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The Three Faces of Justice - Bias in the Tripartite Tribunal

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THE THREE FACES OF JUSTICE—
BIAS IN THE TRIPARTITE TRIBUNAL

The courts never scrutinize administrative adjudication more zealously than when they scent a “denial of natural justice”. “Natural justice”, of course, demands the existence of a tribunal whose members bring an open mind to the evaluation of evidence and argument. How are the demands of natural justice to be satisfied when, by common consent of the parties or by legislative requirement, members of a tripartite tribunal deliberately bring to the hearing their prejudices and precommitments?

The tripartite tribunal, composed of representatives of both parties-in-interest and a third, neutral, member is a device which is universally employed in Canadian labour relations, but which likewise is well-known in commercial and inter-state controversies.1 Several recent Canadian cases2 have put squarely in issue the role of the representative member and, as will be suggested, indicate a failure by the courts to grasp the essential nature of the tripartite tribunal. Stated simply, the question is whether, or to what extent, “bias” by the representative member disqualifies him from participating in the tribunal’s proceedings.

It is, of course, trite law that no man may be judge in his own cause. The House of Lords has said:

[A] judge ought to be, and is supposed to be, indifferent between the parties. He has, or is supposed to have, no bias inducing him to lean to the one side rather than to the other.3

If the representative member of a tripartite tribunal is fixed with this same duty to be “indifferent” then the very loyalties and attitudes which qualify him as “representative” may also disqualify him for bias. To define the duty of the representative member, however, requires scrutiny not only of the words of the instrument under which the tribunal was created, but also of the expectation and understanding of the parties-in-interest.

The appeal of tripartism is threefold.4 First, the parties may commit their dispute to an impartial arbiter, yet seek assurance that his decision will be influenced by knowledge of their special customs and relationship. Here,

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3 Ranger v. Great Western Ry. Co., (1854) 5 H.L. Cas. 72 at p. 89.
the representative member provides a form of "judicial notice". Secondly, in both labour relations and international relations, adjudication is increasingly sought as a substitute for battle. Where the tribunal is created to adjust interests rather than merely to decide disputes over pre-existing rights, the representative member serves as a negotiator *vis-à-vis* the tribunal, while exerting moral suasion upon the party that nominated him. Thirdly, even where the tribunal functions in a more purely adjudicative fashion, parties who are committed to an ongoing relationship may wish to be assured of an "acceptable", if not a favourable, decision. The representative member provides the neutral arbiter with a sounding board upon which proposed rulings may be tested for this quality of acceptability. Of course, each of these virtues contains the seeds of its own negation. "Judicial notice" may extend to improper *ex parte* reception of evidence. Negotiation in the deliberations of the tribunal may degenerate to bluster or bullying. "Acceptability" may be incompatible with justice.

But, given its attractions and its risks, if the parties or the legislature have bargained for tripartitism, the peculiar traditions of that process should be respected by the courts. Whether they have been, can best be examined in context.

**Labour Relations Boards**

One of the most familiar examples of tripartitism in Canada is the labour relations board. Typically, the statute establishing the board provides for at least one presiding officer and equal numbers of members representative of employers and of labour. Typically, too, the statute provides for an oath of impartiality to be taken by the presiding officer and members alike. Finally, the statutory quorum for the board's proceedings is defined in terms which protect the equality of labour and employer representation. With one exception, Manitoba, no Canadian jurisdiction has expressly dealt with the bias of "representative" members. In that province, however, members are forbidden to participate in proceedings in which they have an "undue interest". If the legislation itself sheds little light on the role of the representative member, occasional comments by administrators, board personnel, and other observers all point to an implicit understanding that the representative member is not expected to be "indifferent", or unbiased.

The prototype of today's tripartite labour relations board was the Wartime Labour Relations Board established in 1944, under the federal labour

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5 E.g. Ontario Labour Relations Act, R.S.O. 1960, c. 202, s. 75(2); Trade Union Act, R.S.S. 1953, c. 259, s. 4(1). Although British Columbia, Alberta, Nova Scotia and P.E.I. have no such statutory requirement, in practice their Boards are tripartite.

6 Ontario Labour Relations Act, s. 75(5); Trade Union Act, s. 4(10).

7 Ontario Labour Relations Act, s. 75(6), but cf. Trade Union Act, s. 4(2) which merely provides that "a majority of the members shall constitute a quorum".

