THE LAW SOCIETY OF ALBERTA
BENCHERS' APPEAL REPORT

IN THE MATTER OF THE *Legal Profession Act*
AND IN THE MATTER OF an Appeal to the Benchers from findings in the Decision of the Hearing Committee dated November 14, 2008 regarding the conduct of MATTHEW V. R. MERCHANT, a Member of the Law Society of Alberta

INTRODUCTION

1. Matthew V. R. Merchant, a Member of the Law Society of Alberta (the Member), appeals to the Benchers from the findings of guilt contained in the Decision of the Hearing Committee of the Law Society of Alberta (LSA) dated November 14, 2008, which found the Member guilty of six citations involving conduct deserving of sanction. The Committee imposed the sanction of disbarment.

2. The Member appeals the findings of misconduct and the sanction on the basis of a denial of natural justice. In particular, he contends:

   a. The conduct of the Chair of the Hearing Committee, outside and within the Hearing, created a reasonable apprehension of bias, which tainted the process and the findings;

   b. The Hearing Committee misapprehended the evidence;

   c. The Hearing Committee sanctioned the Member on "non-existing citations".

3. In the alternative, the Member appeals from the Hearing Committee's findings on three of the citations, contending that the findings were based on error, in whole or in part, and that after reversing those findings, the remaining findings of guilt did not justify disbarment.

SUMMARY OF THE DISPOSITION OF THE APPEAL

4. The Benchers in this Appeal concluded that the conduct of the Committee Chair, taken in the aggregate, gave rise to a reasonable apprehension of bias, which deprived the Member of procedural fairness.

5. The Appeal is granted, and the findings of guilt on the six citations are quashed.

6. The sanction imposed and the costs award granted by the Hearing Committee are set aside.

7. The Benchers direct that the six citations be referred to a new hearing before a different Hearing Committee.

THE APPEAL HEARING

8. On September 28, 2010, a Panel of the Benchers convened at the Law Society Offices in Calgary to hear the Appeal. The Panel consisted of Kevin Feth, QC, Chair, Miriam Carey, PhD, Fred Fenwick, QC, James Glass, QC, Harry Van Harten, Sarah King-D'Souza, QC, Steve Raby, QC, Frederica Schutz, QC, Dale Spackman, QC and Anthony Young, QC.

9. James B. Rooney, QC and Shaun Flannigan represented the Member. Lindsay MacDonald, QC represented the LSA.

10. Jurisdiction for this Appeal to the Benchers was established by the letter dated June 21, 2010 from the President of the LSA to the Executive Director appointing the Benchers to hear this Appeal (Exhibit 1), the Notice of Hearing of Appeal pursuant to section 75 of the *Legal Profession Act* dated July 14, 2010 with the acknowledgement of service of copies of the Hearing Report and the Hearing Record (Exhibit 2), the Certificate of Status for the Member (Exhibit 3), and the Certificate of Exercise of Discretion (Exhibit 4).

11. The parties had no objection to the composition of the Panel appointed to hear this Appeal.

12. The LSA did not receive a request for a private hearing. The Appeal was held in public.

MEMBERSHIP OF THE APPEAL PANEL

13. Harry Van Harten of this Appeal Panel was appointed to the Provincial Court of Alberta effective December 13, 2010. The Honourable Judge Van Harten therefore did

not participate in the preparation of this Benchers' Appeal Report and the Benchers' final decision in this Appeal.

14. Section 76(4) of the *Legal Profession Act* provides that if the membership of the Panel of Benchers is reduced, the remaining members of the Panel may continue to act as the Panel for the purpose of concluding the Appeal, if at least five members of the Panel remain. Accordingly, the remainder of the Benchers on this Appeal Panel proceeded to render the decision in this Appeal.

BACKGROUND

15. On December 13, 2006, a Hearing Committee of the LSA convened at the Law Society Offices in Calgary to inquire into the conduct of the Member. The three person Hearing Committee heard evidence from December 13 to 15, 2006, and from January 16 to 19, 2007.

16. The Hearing Committee delivered its decision about the citations on January 24, 2007, finding the Member guilty of six citations, described as Citations 1, 2, 5, 6, 8 and 11. Three other citations, described as Citations 3, 4 and 9, were dismissed. (The remaining citations were withdrawn or became particulars of other citations by earlier direction of the Hearing Committee.) The Hearing was then adjourned to January 30, 2007 for argument and a decision on sanction.

