rawls]. A revised second edition of *A Theory of Justice* was published in English in 1999 (John Rawls, *A Theory of Justice* Cambridge, Mass: Belknap Press of Harvard University, 1999). Rawls initially revised his work in preparation for German translation in 1975, although the final body of revisions incorporated changes made in response to criticisms and was eventually published in English in 1999. The revisions touched on the substance of some of Rawls’ ideas including the formulation of the two principles of justice as fairness. (Rawls’ first principle of justice as fairness was reworked several times, including in 1973 and 1993, to adjust the meaning of “extensive basic liberty”.) In this article, references are to the 1971 edition of the text. I have chosen the earlier edition because many of the major schools of thought that replied to Rawls’ theory or that have critiqued it, did so before 1999 and their responses are therefore to the original version of this work. References to *A Theory of Justice* are to the sections of the chapters (denoted by “§”) unless a more precise pinpoint reference to a page number is appropriate.

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 that there is a necessary connection between the moral judgment of ordinary citizens and good political deliberation. Addressing the works of these earlier philosophers is beyond the scope of this article, however.
institutions responsible for distributing social goods. The concern was prompted by the deep inequalities in social position brought about by birth, economic and social circumstances and which are unmeritoriously favoured by the political system. These inequalities may lead to the creation and distribution of rights, duties and advantages, established through public policies that similarly reflect unequal social participation. In *A Theory of Justice*, Rawls therefore aimed to outline a set of principles for identifying the considerations relevant to determining the proper balance between competing claims of “the good life”.

Rawls proposed a procedure in *A Theory of Justice*. Although created as a hypothetical construct not necessarily designed to be put in action, this procedure was an avenue through which citizens could determine, impartially, substantive principles of justice. Rawls’ procedure conceived of citizens abstracting themselves from their moral commitments, obligations, community ties, and world views in order to agree on the first principles of justice. Moreover, each person would “exclud[e] the knowledge of those contingencies which sets men at odds and allows them to be guided by their prejudices”, 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 was said by Rawls to be one of rational justification, meaning that after reflecting on feasible alternatives, the individuals should conclude on the principles they wish to govern the distribution of social goods for all. Rawls’ understanding of the appropriate political distribution of social goods was premised on the idea that such distribution should be performed by individuals who have distanced themselves from their immutable personal characteristics and their socioeconomic circumstances. As a consequence, citizen participation in the assignment of rights, duties and benefits would theoretically end up being egalitarian or *impartial* and should receive citizen approval on that basis.

Rawls asserted, however, that two substantive principles of justice would always naturally guide those in the original position. These principles were, first, that the greatest equal liberty that is compatible with similar liberty for others should exist for each person 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).

### 2. The Subject of Rawlsian Justice and Decision-making Institutions

To what extent does the subject of Rawlsian justice address formal decision-making institutions such as courts and tribunals? Rawls’ theory is generally known for its application to public policy-making. In this section, I discuss the scope of Rawls’ concept of

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5 Rawls *supra* note 3 at 9-10.  
6 Ibid at 19.  
7 See *ibid* at §§ 20 and 21 for the list of alternative conceptions of justice from which those in the original position are to choose.  
8 See Rawls, *ibid*, § 11 and at 60-61.
justice, highlighting aspects of Rawls’ 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. He explains what constitutes the subject of justice that he will be treating in his work. 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”. The “major social institutions” are ones that play the fundamental role of defining an individual’s “rights and duties and influenc[ing] their life-prospects, what they can expect to be and how well they can hope to do”. Rawls’ ideal was meant to be pervasive. It is clear that the institutions he contemplated encompass much more than traditional political institutions. Their reach extends to economic institutions, competitive markets, private property, and the monogamous family.

Rawls’ delineation of the subject of justice invites questions about the extent to which courts and other public decision-making bodies would be affected. Rawls’ theory primarily addresses 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’ project would address 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 that should lead to the creation of just laws than on the impartial application and review of such laws.

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9 Ibid at 7. Another useful formulation of the subject of justice is given later in §14 of the Theory of Justice at 84: “the 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”.

10 Ibid at 7.

11 Ibid at 7. In Rawls’ 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.”. See also Shane O’Neill who 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. Shane O’Neill, Impartiality in Context: Grounding Justice in a Pluralist World (Albany: State University of New York Press, 1997) at 13.

12 See Andreas Schedler, “Arguing and Observing: Internal and External Critiques of Judicial Impartiality” (2004) 12:3 Journal of Political Philosophy 248. Schedler explains the distinction between the two types of impartiality in this way: “[i]mpartial institutions are ethically neutral insofar as they do not discriminate between competing
When it comes to common public decision-making institutions (courts, tribunals and entities of public administration), Rawls refers to such institutions although they are not the centre of attention in this work. Yet, despite the fact that courts and other adjudicative bodies are not mentioned explicitly in Rawls’ definition of the subject of justice, they implicitly fall within the tapestry of the “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 the *Theory of Justice*. These are found in Rawls’ ideas about the rule of law and the sympathetic observer. The next section outlines Rawls’ view on judging as seen through his commentary on the rule of law and the impartial sympathetic observer. It serves as a useful background against which to consider how critiques of Rawlsian liberalism may be aligned with the need for more expansive and concretized understanding of impartiality in administrative decision-making contexts.

### 3. 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 had already been described in the *Theory of Justice* as “formal justice”15. It stems from Rawls’ view that an institution is a public system of rules in which everyone subject to the system and administering it is aware of the rules. Rawls points out that consistent application, which means treating similar 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 govern themselves accordingly even if the substantive principles on which the law is built is unfair.17

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13 Andreas Schedler observes that the implications of Rawls’ work for adjudicative impartiality have not been given much attention. Impartiality as a function of designing institutions is treated at length in Rawls’ 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. See Schedler, *ibid* at 248.


15 See Rawls, *ibid*, at 58.

16 Rawls, *ibid*.

17 Rawls’ description of formal justice also brings to mind his discussion of pure, perfect and imperfect procedural justice. These comments are given 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
However, the rule of law entails not only consistency but 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. In this sense, the authorities administering the law should not be influenced by “personal, monetary or other irrelevant considerations in their handling of particular cases.” Violations of the rule of law can occur as a result of major incidents such as bribery, corruption and the abuse of the legal system to punish political enemies, as well as through subtler means like bias which causes discrimination against certain groups. Rawls’ 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’ 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 requires a rational spectator to place himself in the position of each person affected. Rawls describes the impartial sympathetic observer in the following way:

[...] he 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, an ability to identify sympathetically with each claimant’s situation and with his or her understanding of what is good characterizes the approach taken by the impartial sympathetic observer. Rawls denounced this approach, however. The sympathetic approach, Rawls argued, brings sympathy to the position of the standard of justice. Using it as determinative 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 liberalist idea that those making decisions about the good of society must be disembodied, Rawls argued that decision-makers decide best by viewing the possibilities in a general way. As 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 approach is a universalist one in which the criteria of transcendence, distance and objectivity will always be used to determine if fairness can be achieved. The use of abstraction and distance as a 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, 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 should be objective abstract and disinterested resonates with liberalism as a political ideology and found in both political and legal theory.

Nevertheless, entering into the more subjective, "messier" aspects of determining facts and law may provide more authentic results, in some cases, when it comes to

21 Ibid at 186.
22 One could argue that it is ironic that Rawls prefers the approach of mutual disinterest because it “leads to the two principles of justice,” (Rawls supra note 3 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.
fairness. Indeed, communitarians, feminist theorists, and others have critiqued Rawls’ liberal approach for its lack of appropriate sensitivity to context. This call for contextualization sometimes asks for focus on the specificities of those making the decision and, at other times, on the contextual factors 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 a historical overview of significant critiques to 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.

4. Challenges to Rawlsian Impartiality

Since the time of Rawls’ *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 communitarians, contextualists, feminists, and those who advocate for discourse theory, among others. As discussed below, one of the central challenges has been to the plausibility of Rawls’ veil of ignorance. Communitarians, for example, asserted the necessity of community, character, and friendship for a true definition of the self. They argued over 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. The communitarian critique has served as a prelude to 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. Feminist critique has also been quite strong in asserting that gender is a critical aspect of context that must be taken into account.

