SUPREME COURT OF NOVA SCOTIA

Citation: *Africentric Learning Institute of Nova Scotia Inc. v. Nova Scotia (Registry of Joint Stock Companies)*, 2014 NSSC 319

Date: 2014-08-28
Docket: Hfx. No. 418197
Registry: Halifax

Between:

Africentric Learning Institute of Nova Scotia Inc.

Applicant

v.

Registry of Joint Stock Companies and
Delmore Buddy Daye Africentric Learning Institute Inc.

Respondents

Judge: The Honourable Justice Arthur LeBlanc

Heard: May 5, 2014, in Halifax, Nova Scotia

Counsel: Sheree Conlon and Ian Breneman, for the Applicant

Edward Gores, Q.C. for the Respondent Registrar of Joint Stock Companies

Lauren A. Grant, for the Respondent Delmore Buddy Daye Africentric Learning Institute

By the Court:

Introduction

[1] This is an application by the Africentric Learning Institute of Nova Scotia ("ALI") for judicial review of a decision of the Registrar of Joint Stock Companies (the "Registrar") dated June 25, 2013, in which the Registrar refused to direct a change of name for the Delmore Buddy Daye Africentric Learning Institute ("DBDALI") pursuant to s. 16 of the *Companies Act*, RSNS 1989, c. 81.

[2] ALI alleges that the Registrar's conduct in her dealings with DBDALI raises a reasonable apprehension of bias, and her decision should be quashed due to a lack of procedural fairness. In the alternative, ALI says the Registrar's decision was unreasonable. The Registrar denies the allegation of bias but takes no position with respect to the reasonableness of her decision.

[3] DBDALI was added as a party to the proceeding by Consent Order at the Motion for Directions on September 24, 2013. It submits that ALI has failed to meet the test for reasonable apprehension of bias. It further argues that the Registrar's decision was reasonable and the application for judicial review should be dismissed.

The Legislative Provision

[4] Section 16 of the *Companies Act* provides as follows:

> 16 (1) No company shall be registered under a name
>
> (a) identical with that of any other subsisting company, incorporated or unincorporated, or so nearly resembling the same as to be calculated to deceive, except under a name resembling that of the subsisting company if the subsisting company testifies its consent in such manner as the Registrar requires;
>
> (b) which, in the opinion of the Registrar, suggests or is calculated to suggest the patronage of Her Majesty or of any member of the Royal

> Family or connection with Her Majesty's Government or any department thereof;
>
> (c) otherwise objectionable; or
>
> (d) otherwise prohibited by regulation.
>
> (2) If any company, through inadvertence or otherwise, is or has been registered by a name
>
> (a) identical with that of any other subsisting company, incorporated or unincorporated, or which the Registrar deems to so nearly resemble the name as to be calculated to deceive, or contains any words prohibited under clause (b) of subsection (1) except in a case in which such consent as aforesaid has been given; or
>
> (b) which the Registrar deems to be otherwise objectionable by reason of this Section or otherwise,
>
> the first mentioned company shall, upon the direction of the Registrar, change its name, and if any company fails to change its name within two months after being so directed, the Registrar may change its name to any name he deems to be unobjectionable, and upon the change being made, the Registrar shall enter the new name on the register in the place of the former name, and shall issue a certificate of change of name to meet the circumstances of the case.

The History of ALI

[5] In December of 2006, the proprietors of ALI submitted a request to the Registry of Joint Stock Companies (the "Registry") to reserve the corporate name "Africentric Learning Institute". On December 19, 2006, the Registrar, Kerry MacLean, refused to permit reservation of the name due to its similarity to an existing entity:

> This letter is to inform you that the name AFRICENTRIC LEARNING INSTITUTE submitted for reservation has been rejected.
>
> THE NAME REQUESTED IS IDENTICAL OR TOO SIMILAR TO A NAME OR NAMES RETRIEVED BY THE NUANS SEARCH (a NUANS report is enclosed).
>
> …

[6] Counsel for ALI sought clarification on the matter and was told that ALI's proposed name was too similar to a society incorporated as the Africentric Learning Associates ("ALA"). Counsel subsequently advised the Registry that

ALA had agreed to provide its consent to ALI's incorporation under the proposed name. The Registry responded:

> … I have consulted with Kerry [the Registrar] about this name. She will not allow the registration of this name as she considers they are too similar. Even if the existing society gives consent, she feels that it will be too confusing to the public.

[7] On January 12, 2007, the Registrar wrote to counsel for ALI advising that the name Africentric Learning Institute would be reserved, provided it was incorporated as a company limited by guarantee, and ALA gave its written consent.

[8] Although ALI considered incorporating under these conditions, it ultimately decided that it preferred not to be bound to incorporate as a company limited by guarantee. On June 27, 2007, counsel for ALI informed the Registrar that it was in negotiations with ALA for the latter to change its name to Network of Africentric Education Associations ("NOAEA"), and asked whether this would permit ALI to reserve the name "Africentric Learning Institute of Nova Scotia" without conditions.

