



Vehicle Sales Authority
of British Columbia

Investigation File: 19-05-278
Hearing File: 20-03-001

**IN THE MATTER OF THE MOTOR DEALER ACT, R.S.B.C., 1996, c.316, and the
BUSINESS PRACTICES AND CONSUMER PROTECTION ACT, S.B.C., 2004, c.2**

MOTOR VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA

(the "Authority")

AND

LGN ENTERPRISES INC. dba AUTO CLEARANCE CENTRE

(Motor Dealer Licence # 40289)

(Respondent)

AND

**A&A AUTO SALES LTD dba
AUTO CLEARANCE DOWNTOWN HASTINGS**

(Motor Dealer Licence #40660)

(Respondent)

AND

AYKUT (ALEX) BILGIN

(Salesperson Licence #201174)

(Respondent)

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Respondent Application to Dismiss the Hearing & Costs

Date and place of decision: September 8, 2021 at Langley, British Columbia

By way of written submissions

I. Introduction

[1] By letter dated June 28, 2021, legal counsel for the Respondents LGN Enterprises Inc. dba LGN Auto Clearance Center ("LGN"), A&A Auto Sales Ltd. dba Auto Clearance Downtown Hastings ("A&A"), and Aykut (Alex) Bilgin (collectively the "Respondents"), apply to have this case dismissed as against them and that they be entitled to costs.

[2] The basis of that application involves pleadings filed in the B.C. Supreme Court action of *Law Society of British Columbia v Loraine Lee* (SCBC #S214739, Vancouver Registry) (the “Law Society Action”).

[3] In summary, the Law Society of British Columbia alleges that Loraine Lee provided legal services while not licensed as a lawyer. In response, Loraine Lee states that if she did provide legal services while with the Authority, she was at all material times supervised by me. The Respondents raise a concern that this alleged oversight leads to an apprehension of bias making these proceedings procedurally unfair. I will provide more detail on the Respondent’s position below.

[4] On July 6, 2021, I issued directions to the parties to provide me with written submissions on the Respondent’s application to dismiss. I also directed the Authority to obtain the pleadings and any affidavits filed in the Law Society Action, copies of which were provided to the Respondents. That process has concluded, and I have the submissions of the parties and the pleadings and affidavits filed in the Law Society Action.

II. Position of the Parties

[5] I will briefly summarize each party’s position below.

(a) The Respondents

[6] The Respondent’s advance two concerns regarding Loraine Lee’s participation in this hearing process that they say raises an apprehension of bias in my adjudication of this case.

[7] First, the Respondents say that an apprehension of bias arises based on my purported supervision of Loraine Lee drafting and submitting argument on the law and the facts in this case, as part of an interlocutory application by the Respondents. On that interlocutory application, Loraine Lee, on behalf of the Authority, provided written submissions on the legal applicability of the rule in *Browne v Dunn* to this case. The Respondents argue that through my purported supervision of legal services provided by Loraine Lee, I was essentially making the legal argument. As such, I could not be viewed as an independent adjudicator on that legal issue, leading to an apprehension of bias. When I rendered a decision on the rule in *Browne v Dunn*, I agreed with the Authority’s legal argument.

[8] Second, the Respondents note the reporting relationships within the VSA and especially the relationship of the investigators and Ms. Lee to me as Registrar. The Respondents say the fact Loraine Lee had a reporting relationship to me, in and of itself, can give rise to an apprehension of bias. In law this is often called institutional bias. That is, bias that arises based on the very structure of or reporting relationships within an agency or tribunal.

[9] In support of their positions, the Respondent’s cite:

Liszskay v. Robinson 2003 BCCA 506 (BC Court of Appeal)

Mullan, David J. *Administrative Law* (Ontario: Irwin Law, 2001), at pp. 321-322.

Team Transport v. Klair, 2007 BCSC 1394 (BC Supreme Court)

(b)The Authority

[10] The Authority argues an apprehension of bias cannot arise from third party statements, such as from Loraine Lee. The Authority says that a “reasonable” apprehension of bias must be inferred from the conduct or circumstances of the decision-maker. The Authority argues that there is no evidence that my conduct or my circumstances suggest a reasonable apprehension of bias.

