THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

PAUL SYDNEY VYAMUCHARO-SHAWA

-and-

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

MOTION DECISION

The Motion

1. This motion on behalf of Mr. Vyamucharo-Shawa seeks three forms of relief: (a) an Order recusing Chair Scaletta from the panel; (b) an Order terminating this proceeding; and (c) an Order directing the Chair of the Discipline Committee to assemble another panel. For the reasons set out below, the panel has resolved to dismiss the motion as it relates to the recusal of the Chair and the termination of the proceeding; these dispositions render it unnecessary to rule on (c) above.

Applicable Principles and Authorities

2. One of the leading cases in Manitoba is *Ritchot v. The Law Society of Manitoba*, 2010 MBCA 13. At paras. 35-39, Hamilton, J.A. writes:

> [35] The seminal decision for questions of bias is *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, in which de Grandpré J. articulated the test for reasonable apprehensions of bias. He wrote (at pp. 394-95):
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> > … [T]he 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. In the words of the Court of Appeal, that 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[?]
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> > I can see no real difference between the expressions found in the decided cases, be they "reasonable apprehension of bias", "reasonable suspicion of bias", or "real likelihood of bias". The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".
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> [36] The above test has been consistently followed by the Supreme Court of Canada. See, for example, *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, in which Cory J. wrote that the test (at paras. 111-13):

> … [C]ontains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. … Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold" …. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case....
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> … [A] real likelihood or probability of bias must be demonstrated….
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> … [T]he threshold for a finding of real or perceived bias is high. ….

[37] Judges are presumed to be impartial and "[t]he burden of proof is on the party alleging a real or apprehended breach of the duty of impartiality … [to] establish actual bias or a reasonable apprehension of bias" (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 39, [2005] 2 S.C.R. 91 at para. 13) and see *Metis Child, Family and Community Services v. A.J.M. et al.*, 2008 MBCA 30, 225 Man.R. (2d) 261.)

[38] A similar presumption of impartiality applies to an administrative tribunal. ...

[39] The facts of each case are crucial to the question of whether there is a reasonable apprehension of bias. See *R. v. S. (R.D.)* at para. 114, and *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259 at para. 77.

3. In *Tymkin v. Ewatski*, 2014 MBCA 4, at para. 43, M.M. Monnin, J.A. writes:

> In summary, the case law establishes that the test for reasonable apprehension of bias with respect to a judge's conduct of a trial is whether an informed person would conclude, reviewing the matter realistically and practically and having thought the matter through, that the trial judge would not decide fairly. Thus, the fundamental concern with respect to an apprehension of bias is the appearance of a fair trial. In light of the strong presumption of judicial impartiality, the test will not involve a sensitive or scrupulous conscience. Rather, the threshold is quite high and requires that there must be a real likelihood or probability of bias. The case law also establishes that it will not be enough to show that a trial judge intervened in the case, was rude or discourteous, or debated with counsel over the relevance of legal or factual issues. Rather, the impugned behaviour must demonstrate a partiality or predisposition to decide an issue in a certain way, or indicate that the judge had made up his mind prematurely. Each case must be decided on its own facts, and the impugned behaviour must be considered in the context of the entire case by considering the quality and quantity of the interventions or comments and their effect on a party's presentation of their case.

[Note: Although this passage is found in the dissenting opinion, the court was unanimous on this particular point.]

4. A number of authorities serve to explain and expand upon the above principles. In no particular order of importance:

(a) It takes much more than a demonstration of judicial impatience with counsel or even downright rudeness to dispel the strong presumption of impartiality. … Baseless

allegations of bias or of a reasonable apprehension of bias founded on a perceived slight or discourtesy that occurred during a trial, will not assist the client's cause and do a disservice to the administration of justice.

Kelly v. Palazzo (2008), 89 O.R. (3d) 111 (ONCA)

(b) [B]ias does not mean that the judge is less than unfailingly polite or less than unfailingly considerate. Bias means a partiality to one side of the cause or the other. It does not mean an opinion as to the case founded on the evidence nor does it mean a partiality or preference or even a displayed special respect for one counsel or another, nor does it mean an obvious lack of respect for another counsel, if that counsel displays in the judge's mind a lack of professionalism.

Middelkamp et al v. Fraser Valley Real Estate Board et al, 1993 CanLII 2884 (BCCA), para. 11

(c) [T]he strong presumption of judicial impartiality is not displaced merely because of a previous, unfavourable decision by a judge involving the same party earlier in the proceeding.