17. On January 29, 2007, the Chair of the Hearing Committee telephoned a lawyer who was a complainant and witness in the proceedings. The Member had testified during the Hearing that he sent a letter of apology to the complainant. In an *ex parte* conversation, the Chair asked the complainant whether the letter of apology had been received. The complainant replied that he had received the letter.

18. The Hearing reconvened on January 30, 2007, and the Hearing Committee ordered the immediate disbarment of the Member. The Chair did not disclose the *ex parte* communication with the complainant.

19. On January 31, 2007, counsel for the LSA contacted the complainant to inform him about the outcome of the Hearing. During that discussion, the complainant informed counsel for the LSA about the *ex parte* communication with the Chair of the Hearing Committee on January 29, 2007.

20. Counsel for the LSA wrote to the Member's lawyer on February 1, 2007, informing him about the *ex parte* communication.

21. The Member then applied to the Court of Queen's Bench of Alberta for judicial review based on a reasonable apprehension of bias, and a stay of the disbarment. The stay was granted.

22. On judicial review, the Member sought an order quashing or setting aside the findings and sanction of the Hearing Committee on the basis that the fact and content of the telephone call between the Chair and the complainant gave rise to a reasonable apprehension of bias.

23. The learned Chambers Justice who heard the judicial review application concluded that a reasonable apprehension of bias was present, and quashed the decision of the Hearing Committee, including the sanction: *Matthew V. R. Merchant v. Law Society of Alberta*, 2007 ABQB 658.

24. The LSA appealed to the Alberta Court of Appeal on the basis that the learned Chambers Justice had erred in entertaining the judicial review application when a statutory route of appeal was available. The Member should have pursued his right of appeal to the Benchers from the decision of the Hearing Committee.

25. The Court of Appeal held that the learned Chambers Justice improperly exercised her discretion by granting a remedy before the Member had exhausted his statutory appeal option. The Court did not comment about the finding by the learned Chambers Justice that a reasonable apprehension of bias had been established: *Merchant v. Law Society of Alberta*, 2008 ABCA 363.

26. The appeal was granted, subject to the LSA providing a written undertaking not to oppose the admission of evidence about the impugned telephone call in an appeal to the Benchers, nor to oppose any extension of time for the Member to appeal. That undertaking was given and the present Appeal ensued.

27. By operation of a stay, the Member has continued to practice law while this Appeal to the Benchers has been outstanding.

FRESH EVIDENCE APPLICATION

28. The Appellant applied to introduce fresh evidence for this Appeal, consisting of the following:

a. A letter dated February 1, 2007 from Garner Groome, counsel for the LSA, to Graham Price, counsel for the Member, by which Mr. Groome relayed certain information provided to him by the complainant about *ex parte* communications between the complainant and the Chair of the Hearing Committee, which occurred by telephone on January 29, 2007;

b. An undertaking from the Executive Director of the LSA confirming that the LSA would not oppose the admission of new evidence about the contents of the telephone call on January 29, 2007.

29. Counsel for the LSA on this Appeal did not oppose the application, but submitted that the fresh evidence should be accompanied by an Affidavit from the complainant sworn on April 15, 2010, attesting to the specifics of the *ex parte* communications between the complainant and the Chair of the Hearing Committee. As a consequence, the LSA advanced a cross application for the introduction of that additional evidence.

30. The Member did not oppose the cross application.

31. The substance of the fresh evidence was that on January 29, 2007, the complainant received a telephone call from the Hearing Committee Chair. The Chair indicated that he had two matters he wished to discuss with the Complainant: one was a litigation matter in which they were both involved; the other involved the Hearing at which the Complainant had testified some weeks earlier.

32. The complainant and the Chair apparently discussed the litigation matter first, and in particular the disclosure of some medical records.

33. When the discussion moved to the Hearing, the Chair asked whether the complainant had received the apology letter addressed to him from the Member dated January 22, 2007. The complainant asked the Chair whether they should be discussing the matter. The Chair responded that he would not be calling the complainant if he did not think he should be doing so. The complainant then confirmed that he had received the apology letter on January 22, 2007. The Chair thanked him and the discussion ended. That was the entire discussion about the Member.