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 there is a need for both contextualized and

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25 Canadian equality jurisprudence has shown as much with its move from formalism to substantive equality. Contrast, for example, *Bliss v Canada (Attorney General)*, [1979] 1 SCR 183 and *Brooks v Canada Safeway Ltd.*, [1989] 1 SCR 1219 [Brooks] which was decided a decade later. In the former, the Supreme Court of Canada asserted, at para 14, in a decision denying that gender discrimination existed under a benefit plan providing disadvantageous benefits to women on maternity leave, that “any inequality between the sexes in this area is not created by legislation but by nature”. In *Brooks*, the Court recognized the need for a more substantive justice approach to equality. On similar facts, and within the era of the *Charter of Rights and Freedoms* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11 [*Charter of Rights and Freedoms*], a discrepancy in benefits between those unemployed because of maternity and those unemployed for reasons of sickness or accident was held to be gender discrimination.
universal elements to resolve specific situations. Finally, in both political and moral philosophy and the judicial realm, the move to 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 in political theory with respect to the notion of impartiality in the public policy realm. I present this section as an historical overview of these debates which developed over a span of more than four decades. The intention is to illustrate the key arguments of the chronological movement towards a recognition of the value of maintaining sensitivity to context in decision-making in the public policy sphere. In Part II, I develop a theory of grounded impartiality for Canadian administrative law, and I discuss some of the major cases dealing with decision-making bias in Canadian administrative law to illustrate how this grounded approach to impartiality would result in a more robust analysis.

a. Communitarianism

Communitarians challenged the notion of the deontological self that lies at the heart of Rawls’ liberal theory of impartiality. Michael Sandel, who launched one of the most memorable communitarian critiques of Rawls’ *Theory of Justice*, found the deontological ethic implausible. He argued that Rawls’ unencumbered self does not allow for intersubjective conceptions of the individual, yet, such intersubjectivity is often 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 from understanding ourselves as

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26 The debate between the communitarians and Rawlsian liberalists took place primarily in the 1980s. It has been said that communitarianism died out in the 1980s – see eg Matt Matravers, “Review of Contexts of Justice: Political Philosophy beyond Liberalism and Communitarianism by Rainer Forst” (2004) 113 Mind 539. But see Michael Walzer who observes wittily that the communitarian critique is like a fashion trend: transient but certain to return. Walzer considers communitarianism to be an intermittent feature of liberal politics and social organization -- see Michael Walzer, “The Communitarian Critique of Liberalism” (1990) 18:1 Political Theory 6 [Walzer, “Communitarian Critique”].

27 See Michael J. Sandel, *Liberalism and the Limits of Justice* 2d ed (New York: Cambridge University Press, 1998) (first published in 1982). By far, this is the most-referenced work on the communitarian critique. Shane O’Neill refers to it as possibly one of the most celebrated critiques of Rawls’ work from a communitarian perspective (O’Neill, *supra* note 11 at 21). Other communitarians include: Alasdair MacIntyre and Charles Taylor, whose work is arguably inspired by Aristotelian notions that shared understandings of the good for the person and his/her community is the foundation of any concept of justice; and Roberto Unger, who, like Sandel, finds inspiration in the Hegelian conception of man as a historically conditioned being. See also Amy Gutmann, “Communitarian Critics of Liberalism” (1985) 14: 3 Philosophy and Public Affairs 308.
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.\textsuperscript{28} 

In other words, the good of the community often figures as a constitutive dimension of a person. The liberal insistence that individuals be constructed as having extracted themselves from all moral commitments does not allow for an authentic picture of the self. At its heart, the liberal-communitarian debate was one over how we should conceive of the person.\textsuperscript{29}

Communitarians argued that from a philosophical and a political perspective, the Rawlsian idea that the principles of justice that guide our rights do not depend on any particular notion of the good life, fails. It seems impossible that one’s reflections on justice should be divorced from his or her reflections on the nature 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”\textsuperscript{30}. We need something to guide our choices in the original position.

Another important aspect of the communitarian way of thinking centred on the voluntary element embedded in the original position. Some communitarians were skeptical about whether we can truly limit ourselves to being bound by the ends and roles that we choose for ourselves. They believed that we are sometimes obligated to fulfill ends that we have not chosen but which are imposed by our identity as members of a family, people, culture etc.\textsuperscript{31} Some have defended liberalism against this communitarian challenge. Kymlicka, for example, has argued that our ultimate goal is to re-think 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 aim necessarily to rest in accordance with the ends that exist for us at present as individuals or as part of a community. These current ends are open to reconsideration, revision or rejection. In response to the communitarian concern that we are bound by pre-determined ends, he asserted that these communal ends are also open to re-evaluation.\textsuperscript{32}

\begin{itemize}
\item \textsuperscript{28} Sandel, \textit{ibid} at 179.
\item \textsuperscript{29} \textit{Ibid} at186.
\item \textsuperscript{30} \textit{Ibid}
\item \textsuperscript{31} But 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. While some communitarians espouse this position, the main aspect of the debate between the liberalists and the communitarians centres on whether the right can truly exist prior to the good. See Sandel’s new closing chapter in the 2d edition of \textit{Liberalism and the Limits of Justice} in which he discusses the liberalism-communitarian debate that arose after the original publication of his book, Sandel, \textit{ibid} at 186.
\end{itemize}
In sum, communitarians maintained that use of the deontological self as an ideal limits the pursuit of justice. It does so in a few ways. First, it 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”. Such a person is incapable of self-knowledge in any morally serious way. This may lead to the impossibility of achieving self-reflection and consequently may render the ends sought by the self to be preferential but irrelevant from a moral standpoint. By contrast, one is able to reach a choice of ends that is less arbitrary when a person in the original position can take into account his or her preferences and possesses an ability to assess their suitability in light of their constitutive and authentic identities. Second, the denial of character in the constitutive sense also denies friendship. Friendship leads to knowing oneself as it involves deliberating with another in a way that can help bring one’s self-image to light by receiving and contemplating someone else’s perception. Finally, because Rawls’ theory posits that “the self is prior to the ends which are affirmed by it”, the unencumbered self is an unworkable model: a person who is divorced from his or her community ties cannot choose a conception of the good because she or he is atomistic. Our personhood is partly made up of our commitment to a conception of a good life; more emphasis should therefore be laid on “constitutive projects and attachments”. With respect to legal decision-making, communitarianism offers the focal point of a more imaginative understanding of the importance of constitutive attachments, as well as community and community-shared norms in the role played by decision-makers.

b. Contextualism

The concerns raised by the communitarians were conceptualized differently among the contextualists. Both stressed the importance of community. But, whereas communitarians focused on the constitutive role that community plays with regard to the self, contextualists argued 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 developing the theory of contextualism, advocated for a conception of justice he called complex equality. Since justice depends on local

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33 Sandel, supra note 27 at 180.
34 Ibid at 180. But see Charles Larmore’s review of “Liberalism and the Limits of Justice” (1984) 81: 6 Journal of Philosophy 336, in which he argues that Sandel’s argument about character is unclear. He points out that Sandel does not specify whether an individual is unable to conceive of himself in the absence of constitutive attachments to the community or whether he is unwilling to do so. He further notes that Sandel offers no reason to support his assertion that commitments of character have anything to do with moral depth (at 339). See also Gutmann, supra note 27, who 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. A piercing critique of communitarianism generally is laid by Walzer in the “Communitarian Critique of Liberalism” (Walzer, “Communitarian Critique”, supra note 26.) who observes that the communitarians present two main critiques of liberalism that conflict fundamentally with one another.
35 Sandel, supra note 27 at 181.
36 Rawls, supra note 3 at 560.
37 Sandel, supra note 27 at 181.
understandings of what is just, it is not possible to have a universal principle or set of principles that lead to justice. The principles of justice are pluralistic in nature. 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.

At issue are the plurality of cultures and the particularity each culture shows in understanding their goods and how they should be distributed. The only way to produce principles of justice that are reflective of these aspects, is for each community to work on interpreting its shared understandings of the goods to be distributed and the most just way of distributing them. Although Walzer’s method aimed to provide a more authentic, in the sense of context-sensitive, understanding of justice, its utility has also been criticized for rejecting universal principles in favour of an approach that is highly context-dependent.

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 proves of interest to legal decision-making by stressing the value of local understandings and the shifting or flexible nature that impartiality may possess depending on the subject communities being judged.

c. 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 constituting and connected rather than autonomous. However, there are aspects of the feminist critique that are distinct. Several major arguments can be taken from a reading

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39 For critiques of Walzer’s approach see O’Neill, supra note 12, especially “Hermeneutics and Justice” and Rainer Forst, Contexts of Justice: Political Philosophy beyond Liberalism and Communitarianism, translated by John M.M. Farrell (Berkeley: University of California Press, 2002) [original published in German in 1994] [Forst, “Contexts of Justice”].


Feminist theorists tend to stress the importance of gender and essentialism.\footnote{Hekman, ibid at 1099. Essentialism and the related notion of identity, especially group identity, have developed into important themes of their own, examined by theorists such as Charles Taylor (see for example, The Politics of Recognition (Princeton, NJ: Princeton University Press, 1992) and Iris Marion Young, “Difference as a Resource for Democratic Communication” in James Bohman and William Rehg (eds), Deliberative Democracy: Essays on Reason and Politics (Cambridge, Mass.: MIT Press, 1999) [Young, “Difference for Democratic Communication”]).} One idea that prevails in the feminist critique of liberalism is that a male way of reasoning is inappropriately favoured by the Rawlsian approach. 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 suggested 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.\footnote{Young, “Impartiality”, supra note 41 at 62-63.} That rationality is a trait more strongly associated with male than female development is a theory that was furthered by academics such as Gilligan, Chodorow and Dinnerstein. 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 ethics based on caring and their connections with others.\footnote{See Gilligan, supra note 41; Chodorow, supra note 41; and Dinnerstein supra note 41, See also Barry, supra note 41 at 236-237.} Since these traits are seen as suspicious in a world of objective rationality, their reasoning process is rejected. Affect, emotion and connections with others are therefore removed to the sphere of the private, away from the public fora of deliberation, though they may offer valuable insights in judging.

