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Selection bias in human rights tribunals: an exploratory study

Abstract: Quasi-judicial tribunals are bound by the principle of natural justice, including the obligation to avoid bias or the apprehension of bias in the selection of adjudicators, as was affirmed for human rights commissions in the *McBain* case.

This paper statistically analyses all decisions rendered by Canadian human rights tribunals, both federal and provincial, in the years 1956 to 1984. The main conclusion is that there is a tendency toward the reappointment of adjudicators whose decisions are favourable to complainants. This calls into question the neutrality of the appointment procedures used in these years, namely appointment by a minister or by a human rights commission. The system recently adopted by the Canadian Human Rights Commission, involving appointment by the chairman of a panel of adjudicators, is proposed as a model worthy of imitation to the extent that it minimizes the apprehension of bias.

Sommaire: Les tribunaux quasi-judiciaires sont tenus d'appliquer le principe de la justice naturelle, y compris l'obligation d'éviter de soulever une crainte raisonnable de partialité lors du choix des arbitres, comme l'arrêt *McBain* l'a affirmé en ce qui concerne les commissions des droits de la personne.

Cet article comporte une analyse statistique de toutes les décisions prises par les tribunaux canadiens des droits de la personne, tant provinciaux que fédéraux entre 1956 et 1984. Il conclut qu'on a eu tendance à renouveler le mandat des arbitres dont les décisions étaient favorables aux plaignants. Cette conclusion interpelle la neutralité du système de nomination en vigueur durant cette période, en particulier lorsque c'était un ministre ou une commission des droits de la personne qui nommait les arbitres. Le système, récemment adopté par la Commission canadienne des droits de la personne, en vertu duquel c'est le président d'un tribunal d'arbitres qui nomme chaque comité d'arbitre, est proposé comme modèle digne d'être imité dans la mesure où il réduit la crainte raisonnable de partialité.

Canada has an imposing array of administrative agencies to resolve conflicts or settle disputes between individuals and/or organizations and/or the state. Examples such as labour relations boards, workers compensation boards, or

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the National Energy Board come readily to mind. The quasi-judicial activity of these agencies is similar to the decision-making that takes place in courts, and the results can generally be appealed to the courts; but the agencies do not enjoy the same safeguards of judicial independence as the courts. Administrative tribunals are obliged to make decisions with a due regard for the principles of natural justice, including such matters as notice of hearing, time to prepare, fairness and openness of hearing, opportunity to cross-examine, and so on.¹ An important aspect of natural justice, and the subject of this paper, is that the tribunal be free of bias. Actual bias is almost impossible to prove and is hardly ever at issue; the debate is generally over the "appearance" of bias. Lord Denning has written that for bias in the legal sense to be apprehended:

There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The judge was biased."²

The leading Canadian case to develop this doctrine of "reasonable apprehension of bias"³ is the *Crowe* case, in which the Supreme Court of Canada, speaking through Chief Justice Laskin, disqualified Marshall Crowe from sitting on the National Energy Board's hearing of the Canadian Arctic Gas application to build the Mackenzie Valley pipeline, because he had previously been involved with the proposal as president of the Canada Development Corporation.

Like many agencies, human rights commissions perform administrative functions, such as carrying out publicity campaigns, along with the quasi-judicial function of enforcing the human rights code. As law enforcement has become more important over the years, the question of the reasonable apprehension of bias in the appointment of tribunals has become an issue several times. This paper, after reviewing earlier developments, deals with a special aspect of selection bias, namely the dynamics of reappointment in a system of ad hoc, external appointment of adjudicators. Quantitative data are analysed to see if reappointment is statistically related to whether

1 André J. Roman, "Regulatory Law and Procedure," in G. Bruce Doern, ed., *The Regulatory Process in Canada* (Toronto: Macmillan, 1978).

2 *Metropolitan Properties v. Lawson* (1969), 1 QB (3d) 716 (Eng. CA), in J.M. Evans, H.M. Janisch, J. Mullen, R.C.B. Risk, eds., *Administrative Law: Cases, Text, and Materials* (Toronto: Emond-Montgomery, 1980), p. 244.

3 *Committee for Justice and Liberty v. National Energy Board* [1978], 1 SCR 369, in *ibid.*, pp. 267.

adjudicators' decisions favour one side or the other. After the analysis of data, we conclude with reflections on the fairness of the present system.

Background

Human rights commissions are charged with investigating and, if possible, conciliating cases of alleged discrimination. If conciliation fails, a quasi-judicial tribunal may be established to determine whether or not the law has been infringed, except in Quebec, where disputes go directly to the Superior Court.⁴ The impartiality of these tribunals has been called into question because of who is appointed and how they are appointed. Two kinds of allegations have been made: some see bias stemming from the influence of a human rights commission over the appointment of tribunals, others fear the effects of political patronage when tribunals are appointed by a minister of the crown.

