CITATION: Ontario Provincial Police v. MacDonald, 2009 ONCA 805
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COURT OF APPEAL FOR ONTARIO

Sharpe, Gillese and LaForme JJ.A.

IN THE MATTER OF a disciplinary hearing held pursuant to the *Police Services Act*, R.S.O. 1990, c. P.15

AND IN THE MATTER OF an application for judicial review pursuant to the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1

BETWEEN

Commissioner, Ontario Provincial Police

Appellant

and

Kenneth MacDonald and Alison Jevons

Respondents

J. Thomas Curry and Christopher E. Burkett, for the appellant

Julian N. Falconer and Sunil S. Mathai, for the respondents

Heard: September 18, 2009

On appeal from the order of the Divisional Court (Carnwath, Spence and Low JJ.) dated March 10, 2009, with reasons reported at (2009), 247 O.A.C. 289.

LaForme J.A.:

OVERVIEW

[1] This appeal originates from disciplinary action taken by the Ontario Provincial Police ("OPP") against the respondents, Superintendent K. MacDonald and Inspector A. Jevons, pursuant to the *Police Services Act*, R.S.O. 1990, c. P.15 (the "*PSA*"). Both respondents were charged with neglect of duty. Inspector Jevons was also charged with deceit. The charges arose from the respondents' internal investigation of another OPP officer, Detective Sergeant M. Zulinski.[1]

[2] The disciplinary proceedings at the heart of this matter have a long and complicated history. There have been only fifteen hearing days before the current adjudicator, all of which were occupied by pre-hearing motions. This appeal arises from a motion for recusal brought by the prosecution on the basis of a reasonable apprehension of bias. There has been no hearing on the merits. Accordingly, what follows is a brief review of the uncontested facts.

BACKGROUND

[3] On April 25, 2004, police were called to a domestic dispute involving a member of the public, Susan Cole, and her estranged husband, Sergeant Paul Alarie. She alleged that he struck her car with a baseball bat. Detective Sergeant Zulinski supervised the investigation. He declined to arrest Sergeant Alarie and no criminal charges were laid.

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[1] All police officers referred to in this judgment are members of the OPP, unless otherwise specified.

[4] As a result, Ms. Cole filed a public complaint against Sergeant Alarie under the *PSA*. The complaint was investigated and dismissed. She appealed to the Ontario Civilian Commission on Policing Services ("OCCPS"). On February 17, 2005, an OCCPS review panel determined that there was sufficient evidence to charge Sergeant Alarie with discreditable conduct and ordered a disciplinary hearing. They also ordered the OPP Professional Standards Bureau to examine the conduct of the investigating officers, and in particular, determine whether Detective Sergeant Zulinski failed to follow OPP domestic violence policies and procedures.

[5] At the time, Superintendent MacDonald was the Commander of the Professional Standards Bureau. Inspector Jevons, then a Sergeant Major with the Professional Standards Bureau, was assigned to investigate Detective Sergeant Zulinski. In her report, she found that the domestic violence policy was "clearly followed during this incident up to the point where an arrest should have occurred. It was only at this juncture, that there may have been deviation from the policy and this essentially came down to a judgment call." She concluded that the "more appropriate route" would have been to arrest Sergeant Alarie and charge him with mischief. Finally, she advised that "an educational discussion with respect to policy" had taken place and recommended that no further action be taken. Superintendent MacDonald followed her recommendation.

[6] Ms. Cole appealed this decision to the OCCPS. On February 3, 2006, an OCCPS review panel determined that there was sufficient evidence to charge Detective Sergeant

Zulinski with neglect of duty and ordered a disciplinary hearing. The disciplinary charges against Detective Sergeant Zulinski were ultimately withdrawn.

[7] On September 14, 2006, Karl Walsh, the president of the Ontario Provincial Police Association ("OPPA"), filed an internal complaint regarding Superintendent MacDonald and Inspector Jevons. The essence of the complaint was that the respondents had failed to conduct a proper investigation into Detective Sergeant Zulinski; a proper investigation would have exonerated him completely. Mr. Walsh alleged that Inspector Jevons provided "a deficient and flawed investigative report" to the OCCPS and failed to comply with the *PSA*. He further alleged that Superintendent MacDonald had full knowledge of these problems.

