Citation: Johnson Mushinski v Manitoba (Labour Board), 2025 MBCA 67
Date: 20250722
Docket: AI25-30-10163

IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N:

	)	***I. D. Johnson Mushinski***
	)	*on their own behalf*
	)	
	)	***A. Fenwick***
	)	*for the Respondent*
	)	*Canadian Union of*
	)	*Public Employees*
INGRID DELRIETHA JOHNSON MUSHINSKI	)	*Local 2153*
	)	
	)	***J. N. Myskiw***
(Applicant) Applicant	)	*for the Attorney General*
	)	*of Manitoba*
- and -	)	
	)	***J. D. Jacobs***
THE MANITOBA LABOUR BOARD and CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 2153 and WINNIPEG CHILD AND FAMILY SERVICES	)	*on a watching brief*
	)	*for Winnipeg Child and*
	)	*Family Services*
	)	
	)	***No appearance***
	)	*for the Manitoba Labour*
(Respondents) Respondents	)	*Board*
	)	
	)	*Chambers motion heard:*
	)	***June 26, 2025***
	)	
	)	*Decision pronounced:*
	)	***July 22, 2025***

TURNER JA

Introduction

[1] In the Court of King's Bench, the applicant (Mushinski) asked the judge assigned to her matter (the judge) to recuse himself because of actual

bias or a reasonable apprehension of bias. The judge declined to do so (the recusal order). Mushinski appeals the recusal order; however, the Attorney General of Manitoba (the AG) submits that the appeal is of an interlocutory order; therefore, leave to appeal is required (see *The Court of Appeal Act*, CCSM c C240, s 25.2 [the *Act*]). The AG also submits that leave should be denied. The remaining respondents do not take a position.

[2] Mushinski disagrees that the recusal order is interlocutory, arguing that given the one judge model in the Court of King's Bench (discussed further below), the recusal order impacts her substantive right to a fair proceeding. She argues she should be allowed to proceed with her appeal without having to seek leave. In the alternative, she submits that leave should be granted to proceed with the appeal.

[3] For the reasons that follow, I find that the appeal is of an interlocutory order and leave to appeal is required. Mushinski has not met the test for leave; therefore, leave to appeal is denied.

Background

[4] Mushinski filed a notice of application in the Court of King's Bench for judicial review of a decision of the Manitoba Labour Board (MLB). Later, she also filed a notice of constitutional question in relation to the same matter.

[5] On September 3, 2019, the Court of King's Bench introduced a one judge model for all civil actions[1]. Under this model, once an action proceeds to a pre-trial or a case management conference, the same judge handles all

[1] See Court of King's Bench of Manitoba, "Practice Direction/Notice: the 'One Judge Model'" (6 August 2019), online (pdf): <manitobacourts.mb.ca/site/assets/files/1152/practice_direction_notice_-_one_judge_model.pdf>.

procedural steps, hears any motions and presides over the trial. Accordingly, the judge who is assigned as the case management judge remains the judge for all steps in a proceeding.

[6] At the first case management conference before the judge on November 13, 2024, Mushinski stated that she had concerns about a reasonable apprehension of bias and actual bias on his part. As a result, December 19, 2024 was set for a hearing of Mushinski's application that the judge recuse himself (the application).

[7] Mushinski's submissions that the judge was biased or that there was a reasonable apprehension of bias were based on several arguments that can be summarized as follows:

a) An allegation that the judge made "racist comments" to a lawyer in a separate proceeding.

b) Comments made by the judge at the first case management conference revealed his "unconscious bias and lack of awareness" of the social context of her case.

c) Another judge in the Court of King's Bench was the spouse of the MLB's chairperson.

d) The judge had *ex parte* communications with counsel for the respondents.

e) The judge's decisions in two unrelated judicial review matters had been overturned by this Court (see *Wells v Manitoba Human Rights Commission*, 2024 MBCA 79; *Smith v The*

> *Appeal Commission*, 2023 MBCA 23), which demonstrated that he was "very opposed to judicial reviews".

[8] The judge denied the application. He noted that there was no dispute that the standard he had to apply was whether a reasonable person, informed of all the relevant circumstances, would conclude that the judge may not be impartial. He then went on to address Mushinski's submissions.

[9] The judge agreed that, in the context of a Law Society of Manitoba disciplinary proceeding, a lawyer alleged that he made racist comments during a case management conference. The judge denied making the alleged comments and the lawyer offered no proof that the comments were made, even though the lawyer had surreptitiously recorded the case management conference.