[9] On July 10, 2007, counsel for ALI spoke to Ron Skibbens of Service Nova Scotia and Municipal Relations by telephone to discuss the naming issue. Mr. Skibbens wrote to counsel later that day, reiterating the understanding that ALA would change its name to NOAEA so that ALI could incorporate as "Africentric Learning Institute of Nova Scotia." He noted, however, that consent from ALA/NOAEA was still required, "since their name change is less than a year old, and elements of the names are similar." The e-mail was copied to the new Registrar, Hayley Clarke.

[10] On July 13, 2007, the Registrar e-mailed Mr. Skibbens a link to a Government of Nova Scotia press release discussing the funding of ALI by the Nova Scotia Department of Education, and stated, "No wonder they were anxious to get their name sorted out."

[11] On October 5, 2007, Registry staff advised the Registrar that ALA had decided to change its name to the Society for Africentric Adult Education ("SAAE") instead of NOAEA, which the Registrar deemed acceptable. In January of 2008, ALA changed its name to SAAE and submitted its consent for ALI to incorporate as Africentric Learning Institute of Nova Scotia.

[12] ALI was incorporated as Africentric Learning Institute of Nova Scotia effective March 25, 2008 and has been operating in Nova Scotia since that time. On February 27, 2009, ALI registered the names "Africentric Learning Institute" and "ALI" as business names.

The Dispute

[13] In 2012, a dispute arose concerning the naming of ALI. The Council on African Canadian Education ("CACE") and ALI took the position that it should continue to operate as the Africentric Learning Institute of Nova Scotia, whereas others in the community, including some individuals within the Nova Scotia Department of Education, were of the view that it had either already been named in honour of Mr. Delmore (Buddy) Daye or should be so named. In the summer of 2012, the Minister of Education indicated that her department would not fund ALI unless it bore Mr. Daye's name.

[14] On September 20, 2012, Paul Ash, an employee of the Department of Education, submitted a request to the Registry to change the name of ALI to "Delmore Buddy Daye Africentric Learning Institute Inc."

[15] On September 21, 2012, Dean Smith, a lawyer with the Federal Department of Justice, contacted Tracey Jones-Grant, a director of ALI, on behalf of DBDALI, seeking consent to the proposed name change. Ms. Jones-Grant responded by e-mail on September 24, 2012, indicating that ALI would not consent to a name change at that time. Her response was copied to the Registrar.

[16] The same day, Mr. Smith sent the following e-mail to a number of individuals:

> As you all know, the newly appointed Board of Directors of the Delmore "Buddy" Daye Africentric Learning Institute (DBDALI) held its first official meeting on Thursday, September 21, 2012. The new Board of Directors resolved to pursue amendments to the incorporation documents of the Africentric Learning Institute of Nova Scotia as recorded by the Nova Scotia Registry of Joint Stock Companies to reflect the new name and list of directors and officers of the organization.
>
> You will recall my correspondence of Thursday, September 21, 2012 advising the new Board of Directors were proceeding in this manner. We indicated that we preferred to proceed in the spirit of cooperation, meaning we would have preferred to have the consent of the ALI Board as we moved to complete this

> transition. However, we have been advised this afternoon that not all of the ALI Board members share the new direction of the DBDALI Board of Directors.
>
> Therefore, we have retained the services of outside legal counsel to incorporate the Delmore "Buddy" Daye Africentric Learning Institute as a separate legal entity. We anticipate this work will be completed by Friday, September 28, 2012.
>
> …

[17] On September 25, 2012, Registry employee Fancy Edwards wrote an e-mail to the Registrar stating:

> There seems to be some dissension among the AFRICENTRIC LEARNING INSTITUTE OF NOVA SCOTIA INC. group. I was speaking with Tracey Jones-Grant, the author of the attached e-mail, on the telephone last week. There has been a name reservation request submitted: DELMORE BUDDY DAYE AFRICENTRIC LEARNING INSTITUTE INC. submitted as a proposed name change for AFRICENTRIC LEARNING INSTITUTE OF NOVA SCOTIA INC. by Paul Sylvester Ash. Paul Sylvester Ash is not listed as an Officer or Director of the registered company, Tracey Jones-Grant is, and has stated that this person is trying to take over and make changes that the group is not approving.
>
> Please advise on how I should proceed with the name reservation, should I reserve it with conditions that it's for a name change only or, based on that statement in this e-mail that they are not going to approve it for name change, should I just outright reject it?

[18] Two days later, Mr. Ash wrote to the Registrar concerning the status of his request to change ALI's name:

> Good afternoon Haley,
>
> I submitted the Delmore "Buddy" Daye Africentric Learning Institute Inc. as a name to be reserved on September 20th. We were told that it would take 2 days to complete the check and receive a response. I understand they name had been escalated to you for review. We have lawyer waiting to complete this process for us as it is a time sense manner. Could you please provide some clarification on the delay and when we can expect a response. Please contact me at … if you have any questions. Thanks in advance. [Errors in original]

[19] On September 28, 2012, Registry employee Gloria Pauls sent the following e-mail to the Registrar with the subject line, "DELMORE 'BUDDY' DAYE AFRICENTRIC LEARNING INSTITUTE INC. URGENT":

