Court of Appeal for Saskatchewan

Docket: CACV2425

Citation: ***DeMaria v Law Society of Saskatchewan*, 2015 SKCA 106**

Date: 2015-10-09

Between:

Daniel DeMaria

Appellant
(Applicant)

And

The Law Society of Saskatchewan

Respondent
(Respondent)

Before:	Ottenbreit, Caldwell and Ryan-Froslie JJ.A.
Disposition:	Appeal Dismissed
Written reasons by:	The Honourable Mr. Justice Caldwell
In concurrence:	The Honourable Mr. Justice Ottenbreit The Honourable Madam Justice Ryan-Froslie
On Appeal From:	2013 SKQB 178, J.C. of Regina
Heard:	June 25, 2015
Counsel:	Daniel DeMaria for himself Fred C. Zinkhan for the Respondent

Caldwell J.A.

I. INTRODUCTION

[1] Daniel DeMaria appeals from the decision of a Queen's Bench Chambers judge sitting in judicial review of a decision of the benchers [the Benchers] of the Law Society of Saskatchewan who, in their turn, were sitting in review of—and upheld—a decision of a panel of three Benchers [the A&E Panel] of the Law Society's Admissions and Education Committee [the A&E Committee]. The A&E Panel had refused Mr. DeMaria's application for admission into the membership of the Law Society as a lawyer. The Chambers judge dismissed Mr. DeMaria's application, finding the Law Society decisions were correct on matters of law and were otherwise reasonable.

[2] While Mr. DeMaria raised a number of grounds of appeal, for the most part I find the Chambers judge's choice and application of the standards of review, as well as her first-instance findings of fact and law as to the alleged 'doctoring' of Law Society documents, meeting quorum requirements and the type of proceedings under review (*i.e.*, admissions versus disciplinary) are unassailable (see her reasons, indexed as 2013 SKQB 178). Moreover, Mr. DeMaria's claim for an order of *mandamus* requiring the Law Society to admit him as a lawyer is unquestionably beyond reach in the context of this appeal. Only one of Mr. DeMaria's grounds of appeal has any traction before this Court: that is, his allegation of a reasonable apprehension of bias. Nevertheless, as I will explain, I am not persuaded to allow the appeal on that basis.

II. BACKGROUND

[3] The legal profession in Saskatchewan is self-governing. The Legislature has empowered the Law Society, acting through the Benchers and in the public interest, to regulate lawyers and students-at-law: *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1 [the *Act*]. Chiefly, this involves setting and enforcing standards for admissions, education, professional conduct and quality of legal services. To enforce its standards, the Law Society conducts disciplinary proceedings and imposes sanctions against lawyers and students-at-law who violate its standards. Under the rubric of setting and enforcing standards, one of the primary responsibilities of the

Law Society is protection of the public by ensuring that only those individuals who are qualified to practice law are admitted to the profession as lawyers.

[4] To become a member—that is, to become a Saskatchewan lawyer—an individual must apply for admission and satisfy the Law Society of certain integrity and competency requirements, which for aspiring students-at-law includes completion of the bar admissions program. Under the admissions process, applicants undergo a review by the Benchers who assess the suitability of the applicant for membership and determine whether admission as a member would be "inimical to the best interests of the public or the members or would harm the standing of the legal profession generally". In 2010, this assessment process was set out under what is now old Rule 180(1)(b) of the *Rules of the Law Society of Saskatchewan* [the *Rules*]; the *Rules* have since been amended, but this decision rests on the *Rules* as they were when Mr. DeMaria applied for admission.

[5] In the circumstances of this case, the Law Society conducted a more formal assessment than usual in relation to Mr. DeMaria, who was a student-at-law applicant for admission. This was so because Mr. DeMaria had been the subject of academic sanction by reason of the nature of his participation in the bar admission program, which had given rise to very serious questions as to his character and his suitability to become a lawyer (see the August 18, September 8, and December 11, 2009, A&E Committee decisions in this regard, located online at: http://www.lawsociety.sk.ca/media/35559/demaria_mercierdecision.pdf). Given this and the requirements of Rule 180, the Executive Director of the Law Society referred Mr. DeMaria's application for admission to the A&E Committee, which in turn availed itself of its discretion under Rule 180(1)(c) to order a Rule 230 hearing before the A&E Panel so as to assist with its determination of whether Mr. DeMaria ought to be admitted as a lawyer.

[6] Between December 2010 and April 2011, the A&E Panel held a three-day *viva voce* hearing on the issue at which both Mr. DeMaria, through his legal counsel, and the Law Society, through its in-house legal counsel, adduced evidence. Mr. DeMaria, who had the onus under Rule 230(13) of satisfying the A&E Panel that he met the requirements of the *Act* and the *Rules*, sought and obtained permission to adduce evidence before and after the Law Society had

presented the case he had to meet. But, in the result, the A&E Panel found it had received evidence of a lack of good character sufficient to refuse him admission.

