Date Issued: March 1, 2013
File: SSAB 7-12-13

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IN THE MATTER OF THE *HOMEOWNER PROTECTION ACT, S.B.C. 1998 C. 31*

AND IN THE MATTER OF an appeal to the British Columbia Safety Standard Appeal Board

BETWEEN:	**Builders**	**Appellant**
AND:	**Homeowner Protection Office**	**Respondent**

REASONS FOR PRELIMINARY DECISION

[1] This is a preliminary decision in this Appeal. As background, the Appellants appeal a decision of the Registrar of the Homeowner Protection Office (the "HPO") upholding a monetary penalty notice issued to the Appellants on March 22, 2012 by the HPO. The Appellants filed their Notice of Appeal seeking to have the decision of the Registrar overturned. The Respondent, HPO opposes the Appellant's position and seeks to have the Appeal dismissed.

[2] Normally, such an appeal would proceed to an Appeal Management Conference, perhaps a Settlement Conference and then failing settlement, on to a hearing, either written or oral. However, shortly before an Appeal Management Conference was held in this appeal before me, Vice-Chair Ms. Drown, the Appellant advised that it was seeking to have me removed from any involvement with the Appeal on the ground that there was a potential conflict of interest if I continued to oversee or determine the Appeal.

[3] At the already scheduled Appeal Management Conference, I canvassed the issue of conflict of interest with counsel for both parties and ordered both parties to submit their written submissions on the issue to me for consideration. These

preliminary reasons for decision deal with the Appellant's application that I be removed from all involvement with this Appeal due to such potential conflict of interest.

Issues

[4] The Appellant's application creates two issues that must be determined:

[5] 1) Does a conflict of interest or a potential conflict of interest or a reasonable apprehension of bias on the part of the Board arise because of Ms. Drown's involvement in the Appeal?

[6] 2) If so, should Ms. Drown recuse herself from case management and determination of the hearing of the Appeal?

Position of the Parties

[7] The Appellants' position is that my continued involvement in the Appeal raises a potential conflict of interest – what I shall refer to as a reasonable apprehension of bias – due to my past employment as an articled student and associate lawyer with Cox, Taylor, the law firm representing the Appellants. Accordingly, the Appellants seek to have me recuse myself from the Appeal and have another board member conduct the Appeal on behalf of the Board. The Appellants submit that my past employment with Cox, Taylor could reasonably be perceived to affect my impartiality in the within Appeal.

[8] While counsel for the Appellants has provided brief written submissions, such submissions acknowledge that counsel does not have instructions from his clients to prepare a lengthy review of the case law on the matter. Further, the Appellants' submit that such a review is not necessary, it being clear that there is at the very least a perception of a conflict by me remaining as the member of the Board hearing this matter.

[9] The Respondent takes no formal position with respect to the matter, but has provided useful written submissions outlining the law in this area.

The Facts

[10] The parties appear to be in agreement with respect to the applicable facts affecting the Appellants' application. To summarize they are as follows:

[11] a) The law firm, Cox, Taylor, Barristers & Solicitors is legal counsel for the Appellants in this appeal;

[12] b) I was employed by Cox, Taylor between 2004 and 2009 – first as an articled student and then as an associate lawyer;

[13] c) During my time with Cox, Taylor I worked with L. John Alexander from time to time, who was then and remains a partner of the firm;

[14] d) Mr. Walden has conduct of the Appellants' file at Cox, Taylor; however, Mr. Alexander is the supervising lawyer or on the file and may be involved from time to time;

[15] e) I am not privy to any confidential information regarding the Appellants and/or their case nor do I have any interest in its outcome;

[16] In addition to the above facts, I confirm that Mr. Walden, counsel for the Appellants, joined Cox, Taylor sometime after I left and that I have never worked with him. I also confirm that I have no interest, financial or otherwise, with Cox, Taylor having ceased employment as an associate lawyer there in July 2009.

The Law

[17] The Appellants rely in their written submissions on Chapter 8 - Rule 1(c) of the Law Society of British Columbia's Professional Conduct Handbook (the "Handbook"), which states that:

[18] 1. A lawyer must not:(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that may reasonably be perceived to affect the officer's impartiality.

[19] As of January 1, 2013, the Handbook has been replaced by the Code of Professional Conduct for BC. Rule 5.1-2(c) replaces Chapter 8 – Rule 1(c) and states:

5.1-2 When acting as an advocate, a lawyer must not:

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice.

[20] Based on the above, the Appellants submit that the appropriate test to apply is whether a bystander could reasonably perceive that my impartiality could be affected by my historical ties to the law firm representing the Appellants.

[21] The Respondent agrees with the test as articulated by the Appellants and a review of case law and legal authorities supports the parties' submissions in this regard.

[22] The Respondent submits that my past relationship with Cox, Taylor is a relevant consideration and cites the Canadian Encyclopedic Digest, Administrative Law, section III.4(.(d)(ii).C.3 (the "CED") in support. The Respondent also submits that the passage of time is relevant in determining whether my past professional relationship gives rise to a reasonable apprehension of bias.

