BRITISH COLUMBIA

Community Care and Assisted Living Appeal Board

Fourth Floor, 747 Fort Street
Victoria BC V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website:
www.ccalab.gov.bc.ca
Email: ccalab@gov.bc.ca

DECISION NO. 2019-CCA-003(b)

In the matter of an appeal under section 29 of the *Community Care and Assisted Living Act*, SBC 2002, c 75

BETWEEN:	Safwana Ahmed	**APPELLANT**
AND:	Vancouver Coastal Health Authority	**RESPONDENT**
BEFORE:	A Panel of the Community Care and Assisted Living Appeal Board: Richard Margetts, Panel Chair Shelly Christie, Member Lynn McBride, Vice Chair	
DATE:	Conducted by way of written submissions concluding on June 05, 2020	
APPEARING:	For the Appellant: Clea F. Parfitt, Counsel For the Respondent: Robert P. Hrabinsky, Counsel	

Preliminary Decision Regarding Recusal of Panel Member

OVERVIEW

[1] The Appellant has requested that Shelly Christie, a member of the Panel appointed to hear this appeal, should recuse herself on the basis that her participation as a Panel member would create a reasonable apprehension of bias.

[2] Although the Appellant has formulated her objection to Ms. Christie participating as a Panel member as a "request", the Board has considered the matter as an Application for Recusal, and has provided these reasons in support of its ruling on the matter.

BACKGROUND

[3] In response to correspondence sent by the Community Care and Assisted Living Appeal Board (the "Board") which advised the parties of the composition of the Hearing Panel, the Appellant wrote to the Board on May 14, 2020 objecting to Ms. Christie's participation as a Panel member.

[4] The Appellant initially based her objection on three main grounds as follows:

a. The Appellant argued that Ms. Christie's past employment as a Licensing Officer with the Respondent, Vancouver Coastal Health Authority ("VCHA") would inappropriately influence her view of the appeal; in particular, because she would have a "collegiality with, similarity of views and approach to, and deference towards her former colleagues".

b. The Appellant also argued that the high degree of procedural fairness owed to the Appellant in the present appeal precluded Ms. Christie from participating because the appeal requires review "by individuals who are not within or closely allied with the licensing system" and because of her past employment Ms. Christie "does not meet this requirement, and lacks the appearance of independence".

c. Finally, the Appellant raised a concern that the other Panel members "may be unduly swayed by any views Ms. Christie may express…in the course of deliberation because of her history as a Child Care Licensing Officer".

[5] In response to the above concerns raised by the Appellant, the Board wrote to the parties on May 25, 2020 and provided some background information regarding Ms. Christie's employment history as follows:

a. She worked as a Child Care Licensing Officer for Vancouver Coastal Health Authority ("VCHA") in Richmond from 1992 to 2003 - 17 years ago.

b. She worked as a Child Care Licensing Officer in Surrey with Fraser Health Authority ("FHA") from 2006 – 2011.

c. She has been retired from Licensing for 9 years and has not had any connection to the licensing field since she retired.

d. She did not work with any of the VCHA staff or decision makers involved in this case during her employment.

e. She does not know the Respondent Medical Health Officer ("MHO"), Dr. Althea Hayden or the Appellant, Ms. Ahmed.

[6] Subsequent to the provision of this information, the Board asked both parties for their positions on the issue of Ms. Christie's participation as a Panel member.

[7] By letter dated May 27, 2020, the Respondent stated it did not object to Ms. Christie's participation as a Panel member and provided submissions on the legal test for reasonable apprehension of bias. The Respondent stated its position that Ms. Christie's past employment does not give raise to a reasonable apprehension of bias and she should not be disqualified from participation on that basis.

[8] By letter dated June 05, 2020, the Appellant confirmed that she was no longer concerned that Ms. Christie might have "worked with or know the decision-

makers in the case", but the Appellant maintained an objection to Ms. Christie's participation on the hearing Panel due to her past employment. In particular, the Appellant maintained the view that Ms. Christie might be "more likely to share the views of the Child Care Licensing Officers than the perspective of a prospective licensee", and that Ms. Christie's "views may hold undue sway during panel deliberations or be presented or relied-upon in a non-transparent way".