[7] Given this result, Mr. DeMaria asked the Benchers, pursuant to s. 24(3) of the *Act* and Rule 240(3), to review the A&E Panel's decision. The Benchers conducted their review hearing on December 9, 2011, with the benefit of the transcripts of the *viva voce* hearing as well as some fresh affidavit evidence adduced by Mr. DeMaria. The fresh evidence consisted, *inter alia*, of unofficial transcripts of conversations Mr. DeMaria had recorded, his allegations that his legal counsel had been ineffective at the *viva voce* hearing by reason of a malfunctioning hearing aid, an explanation as to why a psychologist had not testified for him at the *viva voce* hearing, and copies of some electronic messages exchanged between himself and his work colleagues. Mr. DeMaria was not represented by counsel at the Benchers' review hearing. In result of their review, which they conducted on the standard of reasonableness, the Benchers found it was "open for [the A&E Panel] to conclude [Mr. DeMaria] had not met his onus of proving good character and to deny [him] admission to the Law Society on the grounds stated in its Decision."

[8] Mr. DeMaria then applied to the Court of Queen's Bench for Saskatchewan, seeking judicial review—there being no right to appeal from the Benchers' decision—and injunctive relief in relation to aspects of the A&E Panel's decision and the Benchers' decision to uphold it. As noted, when the matter came before the Chambers judge on May 10, 2013, she upheld the Benchers' decision—and thereby upheld the A&E Panel's decision—finding that the Law Society's refusal of Mr. DeMaria's application for admission was reasonable and that underlying decisions on matters of law had been determined correctly.

III. ISSUES

[9] Mr. DeMaria appeals from the Chambers judge's findings in judicial review of the Bencher's decision as well as from a number of her findings with respect to the procedural fairness issues Mr. DeMaria had raised at first instance before her. I have categorised the grounds of appeal as whether the Chambers judge:

(a) chose and applied the correct standard in her review of the Law Society's determinations of credibility and findings of fact;

(b) correctly chose and applied the standard of *correctness* in her review of the Law Society's decision to consider good character as a factor in its assessment of Mr. DeMaria's application for admission;

(c) erred in fact when she found the A&E Panel's decision had not been 'doctored';

(d) erred in fact or law when concluding the proceedings under review were *admissions* proceedings, as opposed to *disciplinary* proceedings;

(e) erred in fact or law when finding the Benchers had met the quorum requirements for their review hearing;

(f) correctly found there was no reasonable apprehension of bias on the part of the A&E Panel or the Benchers; and

(g) correctly declined to grant a *mandamus* order requiring the Law Society to admit Mr. DeMaria as a lawyer.

But, as I will now explain, only the allegation of a reasonable apprehension of bias has any basis for it.

IV. ANALYSIS

A. Did the Chambers judge choose and apply the correct standard in her review of the Law Society's determinations of credibility and findings of fact?

[10] Findings of fact and assessments of credibility made by an administrative tribunal, such as those made by the A&E Panel, are reviewable on a standard of *palpable and overriding error*: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], *per* Deschamps J. (Charron and Rothstein JJ. concurring). Mr. DeMaria must therefore demonstrate a *palpable and overriding* error on the part of the A&E Panel in their findings of fact and assessments of credibility, or an error of approach or analysis on the part of the Benchers or the Chambers judge in their respective reviews of the A&E Panel's findings. In *H.L. v Canada (Attorney General)*, 2005 SCC 25, [2005] 1 SCR 401, the

Supreme Court said that the *palpable* aspect of the standard may be met where the findings are "unreasonable" or "unsupported by the evidence".

[11] That Mr. DeMaria disagrees with some of the A&E Panel's findings is clear, but it is not enough. As the record indicates and as the Chambers judge correctly concluded, the findings of the A&E Panel are amply supported by the evidence that was before it and, for this reason, its findings cannot be said to be unreasonable. In short, the Chambers judge correctly found there was no basis upon which to interfere with the factual and credibility findings that underpin the decisions below.

B. Did the Chambers judge correctly choose and apply the standard of ***correctness*** in her review of the Law Society's decision to consider good character?

[12] The issue before the Chambers judge and the Benchers called for them each to review the interpretation given to the *Act* and the *Rules* by the A&E Panel. The A&E Panel had determined to consider Mr. DeMaria's *character* in the course of its assessment of his fitness to be admitted as a lawyer. The A&E Panel reached this conclusion chiefly on the basis of Rule 180(1)(b), which mandated that the A&E Committee "shall consider whether the admission is *inimical to the best interests of the public or the members or would harm the standing of the legal profession generally*" (emphasis added). Mr. DeMaria resisted this interpretation because the Legislature had amended s. 24(1) of the *Act* to remove reference to a requirement of *good character* just two months prior to his application for membership. Before amendment, s. 24(1)(b) of the *Act* had required that an applicant produce "testimonials satisfactory to the benchers of good character".

[13] In this way, the interpretation of Rule 180(1)(b), in the context of amendments to the *Act*, is arguably a question of law; and, therefore, the Benchers and the Chambers judge each proceeded to review it on a standard of *correctness*. However, in that the A&E Panel had been called upon to interpret its *home statute* and its own rules (as promulgated by the Law Society under its *home statute*), I find the correct standard of review is that of *reasonableness*: *Dunsmuir*; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654. In this regard, I find the Chambers judge and the Benchers both erred.

[14] However, these errors as to the choice of standard of review have no actual bearing—for the purposes of this appeal—on the overall conclusion that the A&E Panel could consider an applicant's *character* in its assessment of the applicant's application for admission under Rule 180. This is so because the Benchers and the Chambers judge had both found the A&E Panel's interpretation was the *correct* interpretation. That is to say, given this outcome, the application of the *more deferential standard* of reasonableness by either the Benchers or the Chambers judge could not produce the outcome Mr. DeMaria seeks.

