Date: 19981106 Docket: CA 146508

NOVA SCOTIA COURT OF APPEAL
Cite as: Solicitor "X" v. Nova Scotia Barristers' Society, 1998 NSCA 170

Glube, C.J.N.S.; Freeman and Roscoe, JJ.A.

BETWEEN:	)	
	)	
SOLICITOR "X"	)	Gavin MacKenzie
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
NOVA SCOTIA BARRISTERS' SOCIETY	)	Alan J. Stern, Q.C.
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	September 29, 1998
	)	
	)	
	)	
	)	Judgment Delivered:
	)	November 6, 1998

THE COURT: The appeal is allowed with costs and the decision and resolution of the panel is set aside as per reasons for judgment of Roscoe, J.A.; Glube, C.J.N.S. and Freeman, J.A., concurring.

ROSCOE, J.A.:

This is an appeal from a decision of the adjudicative panel of Subcommittee "B" of the Discipline Committee of the Nova Scotia Barristers' Society, whereby the appellant was found guilty of professional misconduct on charges that he:

> b) referred clients to another lawyer in his firm to provide corporate advice and incorporate their business when the business was a tenant of premises owned by a company which he controlled, contrary to Chapter 7 of "Legal Ethics and Professional Conduct" (A Handbook for Lawyers in Nova Scotia) adopted by the Nova Scotia Barristers' Society as at August 1, 1990; and
>
> c) failed to refer the clients of his firm for independent legal advice respecting a dispute concerning termination of their tenancy by the company which he controlled, contrary to Chapters 7, 8 and 23 of "Legal Ethics and Professional Conduct" (A Handbook for Lawyers in Nova Scotia) adopted by the Nova Scotia Barristers' Society as at August 1, 1990.

In the penalty decision of the same panel it was ordered that the appellant be reprimanded and that he pay the costs of the hearings.

By an order of this Court in Chambers, dated April 8, 1998, the appellant was to be identified as Solicitor "X" and publication by the respondent of the resolution of the adjudicative panel was stayed pending the outcome of the appeal.

The complaint arose from dealings that the appellant had with three people who were tenants of a commercial building owned by a company controlled by the appellant in 1996. The appellant had previously acted for two of the complainants when they purchased their house in December, 1995. Although the complainants wished to have a written lease, the appellant would not agree to a written lease. The oral lease entered into on January 5, 1996, provided that the tenants pay rent of $550.00 per month and that either party be able to terminate the lease at any time. The tenants were advised that the lease

could be terminated if the building were sold or if the appellant required the space for his own use. Although the rental payments were not required to commence until March 1, 1996, the complainants took possession of the premises in early January in order to undertake leasehold improvements.

On February 14, 1996 the appellant agreed to a request by one of the complainants to use his name on their business plan. At the same time, the complainants sought advice regarding the creation of a separate entity for their business. The appellant referred the complainants to one of his partners who did the legal work for the incorporation of a company.

On May 2, 1996 the appellant telephoned one of the complainants to inform them that he would be requiring the leased premises for his own use, and that he wished to meet with them to discuss the matter further. A meeting was scheduled for later that day. The complainants cancelled that meeting and sought advice from another lawyer. The appellant was not informed that they had consulted independent counsel. When they did meet the next day, the parties unsuccessfully attempted to resolve the issues of when the tenants would vacate the premises and what, if anything, the appellant would pay them for the leasehold improvements. At one point, the complainants asked if they should have a lawyer to advise them, and the appellant responded “No.” At a subsequent meeting, a week later, the complainants took the position that they would remain in the premises for two more years and that the appellant should pay $15,000.00 towards the leasehold improvements. The appellant did not believe the renovations had been that costly, and he countered with an offer that he would pay them $2,000.00 and allow them to remain in

possession of the rented premises for a further six months. Ultimately, the tenants chose to move at the end of June. In September they complained to the Barristers' Society. A business in which the appellant was a partner took over the vacant premises.

