SUPREME COURT OF YUKON

Citation: *D.M.M. v. T.B.M.*, 2010 YKSC 68

Date: 20101105
S.C. No.02-D3464
Registry: Whitehorse

Between:

D.M.M.

Petitioner

And

T.B.M.

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

D.M.M.	Appearing on her own behalf
T.B.M.	Appearing on his own behalf
Laura Cabott	Child Advocate

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the petitioner mother, D.M.M., asking me to recuse myself from further hearings on all matters pertaining to this case, based upon a reasonable apprehension of bias. The petitioner's notice of application and affidavit (the "affidavit") were filed August 10, 2010. An initial hearing date was set for September 1, 2010. At that time, I indicated to the petitioner that the allegations in her affidavit may not meet the standard of cogent evidence needed to displace the presumption of impartiality. Accordingly, the petitioner sought an adjournment in order to obtain copies

of certain transcripts and to provide other documentation to support the allegations. I granted the adjournment from September 1 to October 18, 2010, with the direction that the petitioner file and serve any further materials in support of her application by September 30, 2010.

[2] When the hearing resumed on October 18, 2010, the petitioner indicated that she had chosen not to file any supplementary affidavit materials because she had concerns about how the information might be received and interpreted by this Court. As I understood her, she did not want to make further allegations in support of her claim that there is a reasonable apprehension I am biased against her, in the event she is unsuccessful on the recusal application and I continue to preside over this case for the indefinite future. Rather, she chose to rely on her existing affidavit and her submissions.

[3] The application was opposed by both the respondent father, T.B.M., and the child advocate.

[4] For the reasons which follow, I am dismissing the application.

ISSUE

[5] As stated in the leading case of *Wewaykum Indian Band v. Canada*, 2003 SCC 45, at paras. 59 and 60, a judge's impartiality is presumed and a party asking a judge to recuse him or herself must establish that there is a reasonable apprehension that the judge is biased. The question is: What would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude? Would that reasonable person think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly? (para. 60)

LAW

[6] In *Boardwalk Reit LLP v. Edmonton (City)*, 2008 ABCA 176, Côté J.A. stated, at paras. 29 and 30:

> "To have any legal effect, an apprehension of bias must be reasonable, and the grounds must be serious, and substantial. Real likelihood or probability is necessary, not a mere suspicion…The threshold is high…The test of appearance to a reasonable neutral observer does not include the very sensitive or scrupulous conscience…
>
> Furthermore, a judge is presumed to be faithful to his or her oath, and it takes cogent evidence to displace that, and to show that the judge has done something to create a reasonable informed apprehension of bias…"

I have omitted the citations in the above quote, but included among the various cases referred to by Côté J.A. was the *Wewaykum* case, cited above. In that case, the Supreme Court quoted a definition of bias, at para. 58 (from R. v. Bertram, [1989] O.J. No. 2123 (H.C.J.)), as:

> "a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case."

ANALYSIS

R.'s Best Interests

[7] Much of the petitioner's submissions were centered around her complaints about the difficulties that she has had in making access arrangements for the 12 year old child, R., as well as her communication problems with R. and the respondent. She also spent a good deal of time arguing that the status quo is not in R.'s best interests. She

seemed to suggest that, because of my involvement with this file over the past seven years, my continued involvement in the future might not bring about results which are in R.'s best interests, particularly if I continue to deny the petitioner the opportunity to have unsupervised access with R. in her now home city of Edmonton, Alberta.

[8] I reminded the petitioner in the hearing that, while she and I might disagree about what is in R.'s best interests, that is not the test for recusal. Rather, I am required by law to focus on whether the petitioner has provided sufficient evidence to give rise to a reasonable apprehension of bias in the mind of a neutral, fully informed and reasonable observer.

Findings of Facts and Statements Made

[9] In her affidavit, the petitioner states that "findings of fact have been made on the basis of affidavit materials without ever being examined" and that "assumptions have been made without scrutiny". She also deposed "I see statements that indicate the law is not being followed."

[10] With respect to the recent decision by the Yukon Court of Appeal in this case, cited at *D.M.M. v. T.B.M.*, 2010 YKCA 6, the petitioner deposed that she saw, presumably in the Court of Appeal judgment, "many statements that suggest things should be handled differently." She also indicated that there were statements made by the Court of Appeal which "identify concerns about past decisions made", again presumably by me.