[8] The OPPA complaint triggered an independent disciplinary investigation, which was conducted by OPP officers seconded from the Criminal Investigations Branch. Ultimately, the investigators recommended that both Superintendent MacDonald and Inspector Jevons be charged with one count of neglect of duty, and that Inspector Jevons be further charged with one count of deceit.

The Disciplinary Hearing

[9] The respondents were served with Notices of Hearing on March 15, 2007. On July 30, 2007, Retired Superintendent M. Elbers presided for the limited purpose of setting a hearing date. He had been involved in the Detective Sergeant Zulinski matter. When the respondents brought a motion to quash the proceedings, Superintendent Elbers

advised that Retired Superintendent N. Tweedy of the Toronto Police Service had been appointed to preside over the actual hearing.

[10] On December 18, 2007, the respondents brought a motion to stay the proceedings on the basis of abuse of process. The motion hearing began on January 7, 2008. On January 8, 2008, Superintendent Tweedy recused himself because his close personal relationship with the Commissioner gave rise to a reasonable apprehension of bias. Justice Montgomery, a retired judge of the Ontario Court of Justice, was appointed the new adjudicator. He sat for the first time in June 2008. On June 10, 2008 and June 17, 2008, the respondents moved for further particulars and disclosure. The motions were granted on June 24, 2008.

[11] On July 8, 2008, the respondents brought a Fresh as Amended Notice of Motion to stay the proceedings on the basis of abuse of process. The motion hearing began in July and carried over into October. Over nine hearing days, four events occurred that, in the Commissioner's view, gave rise to a reasonable apprehension of bias. On November 5, 2008, the prosecution moved to have the adjudicator recuse himself. The adjudicator dismissed the motion for recusal on November 10, 2008.

The Divisional Court proceedings

[12] The Commissioner then brought an application for judicial review to the Divisional Court. He also moved to stay the disciplinary hearing pending the outcome of the application for judicial review. The motion judge dismissed the motion on November

27, 2008. Her order was set aside by a panel of the Divisional Court and a stay was entered on December 11, 2008: *Ontario Provincial Police (Commissioner) v. MacDonald* (2008), 244 O.A.C. 24, rev'd 2008 CanLII 65758 (the "stay decision"). This decision was not appealed.

[13] The Divisional Court dismissed the Commissioner's application for judicial review on March 10, 2009 (the "bias decision"). The Commissioner sought and was granted leave to appeal the decision to this court.

[14] The respondents cross-appeal, claiming that the Commissioner named the incorrect responding parties on the application for judicial review and that he lacked the requisite standing to bring the application.

[15] For the reasons that follow, I would dismiss the appeal. The impugned conduct falls short of establishing a reasonable apprehension of bias. I am satisfied that the decision of the Divisional Court was correct.

[16] However, I propose to first examine the issues raised in the respondents' cross-appeal. In my view, the cross-appeal should also be dismissed.

THE CROSS-APPEAL

[17] At the bias hearing, the respondents brought a motion to quash the application for judicial review on two grounds. First, they argued that the Commissioner named the wrong responding parties: he should have named the adjudicator instead of

Superintendent MacDonald and Inspector Jevons. Second, they asserted that the Commissioner lacked standing to bring the application for judicial review.

[18] The Divisional Court rejected both arguments. The respondents repeat these arguments in this cross-appeal. I disagree with both assertions advanced and conclude that the Divisional Court was correct.

(i) Was the Commissioner required to name the adjudicator as the respondent?

[19] Section 9(2) of the *Judicial Review Procedure Act* (the "*JRPA*"), which is the applicable legislative provision, is worded permissively. It provides:

> **Exerciser of power may be a party**
>
> (2) For the purposes of an application for judicial review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power *may* be a party to the application. [Emphasis added.]

[20] In *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309 (C.A.) at para. 26, this court held that this provision "gives the administrative tribunal the right to be a party to the proceeding if it chooses to do so. It leaves to the tribunal rather than the court the decision of whether to become a party to the application for judicial review". Other jurisdictions with similar statutory provisions have adopted the same interpretation: see, for example, *Brewer v. Fraser Milner Casgrain LLP* (2008), 432 A.R. 188 (Alta C.A.).

[21] I also note the following passage from D. Brown & J.M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Canvasback Publishing, 2005) at 4-54 to 4-55: "Other than in the Federal Court, most jurisdictions contemplate service upon the person or agency responsible for the impugned administration action, and the courts usually permit that person or agency to be added as a party respondent".