The first issue was recently brought to a head by Alistair McBain, then a member of Parliament, in the course of defending himself against a charge of sexual harassment under the Canadian Human Rights Act.⁵ McBain challenged the authority of the federal tribunal, claiming that it could not give him the fair hearing he was entitled to under section 2(e) of the Canadian Bill of Rights⁶ and section 11(d) of the Canadian Charter of Rights and Freedoms.⁷ The tribunal could not be impartial, McBain claimed, because it had been appointed by the commission, which was already convinced of his guilt.⁸

McBain's contention of bias was based not on a perception of personal hostility towards him by the tribunal or the commissioners, but on the structure of the legislation itself. Prior to the *McBain* case, the federal commission attempted conciliation only after it had concluded, usually on the basis of investigation, that the complaint was "substantiated," that is, that there was "probable cause."⁹ The legislation assumed that conciliation would follow a prior investigation showing that the respondent was probably guilty of some wrong-doing.

Some human rights acts do not differentiate so clearly between investigation and conciliation, nor associate the latter with probable cause. In fact,

4 RSO 1977, c. C-12, s. 83. Walter Tarnopolsky, *Discrimination and the Law* (Toronto: Richard De Boo, 1982), p. 453.

5 SC: 1976-77, c. 33.

6 "... no law of Canada shall be construed or applied so as to ... deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."

7 "Any person charged with an offence has the right ... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

8 *Alistair McBain v. Canadian Human Rights Commission et al.* (1985), 6 CHRR, D/3064.

9 SC: 1976-77, c. 33, ss. 36(3) and 37(1).

some acts require the commission to conciliate every case that is not dismissed at the outset as trivial or out of jurisdiction, even if upon investigation the commission finds the charge to be unsubstantiated.¹⁰ Nevertheless, conciliation usually implies a provisional finding of guilt, so most commissions try in practice to separate the processes of investigation and conciliation. As Walter Tarnopolsky explains:

When a complaint has been filed, it is at this stage no more than an allegation. An investigation is required to see whether the allegation is sustained. If an effort is made at this stage to conciliate or negotiate a settlement this implies at least partially that the alleged prohibited act has been committed.¹¹

When commissions are required to conciliate in the absence of a finding of probable cause, the conciliation may be perfunctory, involving little more than informing the complainant that the commission does not think the charge is substantiated, and will not normally lead to the appointment of a tribunal. The Ontario Commission's newsletter, *Affirmation*, states: "If the complainant refuses to accept [a reasonable] settlement, the commission may decide that this refusal is based on vindictive motives. The commission is obligated to ensure that complaints [sic] do not use the Code simply to embarrass or inconvenience the respondent."¹² On the other hand, the threat of a tribunal is the best weapon a commission has against a recalcitrant respondent.¹³ It follows that most tribunals will flow from a finding of probable cause by the commission and the failure of conciliation due to the recalcitrance of the respondent. The commission normally has carriage of the complaint and becomes an active participant in the legal proceedings, acting on behalf of the complainant through its own lawyers.¹⁴

Although all Canadian commissions have probably made a provisional finding of guilt at the point a tribunal is appointed, they do not normally have the power to appoint the particular tribunal. This has not always been the case, however. Originally, both the Manitoba and Saskatchewan commissions could sit as tribunals. As Ian Hunter described the Saskatchewan case:

It is the Saskatchewan Human Rights Commission that investigates a complaint of discrimination; it is the Commission that attempts conciliation; failing settlement, it is the Commission that reports to the Minister; then (unbelievably), it is the Commission that constitutes the inquiry tribunal with authority to "... determine its own procedure ... receive ... evidence ... as in its discretion it deems fit and proper, whether admissible in a court of law or not ..." and "... no order shall be

10 E.g., SO 1981, c. 53, ss. 32(1) and 33; RSA 1980 C.1.-2, s. 20(1); RSNB 1973, c. H-11, s.18(1).

11 Tarnopolsky, *Discrimination and the Law*, p. 445.

12 *Affirmation* 4, no. 3 (1983), p. 2.

13 Judith Keene, *Human Rights in Ontario* (Toronto: Carswell, 1983), p. 224.

14 E.g., RSA 1980, c.1.-2, s. 29(1)(a); CCSM, c. H175, s. 26(a); SO 1981, c. 53, s.38(2)(a).

made or process entered or proceeding taken in any court, whether by way of certiorari, mandamus, prohibition, injunction or other proceeding whatsoever, to question the direction to the Commission or to review, prohibit or restrain any of its proceedings." At such an inquiry, the Commission is a party represented by counsel - in effect, making representations to itself. And, yes, it is in the same Commission upon which is conferred a sanction so sweeping as to be unparalleled elsewhere in Canadian legislation - in fact a legislative *carte blanche* - the power to "... order any party who has contravened the Act . . . to do any act or thing that in the opinion of the Commission constitutes full compliance."¹⁵

The Manitoba legislation was struck down by the province's Court of Appeal in 1973. Even though the Saskatchewan legislation was upheld by its own Court of Appeal,¹⁶ it was changed in 1979¹⁷ to conform to the practice in other Canadian jurisdictions of separating the personnel of commissions and tribunals. The general practice is now to lodge the power of appointing tribunals in a minister of the crown or in some other official who is independent of the commission.

