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DECISION NO. 2018-HA-002(e)

In the matter of an appeal under section 46 of the *Hospital Act*, RSBC 1996, c 200

BETWEEN:	Dr. Andrew Campbell	**APPELLANT**
AND:	Provincial Health Services Authority	**RESPONDENT**
BEFORE:	A Panel of the Hospital Appeal Board: Stacy Robertson, Panel Chair Cheryl Vickers, Member Dr. Paul Champion, Member	
DATE:	Conducted by way of written and oral submissions concluding on May 15, 2019	
APPEARING:	For the Appellant:	Susan Precious, Counsel Nevin Fishman, Counsel Amelia Boultbee, Counsel
	For the Respondent:	Penny Washington, Counsel Kieran Siddall, Counsel Kayla Strong, Counsel

Decision on Reasonable Apprehension of Bias

INTRODUCTION

[1] The Respondent brought an application on May 13, 2019 for an order that Dr. Champion be recused from the Hospital Appeal Board panel hearing this appeal (the "Panel") based on a reasonable apprehension of bias arising from several comments made during the examination of two witnesses on May 9, 2019. The Panel adjourned the hearing of further witnesses and heard submissions from both parties on the application on May 13 and 15, 2019.

[2] The Panel dismissed the Respondent's application in the course of the proceedings on May 16, 2019 with more detailed written reasons to follow. These are those reasons.

Law on Reasonable Apprehension of Bias

[3] The concept of impartiality and the corresponding absence of bias are hallmarks of procedural fairness which this tribunal and other administrative tribunals are bound.[1]

[4] The test for reasonable apprehension of bias is set out in *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 ("*Justice and Liberty*") (at para 40):

> … what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.

[5] In *Wewaykum Indian Band v Canada,* 2003 SCC 45 ("*Wewaykum*"), the SCC accepted de Grandpre J.'s addition to the test for reasonable apprehension of bias from his dissent in Committee for *Justice and Liberty*, supra, as follows (at para 76):

> The ground for this apprehension must, however, be substantial, and I … refus[e] to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience'.

[6] There is a strong presumption of impartiality that is not easily displaced and, therefore, a finding of reasonable apprehension of bias requires a real likelihood or probability of bias and individual comments cannot be seen in isolation[2].

[7] Impartiality means the decision maker must be open to persuasion by the evidence and submissions.[3]

[8] Courts have found that instances of levity or gratuitous comments may be inappropriate and regrettable but do not give rise to a reasonable apprehension of bias.[4]

[9] The Court in *R. v S.(R.D.),* [1997] 3 SCR 484 ("*R. v S.(R.D.)"*) noted the contextual nature of the inquiry and the high burden on the party alleging bias (at para 141):

> … allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding.

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[1] *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 at paras 15, 22 and 27.
[2] *Justice and Liberty,* at para 25.
[3] *Lesiczka v Sahota*, 2007 BCSC 479, at para 7.
[4] *Ferrari v Canada (Citizenship and Immigration)*, 2008 FC 1334 at paras 42-48; and *Cammack & Co. v Kavanagh*, 2006 BCSC 1298, at para 73.

[10] In *R. v S.(R.D.)* the Court noted (at para 119): "[t]he requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes."

[11] In the context of a hearing before the Hospital Appeal Board, Dr. Champion is a panel member precisely because of his experience in the medical field and his experience in hospital settings. This experience is part of the context which he brings to the Panel and the proceedings.

The Panel Member's Comments

[12] The exchange between panel member Champion and the two witnesses occurred after the Appellant had completed his examination in chief and the Respondent had completed its cross-examination of both witnesses. It is common in proceedings, particularly administrative proceedings, for the panel members to have an opportunity to ask questions or seek clarification of the testimony of witnesses. This opportunity happens after the parties have had a chance to examine the witness. After the panel has asked its questions, the parties are given an opportunity to ask any additional questions or clarifications arising from any of the panel's questions. That procedure was followed in relation to both the Appellant and the other witness that were the subject matter of the Respondent's application.