[10] Regarding comments the judge made at Mushinski's first case management conference, he acknowledged that he responded forcefully to the allegation that he was racist. He stated, "I think that's a natural human reaction for most people because racism is a very serious thing. It is a terrible thing, and it is terrible to be accused of that without any evidence whatsoever. It is hurtful. It is hurtful, and I responded vigorously to that, and perhaps I should not have."

[11] The judge explained that *ex parte* means "in the absence of the other party". He noted that he did not communicate with the lawyers for the respondents outside of Mushinski's presence and Mushinski did not present any evidence to show otherwise.

[12] The judge explained that the two above-noted cases on which he was overturned were not the only judicial review cases that he had decided during his career. Just because this Court overturned two of his decisions, it did not demonstrate to him that he was biased against all parties who seek judicial review. In addition, those decisions were not overturned because of bias.

[13] While the judge was providing his oral reasons for denying the application, Mushinski indicated that she intended to appeal.

[14] On January 14, 2025, the Court of Appeal Registrar emailed Mushinski following her attendance to Registry where she sought to file a notice of appeal. He wrote that it appeared to him that the recusal order was an interlocutory order; therefore, she would have to file a notice of motion seeking leave to appeal pursuant to section 25.2(1) of the *Act*. He explained that if leave was granted, she could then file her notice of appeal. He went on to say that if she insisted on filing a notice of appeal without first seeking leave, he would accept the filing but only if she included a letter explaining why, in her view, the recusal order was not interlocutory.

[15] Mushinski chose to file her notice of appeal with an explanatory letter.

[16] On April 10, 2025, counsel for the AG wrote to the Registrar requesting that the matter be put on a motions docket to seek direction from the Court pursuant to rule 37.1 of the MB, *Court of Appeal Rules (Civil)*, Man Reg 555/88R. He sought direction on whether to file materials responding to a motion for leave to appeal or an appeal. The AG took the position that the recusal order was interlocutory; therefore, Mushinski required leave before proceeding with the appeal.

[17] The matter appeared on the motions docket on May 8, 2025. The presiding chambers judge indicated that, in her view, the recusal order was interlocutory, but specifically did not rule on the issue. Mushinski was given until May 29, 2025 to file a notice of motion for leave to appeal. If she chose not to do so, the question of whether leave was required and, if so, whether leave should be granted would be heard based on the materials she had already filed. The AG was directed to file materials responding to a motion for leave to appeal. That is how the matter proceeded before me on June 26, 2025.

Discussion

Does Mushinski Require Leave to Appeal the Recusal Order?

[18] As noted above, Mushinski submits that the recusal order is not interlocutory because, in the Court of King's Bench one judge model, a judge serving as a case management judge remains the judge for the duration of the proceedings. She argues that, as a result, the judge's decision not to recuse himself impacts her substantive and procedural rights to a fair proceeding. She further argues that her concerns regarding the judge's personal feelings may affect his impartiality and may bring prejudice to the entirety of her proceedings.

[19] The AG relies on *Brunning v Fontaine*, 2019 ONCA 98 [*Brunning*], for its position that the recusal order is interlocutory. In *Brunning* at paras 10-11, the Ontario Court of Appeal held:

> [W]e note that the issues surrounding the recusal order, particularly the allegation of a reasonable apprehension of bias, are all grounds that [the applicant] has properly raised in her motion for leave to appeal from the costs order, and which the court deciding whether to grant the leave will have to consider.

> None of this changes the fact that *the recusal order does not finally determine any substantive rights of the parties nor does it determine a substantive claim or defence in the matter before the court. It is thus an interlocutory order that may only be appealed to the Divisional Court, with leave*.
>
> [emphasis added]

[20] The AG submits that the fact the judge will remain for the duration of the proceedings does not determine whether the recusal order is interlocutory. Rather, it is a factor relevant to whether leave should be granted to proceed with the appeal.

[21] In my view, the AG's position is correct. In *Kinnarath v People's Party of Canada*, 2024 MBCA 2 at para 17, this Court recently reviewed the factors to consider when determining whether an appeal is interlocutory:

> The relevant clues as to whether an order appealed from is final or interlocutory are to be found in the wording of the order and the reasons for decision. Here, the motion judge made no evidentiary findings that would be binding at trial. He also did not decide any of the substantive rights of the parties or the issues in dispute, as framed by the action, which was open to him under the *KB Rules* and the modern approach discussed in *Hryniak v Mauldin*, 2014 SCC 7, if appropriate.