At the time of the *McBain* case the federal Human Rights Act contained the only exception to the ministerial appointment of tribunals. The federal commission, whose legislation explicitly required a finding of probable cause prior to conciliation, had the power directly to appoint the tribunal.¹⁸ The Federal Court decided that such "a direct connection between the prosecutor of the complaint (the Commission) and the decision-maker (the Tribunal)," gave rise to a "reasonable apprehension of bias." "After considering a case and deciding that the complaint has been substantiated," said Justice Heald, "the 'prosecutor' picks the Tribunal which will hear the case."¹⁹

Since *McBain*, the federal act has been amended to sever the explicit connection between a finding of probable cause and the appointment of a tribunal. A tribunal is now appointed not when the commission "substantiates" the complaint, but when it thinks that, "having regard to all the circumstances of the complaint, an inquiry thereinto is warranted." Furthermore, tribunals are now appointed from a pre-established panel of potential appointees by the president of that panel.²⁰ A panel also exists in Ontario, but appointments to hear particular cases are made by the responsible minister.²¹ In other provinces no panel exists and appointments are made ad hoc by the responsible minister.

15 Ian A. Hunter, "The Origin, Development and Interpretation of Human Rights Legislation," in R. St. J. Macdonald and John P. Humphrey, eds, *The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms* (Toronto: Butterworth, 1979), p. 94.

16 Tarnopolsky, *Discrimination and the Law*, p. 456.

17 ss 1979, c. S-24.1.

18 sc: 1980-81-82-83, c. 143, s. 19.

19 *Alistair McBain v. Canadian Human Rights Commission et al.* at D/3067.

20 sc: 1985, c. 26, ss. 69, 70 and 71.

21 so 1981, c. 53, s. 34(1) and s. 35(1). Another questionable practice is the appointment of

Appointment by someone other than the commission does not entirely resolve the issue of bias flowing from commission influence. Even though the power of appointment is not officially lodged with a commission, the commission may indirectly influence the selection of tribunal members from a panel. After the federal law was changed to prohibit appointment of tribunals by the commission, a newly created parliamentary Standing Committee on Human Rights asked the Chief Commissioner whether those appointed to the panel had been recommended by the commission. Discovering that the commission had indeed been consulted, and that some members of the panel had been on previous lists established by the commission, the standing committee decided to scrutinize these appointments.²² With or without a panel, one may also raise the question whether commissions informally influence the appointment of tribunals in particular cases.

The problem of commission influence on the appointment of tribunals has its counterpart in worries that political appointment may lead to bias. Human rights advocates frequently point out that discrimination cases sometimes involve governmental respondents, so that the power to appoint tribunals can lead to a conflict of interest for cabinet ministers. The difficulty is partly alleviated if ministers do not appoint ad hoc but from a pre-established panel. If the panel has been selected with impartiality and human rights expertise in mind, it is more difficult to influence the outcome of a particular case through the appointment of the tribunal. The considerations involved in appointing the panel may be challenged, however. The federal panel appointed in 1986 raised questions not only of commission influence but also of political patronage. Critics complained that too many of the appointees were qualified mainly by service to the Conservative party rather than by interest and expertise in human rights issues.²³

Behavioural model and predictions

The method of appointment now used at the federal level may be called internal because the selection of adjudicators for particular tribunals is made from a panel by the president of the panel; it is modelled upon the method of Canadian courts, in which a chief justice assigns colleagues to hear particular cases. This method confers institutional autonomy and impartiality, assuming that the chairman distributes assignments according to internal criteria such as panel members' work load, experience and expertise in certain fields. Judges and other adjudicators are, of course, not inter-

previous members of human rights commissions to act as adjudicators, e.g., Rabbi Gunther Plaut, who was a member and vice-chairman of the Ontario Human Rights Commission. In view of the commission's statutory role in promoting the human rights ideology, it may be asked whether ex-members can be perceived as impartial adjudicators.

²² *Canadian Human Rights Advocate* 2, no. 6 (June 1986), p. 1.

²³ *Ibid.*, 2, no. 9 (October 1986), p. 1.

changeable automata; their personal and philosophical views will inevitably influence their decisions. But the method of internal selection minimizes the likelihood that adjudicators will be chosen for particular cases *because* their sympathies lean in a particular direction.

It is conceivable that a panel chairman or chief justice could abuse his role and appoint on the basis of the known or suspected sympathies of the adjudicators, but institutional factors minimize that likelihood. A chief justice is appointed to serve during good behaviour, which almost always means until death or retirement. He is deliberately insulated from political influence. His reputation among his judicial and legal peers will depend in large part upon the fairness and efficiency of his administration. All of these conditions tend to encourage neutrality rather than partiality in the assignment of responsibilities. The same should be true for the chairman of a panel of adjudicators, assuming a similar institutional structure.

