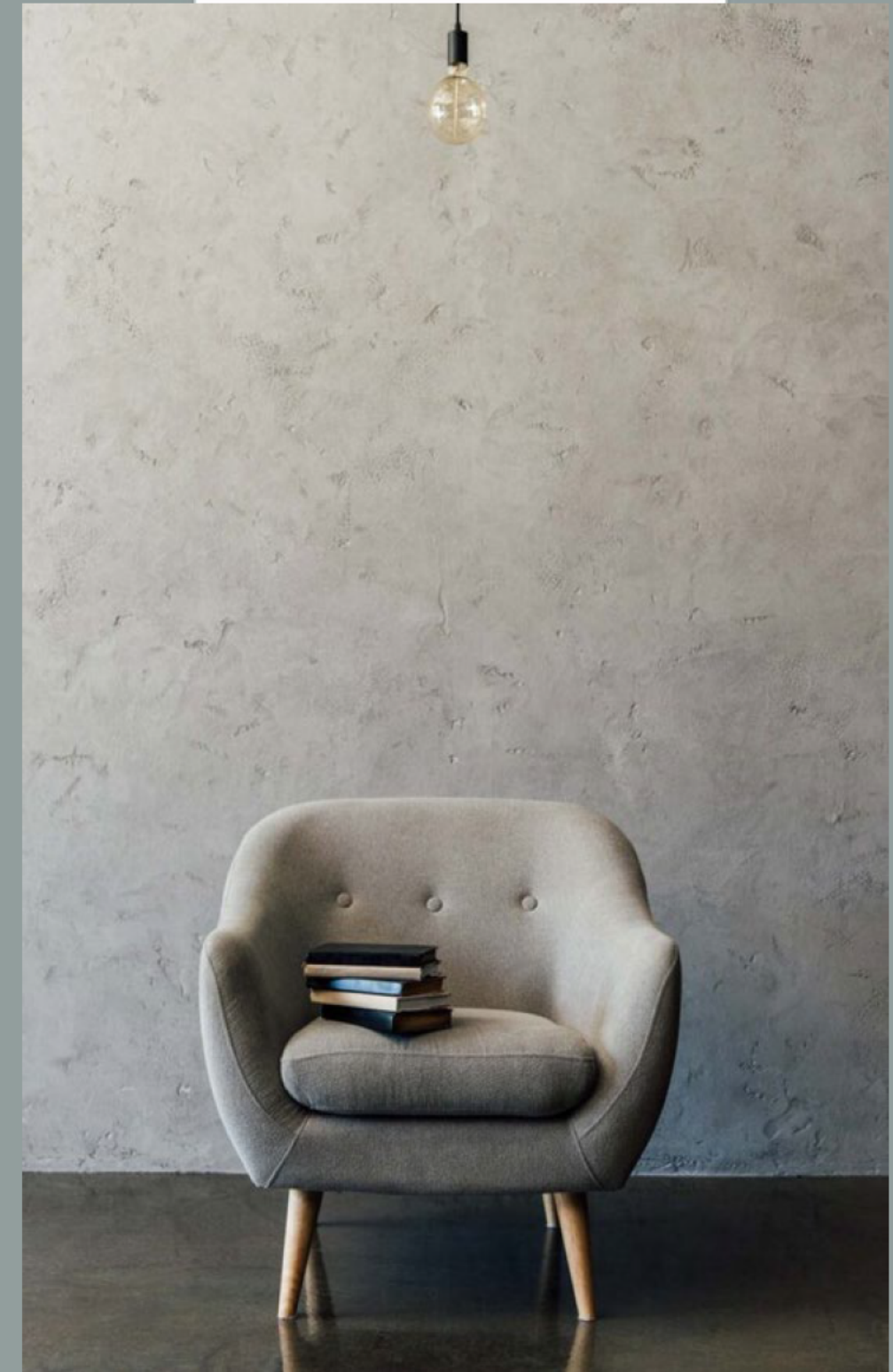


SML

September 10, 2025

Reasonable Apprehension of Bias in Regulatory Decision-Making

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Before We Begin...