34. The Chair did not tell the complainant what use would be made of the information provided.

35. On January 31, 2007, the Complainant received a telephone call from Garner Groome, who informed him about the outcome of the Conduct Hearing. At that time, the Complainant disclosed to Mr. Groome the telephone contact received from the Chair about the apology letter.

36. By the letter dated February 1, 2007, Mr. Groome relayed the *ex parte* communication between the Complainant and the Chair to Mr. Price.

37. The application and cross-application to adduce fresh evidence relied on section 76(6) of the *Legal Profession Act*, which states:

> "(6) The panel of the Benchers holding a hearing under this section may, on application for leave to receive fresh evidence, inquire into the nature of that evidence and, on granting leave, may
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> (a) direct that all or part of the fresh evidence will be received by the panel,

(b) direct the Hearing Committee from which the appeal was taken to hold a further hearing to hear the fresh evidence, or

(c) quash a finding of guilt made by the Hearing Committee and direct that the conduct that was the subject of the finding be dealt with at a new hearing by a different Hearing Committee.

38. The test for the receipt of fresh evidence is well settled, having been articulated by the Supreme Court of Canada in *Palmer and Palmer v. The Queen*, [1980] 1 S.C.R. 759, at 775:

> "(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
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> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, if taken with the other evidence adduced at trial, be expected to have affected the result."

39. The Alberta Court of Appeal adopted that same test for civil matters in *Xerex Exploration Ltd. v. Petro-Canada* (2005), 47 Alta. L.R. (4th) 6 and *Buckley v. Buckley*, 2007 ABCA 232.

40. The Benchers in this Appeal ruled that the fresh evidence satisfied the requirements of due diligence, relevance, credibility and decisiveness. Accordingly, the application and the cross application were granted and, pursuant to section 76(6)(a), the fresh evidence was received for purposes of this Appeal (Exhibits 5, 6 and 7).

SUMMARY OF ARGUMENT

41. For the reasons that will follow, the Benchers have concluded that the Appeal can be decided on the issue of whether a reasonable apprehension of bias existed.

a) Submissions of the Member

42. The Member asserts that an adjudicator should not have private conversations with a party interested in the proceedings. By doing so, the adjudicator steps out of the role of impartial adjudicator and takes on the appearance of an investigator. By collecting information outside of the hearing, the adjudicator might be viewed as advancing one

side's position at the expense of the other, or collecting information that will be used to lay a trap for one of the parties within the hearing, or demonstrating a predisposition against or in favor of one of the parties.

43. The combination of the investigative and adjudicative functions creates the reasonable apprehension of bias, regardless of the results that the investigation yields.

44. Further, it does not matter whether the fact of the improper communication, or its content, affects the hearing outcome. The overriding principle of the rule against bias is that the administration of justice must be protected from disrepute. Justice must not only be done, but must be seen to be done.

45. In the present Appeal, the appearance of bias is aggravated by the Chair's premeditation in contacting the witness, and by his persistence in questioning that witness after a concern was raised about the *ex parte* communication. The Member submits that this evidence demonstrates that the Chair misapprehended his role, or was taking sides.

46. In support of his position, the Member relies on the findings of the learned Chambers Justice on judicial review, who agreed that a reasonable apprehension of bias was established.

47. In addition to the impugned *ex parte* telephone conversation, the Member contends that a reasonable apprehension of bias is gleaned from the nature of the questioning and other conduct exhibited by the Committee Chair during the Hearing.

48. The Chair, it is submitted, extensively and aggressively questioned the Member in such a way as to suggest that the Chair assumed the role of the prosecutor, and "entered the fray" on behalf of the prosecution. As an illustration, the Chair engaged in lengthy questioning of the Member, which stretches in excess of 60 pages of transcript (Vol. II, pgs. 647 to 705; and 708 to 710). The Chair subsequently invited the Member to be recalled and questioned him some more. The Member characterizes much of the questioning as a cross-examination, the purpose of which extended beyond clarification or follow up on matters arising from counsels' questioning. The Chair became prosecutor.