> Hi Hayley
>
> Jean and I have been talking with Paul Ash from dept of Education this morning. They wish to incorporate a new Ltd by Guarantee company with the above name. Apparently there is a big rush on this. There is a conflict here somewhere and apparently from what Paul told us the board of the existing one is being taken over but the existing individuals won't change the information on file. Because of this they were advised by their lawyers not to change the name of the existing one but to form a new one.
>
> They want the name approved so that they can tell the board the changes have been made.
>
> The name AFRICENTRIC LEARNING INSTITUTE INC. already exists.
>
> He said they are prepared to change the word AFRICENTRIC to AFROCENTRIC to make the name different but he still doesn't understand why they can't have the above name.
>
> I have looked on the internet and reviewed the nuans report. The name AFRICENTRIC is a type of learning as learning about history of the african people.
>
> Because of the conflict, I am not comfortable approving the name even with the Dept of Education involved. This is something should have your ok on it or not.
>
> We gave him your direct line so that he or his boss can contact you. Please advise asap how you would like for us to handle this.
>
> I did suggest to Paul that they get the documents in today or fax them to us to hold the date. That way if you ok the name we can work from there.

[20] The same day, the Registry sent a letter to Mr. Ash, stating:

> This letter is to inform you that the name DELMORE BUDDY DAYE AFRICENTRIC LEARNING INSTITUTE INC submitted for reservation has been rejected.
>
> THE NAME REQUESTED IS IDENTICAL OR TOO SIMILAR TO A NAME OR NAMES RETRIEVED FROM THE NOVA SCOTIA DATABASE OF ACTIVE BUSINESS NAMES AND RESERVED NAMES.
>
> …

[21] After receiving this letter, Mr. Ash filed documents to incorporate an entity without the term "Africentric" , called the "Delmore Buddy Daye Learning Institute Inc." ("DBDLI"). The incorporation of DBDLI was effective as of October 1, 2012.

[22] Once DBDLI was incorporated, Mr. Ash continued his efforts to secure the DBDALI name that had been previously rejected by the Registry. On October 16, 2012, he wrote to the Registrar:

> Hi Hayley,
>
> I received your voice mail and thank you for your response. I was hoping that we could meet this week to discuss an organization that we have recently incorporated and would like to make a name change. I can open my schedule to any time that works for you. Thanks

[23] The Registrar responded later the same day, and noted that while it was not normally her practice to meet with clients regarding a name change request, she was prepared to make an exception:

> Hi Paul:
>
> I am out of the office on Friday and have meetings scattered throughout tomorrow and Thursday. I could do late Thursday afternoon (2:30 or 3:00 pm), but I would need to know in advance some information about what you are seeking. Has another name request been submitted and has this request been rejected? I hope you can appreciate that this is not an issue on which I would ordinarily meet with a client given the sheer volume of name requests that come through our office in a given year, but I am prepared to do so given what I understand to be your department's connection to this file. Any information you could provide in advance – in writing and/or by telephone – might in the end save you a trip. Please let me know.

[24] Mr. Ash replied the following afternoon:

> Hi Hayley,
>
> Thanks for your quick response. Yes, Thursday at 2.30 pm would be great. I will come to your office at Maritime Centre. The issue is with the use of the term Afrocentric in a business name. I understand you were directly involved in a previous issue around a name and are the only person who can approve the use of the term. Looking forward to our meeting and thanks again.

[25] Mr. Ash met with the Registrar on October 18, 2012 at 2:30 pm, as planned. There is no evidence before the court as to the content of the discussion that took place during the meeting. However, at 3:07 pm that afternoon, the Registrar sent an e-mail to another Registry employee advising that she would approve the name change requested by Mr. Ash.

[26] On October 19, 2012, Mr. Ash submitted a business name change request to change the name of the Delmore Buddy Daye Learning Institute to the Delmore Buddy Daye Africentric Learning Institute. The Registrar issued a Certificate of Name Change on the same day.

[27] On April 23, 2013, counsel for ALI wrote to the Registrar requesting that, pursuant to s. 16 of the *Companies Act*, she direct DBDALI to change its name due to its similarity to ALI. At the time of ALI's objection, it was unaware that the Registry had originally rejected the DBDALI name on the basis that it was too similar to another registered entity.

[28] The Registrar issued a written decision on June 25, 2013 in which she declined to direct DBDALI to change its name, or to initiate a name dispute file. ALI filed for judicial review of the Registrar's decision on July 31, 2013.

The Evidence

[29] The Notice for Judicial Review was filed on July 31, 2013, and the Motion for Directions was scheduled or August 28, 2013. The record was filed by the Registrar on August 20, 2013. At the Motion for Directions, counsel for ALI raised concerns that the record disclosed by the Registrar was incomplete. It was agreed that counsel for ALI would make a request to the Registrar for a full record, and counsel for the Registrar would provide the Registrar's position. The Motion for Directions was adjourned to September 24, 2013.

[30] On September 24, 2013, counsel for ALI reiterated its position that the record was incomplete, and a hearing was set for December 5, 2013 to settle the record.

[31] On November 20, 2013, ALI filed its evidence and brief in support of the December 5, 2013 hearing to fix the record. On November 29, 2013, counsel for the Registrar produced to ALI a set of documents entitled "Supplement to the Record of the Respondent Registrar of Joint Stock Companies [Documents from the Registrar's file]". These documents included the internal Registry e-mails concerning the conflict between ALI and DBDALI, and the e-mails exchanged between Mr. Ash and the Registrar regarding their in-person meeting to discuss changing the DBDLI name. This Supplemental Record was not filed with the court.