[11] On the issue of institutional bias, the Authority notes that the *Motor Dealer Act* authorizes the current structure and reporting relationships. The *Motor Dealer Act* vests in the “registrar” all powers of complaint handling, investigations, inspection, licensing, adjudication, and discipline. The “registrar” may delegate these powers to others, but at all times these powers are being exercised by the “registrar” whether by me or by my delegate. The Authority cites case law that no claim of institutional bias can arise where the structure is authorized by statute. The Authority further argues that Ms. Lee’s statements in the Law Society Action do not indicate she was acting under my instructions, or that she had *ex parte* communications with me.

[12] In support of their positions, the Authority cites:

Boardwalk Reit LLP v. Edmonton (City), 2008 ABCA 176 (Alberta Court of Appeal)

Brosseau v. Alberta (Securities Commn.), [1989] 1 S.C.R. 301 (Supreme Court of Canada)

Crown Auto Body and Auto Sales Ltd. v. British Columbia (Motor Vehicle Sales Authority), [2014] B.C.J. No. 996 (BC Supreme Court)

McOuat v. Law Society of British Columbia, [2001] B.C.J. No. 256 (B.C. Court of Appeal); leave to appeal refused: [2001] S.C.C.A. No. 177 (Supreme Court of Canada)

Re Forum National, 2020 BCSECCOM 316 (BC Securities Commission)

III. Legal Principles

[13] I now turn to discuss the applicable legal principles.

(a)Apprehension of Bias

[14] Both parties cite case law establishing that the singular test is whether there is an apprehension of bias in my adjudication of this matter.

[15] One of the leading authorities on this point continues to be *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (CanLII), [2003] 2 SCR 259 (Supreme Court of Canada). In *Wewaykum*, the issue was whether a judgement of the Supreme Court of Canada should be vacated because Mr. Justice Binnie of that Court participated in a decision where he had prior involvement and supervision of legal cases involving one of the parties while the Associate Deputy Minister of Justice for Canada. Mister Justice Binnie recused himself on the application

to vacate and filed a statement that he had no recollection of any involvement in the prior case. Ultimately, the Supreme Court of Canada found no apprehension of bias based on the specific facts of the case before them and Mr. Justice Binnie was not required to have recused himself.

[16] The court in *Wewaykum* provided the following legal principles that are to be applied in cases such as the one before me:

- (a) There is a presumption of impartiality on the part of decisions-makers. That presumption carries considerable weight and may only be challenged on serious grounds: paragraphs 59 and 76,
- (b) The person alleging bias must show circumstances requiring disqualification: paragraph 59,
- (c) The one criterion for disqualification is a reasonable apprehension of bias: paragraphs 60, and 66-67,
- (d) The reasonable apprehension of bias test is an objective one. The question is, what would a reasonable person think is the decision-maker's state of mind in the circumstances, having considered all the relevant facts and having thought the matter through: paragraphs 66-67,
- (e) The assessment is fact specific. The entire context of the presented circumstances is to be considered: paragraph 77. The following considerations are usually relevant to that assessment:
 - (i) The extent of any prior involvement in the case, with a supervisory role being less troublesome than participating in legal strategy and in the litigation itself: paragraphs 83 and 88,
 - (ii) The passage of time between any prior involvement in the case and the decision: paragraph 85,
 - (iii) The decision-makers recollections of any prior participation: paragraph 90, and
 - (iv) The processes of the tribunal/decision maker itself: paragraph 92. On this later point, the Supreme Court of Canada provided a statement regarding its internal process: paragraph 92.

(b) Institutional Bias

[17] On the issue of institutional bias, the Authority provides the case of *Crown Auto Body and Auto Sales Ltd.* In that decision, the B.C. Supreme Court considered the *Motor Dealer Act* and the role of the Registrar and whether any apprehension of bias arises because of the overlapping of functions by the Registrar. That decision also cited leading Supreme Court of Canada decisions on the topic of institutional bias, such as *Brosseau and Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 (CanLII), [2001] 2 S.C.R. 781 (Supreme Court of Canada).