49. The Chair's lack of neutrality is demonstrated by the nature of the questioning, which became leading and argumentative. For example, commencing at page 674, line 9 (Vol. II), the Chair challenged the Member for deposing in an Affidavit that his clients were "rushing" the lawyers, and editorialized by stating that the Member's characterization was "not a reasonable characterization", and then persisted in repeating that it was "an unreasonable characterization".

50. As another illustration, commencing at page 696 (Vol. II), the Chair challenged the Member about ambiguity in the Affidavit. Commencing at line 5, the questioning proceeded as follows:

"Q: Do you acknowledge that the Affidavit is misleading?
A: No sir.
Q: In particular, paragraph 15?
A: I don't think so.
Q: Sir, did you consider disclosing in your Affidavit the fact that the failure to deduct the amount of the loan was an error on the part of your firm?
A: I think it would be clear to anyone that that – it was our error. I don't know if I specifically said that in the Affidavit. I said it to the Court."

51. The Member submits that the Chair paid no heed to the fact that the Member had verbally apprised the Court of the correct information, rendering the ambiguity in the Affidavit inconsequential. The questioning therefore sought to impugn the Member's credibility without justification.

52. The Chair then examined the Member on another point, being whether the Member had disclosed to the Court that "without prejudice" correspondence was involved. The Member asserts that the Chair's line of questioning was misleading and judgmental.

53. The Chair attempted to discredit the Member by suggesting that the Member's categorization of the correspondence as being "an attempt to negotiate" was not correct. At page 699 (Vol. II), the Chair asserted:

"Q: Indeed, it wasn't a letter of negotiation, was it?
A: Well, I think it was. It was marked without prejudice, and it said that they would be prepared to pay back a small amount.
Q: Indeed, what the letter said was, among other things, was that this was all they had. They were prepared to give you back what they had. Isn't that right?
A: Yes.
Q: And on that basis, you characterize this letter as a letter of negotiation?
A. That's how I took it."

54. The Chair was challenging the Member, and trying to establish that the Member had misled the Court, notwithstanding that a reasonable contrary explanation was in evidence before the Hearing Committee.

55. The Member also contends that the Chair assumed an investigatory role during the Hearing itself, pursuing inculpatory evidence that was not considered relevant or necessary by the Law Society's prosecutor.

56. That contention focuses on "specials files" mentioned by a witness from the Member's law firm, after the Member had testified. The specials files were produced through the witness, and thereafter, during the Hearing, the Chair was leafing through the files. The Chair asked whether counsel had reviewed the files and Law Society counsel, at page 759, line 17 stated: "I can say for my part, Mr. Chair, that I went through every

piece of paper in this file looking for information that may be of assistance to the Law Society's case." Nonetheless, the Chair wanted the Member recalled for examination on certain documents in the file.

57. Once the Member was recalled, the Chair asked the Member's counsel whether he wanted to examine the Member. Counsel declined. The Chair did not then turn the questioning over to Law Society's prosecutor to resume cross-examination. The Chairman did not even ask the prosecutor whether he wanted to question the witness. Instead, the Chair conducted the cross-examination of the Member himself (Vol. II, page 763).

58. The Member contends that the Chair was considering materials not in evidence, in particular the contents of the specials files, and in that way, was usurping the role of Law Society counsel by undertaking independent investigations.

59. Finally, the Member states that the Chair repeatedly interrupted Law Society counsel during cross-examination, to conduct his own questioning. Examples occur in the transcript at:

Vol. I, pg. 441:

> "The Chair: I don't mean to interrupt, Mr. Merchant, but did anyone from C. F. Bankers or I. tell you they were going to bring criminal proceedings?
>
> A: No."

Thereafter, Law Society counsel continued with his cross-examination.

Vol. I, pg. 462 to 464:

> "The Chair: Mr. Groome, I don't want to interrupt your cross, but there is a question I would like to ask.
>
> Mr. Groome: Absolutely.
>
> The Chair: Mr. Merchant you've said many times that you were pressed for more information. What information were you being asked to provide?
>
> A: Well when I spoke with-I believe it was T. – on March 7th, she was asking: "What was the date of the settlement? What was – what were the dates of the cheques? When did they get the money? Have I told them?"
>
> The Chair: Told them what?
>
> A: Have I told the clients that they have received an overpayment? Have the cheques cleared? Those sorts of questions. And I just clammed up. I just wasn't

very cooperative. I said: Well, I don't know. I guess I could look. I'm not sure. Then she said: Well, the owner will certainly be calling you.