[22] In the current case, Mushinski raised the issue of bias and requested the application within minutes of the judge's arrival at the first case management conference. The application was set quickly and was heard approximately one month after the case management conference. The recusal order is the only decision the judge has made in the case to date. The arguments at the application and the judge's oral reasons do not include any discussion about the actual issues in dispute on the judicial review or the

constitutional question. He did not make any evidentiary findings that could be binding in the future, nor did he decide any substantive rights of the parties.

[23] Mushinski's appeal is an appeal of an interlocutory order; therefore, leave to appeal is required. I will now go on to consider whether leave should be granted.

Should Leave Be Granted to Proceed With the Appeal?

[24] This Court outlined the legal test to determine whether leave should be granted to proceed with an interlocutory appeal in *Knight v Daraden Investments Ltd*, 2022 MBCA 69 at paras 22-26 [*Knight*]:

> To conclude, in my view, an applicant seeking leave to appeal under section 25.2 of the *Act* must satisfy the following criteria:
>
> 1. first, the proposed ground of appeal must have arguable merit; and
>
> 2. second, the proposed ground of appeal must be of sufficient importance to warrant the attention of a full panel of this Court.
>
> In assessing the first criterion, arguable merit, the Court may consider any one or more of the following non-exhaustive list of factors in respect of the proposed ground of appeal:
>
> - Is it prima facie frivolous or vexatious?
>
> - Is it prima facie destined to fail, taking into account the standard of review that will likely be applied?
>
> - Does it have a reasonable prospect of success?
>
> - Can it be dismissed through a preliminary examination?
>
> - Is it likely to be rendered moot due to the natural progression of the proceedings?

- Will it unduly or disproportionately delay or add to the cost of the proceedings?

At the risk of stating the obvious, some of the above questions are merely different ways of approaching the same task—determining the arguability of the proposed ground of appeal.

As for the second criterion, whether the proposed ground of appeal is of sufficient importance, the Court may consider any one or more of the following non-exhaustive list of factors:

- Does it raise a novel or unsettled point of law or of practice?

- Will resolution of the issue likely affect the determination of disputes between others (aside from the parties to the proceedings)?

- How significant is the order to the course or outcome of the proceedings?

Finally, the decision to grant leave to appeal is ultimately a matter of discretion. From time to time, circumstances may present themselves where leave to appeal should be granted, even though both of the above criteria have not been met, if denying leave might result in an injustice (see *Rolling River School Division v Rolling River Teachers' Association of the Manitoba Teachers' Society et al*, 2009 MBCA 38 at para 13).

[emphasis in original]

[25] To apply the test, I think it is helpful to reproduce the proposed grounds of appeal as they are set out in Mushinski's notice of appeal:

1. [Mushinski] submits that [the judge] failed to apply the following legal standard for assessing bias.

    a. An apprehension of *attitudinal bias* may arise either from things that a judge does or says during a hearing or from extrinsic evidence demonstrating that a judge is likely to have strong predispositions that will

prevent impartial consideration of the issues. See *Laver v. Swrjeski, 2014, ONCA 294 (CanLII)*

2. [Mushinski] submits that [the judge] misapprehended the evidence presented during the December 19, 2024, hearing, constituting an error of fact and law.

3. [Mushinski] submits that [the judge] failed to acknowledge procedural unfairness/ conflicts of interest issues raised in the December 19, 2024, hearing.

4. [Mushinski] submits that [the judge] violated the legal maxims:

    a. *No one should be a judge in his own cause or express personal interest in a matter.*

    b. *And listen to the other side.*

5. [Mushinski] submits that [the judge] exceeded its jurisdiction by

    a. Continuing to preside over the matter as the case management judge after showing Judicial Bias by pre-judging the motion before the hearing on November 13, 2024.

    b. And interpreting laws incorrectly, which led to an overreach of its authority.

6. [Mushinski] submits that the double delay in hearing [her] Workplace Safety and Health Motion is also a sign of bias and prejudice.

7. [Mushinski] was never about [her] accusing [the judge] of being a racist. It was always about his unconscious bias regarding the social context of [her] case and that [her] case includes discrimination.

[emphasis in original]

Do the Proposed Grounds of Appeal Have Arguable Merit?

[26] The application of the facts to the correct legal test regarding an allegation of bias—whether a reasonable person, informed of all the relevant circumstances, would conclude that the judge may not be impartial—is highly fact-driven and is deserving of deference. However, because such claims raise serious and sensitive issues, appellate courts do retain some scope for review (see *R v Baldovi*, 2018 MBCA 64 at para 11; *R v S (RD)*, 1997 CanLII 324 at para 102 (SCC) [*SRD*]).