[15] To be clear, on the application of the standard of reasonableness to this question, I find the A&E Panel's conclusion that it could take into account evidence of Mr. DeMaria's character in its assessment under Rule 180 falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law, largely for the very reasons given by the Chambers judge in her correctness review.

[16] In short, as the A&E Panel's interpretation of the *Act* and the *Rules* is not unreasonable, the Chambers judge's conclusion confirming there was no basis for the Benchers to interfere with the A&E Panel's decision in this regard was correct.

C. Did the Chambers judge err when she found the A&E Panel's decision had not been 'doctored'?

[17] Although still under the rubric of judicial review, each of the remaining grounds of appeal address the Chambers judge's handling of the fresh allegations before her that there had been a denial of procedural fairness or natural justice in the proceedings below her. The first of these is that the Law Society had somehow 'doctored' the A&E Panel's decision—*i.e.*, that it did not represent the decision of the decision-makers.

[18] I will not repeat the evidence set out in the Chambers judge's reasons. Some of the basis for Mr. DeMaria's allegation is set out in the analysis below on the question of bias. But, suffice it to say, there were some disconcerting irregularities and continuity concerns in the way the A&E Panel and the Law Society had handled the preparation, execution, collation and distribution of the A&E Panel's final decision. However, these irregularities and concerns were explained by the Law Society in evidence it adduced before the Chambers judge in a way that

detached them from any impropriety. Moreover, the evidence as a whole supported the Chambers judge's finding that Law Society personnel had had only a "limited administrative or clerical role in directing the correction of formatting errors brought about by the use of different versions of word processing software or platforms" and that the involvement of the Law Society's in-house counsel with the final decision had been "merely of a clerical or formatting nature".

[19] That said, I would strongly echo the Chambers judge's statement that the irregularities and concerns that underpin this ground of appeal "all raise legitimate concerns about the integrity of the process itself." The A&E Panel and the Law Society handled the A&E Panel's final decision in a sloppy manner. The evidence bears out an absence of impropriety, but the Law Society can take no pride in that result because it should not have had to prove an absence of impropriety at all.

D. Did the Chambers judge err by concluding the proceedings were *admissions* proceedings?

[20] This ground of appeal is meritless. I have no doubt the Chambers judge correctly found that the decisions she was called upon to review had arisen in the course of *admissions* proceedings. I say this because *nothing* in the record before this Court even suggests that the proceedings were other than admissions proceedings. As the Chambers judge observed, Mr. DeMaria himself initiated the proceedings that underpin this appeal by applying for admission as a lawyer in accordance with the *Act* and the *Rules*. The Law Society responded to his application, but it did not initiate any other proceedings in response. Certainly, the A&E Panel heard evidence of conduct on the part of Mr. DeMaria that had already given rise to the imposition of sanctions against him in respect of the bar admissions program. And, arguably, the Law Society could have pursued disciplinary proceedings against Mr. DeMaria as a student-at-law member in respect of some of his alleged conduct (*i.e.*, as had been set out in the evidence before the panel). But, it is a simple fact that the only matters before the Chambers judge were those that had arisen in the course of *admissions* proceedings before the A&E Committee. Of this, there can be no question.

E. Did the Chambers judge err by finding the Benchers had met quorum?

[21] For the reasons set forth by the Chambers judge, I would summarily dismiss this ground of appeal. The Chambers judge committed no error in law or of fact by finding that the Benchers, when sitting in review of the A&E Panel's decision, had satisfied the legal quorum requirements for a meeting of Benchers.

F. Did the Chambers judge err when she found no reasonable apprehension of bias?

[22] I turn now to consider Mr. DeMaria's allegations of a reasonable apprehension of bias arising from the circumstances of the Law Society's consideration of his application for admission. At its core, Mr. DeMaria alleges the Law Society breached the rules of procedural fairness or natural justice by denying him the right to have his application for admission considered by an impartial decision-maker. To be clear, Mr. DeMaria alleges a reasonable apprehension of bias on the parts of each of the A&E Panel and the Benchers in their separate roles in this matter. Nevertheless, the nature of the evidence and the allegations also asks whether a reasonable apprehension of bias may be made out on the whole of the matter.

1. The Law

[23] I begin to examine the cogency of Mr. DeMaria's allegations by identifying the test for a reasonable apprehension of bias, which is correctly stated as whether "an informed person, viewing the matter realistically and practically and having thought the matter through," would hold "a reasonable apprehension of bias" on the part of the decision-maker (*Committee for Justice & Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at 395, *per* de Grandpré J. [*National Energy Board*]). de Grandpré J. also said: "The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience'."