Another significant feminist challenge to liberalism focused on the use of a generalized other in creating universal principles of justice. Theorists such as Benhabib critiqued 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. There are no differentiating qualities to distinguish one from the other. In Benhabib’s
words, “what we are left with is an empty mask that is everyone and no one”\(^45\). 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. At most the process is “substitutionalist”\(^46\). Not requiring those behind the veil of ignorance to speak from a perspective that stresses their shared commonalities or difference denies the opportunity to have the rich intersubjective insights that would result from being forced to address what it is that makes us different. Such richer insights would make for more grounded attempts at universalization.\(^47\) Understanding how individuals are different requires incorporating the viewpoints of those in the original position. In identifying the desires of individual 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 educating universal principles.

Theorists such as Benhabib have argued that if the definition of universalizing 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 such as 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...\(^48\)

Rawls’ theory presupposes a single self who imagines himself in the position of the other. Benhabib argued instead that moral decisions should be based on mediations between concrete individuals. She insisted that it is necessary to assume “the standpoint of the concrete other”\(^49\) in order to reach meaningful conclusions about what would be acceptable

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\(^{45}\) Benhabib & Cornell, \textit{Feminism As Critique}, supra note 23 at 89.  
\(^{46}\) A term coined by Benhabib.  
\(^{47}\) See also Shane O’Neill’s discussion of this question, O’Neill, \textit{supra} note 11 at 52-54 and the section on “Discourse Theory” in this paper, below.  
\(^{48}\) Benhabib & Cornell, \textit{Feminism As Critique}, supra note 23 at 90-91.  
\(^{49}\) \textit{Ibid} at 91.
by all. In place of the Rawlsian approach, which Benhabib termed monological, she suggested one based on dialogue between concrete individuals.\footnote{Interestingly, the feminist challenges to liberalism have been countered by the theory that feminists and those who espouse liberalism are not addressing the same issue. Brian Barry maintains that feminists and liberalists are parties to an ill-joined debate. Feminists are concerned with using impartiality as a basic principle of the conduct 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. Mendus responds to Brian Barry in \textit{Impartiality in Moral and Political Philosophy} (Oxford: Oxford University Press, 2002). Mendus argues 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”. Mendus suggests that it is important to consider the origins and extent of impartialism’s motivational power. Her claim is that motivational power derives from impartialism’s ability to accommodate the partial concerns we have for others.}

\textbf{d. Discourse Theory}

As an alternative to the original position 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 true discourse. Discourse theory conceives of actual dialogue among the participants involved in developing principles of justice and is considered to be a means of avoiding the pitfalls of liberalism identified by feminists, communitarians and contextualists. The work of Foucault and Habermas are two inspirations for the move towards discourse. The Foucauldian theory of resistance is taken up in his idea of a discursive subject. Habermas’ theory of communicative action is a strong source for the notions that discussion and consensus are key to a political democracy.

Foucault’s conception of the discursive subject furthers his theory of resistance by resisting spaces that have been constructed for groups in society by those who are more powerful.\footnote{On Foucault, power and resistance see: Michel Foucault, \textit{Power/Knowledge} (New York, Pantheon Books, 1980) and \textit{Language, Counter-Memory, Practice} (Ithaca: Cornell University Press, 1977). See also Susan Hekman’s discussion of Foucault and the use of the discursive self in addressing feminist challenges to liberalism in Hekman, \textit{supra} note 41 at 1113-1117.} Described as ”both constructed and creative”\footnote{Mendus, \textit{ibid} at 1113.} the discursive subject takes from the manifold discourses that exist in society, such as liberalism, femininity, motherhood, equality and rationality and continually draws from these discourses 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.”\footnote{Hekman, \textit{ibid} at 1113.} When considered within the context of the challenges that liberalism and communitarianism pose to gender, the discursive subject is a progressive step. 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 communitarians’ concerns about 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.

Even more influential than Foucault’s discursive subject in developing an alternative dialogic approach to Rawlsian liberalist theory has been the adoption of aspects of Habermas’ communicative action theory. The foundation of Habermas’ theory is that public deliberations in which consensus is reached constitute the process through which norms can be democratically created. 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, cultural or other difference. While his approach shares common ground with contextualism in that both stress sensitivity to context, Habermas believes more strongly in the force of universal implications. His project also aims to be more sensitive to the fact of plural viewpoints within a community.

Habermas has also expanded his theory of communicative action to address contexts of legal adjudication in addition to institutional design. In Between Facts and Norms, Habermas set out, as one of his main projects, to examine the plausibility of his discourse theory from the perspective of legal theory. His aim was to determine whether law in the narrow sense (that is, “incorporating all interactions that are not only oriented to

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55 An excellent discussion of the values of Habermasian discourse ethics over the approaches proposed by Rawls and Walzer is found in Shane O’Neill’s work, supra note 12. Rainer Forst also lauds the Habermasian approach in “Contexts of Justice”, supra note 39. A rich literature with which this article can hardly begin to engage let alone do justice, has grown on the Rawls-Habermas debate. See, for example, James Gordon Finlayson and Fabian Freyenhagen eds, 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).

56 See Habermas, Between Facts and Norms, supra note 54 at 195. Habermas outlines his discourse theory of law primarily in chapter 5, “The Indeterminacy of Law and the Rationality of Adjudication”. 
law but also geared to produce and reproduce the law”\textsuperscript{57} can support a discourse theory, particularly with respect to the process of adjudication. The perspective he examined within the legal system is that of the judge, which Habermas considers the privileged point of view in legal theory.\textsuperscript{58}

In developing his theory, Habermas takes issue also with Dworkin’s idea of a ‘Herculean’ judge.\textsuperscript{59} As is well known, this ideal judge has mastered all the jurisprudence and has knowledge of all the valid principles and policies at his disposal. 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.\textsuperscript{60} Habermas’ main critique of Dworkin’s Herculean judge is that Hercules’ approach to decision-making is monological.\textsuperscript{61} Hercules converses with no one but himself in reaching his decisions, not even other judges in the situation of an appellate bench. Habermas acknowledges that a society generally wants its judges to reach their own opinions and to defend them. However, this perspective can only succeed if the judge, due to “professional knowledge and skills and thanks to her personal virtues”, can act as the “citizens’ representative”\textsuperscript{62}. Habermas believes that more is needed to incorporate community representation into adjudication. His solution is to propose an intersubjective discourse theory to ensure a communicative endeavour among the citizens and the legal community.\textsuperscript{63} It is not simply a matter of a single judge relying on an expertise that stems from the standards and practices of a legal community. Rather, it is necessary to bring the community’s self-understanding into dialogue with the legally expert understanding represented by the judge. A procedure for argumentation within the courtroom is the answer that Habermas offers. Designing litigation procedures to allow for more public interest contributions is central to this notion.

\textsuperscript{57} \textit{Ibid} at 195. Habermas observes at 195-96 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”. He considers political legislation to have a central function. As some, including 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) 5 Buffalo LR 295.

\textsuperscript{58} But Habermas notes that legal theory is wider than adjudication and extends to legislation and administration. As well, he asserts that the perspectives of the other participants of the legal order such as the political legislator and the administrator, private legal persons and citizens, in addition to that of judges, are taken into account by legal theory. Habermas, \textit{Between Facts and Norms, supra} note 54 at 196-97.

\textsuperscript{59} He also critiques Hart’s positivist notion of primary and secondary rules and the theory put forward by legal realists maintaining that law cannot be separated from the political values of individual judges (which thereby demolishes in its entirety, the notions of certainty and rational acceptability).

\textsuperscript{60} See Ronald Dworkin, \textit{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, “On Deferece to Tribunals with Deference to Dworkin” (1995-1996) 20 Queen’s LJ 163.

\textsuperscript{61} See Habermas, \textit{Between Facts and Norms, supra} note 54 at s 5.3.1.

\textsuperscript{62} \textit{Ibid} at 222.

\textsuperscript{63} As Habermas states, 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 \textit{ibid} at 223.
While Habermas’ 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 different contexts of public law decision-making 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 we are in the courtroom or in the socio-political arena.

\textit{e. Summary}

In conclusion, the philosophical question of how best to determine the guiding principles of social justice has undergone significant growth, challenge and evolution in the past four or so decades. At its basic level, the question has remained one about impartiality: how to decide impartially between competing conceptions of the good espoused by members of a pluralistic society. To address this concern about justice, there has been a movement from 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, particularly with Habermas’ 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. What about on a concrete level in the day-to-day functioning of courts and administrative bodies? Generally, deliberations about allegation of bias within judicial and administrative law spheres manifest themselves as a site where liberal values come up against a desire to find contextual understandings. In the next Part of this article, 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.

