IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

	)	***D. Matas*** *and*
HER MAJESTY THE QUEEN	)	***M. D. Glazer***
	)	*for the Appellant*
	)	
Respondent	)	***J. M. Mann*** *and*
	)	***A. Y. Kotler***
- and -	)	*for the Respondent*
	)	
	)	*Chambers motion heard and*
SCHUYLER FRANCIS VAN WISSEN	)	*Decision pronounced:*
	)	***September 20, 2018***
	)	
(Accused) Appellant	)	*Written reasons:*
	)	***October 4, 2018***

MICHEL A. MONNIN JA

[1] The accused brings a motion seeking an order that I recuse myself from continuing to serve as a member of the panel determining the outcome of his appeal on his conviction for first degree murder.

[2] The appeal was heard on March 14, 2018. The accused filed this motion on June 8, 2018. The accused provided no explanation or reasons, either in his motion brief or in oral argument, that would explain the delay in bringing this motion.

[3] The accused alleges, because of comments I addressed to his counsel during the course of his submissions on one particular ground of appeal, that I demonstrated a reasonable apprehension of bias. He alleges that the comments made indicate that I had decided the issue in advance of the

case being disposed of; that my comments undercut his argument that his grounds of appeal were to be dealt with cumulatively; and that I was deciding this appeal on the basis of past history.

[4] The exchange which prompted this motion occurred in the latter part of his counsel (Mr. Glazer)'s submissions dealing with a ground of appeal in which he was alleging that the interference by the trial judge prevented him from having a fair hearing. What was said is as follows:

> 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.

[5] In order to provide a more meaningful context to this exchange, I add what was said before and after the above:

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 --

THE COURT (STEEL, J.A.): But what you're arguing if I understand you correctly, Mr. Glazer, is that his treatment of you in his interventions were so extensive in this case that they formulated a ground of appeal?

MR. GLAZER: Yes. Yes.

THE COURT (STEEL, J.A.): And rendered the trial unfair or rendered his charge unfair?

MR. GLAZER: Rendered the trial unfair and compromised my client's rights to a fair trial because as I put in the transcript, I have a very thick skin. But when he does it in front of the jury and the jury walks out shaking their heads, it undermines defence and it makes us look bad in the eyes of the jury. And I put it on the transcript and I can give you the excerpts.

THE COURT (STEEL, J.A.): No, I think you have them in your factum.

MR. GLAZER: All right. What it does is it makes it look like defence counsel is trying to pull a fast one. And defence counsel is unethical and you shouldn't believe the messenger here, defence counsel, it poisons my client's right to a fair trial. And it should never happen. And in Monias this court said it shouldn't happen.

THE COURT (STEEL, J.A.): Okay. But you realize that in Monias the ground was dismissed?

MR. GLAZER: It was dismissed, yes. But I, I'm submitting, I'm not going to be the last lawyer to stand up here and complain about this judge to you. You're going to hear it over and over and over again. Unless something is done to put a stop to it, it's going to continue. And if first degree murder convictions are overturned by this court or the Supreme Court of Canada because of such conduct we all lose. And that's the point I'm making.

THE COURT (STEEL, J.A.): I understand the point but I think what my colleague is saying is that in order to constitute a ground of appeal --

MR. GLAZER: Yes.

> THE COURT (STEEL, J.A.): -- the interventions have to be very, very extensive. On the other hand, if you're complaining of your treatment by that judge then there is another avenue and that is judicial complaint.
>
> MR. GLAZER: Try practicing in Manitoba when you make a complaint against a judge. So --
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> THE COURT (STEEL, J.A.): You know what we are here to decide this morning.
>
> MR. GLAZER: I understand. What I'm saying here is that in my respectful view, this ground in combination with other grounds, tipped the scales in favour of relief to my client.
>
> THE COURT (STEEL, J.A.): Okay.
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> MR. GLAZER: I'm not saying this single ground is alone by itself. But because if in Monias it wasn't enough and I think there was over 50 excerpts where the judge did all kinds of things: Rolled his eyes, commented against counsel, et cetera. Here it's not as extensive as in Monias, I grant you that, but the severity, if you listen to the tape he's yelling at me. And there's no reason to do that at all. And I complained about it to him. If he doesn't like the way counsel operates he can take counsel aside in chambers and talk to counsel. But you don't undermine counsel in front of the jury and you don't make us look bad in front of the jury. All the [excerpts] outside the jury I can handle. But it's in front of the jury that hurts my client and it's wrong. So I urge you to consider that in combination with the other grounds. My time is running out in 10 minutes and I have a little more to cover. If you wish I'll move [on].