8 Department of Labour Act, R.S.M. 1954, c. 131, ss. 11 (6B).

code, P.C. 1003. In announcing the initial appointment of the members of that body, the Minister of Labour named those persons who were "representing the employers" and those who were "representing employees". He stated that,

The representatives of the employers were selected after consultation with the Canadian Manufacturers Association, the Canadian Chamber of Commerce, the Canadian Construction Association and the Railway Association of Canada. Mr. Taylor represents the manufacturers association, Mr. Brown the chamber of commerce, Mr. Deschamps the construction association, and Mr. Hills the railway association. . . .

He then canvassed the appointment of the employee representatives in like fashion. It is clear that the Minister did not merely seek the advice of interested parties in making these appointments, but in fact acknowledged and accepted the web of loyalties which bound the appointees to those who recommended their appointment. In so doing, he established a precedent which seems to have been universally followed.

The inevitably competing tugs of impartiality and loyalty were soon discernible. In an early case before the Ontario labour relations board, likewise established under P.C. 1003, a member of the national Wartime Labour Relations Board appeared as counsel. Subsequently, he sat as a member of the national board to hear an appeal taken from the Ontario decision. This incident was relied upon in a later case by the Ontario board in rejecting a challenge to the presence of a board member who had been active in the affairs of one of the parties to a pending proceeding. The board stated:

The basis of the administration of the legislation is that it is to be administered by a bi-partisan board, in other words that the prejudices, if prejudices there be, of each side will be offset and cancelled out by the prejudices of the other. . . .

In any event, the board noted, the legislation made no provision for alternate members and disqualification would disturb the equality of management and labour representation. In several subsequent cases, the national board reaffirmed this principle.

However, in a concurring opinion by two board members is found the germ of a useful distinction between a "direct" and an "indirect" interest in pending proceedings. By these terms they no doubt intended to distinguish active participation in the events giving rise to a proceeding from general ideological and institutional commitments. Positing that neither sort of interest amounted to legal disqualification under the Regulations, they suggested that participation by a member with a "direct" interest . . . from an ethical point of view . . . may be unwise in that it exposes the Board and Board members, to criticism, whether justified or not.14

10 These federal regulations preempted the field of labour relations under the federal government's broad wartime powers.
11 [1944] 2 Debates of the House of Commons 1505.
14 Toronto General Hospital, supra, footnote 10, per Messrs. Complin and Deschamps.
Viewing the problem as ethical rather than legal, it was inevitable that the board would leave to each member the decision to disqualify himself. This, in fact, has apparently been the administrative practice of both the national and Ontario boards down to the present time.15

When, however, the courts recently intervened to become the keepers of the board member's conscience,16 in effect they ignored the "direct-indirect" dichotomy as the test for disqualifying interest. In so intervening, they may have created a situation in which tripartitism is itself put in peril.

In Bruton v. Regina City Policemen's Association,17 a decision of the Saskatchewan labour relations board was quashed on grounds unrelated to the bias problem. However, Gordon J.A. also held that participation in the proceedings by a board member who had been employed by the union as its spokesman and agent was fatal to the board's order, on the ground that he was disqualified by reason of bias. The other two members of the court pointedly declined to express their views on this issue.18 In a more recent Ontario appellate decision, Bradley v. Canadian General Electric,19 Roach J.A. likewise touched upon the bias problem:

I have heard it said that the nominees of management and labour on the Board 'represent' one or the other. This may be an appropriate time to say they 'represent' neither. As members of the Board they are independent of both. . . . [T]here can be no gradations of independence.20 These two obiter dicta set the stage for the recent trilogy of cases in which tripartitism's Achilles heel was revealed.

So long as the "labour" and "management" members of the board could be relied upon to cancel out each other's prejudgments, "bias" remained a theoretical rather than a practical impediment to natural justice. However, given a struggle between two rival unions, only one of which could claim the allegiance of the board's labour member, "bias" became a clear and present danger. Thus, the struggle between the United Steel Workers of America ("Steel") and the International Union of Mine, Mill and Smelter Workers ("Mine-Mill") has thrice invited judicial scrutiny. Steel and Mine-Mill each seek to represent iron miners and refinery workers; Steel is affiliated, through the provincial federation of labour, to the Canadian Labour Congress; Mine-Mill was expelled from that body some years ago on charges of communist domination; Mine-Mill's destruction is an avowed aim of C.L.C. affiliates. Against this background, high officials of the provincial federation of labour sit as board members to decide contests between Mine-Mill and Steel.