But in the nine provinces which provide for human rights tribunals, an external method of appointment prevails, in as much as adjudicators are appointed by a minister rather than by a chief adjudicator. The previous federal method was also external because the appointment was made by the commission itself. We suggest that, in either species of external appointment, institutional factors do not maximize impartiality.

Consider first the incentive structure facing a minister who makes these appointments.²⁴ As elected politicians, ministers are supposed to promote the collective good. They may do this out of personal convictions about the nature of the collective good (a "public utility function," in the language of political economy).²⁵ Or they may do it out of a desire to be re-elected, or to see other members of their party re-elected, in which case they may try to promote the collective good as they think the voters perceive it.²⁶ Or, as is often argued for the Canadian case, they may try to promote the sectional interests of a coalition of groups sufficient to re-elect them and their party ("brokerage politics").²⁷

24 If the number of appointments were large, the responsibility might have to be transferred de facto to civil servants who advise the minister, but the volume of human rights adjudications in the provinces does not seem this great.

25 The literature examining incentive structures and decision-making is vast and growing. For a novel discussion of the distinction between private and public utility functions and their theoretical and empirical implications, see Michael Margolis, *Selfishness, Altruism and Rationality* (Chicago: University of Chicago Press, 1982), esp. ch. 3.

26 The standard spatial or "vote seeking" model was developed by Anthony Downs, *An Economic Theory of Democracy* (New York: Harper and Row, 1957). For a critique and re-specification of the model, see Henry Chappell and William Keech, "Policy Motivation and Party Differences in a Dynamic Spatial Model of Party Competition," *American Political Science Review* 80 (1986), pp. 881-900.

27 A discussion of the brokerage theory of politics can be found in Richard Van Loon and Michael Whittington, *The Canadian Political System*, 4th ed. (Toronto: McGraw-Hill Ryerson, 1987), pp. 308-13.

The differences among these scenarios are important and interesting, but more important is the shared assumption that ministers have incentives that run at cross purposes with impartiality of adjudication. They will always have reasons to consider a tribunal appointment in a political as well as a judicial context. Human rights legislation is passed by politicians and has high political visibility. There is thus a political payoff to ensuring that the enforcement procedures of the legislation bring results of a desired type.

Nothing in the above reasoning says that ministers will be "for" or "against" human rights when they contemplate appointments. They may well be either, or both at different times. The reasoning merely says that ministers will find it difficult to be impartial in the sense in which we expect impartiality of a chief justice. We would thus expect ministers, at least occasionally, to be thinking of a desired outcome when they appoint human rights tribunals. They would not have to do this all the time, or even most of the time; if they just did it some of the time, it would still leave traces in the statistical evidence.

We must further distinguish between an initial appointment and a reappointment. In the first instance, there is no record of previous decisions to evaluate, although a potential adjudicator's sympathies might be guessed from a knowledge of his legal practice or publications. We predict that ministerial partisanship will influence the initial choice of adjudicators, but we cannot pursue the hypothesis further because we do not have the appropriate data to test it statistically.

Reappointment of an adjudicator who has already decided one or more cases presents an even more favourable opportunity for ministerial discretion, for there is now a record of decisions to indicate where a candidate's sympathies lie. Knowledge of past performance never enables perfect prediction of future performance, but it is helpful. We predict, therefore, that appointing authorities will be more likely to reappoint adjudicators who tend to decide in the desired way, and will be less likely to reappoint adjudicators who do not.

Theoretically, the desired direction could be either "for" or "against" human rights complainants, or a more subtle combination of these. But since human rights legislation is a recent phenomenon, for which governments have taken public credit, we expect the desired direction to be favourable to complainants. We predict, therefore, that adjudicators whose decisions are favourable to complainants are more likely to be reappointed than those who decide in favour of respondents.

An important qualification, however, is that some governments are obviously more favourable to the human rights movement than others. Conservative and New Democratic governments in both Saskatchewan and Manitoba have taken turns in purging the members of human rights commissions and replacing them with partisan supporters. Premier Bennett of British Columbia engaged in a major overhaul of that province's human

rights commission and legislation after winning the election of May 1983. Such political struggles should leave evidence in the record of adjudications. We predict, therefore, that in Manitoba, Saskatchewan and British Columbia, where human rights have become a political issue polarized between the New Democratic party on the left and the Conservative or Social Credit party on the right, adjudication will be more favourable to complainants in periods when the New Democrats are in power.²⁸

Analysis of data

Knopff has compiled a computerized data set containing information on virtually all human rights decisions in all jurisdictions, from the appointment of the first Ontario tribunals in 1956, to June 1984. Both tribunal and court decisions are included in the data set, but only the 424 tribunal decisions will be used in this analysis. Three-quarters of these were decided by a single adjudicator and one-quarter by panels of two to six adjudicators. Cases decided by panels were coded only for the panel chair.²⁹ The cases are coded so that the relationship between direction and decision and reappointment can be studied.³⁰

TABLE 1. *Frequency of Participation in Tribunals*

<i>No. of adjudications</i>	<i>No. of adjudicators</i>
One	80 (55%)
Two-four	43 (29%)
Five-eight	15 (10%)
Nine or more	8 (5%)
N=146	

The frequency of reappointment is shown in Table 1. The data show that reappointment is an important fact of the human rights litigation process. About 45 per cent of adjudicators in this period did two or more cases. The busiest adjudicator, who decided a remarkable twenty-four cases, was followed closely by two others, who each decided eighteen cases. Another way of looking at the data is to point out that only eighty cases, or about 19 per cent of the total of 424 cases, were decided by one-time adjudicators.