- If listening by phone:
 - Phone access (Canada): (647) 374 4685, ID: 863 2710 8086
- Still having trouble hearing? Email Rachel Mason at rmason@sml-law.com
- Feel free to send questions to us during the session using the CHAT feature, or EMAIL us afterward:
 - amatushenko@sml-law.com / rhung@sml-law.com

Land Acknowledgment

We acknowledge that the land our office is on is the traditional territory of many nations including the Mississaugas of the Credit, the Anishnabeg and the Chippewa, and is now home to many diverse First Nations, Inuit and Métis peoples. We also acknowledge that Toronto is covered by Treaty 13 with the Mississaugas of the Credit.

We encourage you to acknowledge the land where you are located and to reflect on ways in which you can support the process of reconciliation.

Agenda

- What is bias?
- Regulatory context
- Some examples
- Key takeaways



What is Bias?

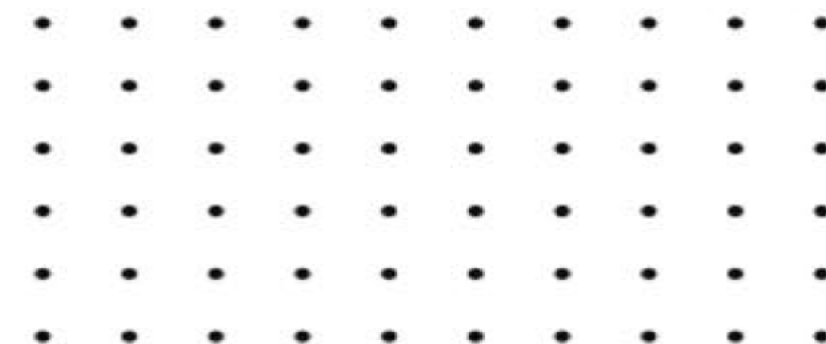
What is Bias?

- Depends on context in which it is alleged
- Generally, can mean:
 - Unfairness towards someone or group of people
 - Prejudice towards or stereotypical views about someone or group of people
 - Prejudgment of an issue
 - Closedmindedness
 - Close connection to a hearing participant
- Personal bias vs. institutional bias
 - Personal: impugns the individual decision-maker(s)
 - Institutional: impugns the institution itself



Reasonable Apprehension of Bias

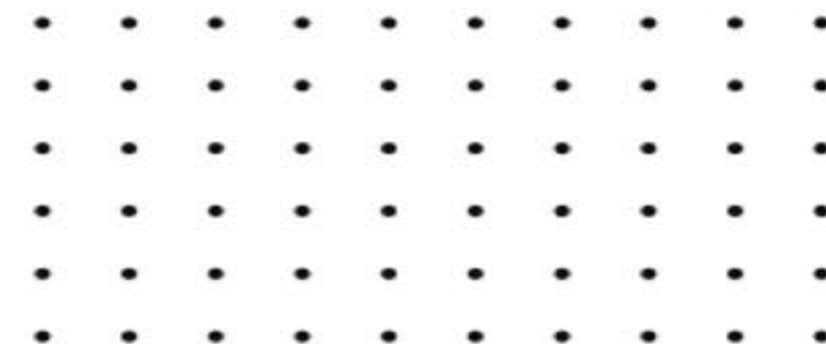
- Bias?
 - Extremely high threshold
 - Requires demonstrating actual bias
 - Not based on perception
- Reasonable apprehension of bias?
 - Also high threshold, but doesn't require actual bias
 - Objective test, based on perception



Reasonable Apprehension of Bias

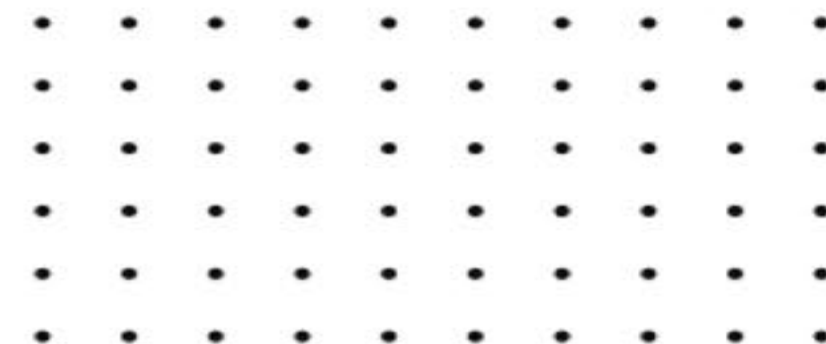
Reasonable Apprehension of Bias Test:

