NOVA SCOTIA COURT OF APPEAL
Citation: *Arbuckle v. Tanner*, 2025 NSCA 54

Date: 20250627
Docket: CA 541997
Registry: Halifax

Between:

Kevin Joel Arbuckle

Appellant

v.

Kaitlyn Dawn Tanner

Respondent

Judges:	Farrar, Fichaud and Bourgeois, JJ.A.
Appeal Heard:	June 12, 2025, in Halifax, Nova Scotia.
Held:	Appeal dismissed with costs per reasons for judgment of Fichaud J.A., Farrar and Bourgeois JJ.A. concurring
Counsel:	Kevin Joel Arbuckle on his own behalf Lynn M. Connors, K.C. for the Respondent

Reasons for judgment:

[1] Mr. Arbuckle and Ms. Tanner are awaiting trial in a family dispute before the Supreme Court of Nova Scotia Family Division. Their child, almost two years of age, attends daycare. The daycare offers an app, called "Lillio". It provides registrants with access to photo and video images of the daycare's activities. Mr. Arbuckle has unilaterally registered members of his extended family for access, contrary to Ms. Tanner's wishes. The issue arose at a pre-hearing conference with the case management judge.

[2] At the conference, the judge issued an interim direction pending the trial, that the app be accessed only by Mr. Arbuckle, Ms. Tanner and by others approved by both. Mr. Arbuckle appeals and challenges the interim direction. He says the judge displayed a reasonable apprehension of bias and asks the Court of Appeal to disqualify the judge from hearing the trial.

Background

[3] Mr. Arbuckle and Ms. Tanner were in a common law relationship from August 2020 until their separation in late February 2024. They are parents of C, born in September 2023.

[4] In April 2024, Ms. Tanner filed in the Family Division an application, later amended, seeking primary care of C, child and spousal support, and recovery of extraordinary or special expenses. In May 2024, Mr. Arbuckle filed a response seeking shared parenting, child support, recovery of extraordinary or special expenses and orders to prevent relocation and to address parenting time.

[5] On October 1, 2024, Justice Jean DeWolfe issued an Interim Without Prejudice Order, consented as to substance and form by counsel for Ms. Tanner and Mr. Arbuckle. The Order said the parties shall have joint custody of C and primary care with Ms. Tanner, and set out a parenting schedule for Mr. Arbuckle.

[6] As the case management judge, Justice DeWolfe has conducted several pre-hearing conferences, with both parties represented by counsel, Mr. Mitchell Broughton for Mr. Arbuckle and Ms. Lynn Connors for Ms. Tanner.

[7] One such conference, on October 16, 2024, dealt with Mr. Arbuckle's financial disclosure. The transcript includes the following passage that pertains to Mr. Arbuckle's submission on bias, which I will discuss later:

THE COURT: Great, thank you. So we've had a, we've had some information provided since last time. We're still – Mr. Broughton, your client's Statement of Financial Information leaves a lot to be desired. I'm very disappointed in what, what is attached there. I don't know what your involvement was with that, but I, I am not going to accept just employment income without having some information as to his, you know, his business financials and so on. Just – you know that's not how we do things. And plus, when there's like a 50 percent drop in his income between 2022 and 2023. Make – it, it just makes – slows everything down, quite frankly. It really feels like we're spinning our wheels. I need his business financial information from 2020 to 2023. I need to have, you know, the full, the full shebang, okay? And, you know, when there's, there's dividends in some of this stuff, I need a full explanation of his business situation …

…

MS. CONNORS: I mean, typically, you get a Statement of Income and a Statement of Expenses.

THE COURT: Yeah.

MS. CONNORS: And you get a, a statement setting out what the equity is in the - … (inaudible due to audio) equity is in, in the business.

THE COURT: … (Inaudible due to audio)

MS. CONNORS: I mean, it's usually a three-page document, and, you know, and –

THE COURT: And why don't you, why don't you just – don't delay and give him exactly what you want from him, but I, I – you know, I don't want to be coming back here again and wasting another half-hour of time, Mr. Broughton, without your client having given everything he can possibly give on his income.

MR. BROGHTON: … (Inaudible due to crosstalk.)

THE COURT: … (Inaudible due to crosstalk.)

MS. CONNORS: … (Inaudible due to crosstalk.) There are multiple emails where I've requested … (inaudible due to audio).

THE COURT: Yeah, I'm sure.

…

MR. BROUGHTON: The general framework does, of course, My Lady, but of course my client reserves his right if Ms. Connors is requesting for anything that's irrelevant or, or of that nature. Just, just leery of your wording of anything she asks for … (Inaudible due to crosstalk.)