16 Supra, footnote 2.
17 Supra, footnote 2.
18 Per Martin C.J.S. at p. 450; per MacDonald J.A. at p. 459.
In *Re Thompson and Local 1026, I.U.M.M.S.W.*,\(^{21}\) in response to a motion by Mine-Mill, James (the board member) disqualified himself voluntarily, although the Board ruled he need not have done so. James had twice before favoured Mine-Mill's position in related proceedings, but had since made a public attack on Mine-Mill and pledged support to Steel. With the consent of all concerned, James continued to sit at the hearing, but agreed not to participate in the proceeding; a brief, impulsive remark by James later in the proceedings was the foundation of the challenge to the board. Freedman J.A. held for the court that this remark was not "participation" in the proceedings such as to warrant an attack on the board, even if bias by James had been shown. In any event, Mine-Mill had waived any objection to the proceedings by acquiescence. Monnin J.A., dissenting, found both that James had participated and that there was a real likelihood that he was biased. In so doing, he foreshadowed the decision of McRuer C.J.H.C. in *R. v. O.L.R.B., ex parte Hall.*\(^{22}\)

In the Ontario case, Archer (the board member) refused to disqualify himself, and by continuing to sit and participate in the proceedings put his impartiality squarely in issue. The attack upon Archer was twofold: (a) he had on an earlier occasion offered advice to a group whose interests ran counter to the present Mine-Mill local applicant; on the facts this did not constitute bias. (b) he was president of the provincial federation of labour whose declared policy favoured Steel over Mine-Mill; this fact was held to constitute legal disqualification. As the learned Chief Justice stated:

> On the one hand, Archer's oath of office as a member of the Ontario Labour Relations Board required him to decide the matter impartially, while, on the other hand, his oath of office as the chief executive officer of the Ontario Federation of Labour required him to carry out the policies of the Federation of which he was president. I think it is asking too much of human nature. . .\(^{23}\)

Nor did the legislative requirement\(^{24}\) of employee representation on the labour relations board enhance Archer's position. "Employee" representation is not synonymous with "union" representation, and—in any event—employee representatives may well be members of unions without holding union office with its additional burden of commitment.\(^{25}\) Certainly as the third case in the trilogy indicates—*Re U.S.W.A., Local 2952 & I.U.M.M.S.W., Local 101*\(^{26}\)—membership in one of the two rival unions might disqualify a board member without more.

The salient feature of the Mine-Mill - Steel trilogy is that tripartitism does not work when one of the parties is not represented on the tribunal. Because tripartitism necessarily identifies "labour" and "management" as the parties-in-interest, nominees for labour representatives are sought from the

\(^{21}\) *Supra*, footnote 2.

\(^{22}\) *Supra*, footnote 2.


\(^{24}\) *Labour Relations Act*, R.S.O. 1960, c. 202, s. 75(2).

\(^{25}\) 39 D.L.R. 2d at p. 119-120.

\(^{26}\) *Supra*, footnote 2.
central labour bodies, and are often officials of those bodies.\textsuperscript{27} Thus, a struggle between the "official" central labour body and an unaffiliated labour group will almost certainly involve the labour board member in a conflict of loyalties. The hostility between Steel and Mine-Mill differs only in intensity and not in kind from that existing between any two union rivals who are divided on the issue of affiliation to the central labour body. In fact, Chief Justice McRuer's decision in \textit{Ex parte Hall} potentially disqualifies all labour members of the board from hearing inter-union contests.

Once Archer was cleared of any direct personal connection with the matters at issue, the only objection to his participation must be that his bias was not offset by that of a Mine-Mill nominee. It is only the absence of a countervailing bias that distinguishes the inter-union contest from the conventional labour-management \textit{lis}. Since the statute makes no provision for the \textit{ad hoc} appointment of representatives of the various dissident or unaffiliated unions, there would seem to be no alternative but to allow Archer to sit.

Judicial refusal to accept the implications of the legislative prescription for a tripartite board is hardly bolstered by the naive suggestion that labour representation be drawn from outside labour officialdom. If there are to be safeguards against the inevitable, indirect, imputed bias which is of the essence of tripartitism, they should properly be provided by the legislature.