[18] From these decisions, the following legal principles on institutional bias apply to the Registrar:

- (a) Institutional bias arises from the way in which an agency or tribunal is structured or carries out its functions. For instance, the common law rule against bias would say an investigator should not also be the adjudicator on a discipline matter,
- (b) The rule against bias is a common law rule. A constitutionally valid statute may permit what the common law prohibits. This includes circumstances that the common law would regard as creating an apprehension of bias,
- (c) The Registrar is appointed under the *Motor Dealer Act* and empowered with all the statutory powers of licensing, complaint intake, inspection, investigation, adjudication, consumer dispute resolution and discipline. The *Motor Dealer Act* allows the Registrar to delegate any and all of these powers to others. Where delegated, the appointed Registrar has a corresponding statutory duty to supervise their delegates,
- (d) The definition of Registrar in the *Motor Dealer Act* makes clear that whether it is the appointed Registrar or a delegated Registrar, when exercising statutory powers, legally it is the Registrar exercising those powers. For instance, a person authorized to exercise the investigation powers of the Registrar, is the Registrar when exercising those powers, and
- (e) There can be no claim of an apprehension of bias when the Registrar is exercising their statutory powers and duties. The Court in *Brosseau* stated “In order to disqualify the Commission [Registrar here] from hearing the matter in the present case, some act of the Commission going beyond its statutory duties must be found” at pp. 309-310.

[19] I turn now to discuss the evidence highlighting the circumstances that may speak to my state-of-mind and which potentially affects my ability to act impartially, as viewed by a reasonable person.

IV. Discussion on the Facts and the Law

(a) Institutional Bias

[20] In the Respondents’ submissions, they raise a concern about bias due to the VSA reporting structure and relationships, and specifically between Loraine Lee and the Registrar. The Respondent’s specifically note paragraph 58 in the Response to Petition of Loraine Lee in the Law Society Action, which states:

58. Ms. Lee performed her duties with the VSA under the supervision of Mr. Christman at all material times.

[21] In support of that statement at paragraph 58 in the Response to Petition, Ms. Lee avers in her Affidavit #1 dated June 7, 2021 filed in the Law Society Action as follows:

54. The majority of the duties I performed for the VSA were administrative in nature and involved executive management and organizational functions.

55. I performed my duties with the VSA under the supervision of a practicing lawyer, Mr. Ian Christman, Registrar at the VSA ("Mr. Christman").

56. Mr. Christman supervised my duties with the VSA at all material times.

[22] Loraine Lee reported to the President regarding duties that "were administrative in nature and involved executive management and organizational functions". I did not supervise Ms. Lee in carrying out those duties. Ms. Lee had a reporting relationship to the Registrar regarding regulatory matters when exercising the Registrar's delegated authority and supervising delegates of the Registrar. This dual reporting relationship is noted in:

- (a) The September 27, 2018, VSA job description for the Director of Compliance and Consumer Services position, which is attached as Exhibit E to the Affidavit of Collette Souvage #1, dated May 10, 2021 (Souvage Affidavit #1), filed in the Law Society Action,
- (b) The job advertisement placed by PFM Executive Search for the position of Director, Compliance & Consumer Services, which is attached as Exhibit C to the Souvage Affidavit #1 in the Law Society Act, and
- (c) The PFM Executive Search Executive Profile for Director, Compliance and Consumer Services, which is attached as Exhibit G to the Souvage Affidavit #1 in the Law Society Action.

[23] Ms. Lee's regulatory role as Director of Compliance and Consumer Services was to act independently in overseeing the investigations, licensing, consumer services and inspections teams so as to separate my adjudicative role as Registrar from the Registrar's investigation, licensing, inspection, and complaint handling roles. Ms. Lee would report to me on regulatory matters such as the manner in which delegates exercised statutory powers delegated to them and seek guidance and direction on the interpretation and application of the legislation administered by the Registrar and associated policy concerns.

[24] I believe the cases of *Crown Auto Body and Auto Sales Ltd.*, *Brosseau*, and *Ocean Port Hotel* are dispositive of this argument. The *Motor Dealer Act* places all statutory powers and corresponding duties on the Registrar. The Registrar may obtain those powers and corresponding duties by either being appointed as Registrar or being authorized in writing to carry out some or all those powers (a delegate). The structure the Respondent's complain of is authorized by the *Motor Dealer Act*. To accede to the Respondent's argument on this point would mean the common law of bias prohibits the Registrar from carrying out their statutory powers or duties. That is not the case.