[22] In sum, the respondents are incorrect; there is no requirement in Ontario that the adjudicator be named as a respondent in an application for judicial review.

[23] The respondents are also wrong when they suggest that they were improperly named as respondents. As noted by Brown & Evans at 4-1 and 4-64, "[t]he law of standing that deals with identifying the proper respondent to a judicial review proceeding has attracted relatively little judicial attention", but there is a "general rule that all persons necessary for the proper adjudication of a matter should be named as parties". Indeed, r. 5.03(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 states, "Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding".

[24] I have already concluded that the adjudicator need not be named. Put simply, if the respondents are correct that they were improperly named, there would be no one left for the Commissioner to name on the application for judicial review. This would be an absurd result. This part of the cross-appeal must therefore be dismissed.

(ii) Did the Commissioner have standing to bring the application for judicial review?

[25] I would dismiss this part of the cross-appeal for procedural reasons. The issue of standing was argued unsuccessfully in the stay decision of December 11, 2008, from which no appeal was taken. In my view, this court should not permit the respondents to reargue the issue at this point in the proceedings.

[26] The stay decision addressed both the Commissioner's application to stay the disciplinary proceedings pending the determination of the application for judicial review, and the respondents' cross-motion to quash the application on the basis that the Commissioner lacked standing. The cross-motion was dismissed by all three judges of the Divisional Court.

[27] The respondents attempted to reargue the issue of standing at the hearing of the application for judicial review. At para. 15 of the bias decision, the Divisional Court stated:

> It would not be in order for this Court to address the grounds that have previously been advanced to the Court in the previous unsuccessful motion to quash. Moreover, since that motion has been dismissed, *the proper course for the Respondents would have been to seek leave to appeal that decision* rather than now to move a second time for the same relief. [Emphasis added.]

[28] The Divisional Court, in my view, was entirely correct to dispose of the motion to quash in the above manner. Unlike *Sigesmund v. The Royal College of Dental Surgeons of Ontario* (2006), 81 O.R. (3d) 659 (C.A.), the respondents do not raise a different or

new issue, but instead raise an issue that has already been ruled on in a different proceeding.

[29] Having failed to appeal the stay decision, the respondents cannot now be said to be prejudiced. I would adopt the conclusion of Weiler J.A. in *Law Society of Upper Canada v. Igbinosun* (2009), 96 O.R. (3d) 138 (C.A.) at para. 74: "[T]here is no injustice in refusing to allow [the respondents] to re-argue the matter in a new hearing". I would, therefore, also dismiss this part of the cross-appeal.

[30] Having disposed of the cross-appeal in its entirety, I turn now to the main appeal.

THE MAIN APPEAL

[31] The bias decision comprehensively sets out the four events that allegedly give rise to a reasonable apprehension of bias on the part of the adjudicator. I find it unnecessary to repeat the facts in the same detail, although I will refer to examples as needed to provide context for my conclusions.

[32] In his factum, the Commissioner sets out four grounds of appeal, which he prefaces with the assertion that "this appeal relates to the unqualified and independent right of those appearing before administrative boards to be treated fairly". In other words, he alleges a denial of natural justice. I believe that this appeal can be disposed of by answering the following two questions:

(i) What standard of review should the Divisional Court have applied to the adjudicator's decision on the recusal motion?

(ii) Did the Divisional Court fall into error by repeatedly referring to the adjudicator's conduct as "reasonable"?

[33] In answering these two questions, I conclude that the Divisional Court did not err in the fashion alleged by the Commissioner. It thus becomes wholly unnecessary for this court to examine the events afresh. Accordingly, I would dismiss the appeal.

(i) What standard of review should the Divisional Court have applied to the adjudicator's decision on the recusal motion?

[34] The Commissioner argues that an adjudicator's decision on a recusal motion based on an allegation of perceived bias is reviewable on a standard of correctness. He asserts that the Divisional Court effectively applied a reasonableness standard by assessing the conduct of the adjudicator from the perspective of an appellate court rather than that of a reasonable, informed and right-minded person.

[35] I agree that there is some jurisprudential support for the application of a correctness standard. I also note that the Divisional Court was silent on the issue of standard of review. However, my view is that the Divisional Court's approach in this case was correct.