\textit{Arbitration}

The tripartite arbitration board has received frequent, if not always sympathetic, scrutiny by Canadian courts. An early Ontario appellate decision, \textit{Vineberg v. Guardian Fire \& Life Assurance Co.},\textsuperscript{28} defined the duty of impartiality incumbent on an arbitrator. Not only will actual bias disqualify; relationship to one of the parties which "would naturally suggest \ldots a presumption of non-indifference"\textsuperscript{29} likewise disqualifies. The \textit{Vineberg} decision has been followed in Ontario,\textsuperscript{30} and cited with approval in Manitoba\textsuperscript{31} and in the Supreme Court of Canada.\textsuperscript{32} Unfortunately, the \textit{Vineberg} case involved a two-man board of arbitration rather than a tripartite board. Bias in one of two arbitrators is as likely to produce injustice as the bias of a single judge. Bias of one member of a tripartite board, however, is cancelled out by the bias of his counterpart; the effective decision lies with the neutral chairman. While, surprisingly, so astute a judge

\textsuperscript{27} For example, all "labour" members of the Ontario board are closely identified with the Ontario Federation of Labour, Bromke, op. cit. \textit{supra} footnote 9 at p. 32. In Quebec, the statute requires that the Minister of Labour seek recommendations from "the most representative labour and management associations". Labour Relations Act, R.S.Q. 1941, c. 162A, s. 30.
\textsuperscript{28} 19 O.A.R. 293 (1892).
\textsuperscript{29} Ibid., at p. 298.
as Meredith J. failed to distinguish Vineberg on that ground in Burford v. Chambers, he did point out that the requirement that nominated arbitrators be neutral "seems to be founded . . . upon sentiment rather than reality."

Feeling himself bound by the Vineberg decision he ruefully remarked:

One's eyes cannot be shut against the fact that in many, very many cases, the arbitrator for each party is expected to be, and is an active advocate of the party by whom he was appointed, however much Courts may insist upon impartiality and deprecate such conduct. . . .

The provincial courts, however, have consistently refused to allow nominated arbitrators to depart from strict neutrality. Neither have they distinguished between actual bias and that imputed by reason of an existing relationship. Bias has been imputed to a nominated arbitrator who acted, in a related matter, as solicitor and counsel to party, who was the brother of a party, and, ex hypothesi who received a fee from a party. While the Supreme Court of Canada has never authoritatively passed on the subject, several obiter dicta foreshadow a similar approach. However, a past relationship will probably not raise a presumption of bias.

Holland & Couper v. Vancouver is one of the few cases in which an arbitration award was attacked upon the ground of actual bias as opposed to bias imputed by reason of a relationship. Strangely, the arbitrator's bias was sought to be inferred from a minority award delivered by him. Manson J., however, stated:

The parties were entitled to an unbiased consideration of the evidence on the part of all three of the arbitrators. They did not get it. It is difficult to believe that the prejudice shown by the dissenting arbitrator did not influence the other two arbitrators and that being so, constitute a ground for setting aside the award and remitting it.

Noting that the minority award merely demonstrates "that there are two sides to every question", and that "there is not the slightest indication that the [dissenter's] reasons influenced his colleagues one iota", the appellate court restored the award. Because the arbitrator was exonerated of any suspicion of bias, the judgment cannot 'e taken as authority for the proposition that actual bias can be disregarded so long as it is confined to the minority.

Clearly, actual operative bias of any arbitrator will vitiate the proceeding even if imputed bias will not. While our courts have not done so, a

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33 Supra, footnote 30.
34 Ibid., at p. 667.
35 Burford v. Chambers, supra, footnote 30.
36 Turnbull v. Pipestone, supra, footnote 31.
41 15 D.L.R. 2d at 629.
42 19 D.L.R. 2d at 409.
recent American decision draws the distinction in terms which bear repetition:

Arising out of the repeated use of the tripartite arbitral Board, there has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be "neutral", at least in the sense that a third arbitrator or a judge is. . . . In fact the very reason each of the parties contracts for the choice of his own arbitrator is to make certain that his "side" will, in a sense, be represented on the tribunal. . . .

The court refused to disqualify an arbitrator nominated by one party, although he was its founder, past president, director, and paid consultant. Although no stronger link between arbitrator and party could be imagined, the court acted with full awareness of the obvious risks inherent in its decision:

Our decision that an arbitrator may not be disqualified solely because of a relationship to his nominator or to the subject matter of the controversy does not, however, mean that he may be deaf to the testimony or blind to the evidence presented. Partisan he may be, but not dishonest.

The accuracy with which the judgment reflects the expectations of the parties to both labour and commercial tripartite arbitration is clear from the privately promulgated rules governing such proceedings. The rules of the American Arbitration Association and the Code of Ethics for Labor Arbitration adopted by the National Academy of Arbitrators, both recognize the peculiar role of the nominated member of the tripartite board. Even in the absence of such explicit evidence in Canada, it would be highly desirable if our courts judicially noted, as Meredith J. did 50 years ago, what the parties themselves expect from the process. So long as they are ad idem so that their respective appointees on the board are either both partisan or both impartial, the courts should defer to their private arrangements. To insure this consensus, some legislative rule-of-thumb would be useful.