[11] Despite my challenge to the petitioner, when this application was first scheduled to be heard on September 1, 2010, about the vague nature of these allegations, the petitioner has failed to provide any further evidence or references of any kind as to what

these findings of fact, assumptions and statements are. Thus, she has failed to present any “cogent evidence” to displace the presumption of impartiality.

Untested Evidence

[12] A third argument which the petitioner seems to be making relates to her complaint that there has been no “testing” of the numerous affidavits which have been filed by both parties to date.[1] As I indicated earlier, she deposed that I have made findings of fact on the basis of affidavit evidence, without that evidence ever being examined or scrutinized.

[13] There are two problems with that submission. The first is that, as a chambers judge presiding over numerous pre-trial applications and applications to vary previous orders, my role is to hear and assess the evidence as it is presented by the parties. My role is not inquisitorial. Rather, it is up to the parties to determine how they wish to present the evidence in support of their various applications. The petitioner is correct that there has been no testing of the affidavit evidence, but it is not up to me to pursue such testing. Rather, it is open to the parties to pursue the various methods under the *Rules of Court* by which their respective allegations can be examined and checked. Some examples include:

- examinations for discovery (Rule 27)
- demands for production of documents (Rule 27(18))
- seeking an order for the pre-trial examination of a witness (Rule 28)
- discovery by interrogatories (Rule 29)

[1] 33 by the petitioner, to date, and 25 by the respondent.

- seeking an order for cross-examination of a deponent on their affidavit (Rule 50(9))

[14] Further, there was an opportunity for all of the relevant evidence to be tested at a trial in 2006, however the parties and the child advocate agreed to a consent order at that time, such that a trial became unnecessary.

[15] Thus, the petitioner cannot justifiably complain that I have made findings and decisions in the past based on untested affidavit evidence, when she has taken no steps herself to pursue such testing.

Appeal Decision "hasn't changed things"

[16] The fourth argument advanced by the petitioner arises from my statement, at an appearance on July 28, 2010, that the Court of Appeal judgment in this case, cited above, "really hasn't changed things". She further deposed that this alleged statement "alarms" her because she believes the Court of Appeal did give "a direction" which was "not the same" as my previous rulings.

[17] I have obtained a transcript of that appearance which confirms I made the statement in the following context:

> "The other issue is that the Court of Appeal decision really hasn't changed things other than to make a recommendation, or other than to order that this Court make the appropriate recommendation for an updated custody and access report. That's been done. You tell me, and Ms. Cabott will update me in a minute here, that Family and Children's Services is not prepared to go ahead with an update. But what the Court of Appeal decision clearly says is that, and I'm reading from you – reading to you from paragraph 35:
>
> > T.M.'s history of violence towards the mother and child is significant and justified the Chambers Judge's

> reluctance to reinstate unsupervised access in Edmonton without the assurances gleaned from a further investigation.
>
> And without assurances gleaned from a further investigation I'm not in a position to make any changes to the consent corollary relief order. I mean, that's what the Court of Appeal is saying. They said yes, in their view, two of the three judges felt that there was a significant change in circumstances to justify an updated custody and access report; yes, they did go that far, but that's as far as they went. Not that unsupervised access was all of a sudden acceptable."

[18] The petitioner failed to provide any particular reference to any passages in the Court of Appeal's judgment to support her interpretation that the Court "gave a direction" which differed from the substance of my earlier decisions.

[19] The appeal was from my decision of June 24, 2009 dismissing the petitioner's application to vary an order I made on February 22, 2007, requiring that her access with R. take place in Whitehorse, unless the parties otherwise agreed in writing. The petitioner also applied at that time for an update to the Custody and Access Report by psychologist, Geoffrey Powter, the original of which was dated January 30, 2004, and which was updated September 15, 2005. The majority of the Court of Appeal only allowed the appeal in respect to the request for the update to the Custody and Access Report. In that regard, the majority appeared to be persuaded that: the petitioner had been separated from T.M.[2] (not the respondent, T.B.M.) since about 2006; that by June 2009, R. was 12 years old and had a desire to see his mother; and almost seven years had elapsed since T.M.'s assault on R (see paras. 12, and 32-34 of the decision). The majority felt that these changes and circumstances were sufficient to merit consideration

[2] See para. 42 below

of the petitioner's request for an update to the Custody and Access Report. (Interestingly, subsequent to the decision appealed from in June 2009, and prior to the hearing of the appeal in May 2010, the parties and the child advocate had already consented to an order made by another judge of this Court for what effectively would be an updated Custody and Access Report.) In the result, the Court of Appeal remitted the petitioner's application to vary access back to this Court for "for reconsideration following receipt of the updated custody and access report" (para. 37). The Court did not disturb my decision denying the petitioner unsupervised access with R. in Edmonton.