- *Committee for Justice and Liberty et al v National Energy Board et al* (1978, SCC):
 - ... what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would [they] think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.
- Objective test about “not only the reality, but the *appearance* of a fair... process” (*Yukon Francophone School Board*, 2015 SCC)



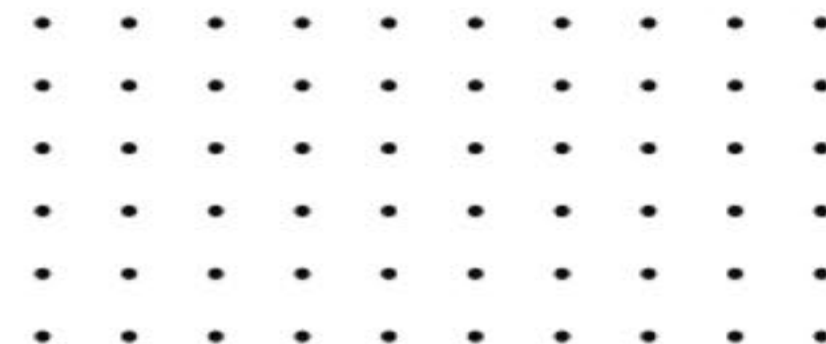
Regulatory Context

- Regulatory decisions must be free from bias
- Can come up in numerous contexts and sometimes unexpected ways
 - Registration/Licensure
 - Investigations
 - Hearings
- Bias assessment: case-by-case and fact-specific



Food for Thought

- Is there a reasonable apprehension of bias if...
 - Decision-maker decided another matter involving the same parties?
 - Decision-maker expressed personal views about an allegation raised?
 - Decision-makers do not have the same professional experience as the professional member?

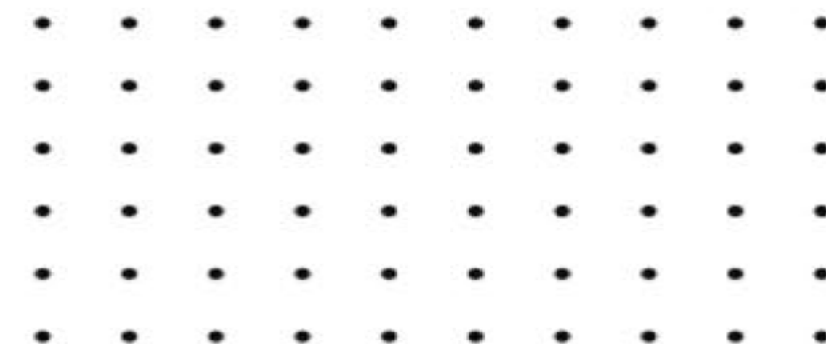




Registration/ Licensure

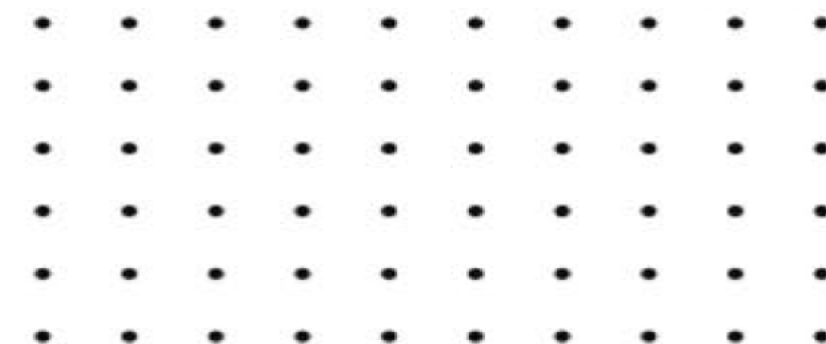
Examples: Registration/Licensure

- *D.W.C. v College of Physicians and Surgeons of Ontario* (2017, HPARB)
 - Registration refused by Committee due to Applicant's past and present conduct (concerns about mental health and substances)
 - Applicant challenged decision on a number of grounds, including bias:
 - Bias of medical assessors:
 - Applicant alleged that assessors applied erroneous considerations, misrepresented the Applicant's theories, and unfairly arrived at conclusions
 - Bias by College:
 - Applicant alleged that registration practices, investigation reports, medical assessors' reports, and Board of Inquiry proceedings contained significant errors