[24] The *National Energy Board* test is applied to the facts of a matter in a way that recognises that the integrity of the administration of justice must give rise to a strong presumption that adjudicators will act fairly and impartially. The Supreme Court recently

reinforced this point in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25, 383 DLR (4th) 579, where Abella J., for the Court, wrote:

> [30] In *Miglin* [(2001), 53 OR (3d) 641 at paras. 29-30 (ONCA)], another case where the allegation of bias arose because of the trial judge's interventions, this Court agreed with the Court of Appeal for Ontario that while many of the trial judge's interventions were unfortunate and reflected impatience with one of the witnesses, the high threshold necessary to establish a reasonable apprehension of bias had not been met. The Court of Appeal observed:
>
>> The principle [that the grounds for an apprehension of bias must be substantial] was adopted and amplified in *R. v. S. (R.D.)* ... to reflect the overriding principle that the judge's words and conduct must demonstrate to a reasonable and informed person that he or she is open to the evidence and arguments presented. *The threshold for bias is a high one because the integrity of the administration of justice presumes fairness, impartiality and integrity in the performance of the judicial role, a presumption that can only be rebutted by evidence of an unfair trial*. Where, however, the presumption is so rebutted, the integrity of the justice system demands a new trial.
>>
>> The assessment of judicial bias is a difficult one. It requires a careful and thorough review of the proceedings, since the cumulative effect of the alleged improprieties is more relevant than any single transgression.
>
> [Emphasis added]

This same approach applies to administrative tribunals; although, perhaps with lesser vigour, depending on the context.

[25] Pointedly, in *R v S. (R.D.),* [1997] 3 SCR 484 [*S. (R.D.)*], Cory J. (Iacobucci J. concurring; La Forest and Gonthier JJ. concurring under separate reasons; and L'Heureux-Dubé and McLachlin JJ. concurring under separate reasons) said this in respect of the evidentiary burden on a litigant who alleges a reasonable apprehension of bias on the part of a judge:

> 112 The appellant submitted that the test requires a demonstration of "real likelihood" of bias, in the sense that bias is probable, rather than a "mere suspicion". This submission appears to be unnecessary in light of the sound observations of de Grandpré J. in *Committee for Justice and Liberty*, *supra*, at pp. 394-95:
>
>> I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis in original]
>
> Nonetheless the English and Canadian case law does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a

mere suspicion is not enough. See *R. v. Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850 (Q.B.D.); *Metropolitan Properties Co. v. Lannon*, [1969] 1 Q.B. 577 (C.A.); *R. v. Gough*, [1993] 2 W.L.R. 883 (H.L.); *Bertram*, *supra*, at p. 53; *Stark*, *supra*, at para. 74; *Gushman, supra*, at para. 30.

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

114 The onus of demonstrating bias lies with the person who is alleging its existence: *Bertram*, *supra*, at p. 28; *Lin*, *supra*, at para. 30. Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case.

2. The Facts

[26] With that basis for the test for a reasonable apprehension of bias, and to set the factual framework for his allegation, I observe that Mr. DeMaria has averred in his affidavits that:

(a) the Law Society's in-house counsel, who appeared *for* the Law Society at the Bencher review hearing, ate breakfast in the hearing room with the Benchers immediately before the Benchers undertook their review of the A&E Panel decision, and remained in the hearing room with the Benchers for "at least ten minutes" after the hearing had concluded and Mr. DeMaria had left;

(b) the Benchers disregarded Mr. DeMaria's objection to the appearance of the Law Society's in-house counsel at the review hearing—he alleges the Benchers obtained an undertaking from him not to raise the issue "in the context of any future review or appeal";

(c) the Benchers failed to issue their decision until more than seven months after the review hearing date;

(d) one Bencher's name was deleted from the list of Benchers on the Law Society's website;

(e) one Bencher, who sat on the review of the A&E Panel's decision, made negative statements about Mr. DeMaria and Mr. DeMaria's employer and discussed Mr. DeMaria's case when interviewing a prospective employee, which occurred *before* the Benchers had rendered their decision;

(f) one Bencher took into consideration evidence that was not properly before the Benchers, of which Mr. DeMaria had no notice and no opportunity to answer, and that was discriminatory;

(g) the Bencher who served as chair of the A&E Panel had contacted the Law Society's in-house counsel directly about the A&E Panel's decision *before* that decision had been released to Mr. DeMaria and, at the end of which communication, the Bencher invited the Law Society's in-house counsel to play golf with him; and

(h) one Bencher, who sat on the review of the A&E Panel's decision, is a 'friend' of the Law Society's in-house counsel on Facebook.

[27] However, some of Mr. DeMaria's evidence does not bear up under scrutiny as being supportive of his allegation of an apprehension of bias. In particular, the *evidence* that a Bencher had made negative statements about him when interviewing a member of the public is not supported by an affidavit from anyone other than Mr. DeMaria himself, who was not present when the statements were allegedly made. In short, it is a valueless allegation. This hearsay evidence is also apparently used to support the allegation that the same Bencher himself took extraneous evidence into consideration—which, if proven, might have tainted the hearing with questions of procedural fairness under the *audi alteram partem* principle, but does not support an allegation of bias on the part of the Bencher in question. In addition, the fact the Benchers took more than seven months to render their reserved decision or allegedly lost quorum is simply not convincingly relevant to a question of bias.

[28] Further, I find no error in the Chambers judge's conclusion that the record does not bear out Mr. DeMaria's complaint that the chairman of the Benchers' review had disregarded Mr. DeMaria's objection to the appearance of the Law Society's in-house counsel at the review hearing. Rather, the record is clear: the chairman entertained Mr. DeMaria's application and gave him time to submit a brief on the issue. The fact is, Mr. DeMaria *withdrew his objection* and *volunteered* not to raise the issue on appeal, saying it was a "non-issue", but then used the Law Society's counsel's participation to try and leverage a better reception for his own fresh evidence application. Moreover, Mr. DeMaria has not appealed from the decision of the Chambers judge in this respect.