[32] Counsel for ALI maintained that the record was still incomplete, and intended to proceed to the hearing on December 5, 2003. The day before the hearing, however, the Registrar agreed to produce further documents and the parties agreed to adjourn the hearing on that basis.

[33] On December 11, 2013, the Registrar produced an additional set of documents which contained a copy of the September 28, 2012 decision of the Registrar rejecting the DBDALI name because it was too similar to an existing entity. It was at this time that ALI first became aware that the DBDALI name had been previously rejected by the Registrar.

[34] Counsel for the Registrar took the position that these additional materials were not before the Registrar when she made the decision under review and, for this reason, refused to file these supplemental materials with the court as part of the official record. As a result, the hearing to settle the record was rescheduled for April 8, 2014.

[35] On April 8, 2014, following agreement by the parties, the court issued an order by consent of the parties permitting ALI to file the two sets of documents as evidence outside the record, attached as exhibits to an affidavit of Tracy Jones-Grant.

Standard of Review

[36] The Registrar, as an administrative decision-maker, owed ALI a duty of fairness in determining whether to direct DBDALI to change its name. The duty to act fairly includes the duty to provide procedural fairness to the parties, and "an unbiased appearance is, in itself, an essential component of procedural fairness": *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities*, [1992] SCJ No 21 at para. 22. The demonstration of a reasonable apprehension of bias on the part of the Registrar would constitute a violation of the duty of fairness owed to ALI. Issues of procedural fairness do not attract a standard of review analysis, and must be assessed on a standard of correctness: *Bowater Mersey Paper Co. v. Communications, Energy and Paperworkers Union of Canada, Local 141*, 2010 NSCA 19 at para. 30.

[37] The parties all submit that the standard of review applicable to the Registrar's decision is reasonableness. Although the degree of deference owed to a decision of the Registrar made pursuant to s. 16 of the *Companies Act* has not

been previously considered by our courts, the Manitoba Court of Appeal in *Brian Neil Friesen Dental Corp. v. Director of Companies Office (Manitoba)*, 2011 MBCA 20, [2011] MJ No 50 considered the appropriate standard of review for a similar decision of the Director of Companies Office. The Court concluded:

> 82 If we turn to previous case law, we see that courts have accepted that deference is due to the Director's decisions. …
>
> 83 In addition, the kind of question before the Director (i.e., are these names so similar that they are liable to be confounded?) is one which should be reviewed on the standard of reasonableness. In *Dunsmuir*, the court stated (at para. 53):
>
> > Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, [[1993] 1 S.C.R. 554] at pp. 599-600; Dr. Q, at para. 29; *Suresh* [2002 SCC 1, [2002] 1 S.C.R. 3] at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

[38] This conclusion is consistent with recent Supreme Court of Canada jurisprudence. In *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, the Court summarized the categories of issues specific to each standard of review:

> 26 Under Dunsmuir, the identified categories are subject to review for either correctness or reasonableness. The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" (*Dunsmuir*, at para. 60 citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62); (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or vires" (paras. 58-61). On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (para. 54); (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues (paras. 51 and 53-54).

[39] In this case, the Registrar is interpreting and applying her home statute. There are no constitutional or jurisdictional issues, no conflict or overlap between two tribunals, and the question is not one of general law of central importance to the legal system and outside the Registrar's specialized area of expertise. Accordingly, the standard of reasonableness applies to a decision by the Registrar under s. 16 of the *Companies Act*.

Reasonable Apprehension of Bias

[40] The test for a finding of reasonable apprehension of bias is settled law, and was summarized in *R. v. R.D.S.*, [1997] SCJ No 84:

> 31 The test for reasonable apprehension of bias is that set out by de Grandpré J. in Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369. Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades: see, for example, Valente v. The Queen, [1985] 2 S.C.R. 673; R. v. Lippé, [1991] 2 S.C.R. 114; Ruffo v. Conseil de la magistrature, [1995] 4 S.C.R. 267. De Grandpré J. stated, at pp. 394-95:
>
> > . . . the 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."
> >
> > The grounds for this apprehension must, however, be substantial and I ... refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

[41] The threshold for a finding of real or perceived bias is high, and the onus lies with the party alleging bias to establish its existence: *R. v. R.D.S.*, *supra*, at para. 114. There is also a strong presumption in favour of the impartiality of an adjudicative decision maker: *Canadian College of Business and Computers v. Ontario (Private Career Colleges)*, 2010 ONCA 856, [2010] OJ No 5435 at para. 27.

[42] As a general rule, only material that was considered by an administrative decision-maker in coming to its decision is relevant on judicial review. However, where the applicant alleges bias or fraud, “it will almost always be necessary to have evidence which is not part of the administrative record”: D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf), at p. 6-63. See also *IMP Group International Inc. v. Nova Scotia (Attorney General)*, 2013 NSSC 332 at paras. 20-25.

[43] There is no dispute that the court is entitled to consider the affidavit evidence admitted outside the record in this case when it considers the allegation of a reasonable apprehension of bias on the part of the Registrar. Counsel for the Registrar, however, says this evidence should be given little weight.

[44] Allegations of a reasonable apprehension of bias on the part of an administrative decision-maker are often raised, but rarely made out. For the reasons that follow, I am satisfied that this is one of those rare cases in which a reasonable apprehension of bias has been established by the applicant.