Conciliation

Of all tripartite tribunals, none has been more carefully immunized against the risk of bias than the conciliation board. Typically, membership on a conciliation board is forbidden to anyone who has "any pecuniary interest" in the matters at issue, or who has, recently, "acted as solicitor,

44 Ibid., at p. 89.
45 E.g. Code of Ethics for Labour-Management Arbitration, Part III—Conduct and Behaviour of Parties, s. 4: "When parties select members of tripartite boards, it is recognized that generally each will select a representative rather than an impartial arbitrator, but in making such appointment parties should select persons who will join with the impartial arbitrator in full and fair discussion and consideration of the merits of the questions to be determined." quoted in McKelvey (ed.), The Profession of Labour Arbitration 160 (1957). See also Attorney General's Committee on Arbitration (Ontario, 1962), Proceedings, p. 453 (J.C. Adams, Q.C.); p. 496-500 (D. Wren); p. 44 (N.L. Rogers, Q.C.).
46 See supra, footnote 34.
agent, or counsel” of either party. This legislative requirement is surprising because the function of a conciliation board is not to adjudicate; it is rather to facilitate the process of collective bargaining. Although the board is required to afford the parties full opportunity to make submissions, and although its proceedings may culminate in a report and recommendations, yet its task is to “endeavour to effect agreement between the parties” rather than to determine the merits of the dispute.

Thus, members are not called upon to evaluate evidence and argument impartially so much as to persuade their nominators of labour market realities and risks. In this task they may well be aided rather than inhibited if board member and party share institutional loyalties. “Natural justice” becomes irrelevant.

This persuasive function of the conciliation board was noted in Ayriss v. Board of Industrial Relations in which an employer sought certiorari to quash a conciliation board’s award on the ground that the labour member was biased. The board member in question was an official of the local Building and Construction Trades Council, to which the local union involved was affiliated. Holding that certiorari did not lie to a non-adjudicative body such as a conciliation board, Riley J. also declined to find a likelihood of bias on the facts alleged. Finally, none of the statutory disqualifications were present.

The generalized significance of the Ayriss decision—if any—is that it raises the issue of why bias or interest should disqualify in non-adjudicative proceedings. It might be argued that the biased or interested board member would forestall any settlement on terms which do not please him, although they might be the best available. Without discounting that possibility, the answer surely is that the parties are not bound to agree. If they wish to face

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47 See e.g. Labour Relations Act, R.S.O. 1960, c. 202, s. 17. The Saskatchewan conciliation regulations contain no counterpart section.
48 S. 23 (2).
49 S. 29.
50 S. 22. Cf. Saskatchewan Conciliation Board Regulations, 1956, s. 12 (2) “... a board may make all such suggestions and do all such things as it deems right and proper for encouraging the parties to come to a fair and amicable settlement of the dispute, and shall hear such representations as may be made on behalf of the parties to the dispute and shall diligently seek to mediate between the parties to the dispute.” Quaere whether the reference to “fair” settlements and “mediation” imply adjudication?
51 For a general account of the function of a board of conciliation, and for reference to the general literature, see Anton, Role of Government in Settlement of Industrial Disputes (1962).
53 The Alberta Labour Act, R.S.A. 1955, c. 167, s. 88, in addition to the restrictions found in counterpart legislation, see supra footnote 47, also disqualifies persons who have “received remuneration directly” from either party within a specified time prior to the dispute. Riley J. held that the board member was not being “directly” compensated by the local union although it contributed to the general funds of the Council, out of which his salary was paid.
the consequences of disagreement—a strike—it is their privilege to listen to
the false counsel of their biased board member. They will not often wish
to do so.

Conclusion

Tripartitism has not escaped criticism by well-informed observers,54 but
the burden of this article is neither to defend nor attack it. The tripartite
tribunal is often established because the parties, or legislators, wish to temper
pure adjudication with elements of accommodation. Perhaps the risk of bias
may discount the value of the tripartite device to the point where we would
be better to abandon it altogether. The decision to do so, however, is
properly beyond the judicial province. Nonetheless, by imposing inap-
propriate duties of impartiality upon representative or nominated board
members, the courts ignore the basic assumptions of tripartitism.

Only a detailed description, by public and private lawmakers, of what
they expect from the exotic three-headed beast will elicit the appropriate
responses from its judicial keepers.

—H. W. Arthurs*

54 See e.g. Carrothers, Labour Arbitration in Canada, 76-8 (1961); Fuller,
Collective Bargaining and the Arbitrator, in Kahn (ed.), Collective
Bargaining and the Arbitrator's Role, 42-6 (1962).

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