\textbf{Part II – Impartiality in Canadian Administrative Law Jurisprudence}

\textbf{1. 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 that have been made by critical political and moral theorists. A fresh approach would require that the inquiry into the presence or absence of a reasonable apprehension of bias in administrative law be grounded in the examination of a set of clear, prescriptive indicia. These indicia encompass five factors. The presence of any one of these
factors does not automatically indicate that an apprehension of bias is reasonable. However, each factor may be fruitfully scrutinized for what it shows about decision-making impartiality in the context of the work of the particular administrative actor and in light of the factual circumstances that have given rise to the allegation. Some factors may be more relevant than others, depending on the factual situation and, in this way, it may be that not all five factors will be useful or necessary to examine in every factual scenario. An assessment of which factors are most relevant to examine 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 such allegations are made by litigants before them.

The first factor is the provenance of the administrative actor, including its policy origins, legislative framework, and family likenesses. This factor stems from the critiques made of Rawlsian liberalism by the communitarians who 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 actor, the policy goals that it was designed to fulfill, and any significant “familial” traits that it may share with administrative actors of the same nature (for example family likenesses that occur among legislative/parliamentary officers, investigatory agencies, Ministers of the executive, arm’s length independent agencies of the executive branch of government, etc.) may prove useful in deciding whether or not an allegation of disqualifying bias is reasonable. As the communitarians had noted, it can assist a determination of fairness to assess the suitability of a decision-maker’s preferences in light of its constitutive identity (i.e. family likenesses).

The shared understandings and institutional culture (including institutional practices) of the individuals who perform the work of the administrative body make up the second factor. This factor, which also originates with the communitarian critique of liberalism, suggests that one should strive for a comprehension of the norms within the institution. Institutional norms have a significant role within any administrative body's conception of work that it does. They develop through the discretionary action of an administrative agency or other administrative body, and form part of its ethos. The norms are also often implicit rather than express. Knowledge of institutional norms may facilitate an evaluation of whether a particular conception of fairness should be given credence. The main issue to address 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 natural development of the administrative body's evolution in light of its enabling legislation (i.e. the development of its expertise). A shared understanding of what is appropriate may not, in and of itself, excuse situation that clearly would otherwise lead to a reasonable apprehension of bias, but it may offer avenues for additional exploration of the reasons why procedural fairness may be understood in a particular way by the administrative body under scrutiny. Institutional norms may or may not act as barriers to fairness, but a frank assessment of their presence in the administrative body

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64 Other constitutive sources outside of legislation may equally be pertinent (e.g. crown prerogative or executive discretion).
65 Ibid.
and the impact they have will inevitably lead to a more thorough and transparent engagement with the question of impartiality.

The third factor consists of local understandings – i.e. those jointly held by the administrative actor and the industry, sector, socio-economic area, etc. that it is empowered to oversee. Local understandings may concern the technical substance matter as well as notions of fairness within that industry. Similar to what was suggested by the contextualist movement, local understandings highlight 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 is to look to understandings of fairness that are shared between the administrative actor and the relevant industry as part of the determination of what impartiality should mean within that decision-making context. However, in considering local understandings, a reviewing court should equally pay attention to potentially problematic issues such as whether local understandings actually represent agency capture in disguise.

The fourth factor, which concerns any connections that exist between the administrative actor and the litigants and/or their counsel in the decision-making process, has traditionally been flagged in the administrative law jurisprudence as a potential reason to doubt a decision-maker’s impartiality. Nonetheless, the feminist response Rawls’ theory of justice suggests that connection can cut both ways. Connection may be a reason for concern about impartiality, but connection between administrative decision-maker and litigants may also be evidence of a relationship that is fair precisely because the litigant has been heard and their issues carefully considered. 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 and/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 premier importance to the question of impartiality but has not been identified in this way in Canadian administrative law jurisprudence. The critiques of classic liberalism brought by discourse theorists suggest that impartiality is furthered by participation of a plurality of relevant perspectives. A grounded approach to administrative impartiality will always aim to examine the central question of whether the circumstance that has caused the allegation of disqualifying bias to arise will act as a hindrance to a meaningful dialogue among parties, administrative actors and any interveners. Furthermore, drawing on Foucault’s 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 in which they engage. This poses particular challenges 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, an academic scholar who has promoted a school of thought, etc., 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
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 probing, examining factors. Finally, the five factors of the grounded theory are non-exhaustive; depending on the circumstances, others may also be relevant.

In the sections that follow, I first briefly illustrate 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 the article which is an illustration of how the factors of the grounded theory apply and their impact on judicial review. To do this, I critically consider five key Supreme Court of Canada cases on reasonable apprehension of bias in the administrative law context.

2. The Impartiality of Judges and Contextualization

The 1997 case of *R. v R.D.S.* was significant for establishing the Supreme Court’s position on bringing social context into the evaluation of the impartiality of judges. *R.D.S.* showed that the Supreme Court of Canada found contextualized judging to be acceptable both in situations where judges decide matters of fairness before them and also in the 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 into account contextual factors in evaluating evidence. It clarified the case law and offered normative guidance to lower court judges. Although it was a controversial case, from a philosophical standpoint, *R.D.S.* is interesting because, similar to the debate between Rawlsian liberalists and communitarians, it shows movement towards embodied decision-making, and highlights the pitfalls of determinism.

At issue in *R.D.S.* 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. 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. 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 questioning why the officer would have said that the events had occurred in the way that he had related them if it were not true. Among other statements, Judge Sparks said that

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66 [1997] 3 SCR 484 [*R.D.S.*].

while she was not saying that this police officer had misled the court, officers had been known to do so in the past and that she knew that police officers do overreact, especially when dealing with non-white groups. Finally, she stated that she believed the evidence of R.D.S. that he had been told to ‘shut up’ or he would be under arrest as that was in keeping with the prevalent attitude of the day.  

In the public law realm, impartiality seeks to make sure that the decision-maker has an open mind and is not deciding in his or her own interest, in a manner that favours one of the parties before her 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, one who is fully informed of all the circumstances and is not overly sensitive, would think upon viewing the situation realistically and practically and after having thought the matter through. The lower courts had 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, though, with majority and minority concurring reasons for judgment as well as a dissent.

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 at the time in Nova Scotia. In other words, to what extent

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68 She also made ambiguous comments about whether this officer had overreacted and about his state of mind. Judge Sparks’ comments in full (reproduced at R.D.S., supra note 66 at para 4) were as follows:

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.

69 The test originated in Committee for Justice and Liberty v National Energy Board, [1978] 1 SCR 369 [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.

70 Four members of the majority agreed that an awareness of context in which a case takes place is consistent with the highest tradition of judicial impartiality and found that the comments were appropriate (La Forest, L’Heureux-Dubé, Gonthier and McLachlin JJ.). Two members of the majority 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 (Cory and Iacobucci JJ.). Finally, the three dissenting judges found that the comments gave rise to a reasonable apprehension of bias since they had been substituted for evidence (Lamer C.J., Sopinka, Major JJ.).
should a judge allow her life experiences to help 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, Justice Sparks may be favouring a particular perception of what is just (namely, equality for African-Canadians) at the expense of other valid claims to what is just (for example, equality for other racialized groups).

But, the R.D.S. case exemplifies the value of contextualized judging. The approach taken by Sparks J. 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 Sparks’ approach to justice was guided by a conception of equality that is informed by her identity as a member of the black community. Her conception of justice is one that recognized difficulty in achieving equality without an initial recognition that incidents such as 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. Taking social factors into account in this way does not necessarily suggest bias; by contrast, it can help to render decision-making better informed.

In R.D.S., both the majority and the dissenting judges agreed that life experience can be useful to judicial decision-making. However, the majority was much more forceful in its approval of the use of this type of context, and articulate in outlining reasons why reference to life experience is appropriate. 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. They found that a conscious, contextual inquiry is a useful step in achieving judicial impartiality. Their reasoning was based in part on the idea that judging genuinely involves an “enlargement of the mind.” 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. It is also necessary that the judge approach the task of judging with an open mind.

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71 R.D.S., supra note 66 at para 29.
72 Ibid at paras 42-44.
73 In reaching this opinion, the court adopted the views of Jennifer Nedelsky which had been developed in her article entitled, “Embodied Diversity and the Challenges to Law” (1997) 42 McGill LJ 97.
In applying these principles to the facts of this particular case, four judges of the majority group of judges 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”\(^2\). The implication seems to be that a different result may have been found if the comments had been made before her conclusions on credibility had been reached. In speaking of one specific comment made by Judge Sparks – that the officer probably overreacted – they showed openness to the 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.\(^6\)

The approach is quite different from that of the minority concurring and dissenting judges who spoke strongly against making comments that even give the appearance that a judge has made a finding based on “generalization” or “propensity”\(^7\).