[25] Further, it is my opinion that the above described reporting relationship between Loraine Lee and the Registrar, would not create an apprehension of bias, even if not authorized by the *Motor Dealer Act*.

[26] The Respondent's claim that an apprehension of bias arises due to the structure of the VSA and the oversight the Registrar has over their delegates is dismissed.

(b) Apprehension of Bias

[27] The Respondent's note that my purported supervision of Loraine Lee in preparing legal argument that I adjudicated on in this case, raises an apprehension of bias. The *Motor Dealer Act* does not specifically authorize the Registrar advancing legal arguments at hearings and then allow the Registrar to adjudicate on that legal argument. Therefore, if that supervision of the legal argument occurred, it must not give rise to an apprehension of bias.

(a) Circumstances of Loraine Lee's hiring

[28] In the Law Society Action, the Law Society argues that Loraine Lee was hired by the Authority to provide legal services as a lawyer. The Law Society provides as evidence the following information in affidavit form:

- (a) The public job posting by PFM Executive Search for the role of Director, Compliance & Consumer Services , with the Authority whereby the posting states "you are a lawyer with knowledge of administrative and/or regulatory law": Exhibit C in the Souvage Affidavit #1,
- (b) The Authority's job description for the role of Director, Compliance & Consumer Services, which identifies the following:
 - (i) "Presenting investigation findings at hearings before the Registrar and the Motor Dealer Customer Compensation Fund Board,"
 - (ii) "Representing the Authority, the Registrar and the Motor Dealer Customer Compensation Fund Board in court, such as judicial reviews,"
 - (iii) "Provide professional and confidential legal services to the Authority to achieve fair, consistent, timely and legally defensible outcomes", and
 - (iv) "Member of the Law Society of British Columbia or eligible for admission to the Law Society of British Columbia."

Exhibit E in the Souvage Affidavit #1

- (c) The PFM Executive Search Candidate profile, which among other things notes the Director, Compliance & Consumer Services will:
 - (i) "Provide professional and confidential legal services to the Authority to achieve fair, consistent, timely and legally defensible outcomes," and
 - (ii) "Representing the Authority, the Registrar and the Motor Dealer Customer Compensation Fund Board in court, such as judicial reviews," and
 - (iii) Be a "Member of the Law Society of British Columbia or eligible for admission to the Law Society of British Columbia."

Exhibit G in the Souvage Affidavit #1

[29] The above factors are the circumstances surrounding my understanding of Loraine Lee's hiring and the duties she was to perform for the Authority: *Wewaykum*. It was my understanding at the time of Loraine Lee's hiring, that she was a practicing lawyer and a member of the Law Society of British Columbia who would be providing legal services to the Authority, among other duties. This was my understanding until I became aware of the Law

Society's allegation that Loraine Lee was providing legal services while not licensed as a lawyer.

(b) Circumstances of Prosecuting & Presenting Legal Argument at Registrar Hearings

[30] I would note that in the Response to Petition by Loraine Lee, Ms. Lee states that she was presenting at hearings before the Registrar, much like the Manager of Investigations did prior to her arrival at the Authority. This is somewhat correct.

[31] Since my time at the Authority starting February 1, 2008, the Manager of Investigations would present the Authority's case involving a consumer complaint, in most instances. Where the issue was merely a licensing matter, the Manager of Licensing would often present the Authority's case. On this latter point, see for example the licensing matter in *Vehicle Sales Authority of British Columbia v. Foorat Serop Sultan dba Canadian Maple Leaf Auto and Foorat Serop Sultan* (May 1, 2019, Hearing File 19-04-002, Registrar).