[45] Initially, the Registry's approach to Mr. Ash's request to reserve the DBDALI name was consistent with its approach to ALI's request to reserve a name containing the words "Africentric Learning." DBDALI's request was rejected on the basis that the name was too similar to another entity (presumably ALI), just as ALI's request was rejected on the basis that its name was too similar to ALA. In ALI's case, the Registrar was unwilling to permit registration of the name even with ALA's consent, due to the risk of public confusion. It was not until ALA agreed to change its name, and provide its consent, that ALI was permitted to incorporate. No such conditions were proposed in order to permit DBDALI to register its name, presumably because the Registrar and her staff had been made aware that ALI opposed any change to its name and Mr. Ash's group was trying to "take over" ALI's operations.

[46] The Registry's approach changed, however, following the intervention of Mr. Ash, whom the Registrar clearly believed was acting on behalf of the Department of Education. On October 16, 2012, Mr. Ash e-mailed the Registrar to ask for a personal meeting to discuss the DBDALI name. The Registrar informed Mr. Ash that she would not ordinarily meet with a client personally to discuss a name change, but she was "prepared to do so given what I understand to be your department's connection to this file." In other words, the Registrar was prepared to deviate from her standard practice because of Mr. Ash's connection with another government department.

[47] Counsel for the Registrar argued that Mr. Ash did not expressly represent that he was acting in his capacity as an employee of the Department of Education when he requested a meeting. While this may be true, Mr. Ash made no attempt to correct the Registrar if she was misapprehending the situation. Ultimately, however, it is the Registrar's belief that Mr. Ash was acting on behalf of the Department of Education, and her conduct as a result of this belief, that is relevant

for the purposes of establishing a reasonable apprehension of bias. The accuracy of her belief is not.

[48] Minutes after the meeting with Mr. Ash, the Registrar reversed her previous decision to reject the DBDALI name as being too similar to an existing entity. The name change was made effective the very next day. Unlike the protocol followed when ALI incorporated, the Registrar made her decision without consulting ALI or seeking its consent. The Registrar apparently saw no need to consult ALI despite her knowledge that the two groups were involved in a dispute and that DBDALI, according to Mr. Ash himself, was attempting to "take over" the operations of ALI.

[49] Counsel for the Registrar says that the decision to allow the DBDALI name should not be characterized as a reversal of an earlier decision *by the Registrar* to reject the name. According to counsel, the initial decision to reject the DBDALI name was an internal or informal administrative decision made by Registry staff, not a decision of the Registrar herself. I do not accept this position. First, there was nothing internal or informal about the letter. It was prepared on Registry letterhead, signed by Fancy Edwards on behalf of the Registry, and sent to Mr. Ash. A reasonable person receiving this letter would consider it to be a formal, binding decision.

[50] More importantly for the issue of bias, the only reasonable inference that can be drawn from the evidence is that the Registrar herself directed staff to reject the name reservation. On September 25, 2012, Ms. Edwards contacted the Registrar regarding Mr. Ash's attempt to change the ALI name. According to Ms. Edwards, Ms. Jones-Grant told her that Mr. Ash was trying to take over and make changes to ALI that ALI was not approving. She wrote, "Please advise on how I should proceed with the name reservation, should I reserve it with conditions that it's for a name change only or, based on that statement in this e-mail that they are not going to approve it for name change, should I just outright reject it?"

[51] On September 28, 2012, Ms. Pauls, another Registry staff member, told the Registrar that she and Jean Gosling had been speaking with "Paul Sylvester Ash from the department of Education", and "[b]ecause of the conflict, I am not comfortable approving the name even with the Dept of Education involved. This is something should [*sic*] have your ok on it or not." Ms. Pauls told the Registrar that they had given Mr. Ash her direct line "so that he or his boss can contact you. Please advise asap how you would like for us to handle this."

[52] The situation was clearly unusual, and neither Ms. Edwards nor Ms. Pauls was comfortable responding to Mr. Ash's name reservation request without explicit direction from the Registrar. For this reason, I consider the decision of September 28, 2012 rejecting the DBDALI name to be a decision of the Registrar.

[53] After meeting with Mr. Ash, the Registrar reversed her own decision to reject the DBDALI name without consulting ALI on the matter or seeking its consent. Unhappy with the Registrar's decision, ALI made a request under s. 16 of the *Act* that the Registrar direct DBDALI to change its name due to its similarity to ALI. The Registrar issued a written decision two months later, on June 25, 2013, in which she declined to direct DBDALI to change its name or to initiate a name dispute file.

[54] In my view, considering all of the circumstances, an informed person viewing the matter realistically and practically and having thought the matter through, would think it more likely than not that the Registrar, consciously or unconsciously, would not decide ALI's request fairly.

[55] The reasonable person considering: (1) the Registrar's comment that she was willing to deviate from normal practice and meet with Mr. Ash because of the Department of Education's involvement in the matter, (2) her subsequent meeting with Mr. Ash, (3) her decision not to consult with or obtain the consent of ALI before deciding the issue, (4) the reversal of her previous decision shortly after the meeting, and (5) the speed with which the official Certificate of Name Change was issued to DBDALI, would be left with the impression that s. 16 of the *Companies Act* is applied differently by the Registry to private companies that are closely aligned with government departments than to those without such associations.