[29] Lastly, although Mr. DeMaria cloaks with aspersion the fact the name of one lawyer was "mysteriously" deleted from the list of Benchers appearing on the Law Society's website "without any announcement or explanation", that is neither here nor there on the question of bias. The bare fact the list of Benchers on the Law Society's website changed has no bearing on the question of whether the circumstances gave rise to a reasonable apprehension of bias on the part of those Benchers who actually sat on the review of the A&E Panel's decision. But then, Mr. DeMaria himself used this more in support of his lack-of-quorum argument than his allegation of bias.

3. The Context

[30] The Supreme Court in *International Woodworkers of America, Local 2-69 v Consolidated Bathurst Packaging Ltd.*, [1990] 1 SCR 282 at para 25, said:

> …the rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. These tribunals are created to increase the efficiency of the administration of justice and are often called upon to handle heavy caseloads. It is unrealistic to expect an administrative tribunal…to abide strictly by the rules applicable to courts of law.

In other words, the courts apply the reasonable apprehension of bias test to the facts of a matter in a way that is responsive to the institutional context in which the impugned decision-makers operate.

[31] In this case, the context in which all of this occurred appreciably blunts any sharp edge to Mr. DeMaria's remaining evidence. For example, as the Chambers judge observed: "…the unique regulatory structure and prevailing jurisprudence did not place [the Law Society's in-house counsel] off-side before the Benchers and does not restrict the Law Society's participatory rights on judicial review." To this observation I would add that the Law Society's in-house counsel, among other capacities, acts as legal advisor to the Executive Director of the Law Society and to the Law Society itself, prosecutes all instances of lawyer misconduct, handles general litigation involving the Law Society, and prosecutes instances of unauthorised practice of law. In other words, the lawyer who fills that in-house position wears many hats.

[32] That said, it is noteworthy, because it places his allegation in its full context, that Mr. DeMaria had also alleged before the Chambers judge that the Law Society's in-house counsel had 'doctored' the A&E Panel's decision. An allegation made possible by the fact that:

(a) the unsigned, 21-page decision released by the Law Society to Mr. DeMaria displays a footer different than the footer displayed on the signature page (which is page-numbered ‘20’) signed by the chairman of the A&E Panel, both of which differ from the footer displayed on the signature pages (which are each page-numbered ‘21’) signed by the two other members of the panel; and

(b) the metadata embedded in the electronic copy of the panel’s decision that the Law Society delivered to Mr. DeMaria recorded the author of that document as someone having the same first name as that of the Law Society’s in-house counsel.

Nonetheless, as I have found above, the Chambers judge properly rejected these allegations. Furthermore, I agree the whole of the evidence discloses only inadvertence on the part of the Benchers, the Law Society and Law Society personnel.

[33] The context further includes the fact the Law Society had institutionalised some protections designed to afford procedural fairness to individuals who find themselves the subject of A&E Committee hearings. For example, at the time Mr. DeMaria faced his hearing and when the Bencher review occurred, ss. 24(3) and 24(4) of the *Act* provided:

> (3) A person whose application for admission pursuant to this section as a member is refused:
>
> (a) may request the admissions panel to review the application; and
>
> (b) has the right to appear before the admissions panel in support of the application.
>
> (4) The benchers shall make rules with respect to the review of applications pursuant to subsection (3).

And, pursuant to the authority conferred upon it under s. 24(4), the Law Society had enacted old Rules 230 and 240, which provided various protections and procedural requirements regarding notice, adjournment, right to counsel, public hearing, transcription of proceedings, and onus and burden of proof, among other things. These provisions served to preserve the independence and impartiality of the Law Society’s decision-makers—at least to *some* measure. Nevertheless, Rules 230 and 240 did not address the risk of the *appearance* of bias that is posed by the institutional overlap of the roles played by the Benchers, on the one hand, and the Law Society’s in-house counsel, on the other.

[34] What I mean is the system was set up such that in-house counsel for the Law Society might be called upon on the same day at the same Benchers' meeting to give legal advice *to the Benchers*—in their role as the directing-minds of the Law Society—and then to later make submissions *before the Benchers*—in their role as adjudicators—*on behalf of the Law Society* in an administrative or disciplinary hearing. In other words, the Law Society had not structured its affairs under its old *Rules* so as to clearly preclude the 'disturbing' possibility that counsel who has made submissions before the Benchers might then advise them in respect of the same matter: *2747-3174 Québec Inc. c Québec (Régie des permis d'alcool)*, [1996] 3 SCR 919 at 124 [*Québec (Régie des permis d'alcool)*].