In its decision, the panel quoted several definitions, rules and commentaries from Chapters 7, 8 and 23 of the Handbook, which cover conflicts of interest and engaging in another business, and then made numerous findings adverse to the appellant, including:

> In early February 1996 when Solicitor "X" received a phone call from Renée Carver asking whether he would permit his name to be used in the business plan developed for she and her partners and seeking advice about this business, Solicitor "X" knew or should have known that she was seeking general legal advice about the business she and her partners were intending to operate and that she was seeking to establish a solicitor client relationship. By permitting the use of his name in the business plan and by advising these complainants to incorporate a company, he was, in the opinion of this committee, providing legal advice and agreeing to enter into a solicitor client relationship both personally and on behalf of his firm . . .
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> . . . Solicitor "X" acknowledged that, during his conversation with Ms. Carver, he was aware that she did not know the description or nature of the services she was seeking. Because of this, the panel is of the opinion that Solicitor "X" should have been alerted to the fact that these complainants were seeking more than advice on incorporation. He did not obtain clear instructions about the nature of the advice they were seeking but made the decision himself that all they needed was the incorporation of a company.
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> . . . He should have known that, as a result of his ownership of the company that was their landlord, he and his firm would be in a position of conflict with these clients if he or the firm gave the advice and services they were seeking. At the very least he should have pointed out the nature of the conflict with these clients, explaining clearly the advice and services neither he nor his firm could provide . . .
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> . . .
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> It is the opinion of this panel, that on May 2, 1996, when he contacted Ms. Shields about the termination of the lease, Solicitor "X" should not have entered into negotiations with her and the other

complainants without advising that they should obtain independent legal advice . . .

The panel concluded that:

. . . Solicitor "X" has committed professional misconduct and conduct unbecoming of a barrister in that he referred these complainants, his clients to another lawyer in his firm to provide corporate advice and incorporate their business when the business to be incorporated was a tenant of premises owned by a company he controlled contrary to Chapter 7 of the Handbook.

The panel further finds that Solicitor "X" failed to refer the clients of his firm for independent legal advice on May 2, respecting a dispute which had arisen concerning the termination of their tenancy contrary to Chapters 7 and 8 and 23 of the Handbook.

The appellant submits that the panel:

erred in law in holding that it is professional misconduct and conduct unbecoming of a barrister to refer a tenant to another lawyer in his firm for corporate advice;

erred in law in speculating about advice a lawyer from another firm may have provided to the complainants;

erred in law in holding that it was professional misconduct and conduct unbecoming of a barrister for the appellant not to have referred the complainants for independent legal advice, when it was clear that the appellant was not representing them on the matter in issue;

erred in law in holding that it was not relevant that the complainants sought independent legal advice before negotiating with the appellant respecting the termination of the lease; and

- erred by questioning the appellant to such an extent to give rise to a

reasonable apprehension of bias.

The jurisdiction of this Court in this matter is contained in s. 32(13) of the **Barristers and Solicitors Act**, R.S.N.S. 1989, c.30, which provides:

> (13) Where
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> (a) an investigation is being conducted; or
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> (b) a resolution or order is made,
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> pursuant to this Section, the Appeal Division of the Supreme Court, or in the case of urgency a judge of that Court, may, upon such grounds and in accordance with such procedures as it shall determine, at any time during the investigation or subsequent to a resolution or order being made but not later than six months following the day on which the order is made, intervene upon the request of
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> (c) the barrister or articled clerk being investigated or in respect of whom a resolution or order is made;
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> (d) an officer of the Society; or
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> (e) a member of the Discipline Committee or a subcommittee thereof,
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> and make such order or give such direction as it shall deem fit and necessary under the circumstances.