The Chair: Didn't you have an obligation under your acknowledgment to tell them that information?

A: Well, I don't know that I had.

The Chair: Did you consider that?

A: I considered that I had to tell them that the case had settled. I hadn't considered what I had or didn't have to tell them, but my father's advice, which was consistent with Mr. Stokes' advice was they have to prove that the Assignments are valid, don't say anything to them. They have to be able to show us the Acknowledgments, those sorts of things.

The Chair: You hadn't spoken to Mr. Stokes as of March 7th. I am asking about what you knew, what you considered on March 7th and 8th. Let's be clear. On March 7th and 8th, what information were you asked to provide?"

60. These interruptions did not relate to points of clarification, but rather were illustrations of the Chair entering into the cross-examination of the Member, and confusing the roles of adjudicator, investigator, and prosecutor.

61. These are only a few examples. The Member submits that a reading of the entire Hearing transcript demonstrates that the Chair "so descended into the fray as to destroy any sense of impartiality": *Jones and de Villars,* Principles of Administrative Law, at page 414.

62. Finally, where an individual's livelihood is at stake, which was the situation here, a heightened level of procedural fairness is required. The Member relies on the following comments of the learned Chambers Justice from the judicial review judgment, *supra*, at para. 24:

"…a decision to deprive a person of his or her livelihood is the most important decision that a tribunal can make. Any tribunal making such a decision has an obligation to take great care to ensure that the process is and appears to be fair and impartial."

b) Submissions of the Law Society

63. Counsel for the Law Society submits that the burden on the Member in advancing an allegation of reasonable apprehension of bias is to establish substantial grounds for the reasonable apprehension.

64. In *R. v. S. (R.D.).* [1997] 3 S.C.R. 484, at para. 112 and 113, Justice Cory for the majority on this point described the standard as "a real likelihood or probability of bias", adding that "a mere suspicion is not enough". Further, the impugned words or actions must be "viewed in context": *supra*, at para. 100.

65. In the judicial review proceeding, the Law Society conceded that the *ex parte* telephone conversation should not have occurred, but submitted that the error was not fatal and did not deprive the Member of procedural fairness.

66. The existence of an *ex parte* communication between adjudicator and witness was enough to raise the issue of apprehension of bias, but was not determinative. The contents of the communication must be examined to assess whether a reasonable apprehension of bias has been established.

67. The substance of the evidence collected by the Chair through that conversation was actually helpful to the Member, as it confirmed the receipt of the Member's apology by the complainant and accorded with the Member's evidence. The telephone call therefore had no possible adverse effect on the Member's cause.

68. The Member's concerns about the Chair's interventions during the Hearing were raised for the first time in this Appeal. If the Member had been concerned about the appearance of bias, it is curious that the concern was not raised during the Hearing or on judicial review.

69. Throughout the Hearing, the Member was represented by an experienced, able counsel, who never raised any objection to the Chair's questioning. The Member himself, while relatively junior at the Bar, also had courtroom experience and apparently never thought to object to the Chair's questioning.

70. The Member was represented by another experienced and capable lawyer on judicial review, and again no concern was voiced about the Chair's interventions.

71. If bias is perceived, "such allegations must, as a general rule, be brought forward as soon as it is reasonably possible to do so": *R. v. Curragh Inc*., [1997] 1 S.C.R. 537, at para. 11.

72. The Ontario Court of Appeal has articulated a similar obligation: "While the failure of a party to object to what it later alleges were undue interventions is not fatal to succeeding on such an argument, it is certainly relevant." *Chippewas of Mnjikaning First Nation v. Chiefs of Ontario*, 2010 ONCA 47.

73. The number of questions posed by the Chair does not matter. Referring to the number of pages of transcript consumed by the questioning provides no real insight, and must be contextualized by the length of the Hearing, which involved six days of evidence and a transcript of approximately 750 pages of testimony.

74. The Chair's interventions were caused by the scattered way in which the Member produced documents to his own counsel and to the Hearing Committee. While the Hearing Committee might have been annoyed with that presentation, it showed admirable restraint and worked to ensure that the substance of the Hearing was fair to the Member.