Table 2 indicates that human rights tribunals have been facing a growing number of cases over time. In the twenty-year period between 1956 and

28 On the politics of human rights in Canada, see Thomas Flanagan, "The Manufacture of Minorities," in Neil Nevitte and Allan Kornberg, eds., *Minorities and the Canadian State* (Oakville, Ontario; Mosaic Press, 1985), pp. 107-24.

29 The vast majority of panels decided their cases unanimously. In only seven cases were there dissenting opinions, and in only three of these was the chair in the minority.

30 For a general report based on this data set, see Rainer Knopff and Thomas Heilke, "Human Rights Litigation, 1956-1984: A Statistical Profile," (1987) 8 CHRR pp. C/87-1 to C/87-8.

1975, 114 cases (an average of 5.7 a year) went to a tribunal. In the five-year period between 1976 and 1980, 139 cases were brought before a tribunal, averaging 27.8 cases per year. And in the most recent period for which we have data, the four-year interval between 1981 and 1984, 166 cases came before a tribunal, an annual average of 42.5 cases.

TABLE 2. *Date of Tribunal Decision**

<i>Date</i>	<i>No. of cases</i>	<i>% of cases</i>
1956-75	114	27.2
1976-80	139	33.2
1981-84	166	39.6
N=419		

*5 cases with missing data excluded.

Complainants have been more likely than not to be successful when taking their case to a human rights tribunal (see Table 3). In the twenty-nine years under study, complainants won 58.5 per cent of all cases, compared to only 28.8 per cent won by respondents. In addition, both (or neither) won 3.3 per cent of the cases, and we were unable to determine a winner in an additional 9.4 per cent of the cases. Where one side was a clear winner, complainants were twice as likely as respondents (67 per cent versus 33 per cent) to win the case.³¹

Is it surprising that complainants are so much more successful than respondents? Investigation by the permanent staff of human rights commissions serves to screen out complaints that are of little substance, so that only strongly justified complaints should come before tribunals. But there is a counterbalancing factor, in that respondents who realize their own case is weak have an opportunity to make a settlement during the conciliation phase. Respondents who persist to the tribunal stage must think, and probably have been advised by their lawyers, that they have a reasonable chance of winning. Although there is no way to measure the strength of these opposed factors, it seems remarkable to us that one side should be twice as successful as the other over two decades. Before making a conclusive judgment, however, it would be useful to have comparable data from other types of administrative tribunals, such as labour arbitrations.

The data indicate, however, that complaints have been growing less successful over time (see Table 4). Complainants in the period 1956 to 1975 won more than three times in four (78.3 per cent). By the 1976-1980 period, complainants were likely to win only two times in three (67.3 per cent); and in the most recent period, 1981-1984, their success rate was down to three out of five (59.5 per cent). One possible explanation of this declining success

31 All remaining analyses have been conducted only on those cases where a clear decision, favouring either the complainant or respondent, was reached.

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TABLE 3. *Decision of Tribunals*

<i>Decision</i>	<i>No. of cases</i>	<i>% of cases</i>
Complainant won	248	58.5
Respondent won	122	28.8
Both/neither won	14	3.3
Other/not available	40	9.4
N=424		

rate is that the increasing visibility of human rights tribunals has led individuals with less obvious cases of discrimination to lodge complaints. It is common knowledge that human rights cases have become more subtle and less clear-cut with the rise of concepts such as affirmative action, systemic discrimination, bona fide occupational qualification, and reasonable accommodation.

TABLE 4. *Likelihood of Complainant Winning By Date of Decision*

<i>Decision</i>	<i>Date</i>		
	1956-75	1976-80	1981-84
Complainant won	78.3	67.3	59.5
Respondent won	21.7	32.7	40.5
N=	(106)	(110)	(153)

p<.01
V=.17

To test the hypothesis of bias in tribunal reappointments, we examined whether those reappointed to human rights tribunals were more or less likely to rule in favour of the complainant. The data in Table 5 bear directly on this question. They suggest that the number of tribunals in which an adjudicator has participated is related to the likelihood of the complainant winning the case. Except for the one-time adjudicators, there is a moderately strong, positive effect of number of tribunals on complainant winning. For example, those who had served on two to four tribunals decided slightly more than half their cases in favour of the complainant. That proportion increased to approximately two out of three decisions where the adjudicator had been involved in five to eight cases, and to almost three out of four decisions in favour of the complainant when the adjudicator had participated in nine or more tribunals.