THE COURT: No, no, no. Don't, don't – it's out – I'm going for outstanding disclosure on this last page of her, of her pre-conference summary, and those things need to be provided. If you provide the Business Financial Statements and they are not sufficient, then she gets to ask for more information on that, and

> whatever she needs in order to determine his income. So, you know, that – and if, if it's irrelev – I've, I've not known Ms. Connors to, to ask for irrelevant stuff. She does not want to ask for boxes and boxes of documents just for the sake of having them. So if she asks for it, I expect you'll provide it unless there's a very, very good reason why you can't. I don't want to come back here again and have you saying, well, we still don't have this, we still don't have that, because there will be costs to that, if, if, if – as to – you know, for whoever is responsible for that. So let's – understood?

[8] On January 31, 2025, the parties participated in a settlement conference with Justice Cromwell of the Family Division. The outcome was an Interim Without Prejudice Order dated March 5, 2025, consented as to form and substance by counsel for both parties. The Order provided C would continue in joint custody and Ms. Tanner's primary care, and addressed details of C's drop off and pickup at her daycare "The Growing Place".

[9] Justice DeWolfe scheduled another pre-trial tele-conference for March 26, 2025. This conference is the focus of the appeal.

[10] The conference was further to *Civil Procedure Rules* 59.38 and 59A, titled "Conference" and "Judicial Dispute Resolution Process Management" respectively. Rules 59 and 59A apply to the Supreme Court Family Division. Rule 26A, titled "Conference", applies to proceedings in the Supreme Court generally, but is incorporated for the Family Division by Rule 59.38. The pertinent provisions of these Rules are:

> **RULE 59**
>
> **SUPREME COURT FAMILY DIVISION RULES**
>
> **…**
>
> **59.38 Conference**
>
> **…**
>
> **59.38** (1) A judge or a court officer may arrange a conference with a judge under Rule 26A – Conference.
>
> …
>
> (3) A judge may give directions for the conduct of a proceeding and, otherwise, provide case management.
>
> (4) Part 6 – Motions, and in particular Rule 26A – Conference, apply to case management of a proceeding …

(5) A judge who gives directions under the provisions of Rule 26A – Conference may do any of the following:

…

(g) do anything that may aid the disposition of the proceeding.

Rule 59A - Judicial Dispute Resolution Process Management

Scope of Rule 59A

59A.01 This judicial dispute resolution and process management Rule applies to every proceeding in the Supreme Court Family Division including proceedings under Rule 60A, 60B and 61.

59A. 02 Object of Rule 59A

The object of this Rule is to:

(a) promote the proportional, just, timely and cost-effective resolution of disputes;

(b) minimize conflict and promote cooperation between the parties; and

(c) reduce the negative impact that the Court dispute resolution process(es) may have on the parties and their children.

…

59A.05 Judicial Dispute Resolution: Process Management

At every appearance, including a conference under Rule 59.08, a judge may by direction or order:

…

(e) provide for an immediate need by making an interim temporary time limited order based upon evidence contained in affidavits and documents filed with the court with or without cross-examination of a party;

…

(i) manage the hearing, trial or dispute resolution process by:

…

(ii) limiting the number of witnesses;

…

(vii) limiting and apportioning the time available to complete any step in a hearing, trial or dispute resolution process including limiting the time allotted to complete oral evidence, examination, cross-examination and/or submissions;

…

(k) give any direction and make any order that is appropriate to promote the proportional, just, fair, timely, and cost-effective resolution of issues in dispute.

Rule 26A - Conference

26A.01 A judge may convene a conference, at which the parties meet with the judge with or without a record.

…

26A.02 – when conference appropriate

(2) A conference may be convened to provide any of the following:

(a) organization of a trial or hearing;

…

(c) case management by a case management judge;

…

26A.03 – motions at conference

(1) A judge who presides at a conference may do any of the following:

(a) give directions;

…

[11] Before the conference of March 26, Ms. Tanner's counsel wrote to the Family Division on March 19, 2025, to summarize the outstanding issues. Her letter identified: relocation of Ms. Tanner and C to Windsor, Nova Scotia, the parenting schedule, decision-making authority, and financial disclosure of Mr. Arbuckle's current income for the calculation of child support. In addition, and pertinent to the issue of the Lillio app, the letter said:

> The main area of concern in recent weeks has been the Respondent's [Mr. Arbuckle's] insistence on adding extended family members to the daycare app, called "Lillio", including his parents, aunts, uncles, and his new partner. It provides daily photos of all the children in [C]'s group. For the parents of the children enrolled it also provides a messaging service between parents and teachers where important information about [C] can be exchanged, and the app also tracks daily diaper changes, food intake, nap length and incident reporting. There are obvious privacy issues with the extension of the use of this app and it

> has been proposed by the Applicant [Ms. Tanner] that only the biological parents and biological grandparents have access to the daycare app to view the photos. The Respondent is opposed and continues to add additional members of his family, including individuals who have not had much historical contact with [C], and most recently his new partner.

[12] Mr. Arbuckle's counsel wrote to the Family Division on March 19, 2025. His letter summarized Mr. Arbuckle's position on relocation, parenting arrangements, decision-making, child and spousal support. On the Lillio app, his letter said:

> Ms. Tanner has continued to isolate [C] from Mr. Arbuckle's family members by engaging in a campaign of removing their access from their daycare app "Lillio" on a daily basis.