[20] Thus, to the extent that the Court of Appeal did not interfere with my Order restricting the petitioner's access to R., then in fact the Court's judgment did not practically change the status quo regarding access. In this context, my statement that the decision "really hasn't changed things" cannot give rise to a reasonable apprehension of bias.

New Perspective

[21] The fifth argument made by the petitioner was that the Court of Appeal's judgment demonstrates that "a new perspective" is called for in future adjudications on this matter. As I indicated earlier, in her affidavit, the petitioner referred to statements from the Court of Appeal which identify concerns about past decisions I have made on this file. However, she failed to provide any particular references to passages in the judgment to support that interpretation. Further, apart from the majority disagreeing with me on whether there had been a sufficient change in circumstances to justify an update

to the Custody and Access Report, there were no comments questioning my impartiality or identifying any concerns about my previous decisions in this action.

[22] Consequently, the petitioner's argument on this point amounts to nothing more than her interpretation of what the majority of the Court of Appeal intended by their words.

Perception of Unfairness

[23] The final argument advanced by the petitioner is that there is a "perception of unfairness" to my continuing to be involved in these proceedings. One of the principle reasons for this submission is that, in dismissing the application for an update to the Custody and Access Report, she alleges I "commented on the waste of resources" in having such a report prepared. The petitioner further alleged in her affidavit "With no value perceived to having this report it clearly raises qualms about the weight the report will be given when submitted to the Court. This is clearly identify [as written] a perception of bias." Yet again, the petitioner has failed to provide any transcript showing that I used the words "waste of resources". What I did say in my reasons for judgment at *D.M.M. v. T.B.M.*, 2009 YKSC 50, is set out at para. 26. Nowhere there did I use the expression attributed to me by the petitioner. The majority in the Court of Appeal, at para. 36, stated that I "erred in considering the application only on the basis of the mother's submission "that there would be no harm" in ordering such a report." There was no suggestion by the majority that I erred by stating that such an update would be "a waste of resources". Indeed, Bennett J.A., in dissent, at para. 54, stated:

> "The chambers judge concluded that there was no basis to expend public resources on a custody and access report. He said that one reason to order a report is if there is a material change in circumstances. It is this aspect of the

> reasons that I interpret quite differently from my colleague. A material change in circumstances, which can be established in a number of ways, is what is required to permit a court to consider whether to vary an order for access. I take from the comment by the chambers judge that if he found that circumstances had changed to the point where he would reconsider access, a custody and access report would then be beneficial. " (my emphasis)

[24] Further on this point, the petitioner deposed that comments in the Court of Appeal judgment "are disturbing" and that "Anyone reading [the judgment] would have to question who was looking out for [R.'s] best interest." Once again, the petitioner has failed to particularize or identify which of the Court of Appeal's comments support these interpretations. The petitioner obviously has an interpretation of the Court of Appeal's judgment which I do not share. However, her submission is simply a matter of argument and does not constitute cogent evidence giving rise to a reasonable apprehension of bias.

[25] The question is not whether the petitioner has a reasonable apprehension of bias, but rather whether the neutral reasonable observer would have such an apprehension. In *Ontario (Director, Family Responsibility Office) v. Samra*, 2008 ONCJ 465, Katarynych J. said, at para. 27:

> "If the applicant is to succeed, the evidence in the motion must rise above the imaginary or conjectural sentiments of the applicant and demonstrate real likelihood or probability of bias…" (citations omitted and emphasis added)

[26] Further, in *University of British Columbia v. University of British Columbia Faculty Association*, 2007 BCCA 201, Rowles J.A., said at para. 85:

> "Courts have held that there must be evidence to support an allegation that the matter will not receive a fair hearing if remitted; neither a bare

> allegation nor suspicion alone will operate to rebut the presumption of regularity [ie impartialty]…" (citation omitted and emphasis added)

COSTS

[27] Pursuant to Rule 60(9) of the *Rules of Court*, costs "shall follow the event", unless the Court orders otherwise. The petitioner has been unsuccessful on her application seeking my recusal. The child advocate took no position on the issue of costs.