DISCUSSION AND ANALYSIS

[9] The Panel has considered all submissions from both the Appellant and the Respondent on the issue, and has determined that no reasonable apprehension of bias exists in the present case. As a result, the Panel has determined that Ms. Christie will continue to sit as a Panel member for the hearing of this matter.

Who decides an allegation of bias?

[10] In accordance with established authority, Ms. Christie participated in the deliberations which led to our conclusion on this matter[1].

[11] The Federal Court of Appeal recently dealt with the issue of the appropriateness of an adjudicator dealing with an allegation of bias made against him or her in *Exter v Canada (Attorney General)*, 2014 FCA 251[2], where the Court held (at paras 39-40):

> [39] I agree with the Board that requests for recusal are more appropriately dealt with by the decision-maker seized with the matter in respect of which a reasonable apprehension of bias or conflict of interest is claimed. This is exactly how requests for recusal are dealt with in other forums, including courts: see for example, Fond du Lac Denesuline First Nation v. Canada (Attorney General), 2012 FCA 73, 430 N.R. 190; Canada (Attorney General) v. Khawaja, 2007 FC 533 (Mosley J.); Ihasz v. Ontario, 2013 HRTO 233, [2013] O.H.R.T.D. No. 326; Ng v. Bank of Montreal, [2008] C.L.A.D. No. 221.
>
> [40] In our system, one cannot presume that a decision maker cannot deal fairly with such requests simply because it is alleged that he or she is biased or has a conflict of interest. The Board's decision does not violate the applicant's constitutional rights or the Board's duty to act fairly, for the applicant was entitled, and she is currently exercising this right, to a review of the decision of the Adjudicator on a correctness standard. That standard ensures the full respect of all the applicant's rights to a fair and impartial adjudication of her recusal

---

[1] See: *Communication, Energy and Paperworkers Union of Canada, Local 60N v Abitibi Consolidated Company of Canada*, 2008 NLCA 4, at paras 35-37; *Boardwalk Reit LLP v. Edmonton (City)*, 2008 ABCA 176 (CanLII) (leave to appeal to SCC denied, *City of Edmonton v. Boardwalk Reit LLP - and - Municipal Government Board*, 2008 CanLII 67835 (SCC)), at paras 7-10.

[2] *Exter v Canada (Attorney General)*, 2014 FCA 251 (leave to appeal to SCC denied, *Rachel Exeter v. Attorney General of Canada*, 2015 CanLII 20815 (SCC)) at paras 39-40

> motion. In fact, all the applicant's concerns will be addressed by the judge who will hear her application in T-943-12. [emphasis added]

Is there a reasonable apprehension of bias in the present case?

[12] The law regarding reasonable apprehension of bias is well settled, and the test was set out in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 as follows:

> [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… [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.
>
> 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".

[13] Further, it is well established that the threshold for a finding of a reasonable apprehension of bias is very high, and allegations of bias ought not to be made lightly or upon speculation, as such allegations call into question the integrity of both the decision-maker against whom the allegation is made, and the broader administration of justice. This point was set out by the Supreme Court of Canada in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 as follows (at paras 112-113):

> [112] The appellant submitted that the test requires a demonstration of "real likelihood" of bias, in the sense that bias is probable, rather than a "mere suspicion". This submission appears to be unnecessary in light of the sound observations of de Grandpré J. in Committee for Justice and Liberty, supra, at pp. 394-95:
>
> > 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'. <u>The grounds for this apprehension must, however, be substantial</u> 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". [Emphasis added.]
>
> <u>Nonetheless the English and Canadian case law does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough</u>. See R. v. Camborne Justices, Ex parte Pearce, [1954] 2 All E.R. 850 (Q.B.D.); Metropolitan Properties Co. v. Lannon, [1969] 1 Q.B. 577 (C.A.); R. v. Gough, [1993] 2 W.L.R. 883 (H.L.); Bertram, supra, at p. 53; Stark, supra, at para. 74; Gushman, supra, at para. 30.