[13] Mr. Arbuckle and Ms. Tanner each tender affidavits as fresh evidence for this appeal. The affidavits provide the following background to the parties' use of the Lillio app:

- C's daycare facility uses the Lillio app. It provides daily photos and a video feed of the children in C's group. For parents, it provides a messaging service. The app tracks diaper changes, food intake, nap length and incident reporting.
- In November 2024, Mr. Arbuckle and Ms. Tanner each signed a "Participation Agreement" with C's daycare. The Agreement included:

  > In the interest of safety and security we require parent permission for the publishing of children's work, photographs or videos through a software program called HiMama (the "Program"). By signing this form you grant permission for us to photograph or video your child for the purposes of sharing this information with you through the Program. You will also receive updates and information about your child through the Program to the email you have provided herein.
  >
  > Note that sometimes other children in the center may feature in photos, videos or stories of your child. By giving your consent you agree not to share photos or video of any child, other than your own, outside the Program without permission.
  >
  > …
  >
  > **Note:** Please complete the Participation Agreement for each parent/guardian of the child.

- In January 2025, Mr. Arbuckle asked Ms. Tanner for permission to add family members as registrants. Ms. Tanner replied that she was only comfortable with Mr. Arbuckle, herself, and both sets of biological grandparents as registrants with access.
- Mr. Arbuckle then unilaterally added two aunts, his uncle, two sisters and his girlfriend.
- On January 26, 2025, Ms. Tanner had these individuals removed from the Lillio app, leaving only herself, Mr. Arbuckle and both sets of biological grandparents.
- On January 27, 2025, Mr. Arbuckle re-added all the removed individuals.
- Ms. Tanner's affidavit says: "This pattern of me removing and the Appellant readding these individuals has continued on an almost daily basis until the issuance of Justice DeWolfe's verbal Order on March 26th, 2025."

[14] I will turn to the tele-conference of March 26, 2025. Attending were Justice DeWolfe, Mr. Broughton, and Ms. Connors with one of her colleagues. Ms. Tanner and Mr. Arbuckle listened in and may have spoken at times, but the transcript did not record an audible comment from either. According to the transcript, the call took 17 minutes.

[15] On this appeal, Mr. Arbuckle alleges Justice DeWolfe's handling of the tele-conference of March 26 displayed bias. An assessment of bias or its reasonable apprehension involves an examination of the context. I will quote the passages that add context. At the tele-conference, Justice DeWolfe addressed the following seven topics:

Length of trial: The judge said:

> … you've said two days. This should not be a two-day matter. It should be a one-day matter, but it depends on how many people are testifying.

The judge asked counsel for their views on length of trial. Ms. Connors said the trial should take under one day. Mr. Broughton said "I agree with my friend that it shouldn't be lengthy witnesses for my client's –". The judge then commented on the number of prospective witnesses:

THE COURT: Or put – if you don't need them. I mean, really, you know, everybody – and what do they really – what can they really say about this matter now, right? I mean, that – I mean, that's really what you have – I'm not really interested in what happened 10 years ago, or, or even 5 years ago, or even 3 years ago. You know what I'm saying? So if they don't have something positive to say, or, or important to say about the parenting, about the, the current situation, the go-forward, don't use them. That's my advice to 'cause I'm not going to care, okay? And it's really important that the person who's making the decision really, you know, cared about what's being said, and I – you know, I don't think care is a bad word, but it's just not relevant, right?

So what, what your clients think are relevant, or what they tell you they want to put in, they're just wasting their money if it's not focused on the issues at hand, and you know that, and I'm not talking to both of your clients now, not to, not, not to you so much, but I would encourage you to do that. I'm only going to set a day. So – because I just don't think this is a two-day matter, quite frankly.

Date of hearing: The judge asked counsel how long they needed to file their materials for trial. Counsel estimated filings by late June. The judge said the next available trial date was September 15, 2025. Counsel agreed:

MS. CONNORS: The 15th is perfect, Justice, thank you.

THE COURT: Mr. Broughton, does the 15th work for you?

MR. BROUGHTON: Yes, the 15th's fine, My Lady.

THE COURT: So we have a hearing on September 15th.

Filing dates and exhibit books: The judge directed:

We're going to have filings of May 26th and June 26th for the exhibit books, and any – let's see, so you have to file – if you're filing new affidavits, file the affidavits and put them in an exhibit book. The exhibit books need everything you want me to read, everything you want to cross-examine people on, so that when you cross-examine somebody, you can take the book and say, you know, I, I show you Exhibit No. 1, page 35, what is this, or whatever. You know what I'm saying? So we're not going through tabs, we're not going through exhibit numbers other than, you know, there should be like two or three exhibits basically. So that's how we do it. And everybody will know what they – and, and in terms of the time – so let's look at what we have to do.