The discussions of the majority and minority judges highlight lines where contextualism may slip into determinism. Unlike Rawls’ concern that an embodied perspective will bring about self-preference, the minority judges of the Supreme Court of Canada are more concerned that introducing contextual factors will allow for pre-judgments based on stereotypes. Equally, 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.\(^8\) In R.D.S., one sees move by the Supreme Court towards contextualized appreciations of impartiality in the judicial context. The move towards accepting contextualized appreciations of impartiality is murkier, however, in administrative law. This is ironic as administrative law is founded on the idea of the myriad of contexts for which flexibility in judicial review is crucial. Nevertheless the Supreme Court of Canada remains overwhelmingly liberal in its approach to determining questions of impartiality in the administrative law context. In the next section, I examine this paradox more closely.

\(^2\) R.D.S., supra note 66 at para 53.
\(^6\) Ibid at para 56.
\(^7\) See eg ibid at para. 7.
\(^8\) See R.D.S., supra note 66 at paras 42-44. Post-R.D.S., 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 Int’l J Evid & Proof 73.
3. Applying A Grounded Theory of 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.79

Drawing on the theory of grounded administrative impartiality outlined above, this section examines the approach to determining impartiality which currently exists 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 some major Supreme Court of Canada decisions on reasonable apprehension of bias through the lens of the grounded theory of impartiality.

In Canadian public law, impartiality is unequivocally of fundamental importance. The right to trial by an impartial tribunal is constitutionally enshrined in the Charter:80 Similarly, in administrative law, the principles of natural justice and procedural fairness offer a parallel protection to litigants in contexts where constitutional and quasi-constitutional guarantees may not apply. The guarantee of an impartial decision-maker is also said to maintain public confidence in our public decision-making institutions. It therefore serves the wider public as much as it does the litigants.81 As in the judicial sphere, the test for reasonable apprehension of bias in administrative law centres on the perception of a right-minded and well-informed person who has thought the matter through.82 But whereas judicial impartiality is determined on the strictest standards of the adversarial system,83 the test used to determine impartiality of an administrative actor depends on the role that it plays and the way that it functions.84 Context therefore plays a centrally significant role in administrative law bias cases.

79 Imperial Oil Ltd. v Quebec (Minister of the Environment) [2003] 2 S.C.R. 624 [Imperial Oil] at para. 28.
80 Canadian Charter of Rights and Freedoms, supra note 25, ss 7 and 11d.
82 See the articulation of the test from Committee for Justice and Liberty as set out at supra note 69 and accompanying text.
83 See R.D.S. supra note 66 at para 93.
The need for attention to context is largely due to the nature of the Canadian administrative state, which comprises decision-making bodies that straddle the executive and judiciary, and embrace a wide plurality of types. 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. As a result of this spectrum of administrative actors, it has become standard 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 administrative actor’s nature and functions. Nevertheless, there is room for espousing more rigour in the methodology of the Supreme Court’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 assuring an appropriate state of mind of the decision-maker, as elaborated in more detail below. The second deals with questions about the state of mind of the administrative decision-maker within the decision-making process and, as such, concerns impartiality directly. 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

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*Materials,* (Toronto, Emond Montgomery, 6th ed. 2010) [Van Harten et al.]. The academic debate over whether administrative tribunals should be converted into courts is beyond the scope of this paper.

85 These decision-making bodies will be synonymously termed “administrative actors” and “administrative decision-makers” throughout this paper. “Administrative actor” and “administrative decision-maker” are global terms used to denote decision-makers in both their institutional and individual senses. See, generally, W. A. 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) [Bogart].

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

87 The nature of the Canadian administrative state and the varying structure 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 Yearbook of Access to Justice 285. See also Bogart, supra note 85.

88 They relate to four major concerns; namely, situations in which 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 toward an outcome.

The first three situations are forms of conflict of interest. See, generally, Jacobs supra note 84 at 258.
bias has been alleged. The next section presents some examples by revisiting the analysis of key Supreme Court cases.

**a. Administrative Independence**

Arguments about reasonable apprehension of bias sometimes concentrate on whether an administrative actor’s structure or relationships appear sufficiently independent 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 ensuring impartiality.\(^89\)

At the same time, the Supreme Court’s method of analysis for determining if there is a lack of independence giving rise to reasonable apprehension of bias is unfortunately underdeveloped, leading to conflicting results in the jurisprudence.\(^90\) 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 to help decide 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 Supreme Court’s analyses in *Matsqui* and *Ocean Port Hotel* are contrasted to exemplify the Supreme Court’s ambivalence to context in determining administrative

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\(^89\) See Madame Justice L’Heureux-Dubé in her separate concurring reasons in *Régie supra* note 84. On judicial review, Canadian courts often evaluate whether an administrative tribunal is sufficiently independent through an analysis of 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, and 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-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 Supreme Court of Canada has held that it is necessary to allow some flexibility for the various ways in which different tribunals function. See *Valente supra* note 84; *Matsqui supra* note 84 and, generally, *Jacobs supra* note 84.

\(^90\) I discuss the divergent outcomes in *Matsqui* and *Ocean Port* regarding operational context, as well as the conflicting approaches to conceiving of 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 & Anne L. Mactavish, eds, *Dialogue Between Courts and Tribunals: Essays in Administrative Law and Justice (2001-2007)* (Montreal: Les Éditions Thémis, 2008).
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 Supreme Court of Canada has vacillated on the issue of how closely, if at all, it will 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 the contextual data that it collects in specific questions that it seeks to answer about reasonable apprehension of bias. Two of the most significant Supreme Court of Canada 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 Supreme Court, in Ocean Port Hotel, held that clear legislative language indicating the degree of independence of administrative actor should take precedence over common law principles of natural justice. Left unsettled, however, was how to determine whether independence was at risk (and, if so, how to rectify it), when the relevant legislation was ambiguous. In this regard, the earlier Supreme Court 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 of the elements of the grounded theory of administrative impartiality. It next outlines some of the advantages that scrutinizing operational context, particularly through the contextual factors of the grounded theory approach, can bring to bear.

In Matsqui, issues of independence and impartiality had arisen with respect to a set of First Nations’ tax assessment boards whose enabling legislation had been created by the time of the litigation, though the boards not yet been put into operation. The Court stressed the value of seeing a tribunal in operation before determining if its decision-making process should give 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 contextualized explorations of administrative law independence. 91 There

91 With respect to the issue of independence, four judges (L’Heureux-Dubé, Sopinka, Gonthier and Iacobucci JJ.) were of the view that the issue could not be determined until the tribunal could be assessed in operation. These four judges formed the majority on the issue of independence although 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 judges (Lamer C.J. and Cory J.) held the opinion that the tribunal exhibited a lack of independence which gave rise to a reasonable apprehension of bias. They therefore concluded that that the tribunals did not provide an adequate alternative remedy which CP Rail and Unitel should have exhausted before applying for judicial review. LaForest, McLachlin and Major JJ 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.
was significant divergence, however, between the minority and majority judges with respect to how to analyze the issue of independence.

In the minority opinion on the issue of independence, Lamer C.J. held that the nature of the tribunal, the interests at stake, and "other indices of independence" were to be taken into consideration in assessing whether an administrative body possessed sufficient independence to avoid raising a reasonable apprehension of bias. The last two of these factors – namely, the interests at stake and "other indices of independence" – were quickly dealt with. As for the interests at stake, Chief Justice Lamer noted that tax appeals were important, but could not be considered to fall among the most significant interests that an individual may possess (unlike security of the person, for example). Something less than the highest level of independence would therefore be appropriate. As for "other indices of independence", the only other indicium of independence noted, without explanation, was the oath of office that the members were to swear, affirming that they would act impartially.

The nature of the tribunal was a factor that generated more discussion by the minority. With respect to the nature of the tribunal, Lamer C.J. looked specifically at the enabling primary and secondary legislation of the tax assessment tribunals. His analysis focused on the statutory language relating how appointments were to be made to the tribunals and describing the tribunals' powers. Chief Justice Lamer's greatest concern was that the enabling bylaws did not guarantee remuneration or fixed terms of appointment. At most, the permissive language of the legislation indicated that members of the tribunal may be paid reasonable remuneration. Moreover, there was no guarantee of security of tenure. The bylaws left, ambiguously, decisions regarding the length of appointment terms to the Chief and Council of each first nations group. Finally, there was concern because the appointments were to be made by the Chiefs and Councils of the bands that regularly appeared before the tribunals, leaving open the possibility that a non-band party may appear before a tribunal whose term of appointment and pay were controlled by members of the opposing party. Chief Justice Lamer found the entire structure to be inadequate for an adjudicative body that performed functions similar to a court. He 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 guarantee of independence. As he put it, "[i]ndependence premised on discretion is illusory."

By contrast, the majority of the judges who addressed the issue of independence in *Matsqui* held that the issue could not be determined until one had 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 on the wording of the legislation alone as knowledge of the operational reality may provide "a significantly richer context for objective consideration of the institution and its relationships". Otherwise, he stated, referring to the fact that the test for independence is based on the impression of a

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In summary, six of the nine judges addressed the issue of independence and, of the six judges, four were of the view that operational context is important to see before an opinion can be formed. It is for this reason that these four judges are considered to hold the majority's view on the issue of independence.