[6] Following the hearing of the motion to recuse myself, I dismissed it with reasons to follow. These are my reasons.

[7] During the course of Mr. Glazer's submissions on the appeal, he informed the Court that, while he felt that all of the grounds of appeal were

legitimate, he would address them in descending order of merit; namely, that his weakest grounds would be addressed towards the end of his submissions.

[8] This particular ground of appeal, that the trial judge had unduly interfered with counsel's conduct of the trial, was one of the last grounds argued by Mr. Glazer.

[9] Later in the course of the appeal hearing, Mr. Glazer acknowledged that the alleged interference that occurred during the accused's trial was not as extensive as what had happened in *R v Monias*, 2016 MBCA 111, a case involving the same ground of appeal.

[10] It is instructive to consider what this Court said in *Monias* because, in my view, that case adds further context to the exchange quoted above. In *Monias*, this Court stated the following in dismissing the appeal on that same ground of judicial interference (at paras 5-6, 11):

> The second ground of appeal asserts that the trial judge's numerous interventions during the testimony of various witnesses deprived the accused of a fair trial or destroyed the appearance of a fair trial. Subsumed in the accused's second ground was his contention that the trial judge was much more critical and disapproving of the manner in which his counsel conducted the examination of witnesses than with other counsel.
>
> While the trial judge did intervene on numerous occasions, it is our view that, for the most part, there was a valid purpose for the interventions. Some of the interventions were required because the trial judge sought clarification, or because the questions being posed were compound questions which could be and, as some of the transcripts show, were confusing to the witness. Other times, the trial judge intervened to protect the jury from hearing evidence it was not entitled to hear. On the whole, when the trial judge's interventions are viewed in their proper context and cumulatively,

> we are all of the view that they did not deprive the accused of a fair trial or the appearance thereof.
>
> In the end, while it cannot be said that the trial judge's interventions deprived the accused of a fair trial, or would have led a reasonably-minded person to conclude that the accused did not receive a fair trial, it would have been better had the trial judge been more restrained.

[11] As well, a fair reading of Mr. Glazer's submission establishes that this ground, on its own, was not a sufficient basis on which a new trial could be ordered. Mr. Glazer, however, argued that this ground of appeal, in combination with other grounds of appeal, tipped the scales in favour of the accused, the cumulative argument referred to earlier in these reasons.

[12] In advance of considering the issue of recusal per se, I will deal with the issue of delay in bringing on this application.

[13] In *R v McQuaid*, 1996 NSCA 254, the appellant brought a motion following the hearing of an appeal, as is the case here, seeking to have the whole panel recuse itself. The recusal request was based on comments one of the panel members had made at the hearing. In dismissing the motion, Bateman JA wrote (at paras 34-35):

> As noted by Pugsley, J.A. in *Smith v. Whiteway,* [*R v Smith & Whiteway Fisheries Ltd* (1994), 133 NSR (2d) 50], "A lawyer who wishes to object to a presiding judge on the ground of reasonable apprehension of bias is expected to make the recusal motion with reasonable promptness after ascertaining the grounds for filing the motion." Mr. O'Neill's allegation of bias relates to comments by the panel at the hearing on September 11, 1996. Remarkably, not until forty-three days later, on October 24, did he advise the court of his intention to bring forward a recusal motion, indicating at that time that just two days earlier he had ordered a copy of the transcript of all four appeal hearings. Mr. O'Neill offers no

> explanation for his delay in bringing the motion. In this regard he says only that "... the motion has been brought in a timely fashion."
>
> One would expect that the apprehension of bias claimed by Mr. O'Neill, if reasonable, would have been immediately apparent to him during the hearing. That he did not act upon it with dispatch leads, possibly, to the inference that the alleged apprehended bias was, indeed, not apparent to Mr. O'Neill. This places the bona fides of his application in doubt. While he might answer that it became apparent to him only upon reflection, it is inexplicable that he did not, then, raise it when he had a further clear opportunity to do so in his supplemental submission filed two weeks after the hearing.

Also see *R v Curragh Inc*, [1997] 1 SCR 537; and *Ayangma v Charlottetown (City) et al*, 2017 PECA 15.

[14] Based on the above decisions, the accused's motion can be denied on the basis of delay alone. However, I am not prepared to leave it at that without addressing the issue that my exchange with Mr. Glazer demonstrates an apprehension of bias on my part.

[15] 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.)

[16] 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.

[17] 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.

[18] 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.

[19] 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.

[20] 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.

[21] 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.

[22] Accordingly, for all of the above reasons, I denied the accused's motion.

Monnin JA