Motor
Vehicle Sales Authority
of British Columbia

File No. 09-111523

MOTOR VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA
(Previously known as the Motor Dealer Council of B.C.)

IN THE MATTER OF THE *MOTOR DEALER ACT* R.S.B.C. 1996 C. 316 AND THE *SALESPERSON LICENSING REGULATION* B.C. REG. 241/2004

RE:

ANWAR BADSHAH
(Salesperson License # 111523)

SALESPERSON

DECISION OF THE REGISTRAR OF MOTOR DEALERS ON A MOTION TO DISQUALIFY

APPEARANCES

For the Authority:	Hong Wong, Manager of Licensing Holly Childs, Compliance Officer Jaydon Rush, Licensing Officer
For Anwar Badshah	Gerhard Pyper Esq. Michael Carter
Date and Place of Hearing:	January 8, 2010, at Surrey, British Columbia.

The Motion

1. During the course of this hearing, counsel for Mr. Badshah objected to introducing evidence from Ms. Holly Childs about her interview of Mr. Badshah and a statement she apparently obtained from Mr. Badshah. Counsel for Mr. Badshah stated these statements were obtained without Mr. Badshah having legal counsel present, in breach of Mr. Badshah's right to counsel under the *Charter of Rights and Freedoms,* or alternatively, a breach of Mr. Badshah's rights under procedural fairness and natural justice.

2. Discussion between myself and counsel for Mr. Badshah ensued as to the proper legal arguments to be advanced and whether the *Charter of Rights and Freedoms* was applicable. I decided that I would convene a *voir dire* to hear Ms. Childs' evidence and Mr. Badshah's

evidence on any breach of his rights. A determination of any such breach must be assessed in light of the actual events surrounding the obtaining of the evidence.

3. A brief recess was called and upon reconvening the hearing, counsel for Mr. Badshah made a motion that I recuse myself on two grounds:

(i) I lacked judicial independence; and

(ii) I lost jurisdiction, as I entered the arena as a prosecutor in this matter.

4. In support of the motion that I recuse myself, Mr. Badshah gave evidence. He stated that he was concerned about certain remarks I had made to his lawyer. When asked to specify which remarks were of concern, he could not say. He then generalized that his concern was that I was arguing with his lawyer. Counsel for Mr. Badshah elaborated. He stated that Mr. Hong Wong had not responded to his objection of introducing Ms. Childs' evidence and I instead entered discussions with him on that point. It was pointed out to counsel for Mr. Badshah that Mr. Wong is the Manager of Licensing and is not a lawyer.

5. In support of his motion, Mr. Badshah provided two cases; *R v. S. (R.D.)* (1997), 118 C.C.C. (3d) 353 (S.C.C.) and *Bell Canada v. Canadian Telephone Employees Assn.* [1998] F.C.J. No. 313 (T.D.).

6. I adjourned the hearing to consider the motion by Mr. Badshah. For the reasons that follow, Mr. Badshah's motion that I disqualify myself is denied.

Disqualification - The Law

7. Mister Justice Frankel, writing for an unanimous B.C. Court of Appeal in *R. v. Alpha Manufacturing Inc.,* 2009 BCCA 443 recently discussed the test for disqualification of a judge, which principles are generally appropriate for an administrative decision maker:

> [18] *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (CanLII), 2003 SCC 45, [2003] 2 S.C.R. 259, is the leading authority on reasonable apprehension of bias. The principles set out in that case are conveniently summarized in paragraph 7 of the judgment of Mr. Justice Donald in *Taylor Ventures Ltd. (Trustee of) v. Taylor*, 2005 BCCA 350, 49 B.C.L.R. (4th) 134:
>
> (i) a judge's impartiality is presumed;
>
> (ii) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;

(iii) the criterion of disqualification is the reasonable apprehension of bias;

(iv) the question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;

(v) the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly;

(vi) the test requires demonstration of serious grounds on which to base the apprehension;

(vii) each case must be examined contextually and the inquiry is fact-specific.

[19] Also pertinent is *R. v. S.(R.D.)*, 1997 CanLII 324 (S.C.C.), [1997] 3 S.C.R. 484, wherein Mr. Justice Cory stated:

> 111 The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (S.C.C.), [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. . ."
>
> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram*, *supra*, at pp. 54-55; *Gushman*, *supra*, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark*, *supra*, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

8. As to testing the evidence of bias, Mr. Justice Goepel in *Makowsky v. John Doe*, 2007 BCSC 1231, aff'd 2008 BCCA 112, stated:

> [22] In his affidavit, the plaintiff raises his personal concerns about my hearing the case. The test for whether there is a reasonable apprehension of bias is an objective one; the subjective views of a party do not form part of the test: *Lesiczka v. Sahota*, 2007 BCSC 479 (CanLII), 2007 BCSC 479, leave to appeal refused, 2007 BCCA 334 (CanLII), 2007 BCCA 334[emphasis added].