[27] Mushinski's proposed grounds of appeal raise issues of whether the judge erred in how he applied the facts to the legal test. Therefore, she raises questions of mixed fact and law. If leave were granted, a full panel of this Court would review the matter on a standard of palpable and overriding error. As this Court stated in *Albo v The Winnipeg Free Press*, 2020 MBCA 50: "A palpable and overriding error is an obvious error that can be plainly identified in a judge's reasons that is determinative of the outcome of the case" (at para 19).

[28] In my view, Mushinski's proposed grounds of appeal do not have arguable merit. The judge considered the correct legal test and applied the facts to that test. In his oral reasons, the judge corrected and explained many of the facts that Mushinski relied upon in her allegations of bias:

a) There was no evidence presented at the Law Society of Manitoba disciplinary hearing that the judge made racial or racist comments regarding a lawyer.

b) He had presided over many more judicial review cases than the two where he was overturned by this Court.

c) He did not have any *ex parte* communications with the lawyers for the respondents.

d) He acknowledged that he responded forcefully to the allegations of racism, but explained that he was aware of the existence of systemic discrimination.

[29] At the hearing of the application, Mushinski made a brief mention that another judge was the spouse of the MLB's chairperson and an arbitrator of the MLB. She did not make any further submissions to explain why that led her to conclude that the judge was in a conflict of interest. It is understandable that the judge did not address that argument in his oral reasons given that no real submissions on the topic were made at the application.

[30] As for the last proposed ground of appeal regarding delay, it is my understanding that a hearing was set for Mushinski's motion to add Workplace Safety and Health as a respondent on the judicial review proceedings. That motion was adjourned *sine die*, pending the disposition of my decision on this matter in this Court. While I agree that there is a delay in hearing that motion, it is logical that a decision on this matter come first. As such, in my view, that proposed ground of appeal also does not have merit.

Are the Proposed Grounds of Appeal of Sufficient Importance to Warrant the Attention of a Full Panel of This Court?

[31] The proposed grounds of appeal do not raise a novel or unsettled

point of law or practice. They also would not affect the determination of disputes between other parties.

[32] At the hearing before me, Mushinski submitted that she wanted a full panel of this Court to hear her appeal because a panel of three judges would provide more than one perspective and opinion, and it would provide her the opportunity to persuade more than one person of her position.

[33] While I agree that a full panel of judges provides different perspectives on a matter, that alone does not make a matter of sufficient importance to warrant a hearing before a full panel of this Court.

Ultimate Discretion

[34] There remains an ultimate discretion whether to grant leave to appeal an interlocutory order. If denying leave would result in an injustice, leave to appeal may be granted even if the two criteria cited in *Knight* are not met.

[35] I understand Mushinski's position that the recusal order is significant to her, and she feels that having the judge continue to preside over her matter for the duration of the proceedings will be unfair.

[36] The traditions of integrity and impartiality are the backdrop of our judicial system and are reflected and reinforced by the judicial oath (see *Kalo v Manitoba (Human Rights Commission)*, 2008 MBQB 92 at para 18). In *SRD* at para 116, Cory J wrote:

> Often the most significant occasion in the career of a judge is the swearing of the oath of office. It is a moment of pride and joy coupled with a realization of the onerous responsibility that goes

> with the office. The taking of the oath is solemn and a defining moment etched forever in the memory of the judge. The oath requires a judge to render justice impartially. To take that oath is the fulfilment of a life's dreams. It is never taken lightly. Throughout their careers, Canadian judges strive to overcome the personal biases that are common to all humanity in order to provide and clearly appear to provide a fair trial for all who come before them. Their rate of success in this difficult endeavour is high.

[37] There is nothing before me to demonstrate that the judge will not fulfill his judicial oath by hearing, considering, and deciding the judicial review and constitutional question fairly.

[38] From the record before me, it appears that Mushinski jumped to the conclusion that the judge was biased or there was a reasonable apprehension of bias within minutes of the first case management conference at which he presided. Her reasons for that conclusion were based on matters that had nothing to do with her or with her proceedings. There is no evidence that the judge has prejudged Mushinski's applications, that he is biased against her or her position, or that he will not abide by his judicial oath to render justice in her case impartially.

[39] It is important to keep in mind that the decision not to grant leave to appeal the recusal order at this point does not mean that, should Mushinski not be successful on the judicial review or the constitutional question, she could not include the recusal order as a ground of appeal when the substantive matter is finally concluded.

Disposition

[40] Mushinski's appeal is of an interlocutory order; therefore, leave to appeal is required. Applying the facts to the test set out in *Knight*, the requirements for leave are not met and leave to appeal is denied.

[41] The respondents did not seek costs; therefore, there will not be an order of costs for this motion.

Turner JA