[56] Having found that the Registrar's conduct leading up to and including her decision of June 25, 2013 raised a reasonable apprehension of bias that resulted in a denial of procedural fairness to ALI, I need not consider ALI's argument that the timing and circumstances of the Registrar's disclosure of the record establishes a reasonable apprehension of bias. I would note, however, that a consequence of counsels' agreement to admit the supplementary materials outside the record is that no finding has been made by this court that these materials properly form part of the record.

The Reasonableness Analysis

[57] Even if I am wrong with respect to the existence of a reasonable apprehension of bias, I would quash the Registrar's decision on the basis that it was unreasonable.

[58] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, the Supreme Court of Canada described "reasonableness" as follows:

> **47** Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[59] More recently, in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* , 2011 SCC 62, Justice Abella, for the Court, clarified that while a reviewing court is to consider both the reasoning process and the outcome, it is not to undertake two discrete analyses. Instead, "[i]t is a more organic exercise – the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes": para. 14.

[60] Justice Abella also emphasized that the tribunal's reasons will not be held to a standard of perfection. The *Dunsmuir* criteria will be met so long as "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": para. 16.

[61] Accordingly, in assessing the reasonableness of the decision, I must consider whether the Registrar's reasons allow me to understand why she made her decision, and whether her decision not to order DBDALI to change its name falls within the range of acceptable outcomes.

[62] Before I begin reviewing the Registrar's decision, I wish to comment on the relevance to the reasonableness analysis of the Registrar's previous decision to reject the DBDALI name, an issue which generated considerable argument at the hearing. For the reasons that follow, I find that the Registrar's decision was unreasonable on the basis that she applied the wrong legal test and, as a consequence, failed to properly consider all of the relevant evidence. Having come to this conclusion, I need not offer my views on whether the previous decision is relevant to the reasonableness of the decision under review.

[63] The Registrar began her decision by setting out s. 16 of the *Act*, which prohibits registration of a company with a name that is identical to an existing registered entity, or so nearly resembling an existing registered entity "as to be calculated to deceive." She then outlined the Registry's process when it receives a complaint regarding name similarity:

> When this office receives a complaint regarding name similarity, we review all of the elements of the name to determine whether the entire name is similar to a previously registered name. Only where there is sufficient similarity to warrant further review, is a name dispute file initiated, and the other party to the dispute contacted. At such time, each party is afforded the opportunity to present their position in writing to the Registrar before any decision would be made. A direction by the Registrar to change a name is significant, so such decisions are never taken lightly.

[64] She noted that the names Delmore Buddy Daye Africentric Learning Institute and Africentric Learning Institute of Nova Scotia "are certainly not identical, nor could it be said that DBDALI is so close to ALINS as to be 'calculated to deceive' which is the threshold established in the legislation noted above."

[65] The Registrar rejected ALI's argument that the language of "calculated to deceive" used in the *Act* should be interpreted to mean "likely to deceive":

> You have suggested that the lesser threshold of "likely to deceive" is appropriate given the decision in *Dorset Seafoods Ltd. v. Dorset Fisheries Ltd.*, a decision of the Newfoundland Supreme Court. While I do not concede this to be true in Nova Scotia, in my opinion, this lesser threshold would not be met in any event, given the several differences in these two names. While the case was not included for this purpose, I would add that the *Dorset* decision involved two companies having the same distinctive element in both names, in addition to the nature of their business being the very same (although using a different single term for that activity), which is quite different than in the present circumstance.

[66] The Registrar then offered the following explanation for her conclusion that the names were not "confusingly" similar:

> The descriptive element or elements of a name are not exclusive to any one entity. Further, distinctive elements are used – as the term suggests – to distinguish. There are many organizations that could have the same descriptive elements in their registrations, but used in association with different distinctive words, are distinguishable from the others.
>
> In the present case, the names DBDALI and ALINS share the descriptive elements "Africentric Learning Institute". The words "Delmore Buddy Daye" and "of Nova Scotia", respectively, serve as their distinctive elements:
>
> > DELMORE BUDDY DAYE **AFRICENTRIC LEARNING INSTITUTE** INC.
> >
> > **AFRICENTRIC LEARNING INSTITUTE** OF NOVA SCOTIA INC.
>
> Of the six words in each (excluding the legal elements), three are common, leaving three which are different. While the names are therefore somewhat similar, when reviewed in their entirety, I do not believe that they are confusingly similar.

[67] She went on to compare the terms "Africentric Learning Institute" to "Montessori School":

> By way of an example, consider also the descriptive elements of a "Montessori School". When searched in the Registry of Joint Stock Companies database, you will find many registrations which include these terms. However, distinctive elements surrounding this description enable their differentiation, one from another which I believe is also true of the two names in question.