[13] Panel member Champion asked [the Witness] questions about an incident she had with Dr. G. [The Witness] was a registered nurse who was working as the Quality and Safety Leader at BC Children's Hospital ("BCCH"). [The Witness] gave evidence that she reported a safety incident involving Dr. G. The exchange in question is as follows:

> Q. When you were told, or led to believe that Dr. [G] wished in future if you had any complaint or concerns to see him personally in private did you understand that to be a normal - - normal way of dealing with things?
>
> A. No.
>
> Q. And you said that being in private, would that have meant that that you were with no one else other than Dr. [G]?
>
> A. That's correct. And I have expressed to them following that that I would not feel comfortable having a private conversation with him in his office without someone else being present.
>
> Q. But there was no mention made that - - to him or to you or to your knowledge that this would in any case have been an inappropriate meeting?
>
> A. No.
>
> Q. No one mentioned that to you?
>
> A. No.

[14] The exchange between panel member Champion and the Appellant can be broken down into three separate exchanges. First, there was an exchange about attendance at rounds and CATH conferences; second, there was a comment about differing skill sets of the two surgeons and Dr. Champion's surprise at the situation;

and third, there was a comment about a text exchange between Dr. Campbell and Dr. G.

[15] The following exchange is about the attendance at rounds:

> Q. I guess with regard to the meetings, the meetings that Dr. [G] created that there would be meetings when he arrived, but if you weren't there you weren't there you weren't having meetings, is that - -
>
> A. Yes.
>
> Q. - - the idea? Were they the daily review meetings at 6:00 or 4:00 or something?
>
> A. So, the - - actually, that's - - that's precisely right. So, the 7 o'clock meetings were a fixed time. It would change more in keeping with [Dr. G's] schedule, but, to be honest, that was relatively infrequent for the morning ones. Those were more consistent. The afternoon ones were constantly changing, so it would be at 2:00, it would be at 5:30, it would be at 6:00, it would be at 4:00. They were supposed to be at 4:00. The meetings that were not held if [Dr. G] was not present were generally the Monday afternoon CATH conference, where if he wasn't present he would either ask that it be delayed to another day, or the - - whole meeting would just be - - be cancelled.
>
> Q. This was the meeting - - these were the meetings where you subsequently were criticized for not being present often enough?
>
> A. I think, to be honest, all three of those would be ones where I was criticized for - - for not being present often enough.
>
> Q. So, your - - your best bet is to create a system of your own where it becomes a meeting when you arrive, I guess?
>
> A. Yes.
>
> Q. Makes you a hundred percent, correct?
>
> A. It does.

[16] The next exchange between panel member Champion and the Appellant dealing with the differing skill sets of Dr. G and Dr. Campbell is as follows:

> Q. Anyway. Okay, my final thought was that I really am surprised at what has happened to you because the way you have described the varying skill sets, which is very common amongst obviously surgeons or physicians with procedural duties, diagnostic procedures that they do, the fact that you - - nature has divvied up the skills between you slightly different - -
>
> A. Mm-hm.
>
> Q. - - would make a good fit.
>
> A. Yes.
>
> Q. So, I appreciate your - - your surprise and exhaustion by all this. …

[17] The final comment by Dr. Champion refers to an exchange of texts between Dr. G and Dr. Campbell regarding an expensive pair of shoes that Dr. Campbell bought for Dr. G as a Christmas present and which Dr. G noted was expensive, but

much appreciated. Dr. Campbell responded that it was "totally tongue in cheek but honestly you have made my life so much better than it was a few years back". Dr. Campbell also noted that Dr. G could quote that back to him next time he was late for something. Dr. Champion made the following observation about the text exchange:

> Q. … Incidentally, finally, I - - I really enjoyed the texts. I think you've learnt from that that a good deed never goes unpunished.
>
> A. Thank you.