75. The interventions were a small part of the Hearing, and would not cause an observer of the whole proceeding to reasonably apprehend, on substantial grounds, and in the face of a strong presumption of judicial fairness and impartiality, that the Hearing Committee was biased.

76. As for the Chair's questioning of the Member about the "specials files", that was done with the permission of the Member's counsel, as noted in the following exchange (Vol. II. page 762, line 23 to page 763, line 6):

> "THE CHAIR: I would like to hear from Mr. Merchant on this then. Could we recall Mr. Merchant, please.
>
> MATTHEW MERCHANT, having been previously sworn, testified as follows:
>
> THE CHAIR: Would you like to ask the questions, Mr. Price, or would you like me to do it?
>
> MR. PRICE: You can do it, sir."

77. The conduct and questioning of the Committee Chair must be considered in the context of the procedural powers given to a Hearing Committee under sections 63, 65, 68 and 69 of the *Legal Profession Act*, which include the power to "…hear, receive and examine evidence in any manner it considers proper" without being "bound by any rules of law concerning evidence in judicial proceedings".

78. Counsel for the Law Society contends that these provisions, including section 65, which allow the Hearing Committee to expand the inquiry to "deal with any other conduct of the member that arises in the course of the hearing", indicate a robust role for a Hearing Committee, which has no parallel in the criminal or civil process.

STANDARD OF REVIEW

79. The Member submits that the standard of review is correctness on issues of jurisdiction, including an allegation of a reasonable apprehension of bias.

80. Counsel for the Law Society concurs, in the sense that matters of procedural fairness are decided without affording deference to the original decision maker.

81. The Benchers on this Appeal accept that a review of whether the proceeding met the level of fairness required by law is conducted without deference.

82. The Alberta Court of Appeal held in *Hennig v. Institute of Chartered Accountants of Alberta*, 2008 ABCA 241, at para. 12:

> "Because the court decides whether the fairness standard has been met without affording deference, in that sense fairness is reviewed for "correctness"…".

83. Accordingly, the Benchers examination of the alleged reasonable apprehension of bias proceeded on the basis that no deference would be afforded, a standard akin to that of correctness.

REASONS FOR DECISION

84. The test for reasonable apprehension of bias may be stated as follows: What would an informed person, viewing the matter realistically and practically and having thought the matter through, conclude? – *Matthew V.R. Merchant v. Law Society of Alberta, supra,* at para. 6; *Committee of Justice and Liberty v. Canada (National Energy Board)*, [1978] S.C.R. 269 at 394-395.

85. In *Newfoundland Telephone Company Limited v. The Board of Commissioners of Public Utilities,* [1992] 1 S.C.R. 623, at 636, Justice Cory wrote:

> "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 the adjudicator."

86. The test for reasonable apprehension of bias is therefore directed at the appearance of fairness, and does not demand a determination that the adjudicator was actually biased.

87. Further, the test requires a real likelihood of bias; mere suspicion is not enough: *R. v. S. (R.D.)*, *supra*.

88. The threshold for finding real or perceived bias is high. 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": *R. v. S.(R.D.)*, *supra*, at para. 113.

89. In the present Appeal, the concerns raised about the Committee Chair engage his *ex parte* communications with a complainant outside of, and his conduct and questioning within the Hearing.

90. The *ex parte* communications outside of the Hearing have already been the subject of judicial commentary in *Matthew V.R. Merchant v. Law Society of Alberta, supra.* The Order of the learned Chambers Justice was overturned on appeal, but the appellate court did not disagree with the findings about apprehension of bias, noting that it was "unnecessary and undesirable to comment upon the merits": *Merchant v. Law Society of Alberta*, *supra*, at para. 34.

91. While the findings of the learned Chambers Justice are not binding, in light of the successful appeal, they provide some judicial guidance and remain persuasive.

92. In examining the effect of the *ex parte* communications, the learned Chambers Justice commented about the analysis at para. 14:

> "I do not agree with the Applicant that there can be no exception to the principle that a private communication with a party or witness outside of the hearing process gives rise to a reasonable apprehension of bias. The *ex parte* communication does not automatically void the process. It is necessary to consider the content and nature of the communication and the surrounding circumstances, and determine what an informed person, viewing the matter realistically and pragmatically and having thought the matter through, would conclude. That view is consistent with the test established to determine whether there is a reasonable apprehension of bias. As I said above, there must (sic) something real that leads to the creation of an apprehension of bias."