> [113] Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See Stark, supra, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly. [Emphasis added]

[14] It is recognized in the area of administrative law that some level of expertise of the Board in the area the Board is organized to adjudicate is of benefit to the parties, the panel and the public at large.

[15] Indeed, the legislative scheme which governs the operation of the Board sets out that the Board is an "expert tribunal". Section 58(1) of the *Administrative Tribunals Act*, SBC 2004, c 45[3], states:

> 58 (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

[16] Further, under section 31.1(1) of the *Community Care and Assisted Living Act*, SBC 2002, c 75 (the "CCALA"), the Board has exclusive jurisdiction over "all those matters and questions of fact, law and discretion arising or required to be determined in an appeal under section 29".

[17] By operation of these legislative provisions, the Board is presumed to have expertise over and above that of a Court in the areas over which the Board exercises jurisdiction. Because of the specific expertise of the Board in the areas of community care and assisted living, the Courts will show significant deference to the Board's legal and factual findings and the Board's exercise of discretion.

[18] In *Newfoundland Telephone Co. v. Newfoundland (Public Utilities Board of Commissioners)*, [1992] 1 S.C.R. 623, the Supreme Court referenced the expertise of Boards and how that expertise can be gained by ensuring membership of persons with subject-matter expertise as follows:

> Administrative boards play an increasingly important role in our society. They regulate many aspects of our life, from beginning to end. Hospital and medical boards regulate the methods and practice of the doctors that bring us into this world. Boards regulate the licensing and the operation of morticians who are concerned with our mortal remains. Marketing boards regulate the farm products we eat; transport boards regulate the means and flow of our travel; energy boards control the price and distribution of the forms of energy we use; planning boards and city councils regulate the location and types of buildings in which we live and work. In Canada, boards are a way of life. Boards and the functions they fulfil are legion.

---

[3] Applicable by virtue of section 29.1(m) of the *Community Care and Assisted Living Act*, SBC 2002, c 75.

> …
>
> The composition of boards can, and often should, reflect all aspects of society. Members may include the experts who give advice on the technical nature of the operations to be considered by the Board, as well as representatives of government and of the community. There is no reason why advocates for the consumer or ultimate user of the regulated product should not, in appropriate circumstances, be members of boards. No doubt many boards will operate more effectively with representation from all segments of society who are interested in the operations of the Board.

[19] The Board in the present situation is able to maintain its status as an expert tribunal by virtue of membership from individuals with a wide variety of experience, including experience in the specific areas of community care and assisted living.

[20] In the Panel's view, it is illogical and without foundation to assume that knowledge of, or experience with the issues being deliberated would create an inference that the panel will be *negatively* impacted by the professional expertise of one of its members. This is so for numerous reasons. First, such an assumption presumes that knowledge of and experience with a system equals allegiance with the operation of a system in a specific case, which is simply unsupportable. Second, such an assumption presumes Panel members are unable or unwilling to decide matters independently and without improper influence, which is equally unsupportable.

[21] On the facts as we understand them, Ms. Christie has not been an employee of VCHA for many years and has had no professional dealings with any of the parties involved in this matter. She does not have "collegiality with, similarity of views and approach to, and deference towards her former colleagues", nor is she "within or closely allied with the licensing system".

[22] The Panel finds that the allegations that Ms. Christie may be biased are no more than vague speculation based on Ms. Christie's past employment, and are unsupportable in fact or law. Further, the Panel finds the allegations that the Panel might be "unduly swayed" by improperly held views by another Panel member, are likewise without foundation.

[23] The Panel has not been persuaded that Ms. Christie's past employment experience would, in the specific context of the present appeal, lead an informed person, viewing the matter realistically and practically – and having thought the matter through – to conclude that she or the Panel would not decide the appeal fairly and with an open mind.

[24] Each member of this Panel is committed to fairly deciding the present appeal, and we find that Ms. Christie's past employment experience does not meet the high threshold to give rise to a reasonable apprehension of bias.

DECISION

[25] For all of the above reasons, the application is dismissed.

"Richard Margetts"

Richard Margetts
Panel Chair

"Shelly Christie"

Shelly Christie
Member

"Lynn McBride"

Lynn McBride
Vice-Chair

June 19, 2020