Interim support: Justice DeWolfe asked if there was an issue respecting interim support. Ms. Connors replied:

> MS. CONNORS: There is maintenance being paid, Justice. It's on an income of – to Mr. Arbuckle of 45,000. His income has now gone up to 75,000. My friend and I have exchanged some emails yesterday about adjusting table amounts, and about adjusting the – his contribution to the after tax childcare expense.
>
> THE COURT: Yeah.
>
> MS. CONNORS: So, you know, I think we can work it out between ourselves honestly, …

That ended the discussion of interim support.

Lillio app: This is Mr. Arbuckle's focus on the appeal. Ms. Tanner and Mr. Arbuckle disagreed whether Mr. Arbuckle could give access on the "Lillio" app to persons not approved by Ms. Tanner. The app provided photos of the children in C's daycare class. Ms. Tanner had privacy concerns. Mr. Arbuckle wanted his extended family to have access.

At the tele-conference, the discussion proceeded on the point as follows:

> MS. CONNORS: … The only other pressing issues, subject to the comments of my friend, is that there – I've made reference in the Pre-Conference Memorandum to the app at the daycare which is allowing access to photographs and –
>
> THE COURT: Stop, stop right there. Only parents and, and people who parents agree to can do that. Interim order.
>
> MS. CONNORS: Okay.
>
> THE COURT: That, that's a no-brainer. … And, Mr. Broughton, anything you need to address in the meantime?
>
> …
>
> MR. BROUGHTON: I just wanted – what that just – whatever that exchange just was there. There was reference to the Lillio app, … and I – my apologies, Justice, I got a little bit lost in there. And so the Interim Order is standing, we have dates set down for filing, and we have the hearing date established. Is that correct, Justice?
>
> THE COURT: Yeah, and there's going to be an Interim Order that says nobody adds people to the daycare app unless both parties agree.

> MR. BROUGHTON: Oh, okay. My client is of the perspective that, as the daycare app is to share things with his extended family, he still has limited time with the child…
>
> THE COURT: Yes.
>
> MR. BROUGHTON: … so it is a good, you know, extended family also.
>
> THE COURT: … That argument in September. He's not making it now, all right?
>
> MR. BROUGHTON: Yes, Justice.
>
> THE COURT: We're, we're not go – I'll hear about that in September, but until then, he – it's, it's him and whoever they both agree to. Him and her, and whoever they both agree to, all right? Take some pictures on the weekend. Now, we have – anything else that we need to address today? And, I guess, Mr. Broughton?
>
> MR. BROUGHTON: No, My Lady.

Mr. Arbuckle's partner driving C: Ms. Tanner had concern about C being driven by Mr. Arbuckle's new partner. The judge did not share the concern:

> THE COURT: But, you know what – okay. I mean, if she's got a licensed vehicle and she's, and she's known to the child, you know, whatever. It's not a big deal, is it?
>
> MS. CONNORS: It is from my cli -, from my client's perspective right now, but I think that if, if we – Justice, I've had a conversation with my client. I think if we – sometimes in, in the sweetness of time, if you understand my meaning …
>
> THE COURT: I'm not … (inaudible due to call-in audio).
>
> MS. CONNORS: … it, it would probably resolve itself.
>
> THE COURT: Sorry, I can see it's not urgent, it's not a, not a threat or anything, so I'm not saying anything about the partner, and we'll just leave it at that, and, you know, we have to get past some of these things unless they're big issues for the child's well-being. Okay. …

Pre-trial memo and trial logistics: The judge then scheduled the filing of pre-trial memoranda by August 26, 2025, advised the trial would start at 10 a.m. on September 15, 2025, and told counsel she would be available for a pre-trial conference in late August if counsel requested.

[16] On March 27, 2025, the Family Division sent the parties a Post-Conference Memorandum that summarized the tele-conference. On the topic of "issues addressed", the Memorandum said:

> **Issues addressed at the March 26, 2025 Conference**
>
> **7. Daycare App.** No person shall be added to the daycare app other than the parties, unless they otherwise agree. Ms. Connors to prepare the order. Mr. Arbuckle can make argument about the daycare app at the hearing.
>
> **8. Driving Issues.** Charlie is not to drive the child. Court declined to make an order or any comment about Mr. Arbuckle's common law partner driving the child provided she is a licensed driver and known to the child. There is no urgency at this point impacting the child's wellbeing.
>
> **9. Witnesses.** The Court cautioned counsel/parties to review their witness lists to ensure the relevancy of the family member witnesses. One day will be set for the hearing.
>
> **10. March 2025 Interim Order.** The March 2025 Interim Order will remain in effect. Counsel will continue to communicate about adjusting Mr. Arbuckle's child support based on his increased income ($75,000).

[17] On March 31, 2025, Mr. Arbuckle filed with the Court of Appeal a Notice of Application for Leave and Notice of Appeal from Justice DeWolfe's direction of March 26, 2025 respecting the Lillio App.