[68] The Registrar concluded her decision as follows:

> Based on all of the foregoing, I am not prepared to direct that the name "Delmore Buddy Daye Africentric Learning Institute Inc." be changed, nor will a name dispute file be initiated. <u>If in the future, there is some greater evidence of actual confusion between the two registrations</u>, we will review any evidence provided and make a determination of how best to proceed at that time. [*Emphasis added*]

[69] The primary flaw in the Registrar's decision is her rejection of the standard of "likely to deceive", which she considered to be a "lesser threshold" than that of "calculated to deceive." Section 16 of the Nova Scotia *Companies Act* is modeled after s. 6 of the *Companies Act*, 1862 (UK, 25 & 26 Vict.) c. 89, the first English statute dealing with company names, which provided that no company should be registered under a name identical to or so nearly resembling the name of an

existing registered entity as to be "calculated to deceive". The English legislation changed in 1948 so that the word "undesirable" was used instead of "calculated to deceive." Nova Scotia and Saskatchewan are the only two provinces that continue to use the original English wording, while other provinces use variations including "likely to deceive", "liable to be confounded with", and "likely to confuse or mislead."

[70] Neither s. 16 of the Nova Scotia Act nor s. 228(1) of the Saskatchewan legislation, *The Companies Act*, RSS 1978, c C-23, has been judicially considered. However, in *Dorset Seafoods Ltd. v. Dorset Fisheries Ltd*., 1987 CarswellNfld 62, the Newfoundland Supreme Court considered s. 22 of the *Companies Act*, RSN 1970, c. 54, which, at that time, prohibited registration of a name so nearly resembling that of a subsisting company "as to be calculated to deceive."

[71] The plaintiff in that case argued that because the legislation used the English wording, the court should not apply the reasoning in *Re CC Chemicals Ltd*., [1967] 2 OR 248, 1967 CarswellOnt 37 (CA) and *Cdn. Motorways Ltd. v. Laidlaw Motorways Ltd.*, [1974] SCR 675, authorities the plaintiff said were applicable only where the statute used the language of "likely to deceive." According to the plaintiff, the court should follow the English authorities which applied a "passing off" test in name similarity conflicts, an approach that was rejected in *CC Chemicals* and *Cdn. Motorways*. Under the passing off test, the first company must demonstrate that the second company's use of a similar name was calculated to lead other people to believe that it was actually the first company.

[72] Rejecting the plaintiff's argument, Russell, J. noted that the English statute did not give the registrar the right to direct the second company to change its name, and there was no right of review by the court. As a result, the only option available if the first company objected to the registration of the second company was to apply for an injunction against the second company, which was known as the "passing off action." In order to succeed, the plaintiff in a passing off action had to prove that the second company's use of the similar name would lead members of the public to believe it was doing business with the first company, thereby allowing the second company to take advantage of the first company's goodwill.

[73] Russell, J. explained that under the Newfoundland *Companies Act*, however, the first company was not limited to a passing off action, but could instead apply to the registrar to direct the second company to change its name. Unlike in a passing off action, the prior registration of the first company was a relevant factor. The

registrar's decision was then reviewable by the court if challenged by the second company. Consequently, the passing off test was not applicable to the situation before the court.

[74] In Russell, J.'s view, the test in *CC Chemicals* applied, notwithstanding the differences in legislative language:

> 34 In North Cheshire & Manchester Brewery Co. v Manchester Brewery Co., [1899] A.C. 83 (H.L.), Lord Halsbury at p. 84 stated that the real question in dealing with "calculated to deceive" is:
>
> > Is the name so nearly resembling the name of another firm as to be *likely to deceive?* (emphasis added)
>
> 35 Most, if not all, of the legislation in other Canadian jurisdictions use the wording "likely to deceive". In view of this I am satisfied that the test found to be applicable to legislation using the words "likely to deceive", is equally applicable to this matter.

[75] In *CC Chemicals*, Kelly, JA, for the Court, held that the test of "likely to deceive" means that deception is probable, not possible. The determination of a probability of deception would be based on the following factors:

> 38 The relevant facts which it is appropriate for the Provincial Secretary to seek and to consider when deciding whether to grant a name would be:
>
> > (a) the name of any corporation, association, partnership, individual or business with respect to which similarity might be found;
> >
> > (b) the nature of the business with which that name was then associated;
> >
> > (c) the persons or class of person who ordinarily might be expected to deal with the above-named corporation, association, partnership, individual or business;
> >
> > (d) the name sought by the applicants for incorporation;
> >
> > (e) the objects for which incorporation is sought;
> >
> > (f) any additional business activities which the applicants may have in mind beyond the actual objects set out in the application;
> >
> > (g) the persons or class of person who might ordinarily be expected to deal with the corporation sought to be incorporated.
>
> 39 Approached in the light of the awareness of the foregoing information, the Provincial Secretary must then make a decision as to whether the visual and auditory qualities of the two names are so similar that the use of the proposed

> name by the corporation to be incorporated is likely to deceive those members of the public who are dealing or may wish to deal with the existing name holder.

[76] In *Canadian Motorways*, a decision of the Supreme Court of Canada, the majority approved of the test applied in *CC Chemicals*, but held that it did not apply in the circumstances before it. In *Canadian Motorways*, the issue was not whether one company was likely to be confused with another by members of the public; it was whether the public was likely to believe that the two companies were associated with one another, even though no such association existed.

[77] In my view, as this is a case where the concern is that one company will be confused with the other, the Registrar was required to consider contextual factors like those identified in *CC Chemicals* when deciding whether to direct DBDALI to change its name.

