2014 LSBC 47
Decision issued: October 16, 2014
Citation issued: December 22, 2010

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act,* SBC 1998, c. 9

and a hearing concerning

PAMELA SUZANNE BOLES

RESPONDENT

DECISION OF BRUCE LEROSE, QC, CHAIR

Hearing date:	April 10, 2014
Written Submissions:	July 21, 2014 August 25, 2014 September 9, 2014
Panel:	Bruce LeRose, QC, Chair Ralston S. Alexander, QC, Lawyer Clayton Shultz, Public representative
Counsel for the Law Society:	Mark Andrews, QC and Gavin Cameron
Counsel for the Respondent:	Richard Gibbs, QC

BACKGROUND

[1] On June 11, 2012 the Panel issued written reasons in which the Respondent was found to have committed professional misconduct by breaching Rule 3-44 of the Law Society Rules on four different occasions. See 2012 LSBC 21.

[2] The Respondent applied to the Supreme Court of British Columbia for judicial review of the Panel's decision, seeking an order to quash the decision as unfair, unreasonable and made contrary to the rules of natural justice. Madam Justice

Adair, in a decision issued on January 9, 2013 dismissed the petition. See *Boles v. Law Society of British Columbia*, 2013 BCSC 22.

[3] The Respondent on June 7, 2013, made an application to have the Chair of the Panel removed as he was no longer a sitting Bencher of the Law Society of British Columbia. This application was dismissed by the President's Delegate in a Memorandum dated August 24, 2013.

[4] On November 27, 2013 the Respondent filed a Notice of Family Claim in the Rossland Court Registry on behalf of one SL, and joined as Respondents ML, the nephew of the Chair, GL, the brother of the Chair, ML, the ex-sister-in-law of the Chair and C Restaurants Ltd., a business owned by members of the Chair's family and a client of the Chair.

[5] On April 10, 2014 an application was made by the Respondent to the Hearing Panel seeking an order that Bruce LeRose, QC, the Chair of the Hearing Panel, step aside due to the reasonable apprehension of bias arising from the Respondent acting against near members of his family and his family's restaurant in proceedings in the Supreme Court of British Columbia, Rossland Registry.

[6] The Respondent submits that, going forward in this proceeding, the Respondent, with the support of the Law Society, will apply to the Panel to re-open their case in order to call additional evidence, which will include that of the Respondent and her husband and thereafter will ask the Panel to reconsider its Decision on Facts and Verdict.

ANALYSIS

[7] The Respondent submits that, because of the retainer she has with SL, the Chair can no longer continue to hear this case because of the clear and unequivocal reasonable apprehension of bias he may have or be perceived to have due to the fact that close family members and a family business are involved in litigation in which the Respondent acts as counsel for the Petitioner, SL.

[8] The Law Society presented two positions at the hearing of the application. The first was set out in its written submission to the Panel:

(a) If Ms. Boles accepted the retainer prior to notification in early 2012 that Bruce LeRose QC was a member of the Hearing Panel, Ms. Boles has delayed in complaining about his participation and must be taken to have waived any objection she might have.

(b) If Ms. Boles accepted the retainer after notification in early 2012 that Bruce LeRose QC was a member of the Hearing Panel, Ms. Boles has created the circumstances upon which she now relies, and a litigant may not rely upon her own actions as creating an apprehension of bias necessitating recusal.

[9] Counsel for the Law Society further submitted that, while it has not been advised when the retainer was accepted, either (a) or (b) must apply and thus the application should be dismissed.

[10] The Law Society's point that failure to raise the allegation in a timely fashion bars a subsequent complaint of reasonable apprehension of bias is supported by the decision *Steadman-Byrne v. Amjad*, [2007] EWCA Civ 265, [2007] 1 WLR 2484 at paragraph 17; "Appellate and reviewing courts tend not to look favourably on complaints of vitiating bias made only after the complainant has taken his chance on the outcome and found it unwelcome".

[11] Also Sara Blake, *Administrative Law in Canada*, 5th ed. (Markham: LexisNexis, 2011), notes at page 120 that :

> Bias may be waived. A party who was aware of bias during the proceeding, but failed to object, may not complain later when the decision is adverse. The genuineness of the apprehension becomes suspect when it is not stated promptly. A party should raise a concern about bias when first aware of it but, given the onus of proof that must be met to allege bias, waiver should only be found if the party had sufficient knowledge of the facts. The onus is on the party alleging waiver to prove it.

