IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

HER MAJESTY THE QUEEN	)	***D. Matas*** *and*
	)	***M. D. Glazer***
	)	*for the Appellant*
Respondent	)	
	)	***A. Y. Kotler***
- and -	)	*for the Respondent*
	)	
	)	*Chambers motion heard:*
THEODORE RAYMOND HERNTIER	)	***October 15, 2018***
	)	
	)	*Decision pronounced:*
(Accused) Appellant	)	***March 15, 2019***

MICHEL A. MONNIN JA

[1] Prior to the hearing of his appeal from a conviction for second degree murder, the accused brings a motion that I recuse myself from the panel scheduled to hear his appeal.

[2] The accused alleges that comments which I made during the course of hearing an appeal in the matter of *R v Van Wissen*, 2018 MBCA 110, indicate that I have a reasonable apprehension of bias against him.

[3] The comments that I made in the *Van Wissen* appeal dealt with one of many grounds of appeal in that matter; namely, that the trial judge had unduly interfered with counsel's conduct of the trial. A similar ground of appeal is to be argued in this accused's appeal.

[4] The exchange, which the accused alleges demonstrates that I have a reasonable apprehension of bias against him, was as follows:

MR. GLAZER: I have provided you in my factum with the numerous occasions when the judge interfered, was rude, expressed hostility, refused to let me speak, was ranting against counsel and yelling at me. You have all that. And --

THE COURT (M.A. MONNIN, J.A.): You know what, Mr. Glazer, I've read this transcript.

MR. GLAZER: Yes.

THE COURT (M.A. MONNIN, J.A.): And you and I have dealt with, we've been in trials together a long time ago. What applies in the head note of this case applies in this case as far as I'm concerned.

MR. GLAZER: And that says, sorry, I gave you my copy so I don't have one handy.

THE COURT (M.A. MONNIN, J.A.): There's -- you're not perfect in this trial; [n]either is the judge. And I'm not going to interfere. I can tell you that right now.

MR. GLAZER: Well, I just want to make this point and I make it --

THE COURT (M.A. MONNIN, J.A.): If you're not happy go to judicial [council].

MR. GLAZER: Well there's problems in doing that as My Lord is aware.

THE COURT (M.A. MONNIN, J.A.): I don't see any problems in doing that.

MR. GLAZER: Well, in Monias [*R v Monias*, 2016 MBCA 111] counsel came to this court complaining about that, that was the single Crown appeal.

THE COURT (M.A. MONNIN, J.A.): And you're doing the same thing again.

MR. GLAZER: This is one of my grounds. Let me say this to you.

THE COURT (M.A. MONNIN, J.A.): And I'm telling you that --

MR. GLAZER: Yes.

THE COURT (M.A. MONNIN, J.A.): you're a difficult counsel to deal with in a trial. You're covering all the bases that you can but you don't make it easy for any trial judge.

MR. GLAZER: Well, advancing my client's cause I don't see why that would make it difficult.

THE COURT (M.A. MONNIN, J.A.): But there's ways of doing it, Mr. Glazer --

MR. GLAZER: Well --

THE COURT (M.A. MONNIN, J.A.): -- and the reaction of the trial judge; it may not be perfect but it's not a ground for appeal in my view.

MR. GLAZER: All right. Well, My Lord that is --

THE COURT (M.A. MONNIN, J.A.): You can try to convince my colleagues otherwise.

MR. GLAZER: I'm just saying to you, respectfully and (inaudible), the courtroom is my workplace.

THE COURT (M.A. MONNIN, J.A.): I understand that.

MR. GLAZER: And I, I deem this harassment in the work place. And no one should have to put up with it quite frankly.

THE COURT (M.A. MONNIN, J.A.): And neither should the judge be harassed, Mr. Glazer.

MR. GLAZER: Well, I wasn't harassing the judge.

THE COURT (M.A. MONNIN, J.A.): Well it's all in the perspectives.

MR. GLAZER: Well --

[5] Counsel for the accused in the case at bar (Mr. Glazer) is the same counsel who appeared for the accused in *Van Wissen*, and the judge who presided over the accused's trial is the same judge who presided over the *Van Wissen* trial.

[6] Almost three months after the hearing of the *Van Wissen* appeal and prior to the Court releasing its decision in the matter, the accused brought a motion that I should recuse myself from that appeal. That motion was denied. See *R v Van Wissen,* 2018 MBCA 100.

[7] In support of his motion, the accused relies on the affidavit evidence of a person who was present in the courtroom during the *Van Wissen* appeal, and who deposed that she found it difficult to accept that a judge would express negative opinions about a lawyer in a public hearing and that I appeared to have some personal animosity against Mr. Glazer.

[8] The accused also argues that my criticism of counsel in *Van Wissen* and my informing counsel that I found little merit to the ground of appeal being advanced means that I will be biased against him because he is advancing a similar ground of appeal. In this case, that is only one ground out of 20 being advanced.

[9] The test to be met in a recusal application was dealt with in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 (at paras 20-26):

> The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:

> . . . 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. (Citation omitted).

(*Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, per de Grandpré J. (dissenting))

This test — what would a reasonable, informed person think — has consistently been endorsed and clarified by this Court: e.g., *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, at para. 60; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at para. 199; *Miglin v. Miglin*, [2003] 1 S.C.R. 303, at para. 26; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 46; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 11, per Major J., at para. 31, per L'Heureux-Dubé and McLachlin JJ., at para. 111, per Cory J.; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, at para. 45; *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 143; *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 684.

