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IMMIGRATION LAW GROUP

IMMIGRATION IS RACIST. NOW WHAT?

TOOLS AND TIPS FOR DEALING WITH RACISM AT THE TRIBUNALS



Racism at hearing

- Extensive questioning of Roma clients IRB
- Annoyance at Caribbean clients b/c Board can not understand accent
- Refusal to accept identification of African clients
- Accusation that Black claimants lying about health concerns
- Challenges in obtaining a DR for Black male clients
- Lacklustre treatment of DV issues or questions based on rape mythology for Black female claims.
- Assumption of fraud for Chinese and Indian clients in IAD sponsorship appeals
- Treatment of rehab for Black men (IAD)





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IRCC Anti-Racism Employee Focus Groups

https://epe.lac-bac.gc.ca/100/200/301/pwgsc-tpsgc/por-ef/immigration_refugees/2021/122-20-e/POR_122-20-Final_Report_EN.pdf

- Widespread internal references to certain African nations as “the dirty 30”
- Stereotyping immigration countries (Nigerians in particular) as corrupt or untrustworthy
- Manager referring to Latin American Applicant as people who come here to collect social insurance.



How does this racism present in a hearing?



- Annoyance, rudeness, sarcasm
- Questioning based on prejudices or stereotypes
- Unreasonable cross examination questions.
- Racist and sexist decisions
- Not limited to client - Lawyering while Black



Anticipate racism

Notify the
client

Expert
evidence up
front

Explanations
in narrative
or testimony



Dealing with racism

5.6-1 A lawyer shall encourage public respect for and try to improve the administration of justice.

A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet for the same reason, a lawyer should not hesitate to speak out against an injustice.



Reasonable Apprehension of Bias

Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369, at p. 394:

. . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . [T]hat test is “**what would an informed person, viewing the matter realistically and practically - and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.**



Predisposition to an outcome

Questions based
on stereotypes

Aggressive tone

Demonstrated
impatience

Questions that go
beyond
focusing/clarifying
evidence

Expressions of
annoyance,
impatience and
sarcasm

Racist?



Interrogation

✓ [Guermache v. Canada \(Minister of Citizenship and Immigration\), 2004 FC 870 \(CanLII\)](#)

[10] It is clear in this case, from the outset, that the member was not at all interested in hearing the applicant's testimony. The procedure selected by the member was such that the applicant did not have the opportunity to present his "case" before an impartial decision-maker. In that respect, the hearing of May 15, 2003, was **more like a police interrogation than a hearing before a tribunal, specialized though it may have been. From the beginning to the end of the hearing, the member questioned the applicant relentlessly on countless details, evidently with the goal of making him "crack"**. Not only did the applicant have to answer the questions asked by the refugee claim officer but, systematically, at the same time the applicant also had to answer to the best of his abilities the multitude of questions asked by the member himself. Obviously, he was looking for every pretext possible to make the applicant contradict himself. **There is basis for me to find that it was a case of the applicant clearly trying to avoid or evade the questions asked. Quite to the contrary, the member was visibly impatient as soon as the applicant tried to complete his answers**



Annoyance/Sarcasm/Rudeness/Impatience

✓ *Perez Perez v. Canada (Citizenship and Immigration), 2013 FC 506 (CanLII)*

[36] It is entirely open to the RPD to verify and comment on the accuracy of the statements. Nonetheless, the case law of the Federal Court indicates that the RPD must, in a manner appropriate for a **first-instance decision-maker, ensure that it verifies at the hearing every inconsistency, real or apparent, in the applicant's account of persecution without criticizing, blaming, making disparaging comments or showing unjustified aggression and impatience toward the applicant which could inhibit the applicant's testimony, particularly because this should be the claimant's opportunity to be heard** within an atmosphere conducive to active listening

✓ *Hernandez v Canada (Minister of Citizenship and Immigration), [2010 FC 179](#)*

First, he clearly showed unjustified **aggressiveness and impatience toward Ms. Hernandez** and her counsel. Second, it seems that the member had a preconceived idea of the outcome of the case, **making one impossible demand after another and cutting Ms. Hernandez's explanations short.**

✓ *Sereiboth v. Canada (Citizenship and Immigration), 2013 FC 736 (CanLII)*

The member's legitimate concern soon deteriorated into **frustration, sarcasm, snide remarks** and the failure to at least try to understand ragged testimony through an interpreter



Annoyance/Sarcasm/Rudeness/Impatience

✘ *Arthur v. Canada (Attorney General)*, [2001 FCA 223](#)

An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. **It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel.** It must be supported by material evidence demonstrating conduct that derogates from the standard.