[36] The Divisional Court has consistently held that it is not necessary to consider standard of review when a decision is challenged on the basis of a denial of natural justice, as it is here: see *Canadian College of Business and Computers Inc. v. Ontario (Private Career Colleges Act, Superintendent)* (2009), 251 O.A.C. 221 (Div. Ct.) at para. 11, citing *London (City) v. Ayerswood Development Corp.* (2002), 167 O.A.C. 120 (C.A.)

at para. 10. Support for this approach is found in the comments of Arbour J. in *Moreau-Bérubé v. Nouveau-Brunswick*, [2002] 1 S.C.R. 249 at para. 74, where she says:

> [Procedural fairness] requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation.

[37] In my view, it was unnecessary for the Divisional Court to even address the issue of standard of review because procedural fairness does not require an assessment of the appropriate standard of review. The proper approach is to ask whether the requirements of procedural fairness and natural justice in the particular circumstances have been met: *Forestall v. Toronto Services Board* (2007), 228 O.A.C. 202 (Div. Ct.) at para. 38. The Divisional Court followed this course and, in my view, it committed no error in doing so.

[38] I pause to observe that the above cases arose from challenges to final decisions rather than interlocutory rulings like the one at issue. In my view, this is not a meaningful difference. If, as the recusal motion alleges, there exists a reasonable apprehension of bias that would taint the final decision, that same apprehension of bias taints the decision on the recusal motion itself. Further, there is no reason why the Divisional Court should approach an interlocutory ruling on bias in a different manner than if the issue was raised after the completion of the proceedings.

(ii) Did the Divisional Court err by repeatedly referring to the adjudicator's conduct as "reasonable"?

[39] Next, the Commissioner submits that the Divisional Court erred by focusing on whether the impugned conduct was reasonable instead of conducting a probing appraisal of the adjudicator's conduct from the perspective of a reasonable, informed and right-minded person. He cites, as an example of the alleged error, the following passage at para. 89 of the bias decision:

> The rulings that the Adjudicator made on the issue of the Commissioner's answers were, in the context of the objections raised by the Respondents and in view of the gratuitous response of the Commissioner after the recess, *reasonably made in the circumstances*. [Emphasis added.]

[40] In my view, there is no reason to conclude that the Divisional Court applied the incorrect test in assessing whether the adjudicator's conduct gave rise to a reasonable apprehension of bias. Indeed, at paras. 18-26 of the bias decision, the court accurately reviews the law on reasonable apprehension of bias. Moreover, I believe that an assessment of the reasonableness of the impugned conduct is a proper step in determining whether that conduct gave rise to a reasonable apprehension of bias.

Test for reasonable apprehension of bias

[41] It has long been established that the removal of an adjudicator is appropriate where a reasonable apprehension of bias has been demonstrated. The applicable legal test was set out in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394:

> [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... [The] test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude..."

[42] The test contains a two-fold objective element: first, the person considering the alleged bias must be reasonable; and second, the apprehension of bias itself must also be reasonable. The jurisprudence in Canada has, over the years, defined and fleshed out these two elements. For example, the reasonable person is vested with knowledge and understanding of the judicial process and the nature of judging. Further, "[t]he grounds for this apprehension must ... be substantial... and the test [will not] be related to the very sensitive... conscience": *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at paras. 31 and 37.

[43] The reasonable person also knows and considers the context surrounding the impugned behaviour, including the length and difficulty of the proceedings: *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at para. 77; *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 (C.A.).

[44] There is one final, essential element that informs the analysis: the strong presumption of judicial impartiality and integrity. The onus rests on the applicant to demonstrate a reasonable apprehension of bias, and the threshold is a high one: see, for example, *R. v. Brown* (2003), 64 O.R. (3d) 161 (C.A.) at paras. 37-39; *Chainauskas Estate v. Reed* (2009), 251 O.A.C. 209 (C.A.) at para. 12.

The Divisional Court

[45] As noted above, the Commissioner points to four events in support of his allegation of a reasonable apprehension of bias on the part of the adjudicator.