[35] I do not mean to suggest that the rules ought to specifically preclude counsel from acting in one of these two capacities. That, for a law society, should be a common sense practice regularly exercised to preserve at least the *appearance* of procedural fairness in administrative and disciplinary proceedings. But, recognising the risk and the obvious institutional limitations at play here, the Benchers should have been *particularly* keen to abstain at all times when acting as adjudicators from public displays of too-cosy familiarity with the Law Society's counsel, whether in-house or a retained private lawyer, in all administrative and disciplinary matters. As is evident from the facts of this case, behaviour of that nature not only undercuts the *appearance* of procedural fairness, but is unseemly in an adjudicator sitting in judgment of the *integrity* or *character* of another individual. If anyone ought to know better, it is those persons who are statutorily charged with setting and upholding standards of practice and conduct for the legal profession; but, that is also what—in some measure—saves this matter from giving rise to a *reasonable* apprehension of bias, as I will explain later. But, in order to do that, I need to clearly lay out the groundwork for the explanation.

4. The Groundwork

[36] I begin by observing that, narrowed to that which is relevant and material to an allegation of a reasonable apprehension of bias, the evidence germane to this inquiry is simply this:

(a) the Bencher who served as chair of the A&E Panel contacted the Law Society's in-house counsel on an *ex parte* basis about the A&E Panel's final decision before it was released to the parties and also invited the Law Society's in-house counsel to play golf with him;

(b) the Benchers who sat in review of the A&E Panel's decision breakfasted with the Law Society's in-house counsel on the day of the hearing and met with him on an *ex parte* basis after the Bencher review hearing; and

(c) one Bencher is 'friends' on Facebook with the Law Society's in-house counsel.

[37] The other side of the evidence ledger is quite short. Although it was arguably open to the Law Society in the circumstances to supplement the record with affidavit evidence from the Benchers themselves, attesting to what occurred at their breakfast meeting with in-house counsel and after Mr. DeMaria had left the hearing room, they did not do so (*Tremblay c Quebéc (Commission des affaires sociales)*, [1992] 1 SCR 952 at para 210, and at pp. 124–127 of *Québec (Régie des permis d'alcool)*). Thus, the Chambers judge had no evidence from the Law Society controverting or refuting what Mr. DeMaria had averred to in his affidavits.

[38] Other than a blanket denial of *actual bias*, the Law Society did not deny these events occurred or explain them and, in this appeal, it has simply said Mr. DeMaria's evidence is "illustrative of nothing and discloses no impropriety on the part of [the Benchers]". That said, the Law Society's in-house counsel did provide *some* affidavit evidence as to the matter, averring in his affidavit of January 14, 2013 that:

> 12. Throughout the proceeding, I acted as counsel to the Law Society of Saskatchewan (as a Corporate entity) and the Executive Director. I presented on behalf of the Law Society as a party before the panel of the Admission[s] and Education Committee that presided over the matter. I did not provide legal advice to, represent, or act on behalf of the Admissions and Education Committee panel in relation to the hearing of this matter. The panel did not solicit my assistance nor were they provided with legal advice from me during the hearing or their deliberation.
>
> …
>
> 23. I did not write the A&E Committee Decision dated August 8, 2011. I was not counsel to the Admissions and Education Committee panel charged with hearing this matter. I was not involved in writing the A&E Committee Decision.

But, this stands alone, not in contradiction or in answer to Mr. DeMaria's evidence about the actions of the Benchers.

[39] Nonetheless, on the whole of what remains relevant and material to the question of bias, I find the evidence frames an *allegation* of an *apprehension* of bias—one that is based on the relationship between the Benchers and the Law Society's in-house counsel. Because of this—but to a lesser degree—the evidence may also be taken to suggest an apprehension of bias on the

basis of institutional arrangements; but, I find this to be secondary to, and subsumed under, the first basis for the allegation. Moreover, Mr. DeMaria has not alleged that a reasonable apprehension of bias might arise in *a substantial number of cases* similar to his: *Québec (Régie des permis d'alcool)*, at para. 44. With that groundwork, I turn to review the Chambers judge's decision on this issue, beginning with the allegation against the A&E Panel.

5. The A&E Panel Allegation

[40] In her reasons, the Chambers judge took care to differentiate between bias on the part of those Benchers who had served on the A&E Panel and bias on the part of those Benchers who had sat in review of that panel's decision. As to the A&E Panel, she concluded Mr. DeMaria's evidence did not meet the threshold for a reasonable apprehension of bias, but she did so in these terms:

> [120] One can readily see how Mr. Patterson's closing inquiry about golf might convey the impression he and Huber were on friendly terms, and perhaps more importantly, the perception on Mr. Patterson's part that Huber's role somehow transformed from counsel *before* the Committee to counsel *for* the Committee. However, the facts surrounding this email must be considered against the applicable test for bias. To place the email in context, its purpose was to electronically convey the *final* A & E Decision to the Law Society subject to receipt of counter-part signatures from the two other Committee members. In Mr. Patterson's mind, the decision was final subject only to receipt of the counter-part signatures. Viewed in this context, I am not persuaded that an informed person familiar with this decision-making process would conclude that the outcome of this decision could be influenced by Mr. Patterson's inquiry about golf at an upcoming Benchers' meeting.
>
> (Emphasis in original)

[41] This suggests the Chambers judge in fact concluded the circumstances did give rise to an objective *impression* or *perception* of impropriety, but that she had reasoned away from this conclusion on a subjective basis, referring particularly to the A&E Panel chairman's state of mind when he was communicating on an *ex parte* basis with the Law Society's in-house legal counsel. In this way, the Chambers judge could be seen to have turned the focus of her appraisal to the chairman's *actual* ability to keep an open mind and away from what an informed bystander would *reasonably perceive*. If so, this was in error.