ANALYSIS

[18] Prior to deciding the Respondent's application for recusal due to a reasonable apprehension of bias, the Panel sought further submissions on the issues for determination in the appeal in order to determine the relevance of any comments by the panel member. The Respondent says that the issue of bias must be determined regardless of what the issues for determination are in these proceedings. However, the Respondent acknowledges that if a modification of privileges is found, then the evidence of the current nature of what it calls the dysfunctional relationship between Dr. Campbell and Dr. G and other members of the program would be relevant. The Respondent takes this position despite also taking the position that it has not alleged any conduct or competency issues in regard to Dr. Campbell's contract termination or affecting his privileges.

Exchange with [the Witness]

[19] The Respondent says that the exchange with [the Witness], who was a nurse, shows that panel member Champion had already formed a negative impression of Dr. G on an issue which was wholly irrelevant to the proceedings.

[20] The Appellant says that the exchange between panel member Champion and [the Witness] was aimed at clarifying the issue of workplace intimidation and complaints against Dr. G and represents an example of good case management, not bias.

[21] To understand the full context of the comments, the evidence of [the Witness] must be examined in more detail. She was a registered nurse and the Quality and Safety Leader at BCCH. She testified to two specific outbursts by Dr. G which she felt were inappropriate. One incident involved her noticing that Dr. G did not comply with the hand washing policy and she thought if she mentioned it then others would see that it was okay to bring it up even to a senior member of the team like Dr. G, and others would be more comfortable ensuring everyone followed the policy. [The Witness] testified that unfortunately, instead of seeing it as a teaching moment for everyone, which is what she had intended and hoped would happen, Dr. G denied that he failed to wash his hands and according to [the Witness], a verbal altercation arose between her and Dr. G in front of the staff which she found inappropriate and threatening. She testified that she filed a workplace complaint against Dr. G in 2015 regarding the hand washing incident. The Panel heard that [the Witness]'s contract with BCCH as the Quality and Safety Leader was terminated without cause by BCCH.

[22] Against this backdrop, panel member Champion was seeking clarification of Dr. G's alleged comment to [the Witness] that she should address any complaints involving him in private. Given the nature of the allegation of [the Witness], the panel member's concern with this approach is entirely understandable and he was simply using his experience in a hospital setting to try to understand the comment alleged to have been made by Dr. G. Implied in the panel member's question was whether Dr. G's comments about the private meeting were condoned or approved by BCCH administration or whether that same recommendation was given to her by anyone at BCCH. [The Witness]'s comment that she expressed to "them" that she would not be comfortable meeting alone with Dr. G was a reference to BCCH administration so seeking clarification on what BCCH administration's response to that comment was entirely reasonable in the circumstances.

[23] Of course, at this stage of the proceedings the Panel had not made any findings regarding the above evidence and whether Dr. G made the alleged statements or whether they were inappropriate. Panel member Champion was simply trying to clarify the evidence presented by [the Witness].

[24] The Panel finds that the comments and questions by panel member Champion about the private meeting between Dr. G and [the Witness] after she had made a formal complaint about him being inappropriate were a reasonable clarification of the evidence of [the Witness]. Given his experience in hospital settings, panel member Champion wanted to know whether anyone mentioned that such a meeting in the circumstances would be inappropriate. No reasonably informed person with the full knowledge of the issues in this matter and the evidence of [the Witness], would conclude that because panel member Champion made reference to an inappropriate meeting that he would not decide the issues or matter fairly. The Respondent's assertion that these comments created a reasonable apprehension of bias do not meet the stringent standard established in the case law. At that point, the Respondent still had the opportunity to lead evidence that Dr. G did not make the alleged comments or that a private meeting in the circumstances was appropriate.

[25] Panel member Champion's comments do not indicate that he was closed to persuasion or not open to an argument that the events did not occur as stated by [the Witness] or were entirely irrelevant as the Respondent alleges in this application.

