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“Improper Jumps in Reasoning” on Judicial Disqualification says Court of Appeal

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Cases Considered: *Boardwalk REIT LLP v. Edmonton (City)*, 2008 ABCA 176

Enough already! That’s the Alberta Court of Appeal’s message on judicial disqualification applications. The court is not saying, “leave potential bias issues to us.” It is merely reinforcing the time honoured “reasonable apprehension of bias” principle. But there is a twist in this case. In fact, there are two.

First, the court underlines that the “apprehension” of bias must be based on serious grounds. Remote and speculative connections between a judge and parties or issues in a proceeding (and Justice Côté lists ten factual examples) will not be grounds for disqualification. Secondly, while there was no scolding of counsel, the court also targeted what might be described as “strategic disqualification initiatives.” Justice Côté cited seven dangers of unnecessary recusal, from judge shopping and expense and delay to the reality of almost unavoidable connections.

The Facts

The issue concerned an alleged appearance of bias in a municipal assessment judicial review appeal by Boardwalk REIT LLP. This concerned assessments of Boardwalk properties located in Edmonton. The alleged bias raised by two Edmonton municipal assessors concerned one Calgary-based member of the three-judge Court of Appeal panel.

For his personal Calgary assessment appeal, the Calgary judge had hired an accountant who was with the same national firm of chartered accountants as the people engaged by Boardwalk for its Edmonton assessment appeals. When the matter reached the courts, Boardwalk was represented by a law firm, not the accounting firm. The accountants did not appear or testify before either the Court of Queen’s Bench or the Court of Appeal.

The bias issue was raised in a letter to the Chief Justice, after the Court of Appeal Panel heard the matter, but while it was still in the process of requesting and considering further written arguments. As a result, the Calgary judge did not formally disqualify himself, but he voluntarily agreed not to participate in deciding the appeal. The Edmonton Assessor then moved to disqualify the two remaining Edmonton-based judges on the panel on the ground that the Calgary judge had a conflict of interest and this judge’s participation on the panel “tainted” the two other judges.

The Court of Appeal concluded that the Calgary judge was not legally disqualified, and (though not then strictly necessary) went on to conclude that the rest of the panel was not disqualified either.

Enough Already!

No one disagreed about the proper legal test, namely "reasonable apprehension of bias," as applied by the Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para 74, which in turn relied on C*ommittee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 639. Any apprehension of bias must be reasonable. As Justice De Grandpré said in *Committee for Justice and Liberty*, the questions is what "reasonable and right minded persons" informed and "viewing the matter reasonably and practically - and having thought the matter through - would conclude."

The difficulty is in the application of this test. Ironically, this is underlined by the *Committee for Justice and Liberty* case itself. Justice De Grandpré, whose formulation of the test is consistently quoted, was in dissent. What separated his conclusions from those of the majority (which applied the same test) was his conviction that, because the hypothetical reasonable person had to be informed, that person would conclude that it was okay for the Chair of the National Energy Board Panel set to hear a major pipeline application to have, as President of one of the companies in the Applicant consortium prior to his appointment to the Board, participated in development of the application, including matters of finance and routing. The Bora Laskin-led majority emphatically disagreed.

Presumably, with this application difficulty in mind, Justice Côté, for the two remaining judges, bore down on the facts - particularly the specific nature of the alleged connections of the Calgary judge to the Boardwalk case decided by the Edmonton assessment authorities. He outlined an eight step "chain of connections" that represents "many degrees of separation." While the common denominator was the national accounting firm there were no individual connections or connected proceedings. Justice Côté drove his (at least) four degrees of separation analysis home by listing ten thumbnail examples of situations where no apprehension of bias was found.

The key is in the evidence; the grounds alleged must be serious and substantial. Nothing less should trigger the antennae of the hypothetical reasonable person. Speculation is not allowed. In other words, it is a matter of remoteness. Specific factors considered relevant include timing of connected matters or relationships, whether the issues are the same (though legal issues cannot artificially be subdivided) and most important, the specific nature of personal relationships. In *Wewaykum Indian Band*, Justice Ian Binnie of the Supreme Court of Canada was held not to be disqualified (although he voluntarily recused himself) where, some 18 years before hearing the appeal, he held, as Associate Deputy Minister of Justice, general responsibility for all Federal litigation, including the beginnings of the case in question. At the time, Justice Binnie had received memoranda on the claim and had attended a meeting where the claim was discussed. By 2002, when the case was decided, he had no recollection of any relevant meetings or views.

No "Mechanical Rules"

Justice Côté criticized what he described as a “mandatory approach” involving “mechanical rules.” For example, relationship by family or marriage is undoubtedly serious and significant, but much less so when it is applied (as Justice Côté theorizes) at four degrees removal (spouse and children, grandchildren, etc.) from a judge. The issue is always evidence of serious and substantial connection.

Disqualification of the Remaining Two Judges

Justice Côté was emphatic: there is no automatic disqualification. The hypothetical reasonable person would not be apprehensive of bias even if one panel member were disqualified because she or he would understand that:

- Judges can’t be influenced by matters that they don’t know about
- Parties can’t create a disqualification (e.g., by initiating disciplinary complaints against judges)
- Judges do their own work (as the Supreme Court of Canada pointed out in *Wewaykum Indian Band* at para 92)
- Legal and judicial systems must be understood before adopting analogies, e.g., from the UK.

Justice Côté was not done. He alluded (while taking care not to question the motives of counsel) to the dangers of “tactical and opportunistic recusal motions” (para. 74). Then he listed seven dangers that arise where judges withdraw unnecessarily, thus aborting a proceeding. These are:

- Judge Shopping
- Delay and Expense
- Tarnished Experience (i.e., public credibility of courts)
- Producing Insoluble Problems (”Some litigants,” he said at para. 104, “would like that.”)
- Preventing Litigation by Judges
- Litigation over Litigation and Technicalities (avoid “litigants … trolling for technical coincidences” at para 107)
- Some connections are almost unavoidable

Conclusions

There is nothing new in terms of legal principle in *Boardwalk REIT LLP v. Edmonton (City).* “Reasonable apprehension of bias” continues to rule. It is the application of the principle to which the opinion speaks. Grounds for reasonable apprehension must be serious, and there should be no easy assumptions about relational circumstances. Justice must be impartial, but there are no formulas for judicial disqualifications. Counsel should not be quick to raise uncompelling judicial relationships, particularly where there is a voluntary recusal and the issue is the impartiality of the remaining judges on a panel. Procedural fairness cuts in both directions - courts should go a long way to avoid apprehension of bias, but it is also possible that justice delayed by allegations of bias based on distant relationships may be justice denied.

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