The anomaly in this analysis is the group of adjudicators who had been involved in only one decision. If ruling in favour of the complainant leads to a greater probability of reappointment, those with the fewest appointments should be least likely to rule in favour of the complainant, whereas they are in fact more favourable than those with two to four appointments.

A key to understanding the anomaly can be found in Table 6. When we examine complainants' success rate in various time periods, we find in

TABLE 5. *Likelihood of Complainant Winning by Number of Tribunals in which Adjudicator Participated**

Decision	No. of tribunals in which adjudicator participated			
	One	Two-Four	Five-Eight	Nine or more
Complainant won	63.8%	55.3%	67.6%	72.1%
Respondent won	36.2	44.7	32.4	27.9
N=	(69)	(94)	(74)	(86)

*This table excludes cases in which the commission appointed itself, or some of its members, to be the tribunal (i.e., in Manitoba before 1974 and in Saskatchewan before 1980). Researchers wishing to know the voting records of particular adjudicators may contact the authors.
 $p < .05$
 $V = .15$

almost each instance that those involved in fewer cases in that period are less likely to rule in favour of the complainant. To illustrate, those involved in one decision in 1956-1975 were significantly less likely than others to favour the complainant, whereas those participating in nine or more decisions were most likely to do so. In this period, however, the place of the middle two groups is opposite our expectations. The data for 1976-1980 are generally consistent with our expectations. Those with few decisions were less likely, and those with many decisions were more likely, to rule in favour of the complainant. Indeed, those involved in nine or more decisions ruled in favour of the complainant more than 75 per cent of the time. In contrast, those who decided only one, or two to four, cases favoured the complainant less than 60 per cent of the time. The results from the most recent period, 1981-1984, show a persistent, although weaker pattern, consistent with those discussed previously for all groups except those involved in only one decision. Complainants in this period were much more likely to win if the case was decided by a first-time adjudicator than by others.

This last finding is not inconsistent with our expectations; indeed, we expect that a disproportionate share of future adjudicators will be found among this group of first-time participants. The end of our time series simply does not allow us to investigate this hypothesis at this time. Aside from the first-timers, the pattern for the 1981-1984 period is consistent with our expectations; those involved in nine or more cases were more likely to rule in favour of the complainant than were those involved in five to eight, and the latter group were more likely to do so than those involved in two to four decisions. The anomalous position of the two to four group in the whole data set is a statistical artifact caused by the large number of first-time adjudicators in the most recent time period, during which the case load has been heaviest.

We also examined whether the jurisdiction in which the case was heard and the partisan stripe of the government affected the outcome of cases

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TABLE 6. *Likelihood of Complainant Winning by Date of Decision by Number of Tribunals in which Adjudicator Participated**

Number of Tribunals	Date			Total
	1956-75	1976-80	1981-84	
One	66.7%	59.1%	67.6%	64.7%
Two-four	77.8	57.1	45.8	55.0
Five-eight	72.7	69.6	62.1	67.6
Nine or more	82.1	76.2	62.2	74.0

*Cell entries are percentages of cases decided in favour of complainant. This table excludes the same cases as were excluded in Table 5 (see note to that table).

before human rights tribunals. The data on complainants' success rate in various jurisdictions are presented in Table 7. Complainants were most successful if their cases were heard in Saskatchewan, New Brunswick, British Columbia and Ontario, least successful in Nova Scotia and before federal tribunals, with Alberta, Manitoba and Newfoundland between these extremes. There is no obvious explanation for these results, and it is likely that factors more complex than simple geography are at work.

TABLE 7. *Percentage of Decisions in Favour of Complainant by Jurisdiction*

Jurisdiction	Percentage of decisions favouring complainant	N
British Columbia	74.5%	55
Alberta	60.9	23
Saskatchewan	78.6	42
Manitoba	56.5	23
Ontario	72.2	158
Quebec	-	-
New Brunswick	75.0	12
Nova Scotia	42.9	14
Prince Edward Island	-	-
Newfoundland	57.1	7
Federal	37.1	35
N=369		

The data in Table 8 suggest that the partisan coloration of the government had a discernible effect, in the expected direction, on the success rate of complainants. The clearest effect can be seen in Saskatchewan, where complainants won four times out of five during periods of NDP government but only three times out of five when the Conservatives were in power. Likewise, tribunals were more likely to favour the complainant when the NDP was in power in British Columbia and Manitoba than when the Social Credit or Conservative parties governed those provinces.

It is necessary to make comparisons *within* provinces because the success

rate varied for parties across the provinces. Complainants were less likely to win under Conservatives in Manitoba than under Conservatives in Ontario, and the probability of success varied by a similar amount under NDP governments in Manitoba compared to NDP governments in British Columbia and Saskatchewan. This is consistent with the well-known fact that party systems and political cultures are widely different in Canadian provinces, even when the parties have the same names.