92 The relevant provisions of the bylaws are set out in *Matsqui supra* note 84 at paras 88-91.
93 Although they would be paid for travelling and out of pocket expenses incurred in the course of their duties.
94 See *Matsqui supra* note 84 at para 104.
95 See *Matsqui supra* note 84 at para 123.
reasonable well-informed person, "the administrative law hypothetical ‘right-minded person’ is right minded, but uninformed". He noted that in administrative law jurisprudence, conclusions about independence were generally not formed until after a tribunal was in operation. Finally, Sopinka J. 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 Supreme Court’s interpretive principles maintaining 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 on this issue found it inappropriate to form conclusions about the aboriginal tax assessment boards' independence without first granting the benefit of showing 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.

The elements discussed by Sopinka J. and the majority of judges on the issue of institutional independence in Matsqui collectively constitute a discussion of administrative actor provenance and institutional practices. The majority decision on this issue illustrates how two factors of the grounded theory of impartiality may be useful in analyzing the question of reasonable apprehension of bias. Although the majority on this issue did not enter into a discussion of the other factors related to a grounded theory of impartiality, if pushed further, it would appear that the analysis could also usefully have addressed the question of discourse and, specifically, whether, once the tribunals were up and running, meaningful dialogue between the assessment board members and non-band litigants could actually take place.

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96 *Matsqui* 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."

97 The cases to which the majority referred in support were: Alex Couture Inc v Canada (Attorney - General) (1991), 83 DLR (4th) 577 (Que CA), leave to appeal refused; [1992] 2 SCR v. MacBain v Lederman, [1985] 1 FC 856 (CA); Mohammed v Canada (Minister of Employment and Immigration), [1989] 2 FC 363 (CA).
There are valid reasons for incorporating aspects of operational context into the determination for sufficiency of independence. A consideration of contextual factors such as the origins and reasons for the creation of the administrative actor, any family likenesses, the shared understandings and institutional culture amongst those who work there, institutional practices, understandings between the administrative actor and the industry, connections between decision-makers and litigants, as well as the possibility for meaningful discourse during proceedings can assist to derive a fuller picture of whether barriers to fair and meaningful decision-making are present. They ground the analysis of reasonable apprehension of bias by converting it into an inquiry into concrete areas where barriers to independence may exist.

Moreover, the nature of the reasonable apprehension of bias test itself speaks to why a grounded analysis is preferable. The test is based on the perception of the reasonable person. The test should therefore enable this reasonable observer to provide balanced opinions – that is, to be balanced between acting too hastily and being otiose in reaching conclusions about the existence of disqualifying bias in administrative action, in light of the interests at stake. On the one hand, the reasonable apprehension of bias analysis should avoid hasty, uninformed, and thereby unmerited disruptions of the administrative state (although there are certainly instances where criticism and disruption of administrative actors are necessary). A decision that is not fully informed may risk working against the legitimate policy goals that lie behind the creation of the administrative actor and which, as in the case of *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 should be given credit and 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 into account the interests at stake in deciding how far to go in their search for justifications. Considering operational context in light of the ambiguity of 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 the risks to the individual upon a negative finding are high – the reasonable person would understandably be less amenable to wait for an administrative procedure to be put into operation so that any possible discretionary contextual safeguards may be analyzed.\(^98\) When there are risks to individual liberty and security of the person, statutory analysis alone may be sufficient to trigger concern about independence, and therefore procedural fairness, in the administrative state. In other words, though generally much more can be gleaned from an understanding of operational

\[^{98}\text{An example may be found in the US Supreme Court case of *Hamdan v Rumsfeld, Secretary of Defense et al.* 548 U.S. 557 (2006) which, although it did not deal with independence, dealt with the safeguards of procedural fairness required for an individual detainee tried by military commission and the importance of condemning lack of procedural fairness in such circumstances, even before trial, if legislative material provides a basis to presume that a hearing meeting basic tenets of fairness will not be held.}\]
context, statutory analysis alone may be sufficient in some administrative contexts and circumstances.

Reading the statute alone to determine independence as the minority set of judges on the independence issue chose to do is in keeping with a liberal view. Rawlsian impartiality requires disengagement from the realities of everyday life. But, determining issues relating to administrative independence by way of statutory analysis alone does not accord weight to the various practices, norms, self-understandings, etc. that may themselves present barriers, or which may render more or less reasonable, a perception of bias caused by lack of statutory independence. What is needed is an analysis that derives 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 shuts the door to the much richer set of information the exploration of operational context can bring. Moreover, as emphasized by feminist theorists, grounding decision-making in concrete realities as opposed to abstract ideals allows for generalization that is more authentic. In a field as pluralistic as the Canadian administrative state, drawing general principles about administrative independence would be more faithfully facilitated if appreciation of the operational realities were incorporated into the analysis. Sopinka J.’s insistence on seeing the tribunal in operation complements this view.

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99 While there are certainly approaches to statutory interpretation that are contextual in nature within Canadian public law jurisprudence, these approaches focus on understanding provisions of a statute within the broader statutory language and the legislation’s historical purpose(s). (See, for example, Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City) 2000 SCC 27 (per L’Heureux-Dubé J.). What distinguishes the grounded approach to impartiality is that the contextual elements examined do not only include an appreciation of the greater statute but, more importantly, aim to take into account aspects of the day-to-day operational realities of the administrative body in question.

100 Two ways in which a tribunal’s practices, norms, self-understandings etc. can be brought before the court for their analysis on judicial review are through an examination of documents emanating from the tribunal such as annual reports, and by allowing the tribunal to appear on judicial review to discuss them. Both offer an opening to a much richer dialogue with the tribunal than a simple reading of the statute. One is reminded of Habermas’ 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 from the tribunal are usually accepted (see for example Régie supra note 84 on the question of conflicting roles), Supreme Court jurisprudence has opened the door only tentatively to allowing tribunals to appear on judicial review of their own decisions to discuss their policies and practices. See the seminal case on this issue, Northwestern Utilities Ltd. v City of Edmonton [1979] 1 S.C.R. 684; see Ontario (Children’s Lawyer) v Ontario (Information and Privacy Commissioner) 75 O.R. (3d) 309 (C.A.). For literature on the debate relating to granting tribunals standing on judicial review of their own proceedings see: Laverne A. Jacobs and Thomas S. Kuttner, “Discovering What Tribunals Do: Tribunal Standing before the Courts”, Can. Bar Rev. 81(2002): 616, Noel Semple, “The Case for Tribunal Standing”, C.J.A.L.P. 20 (2007): 305 and Frank A.V. Falzon, “Tribunal Standing on Judicial Review”, C.J.A.L.P 21 (2008): 21.
In summary, in cases where legislative language pertaining to the independence of administrative actors is ambiguous, the Supreme Court has sent unclear messages about whether an administrative body’s operational context should be examined in cases where allegations of reasonable apprehension of bias arise and, if so, which elements of operational context to scrutinize. These unclear messages are the inevitable result of an approach that is not firmly rooted in a principled search for diagnostic contextualized data. Moreover, although Matsqui articulated an approach that favours looking at the tribunal in operation, the approach could be further refined to ensure the use of specific factors that would 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 considerations to inform the legal analysis of a case concerning the sufficiency of independence under a statutory provision that entrusts an administrative decision-maker’s security of tenure with the discretion of a public official. In *Bell Canada v Canadian Telephone Employees Association*¹⁰¹, a case decided shortly after *Ocean Port Hotel*, Bell Canada argued that the independence of the Canadian Human Rights Tribunal ("Tribunal") had been compromised by the Canadian Human Rights Commission’s power to issue binding guidelines on the Tribunal concerning classes of cases, and by the power of the Tribunal Chair to extend the terms of Tribunal members if they expired during an ongoing inquiry. Both powers were discretionary and found their source in the enabling legislation.¹⁰²

Although the Court was not of the opinion that the Human Rights Commission’s guideline power posed a potential threat to independence, it considered the issue of independence in order to assess Bell’s argument that the Chairperson’s discretionary power to extend the appointments of tribunal members compromised the members’ security of tenure¹⁰³. In finding no breach of the members’ security of tenure, the Supreme 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 to step in to help illuminate the precise standard of independence. The Supreme 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

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¹⁰² The relevant sections of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6) were 27(2), 27 (3) and 48.2(2).
¹⁰³ Subsection 48.2(2) of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6) reads: "(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"
a hearing was complete. The Tribunal Chairperson was in a good position to take on this role in light of his or her knowledge of the need to extend in any given situation, and also because of the Chair’s separation from the Human Rights Commission which would be a party to the litigation. The second justification was that the case law had already approved the legislative endowment of a discretionary power to extend appointments in the head of the decision-making body in Valente. Beyond these two justifications, the Court also held that a high level of independence required because of the adjudicative nature the Canadian Human Rights Tribunal.