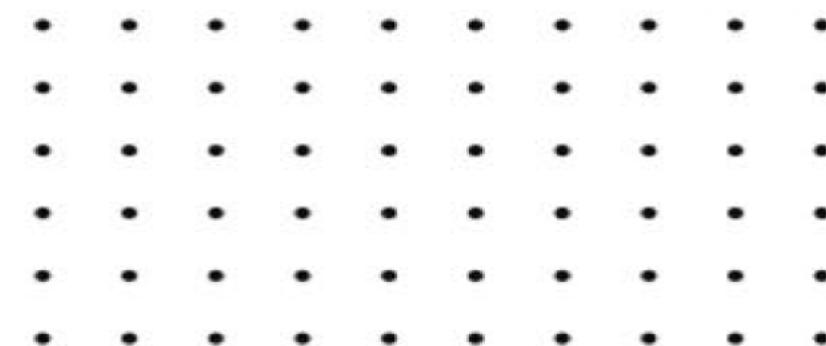
Examples: Registration/Licensure

- *D.W.C. v College of Physicians and Surgeons of Ontario* (2017, HPARB) cont.
 - **Board findings:**
 - Diagnoses can be disputed, but this does not in itself create a RAB
 - Medical assessors each came to their conclusions based on their professional observation and assessment of the Applicant
 - Committee's Order was not tainted
 - Committee gave Applicant the opportunity to present his case fully and fairly



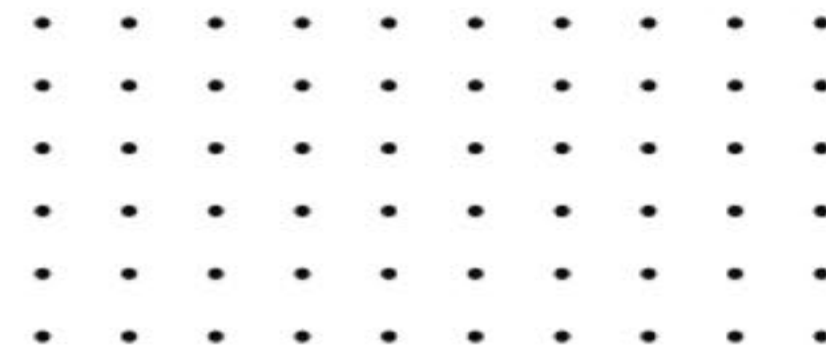
Examples: Registration/Licensure

- *A.G. v College of Registered Psychotherapists of Ontario* (2018, HPARB)
 - Registration refused by Committee due to Applicant failing to prove completion of adequate education and training (largely hypnotherapy)
 - Applicant claimed that Committee held an implicit bias. Alleged that Committee considered practitioners of non-mainstream, non-Western models of psychotherapy to be part of a subordinate group.
 - Took issue that two panel members had no mental health experience; two professional members may not have had experience with non-mainstream forms of psychotherapy
 - **Board findings:**
 - Committee panel was duly constituted under the Code
 - Legislation does not require that members of the panel hold similar training as an applicant; lack thereof is not a basis for a finding of bias



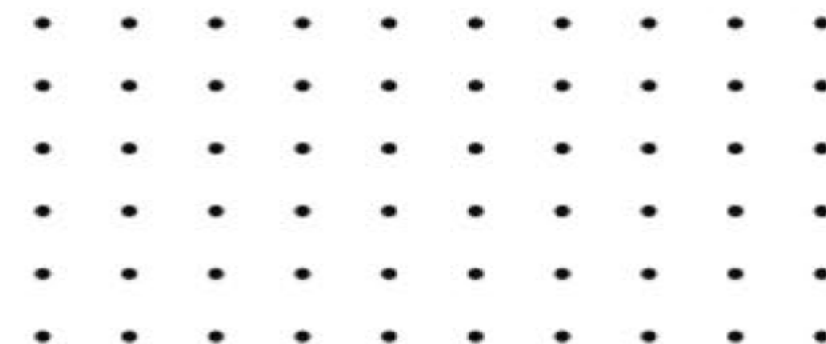
Examples: Registration/Licensure

- *A. C. v College of Physicians and Surgeons of Ontario* (2017, HPARB)
 - Registration refused by Committee due to Applicant's past and present conduct (criminal charge; subsequent acquittal)
 - Applicant challenged decision on a number of grounds, including RAB
 - Applicant alleged that RAB was created by:
 - A member participating in both the ICRC panel and in the Registration Committee panel
 - Prosecution counsel participating in deliberative process of the Registration Committee