TABLE 8. *Percentage of Cases Won by Complainant by Jurisdiction by Partisanship of Government (selected jurisdictions)*

Jurisdiction	Percentage of decisions favouring complainant				
	Total	Party in power			
		NDP	Liberal	Conservative	Secred
B.C.	74.5	79.0	-	-	72.2
Alberta	60.9	-	-	60.9	-
Sask.	78.6	81.1	-	60.0	-
Manitoba	56.5	61.5	-	50.0	-
Ontario	72.2	-	-	72.2	-

TABLE 9. *Ordinary Least Squares Regression of Complainant Winning on Various Predictors*

<i>Dependent variable - Decision in favour of complainant</i>			
<i>Independent variables -</i>	<i>Regression coefficient</i>	<i>Standard error</i>	<i>Standardized coefficient</i>
Constant	2.68	.47	
Number of decisions	.0003*	.0001	.13*
Date	-.012*	.005	-.14*
<i>Locale</i>			
British Columbia	.022	.216	.02
Alberta	-.071	.102	-.04
Saskatchewan	.057	.161	.04
Manitoba	-.106	.165	-.05
New Brunswick	.083	.137	.03
Nova Scotia	-.061	.178	-.02
Newfoundland	-.151	.176	-.04
Federal	.085	.276	.05
<i>Party</i>			
Liberal	-.368	.341	-.24
P.C.	-.042	.224	-.04
NDP	-.001	.161	.00

* $p < .01$

$R^2 = .10$

To conclude our data analysis, we regressed the complainants' success rate against variables measuring the number of decisions rendered by

adjudicator, the date of decision, a series of "dummy" jurisdiction variables and a set of "dummy" party variables. To avoid an identified model, Ontario was excluded for the jurisdiction dummies and the Social Credit party from the party dummies. In effect, the jurisdiction coefficients can be interpreted as variations from Ontario and party as variations from the Socreds. The results, presented in Table 9, corroborate the findings of the bivariate analyses. The only two predictors statistically different from zero are the number of decisions rendered by adjudicator and the date of the decisions, with the negative coefficient of the latter signifying a decreasing probability of complainant success over time. Equally important, once the effect of these two variables has been taken into account, neither the location of the case nor the party in power has significant effect on the outcome (a finding consistent with Table 8, which suggested an interaction of provincial and partisan variables).

Discussion

It is ironic that *McBain* raised the issue of impartiality in the context of federal human rights adjudication, for federal tribunals have been statistically the most favourable toward respondents, as shown in Table 7. One possible explanation of this fact is that respondents under federal jurisdiction are usually government departments, crown corporations, or large, federally regulated enterprises such as banks or airlines. An earlier analysis of the data by Knopff and Heilke showed that defendants of this type tend to be more successful than individual defendants in all jurisdictions, probably because they are able to spend more on legal defence.³² With their sophisticated personnel departments, corporations and government departments may also avoid blatantly discriminatory practices that are easily exposed before tribunals.

The data analysis generally confirms the hypothesis that repeat adjudicators differ in behaviour from one-time adjudicators. There was a statistically significant tendency for repeat adjudicators to be more favourable to complainants than were first-time adjudicators. Moreover, the more frequent the repetition, the greater was the degree of partiality toward complainants.

These results are compatible with our working assumptions that at least some appointing authorities wish to achieve results of a certain type and thus tend to reappoint adjudicators who deliver such results. It is, however, impossible to say that our model is definitively validated; for there are at least two other conceivable explanations of the results. One is that the authorities tend to reappoint those who give the technically best performance as adjudicators (speed, well-written opinions, etc.), and that there is some reason why these technically proficient adjudicators are more than ordinarily sympathetic to human rights complaints. Another possible expla-

32 Knopff and Heilke, p. C/87-5.

nation is that there is something about the process of human rights adjudication that makes those who repeat it more sympathetic to complainants. These alternate hypotheses cannot be tested with our data base, but it is to be hoped that future researchers will find ways to explore these and other explanations.

While these two explanations look suspiciously like special pleading, they cannot be directly disproven on the basis of the data presented here. But another part of our analysis points to their falsity. The data clearly demonstrate that, where human rights commissions have become politically controversial, the political complexion of the government has an effect on adjudication outcomes. This strongly suggests that appointing authorities do tend to seek adjudicators who will lean one way or another.

Another relevant fact is the demonstrated difference in success rates of complainants appearing before courts and tribunals. In Quebec, where the absence of tribunals means that all human rights cases are court cases, complainants' success rate was only 36 per cent in the period of our study. In first-level appeals cases in all jurisdictions, which are almost all heard in court (only the federal jurisdiction has appellate tribunals), the success rate of complainants was only 39 per cent. This means that tenured judges hearing a run of cases are on average less sympathetic to complainants than are adjudicators appointed ad hoc, and much less sympathetic to complainants than repeat adjudicators.³³ This in turn suggests that the method of appointment has something to do with the tendency of outcomes – hardly a surprising finding in view of the long struggle for judicial independence.