See also *Attorney General of B.C. v. Lindsay*, 2009 BCCA 159 at paragraph 10.

9. The doctrine of a reasonable apprehension of bias is part of the common law principles of procedural fairness and natural justice. The level of independence for an administrative decision maker, or the degree of procedural fairness and natural justice provided to an affected person, may be modified by statute: *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52 (CanLII). This is important when considering the context in which Mr. Badshah's motion is brought.

Discussion

(i) Judicial Independence

10. Judicial independence was considered by the Supreme Court of Canada in *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49 as holding the following principles and requirements:

> 45 Judicial independence consists essentially in the freedom "to render decisions based solely on the requirements of the law and justice": *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13 (CanLII), [2002] 1 S.C.R. 405, 2002 SCC 13, at para. 37. It requires that the judiciary be left free to act without improper "interference from any other entity" (*Ell*, at para. 18) — i.e., that the executive and legislative branches of government not "impinge on the essential 'authority and function' . . . of the court" (*MacKeigan v. Hickman*, 1989 CanLII 40 (S.C.C.), [1989] 2 S.C.R. 796, at p. 828). See also *Valente v. The Queen*, 1985 CanLII 25 (S.C.C.), [1985] 2 S.C.R. 673, at pp. 686-87; *Beauregard v. Canada*, 1986 CanLII 24 (S.C.C.), [1986] 2 S.C.R. 56, at pp. 73 and 75; *R. v. Lippé*, 1990 CanLII 18 (S.C.C.), [1991] 2 S.C.R. 114, at pp. 152-54; *Babcock v. Canada (Attorney General)*, 2002 SCC 57 (CanLII), [2002] 3 S.C.R. 3, 2002 SCC 57, at para. 57; and *Application under s. 83.28 of the Criminal Code (Re)*, at para. 87.
>
> 46 Security of tenure, financial security and administrative independence are the three "core characteristics" or "essential conditions" of judicial independence: *Valente*, at pp. 694, 704 and 708, and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, at para. 115. It is a precondition to judicial independence that they be maintained, and be seen by "a reasonable person who is fully informed of all the circumstances" to be maintained: *Mackin*, at paras. 38 and 40, and *Provincial Court*

Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice), 2005 SCC 44 (CanLII), [2005] 2 S.C.R. 286, 2005 SCC 44, at para. 6.

> 47 However, even where the essential conditions of judicial independence exist, and are reasonably seen to exist, judicial independence itself is not necessarily ensured. The critical question is whether the court is free, and reasonably seen to be free, to perform its adjudicative role without interference, including interference from the executive and legislative branches of government. See, for example, *Application under s. 83.28 of the Criminal Code (Re)*, at paras. 82-92.

See also *R v. S. (R.D.)* (1997), 118 C.C.C. (3d) 353 (S.C.C.) and *Bell Canada v. Canadian Telephone Employees Assn.* [1998] F.C.J. No. 313 (T.D.).

11. The crux of judicial independence is that no outside entity should influence or appear to influence the decisions of a judge or decision maker. In the *Bell Canada* case provided by Mr. Badshah, Justice McGillis noted the Human Rights Tribunal in that case was adjudicating rights between parties and those rights were quasi-constitutional in nature. Justice McGillis found that the Tribunal lacked judicial independence as it lacked security of tenure and financial security – two of the three core requirements for judicial independence noted in *Imperial Tobacco* and *R v. S. (R.D.)*. In the context of that case and under those specific facts, Justice McGillis found the Tribunal lacked independence.

12. No evidence was advanced on whether my "security of tenure, financial security and administrative independence" are negatively impacted. Further, there is no evidence that there are outside influences affecting my ability to render a decision in this matter based "solely on the requirements of the law and justice". This ground for disqualification has not been made out.

(ii) Entering the arena as a prosecutor

13. In considering this ground, one must first put this matter into context. The Authority has a concern about the licence held by Mr. Badshah. That concern arises from evidence the Authority says it obtained about recent criminal convictions regarding Mr. Badshah. The question for me is whether it is in the public interest that Mr. Badshah should or should not continue to be licensed, have his licence suspended for a period of time, or whether the facts of Mr. Badshah's particular case warrant he maintain his licence, but with conditions added to his licence. There is no *lis* or litigation between two parties like there is before the courts. It is an assessment of Mr. Badshah's licence; the particular facts of his situation weighed against the public's interest: sections 6 and 7

of the *Salesperson Licensing Regulation* B.C. Reg. 241/2004; see also *R. v. S. (R.D.), supra*, per L'Heureux-Dube and McLachlin JJ. at paragraph 32 and Cory and Iacobucci JJ. at paragraph 92.