Examples: Registration/Licensure

- *A. C. v College of Physicians and Surgeons of Ontario* (2017, HPARB) cont.
 - **Board findings:**
 - RAB made out
 - Where a statute provides for overlapping functions, a member's participation in two decision-making bodies does not necessarily create a RAB. However, the overlapping of functions does not necessarily mean that a RAB cannot exist. (*Ringrose v CPSO* (1977, SCC))
 - The member's participation in the Registration Committee the day after they participated in the ICRC decision to refer allegations resulted in a RAB
 - Prosecutor participating in Registration Committee deliberations in this case also contributed to RAB
 - Note: Fact-specific. Other Courts or tribunals may not have come to the same conclusion.





Investigations

Examples: Investigations

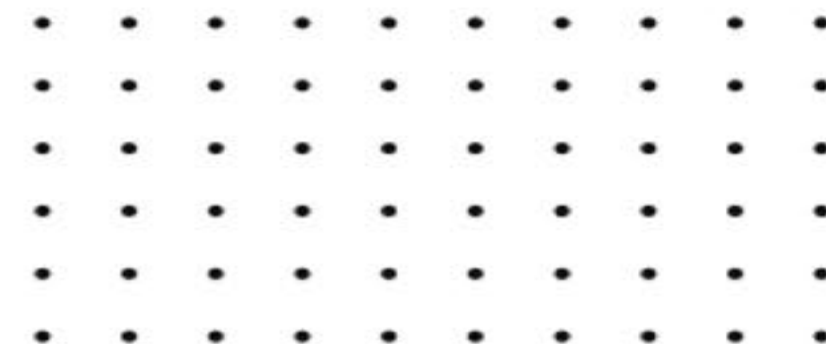
Example: alleged bias by decision-maker based on them considering multiple cases involving the same person

- **Alleged bias towards Registrant:**
 - *Dalouee v Freeman-Attwood* (2023, HPARB)
 - A panel of the College's ICRC reviewed two similar (but separate) complaints against the Registrant on the same day and arrived at the same disposition. The Registrant argued that this made the ICRC predisposed to finding fault, which resulted in RAB
 - HPARB rejected the bias argument:
 - The governing statute requires the ICRC to consider the Registrant's complaint history
 - The governing statute gives broad discretion to the ICRC to consider any information it considers "relevant"
 - No evidence of RAB



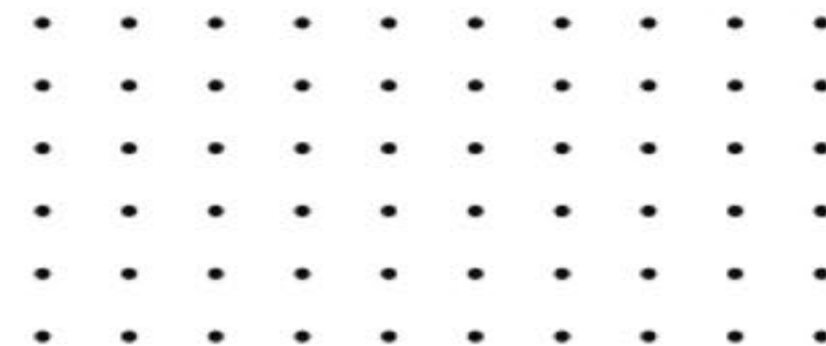
Examples: Investigations

- **Alleged bias towards complainant:**
 - *Talwar v Attwood* (2025, HPARB):
 - Complainant alleged there was RAB in the ICRC's decision-making process because the same panel members, on the same day, dealt with two complaints made by the complainant against two different registrants
 - HPARB rejected the bias allegation:
 - A panel can meet on the same day and consider a number of matters
 - This panel's analysis was based on the information on the record pertaining to the subject complaint, without reference to any other matter
 - No evidence to support allegation of RAB