[46] The first event stemmed from the inadvertent disclosure of a confidential document by a prosecution witness, Inspector K. Messham, to the respondents. The adjudicator expressed his frustration when, after considerable debate and discussion, Superintendent VanZant, the lead investigating officer, indicated that he could not give an undertaking that Inspector Messham would not be charged with a contravention of s. 80 of the *PSA*. The appellant submits that the adjudicator's comments reflected an unfair criticism of Superintendent VanZant and the prosecutor, giving rise to an appearance of bias. The Divisional Court thoroughly reviewed the record and concluded at para. 37:

> The fairest view of the exchange, as regards the evidence of Inspector Messham, is that at the 5:00 p.m. end of a day in which it appeared little progress with the hearing had been made, the Adjudicator expressed his frustration that a great deal of time had been wasted. Judges and counsel know that such things happen from time to time. Hearings sometimes take unexpected turns and that, compounded by the complexity of the law, can result in the expenditure of more time than expected. Reasonable counsel would perceive the comment about a waste of time to be an admonition to them to try to avoid falling into the trap of such time-consuming complications unnecessarily. Judges give such admonitions to counsel often enough that experienced counsel should know that this goes with the nature of the work and is not to be taken personally.

[47] The second event arose from a claim of work-product privilege by the prosecution over a set of interview notes. The adjudicator rejected the prosecution's claim and, after the prosecutor described the ruling as "exceptional", the adjudicator expressed his concern that the prosecution was resisting disclosure of the notes and over the amount of time being taken with the issue. He stated: "[W]e get so academic that we lose sight of the real issue". Again, the appellant submits that the adjudicator's remarks reflected an unfair adverse criticism of the prosecutor giving rise to an appearance of bias.

[48] The Divisional Court found, at para. 51, that the adjudicator's disclosure rulings were "manifestly reasonable" and, at para. 54, that there was nothing in what the adjudicator had said "to alter the view expressed above that the Adjudicator has acted reasonably in this regard".

[49] The third event occurred in response to the possibility that during his testimony, the Commissioner had disregarded the adjudicator's ruling that he could not use a particular exhibit to refresh his memory. The adjudicator indicated that he was disturbed by what had occurred, that it was "getting close to professional conduct" and that it was "something I'll have to deal with when I come to do my thing". The Divisional Court rejected the submission that this incident gave rise to a reasonable apprehension of bias and noted, at para. 84, that the adjudicator said he was "not pointing the finger" at counsel for the prosecution. The adjudicator, held the court, was entitled to indicate his concern and, at para. 85, the court found: "It was surely in order for the Adjudicator to put counsel on notice this way so that they could consider how best to address the issue".

The court rejected, at para. 86, the contention that the adjudicator's comments indicated that he had effectively made an adverse credibility finding against the Commissioner: "He opened the issue; he did not close it". The court concluded, at para. 89:

> The rulings that the Adjudicator made on the issue of the Commissioner's answers were, in the context of the objections raised by the Respondents and in view of the gratuitous response of the Commissioner after the recess, reasonably made in the circumstances. For the above reasons, the actions of the Adjudicator relating to the testimony of the Commissioner do not give rise to a reasonable apprehension of bias.

[50] The fourth and final event was triggered by a statement by the prosecutor in answer to a question from the adjudicator about the prosecution's apparent change of position when, shortly after discussing the timetable for the hearing, the prosecutor brought the recusal motion. The prosecutor stated that the reason was that he had had some discussion with counsel at the Ministry of the Attorney General and had been told that the Attorney General would support the prosecution "in the event of taking any further steps", thereby clearly implying that the prosecutor had elicited the support of the Attorney General for a judicial review application should the adjudicator refuse to recuse himself. In his recusal ruling, the adjudicator described the prosecutor's comments as "highly improper" and "particularly shocking since at the time they were made I had not yet made a decision to voluntarily remove myself or not". He further stated that they might appear to be an "attempt to pressure and to intimidate a judicial officer".

[51] The Divisional Court observed that while the prosecutor's comments may have been responsive to the adjudicator's question, the relevance of the Attorney General's position was, at para. 122, "not evident" as the prosecution was obliged to raise the issue of bias as soon as the apprehension of bias arose, and that "it would have been reasonable for the Adjudicator to wonder why that support was mentioned". While the adjudicator's remarks could, at para. 125, "[a]t first blush" appear to amount to "an overreaction and a reason to apprehend bias", they were more properly viewed as being directed at the prosecutor's "specific impugned remarks" rather than at his professional standing. The court concluded, at para. 126, that when considered in the light of all the circumstances: "[T]he Adjudicator's reaction to the impugned remarks was reasonable. That reaction does not give rise to a reasonable apprehension of bias."