[32] In other cases, the Authority would have its outside legal counsel, Robert Hrabinsky, appear on behalf of the Authority to present the Authority's case and make any needed legal argument. Notably, these cases involved lawyers appearing for the various respondent dealers and or salespersons. These appearances by Mr. Hrabinsky would be in relation to both consumer complaint files and licensing matters. See for example:

- *Breezy Webster & Vehicle Sales Authority of British Columbia v. Pioneer Garage Ltd. dba Fraser Valley Pre-Owned et al* (April 27, 2018, Hearing File 17-07-002, Registrar) – consumer complaint
- *Re: Pioneer Garage Ltd. dba Greenlight Auto Sales and Pioneer Garage Ltd. dba Pioneer Pre-Owned* (August 10, 2017, Hearing files 17-06-002 and 17-07-003, Registrar) – licensing matter
- *Fellner v. Pinnacle Car Sales & Leasing Ltd. dba Pinnacle Motors et al* (November 7, 2016, Hearing File 16-05-005, Registrar) – consumer complaint file
- *Motor Dealer Council of British Columbia dba Motor Vehicle Sales Authority of British Columbia v AutoCanada Northtown Auto GP Inc. et al* (August 13, 2015, Hearing File 13-08-001, Registrar) – consumer complaint and licensing matter

[33] Then there is this case. At the commencement of this case, Loraine Lee was presenting the Authority's case and submitting legal argument on behalf of the Authority. Since at least the commencement of the Law Society Action, the Authority's outside legal counsel has taken over presenting the Authority's case.

[34] Paragraphs 30 to 33 demonstrate the Authority's usual process regarding the presentation of its case at Registrar's hearings. Consumer complaints would generally be prosecuted by the Manager of Investigations while licensing matters would be prosecuted by the Manager of Licensing. Where there was a necessity for legal counsel to prosecute a case and provide legal argument in either a consumer complaint or licensing matter, outside legal counsel would do so.

[35] This helps to understand the circumstances in which legal arguments from the Authority would normally be presented at Registrar hearings: *Wewaykum*. If I received legal argument from the Authority, I could expect the person presenting the legal argument was a licensed lawyer.

(c) Circumstances of presenting legal argument in this case and the One West Auto case

[36] In this case, the Respondents note Loraine Lee presented substantive argument on the law and facts regarding the applicability of the rule in *Browne v Dunn*, among other issues. As earlier noted, the concern is whether that legal argument was supervised and reviewed by me before it was presented in this hearing and adjudicated upon by me.

[37] At no time did I supervise or preview the Authority's submissions on the rule in *Browne v Dunn* or any other matter that have been prepared in this case. I did not participate in their preparation. The first time I saw the submissions were when they were presented to me as part of the Authority filing its submissions with the Registrar's office and for my adjudication.

[38] Filed in the Law Society Action is the Affidavit of Mathew Wansink #1, dated May 11, 2021. Attached to that Affidavit are submissions with legal argument in the One West Auto case. At a pre-hearing conference before me in the One West Auto case, I requested written submissions and legal argument from the dealer's counsel (Mr. Wansink) and from Ms. Lee on behalf of the Authority. The Authority's submissions were delivered by Ms. Lee's assistant in an email and are exhibit C to the Wansink Affidavit #1 in the Law Society Action.

[39] At no time did I supervise or preview the Authority's submissions prepared in the One West Auto case. I did not participate in their preparation. The first time I saw those submissions was when they were presented to me as part of the Authority filing its submissions with the Registrar's office and for my adjudication.

(d) Statements of Third Parties

[40] The Authority cites cases highlighting that the statements of third parties, including in the filings of civil proceedings, cannot create an apprehension of bias for good legal and policy reasons. If that were the case, litigants could attempt to have a decision maker recused by making false allegations and filing spurious claims. This was noted by the Alberta Court of Appeal in *Boardwalk Reit LLP*, supra:

[72] Other litigants have sometimes tried to rely upon their own acts as creating a conflict of interest or bias and asked the judge in question to step aside as a result. Sometimes the litigant has revealed a fact, sometimes made an accusation against the judge, or sometimes tried to have the judge disciplined by the appropriate judicial council. Such litigants' attempts at self-help by engineering perceived conflicts are firmly rejected, for obvious reasons of justice and policy. See *McElheran v. R.*, 2006 ABCA 161, [2006] A.R. Uned. 869, Calg. 0401-0338-AC (May 26); *Mattson v. ALC Aircraft Can.* (1993) 18 C.P.C. (3d) 310, 317-18 (B.C.); *Allain Sales etc. v. Guardian Ins. Co. of Can.* (1996) 1996 Canlll 12052 (NB QB), 180 N.B.R. (2d) 338, 50 C.P.C. (3d) 273, 279-80; *Suresh v. Min. of Cit. & Imm.* (2000) 2000 Canlll 15604 (FCA). 258 N.R. 119, 122 (F.C.A.) (para. 9); *Middelkamp v. Fraser Valley Real Est. Bd.* (S.C. B.C.), supra (para. 25); cf. *S.G. v. Larochelle*, supra.

