July 31, 2019

Application for Mistrial and Judicial Recusal Denied

By: Serena Eshaghurshan

Case Commented On: *R v JNS*, 2019 ABQB 557 (Can LII)

In July 2019, the Honourable Mr. Justice Steven N. Mandziuk of the Court of Queen's Bench of Alberta (ABQB) heard an application for a mistrial and his recusal as the presiding judge over a criminal matter. The Applicant, JNS, sought the remedy due to Justice Mandziuk presiding over both his child support case and his criminal trial. Justice Mandziuk declared that there was no evidence or appearance of judicial bias and dismissed the application.

Facts

JNS has two biological children with his ex-wife, SV: D and R. He also has two stepdaughters from the marriage: S1 and S2. On March 19, 2019, JNS was convicted of sexually abusing his stepdaughters. Sentencing was then adjourned until late May. Due to the nature of the charges, and to protect the identities of the victims, a publication ban was issued in accordance with s 486.5 of the *Criminal Code*, RSC 1985 c C-46.

The crux of the issue in this case is that Justice Mandziuk had judicial contact with JNS prior to his criminal trial. On April 23, 2018, Justice Mandziuk granted a child support order in Family Chambers with SV as the Applicant and JNS as the respondent. It is important to note that the order only dealt with support for D and R. Because of this previous judicial contact and the information revealed in Family Chambers, JNS sought a mistrial in the criminal case and for Justice Mandziuk's recusal, as he claimed there was a "reasonable apprehension of bias" (at para 4). Unlike a criminal trial where the burden is on the Crown to prove all elements of an offence beyond a reasonable doubt, the onus was on JNS to establish judicial bias on a balance of probabilities, which essentially means more likely than not (at para 4). JNS did not argue that Justice Mandziuk was actually biased, but rather that there was a perception of bias (at para 5). Justice Mandziuk claimed that he "had no memory of the Chambers application and made no connection between the civil and criminal proceedings" (at para 5).

Issues for the Court of Queen's Bench

Justice Mandziuk was required to consider whether JNS proved, on a balance of probabilities, that judicial bias was evident, and if so, whether the motion for mistrial and his recusal as a judge should be granted?

The Nature of Family Chambers

Before starting his analysis, Justice Mandziuk gave a brief explanation of Family Chambers and how it typically operates. Family Chambers is held twice every weekday, and normally deals with 50-80 matters per day (at para 7). Parties are permitted only 20 minutes to present their contested applications, and anything requiring more time is dealt with in Special Family Chambers (at para 8). Justices may be required to preside in Family Chambers several times per year, and evidence that is presented in Chambers is typically not reviewed by the judge beforehand, but rather presented by counsel during the hearing. As such, justices potentially preside over hundreds of matters in Family Chambers in a given year, with no advanced preparation beforehand (at paras 9 and 10).

Analysis

The Presumption of Judicial Impartiality

Justice Mandziuk began his analysis by considering case law that explained the meaning of judicial impartiality. In *Wewaykum Indian Band v Canada*, [2003] 2 SCR 259, 2003 SCC 45 at para 59, the Supreme Court of Canada explained what the general presumption of judicial impartiality meant. The Court also stated that the onus of rebutting the presumption is on the party challenging it:

> "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, Ethical Principles for Judges (1998), at p. 30)… [T]he law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified. (cited in *JNS* at para 16; emphasis added)

The test to establish judicial bias was laid out by the dissent in *Committee for Justice & Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at para 40, 68 DLR (3d) 716: "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude." (cited in *JNS* at para 19)

Thus, the test is a 'reasonable person' test and was later refined in *Wewaykum Indian Band* at para 66:

> … to put it differently, in cases where disqualification is argued, the relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was. (cited in *JNS* at para 20; emphasis added)

Additionally, grounds for disqualification cannot be established solely on the basis that a judge presides over the same litigant at a different time or in a different proceeding. There are several

reasons why a judge would be required to preside over the same party at a different time, such as there not being enough judges available or where it is pragmatic to have all matters presided over by the same judge (*Broda v Broda*, 2001 ABCA 151, 286 AR 120 at para 16; cited in *JNS* at para 21). This sentiment was further echoed in *Collins v R*, 2011 FCA 171 at para 11, 421 NR 201, where the Court ruled that an adverse verdict is not enough to warrant disqualification:

> "[t]he simple fact that judges render a judgement which is unfavourable to a party cannot in itself result in a conclusion of bias… a reasonable apprehension of bias must be shown to exist either in the judgement itself, in the comportment of the judge or by some other means" (cited in *JNS* at para 22).

Justice Mandziuk also mentioned *R v Delorme*, 2016 ABPC 243, which had similar facts to the case at hand. In that case, an application for recusal was made on the grounds that the judge presided over a previous family matter of the accused. The Court refused to grant the recusal, stating that the accused did not satisfy the reasonable person test on a balance of probabilities (at para 15).