14. In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52 (CanLII), the Supreme Court of Canada had occasion to consider the independence of administrative decision makers in the context of licensing decisions. The following head note entry accurately summarizes the legal principles in that decision:

> It is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. The statute must be construed as a whole to determine the degree of independence the legislature intended. Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice. However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication.
>
> There is a fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts. Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. Given their primary policy-making function, however, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not.
>
> The legislature's intention that Board members should serve at pleasure is unequivocal. As such, it does not permit the argument that the statute is ambiguous and hence should be read as imposing a higher degree of independence to meet the requirements of natural justice, if indeed a higher standard is required. Where the intention of the legislature, as here, is unequivocal, there is no room to import common law doctrines of independence. Nor is a constitutional guarantee of independence implicated here. There is no basis upon which to extend the constitutional guarantee of judicial independence that animated the *Provincial Court Judges Reference* to the Liquor Appeal Board. <u>The Board is not a court, nor does it approach the constitutional role of the courts. It is first and foremost a licensing body. The suspension complained of was an incident of the Board's licensing function. Licences are granted on condition of compliance with the Act, and can be suspended for non-compliance. The exercise of power here at issue falls squarely within the executive power of the provincial government.</u>[emphasis added]

15. The *Salesperson Licensing Regulation*, the *Motor Dealer Act* and the Administrative Agreement between the Provincial Crown and the Authority make it very clear that in relation to licensed salespersons, the Registrar is the only person authorized to:

(i) issue licences, refuse licences or cancel and suspend licences;

(ii) set minimum requirements in order for a person to be licensed;

(iii) place conditions on licencees the Registrar deems appropriate;

(iv) investigate complaints;

(v) conduct inspections;

(vi) adjudicate claims that a salesperson has committed a deceptive or unconscionable act or practice contrary to the *Business Practices and Consumer Protection Act*; and

(vii) instigate legal proceedings against a salesperson.

The Registrar may delegate some of these powers; but ultimately, the Registrar is the person charged with protecting the public interest *vis-à-vis* licensed salespersons.

16. The institutional independence of the Registrar from the Authority in the exercise of these statutory powers are noted in the Administrative Agreement between the Provincial Crown and the Authority:

> **7. Core Business Functions to be Delegated**
>
> (a) Subject to the Delegation Regulation, the Authority's administration of the Act will include the following core business functions:
>
> i. registration and licensing within the Motor Dealer industry by a Registrar of Motor Dealers,
>
> **12. Appointment of the Registrar**
>
> (d) The Authority acknowledges that the Registrar exercises statutory duties that require independent decision-making and, for that purpose, the Board will not interfere with the independent exercise of these statutory functions.

17. It is in this context that any claim of a reasonable apprehension of bias must be viewed in this particular case.

18. I cannot accept Mr. Badshah's argument that because I questioned his lawyer as to the correct application of the law, that I am or appear to be biased as having entered the arena as a prosecutor. It is the Registrar's duty to safeguard the public interest, which includes ensuring the correct law is applied in hearings and all the facts are placed before me. I may question the Authority and any other witness in order to fully understand the evidence being presented. Judges and decision makers do not sit silent in hearings or trials, especially when the law is being argued. To accept Mr. Badshah's position would mean that judges and decision makers must apply the law as it is described to them by the parties, even if one or both parties may be in error. Judges and administrative decision makers, must apply the law as they know it to exist and not just the law they are told exists. Also, if I accept Mr. Badshah's position, a decision-maker who has a question or concern about some evidence, would be unable to seek clarification. Restricting a judge or administrative decision maker from making such inquiries, would defeat the very purpose of the Canadian justice system – the pursuit of the truth and fair and just decisions based on the equal and consistent application of the law.

19. The discussion between me and Mr. Badshah's counsel was on the proper application of the law. I ruled that I would hear the evidence in the context of a *voire dire* to test its admissibility and the allegation it was obtained in breach of Mr. Badshah's rights. I did not making any findings of fact on that evidence, as it has yet to be placed before me, nor did I rule on its admissibility. I would note that the only evidence of an apprehension of bias is that of Mr. Badshah's perception. His concern is that I was arguing with his lawyer; which was on the proper application of the law. Such discussions between judges and lawyers in the court room are commonplace. It is even more commonplace where there is only one lawyer representing one party in a dispute. A reasonable and properly informed person, understanding the need for the proper application of the law and the role of the Registrar in licensing hearings, would not have a reasonable apprehension of bias in this case.

20. For these reasons the motion to disqualify myself is denied. This hearing may be brought back before me at the earliest opportunity.

Date: February 16, 2010.

[redacted]

Ian Christman B.A., LL.B.