[18] On April 14, 2025, the Supreme Court Family Division issued an Order that incorporated Justice DeWolfe's direction at the March 26 conference:

> **Daycare App**
>
> 1. The Applicant, Kaitlyn Dawn Tanner, and the Respondent, Kevin Joel Arbuckle, are the only individuals who may access the Lillio App used by [C]'s daycare absolutely.
>
> 2. Each party may only add additional individuals to access the Lillio App used by [C]'s daycare, with the express permission of the other party and given prior to any addition.

[19] On May 6, 2025, Mr. Arbuckle filed a motion to introduce fresh evidence in the Court of Appeal. The fresh evidence comprises his affidavit with exhibits. Ms. Tanner filed an affidavit that she offers as fresh evidence in reply.

[20] This Court heard the matter on June 12, 2025. Mr. Arbuckle spoke on his own behalf. Ms. Connors represented Ms. Tanner.

Issues

[21] The grounds in Mr. Arbuckle's Notice were that Justice DeWolfe's direction on the Lillio App offended principles of natural justice and procedural fairness, exceeded her jurisdiction, displayed a reasonable apprehension of bias and was made without an emergency or urgent situation. The Notice asked that the issue relating to the Lillio App be remitted to the trial and that the trial be conducted by a different justice.

[22] Mr. Arbuckle's factum raised issues not listed as grounds in his Notice. These include breach of s. 7 of the *Charter of Rights and Freedoms*, the alleged "gross misrepresentation" and "unbecoming conduct" by Ms. Tanner's counsel, and the judge's failure to consider C's best interests. Mr. Arbuckle's oral submissions centered on his allegation of bias.

[23] I will address the following:

1. Should the Court grant leave to appeal?
2. Should the Court admit fresh evidence?
3. Did the judge's conduct display a reasonable apprehension of bias?
4. Did the interim direction and Order respecting the Lillio App embody an appealable error of jurisdiction, procedure or legal principle?
5. What costs should be ordered?

First Issue: Leave to Appeal

[24] Leave is required for an interlocutory appeal: *Judicature Act*, RSNS 1989, c. 240, s. 40. Mr. Arbuckle's Notice sought leave. His submissions did not address the point.

[25] Leave is granted when the appellant raises an arguable issue, meaning a submission that, if accepted, could result in the appeal being allowed: *APA Inc. Experts Conseils/Consultants and Forgeron Engineering Limited v. Fares Construction Ltd.*, 2025 NSCA 42, para. 31, and cases there cited.

[26] The allegation of judicial bias, if accepted, could result in Mr. Arbuckle's appeal being allowed. I would grant leave.

Second Issue: Fresh Evidence

[27] *Civil Procedure Rule* 90.47(1) says this Court "may on special grounds authorize evidence" on the hearing of the appeal.

[28] Fresh evidence to impugn the merits of the decision under appeal may be admitted when the evidence satisfies the criteria in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. The tendered fresh evidence does not satisfy these criteria. In particular, the evidence was available before March 26, 2025 and, as I will discuss, would not have changed the outcome.

[29] Apart from *Palmer*'s criteria, the Court may admit fresh evidence on whether the court or tribunal under appeal offended a principle of procedural fairness, for instance by displaying a reasonable apprehension of bias or failing to allow an opportunity to present argument: *R. v. Wolkins*, 2005 NSCA 2, para. 61, per Cromwell J.A., as he then was; *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2018 NSCA 83 [varied on another issue 2020 SCC 21], at para. 73, and cases there cited.

[30] I would admit the tendered fresh evidence of both Mr. Arbuckle and Ms. Tanner in reply, for the purpose of addressing procedural fairness.

Third Issue: Reasonable Aprehension of Bias

[31] In *Yukon Francophone School Board, Education Area # 23 v. Yukon (Attorney General)*, 2015 SCC 25, Justice Abella for the Court summarized the principles that govern an allegation of bias:

> [20] 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 Grandpre J. (dissenting))
>
> …
>
> [26] 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* [*Wewaykum Indian Band v. Canada*, [2003] SCC 45], at

> para. 77; *S. (R.D.)* [*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484], 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. [Justice Abella's underlining]
> >
> > …
> >
> > [37] But whether dealing with judicial conduct in the course of a proceeding or with "extra-judicial" issues like a judge's identity, experiences or affiliations, the test remains
> >
> > > Whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias … . [T]he assessment is difficult and requires a careful and thorough examination of the proceeding. The record must be considered in its entirety to determine the cumulative effect of any transgressions or improprieties. (Citations omitted; *Miglin* [*Miglin v. Miglin*, 2003 SCC 24], at para. 26).

[32] Normally, the concerned party should request the judge to recuse. Then the judge issues a ruling with reasons. If the party disagrees and appeals, those reasons assist the Court of Appeal. Mr. Arbuckle initiated his challenge in the Court of Appeal and we must infer the judge's state of mind from the transcript.

[33] To support his allegation of bias, Mr. Arbuckle cites comments by Justice DeWolfe at the conferences of October 16, 2024 and March 26, 2025. I will consider the comments in their context, as directed by *Yukon* and *S.(R.D.)*.