Exchanges with the Appellant

Questioning about Rounds

[26] Panel member Champion's comments/questions about attendance at rounds, when viewed in their full context, do not meet the test for reasonable apprehension of bias. The comments were made in the context of the Respondent alleging that Dr. Campbell was late for rounds and CATH conferences. Dr. Campbell's evidence was that Dr. G set the meeting times and changed them to fit his schedule. The comment was simply a statement of panel member Champion's understanding of the application of that evidence that if you are responsible for setting the meetings, and it is only a meeting when you are there, then your attendance would be 100%, as opposed to Dr. Campbell having to miss rounds or CATH conference because of a

conflict in his schedule. This is simply a rational extrapolation of the evidence which panel member Champion is noting, perhaps rhetorically, but there is nothing in the statement when taken in its full context to suggest a reasonable apprehension of bias or that he had decided the issue and was closed to any alternative evidence or argument. At this stage of the proceedings, it was still open for the Respondent to show that the evidence of Dr. Campbell on this point was not accurate or credible. Panel member Champion was simply clarifying the evidence presented by Dr. Campbell regarding the timing of rounds and CATH conferences and how those meetings were scheduled by Dr. G.

Questioning about differing skill sets

[27] Panel member Champion's comments about the differing skill sets of the two surgeons and being surprised about what happened to Dr. Campbell raise two separate issues. First, the statement regarding the differing skill set is simply a summary statement of Dr. Campbell's evidence and his experience that it is common to have different but complimentary skills in a department. Given what panel member Champion viewed as complimentary skill sets of the two surgeons in the Division, he expressed his surprise at why one surgeon was simply terminated when the Respondent acknowledged that there were no conduct or competency issues relating to the termination. The Respondent's allegation of reasonable apprehension of bias regarding panel member Champion's surprise at how BCCH treated Dr. Campbell is more a reflection of the way that the case proceeded than any reasonable apprehension of bias.

[28] At this stage of the proceeding the Panel was justifiably confused about the direction of the proceeding and what was or was not relevant given the Respondent's change in pleadings and direction of the case at the opening of the hearing. On the one hand, the Respondent pled that Dr. Campbell's contract was terminated without cause, that there were no conduct or competency issues relating to Dr. Campbell's privileges, and he remained a full active staff member at BCCH. On the other hand, however, the Panel was advised that there was dysfunction in the department and the Respondent argued that Dr. Campbell was the source of the dysfunction, and therefore, even if the Panel found a modification of his privileges because of a failure to be allocated cases, the Panel should exercise its discretion and not grant the remedy sought by the Appellant.

[29] Panel member Champion's surprise at what happened to Dr. Campbell is similar to the case of *Hennessey v Canada*, 2016 FCA 180 ("*Hennessey*"), where the Federal Court of Appeal reviewed comments of the Federal Court which had asked counsel on the first day of trial where the evidence of the "big conspiracy" was. Both cases involved serious issues: one a conspiracy, and the other the effective termination of the Appellant's practice at BCCH, and both statements were made early in the proceedings when it was not clear what evidence was going to be led relevant to the issues. The Court of Appeal in *Hennessy* (at para 17)found that the comment made by the lower Court did not represent any prejudging of the matter and was simply the Court's way of encouraging the party to get to the real issues and demonstrated good trial management not bias.

[30] The Respondent argues that panel member Champion's comments show that he has prejudged the credibility of Dr. Campbell and Dr. G and the manner in which

Dr. Campbell was treated by BCCH. The Panel disagrees. A finding that panel member Champion had decided these issues and would not assess additional evidence or argument fairly might possibly amount to a finding based on a very sensitive or scrupulous conscience, but that is not the test.

[31] It is common to be swayed by evidence as it is presented and has not yet been tested by contrary evidence. While panel member Champion's comments of surprise about how Dr. Campbell was treated were somewhat ill advised given the early state of the proceedings, they are understandable when one appreciates the developing nature of the proceedings and the Respondent's arguments that the conduct and competency of Dr. Campbell were not relevant to his privileges while at the same time arguing that they were relevant to remedy and the dysfunction allegedly caused by him in the Cardiac Sciences team. The comments when informed by the contextual background of these proceedings would not lead a person to realistically think that panel member Champion would not decide the matter fairly.

Comment about the text exchanges

[32] The last comment by panel member Champion about the exchange of texts between Drs. G and Campbell regarding the Christmas present was not a question but just a comment. In that respect the comment was not really trying to elicit clarification or a summary of the evidence but was just an observation. Generally, these types of observations are not advisable by panel members during the hearing, however, not every unadvisable observation gives rise to a reasonable apprehension of bias.