In **Ayre v. The Nova Scotia Barristers' Society**, [1998] N.S.J. No. 244 (Q.L.), Hart, J.A. , in referring to s. 32(13), said at paragraph 10:

> This provision of the **Act** and its predecessors have consistently been interpreted by this Court to limit our jurisdiction in the manner described by Cooper, J.A. in **Hatfield v. Nova Scotia Barristers' Society** (1978), 30 N.S.R. (2d) 386 at p. 389:
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> > What we have before us therefore is not an appeal in the ordinary sense but a request by a barrister for intervention. I have nevertheless thought it convenient to refer to Mr. Hatfield as the appellant and the Society as the respondent.

> In exercising our power of intervention here I think that our function is not to examine and weigh the evidence taken before the subcommittee with a view to determining whether the subcommittee has drawn a right conclusion from it but rather, **first**, to consider whether or not the procedure followed was in conformity with the **Act** and applicable regulations and thus free from error of law appearing on the face of the proceedings, and, **secondly, whether or not the principles of natural justice were observed** - see **Mehr v. The Law Society of Upper Canada**, [1955] S.C.R. 344, at pp. 346 and 347.
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> (emphasis added)

This appeal, in my opinion, can be resolved on the basis of the second part of the review, that is, on consideration of whether the principles of natural justice were observed, and it therefore will not be necessary to consider the other issues raised by the appellant.

The appellant submits that one of the fundamental rules of natural justice, the right to be adjudged by a fair and impartial tribunal, was not accorded to him. It is submitted that the excessive intervention and questioning of the appellant by members of the panel, together with their apparent assumption of the role of prosecutor and prejudgment of the issues gave rise to a reasonable apprehension of bias.

The questioning by members of the panel to which the appellant objects took place after he had been examined in chief by his counsel and after the thorough cross-examination by counsel for the Society. The questioning, by three members of the five member panel, spans 75 pages of the transcript, compared to 26 for the examination in chief and 27 pages of cross-examination. The time notations in the transcript indicate that the examination by panel members consumed two hours of time. Many of the questions were not relevant to the actual charges that the appellant faced, that he had referred the

complainants to another lawyer in his firm for corporate advice and that he failed to refer them for independent legal advice concerning termination of the tenancy. There were numerous questions about the reasons the appellant did not wish to enter into a fixed term lease, what he did with the premises after the complainants left, his other business ventures, his partners in those other businesses and their business affairs, questions about the amount of time the appellant's partner had billed for his first meeting with the complainants, and questions calling for the appellant to speculate what a lawyer from another firm would have told the complainants if he had referred them for independent advice. There was an attempt to have the appellant speculate that an independent lawyer asked to incorporate a company would have suggested that the complainants should renegotiate their lease, and also an imputation that he had bargained in bad faith when he met with the complainants to discuss the date and terms of termination. There was an insinuation that the appellant had unfairly taken advantage of the complainants from the outset when he entered into the oral lease with them, although that was not the basis of the complaint or the charges.

The well established test for reasonable apprehension of bias was most recently considered by the Supreme Court of Canada in **R. v. R.D.S.**, [1997] 3 S.C.R. 484 where, on the issue of the proper test, there was agreement by the majority with the statement of Major, J. at paragraph 11:

> . . . The test for finding a reasonable apprehension of bias has challenged courts in the past. It is interchangeably expressed as a "real danger of bias," a "real likelihood of bias," a "reasonable suspicion of bias" and in several other ways. An attempt at a new definition will not change the test. Lord Denning M.R. captured the essence of the inquiry in his judgment in *Metropolitan Properties Co. v. Lannon*, [1969] 1 Q.B. 577 (C.A.), at p. 599:

> [I]n considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see *Reg. v. Huggins*; and *Rex v. Sunderland Justices*, *per* Vaughan Williams L.J. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *Reg. v. Camborne Justice*, *Ex parte Pearce*, and *Reg. v. Nailsworth Licensing Justices, Ex parte Bird*. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased."
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> See also *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256.