[34] First, the pre-hearing conference of October 16, 2024. The discussion focused on Mr. Arbuckle's inadequate financial disclosure. Mr. Arbuckle cites Justice DeWolfe's comment to Mr. Arbuckle's counsel:

> **THE COURT:** … I've not known Ms. Connors to, to ask for irrelevant stuff. She does not want to ask for boxes and boxes of documents just for the sake of having them. So if she asks for it, I expect you'll provide it unless there's a very, very good reason why you can't. …

[35] Mr. Arbuckle says Justice DeWolfe unduly deferred to Ms. Connors' wishes. To bolster his point, Mr. Arbuckle tenders as fresh evidence a Law School class photo from 1982 showing Ms. Connors and Justice DeWolfe as classmates. Mr. Arbuckle says this shows they have a personal relationship and establishes a reasonable apprehension of bias.

[36] I respectfully disagree. Earlier, I quoted the passages that give context to the judge's impugned comments of October 16, 2024. What appears is the following.

[37] Mr. Arbuckle had failed to make the required financial disclosure. This, despite Mr. Arbuckle's representation by counsel, who knew the rules of disclosure and could so advise his client, and notwithstanding specific emailed requests from Ms. Tanner's counsel to Mr. Arbuckle's counsel. Mr. Arbuckle's delinquency was causing unnecessary delay and elevating costs. The requested information was identified in Ms. Connors' pre-conference memorandum before the October 16 conference. The judge found this information was disclosable and directed Mr. Arbuckle to provide it. Justice DeWolfe was doing her job. This is not bias.

[38] Next, Mr. Arbuckle's factum cites several items from the tele-conference of March 26, 2025.

[39] First is Justice DeWolfe's statement, when discussing the length of trial:

> So if they don't have something positive to say, or, or important to say about the parenting, about the, the current situation, the go-forward, don't use them. That's my advice to, 'cause I'm not going to care, okay? And it's really important that the person who's making the decision really, you know, cared about what's being said, and I – you know, I don't think care is a bad word, but it's just not relevant, right?

[40] Mr. Arbuckle submits a judge who does not "care" about his evidence displays bias.

[41] Justice DeWolfe's comment anchored her suggestions to both counsel that their evidence should be confined to relevant matters and, if that was done, the trial should take no more than one day. The judge was not saying she cared about Ms. Tanner's evidence, but not about Mr. Arbuckle's. Her message to both was: in a trial, only relevant evidence matters, and both parties would be wise to govern themselves accordingly. This is case management, not bias.

[42] Next, Mr. Arbuckle's factum cites the following exchange with Ms. Tanner's counsel from the March 26 tele-conference:

> **MS. CONNORS:** So, you know, I think we can work it out between ourselves honestly, and the only other pressing issues, subject to the comments of my friend is that there – I've made reference in the Pre-Conference Memorandum to the app at the daycare which is allowing access to photographs and –
>
> **THE COURT:** Stop, stop right there. Only parents and, and people who parents agree to can do that. Interim order.
>
> **MS. CONNORS:** Okay.
>
> **THE COURT:** That's a no-brainer. …

Later, to Mr. Arbuckle's counsel, the judge said a submission for broader access, "I'll hear about in September", *i.e.* at the trial.

[43] The judge had read the comments on the Lillio app in both parties' pre-conference memoranda of March 19, 2025. When Ms. Tanner's counsel wished to expand, the judge cut her off. Later, to Mr. Arbuckle's counsel, the judge said it was a matter for the trial, where evidence could be presented. The judge was more abrupt to Ms. Tanner's counsel than to Mr. Arbuckle's.

[44] The existing situation with the Lillio app was chaotic, with Mr. Arbuckle repeatedly adding registrants and Ms. Tanner repeatedly removing them. An interim direction was needed. The direction's content was even-handed, treated Ms. Tanner and Mr. Arbuckle equally and left the ultimate ruling for the trial when the judge could hear proper evidence. The judge could have tempered her impatience and should have permitted submissions by both counsel before announcing her ruling. I will address this point later respecting procedural fairness. But impatience directed at both parties is not bias against Mr. Arbuckle.

[45] Lastly, Mr. Arbuckle's factum cites the judge's comment from the March 26 tele-conference:

> **THE COURT:** But, you know what – okay, I mean, if she's got, if she's got a licensed vehicle and she's, and she's known to the child, you know, whatever. It's not a big deal, is it?
>
> **MS. CONNORS:** It is from my cli-, it is from my client's perspective right now, but I think that if, if we – Justice, I've had a conversation with my client. I think if we- sometimes in, in the sweetness of time, if you understand my meaning …
>
> **THE COURT:** It's not … (inaudible due to call-in audio).

> **MS. CONNORS:** …it, it would probably resolve itself.
>
> **THE COURT:** Sorry, I can see it's not urgent, it's not a, not a threat or anything, so I'm not saying anything about the partner, and we'll just leave it at that, and, you know, we have to get past some of these things unless they're big issues for the child's well-being. …

[46] This passage involved Ms. Tanner's objection to Mr. Arbuckle's new partner driving C. The judge declined to intervene and advised Ms. Tanner to "get past" it because there was no harm to C. The judge's curt tone was directed at Ms. Tanner, not Mr. Arbuckle. The outcome favoured Mr. Arbuckle. The exchange does not indicate judicial bias against Mr. Arbuckle.