Klippenstein v. Manitoba Ombudsman, 2015 MBCA 15, at para. 28

(d) [T]he mere fact that a judge is attacked personally by a litigant, as Mr. Klippenstein has done by his criminal complaint, is not reason *per se* for disqualification of the judge.

Klippenstein v. Manitoba Ombudsman, 2015 MBCA 15, at para. 29

(e) Commenting on the oft-cited adage that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done", Côté, J.A. of the Alberta Court of Appeal, writes:

Some lawyers or writers may attempt to link people automatically because of vague memories of reading in law school ***R. v. Sussex JJ. ex. p. McCarthy*** [1924] 1 K.B. 256, 93 L.J.K.B. 129 (D.C.). That is the brief decision containing the pregnant ***dictum*** about appearance being as important as reality. But that aphorism is usually cited without referring to parts 1 and 3 of the Supreme Court of Canada's modern qualification, that bias requires the appearance to a
1. reasonable thinking
2. neutral observer
3. knowing the relevant facts.
(Emphasis in the original.)

Boardwalk Reit LLP v. Edmonton (City), 2008 ABCA 176, at para. 61

(f) Obviously the mere presence on the court of one appellate judge who is (allegedly) disqualified does not disqualify the other members of that court.

"If there is a duty on the part of one member of our Court to recuse him or herself, it is an astounding proposition to suggest that the same duty automatically attaches to the rest of the

Court or compromises the integrity of the whole Court. To reach that conclusion would be to ascribe a singular fragility to the impartiality that a judge must necessarily show, and to the ability of judges to discharge the duties associated with impartiality in accordance with the traditions of our jurisprudence."

Boardwalk Reit LLP v. Edmonton (City), 2008 ABCA 176, at para. 68, citing *Mugesera v. Canada (#2)*, 2005 SCC 39, [2005] 2 S.C.R. 91, 335 N.R. 220, at para. 227

(g) [L]itigants have sometimes tried to rely upon their own acts as creating a conflict of interest or bias, and asked the judge in question to step aside as a result. Sometimes the litigant has revealed a fact, sometimes made an accusation against the judge, or sometimes tried to have the judge disciplined by the appropriate judicial council. Such litigants' attempts at self-help by engineering perceived conflicts are firmly rejected, for obvious reasons of justice and policy.

Boardwalk Reit LLP v. Edmonton (City), 2008 ABCA 176, at para. 72, citing (among other authorities) *Middelkamp et al v. Fraser Valley Real Estate Board et al*, 1993 CanLII 2884 (BCCA), para. 25

(h) [W]hile a judge must maintain an open mind, this does not mean that he or she cannot express disbelief of evidence being given by a witness or indicate a tentative view of how he or she is inclined to decide an issue in dispute. True impartiality does not require that the judge have no sympathies or opinions. It requires that the judge nevertheless act with an open mind.

Metis Child, Family and Community Services v. A.J.M. et al., 2008 MBCA 30, at para. 76, citing Professor Philip Bryden, "Legal Principles Governing the Disqualification of Judges" (2003) 82 Can. Bar Rev. 555 at 588.

(i) … [N]ot every intervention [by a trial judge] before or during a cross-examination will so prejudice the presentation of a case or give rise to an apprehension that the judge's mind is closed. It is … a contextual analysis.

Metis Child, Family and Community Services v. A.J.M. et al., 2008 MBCA 30, at para. 77

(j) It is obviously impossible to determine the precise state of mind of an adjudicator. Further, the proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.

Wewaykum Indian Band v. Canada, 2003 SCC 45 (CanLII), [2003] 2 SCR 259 at para. 64.

(k) Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is

> particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.
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> *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, para. 68

Discussion

5. Like many other legal tests, the practical application of the test for recusal can appear at turns to be both deceiving in its simplicity and vexing in its complexity.

6. Based on the above citations, it is fair to note that the basic test is reasonably well-settled – whether an informed person would conclude, reviewing the matter realistically and practically and having thought the matter through, that the adjudicator would not decide the matters at issue fairly. The test is tempered by the very strong presumption of impartiality, and by the reality that an adjudicator being "less than unfailingly polite or less than unfailingly considerate" will not discharge the burden on the applicant to establish a reasonable apprehension of bias.