[23] The Respondent also points out that pursuant to s. 45 of the *Safety Standards Act* that I have a duty to "faithfully, honestly and impartially perform [my] duties" and submits that case law suggests that I am entitled to a reasonable presumption that, in exercising my jurisdiction should I not recuse myself that I will act in good faith (Marques v. Dylex Ltd. (1977), 81 D.L.R. (3d) 554 (Ont. Div. Ct.) at para. 35).

[24] The Respondents submit that Rando Drugs Ltd. v. Scott, 2007 ONCA 553 ("Rando") provides a useful summary of the law. I agree. The Rando case summarizes the law regarding allegations of a reasonable apprehension of bias as set out by the Supreme Court of Canada. Such authority is convincing, especially as my own research has indicated that other tribunals in British Columbia regularly rely on such decisions of the Supreme Court of Canada when determining similar applications for recusal on the grounds of conflict of interest or reasonable apprehension of bias (Emergency and Health Services Commission v. Ambulance Paramedics of BC Cupe Local 873, BCLRB No. B129/2009 and Ansan Industries Ltd. v. Construction and Specialized Workers' Union Local 1611, BCLRB No. B64/2012).

[25] In the Rando case, the court had to determine whether a judge was in a conflict of interest arising from the fact that he had been a partner in the law firm that had once represented a party to the litigation. The judge's partnership ended 10 years prior to the trial. The judge adopted a guideline that he wait for three years before hearing any cases involving his prior firm and refused to recuse himself. The court held that this was appropriate and dismissed the appeal. Of note, the court considered the fact that the judge in question had no involvement with the case while he was a partner with the firm and had no continued interest in the firm. The court of appeal also looked at the ethical requirement that there be a "cooling off period" whereby judges did not hear cases brought by their former partners and associates for a certain number of years – namely 2, 3 or 5 years.

[26] My own research notes that the "cooling off period" cited in the Rando case, is also referenced in the Canadian Judicial Council's publication *Ethical Principles for Judges*. At page 52 of this publication, in cases where the judge's previous law firm or associates did not represent the party at issue prior to the judge's appointment, it is recommended that "the traditional approach is to use a 'cooling off period' often established by local tradition at 2, 3 or 5 years and in any event at least as long as there is any indebtedness between the firm and the judge."
Another case that I find useful in reaching my decision is *Taylor Ventures Ltd. (Trustee of) v. Taylor*, (2005), 49 BCLR (4th) 134 (CA). At paragraph 7 the principles enunciated by the Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, [2003], 2 S.C.R. 259 are summarized as follows:

1. A judge's impartiality is presumed;
2. A party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;
3. The criteria for disqualification is the reasonable apprehension of bias;
4. The question is what would an informed, reasonable and right minded person, reviewing the matter realistically and practically and having thought the matter through conclude;
5. The test for disqualification is not satisfied unless it is proved that the informed, reasonable and right minded person would think that it is *more likely than not that the judge,* whether consciously or unconsciously*, would not decide fairly*;
6. The test requires demonstration of serious grounds on which to base apprehension;
7. Each case must be examined contextually and the inquiry is fact specific (emphasis in the original).

Decision

[27] As there is no rule in the Board's governing legislation or rules of practice and procedure that diverges from the predominant case law governing cases where reasonable apprehension of bias is alleged, members of the Board are governed by the same laws as judges and other judicial officers. The common law in this regard is clear and is summarized in the decisions cited above. It is not enough that a party has raised an objection. These clearly enunciated legal principles, applied to the facts before me, are what I must base my decision on (*De Cotiis v. De Cotiis* 2004 BCSC 117 at para 11.

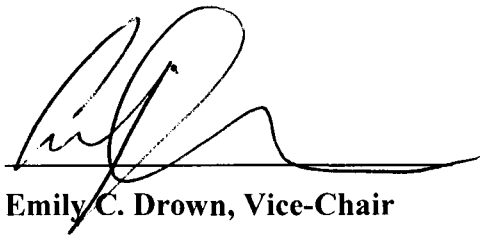
[28] A review of the facts and law applicable to cases involving allegations of a reasonable apprehension of bias indicates that my former employment with Cox, Taylor, is indeed a factor that ought to be looked at closely to determine whether such apprehension of bias or a conflict of interest exists. However, a review of the law and facts also indicates that so is the passage of time since I have left such employment and the fact that I was never counsel for the Appellants during my time with Cox, Taylor. In fact, it is my understanding that the Appellants were not clients of the firm during my tenure with Cox, Taylor.

[29] Applying the law to the facts at hand, I find that given that I was never counsel for the Appellants and have no ongoing interest in the firm of Cox, Taylor, indebtedness or otherwise, that a three year cooling off period is adequate for me to hear the Appellants' appeal. I find that a reasonable person, being apprised of the facts at hand, would not perceive that my impartiality would be affected. Accordingly, I find that I am not disqualified from hearing the Appellants' appeal and refuse to recuse myself. The Appellants' application in this regard is dismissed.

Conclusion

[30] Upon review of the facts of the case and the applicable law, I am satisfied that a sufficient period of time has passed since my employment and association with Cox, Taylor that there is no reasonable apprehension of bias. Accordingly, the Appellants' application to have me recuse myself from this Appeal is dismissed. A second Appeal Management Conference shall be held forthwith to determine how the Appeal shall proceed.

Signed:



Emily C. Drown, Vice-Chair