[47] Overall, Mr. Arbuckle says the judge's manner was "scornful" of him. That is not how I see it. Case management is agenda driven. The judge's job is to move the matter efficiently toward trial. At times, Justice DeWolfe was unnecessarily abrupt. But her manner was directed as much or more to Ms. Tanner's counsel than to Mr. Arbuckle's.

[48] There was neither bias nor a reasonable apprehension of bias.

Fourth Issue: Appealable Error Re the Lillio App

[49] Mr. Arbuckle submits the interim direction respecting the Lillio App (1) exceeded the judge's jurisdiction, (2) was procedurally unfair by blocking counsel's opportunity to make argument on March 26, and (3) on the merits, erred in principle by compromising C's best interests. I will address these points in turn.

[50] **Jurisdiction:** *Rules* 59.38(1), 59.38(3), 59.38(4), 59.38(5)(g), 59A.01, 59A.02, 59A.05(e), 59A05(k), 26A.02(2)(c) and 26A.03(1)(a) are quoted above. These Rules authorize a case-management judge to deal with an immediate need by giving an interim order or direction. The judge is to implement the purpose of Rule 59A, *i.e.* to achieve a proportional, just, timely and cost-effective resolution that minimizes conflict. The interim order or direction may be based upon "documents filed with the court", without cross-examination. Such documents include the pre-conference memoranda of March 19, 2025 that identified the concern respecting the Lillio app.

[51] The *Rules* contemplate that a case management judge in the Family Division has broad discretion to marshal the turmoil of a family dispute with a utilitarian interim direction, pending the trial.

[52] The Judge's direction ended the helter-skelter of alternating addition and removal of Lillio registrants. It operated only in the interim and left the ultimate issue for determination at the trial on September 15, when full evidence and argument could be offered.

[53] The interim direction of March 26, later incorporated in the Order of April 14, 2025, squarely occupied the jurisdiction of a case management judge in the Family Division.

[54] **Denial of opportunity to argue:** At the March 26 tele-conference, Justice DeWolfe aborted Ms. Connors' attempt to speak on the Lillio app and, a few minutes later, foreclosed Mr. Broughton's attempt to address the point. In my respectful view, the judge denied procedural fairness to both parties. Each counsel should have had the opportunity to offer input before the judge made a ruling.

[55] However, the remedy is not to drop the interim issue, as Mr. Arbuckle proposes, or remit the matter to the Family Division for another interim hearing which could delay the trial. This Court has the authority to make any order that might have been made by the court appealed from: *Civil Procedure Rule* 90.48(1)(b). In this Court, both parties have provided thorough affidavit evidence and argument on the usage of the Lillio app. I have accepted the fresh evidence for the purpose of considering the issue of procedural fairness, which includes the remedy for a breach. The fresh evidence and submissions redress any deficiency from the March 26 conference.

[56] With the benefit of that fresh evidence and argument, I will address whether the interim direction of March 26-27, 2025, and Order of April 14, 2025, were appropriate.

[57] **Error and best interests:** Mr. Arbuckle says the judge's direction may estrange C's extended family by denying access to C's images. He submits the judge erred by harming C's interest in family cohesion.

[58] The assessment of a child's interests is central to a family dispute and attracts significant deference from the appeal court. This is especially so for an interim direction. Interlocutory rulings require leave to appeal because the appeal court should not lightly pre-empt a scheduled trial that will litigate the merits.

[59] Justice DeWolfe's direction affects Lillio's private feed of images. Nothing prevents Mr. Arbuckle taking his own photos or videos of C and sending them to whomever he wishes.

[60] The judge's direction acknowledges that Ms. Tanner, who has joint custody with primary care, has a privacy concern about the distribution of her daughter's images to a fluctuating circle of recipients for whom she has no control or input. The acknowledgement of that concern reflects no error. The daycare's Participation Agreement adopts the concern by stating "In the interest of safety and security we require parent permission for the publishing of work, photographs and videos". The Participation Agreement says "each parent" must sign, meaning neither may engage the Agreement unilaterally. Mr. Arbuckle and Ms. Tanner accepted the bilateral standard when they signed the Participation Agreement.

[61] The judge's direction treats Mr. Arbuckle and Ms. Tanner equally. Both must consent to any additional registrants proposed by either parent.

[62] The judge's direction lapses at the trial in September, when Mr. Arbuckle may litigate the issue fully with evidence.

[63] The direction is a fair balance. It neither reflects an error of principle nor offends C's best interests. Had the issue been litigated before me at first instance, after a full argument that was missing on March 26, I would have given the same direction.

Fifth Issue: Costs

[64] Ms. Tanner is entitled to costs of the appeal. The question is: how to calculate them.