[33] The Respondent argues that the comment about the text exchange would lead a reasonably informed bystander to conclude that Dr. Champion was critical of Respondent's counsel for putting the text message to Dr. Campbell or that he was critical of the Respondent's treatment of Dr. Campbell. The Panel disagrees. Any finding that panel member Champion was critical of counsel for putting the text messages to the Appellant would have to be based on a very sensitive or scrupulous conscience and would not meet the test for a finding of reasonable apprehension of bias.

[34] We agree with the Appellant's observation that the comment appeared to inject some levity into a very serious matter rather than being any judgement stated by the panel member on the outcome of the proceedings.

[35] The context behind the statements is that Dr. Campbell bought an expensive gift for Dr. G while at the same time Dr. G was not allocating cases to him and eventually, after the notice of termination, did not allocate any cases to Dr. Campbell. The comment suggests that if Dr. Campbell was trying to curry the favour of Dr. G to get allocated some cases, then it didn't work. It was just an observation given with a smile and not a rash conclusion on the issues in this proceeding.

[36] This last comment by panel member Champion is less controversial than the statement by the Court in *Commanda v. Algonquins of Pikwakanagan First Nation,* 2018 FC 616 (at para. 74), where the Federal Court rejected a claim for reasonable apprehension of bias where the initial decision-maker made a comment about a

person looking for evil and that the applicant was just casting aspersions on people with no hard evidence of wrongdoing. Those comments directly related to the substance of that proceedings and were not found to represent a reasonable apprehension of bias.

[37] The comment about the text messages would not lead a reasonably informed person who was aware of the serious allegations, the confusion over the issues to be determined, and the stage of the proceedings, to conclude that panel member Champion would not be open to further persuasion by the evidence and arguments. Therefore, the comments do not demonstrate a reasonable apprehension of bias.

[38] The Respondent does not cite any cases that are factually similar to the comments and questions of panel member Champion in this matter.

[39] The Appellant cited cases where a reasonable apprehension of bias was found and the facts in those cases are clearly distinguishable from the facts in this case and represent significant prejudgment of an issue or matter before it before the completion of the case.[5]

[40] The Panel has examined all of the comments relied upon by the Respondent in its application separately for analytical purposes but wants to make clear that the comments, when examined individually and also when considered together, do not meet the stringent standard to justify a finding of reasonable apprehension of bias.

[41] The comments of panel member Champion did not suggest any finality on any of the issues. It is acknowledged that the issues on appeal have developed during the course of these proceedings, causing confusion in the Panel members and leading to several applications during the course of the proceedings respecting relevance.

[42] While some of the questions or comments in issue could have been framed more artfully, and some attempts at levity or the use of familiar phrases fell flat, the Panel has not been persuaded that Dr. Champion's comments would, in the context of the appeal, lead an informed person, viewing the matter realistically and practically – and having thought the matter through – to conclude that Dr. Champion is not open to persuasion and does not have an open mind on any issue of credibility or law in this appeal. The Panel, each member of which is committed to withholding final judgment until after all the facts and submissions are heard, finds that the comments do not meet the high threshold to establish a reasonable apprehension of bias on Dr. Champion's part.

DECISION

[43] The Respondent's application for an order that Dr. Champion be recused from the Panel based a reasonable apprehension of bias is dismissed.

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[5] See *Baker v Canada* 1999 SCC 699; *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities),* [1992] 1 SCR 623; *Misra v College of Physicians & Surgeons (Saskatchewan)* (1988), 36 Admin LR 298 (CA); *Henderson v Sarnia (City) Commissioners of Police* (1984), 7 DLR (4th) 355 (Ont. Div. Ct.).

"S. Robertson"

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Stacy Robertson, Panel Chair
Hospital Appeal Board

"Paul Champion"

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Dr. Paul Champion, Member
Hospital Appeal Board

"Cheryl Vickers"

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Cheryl Vickers, Member
Hospital Appeal Board

June 16, 2020