[28] The respondent represented himself. He prepared and filed: a Response to the Notice of Application, his affidavit #25 dated August 26, 2010; an Outline of 48 paragraphs; and a helpful Book of Authorities. He also appeared and was ready to proceed with the initial hearing of the application on September 1, 2010, and opposed the adjournment. He appeared again on October 18, 2010, for the continuation of the hearing, which lasted an hour and a half. He submitted that he would like to be compensated for his time and effort by way of court costs, but was unsure of his entitlement to costs as a self-represented litigant. He stated that he took about one week of personal time over the summer school vacation to research and prepare his response to the application, which was time he would have otherwise spent with his family. He also submitted that he is disappointed that the petitioner sought an adjournment ostensibly for the purpose of filing further evidence in support of her application, but when the hearing resumed on October 18, she had filed no further supplementary materials at all.

[29] As recognized by Vertes J.A., of the Yukon Court of Appeal in *Kilrich Industries Ltd. v. Halotier,* 2008 YKCA 4, at paras. 58 – 59, it is now well-recognized across

Canada that self-represented litigants are entitled to recover costs. Costs are awarded as a reasonable allowance for the loss of time, and actual expenses incurred, in preparing and presenting the case.

[30] In an earlier case from the British Columbia Court of Appeal, *Skidmore v. Blackmore* (1995), 122 D.L.R. (4th) 330, Cumming J.A., speaking for the Court at para. 37, observed that party and party costs serve many functions. They partially indemnify the successful litigant, deter frivolous actions and defences, encourage parties to deliver reasonable offers to settle, and discourage improper or unnecessary steps in the litigation.

[31] Under Rule 60(14), this Court may fix a lump sum as the costs of a proceeding, including an application, and may fix those costs either inclusive or exclusive of disbursements.

[32] I am mindful of the costs I previously awarded to the respondent when he was still represented by legal counsel, for earlier applications of approximately the same complexity and duration. I am referring here to the costs which were awarded in the respondent's favour on the following dates and in the following amounts:

February 22, 2007, $1,000

July 19, 2007, $ 500

September 15, 2008, $1,000

June 24, 2009, $1,000

[33] I also take into account that on this application it does not appear that the respondent has had to incur legal fees. On the other hand, he very likely incurred some disbursements (but not filing fees) in preparing and filing his written materials and took

time away from his family for the better part of a week to prepare those materials. In addition, he has sat through about three-and-a-half to four hours of hearing time.

[34] In all of the circumstances, it would seem appropriate to award the respondent a lump sum of $750 in costs, payable by 4 p.m. on December 17, 2010.

POST-SCRIPT

[35] The parties and the child advocate filed a consent order on June 4, 2010, recommending that a “comprehensive and thorough Custody and Access Report” be prepared by a psychologist or other qualified professional, other than Geoffrey S. Powter. Mr. Powter prepared the original Custody and Access Report dated January 30, 2004, as well as the update dated September 15, 2005. However, he filed a letter with the Court dated November 30, 2009, indicating that “As a result of a professional discipline complaint laid against me by a party to this matter, I now find myself in a personal conflict and as such must regretfully and respectfully recuse myself as a expert in this litigation.”

[36] The Court of Appeal then rendered its decision on July 22, 2010, remitting the petitioner’s request for an update back to this Court for an appropriate order. The Court of Appeal further remitted the petitioner’s application to vary access to the child R., for reconsideration by this Court “following receipt of the updated Custody and Access Report”.

[37] At an appearance on July 28, 2010, the child advocate informed me that she had previous discussions with counsel for the Director of Family and Children’s Services who said that it would be unlikely that an update would be ordered because of the Department’s policies and guidelines. However, at the time of those discussions, the

Court of Appeal decision had not yet been issued. The child advocate provided a copy of the Court of Appeal decision to the Director on July 28, 2010.