Yet, none of these justifications engages directly with the issue of whether the decision-maker whose term was precariously waiting for renewal could reasonably be perceived not to be deciding independently. A grounded theoretical approach would have prompted the Court to inquire about a different set of elements in the administrative actor’s surroundings which may, in perception or in reality, prevent an adjudicator from deciding freely. The factors suggested by the grounded theory concern the administrative actor’s provenance – i.e. 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 may 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 Canada might first have reflected on the policy goals behind the creation of the Human Rights Tribunal, asking questions such as whether the attainment of these goals would legitimate the discretion put in the Chair to extend appointments. Throughout this analysis, evidence regarding

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104 See Bell supra note 101 at para 52.
105 See Bell Canada supra note 101 at para 53. See Valente supra note 84.
106 The Court posited the now familiar idea of a spectrum with some administrative tribunals closer to the executive and, developing policy, and others closer to the judicial end with a 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.
107 The Tribunal Chairperson’s power to extend appointments originated in the enabling statute of the Tribunal, preventing it from being overturned by common law principles of fairness, including independence. This is a general principle that the Supreme Court of Canada reiterated in Ocean Port Hotel two years earlier. Interestingly,
the history of the Tribunal, which may, for example, have included the place of the Canadian Human Rights Tribunal as part of a statutory network along with the Human Rights Commission, aimed at resolving human rights claims as expeditiously as possible could have been considered.

Continuing on with a grounded inquiry, the Court may have then turned to assess whether the extension power posed a perceived or real barrier to the members adjudicating fairly—e.g., on fact, law and without dictation. To do so, the Court may have explored a series of questions about the shared understandings that exist within the human rights tribunal. These questions would necessarily be anchored in the arguments put forward by the party alleging a reasonable apprehension of bias due to insufficient independence, and may vary from case to case. But, as an example, if the concern were that the Chair may withhold extending a retiring member’s appointment because of disagreement with that adjudicator’s final decision, it might be that evidence showing statistical patterns regarding renewal might be useful. Any available information (mission statements, annual reports, academic or other studies done on the tribunal, with tribunal members etc.) may also be helpful in identifying the norms and values espoused in the culture of the tribunal and whether such a cultural context would be auspicious for discretionary Chair renewal. Internal practices of the Tribunal related to its institutional culture may also be accessed in this way. Although it might be challenging to pierce the internal norms of a group of co-workers within an organization such as an administrative tribunal and their connections to those they regulate, and to draw conclusions from them, a grounded theory at least opens the door to considering, in a systematic fashion, internal culture, practices, and self-understandings as possible barriers to independence. Local understandings may have a role to play as well, if only to document what a legitimate expectation (if any) a litigant may have in this instance. Finally, since this institutional issue does not directly deal with a specific hearing or other proceeding involving the litigants’ rights at issue, it is unlikely that connection and discourse would be probing factors to explore in this case.

In sum, while we do not have enough evidentiary information to determine if Bell Canada would have resulted in a different outcome using a grounded theory approach. Yet, it is clear that the analysis would have been more transparent and centred on identifiable guideposts for analyzing the operational context of the tribunal and ultimately for determining whether a reasonable apprehension for lack of independence existed.

b. Administrative Impartiality

the Supreme Court of Canada did not factor this principle into its analysis. Instead, the Court duly explored Bell’s argument, providing the two responses that I have outlined and concluding in light of Valente 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." (See Bell, supra note 101 at para. 53).
The test of whether a reasonable person with full information who has thought the matter through would apprehend bias is equally as dissatisfying a test for lack of impartiality as it is a test for lack of independence. The test offers few signposts for identifying an apprehension of partiality that is reasonable. As with the Supreme Court’s doctrine on administrative independence, the administrative impartiality jurisprudence is also founded on a methodology that could be more robustly developed. Cases in which conflict 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 on the outcome.

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 has reasonably appeared to jeopardize a fair hearing in a matter, or when personal or professional relationships between the administrative actor and parties, counsel, witnesses etc. compromise the perception that an unbiased decision-making process has or will be followed. ¹⁰⁸

At issue when alleged conflicts arise, whether on an individual or institutional level, are three main issues: how direct and immediate the apparent conflict or conflicting relationship is, the existence of any legislative sanction and, ubiquitously, the nature of the functions performed by the administrative actor and, in particular, how closely those functions mirror those of a court. Because the notion of impartiality deals fundamentally with 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, Canadian Supreme Court and lower court decisions have shown a tendency to focus more closely on any exemptions that may be provided by legislative design and the nature of the functions performed by the administrative actor.¹⁰⁹ This problematic approach has left a vacuum in the Canadian administrative law doctrine of impartiality. The doctrine is impoverished from the jurisprudence’s lack of engagement with the central issues that would preoccupy a reasonable observer concerned about the state of mind of the decision-maker. These central issues are the possibility of genuine discourse throughout the proceeding and any connections between the decision-maker and others that may foil the

¹⁰⁸ On the legal doctrine of disqualifying bias in Canadian administrative law, see generally Van Harten et al supra note 84, Jacobs supra note 84, and David P. Jones and Anne deVillars, Principles of Administrative Law, ⁵th ed. (Toronto: Carswell, 2009).

achievement of such discourse. A grounded approach to impartiality would offer the opportunity of a more piercing analysis than what is presently found in the jurisprudence.

To take an example, consider the administrative law doctrine which maintains that as long as the conflicting functions of an administrative body are prescribed by constitutionally valid enabling legislation, then a reasonable apprehension of bias should be deemed not to arise. Under the rule of law, democratically created legislation may place, in one administrative body, functions such as prosecution and adjudication that, when performed by the same entity, contradict the principles of natural justice. The difficulty with the doctrine is that it has been interpreted in some instances to permit for conflicting actions to survive without scrutiny even in cases where the legislation has not expressly sanctioned the specific type of conflict that is at issue. In other words, it has failed to deal with the discretionary pockets that may exist within the legislation where the actions of administrative actors are not entirely covered by the legislation’s sanctioning of conflicting functions. 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 contaminants appeared on the land of a housing development that Imperial Oil had previously owned and operated for several decades as a petroleum products depot. In 1998, the Québec Minister of the Environment ("Minister") issued a characterization order against Imperial Oil. The order, which instituted the polluter-pay 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 provision of the statute, the entity responsible for the contamination could also be held responsible for the costs and execution of the decontamination work. In issuing the order, the Minister acted under broad powers bestowed upon him by the Environment Quality Act.

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 ("Ministry"), for which the Minister was responsible, 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. However, the Ministry had granted approval of the decontamination even though its own precondition that an independent consultant be involved 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 in which they named, among other respondents, the Minister for negligence in supervising and approving the decontamination work. Imperial Oil believed that a conflict of interest existed because the Minister had ordered them to undertake the characterization study in the wake of these three pending cases.

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110 This doctrine is most clearly articulated by the Supreme Court of Canada in Brosseau v Alberta Securities Commission, ibid. For cases that have discussed and/or applied the doctrine see: Imperial Oil supra note 79; Global Securities ibid.; Broers ibid.; and Anne & Gilbert ibid. For Supreme Court of Canada cases that deal with the issue of seemingly conflicting interests but in the very politicized context of elected municipal councillors, see Old St. Boniface Residents Assn. Inc. v Winnipeg (City),[1990] 3 S.C.R. 1170 and Save Richmond Farmland Society v. Richmond (Township), [1990] 3 S.C.R. 1213.

court actions and with knowledge that additional court actions were forthcoming. There therefore appeared to be a financial interest on the part of the Minister to reduce the costs that he and the Ministry would incur through the lawsuits.

Unfortunately, the alleged appearance of partiality was absolved by the Supreme Court of Canada, and by all lower decision-making entities except for the Québec Superior Court, 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 did not apply in the situation because the Minister was invested with overlapping and inherently conflicting functions by the enabling legislation. Specifically, the Minister had been given the powers of providing information, participating in preservation and decontamination work, oversight, issuing authorizations and permits, and making various categories of orders prescribing corrective measures. In a similar vein, the Supreme Court 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 large discretion under the statute, his multiple functions, and the essentially political nature of his decision about which route to take. Faced with the situation, the Minister in Imperial Oil had three options under the relevant statute. He could have chosen not to act at all. He could have had the work to remove the contaminants performed, and attempted later to recover the cost from the parties responsible for the contamination. Or, he could have chosen to pursue those responsible for the contamination under the polluter pay provision, as he chose to do. The Supreme Court focused exclusively on the Minister’s choice of options under the statute, indicating that the choice to pursue the polluter-pay principle was not in and of itself indicative of partiality. The analysis performed by both TAQ and the Supreme Court to determine whether there was any appearance of partiality on the Minister’s part therefore rested at a macro level of scrutiny.