[41] *Boardwalk Reit LLP* was applied in *Re Forum National*, 2020 BCSECCOM 316 ("Re Forum National"). In that case, the applicant before the Commission filed a Civil Claim in B.C. Supreme Court naming various parties including the Commission. The Applicant then asked the Commission panel to recuse themselves stating they were adverse in interest. Citing *Boardwalk Reit LLP*, the Commission stated recusal must be avoided in those situations so as to avoid such mischief in administrative proceedings. This principle seems consistent with the direction in *Wewaykum*, that decision-makers be careful in recusing themselves and that to often decision-makers recuse themselves when there is no legal reason for recusal.

[42] The distinguishing feature between this case and that of *Re: Forum National* and *Boardwalk Reit LLP*, is that the Respondents in this case are not the litigants in the Law Society Action. The Respondents have become aware of the statements of Loraine Lee and raise a concern that, if true, they suggest I have not been an independent adjudicator, but participated in the litigation on behalf of the Authority. I agree that caution is necessary in these cases to avoid persons manufacturing an apprehension of bias to suit their purposes, for legal and policy reasons. However, there is no evidence that the Respondents in this case have done so.

[43] I am also cognizant that this hearing is ongoing as is the Law Society Action. These are not facts that occurred years ago.

V. Decision

[44] I turn now to see if it would appear to a reasonable person, knowing the circumstances of the case, understanding the law, and thinking the matter through, that I would not be able to independently and impartially adjudicate this case. In my opinion, on the circumstances of this case, such an apprehension of bias would occur to a reasonable person.

[45] First, the allegations and evidence filed in the Law Society Action have not been judicially decided. The reasonable person would know that Loraine Lee's version of the facts are as open to being believed as that of the Law Society's. This can raise some doubt.

[46] Second, Loraine Lee's statement in the Law Society Action suggests I participated in the litigation of this particular case as opposed to the supervision of a different case involving the same party or parties years ago. Participating in the litigation of this case is more troublesome, if true: *Wewaykum*.

[47] Third, there is no evidence that these sets of facts were manufactured by the Respondents for their benefit. Therefore, the public policy concern about third party statements as articulated in *Boardwalk Reit LLP* and applied in *Re Forum National* does not arise here.

[48] Fourth, in adjudicating on the applicability of the rule in *Browne v Dunn* in this case, I agreed with the Authority's legal argument. If there is some belief that I participated in the creation of the Authority's legal argument, then my ruling in its favour could lead to the appearance of bias.

[49] Finally, I believed Loraine Lee was a practicing lawyer and member of the Law Society of British Columbia providing legal services to the Authority up until the Law Society made its

allegations. In that regard, I accepted the legal argument Loraine Lee provided on behalf of the Authority regarding the rule in *Browne v Dunn* to be that of a lawyer licensed to present legal argument before me. Had I known the truth of the matter, I would not have allowed Loraine Lee to have advanced legal argument on behalf of the Authority.

[50] In finding that a reasonable apprehension of bias could arise under the unique circumstances of this case, I am left with no choice but to recuse myself.

[51] The Respondents request a dismissal of this case and that they be awarded their costs. As I have recused myself, I cannot make that determination. I therefore must declare a mishearing and refer this matter to another adjudicator.

VI. Further Review

[52] As I have not made a “determination” as that term is defined in section 26.11 of the *Motor Dealer Act*, there is no right to request a reconsideration of this decision.

[53] This decision may be reviewed by petitioning the B.C. Supreme Court for judicial review pursuant to the *Judicial Review Procedure Act*. Such a petition must be filed within 60 days of this decision’s date: section 7.1(t) of the *Motor Dealer Act*.

“Original is signed”

Ian Christman, JD
Registrar of Motor Dealers