Applying these decisions to the case at hand, Justice Mandziuk concluded that JNS did not satisfy the reasonable person test and thus failed to establish the presence or appearance of judicial bias:

> … an informed person would not conclude on these facts that I have a bias in this case, or that there is an appearance of bias, arising from the decision I made in Family Law Chambers on financial matters almost a year before… (cited in *JNS* at para 27)

In summary, for judicial bias to be established, it must meet the reasonable person test set out in *Committee for Justice & Liberty* and in *Wewaykum Indian Band*. Judicial bias cannot be established solely on the grounds that a litigant later appears before the same judge for a different matter, or that a judge renders an unfavourable verdict to that party (*Broda*, *Collin*s, *Delorme*).

The Areas of Alleged Evidentiary Overlap

JNS also argued that there were four critical areas of evidentiary overlap between the Family Chambers hearing and the criminal trial that supported his application for a mistrial and recusal: (1) SV's affidavit regarding the nature of the relationship between him and his stepdaughters S1 and S2, (2) money withdrawn from JNS's corporation and given to his stepdaughters, (3) comments made in Family Chambers that damaged his reputation and credibility, and (4) the short time frame between the child support order and the criminal trial (at para 28).

On the first point, JNS argued that SV's affidavit disclosed information about the relationship between him and his stepdaughters, thus constituting an overlap of evidence in both the civil and criminal proceedings. However, Justice Mandziuk did not agree because an Agreed Statement of Facts was filed in the criminal trial which disclosed that JNS took on a parental role towards his stepchildren. This was not disputed by the Crown or the Defence. Thus, it was held to not be an issue (at para 29).

JNS's second argument for evidentiary overlap between both proceedings was the nature of the withdrawals allegedly made from his corporation and given to his stepdaughters. Justice Mandziuk did not see this overlap as problematic, as he stated he refused to classify the transfers as "child support" at Family Chambers, and instead insisted on a fuller hearing (at para 30). Again, the child support application in Family Chambers was only for D and R, not S1 and S2 (at paras 2 and 31). The nature of the payments to S1 and S2 was not ruled on in Family Chambers. Justice Mandziuk also stated that he did not render a judgement on the "withdrawals from the corporation" at the criminal trial, and the only mention of the payments was when S1 and S2 testified as to why they were paid (at para 30). The only mention of JNS's corporation was when S2 testified that part of her payment was due to her working for the family business (at para 30).

Justice Mandziuk also disagreed with JNS's third argument that his character or credibility was damaged, as the Family Chambers hearing was directed towards discovery of JNS's income and the criminal charges were mentioned in the context of explaining his financial situation (at paras 12, 32 and 33). No comments or findings were made about SV's or JNS's credibility (at paras 32 and 33).

Lastly, while Justice Mandziuk conceded that the period elapsed between the civil case and the criminal trial was relatively short, he again made mention to the nature of Family Chambers and the brief nature of the hearing (at paras 8, 9 and 34).

In one last effort, JNS argued *R v Funes*, 2016 ONCA 567 to establish a reasonable apprehension of bias. In *Funes*, the Court ruled a mistrial should have been declared based on the "perception of fairness" (at para 37). The judge in *Funes* presided over a preliminary inquiry (where the accused testified as a victim) and the criminal trial of the accused. The accused did not testify at his trial, but the judge heard his voice at the preliminary inquiry, and he also allowed wiretap evidence and police identification evidence to be admitted. The issue was not whether the judge was biased, but rather what a reasonable person, having knowledge of all the relevant information and circumstances, would conclude. The Court decided that a mistrial should have been declared based on the perception of fairness (at para 37). However, Justice Mandziuk distinguished *Funes* from the case at hand, as he ruled that there "was no evidence in the Family Chambers hearing… that was of any significant relevance in the criminal prosecution" (at para 38). By applying the reasonable person test from *Wewaykum Indian Band*, he held there was no evidence to support the finding of judicial bias:

> … A reasonable person properly informed would not apprehend that there was conscious or unconscious bias on my part in the criminal proceedings arising from my exposure to the civil action's evidence. (at para 38)

Commentary

In my opinion, the judgement was fair. Given the sheer number of matters dealt with in Family Chambers and the time constraints imposed, it is unsurprising that a judge may find him or herself in the position of later presiding over a previous litigant. Based on the evidence presented in the civil action and criminal trial, I also agree with Justice Mandziuk's finding that there was no significant evidentiary overlap in the proceedings. I believe that JNS's motion for mistrial and

disqualification was his last strategy to avoid a criminal conviction for abusing his stepdaughters. However, I think it is interesting that a judge is permitted to make a final ruling on his own impartiality. I think it is difficult for anyone to truly detect if they are unbiased in a given situation, and perhaps it is more consistent with due process to have an uninvolved 3rd party hear the evidence and then decide. Regardless, this was an intriguing case and it will be interesting to see how this ruling shapes future judicial impartiality cases.

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