[42] As Cory J. explained in *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 at 636, the applicable test is one for a reasonable *apprehension* of bias:

> 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.*
>
> (Emphasis added)

[43] Similarly, in *Huerto v College of Physicians and Surgeons of Saskatchewan* (1996), 133 DLR (4th) 100 (CA) at 104, Cameron J.A. observed that the test is "*largely an objective rather than a subjective one*, and it imports standards of reasonableness, which in turn imports a measure of discretion in the judge called upon to apply it" (emphasis added).

[44] However, notwithstanding this, the Chambers judge's decision is correct. I say this because I find no *reasonable* basis to conclude that an *informed* person, viewing the matter *realistically and practically*—and *having thought the matter through*—would hold a reasonable apprehension of bias on the part of the chairman of the A&E Panel. No doubt, the chairman's golf invitation was an imprudent and out-of-place addition to a surprisingly *ex parte* email, which had delivered the A&E Panel's unreleased final decision to counsel for a party. But, that evidence is insufficient to supplant the *strong* presumption that the chairman had acted fairly and impartially *in reaching* that final decision. Unlike the case in *United Enterprises Ltd. v Saskatchewan (Liquor and Gaming Licensing Commission)*, [1997] 3 WWR 497 (QB), this is a single transgression—a careless slip of familiarity—that is explicable (but, this is not to say it can be overlooked) given the context of the institutional limitations and administrative arrangements at the Law Society.

[45] In my assessment, the relevant evidence is insubstantial and does not support a *reasonable* apprehension of bias, except—perhaps—to the 'very sensitive or scrupulous conscience'. Put another way, in the light of a *strong* presumption of impartiality and the institutional context at play here, the impugned conduct—a single flippant display of familiarity between a Bencher and the in-house counsel for the Law Society—simply would not demonstrate to a *reasonable* and *informed* person that the chairman had not been open to persuasion on the evidence and arguments presented in Mr. DeMaria's case. Benchers are, for

the most part, educated and trained in the law. For that reason, Benchers are more than passingly familiar with the requirements of procedural fairness and natural justice, including the requirement that decision-makers remain independent and impartial. And, by reason of their professional training and experience with the adversarial process, they are skilled at compartmentalising their minds, expertly divorcing themselves from friendship and affinity to dispassionately assess a matter on the basis of advocacy and reasoned argument on the facts and law. In the result, I cannot say the evidence makes out a *real* likelihood or probability of bias on the part of the chairman; and "a mere suspicion is not enough" (see *S. (R.D.)* at para. 112).

6. The Bencher Allegation

[46] I turn now to review the Chambers judge's reasons as they pertain to the Benchers who sat in review of the A&E Panel. Here, the Chambers judge assessed the reasonableness of Mr. DeMaria's allegation of an apprehension of bias in these terms:

> [155] As previously discussed, DeMaria submits that fairness of the hearing at both levels was compromised by a reasonable apprehension of bias in relation to the actions of several tribunal members. Four instances of bias are alleged in relation to the Benchers' hearing.
>
> [156] The first concerns the alleged improper fraternization between [Law Society Counsel] and the Benchers' Review Committee when [Law Society Counsel] was seen having breakfast with several Benchers immediately preceding the review hearing. Fraternization is also alleged to have occurred following the hearing when [Law Society Counsel] remained in the hearing room for a prolonged period of time after conclusion of the hearing. …
>
> [157] Turning to the post-hearing activity, this Court is asked to draw a negative inference from the fact [Law Society Counsel] did not immediately leave the hearing room at the conclusion of proceedings. DeMaria offers no direct evidence [Law Society Counsel] spoke to or approached the Benchers following the hearing. Paragraph 12 simply indicates that [Law Society Counsel] failed to leave the hearing room for at least 10 minutes after DeMaria departed. He had no visual contact with [Law Society Counsel]. The affidavit does not indicate if any *ex parte* discussion occurred nor if [Law Society Counsel] remained beyond 10 minutes.
>
> [158] The applicant has brought to my attention the decision of this Court in *United Enterprises Ltd. v. Saskatchewan (Liquor and Gaming Licensing Commission)*, [1997] 3 W.W.R. 497, 150 Sask. R. 119 (Sask. Q.B.). This case is easily distinguishable on its facts. In finding a reasonable apprehension of bias in that case, the court alluded to multiple, flagrant instances of fraternization. *I am satisfied that in relation to the two examples of fraternization, a reasonably informed bystander would not perceive bias based on these two incidents alone.*
>
> [159] The onus is on the applicant to establish bias or a reasonable apprehension of bias. The evidence set out in paras. 11 and 12 falls far short of meeting that onus.