[38] At a further appearance on August 11, 2010, an agent for the child advocate indicated that a decision on the update had not yet been made by the Director, but that such a decision was expected the week of August 23rd.

[39] At the continuation of the recusal hearing on October 18, 2010, the child advocate informed me that she still had not received a decision from the Director on the update. She has sent two letters to the Director requesting her position. The child advocate informed me that the situation has become complicated by the fact that the Director apparently is unable to rely upon legal counsel from the Yukon Department of Justice because of a perceived conflict of interest. Apparently the Director has not yet retained alternate counsel in order to receive advice on whether to accept this Court's recommendation that the update be done.

[40] It is interesting to recall that on June 16, 2006, I issued a Memorandum of Ruling (2006 YKSC 41) regarding an earlier recommendation in my reasons filed February 2, 2006 (2006 YKSC 9) that a second update to the original Custody and Access Report be prepared, pursuant to s. 43(2) of the *Children's Act*. At that time, the trial was scheduled to commence September 5, 2006, and it was common ground between the parties and the child advocate that the second update would likely be a pivotal piece of evidence at the trial. In my June 16 Memorandum of Ruling, I questioned whether the Director has discretion to refuse to prepare such an update in a case where "the Director consents or has given a prior written report" (my emphasis). It does not appear that the Director responded to that comment. In any event, the trial did not proceed, as

the parties and the child advocate were able to agree upon the terms of the Order dated September 7, 2006.

[41] In this case, the Director has consented to the preparation of two prior reports, referred to above.

[42] The petitioner still wishes to have unsupervised access with the child, R., in her home city of Edmonton, Alberta. However, the problem with that proposal is that the petitioner's abusive former intimate partner, T.M., also resides in the City of Edmonton, and I have continuing concerns about the prospect of the child coming into contact with T.M. while in the City of Edmonton, if such access is unsupervised. My concerns in that regard were addressed by the Court of Appeal in both the majority and dissenting judgments.

[43] The petitioner claims she has been separated from T.M. since about 2007, and perhaps even earlier. She made submissions to the justices of the Court of Appeal and to this Court that she and T.M. continue to be separated to this date. However, the respondent father presented relatively recent evidence which contradicts the petitioner's claims in that regard and suggests that there is a continuing intimate relationship between her and T.M. I am referring here to the father's affidavit #24 dated July 21, 2010, and the affidavit #1 of Tracy Harris, dated July 20, 2010.

[44] As noted by the majority judgment in the Court of Appeal, the absence of an updated report "essentially leaves the mother and child in a hopeless position of not being able to see each other except rarely and away from a natural home setting…". I would hope that an update to the Custody and Access Report will shed some light on the issue of whether the petitioner is truly separated from T.M. and/or to what extent the

child might be at risk of having contact with T.M. if he is allowed unsupervised access with his mother in Edmonton.

[45] This matter has been in litigation for the past seven years. A trial has not yet taken place because an order was agreed to in September 2006. However, events subsequent to that trial necessitated, in my view, an order on February 22, 2007 requiring that the petitioner exercise her access to the child in Whitehorse, unless the parties otherwise agree in writing. That order has been followed by four consecutive applications[3] by the petitioner for a variation to allow her some other option than having to travel to Whitehorse to exercise access. Three of those applications have been unsuccessful and one is pending. In the meantime, the petitioner has only been able to negotiate a few periodic instances of access in locations other than Edmonton.

[46] The petitioner has made it abundantly clear to this Court on numerous occasions that the status quo is highly unsatisfactory and is adversely affecting her ability to parent the child. The majority of the Court of Appeal seemed to have some sympathy for the petitioner in that regard.

[47] While the petitioner has indicated her desire to test some or all of the affidavit evidence by proceeding to a trial, such a trial, if it takes place at all, would not likely happen for several months, and in the meantime, the petitioner's ability to have access with the child remains very limited.

[48] It is for these reasons that I once again urge the Director to accept the recommendation of this Court in the order made June 4, 2010, that a second update to the original Custody and Access Report be prepared, as that may well expedite a

[3] The most recent was filed July 12, 2010, but has been adjourned generally pending the outcome of this recusal application.

resolution to this existing problem regarding the petitioner's access which will be in the child's best interests.

Gower J.