[12] In support of the Law Society's point that a party cannot manufacture an apprehension of bias through her own conduct, counsel for the Law Society relies on the decision *Boardwalk Reit LLP v. Edmonton (City)*, 2008 ABCA 176, leave to appeal refused [2008] SCCA No. 328, where Cote JA states at paragraph 72:

> Other litigants 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.* See *McElheran v. R.*, 2006 ABCA 161; *Mattson v. ALC Aircraft Can.* (1993), 18 CPC (3d) 310, (BCSC); *Allain Sales etc. v. Guardian Ins. Co. of Can*. (1996), 180 NBR (2d) 338,;

> *Suresh v. Min. of Cit. & Imm*. (2000), 258 NR 119 (FCA), (para. 9); *Middelkamp v. Fraser Valley Real Est. Bd*., [1993] BCJ No. 2965 (SC), (para. 25); cf. *S.G. v. Larochelle,* 2005 ABCA 111.

and at para. 76:

> I do not suggest that that is anyone's motive here. The assessor may well have learned the facts accidently or routinely. But if the rest of the panel were to withdraw here, counsel in some later appeal who thought that the wind was blowing the wrong way, would have a powerful incentive. He or she might search out whether any member of the panel had a cousin, lawyer, accountant, physician, or neighbour who had been somehow involved with any of the parties, with any of the counsel's law firms, with any of the witnesses, or with any of the issues.

[13] The Law Society's second position, which was not referenced in its written response to the application but spoken to by counsel at the time of the hearing of the application, is that for pragmatic reasons the Chair may simply choose to resign from the Panel, not because of any reasonable apprehension of bias but just to do so in the interest of efficiency and perhaps for other personal reasons. Law Society counsel submitted that Rule 5-2(8) of the Law Society Rules allows for a member of a panel to simply quit and a replacement could be appointed by the President, allowing the proceeding to carry on where the previously constituted panel had left off.

[14] Subsequent to the hearing of this application, the Panel, and in particular the Chair, sought clarification of Rule 5-2(8) from Jeff Hoskins, QC, Counsel to the Tribunals at the Law Society, as well as some clarification as to whether it was a Panel decision to have the Chair step down on the grounds put forward by the Respondent or whether the decision should be made by the impugned panel member alone.

[15] Both counsel for the Respondent and for the Law Society were given a further opportunity to make written submissions in response to a memorandum prepared by Tribunal Counsel that dealt with the issues referred to in paragraph 14 above.

[16] Counsel for the Respondent amended his client's position after reviewing the Memorandum from Tribunal Counsel. In his submission by email dated Monday, August 25, 2014, Mr. Gibbs concluded,

> Mr. Hoskins allows for the possibility that waiver by Ms. Boles may be sufficient to allow present panelists to continue after Mr. LeRose steps

> down. Ms. Boles does not waive anything. It sounds as though, on the strength of the Hoskins Memo, Ms. Boles was correct that the approach should have been to Mr. LeRose, QC, by letter, to draw the situation to his attention and ask him to do the right thing, but that she was wrong, that is, I was wrong, that the consequence would be re-stocking of the present Hearing Panel by the President. Ms. Boles agrees with Mr. Hoskins' conclusion that a re-hearing is required, particularly because the next step would be to reconsider paragraph 41 and the findings of professional misconduct, and, now that Mr. Hoskins has correctly articulated her rights, she waives nothing."

[17] Counsel for the Law Society has also amended the Law Society position and as set out in his email of Tuesday, September 9, 2014:

> In light of Ms. Boles' withdrawal of her consent to proceeding in that fashion, and her adoption of Mr. Hoskins' view that the proper procedure would be to rehear the entire matter should Mr. LeRose stand down, it is apparent that the effect of Mr. LeRose standing down will not be the efficient conclusion of this process. The practical considerations are thus now significantly different.
>
> Having considered this, I withdraw my submissions on the pragmatics of the situation. I now stand on the legal position which I advanced, that there is no apprehension of bias and Mr. LeRose should not withdraw.

DECISION

[18] The first question to answer with respect to this application is who should decide this matter?

[19] In *Aresenau-Cameron v. Prince Edward Island*, [1999] 3 SCR 851, one of the parties made a motion to Lamer, CJC of the Supreme Court of Canada for the disqualification of Bastarache, J. from sitting on the appeal on the basis of views and beliefs expressed by the learned Judge before being appointed to the bench. At the opening of the hearing on the motion, the Chief Justice quoted *Robertson v. Edmonton*, 2004 ABQB 519:

> The motion is an irregular motion, it is not the proper way. I informed the Counsel it is not the proper way to ask a Judge to disqualify himself or herself. The application should be made to the Judge himself.

[20] Accordingly, as the application seeks to have the Chair, Bruce LeRose, QC, step aside due to a reasonable apprehension of bias, then the Chair shall make the decision on the application.

[21] On the question of whether, in all the circumstances, there exists a reasonable apprehension of bias on the part of the Chair, the Chair does not accede to the request of the Respondent and declines to step down on the alleged ground of a reasonable apprehension of bias. The Chair adopts the legal arguments put forward by counsel for the Law Society and has concluded that the Respondent either failed to raise the allegation in a timely manner or, more likely than not based on the timing of the application, created the apprehension of bias through her own conduct. The application is dismissed with costs to follow the cause.