> [160] The applicant also makes numerous allegations of bias against the Chairperson … specifically: i) proceeding without quorum; ii) pressuring the applicant to withdraw his objection in relation to [Law Society Counsel's] appearance before the Review Committee; iii) failure of other members to sign the Benchers' decision; and iv) a seven month delay in rendering a decision.
>
> [161] Aside from issue ii), the specific allegations of bias aimed at [the chairman] are not "bias" issues *per se*, but a mere repetition of previous grounds of attack (i.e. jurisdiction, procedural error, etc.). All have been fully addressed within the context of arguments advanced and none give rise to the suggestion of impartiality [*sic*].
>
> [162] This leaves the contention [the chairman] was biased because he pressured the applicant to stand down on the issue of [Law Society Counsel's] participation before the review panel.
>
> [163] The scope of the participatory rights of the Law Society has already been dealt with on a substantive basis in relation to standing and will not be re-hashed except to say the unique regulatory structure and prevailing jurisprudence did not place [Law Society Counsel] off-side before the Benchers and does not restrict the Law Society's participatory rights on judicial review. Even if I am wrong, a review of the transcripts from the case management meeting on October 17, 2011 leading up to the hearing does not bear out his complaint of undue pressure.
>
> [164] It is apparent from an objective reading of the transcript that no pressure was exerted upon DeMaria to withdraw his objection. It was a strategic choice on his part to back down from this argument and it in no way amounts to bias.
>
> [165] Similarly, I am not satisfied the allegations of bias aimed at [two Benchers] meet the requisite test. Simply having [Law Society Counsel] as a Facebook friend falls far short of meeting the threshold.

[47] While I might not have parsed the evidence in the way the Chambers judge did—in that she addressed the ill-considered breakfast meeting apart from the other evidence—I find no error in her overall conclusion that the threshold for a reasonable apprehension of bias had not been met in this case. In my assessment, the evidence, when considered *realistically* and *practically* in the institutional context of the matter, does not give rise to a *reasonable* apprehension of bias on the part of the Benchers.

[48] I say this for largely the same reasons as arose in my assessment of the allegation of an apprehension of bias on the part of the chairman of the A&E Panel (particularly at para. 45). Without repeating that analysis, I would emphasise that the administrative arrangements established under the old *Rules* were inherently fraught with tension between the various roles played by the Benchers and the Law Society's in-house counsel. The evidence here is sparse, but it does indicate that administrative hearings of this nature could occur in the *midst* of convocation—the official name for a Benchers' meeting—but were held *in camera*, after

excluding Law Society personnel from the meeting. Although not ideal for the reasons identified in *Québec (Régie des permis d'alcool)*, this arrangement is understandable in the context of the institutional limitations of the Law Society. But, that does not detract from the tension and, to an *uninformed* observer or one having a 'very sensitive or scrupulous conscience', the institutional overlap of these functions (prosecutor and legal advisor; adjudicators and directing-minds) at the same meeting might seem untoward. However, once the observer is informed of the context and has thought the matter through, the fact the Benchers were seen with counsel opposite to Mr. DeMaria before his hearing falls short of meeting the threshold for a *reasonable* apprehension of bias.

[49] Lastly, in today's world, a reasonable and informed person would place little or no weight on the fact a Bencher is 'friends' on Facebook with the Law Society's in-house counsel. Without more, that unadorned fact is indicative of nothing more than the two individuals know each other, which would be presumed in any event from their respective offices within the corporate structure of the Law Society. This fact does not add anything to the balance.

[50] At the end of the day, the Law Society admissions hearing process was not ideal and its execution in this case certainly had its shortcomings—and, for that reason, Mr. DeMaria was right to fearlessly raise his allegations of bias—but the circumstances simply do not amount to a *reasonable* apprehension of bias. On the whole, the evidence does not reasonably suggest anyone other than the A&E Panel or the Benchers made their respective decisions or that they were improperly influenced by their relationship with the Law Society's in-house counsel. Moreover, an *informed* person, viewing this matter *realistically and practically* in its proper context—and having thought the matter through—would not conclude it was more likely than not that the A&E Panel or the Benchers had not decided the matter impartially (*National Energy Board*).

[51] For these reasons, I would sustain the Chambers judge's finding and dismiss this ground of appeal.

G. Did the Chambers judge correctly decline to grant a *mandamus* order?

[52] There is simply no merit to this last ground of appeal. I have found no basis upon which to interfere with the Chambers judge's decision on the substantive grounds of appeal. This means

Mr. DeMaria is not entitled to any of the relief he claimed. Regardless, *mandamus* does not lie here because the Law Society clearly possesses a discretion to admit Mr. DeMaria (or to act in one of a number of ways) and it has exercised that discretion—an exercise against which *certiorari* might lie. But, as the Law Society has not refused to exercise its discretion and as there is no specific duty imposed upon the Law Society to admit Mr. DeMaria, it was not within the Chambers judge's power to issue an order in the nature of *mandamus* requiring it to do so. See *Dolan et al v Members of Council of the City of Moose Jaw et al,* 2008 SKCA 170 at para 20, 306 DLR (4th) 115; and *Re Lofstrom and Murphy et al* (1971), 22 DLR (3d) 120 (Sask CA); see also Donald J.M. Brown, Q.C., and John M Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Rel 2015-1) vol 1 (Toronto: Carswell, 2013) at para 1:3230.

V. DISPOSITION

[53] I would dismiss the appeal.

[54] In the circumstances, as allegations of an apprehension of bias ought to be carefully but fearlessly brought, I decline to award costs to the Law Society. Each party shall bear their own costs.

"Caldwell J.A."
Caldwell J.A.

I concur. "Ottenbreit J.A."
Ottenbreit J.A.

I concur. "Ryan-Froslie J.A."
Ryan-Froslie J.A.