✘ *Jaouadi v Canada (Minister of Citizenship and Immigration)*, [2003 FC 1347](#)

A sarcastic comment when a party refused to give evidence, or an ill-chosen and insensitive phrase, will not, without more, lead to disqualification



Stereotypes

S.G. v. Criminal Injuries Compensation Board, 2016 ONSC 7485 (CanLII)

First, the **member asked a number of questions that reflected rape myth stereotypes about the reactions of victims of sexual assault.** For example, **he repeatedly asked why the appellant had not screamed or run away, both questions that reflect rape myths** that would be an improper line of cross-examination in a criminal trial (*R. v. Osolin*, [1993 CanLII 54 \(SCC\)](#), [1993] 4 S.C.R. 595 at paras. [168-69](#)). He continued to ask these questions even after objection by the appellant's representative. He also asked other questions reflecting rape myth stereotypes, such as **why the victim did not complain immediately to police and why she continued to have contact with the alleged perpetrator.**

[22] **Second, the behaviour of the member during the hearing, coupled with the tone and line of questioning, gives rise to concerns about the fairness of the proceeding. He was aggressive in tone, and he demonstrated impatience,** if not skepticism during the appellant's testimony. While the Board's process is often inquisitorial in nature, the Board should not take an adversarial position vis-à-vis an applicant.



Objections



I object as this line of board questioning does not focus the evidence on the matters in issue or clarify evidence

I object as this line of questioning is based on a cultural/linguistic/cultural stereotype

I object and note that the Board member has been aggressive in tone, and is demonstrating clear impatience and/or sarcasm thus impeding the claimant's ability to present testimony



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But can we object to racism because well....it is racist?

“One of the greatest challenges of anti-discrimination law is institutionalized inequality. Recognized in law as systemic discrimination, it is **embedded in processes, practices, norms and relationships that reproduce and accentuate inequality.**”

INSTITUTIONAL INEQUALITY AND THE DYNAMICS OF COURAGE - Colleen Sheppard

IRB complaint Case No.20-006

The allegation regarding racism and discrimination is unfounded. An allegation about racism or discrimination at the IRB - whether systemic or individualized – is taken very seriously. In this case, **the complainants did not submit evidence, expert opinion or other information to substantiate their allegation.**

Can the 'reasonable person' be BIPOC?





R. v. S. (R.D.), 1997 CanLII 324 (SCC)

Youth Court: 15 year old young black male accused of resisting arrest and assault of police Officer

Justice Sparks

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.



R. v. S. (R.D.), 1997 CanLII 324 (SCC)

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 Steinburg 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.**

Reasonable Person:

We conclude that the reasonable person contemplated by de Grandpré J., and endorsed by Canadian courts is a person who approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. The reasonable person understands the impossibility of judicial neutrality, but demands judicial impartiality. **The reasonable person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community, is supportive of the principles of equality.**



The results so far.....

Biased Impartiality: A Survey of Post-RDS caselaw on Bias, Race and Indigeneity, 2021. Sujith Xavier

- 829 cases between 1997 to 2020
- “reasonable apprehension of bias dealing with race”
- 90% of time the veil of judicial impartiality is not pierced

Cina: Justice Kelen

- Board members are impartial so it is fine
- Court refused to even look at the biased comments and their potential impact it had on racialized Roma at the Board.
- Erases their racialized lived experiences



Human Rights Jurisprudence

Peel Law Association v. Pieters, 2013 ONCA 396 (CanLII)

- 1) the prohibited ground or grounds of **discrimination need not be the sole or the major factor** leading to the discriminatory conduct; it is sufficient if they are a factor;
- 2) **there is no need to establish an intention or motivation to discriminate**; the focus of the enquiry is on the effect of the respondent's actions on the complainant;
- 3) the prohibited ground or grounds need not be the cause of the respondent's discriminatory conduct; it is sufficient if they are a factor or operative element;
- 4) **there need be no direct evidence of discrimination; discrimination will more often be proven by circumstantial evidence and inference**; and
- 5) racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices.



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Thank you

Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes.

*R v. Parks
Doherty J.A*