The objective of the test is to ensure not only the reality, but the *appearance* of a fair adjudicative process. The issue of bias is thus inextricably linked to the need for impartiality. In *Valente*, Le Dain J. connected the dots from an absence of bias to impartiality, concluding "(i)mpartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" and "connotes absence of bias, actual or perceived": p. 685. Impartiality and the absence of the bias have developed as both legal and ethical requirements. Judges are required — and expected — to approach every case with impartiality and an open mind: see *S. (R.D.)*, at para. 49, per L'Heureux-Dubé and McLachlin JJ.

In *Wewaykum*, this Court confirmed the requirement of impartial adjudication for maintaining public confidence in the ability of a judge to be genuinely open:

> . . . public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.

> The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. (Emphasis added; paras. 57-58.)

Or, as Jeremy Webber observed, "impartiality is a cardinal virtue in a judge. For adjudication to be accepted, litigants must have confidence that the judge is not influenced by irrelevant considerations to favour one side or the other": "The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger" (1984), 29 *McGill L.J.* 369, at p. 389.

Because there is a strong presumption of judicial impartiality that is not easily displaced (*Cojocaru v. British Columbia Women's Hospital and Health Center*, [2013] 2 S.C.R. 357, at para. 22), **the test for a reasonable apprehension of bias requires a "real likelihood or probability of bias" and that a judge's individual comments during a trial not be seen in isolation**: see *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851, at para. 2; *S. (R.D.)*, at para. 134, per Cory J.

The inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific, and there is a correspondingly high burden of proving the claim on the party alleging bias: see *Wewaykum*, at para. 77; *S. (R.D.)*, at para. 114, per Cory J. As Cory J. observed in *S. (R.D.)*:

> . . . 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. (Emphasis added; para. 141.)

[bolding added]

[10] In denying the recusal motion in *Van Wissen*, I wrote (at paras 16-21):

Unlike trial courts, where judges typically do not descend into the arena, appellate court judges are expected to enter the fray and challenge counsel and the validity of the arguments being advanced. It is appropriate for appellate court judges to play an active role in the appeal hearing. Appellate courts have the benefit of considering all of the arguments pertaining to the grounds of appeal before the appeal hearing. This provides appellate court judges with the opportunity to let counsel know the areas where there are concerns and to give counsel the opportunity to address those concerns.

My role as an appellate court judge is to deal with the issues in a fair and reasonable manner. That role, however, does not prevent me from expressing my view on any particular ground of appeal for fear of being accused of bias, even if it is to state that, in my view, that particular ground has little or no merit. I did so in this case.

The impugned exchange between Mr. Glazer and I, though pointed, was no more or less than what occurs between counsel and members of an appellate panel during the course of submissions. In light of our Court's recent dismissal of the same ground of appeal in *Monias*, it was important for Mr. Glazer to be aware that, from my perspective, he had a steep mountain to climb. That was basically the essence of my exchange with him.

Prior to the hearing, I had read the entire transcript of the trial proceedings and was aware of the difficulties which appeared to exist between the trial judge and Mr. Glazer. I was simply pointing out to Mr. Glazer that, in my view, he, as counsel, also had a role to play in the heated exchanges with the trial judge, and that I was not prepared to absolve him of all responsibility for what occurred during the course of the accused's trial. That does not amount to my being biased against his client. It simply reflects the lack of merit in that particular ground of appeal.

I acknowledge that I used strong language in my exchange with Mr. Glazer, but when that exchange is taken in context, it falls short of demonstrating that I had, or have, a reasonable apprehension of bias towards the accused. A Court of Appeal hearing is not a tea party.

> As a final point, the accused argued that the ground of appeal that brought about my comments was to be considered cumulatively with all of the other 17 grounds being advanced, and that my comment meant that I would not consider the grounds cumulatively. I know of no authority, nor was any advanced, for the proposition that he is advancing. Each ground is to be looked at individually and either accepted or rejected individually.

[11] Having denied a motion to recuse myself in *Van Wissen*, I can hardly see how or why I should accede to the request to recuse myself in this case, as what I stated in the prior appeal is as applicable to this one. More so, in this case, I have made no comments whatsoever.

[12] In *Van Wissen*, I was discharging my duty to my office and my role in the judicial process, as I have done for years, and I intend on continuing to do so. Over the years, there have been instances where I have found counsel to be difficult, but that is simply a hurdle to overcome in attempting to discharge my responsibilities and decide a matter based on the relevant evidence and the law as it applies.

[13] The fact that one of the grounds in this appeal is similar to a ground advanced in *Van Wissen* does not persuade me that my comments in *Van Wissen* in any way establish that I have a reasonable apprehension of bias.

[14] The words I used in *Van Wissen* are consistent with prior pronouncements made in this Court and do nothing to dispel the strong presumption of impartiality. While I might have spoken tersely, as described by the Crown in its motion brief, that does not lead to a conclusion of bias.

[15] With respect to this courtroom spectator, I am not prepared to rely on her evidence to convince me that I should recuse myself in this particular

case because I have no evidence of how informed or how little informed she may be as to the conduct of an appeal hearing, and I find that introducing her personal views turns what should be an objective assessment into a subjective one. The issue of a recusal is a matter for principled analysis, not the individual opinion of a random member of the public.

[16] I have not been persuaded that an isolated comment that I made in another appeal demonstrates that I have a real likelihood or probability of bias in this appeal. The accused, in my view, has failed to truly demonstrate a sound basis for perceiving that I have already come to a particular determination of a particular ground being advanced in his appeal.

[17] There is no basis in law for my recusing myself from hearing this appeal and, accordingly, the motion is denied.

Monnin JA