Examples: Investigations

- **Other examples of alleged bias at investigation stage:**
 - Allegation that providing a registrant an extension to respond to the investigation demonstrated a RAB (dismissed)
 - Allegation that the screening committee was biased against the complainant because the registrant was an occasional peer reviewer for the College (dismissed)
 - Allegation that reference to information provided by the complainant to the investigator amounted to RAB (dismissed)
 - Allegation that “friendly” communications by investigator with the Registrant showed RAB - e.g., beginning emails with a familiar greeting such as “Hi” (dismissed)





Hearings/ Adjudication

Hearings/Adjudication

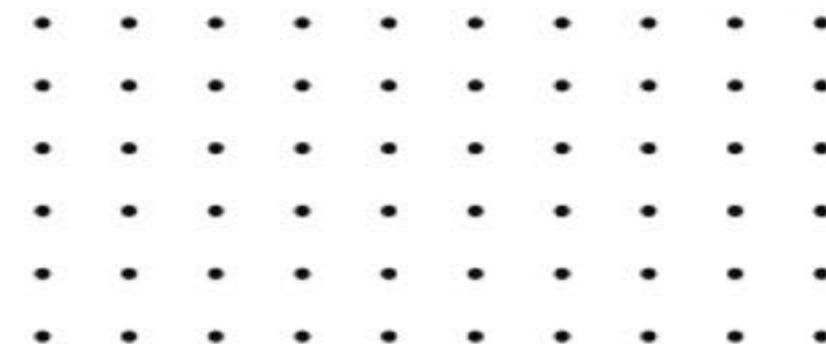
- Hearing panels expected to show impartiality and objectivity
- Bias allegation must be raised as soon as possible
- As a result, panel members at hearing stage often consider bias allegations against them at first instance.



Examples: Hearings/Adjudication

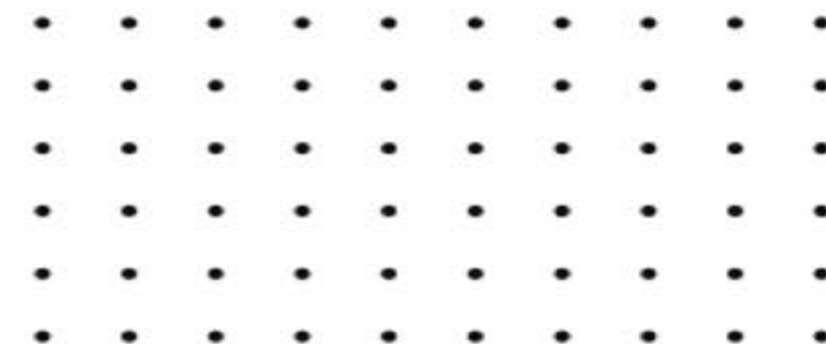
- **Impartiality concerns:**

- Li v College of Physicians and Surgeons of Ontario (2004, Div Ct):
 - Expert witness appointed to the Discipline Committee before reasons were released in the matter in which they testified. This created a RAB because there were inadequate systems in place to make sure the witness did not speak with members of the panel.
- Chuang v Royal College of Dental Surgeons of Ontario (2006, Div Ct):
 - A panel member was related to the former Chair of the Executive Committee and the current Chair of the Discipline Committee. No impartiality or RAB concerns because no evidence that they spoke about the matter at issue.



Example: Hearings/Adjudication

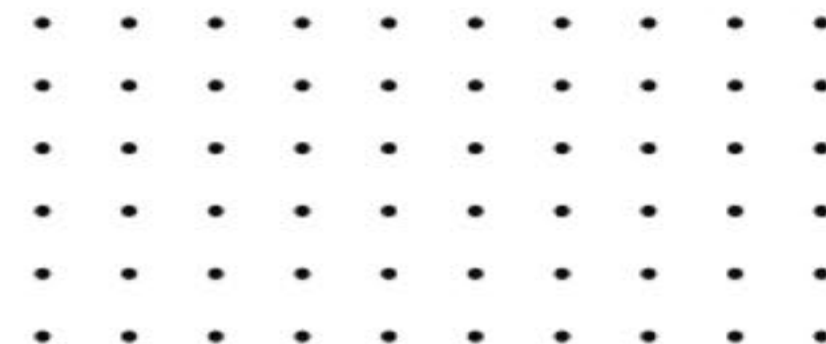
- **Loss of objectivity:**
 - *Canada (Canadian Human Rights Commission) v Canada (Attorney General)* (2025, Federal Court)
 - Federal Court found that adjudicator showed RAB
 - During the hearing, the complainant raised an allegation that the adjudicator showed an apprehension of unconscious bias
 - No recusal motion, but once the decision was released, it included a “Bias Allegation Addendum” authored by the adjudicator
 - Subjective, personal description of what occurred
 - Did not give opportunity for the parties to make submissions or notice that the “Bias Allegation Addendum” would be included