93. The Benchers in this Appeal agree with that statement of the analysis.

94. The Law Society contends that the telephone conversation did not prejudice the Member, and that accordingly, there was neither harm nor foul. The telephone call was made after findings of guilt, which impliedly called into question the Member's credibility. Since the Member's honesty was already impugned, the challenge to his honesty inherent in the telephone inquiry did not give rise to a reasonable apprehension of bias.

95. The concern, however, is not the evidence uncovered by the telephone discussion, but instead, the perceived motivation of the Chair revealed by the "content and nature of the communication and the surrounding circumstances".

96. The real purpose behind the telephone call is unknown, but the likely purpose was to determine whether the Member's representation about sending the apology letter was true. The contact was deliberate, not an inadvertent remark during a conversation about other topics. The appearance is that the Chair was trying to collect information that could be used to impugn the Member during the sanctioning phase of the Hearing, or to lay a

trap, or to share with other Committee members outside of the Hearing. Fundamentally, the Chair was gathering information and therefore engaging in an investigatory role. In doing so, he created the impression that he had stepped out of his role of impartial adjudicator. That created a reasonable apprehension of bias.

97. The perception of bias is aggravated by the nature and extent of the Chair's questioning during the Hearing. The questioning was often leading, argumentative, or sought inculpatory admissions. The Member characterizes some of it as a "cross-examination". The Benchers on this Appeal accept that, at times, it had that flavour.

98. Proceedings respecting conduct deserving of sanction under Part 3 of the *Legal Profession Act* provide a Hearing Committee with broad powers to receive and consider evidence. As counsel for the Law Society observed, the procedural powers given to a Hearing Committee under sections 63, 65, 68 and 69 of the Act include the authority to "…hear, receive and examine evidence in any manner it considers proper" without being "bound by any rules of law concerning evidence in judicial proceedings".

99. In addition, the Hearing Committee is empowered to compel as a witness the member whose conduct is the subject of the Hearing, and to require a witness to provide evidence that might tend to incriminate that person: section 69.

100. The Hearing Committee is composed only of Benchers, and therefore the Hearing Committee is presumed to be knowledgeable about the profession. The Benchers act in the public interest, and have an obligation to determine whether the conduct of the member "is incompatible with the best interests of the public or of the members of the Society, or tends to harm the standing of the profession generally": section 49 of the Act.

101. This procedural backdrop might suggest that a Hearing Committee, acting in the public interest, can assume a more inquisitorial approach to a proceeding than might be the case in a court of law. However, the proceedings are still structured on an adversarial model in which counsel for the Law Society acts as prosecutor, and the member is the respondent. In such a model, a Hearing Committee must remain vigilant not to create the appearance of usurping the role of one of the parties. The appearance of impartiality remains fundamental to procedural fairness.

102. Assuming an overly aggressive posture, and appearing to advance one side's position at the expense of the other, can compromise impartiality by creating the appearance of prejudgment or bias.

103. In the present matter, the Hearing Chair's questioning, when taken in total, created the reasonable apprehension that he was usurping the role of the prosecutor. The interventions were repeated and pronounced. He might have done so to promote efficiency in a long hearing, or to uncover evidence that would crystallize issues, or to focus the inquiry. However, by stepping into the role of the prosecutor, even through inadvertence, a reasonable apprehension of bias was created.

104. The Benchers on this Appeal do not have the same concern about the Committee Chair's request to see the "specials files", and his review of them. The request was made within the confines of the Hearing, and expressly consented to by the Member's counsel (Vol. II, page 756):

> "THE CHAIR: I am interested in these special files that you have identified. I would like to see those.
>
> MR. PRICE: You want them produced?
>
> THE CHAIR: Yes.
>
> MR. PRICE: Produce them. I don't have a problem with it."

105. The Chair's subsequent review of the files took place within the Hearing, with the full knowledge and consent of the Member and his counsel. The Member cannot now be heard to complain about that which he expressly permitted through his counsel.