[78] Instead of considering these factors, the Registrar rejected the case law cited by ALI and purported to apply what she considered to be the more stringent threshold of "calculated to deceive", without applying any principles of statutory interpretation or citing any authority that would give content to that standard. What is the test for determining whether a name is calculated to deceive, and how was that test applied in this case? The decision discloses no clear answers.

[79] The Registrar limited her analysis to a purely textual comparison of the names DBDALI and ALI, and noted that while she was unwilling to direct DBDALI to change its name, she would be open to reconsidering her decision "[i]f in the future, there is some greater evidence of actual confusion between the two registrations." This comment implies that the Registrar's standard requires evidence of actual confusion, which is contrary to the jurisprudence.

[80] The analysis conducted by the Registrar is superficial and unreasonable. She dismissed the *Dorset* decision without consideration of its analysis of the appropriate test, and applied a standard that apparently requires a greater than 50% tally of identical words in the business names, and evidence of actual deception. She evidently did not consider the test under s. 16 to include the contextual factors identified *CC Chemicals* and adopted by the court in *Dorset*, or indeed, any contextual factors at all.

[81] According to the test in *CC Chemicals*, before undertaking a textual analysis of the two names, the Registrar must consider the broader context in which the companies operate or intend to operate, including the nature of the business, the

objects for which incorporation is sought, and the persons or persons who might ordinarily be expected to deal with the companies in question. Only then may she proceed to an analysis of the visual and auditory aspects of the names, "in light of the awareness of the foregoing information."

[82] There are a number of contextual factors that would have informed the Registrar's textual analysis of the DBDALI and ALI names that were either referenced in ALI's submissions to the Registrar or were within her knowledge through her involvement with the incorporation of both companies. These include:

(1) ALI has been offering its services to the African Nova Scotian community since its incorporation in 2008;

(2) A pre-existing conflict existed between ALI and DBDALI regarding the use of the ALI name;

(3) Paul Ash of the Department of Education, neither an officer nor a director of ALI, attempted to change ALI's name to DBDALI without its consent;

(4) The incorporators of DBDALI created that entity for the express purpose of "taking over" the province's only Africentric Learning Institute because ALI would not consent to a name change;

(5) Both companies are purporting to provide the same services to the same community;

(6) Both companies are holding themselves out as *the* "Afrocentric Learning Institute" incorporated by CACE, as contemplated by s. 43(h) of the *Ministerial Education Act Regulations* enacted under the *Education Act*, SNS 1995-96, c 1.

[83] If the Registrar had considered these contextual factors when performing the textual analysis to determine whether there was a probability of deception, the only reasonable conclusion would have been that there was. Having failed to apply the correct test and consider the appropriate contextual factors, the Registrar's decision must be quashed as unreasonable.

Remedy

[84] The parties all agree that the ordinary remedy on an application for judicial review is to quash the administrative decision-maker's decision and remit the

matter back for reconsideration. Where the court has found a reasonable apprehension of bias, the decision is normally remitted to a different decision-maker. In the unique circumstances of this case, however, where a reasonable apprehension of bias has been found on the part of the Registrar, and there is no alternate decision-maker available to reconsider the decision, this remedy is clearly inappropriate.

[85] In *Giguère v. Chambre des notaires du Québec*, 2004 SCC 1, [2004] SCJ No 5, Deschamps, J., in dissent, though not on this point, stated:

> 65 Consequently, once it has been determined that an administrative tribunal has exceeded its jurisdiction by rendering an unreasonable decision on a matter within its jurisdiction, the case must, in theory, be sent back to it …
>
> 66 A court of law may not substitute its decision for that of an administrative decision-maker lightly or arbitrarily. It must have serious grounds for doing so. A court of law may render a decision on the merits if returning the case to the administrative tribunal would be pointless: Guindon, supra; Guilde, supra. Such is also the case when, once an illegality has been corrected, the administrative decision-maker's jurisdiction has no foundation in law: Guilde, supra. The courts may also intervene in cases where, in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable: Matane (Ville de) v. Fraternité des policiers et pompiers de la Ville de Matane inc., [1987] R.J.Q. 315 (C.A.). It is also accepted that a case may not be sent back to the competent authority if it is no longer fit to act, such as in cases where there is a reasonable apprehension of bias: Guindon, supra; Ordre des audioprothésistes du Québec v. Chanteur, [1996] R.J.Q. 539 (C.A.); Transformateurs Philips, supra; Guilde, supra.

See also *Telus Communications v. Telecommunications Workers Union*, 2014 ABCA 199, [2014] AJ No 630 at paras. 35-36; *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342, [2013] FCJ 367 at para. 119.

[86] In light of the court's finding of a reasonable apprehension of bias in this case, the Registrar is no longer fit to act. In addition, returning the case to the decision-maker would be pointless, because only one interpretation or solution is possible when the proper test is applied. Accordingly, I decline to remit the matter back to the Registrar. Instead, I will grant an order under Rule 7.11(c) requiring the Registrar to direct DBDALI to change its name.

Conclusion

[87] The judicial review application is allowed. The Registrar's decision is quashed on the basis of a reasonable apprehension of bias. This court orders the Registrar to direct DBDALI to change its name, with the change of name to be completed within 60 days of this decision.

[88] Should the parties be unable to agree on costs, I will accept written submissions within 30 days of the release of this decision.

Leblanc, J.