Example: Hearings/Adjudication

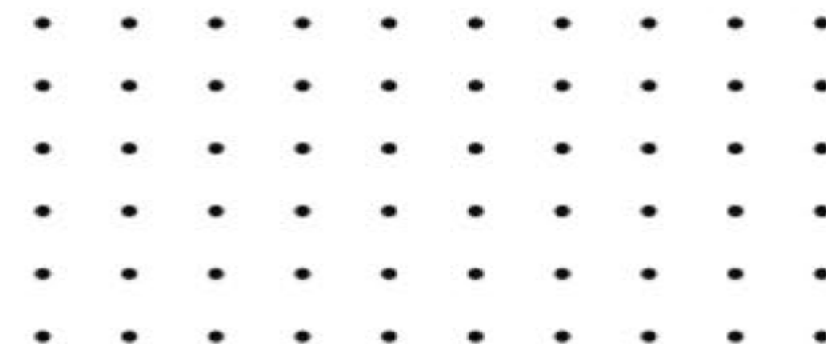
Canada (Canadian Human Rights Commission) v Canada (Attorney General) (2025, Federal Court) – Bias Allegation Addendum:

“Before describing how the matter was resolved, I feel the need to speak on the record from a personal perspective. Allegations of racial bias are very toxic in today’s world. The mere allegation of such impropriety carries with it significant stigmatization and it is often very difficult for the accused to achieve redemption because the allegation, though difficult to prove, is also quite difficult to disprove. My personal reputation was impugned by [the complainant’s] allegation, so I wish to reply to defend myself...”



Example: Hearings/Adjudication

- Finding: RAB. Adjudicator lost the necessary objectivity when they “injected [themselves]” into the analysis of the allegation of unconscious bias
- Adjudicator assessed the matter subjectively:
 - Addendum referenced speaking from “personal perspective”
 - Adjudicator wrote that they did not want their “reputation impugned”
 - Adjudicator wrote that they wished to “defend themselves”
 - Addendum referenced how the adjudicator perceived the complainant (e.g., it said they did not perceive the complainant to speak with an accent)
 - Adjudicator wrote that they doubted they were racially biased because some of their closest friends were of the same ethnic origin as the complainant

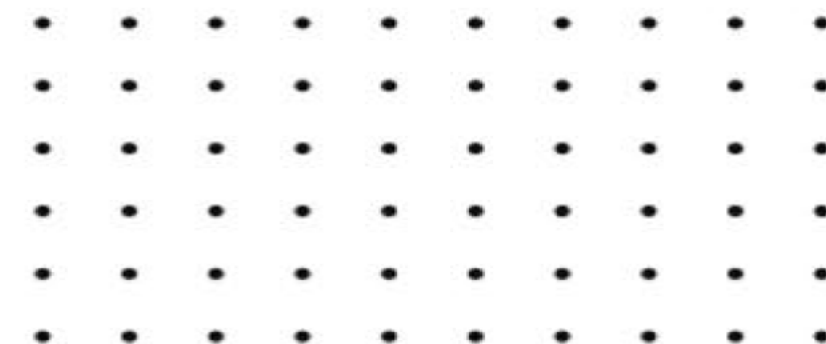




Takeaways

Key Takeaways?

- Objectivity and impartiality are crucial
- In assessing RAB, must consider whether, objectively, RAB has been demonstrated. The perspective of a reasonably informed objective observer.
- Demonstrating RAB is a high bar, because it puts the decision-maker's presumed integrity and impartiality into question
- But, courts/review boards will find RAB where actual or perceived loss of objectivity is demonstrated



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THANK YOU

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