7. The authorities are also illustrative of circumstances which did *not* rise to the point where the presumption of impartiality was "dispelled", such that recusal was the only reasonable response; in particular: Para. 4(a) – "judicial impatience with counsel or even downright rudeness"; Para. 4(b) – holding "an opinion as to the case founded on the evidence [or] ... a partiality or preference or even a displayed special respect for one counsel or another"; Para. 4(c) – "a previous, unfavourable decision by a judge involving the same party earlier in the proceeding"; and Para. 4(d) – the "mere fact that a judge is attacked personally by a litigant" by, for example, lodging a formal complaint about them to their governing body.

8. In this case, the defence focus is on a single offensive word, uttered on a single occasion over some 8.5 days of hearings, for which the Chair immediately and "unreservedly" apologized; the Chair made no excuses for the utterance at the time, and makes none now.

9. The panel does not condone the utterance of the Chair, but it does note that its use on this one, very limited occasion does not even come close to reaching the behaviours under scrutiny in other cases, in particular that of the judge in the case of *Doré v. Barreau du Québec*, cited in the defence materials.

10. The panel notes further that a dispassionate review of the available transcripts (those for Days 1, 2, 3, 5, and 7 not being in evidence) – and in particular those passages which include interventions and procedural and evidentiary decisions by the Chair – supports its conclusion that Mr. Vyamucharo-Shawa is, in fact, receiving an objectively fair hearing. The panel members are satisfied that they retain the critical capacity to assess the evidence and to rule upon the issues which are actually before it (being the guilt or innocence of the member being disciplined in relation to each of the charges he is currently facing) with the impartiality and open-minded fairness which both Mr. Vyamucharo-Shawa and the general public are entitled to expect.

11. The panel notes that in the educational setting with which Mr. Rondeau (the Public Representative on the panel) is most familiar, the use of the impugned word would not have been tolerated to the same extent as courts responding to a recusal motion. He does, however, note – and adopt – the admonition at Para. 2 above that "[T]he threshold for a finding of real or perceived bias is high."

12. While the above comments are dispositive of the motion, the panel wishes to comment on several other circumstances which the defence asserts are indicative of bias on its part.

13. The defence asserts that canvassing the participants regarding their availability for additional dates a month before this motion was scheduled for argument constitutes a "lack of procedural fairness"; it asserts further that this action constitutes definitive proof of a "closed mind" on the part of the panel, and constitutes definitive proof of a decision having already been made. These too are assertions lacking in merit. The Chair was keenly aware of the difficulties involved in coordinating the schedules of six lawyers, a public representative, and a court reporter (witness the dates actually set on October 28, 2024, the earliest of which was November 18, 2024), and was simply trying to proactively address those realities. While no dates were set between November 19, 2024 (the day after the timeline for the filing of materials relating to the motion) and December 10, 2024 (when the motion was argued), this was not a situation where the sinister motivations attributed to the Chair were even "on his radar".

14. With respect the assertion that the involvement of Mr. Kenneth Mandzuik in the hearing constitutes a "conflict of interest and lack of procedural fairness". It does not. The involvement of Mr. Mandzuik in the court proceeding underlying Citation #2 was known to Mr. Vyamucharo-Shawa from the day the complaint was first made by the presiding judge. He was subpoenaed to testify (meaning he could not have avoided testifying except by moving to have the subpoena expunged, or by ignoring it and risking sanctions), he took an oath to testify truthfully, and his testimony before the panel had no connection with his volunteer activities as a Bencher of the Society and the Vice-Chair of its Discipline Committee. This submission has no merit.

15. Finally, in his Motion Brief, Mr. Kwilu asserts that the utterance was "offensive, rude and insulting to the member and his counsel"; the Chair concedes it was "offensive" and "rude", but says the remainder of this assertion is simply wrong. A moment before the utterance, the Chair was looking generally to his left, where both Mr. Vyamucharo-Shawa and Mr. Kwilu were seated. As Mr. Vyamucharo-Shawa resumed his comments, the Chair swivelled his chair to the right (so that he was no longer facing either of them), then leaned back and glanced up at the ceiling, at which point the offensive word was uttered. The utterance was not directed to either Mr. Vyamucharo-Shawa or Mr. Kwilu and was, in fact, not directed to *anybody* in the room. To his ears, the utterance was "under his breath", barely above a whisper, and he was unsure whether anyone else had even heard it. As noted, immediately upon learning that others in the room had heard it, the apology – which Mr. Kravetsky in his Motion Brief accurately describes as "unequivocal" – was proffered.

Decisions

16. The motion to recuse Chair Scaletta is dismissed.

17. The motion to terminate the proceeding is dismissed.

18. There will be no order as to costs.

DATED this 10th day of December, 2024.

Dean Scaletta

Maureen Terra

David Rondeau