106. The Benchers' concerns about the questioning, however, remain.

107. The Law Society submits that the Member's failure to raise objections to the Chair's questioning within the Hearing is relevant. The Benchers agree. As noted in *R. v. Curragh Inc., supra,* and *Chippewas of Mnjikaning First Nation v. Chiefs of Ontario, supra,* such allegations should as a general rule be brought forward at an early opportunity, and the delay in doing so may be taken into account.

108. A party should not lie in the weeds, and after learning of an adverse result, spring up with a complaint about procedural irregularity that could have been raised and addressed during the course of the hearing. That undermines judicial economy and the efficient administration of justice. Nevertheless, the Benchers recognize that objections of that nature are delicate, and might be perceived as inviting offense from the adjudicator.

109. Here, the impact of the Committee Chair's questioning on procedural fairness might not have been fully apparent until the discovery of the *ex parte* communications. However, when viewed in combination with the fact and content of the telephone call, the appearance of bias becomes more pronounced.

110. Consequently, these Benchers are satisfied that, notwithstanding the delay and the failure to bring the concerns about the Chair to the attention of the Hearing Committee at the time, the questioning of the Chair helps to inform a reasonable observer about the overall appearance of fairness for this Hearing.

111. Accordingly, these Benchers are satisfied that a reasonable apprehension of bias has been established based on the *ex parte* communications alone, and more egregiously, in combination with the Chair's questioning.

112. At the judicial review application, the Law Society argued that the Hearing Committee's decision could be sustained, at the discretion of the Court, even if the Court found a reasonable apprehension of bias. No such argument was advanced before the Benchers in this Appeal. But in any event, even if such discretion exists, the Benchers here would not utilize it to uphold the decision of the Hearing Committee.

113. The Hearing Committee process is integral to the independent regulation of the legal profession. It must be viewed by the public and members of the Law Society as impartial and procedurally sound. The obligations of procedural fairness can be no less demanding when the individual at jeopardy is a lawyer accused of conduct deserving of sanction – especially when his continuing participation in the Law Society and his livelihood are at stake.

DISPOSITION

114. The Benchers on this Appeal have concluded that the conduct of the Committee Chair, taken in the aggregate, gave rise to a reasonable apprehension of bias, which deprived the Member of procedural fairness.

115. Section 77(1) of the *Legal Profession Act* states in part:

> "**77(1)** Within a reasonable time after the conclusion of their appeal hearing under section 76, the Benchers may, in respect of any conduct that resulted in the order of the Hearing Committee under section 72(1)(a) or (b), make one or more of the following orders:
>
> (a) an order
> (i) confirming the Hearing Committee's finding of guilt in respect of the member's conduct, or
> (ii) quashing the finding of guilt, with or without a further order under subsection (3);
>
> …
>
> **(3)** If the Benchers under subsection (1)(a) quash a finding of guilt,
>
> (a) the Benchers may also make an order directing that the member's conduct that was the subject of the finding be dealt with at a new hearing by a different Hearing Committee, and
>
> (b) section 59 applies to the matter as though that section referred to the Benchers rather than to the Conduct Committee."

116. The Appeal is granted, and the findings of guilt on the six citations, described as Citations 1, 2, 5, 6, 8 and 11, are quashed.

117. The sanction imposed and the costs award granted by the Hearing Committee are set aside.

118. These Benchers direct that the six citations, described as Citations 1, 2, 5, 6, 8 and 11, be referred to a new hearing before a different Hearing Committee.

COSTS

119. In the event that the parties cannot agree on the costs for the Appeal, the parties may provide written submissions about costs to this Appeal Panel within 60 days of the date of this report.

120. The Appeal Panel will remain seized of this matter for any incidental directions or relief required from either of the parties to give effect to this Decision.

121. The Executive Director shall provide a copy of this report to counsel for the parties, and proceed with the process contemplated by section 77(3)(b).

Dated this 31st day of January, 2011.

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KEVIN S. FETH, QC, Bencher, Chair

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MIRIAM CAREY, PhD, Lay Bencher

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FRED FENWICK, QC, Bencher

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JAMES GLASS, QC, Bencher

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SARAH KING-D'SOUZA, QC, Bencher

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STEVE RABY, QC, Bencher

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FREDERICA SCHUTZ, QC, Bencher

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DALE SPACKMAN, QC, Bencher

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ANTHONY YOUNG, QC, Bencher