Although some administrative tribunals will not be held to the same standard as a trial judge, (see **Old St. Boniface Residents Association Inc. v. Winnipeg (City)**, [1990] 3 S.C.R. 1170), disciplinary committees of professional associations exercising primarily adjudicative functions, as in this case, will be held to a high standard of justice. In **Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)**, [1992] 1 S.C.R. 623 Cory J., writing for the court, wrote [pp. 636, 638–639]:

> Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. [Authority deleted.] The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.
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> . . .
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> It can be seen that there is a great diversity of administrative boards. **Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts**. **That is to say that the conduct of the members of the board should be such that there could be no reasonable apprehension of bias with regard to their decision.** At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a prejudgment of the matter to such an extent that any representations to the contrary would be futile . . .
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> (emphasis added)

Similar guidelines for disciplinary boards were prescribed in **Kane v. University of British Columbia,** [1980] 1 S.C.R. 1105, where Dickson, J. for the majority, noted at page 1113:

> 2. As a constituent of the autonomy it enjoys, the tribunal must observe natural justice which, as Harman L.J. said, [*Ridge v. Baldwin* [[1962] 1 All E.R. 834 (C.A.)], at p. 850] is only "fair play in action". In any particular case, the requirements of natural justice will depend on "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter which is being dealt with, and so forth": per Tucker L.J. in *Russell v. Duke of Norfolk* [[1949] 1 All E.R. 109], at p. 118. To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.

> 3. A high standard of justice is required when the right to continue in one's profession or employment is at stake. *Abbott v. Sullivan* [[1952] 1 K.B. 189], at p. 198; *Russell v. Duke of Norfolk, supra*, at p. 119. A disciplinary suspension can have grave and permanent consequences upon a professional career.

The appellant also relies on **Golumb v. College of Physicians & Surgeons of Ontario** (1976), 68 D.L.R. (3d) 25 (Ont. Div. Ct.), particularly the following passage from the decision of Galligan, J.:

> . . . Accordingly, it is the duty of the Discipline Committee before whom such charge is heard to act fairly, to act judicially, and to be guided by the fundamental rules of natural justice. Not only must the Discipline Committee approach the case with an open mind, it must act fairly and impartially, and whatever else may be said about whether its decision is right or wrong, any reasonable person appearing before the Committee must be given the impression by the conduct and demeanour of the Committee that it has in fact acted fairly, impartially and judicially.

In the **Golumb** case, the appellant doctor was charged and found guilty of billing the provincial medical insurance plan for obstetrical services which it was alleged were included in the standard total fee for obstetrical care which he had been paid. There was no allegation of fraud or of deliberately seeking payments that he knew he was not entitled to receive. On appeal, he complained that one member of the discipline committee questioned the integrity of a character witness called on his behalf, and in a series of questions of another witness spanning 14 pages, the same committee member raised issues about whether the appellant had misrepresented the nature of medical services rendered to some of his patients. The appellant did not testify himself. The appellant had not been charged with misrepresentation. The majority of the Divisional Court determined that the questions by the panel member were irrelevant, highly prejudicial and destroyed the appearance of impartiality. Galligan, J. stated that members of a professional

discipline board have a duty to act judicially and must not adopt the role of prosecutor or defender. He relied on the following passage from the decision of Evans, J.A. in **Majcenic v. Natale**, [1968] 1 O.R. 189; 66 D.L.R. (2d) 50 at pp. 203-4 O.R., pp. 64-5 D.L.R.:

> I turn now to a consideration of the general conduct of the trial. The trial Judge on many occasions took over the examination of the various witnesses and in so doing intervened to the extent that he assumed the duty and responsibility of counsel. I can appreciate that on occasion it is not only desirable but necessary that the trial Judge question the witnesses for the purpose of clarification of the evidence and I do not consider that he is solely an umpire or arbitrator in the proceedings. There is a limit however to the intervention and when the intervention is of such a nature that it impels one to conclude that the trial Judge is directing examination or cross-examination in such a manner as to constitute possible injustice to either party, then such intervention becomes interference and is improper.
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> . . .
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> In *Boran et al. v. Wenger*, [1942] O.W.N. 185, [1942] 2 D.L.R. 528, Riddell, J.A., speaking for the Court said:
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> > "We do not for a moment suggest that the trial judge has not the right -- it may often be the duty -- to obtain from the witnesses evidence in addition to that brought out by counsel -- but this is adjectival, to clear up, to add to, what counsel has brought out."
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> The same principle was set out in *Yuill v. Yuill*, [1945] 1 All E.R. 183, and in *Jones v. National Coal Board*, [1957] 2 All E.R. 155.
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> When a Judge intervenes in the examination or cross-examination of witnesses, to such an extent that he projects himself into the arena, he of necessity, adopts a position which is inimical to the interests of one or other of the litigants. His action, whether conscious or unconscious, no matter how well intentioned or motivated, creates an atmosphere which violates the principle that "justice not only be done, but appear to be done". Intervention amounting to interference in the conduct of a trial destroys the image of judicial impartiality and deprives the Court of jurisdiction. The right to intervene is one of degree and there cannot be a precise line of demarcation but if it can be fairly said that it

> amounted to the usurpation of the function of counsel it is not permissible.

Counsel for the respondent submits that, as it is a question of degree, each case depends on its own facts, and the questioning by the panel in this case is more analogous to that in **Rusonik v. Law Society of Upper Canada** (1988), 28 O.A.C. 57 (Ont. Div. Ct.) where the conclusion of the court was that the interventions were not so excessive as to give rise to any reasonable apprehension of bias. In **Rusonik, supra**, Campbell, J., for the court, after referring to **Golumb, supra**, said at p. 57:

> There is a fine line between testing the solicitor's evidence and the positions he was taking during the course of hearing, and challenging or denigrating that evidence and those positions.
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> It was obviously necessary to ask many questions in this case, simply in order to understand the evidence of these highly complex transactions. There were many times that the Committee tested the evidence and the position of the appellant and disclosed obvious areas of concern which gave him an opportunity to meet and to respond directly to those concerns. The Committee on some occasions went rather further towards the direction of challenging the appellant than was, in our view, desirable. The interventions were frequent and on some occasions significant and, in our view, at some points excessive. It is better for any trier of fact to err, if at all, on the side of reticence.
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> It was, however, quite appropriate, in our view, for the Committee to express frustration about the matter in which the appellant, who chose not to be represented by counsel, decided to examine himself in chief, and the manner in which he chose to cross-examine the adverse witnesses.
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> . . . The interventions were not in our view so excessive as to deprive the Committee of jurisdiction, or infect its findings of fact or recommendations as to penalty, or to give rise to any reasonable apprehension of bias.

Conclusion:

In my opinion, when the questioning by the panel members in this case

is examined in accordance with the principles set out in the authorities cited above, the appellant has met the burden of proving the existence of a reasonable apprehension of bias. A reasonable person would not be left with the impression that the panel acted fairly, impartially and judicially. The extent, manner and substance of the excessive questioning, exceeded the bounds of simple clarification of the evidence, and brought the adjudicators into the arena, cast with the demeanor of prosecutors. This was not a situation, similar to **Rusonik, supra**, where the transactions were complex. Here, the interrogation of the appellant by the panel members on matters not relevant to the charges, combined with the suggestions of bad faith and unfair conduct on the part of the appellant, gave rise to a reasonable apprehension of bias and thus breached the rules of natural justice.

As indicated in the **Newfoundland Telephone** case, the denial of a right to a fair hearing as a result of a reasonable apprehension of bias cannot be validated by the subsequent decision of the tribunal (see page 645). The decision is void *ab initio*.

For these reasons, I would allow the appeal and set aside the decision and resolution of the panel dated January 22, 1998. I would also order the respondent to pay costs of the appeal to the appellant in the amount of $2,500.00, plus disbursements.

Roscoe, J.A.

Concurred in:

Glube, C.J.N.S.

Freeman, J.A.