There will, of course, be variability among any set of adjudicators. Studies of judicial behaviour make it apparent that, even if all human rights disputes were heard before superior courts, there would be wide variation among judges in their disposition of cases. It is thus not surprising that adjudicators vary in their sympathy toward human rights complainants.

There is, however, an important difference in the situations. Variation in judicial behaviour is random, or at least not under control of the political executive, whereas the executive can choose human rights adjudicators according to circumstance. This gives the appointing authorities an opportunity to put their thumb on the scales. In cases which they consider of special importance, they have the option of appointing an adjudicator with a known record. This is a significant chance to exercise influence upon the policy-making process; for even if the adjudicator's decision is appealed, his decision and written opinion will form the basis of subsequent judicial consideration.

Is our analysis relevant to litigation? Perhaps. On the negative side, it should be noted that respondents in *McBain* submitted statistical evidence of the results of federal tribunals in an attempt to show that such tribunals

33 For a more detailed discussion, see Knopff and Heilke, p. C/87-8.

had not been biased. The Federal Court of Appeal, however, did not base its judgment on this evidence, holding that it spoke to the question of “actual bias,” which was not at issue.³⁴ The court preferred to deal with “reasonable apprehension of bias,” or appearances. Its holding was not that federal tribunals had been biased in fact but that their method of appointment was such that a reasonable man might fear that justice would not be done.

Statistical evidence of the type presented here might become relevant to litigation in two ways. One would be through the concept of “attitudinal bias.”³⁵ The first rule of natural justice, that “no one should be judge in his own case,” requires by extension that the adjudicator have an open mind with respect to the facts of the case. After a survey of the case law, Jones has concluded:

Although it appears, therefore, that there has been no clear case where the courts have specifically struck down even a quasi-judicial decision on the grounds of attitudinal bias, it is submitted that this may nevertheless be an effective ground for judicial review, if the alleged prejudgment or preference does in fact raise a serious doubt as to the impartial judgment of the decision-maker. Although both bias and the reasonable apprehension of it are questions of fact, in some circumstances, at least, attitudinal preferences may well amount to disqualifying bias in the eyes of the court. After all, justice must be seen to be done.³⁶

Since the issue has not yet been tested, one cannot say what would be the factual threshold for determining attitudinal bias. Suppose a human rights adjudicator had given ten, or twenty, or thirty, or forty decisions for complainants and none for respondents. There would seem to be a point at which one would have to question his impartiality. The records of the three most experienced adjudicators in our data set are fifteen to five, fourteen to three, and fifteen to three in favour of complainants in cases where either the complainant or respondent clearly won. While respondents would certainly be worried if they appeared before adjudicators with such records of past decisions, would a court see these data as factual proof of attitudinal bias?

An alternate approach would be to marshal the data to support a finding of reasonable apprehension of bias. In this instance, one would not seek to impugn the impartiality of an individual adjudicator so much as to cast into doubt the neutrality of a system that required ad hoc, external appointment of adjudicators by the political executive. The data could perhaps show that the appearances resulting from the system would lead reasonable observers to apprehend bias.

As political scientists rather than lawyers, we are not able to amplify these

34 CHRR D/3064, at D/3068.

35 David Phillip Jones, “The National Energy Board Case and the Concept of Attitudinal Bias,” *McGill Law Journal* 23 (1977), p. 459.

36 *Ibid.*, pp. 481-82.

suggestions about litigation. Our primary concern is to explore the dynamics of an important decision-making process. We note, however, that external, ad hoc appointment by the political executive is part of a process that is heavily weighted as a whole on the side of complainants. Human rights commissions invite complaints through many forms of advertising. Once a complaint is brought, employees of the commission investigate it free of charge to the complainant. In "conciliation," they exert pressure on respondents to settle, the biggest weapon being the threat to ask the minister to appoint a tribunal. If a tribunal is appointed, the commission almost invariably provides legal representation at no cost to the complainant, whereas respondents pay their own legal fees. We are not aware of a case where a tribunal has awarded costs or damages to a respondent when a case is dismissed. The commission, at its discretion, may also pay complainants' costs through one or more levels of judicial appeal, whereas respondents are once again on their own.

At the very least, human rights commissions can impose large costs on those against whom complaints are made. Discretion in the appointment of adjudicators is an aspect of the process which in practice weights it still more heavily in favour of complainants. (It could, of course, be used in the other direction as well.) Courts provide possibility of redress but only at further great expense.

Legislators may wish to reflect upon the fairness of the machinery they have constructed. When human rights commissions were first created, it was thought that public education and conciliation would be their primary duties; probably no one anticipated how large and permanent the adjudicatory function would become. Perhaps it is time to review these procedures to ensure their compatibility with larger conceptions of natural justice. In this regard, the recent legislative reform of the appointment procedure for federal tribunals may be worth consideration in other jurisdictions. One may reasonably expect those responsible for human rights legislation to have special concern for natural justice and to wish to avoid further embarrassments like *McBain*.