Analysis

[52] The Commissioner argues that these continual references to the reasonableness of the adjudicator's conduct and rulings demonstrate that the Divisional Court applied the wrong test for reasonable apprehension of bias and standard of review. I disagree.

[53] It seems clear to me that the Divisional Court reasoned in the following manner:

- the rulings of the adjudicator were reasonable;
- the comments of the adjudicator were understandable, given the difficulty, length and politically charged nature of the proceedings;
- given the above, the reasonable, informed, right-minded person would not think that the adjudicator was biased;

- therefore, the adjudicator was correct in not recusing himself.

[54] This chain of reasoning is perfectly acceptable. The reasonableness of a ruling is relevant to the question whether there is a reasonable apprehension of bias. Absent other factors, it is nonsensical to suggest that a reasonably conducted hearing or a reasonable ruling can give rise to an apprehension of bias. Moreover, I am not persuaded that there is any reason to disagree with the Divisional Court's characterization of the adjudicator's response to the four incidents that were raised in support of the application for judicial review and that formed the basis for this appeal. Whether considered individually or cumulatively, those incidents fall well short of supporting the claim of reasonable apprehension of bias.

[55] It is also worth noting that in *Marchand*, this court held that no reasonable apprehension of bias arose from the conduct of the trial judge because "the trial judge did not act improperly"; there was "nothing unfairly critical in the trial judge's comments"; and there was nothing "unfair in the trial judge's observations". The court emphasized that the trial judge had a right to intervene "in order to try to control this difficult trial and to understand the evidence".

[56] Similarly, in *R. v. McCullough*, [1998] O.J. No. 2914 (C.A.) at para. 17, this court found no apprehension of bias where "[t]he trial judge's inquiries of the conduct of a witness and the appellant's counsel were neither unreasonable nor otherwise improper" and "[h]e expressed his concerns in a reasonable manner." The language used by this

court in *Marchand* and *McCullough* is markedly similar to that used by the Divisional Court in this case. Accordingly, the Divisional Court did not err in its analysis of the adjudicator's conduct.

[57] The Commissioner also argues, especially in respect of Inspector Messham, that the court improperly used the perspective of reasonable *counsel* rather than of a reasonable person. Again, I disagree.

[58] When considering the impugned comments of the adjudicator, the words of Doherty J.A. in *Kelly v. Palazzo* (2008), 89 O.R. (3d) 111 (C.A.) at para. 21 are apposite:

> It takes much more than a demonstration of judicial impatience with counsel or even downright rudeness to dispel the strong presumption of impartiality. While litigants may not appreciate that presumption and thus may misread judicial conduct, lawyers are expected to appreciate that presumption and, where necessary, explain it to their clients.

[59] In other words, the knowledge and understanding of the reasonable person approaches that of counsel. This is not a surprising result; counsel are in fact vested with much of the same knowledge that is, as a matter of law, attributed to the reasonable observer. Accordingly, in my view, the Divisional Court was aware of and correctly applied the "reasonable person" standard.

Conclusion

[60] For the above reasons, I conclude that the Commissioner has not met the high threshold required to demonstrate a reasonable apprehension of bias on the part of the

adjudicator. The Divisional Court found that an informed person viewing the matter realistically and practically – and having thought the matter through – would not conclude there was any apprehension of bias on the part of the adjudicator. I would go further and say that the events in this case fall far short of the type of conduct that would give rise to a reasonable apprehension of bias.

[61] I would, therefore, dismiss the appeal. Given this result, it is unnecessary to address the respondents' fresh evidence application.

DISPOSITION

[62] The Commissioner has not established a reasonable apprehension of bias on the part of the adjudicator. The appeal is dismissed.

[63] There is no requirement that the adjudicator be named as a respondent in an application for judicial review. The respondents were properly named. The issue of standing was not properly before this court. The cross-appeal is dismissed.

[64] Finally, I would award costs to the respondents for both the leave application and this appeal in the aggregate amount of $20,000 inclusive of disbursements and GST. The Commissioner advised that he was not seeking costs; therefore, I would make no order regarding costs on the cross-appeal.

RELEASED: RJS

NOV 13 2009

J.A.

I agree Robert J. Sharpe J.A.

I agree K.M. Weiler J.A.