Indeed, once the decision to pursue the polluter-pay principle had been made, the Supreme 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 Supreme Court noted that there were procedural protections in place in the statute. But, nowhere in the decision did the Court examine closely how these procedural protections were executed by the Minister. There was no qualitative inquiry into the manner in which these obligations were fulfilled, and in particular, whether any improper purpose could be reasonably 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 his receipt and contemplation of the observations presented by Imperial Oil and his reasons supplied for ordering the characterization study (both required under the statute), as well as the degree to which any functional necessity may have been at play were not examined. It would have been useful to explore whether the reasons given for the order were indicative

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113 Section 31.42 of the Environment Quality Act, supra note 111, requires the Minister to provide reasons for issuing a characterization order.
of the Minister catering to self-interest and to financial savings. It would also have been useful to examine whether by contrast to showing self-interest, the Minister’s reasons focused on proper considerations within the statutory environmental context at hand, whether the process followed allowed for Imperial Oil to adequately and fully make its case, and whether that case was appropriately and fully considered by the Minister before making the order. Instead, the Supreme Court found perfunctorily that the statutory protections required by the proceedings had been met. As the Court stated, "[t]he 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."  

Even more disappointing is that for an administrative body performing one of its multiple conflicting roles, the standard of impartiality that is to be met in the particular case under scrutiny is rarely fully articulated. In Imperial Oil, the Court states 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". Yet, at no point does the Supreme 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 statutory procedural protections in place, but without a guarantee that these legislated procedural protections were contemplated with the particular fact scenario of the Minister in mind.

A grounded theory of impartiality would have inquired into factors that would be revelatory of 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, a grounded approach to administrative impartiality would provide a more satisfying analysis. A grounded analysis of impartiality seeks to 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 listened to by a decision-maker possessing a mind open to persuasion. If the extent to which the Minister could engage openly and fairly with Imperial Oil was an animating issue, then concern about any considerations that may have guided the Minister away from appropriate

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114 Imperial Oil, supra at para 27.
115 See Imperial Oil, supra note 79. See also Newfoundland Telephone [1992] 1 SCR 623.
116 Imperial Oil, supra note 79 at para 31.
117 The Court’s almost simultaneous call for the need for context and aversion of the task of establishing the nature of impartiality that would apply in this context by deferring to statutory language can be seen in the following dicta by Lebel J. for the Court at para 32: "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".
discussions would have been brought forward for further examination. In this light, the report by the Ministry engineer, discussed in the Superior Court decision, and which indicated the Ministry’s desire to offset the legal costs occasioned by the lawsuit118, may have been more fully explored for whether it suggested any improper purpose on the part of the Minister and therefore an improper state of mind. The notion of connection could also profitably be used to ground questions about impartiality in cases where relationships appear to give rise to conflict of interest. Active relationships such as live litigation might reasonably cast a pall on the state of mind of the decision-maker, regardless of whether the administrative function involved is closer to the political end of the spectrum and depending on the reach of any legislative sanction.

As mentioned earlier, not all elements of the grounded theory are relevant for every case; however, the factor of administrative actor provenance is clearly also fruitful in this scenario. Knowing the nature of the Minister’s political, discretionary and other functions and the extent to which his obligations conflict under the statute provides a backdrop for understanding the standard of impartiality that can be reasonably expected in fulfilling the statutory procedural protections.

I would suggest that in Imperial Oil, the Minister’s connection to the party before it through live litigation would be a reasonable cause for concern about impartiality. Even within the broad, general framework of multiple and conflicting functions, when it comes to the specific proceedings put in place to ensure fairness at the time of determining whether Imperial Oil should be ordered to perform a characterization study at their own expense, the active litigation between the Minister and Imperial Oil suggests an improper state of mind for the administrative actor. It may be that at this point the question of necessity should arise and an exploration as to whether any other public official could perform the role of the Minister. Nonetheless, an approach to administrative impartiality that is grounded on specific contextual factors such as discourse, connection and provenance helps to render more transparent the reasoning process leading to a conclusion about the existence of reasonable apprehension of bias.

Ultimately, legislation alone cannot provide a resolution when allegations of conflict of interest arise. 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 which are worthy of examination as they may affect the determination of whether or not an administrative body is impartial. A brief, additional example can be used to show how the two remaining factors of shared and local understandings may play a role in determining whether impartiality has been met. In Régie119, the Supreme Court of Canada found that the possibility of lawyers and directors performing the conflicting roles of prosecutor and adjudicator within the tribunal raised a reasonable apprehension of bias at the institutional level that could not be countenanced by enabling legislation. The job descriptions had

119 See Régie, supra note 84.
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 play multiple and conflicting roles in the same file. The Régie’s annual report showed, further, that one individual could participate in the prosecution and adjudication of the same file.\textsuperscript{120}

In \textit{Régie} fact scenario, beyond examining the provenance of the tribunal, its ability to engage in discourse and any connections it may have with litigants etc. that may hinder fair and meaningful exchanges, it would also have been useful to examine the shared understandings amongst those in the administrative agency about the agency’s role and the shared normative values within the institution that guide its design of procedural safeguards. A grounded analysis can serve to raise pertinent questions to explore pertaining to why the conflicting roles may have been chosen and why they may or may not be appropriate. Moreover, in determining fair and just outcomes, an administrative body may need to draw upon its expert knowledge of the community or industry it has been tasked with administering in order to interpret the relevant legislation. This expert knowledge may be of a technical subject matter but may also relate to documented expectations of what the community and the decision-maker have considered to be fair in the past.

In addition to whatever authorization a statute may offer, focusing the analysis of whether sufficient impartiality exists on such ideals of genuine dialogue, the connections between actors and litigants such as the existence of live litigation, and on the shared understandings within it, the provenance of the administrative agency, and the importance of 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 is clearly violative of procedural fairness but opens the door to more transparent, robust and complete determinations about allegations of bias.

\section*{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

\textsuperscript{120} The Régie’s decision was quashed for lack of impartiality. See \textit{Régie, ibid} at para 48. Even if the legislation had defined the conflicting roles, the Régie’s decision still would have given rise to a reasonable apprehension of institutional bias as minimum as conflicting functions would have been found contrary to section 23 of the Québec \textit{Charter of Human Right and Freedoms}. The existence of constitutionally (or, in this case quasi-constitutionally) controlling legislation is a point of distinction from cases such as \textit{Brosseau v Alberta Securities Commission}, \textit{supra} note 109. In \textit{Brosseau v Alberta Securities Commission}, 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 essentially to 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 \textit{Newfoundland Telephone} [1992] 1 SCR 623, an administrative impartiality case that deals with attitudinal bias as opposed to conflict of interest.
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 context 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 such a contextual analysis should look like.

In this article, I have presented the beginning of a conceptual framework for addressing allegations of reasonable apprehension of bias in administrative law. I have termed this conceptual framework a theory of *grounded administrative impartiality*. This theory advocates for the inclusion of contextual factors relating to administrative bodies when their impartiality is under scrutiny. It also advocates for a dialogic space in which tribunals can explain their institutional shared understandings, cultures and norms, and local understandings before a reviewing court. The focus is on the elaboration of factors that aid in identifying the information to be sought and analyzed when questions about reasonable apprehension of bias arise in administrative decision-making. 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 and less inchoate articulation of why any apprehension of bias should or should not be considered reasonable.

These generative concepts of provenance, institutional norms and culture, local understandings, connection, and discourse, which find their genesis in political philosophical debates about impartiality, therefore provide a theoretical framework which can help to ground analyses relating to impartiality in administrative law. The advantage of these concepts is that they are more precise and descriptive than the terms and expressions that the Supreme Court has developed to date. They push the analysis to more concrete questions about the nature of the administrative actor, therefore providing a richer understanding of why disqualifying bias should or should not be perceived.

Why should context matter? Why should there be a contextual approach to determining questions of independence and impartiality? I suggest that at least two reasons can be put forward. The first deals with authenticity. As in the movement in political and moral philosophy, contextualized decision-making about impartiality in the Supreme Court of Canada jurisprudence offers an opportunity to embrace a more authentic understanding of what being impartial means. The schools of thought that were critical of Rawlsian liberalism based their criticism in an unease about the abstract and universal way in which principles of social justice were being developed. So too in administrative law: as opposed to universal principles that can be discerned from largely abstract and theoretical words of legislative drafters, determining whether impartiality exists should involve a true appreciation of the background and characteristics of the administrative bodies and litigants involved. However, it is necessary to express a degree of caution and balance that 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. 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.¹²¹

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 an aspirational goal. This goal is to question 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, shared and justified. In the end, it may be that by considering factors such as provenance, shared and local understandings, connection and diversity, new norms of impartiality will develop, contextualized so that they fit more authentically with the decision-making context involved. This is especially true in administrative law where the jurisprudence has maintained that context and flexibility are central. Procedural fairness concepts including the concept of impartiality must be adaptable to the nature of the administrative actor involved. Embracing a move towards grounded impartiality in judicial review of administrative action will go far in providing decisions that are fair to the citizens and that promote the public interest.

¹²¹ This was a theme grappled with by feminist scholars and other critical scholars. See for example Young, "Difference for Democratic Communication" supra note 42.