[65] Each party requested a lump sum:

- At the conclusion of the submissions in this Court, Ms. Tanner's counsel presented the Court with her firm's invoices to Ms. Tanner for March 31, 2025 to June 11, 2025. These total approximately $38,000. She requested an award of $29,265, being approximately 75% of the invoiced amounts.
- Mr. Arbuckle requested costs of $11,552, which he calculated as his time multiplied by a notional rate of $60 per hour.

[66] In *Armoyan v. Armoyan*, 2013 NSCA 136, paras. 15-30, this Court approved the following approach to whether lump sum costs are appropriate:

- Tariffs are the norm, meaning there must be a reason to consider a lump sum. The tariffs deliver the benefit of predictability by limiting subjective discretion.
- However, tariffs are based on assumptions of normalcy. A case that bears no resemblance to those assumptions may inject the heavy dose of subjectivity that the tariffs aim to avoid. In such a case, it is better to skip the tariff and channel the discretion directly to the principled calculation of a lump sum.

[67] Here, an award based on the tariff clearly is unsatisfactory. The Family Division did not award costs, meaning there is no basis for the tariff's guideline of 40% for appeal costs. Case management directions normally are standard fare. The tariffs contemplate neither complex litigation arising at a case management conference nor a fully throttled appeal from a case managing judge's direction. An award of lump sum costs for this appeal is appropriate.

[68] *Armoyan*, paras. 10-16, 31-38 offers guidance on the calculation of lump sum costs. The approach derives from principles approved by Justice Freeman in *Williamson v. Williams*, 1998 NSCA 195, [1998] N.S.J. 498 and Justice Saunders in *Landymore v. Hardy* 1992 NSSC 70, 112 N.S.R. (2d) 410. The approach has been applied by authorities since *Armoyan*, including recently in *Fraser v. MacIntosh*, 2024 NSCA 85, paras. 22-24, per Beaton J.A. for the Court.

[69] To summarize from these authorities:

- Solicitor and client costs are based on "rare and exceptional circumstances as when misconduct has occurred in the conduct of or related to the litigation" (*Armoyan*, para. 11). Lump sum awards are party and party costs, not solicitor and client. Here, we are dealing with lump sum party and party costs.
- The basic principle of party and party costs is to award a "substantial contribution" toward the party's reasonable fees and expenses. For a lump sum award, this involves two factors: what amount is a "reasonable" starting point and what percentage of that amount is a "substantial contribution" in the circumstances. (*Armoyan*, paras. 16, 37)

- Determining a "reasonable" amount of fees and expenses, as a factor for lump sum party and party costs, involves a different calculus than assessing solicitor and client costs. For a party and party lump sum, "reasonableness" depends largely on the reliability of the information provided to the Court. Simply handing to the Court a lawyer's invoice that has vaguely described items, rote nomenclature, little useful explanation as to what is covered, and no supporting affidavit, *i.e.* no opportunity for the other party to test or cross-examine, will lower the amount the court considers to be "reasonable". (*Armoyan*, para. 16)

- "Substantial contribution" for a lump sum award means more than 50% but under 100% of the reasonable fees and expenses. Unless there is reason to do otherwise, the Court may default at 66%. Reasons to vary that percentage derive from the Court's overall mandate to "do justice between the parties" and the criteria cited in *Civil Procedure Rule* 77 on costs. Such reasons may include the conduct of either party that affected the speed, effort or expense of the proceeding and the content of unaccepted but reasonable settlement offers. (*Armoyan*, paras. 16, 37)

[70] The invoices provided by Ms. Tanner to the Court are unaccompanied by affidavits. This differs from *Armoyan*, where Ms. Armoyan filed affidavits that set out the background (see paras. 32-33). Here, there is no testing the content. The invoices here contain blacked out passages, vaguely described items, and do not clearly distinguish work related to this appeal from work that may relate to the upcoming trial, for which no costs have been awarded.

[71] I would reduce the "reasonable" amount of costs and expenses, *i.e.* the starting point, from $38,000 to $25,000.

[72] Next is the percentage that represents "substantial contribution".

[73] Mr. Arbuckle has inflated and hyperbolized a simple case management item into an unnecessarily complex and costly endeavour. As an articulate advocate, by representing himself he avoids legal fees of this appeal. Meanwhile, Ms. Tanner is left to pay her lawyer's substantial invoices, with the trial yet to come. I would apply a hefty percentage of 80%.

[74] I would award Ms. Tanner $20,000 costs of the appeal (80% of $25,000), all-inclusive, payable forthwith in any event of the cause.

Conclusion

[75] I would grant leave to appeal and admit the fresh evidence from both parties for the purpose of assessing procedural fairness. I would dismiss the appeal.

[76] I would order Mr. Arbuckle to pay Ms. Tanner costs of the appeal in the amount of $20,000, all-inclusive, payable forthwith in any event of the cause.

Fichaud J.A.

Concurred: Farrar J.A.

Bourgeois J.A.