PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Duggan*, 2018 NSPC 79

Date: 20180717
Docket: Truro No. 8149726, 8149727
Registry: Truro

Between:

The Queen

v.

Ernie Ross Duggan Junior

Judge:	The Honourable Judge Alain Bégin
Heard	July 17, 2018, in Truro, Nova Scotia
Counsel:	Peter Craig and Perry Borden, for the Crown David Mahoney and Stephanie Hillson, for the Defence

Duggan Recusal and Publication Ban Decision – July 17, 2018

[1] This is my decision for the matter of R. v. Ernest Duggan. In particular, an application has been made by counsel for Mr. Duggan that I:

1. Recuse myself from hearing the Preliminary Inquiry, and
2. That I order a publication ban on all materials and submissions relating to the application by the Defence for my recusal.

Publication Ban

[2] The Accused has applied for a Publication Ban for all matters relating to the Recusal Application that was made by the Accused. The Crown is not opposed to the application, but it does question whether it is necessary to protect the Accused's rights considering that jurors can be challenged for cause in the jury selection process.

[3] The Accused relies on s. 537(1)(i) of the *Criminal Code* that provides myself with wide discretion to regulate a proceeding. I accept that this section of the Code provides me with the necessary authority to grant a publication ban as it relates to the recusal application.

[4] The Accused is seeking a blanket publication ban on all matters relating to the recusal application. I questioned counsel whether a partial publication ban could be ordered so that the general public would not be totally excluded from understanding what is occurring in our Courts, while still maintaining the integrity of any potential jury pool, and protecting the rights of the Accused.

[5] The Accused is of the view that a total ban is necessary and that if I was to order a partial ban that I would be "splitting hairs." The Crown is of the view that a partial ban would be permissible.

[6] The proper notice of the application for a publication ban was provided to the media. Reporters for Saltwire and BellMedia were in attendance when the recusal and publication ban applications were heard. The reporter from Saltwire addressed the Court and he stated that he was not interested in reporting the specific details contained in the documents filed with the Court on behalf of the Accused. The media merely wants to generally report on the 'bigger picture' of

what had been requested, and what the Court's decision was in response to the applications before the Court.

[7] I disagree with counsel for the Accused that a complete publication ban is required to protect the potential jury pool. I firmly believe that a partial publication ban could protect the jury pool, and the Accused's rights, while keeping the members of the general public informed as to what is being decided by our Courts. The openness of our Courts is very important in a free and democratic society. This openness can be achieved while still protecting the rights of an Accused.

[8] I will order the following Publication Ban:

1. There is to be a Publication Ban on all of the documents filed with the Court by the Accused in support of the Recusal Application, including the Affidavit of Haley Parker and the attached Exhibits.
2. There is to be a Publication Ban on the written submissions of the Accused and the Crown.
3. The only reporting on what has been applied for by the Accused and the decision of this Court is to be from the redacted decision that I will provide to the media this morning after delivering my decision.
4. The Publication Ban shall remain in effect until the jury is sequestered in the trial for the Accused. If the trial for the Accused proceeds by way other than a jury trial then I will hear applications regarding the termination of the Publication Ban.

Recusal Application

[9] Counsel for the Accused, through the affidavit of Haley Parker, alleges a certain factual basis for their recusal application. It is important to note that almost all of these factual allegations by the Defence were unknown to myself during any of my interactions with the Accused, and they only became known to myself once the recusal application was made, and the affidavit of Haley Parker was filed with the Court.

[10] The factual allegations by the Defence, with a couple of corrections by myself, are as follows, and the allegations that were unknown by myself are noted as such:

1. April Duggan and the Accused were married for approximately 20 years as of July 2017. (Unknown by myself)
2. They were next door neighbors of the deceased, Susan Butlin (hereinafter "Ms. Butlin").
3. Ms. Butlin alleged that the Accused had sexually assaulted her on July 2, 2017.
4. Ms. Butlin spread these allegations throughout the community prior to advising the Accused and April Duggan of the allegations. (Unknown by myself)
5. On July 18, 2017, Ms. Butlin sent a message to April Duggan advising that the Accused had traumatized her and had been inappropriate with her at her home on July 2, and that he owed her an apology. (Unknown by myself)
6. April Duggan recalled that the Accused and Ms. Butlin had been drinking on July 2, 2017, however she was not aware of any issues until she received a message on July 18. (Unknown by myself)
7. April Duggan had decided to separate from the Accused and provided him a letter in early July 2017 saying she wanted a separation. (Unknown by myself)
8. The Accused became very upset about the allegations that Ms. Butlin had brought against him. He did not know why she was doing this to him and his family, and that he was devastated that she was telling people in the community that he had sexually assaulted her. He worked in the community and attended at people's homes, he was a family man and he became very upset about her allegations. (Unknown by myself)
9. Ms. Butlin claimed her pool was vandalized on August 5.
10. On August 7, Ms. Butlin brought a complaint to the RCMP in Bible Hill alleging that the Accused had sexually assaulted her on July 2, and that she also suspected him of damaging her pool. (Unknown by myself.
11. On August 7, two RCMP officers spoke to Ms. Butlin about the sexual assault allegations, and both concluded that there were insufficient grounds for laying a criminal charge. They both

recommended that she pursue a peace bond instead. (Unknown by myself)

12. On August 10, 2017, Ms. Butlin swore an Information at the Truro Provincial Court alleging that the Accused had forced unwanted sexual activity on her and she also implied that he had also damaged her pool.

13. The Summons for the peace bond was served on the Accused on or before August 17, 2017, by Cst. Gallen and the case was scheduled for appearance in the Truro Provincial Court on August 30, 2017, at 9:30 a.m.

14. The Accused, according to April Duggan, was prepared to agree to the peace bond so that he could "get it behind him." (Unknown to myself)

15. On August 28, 2017, Jessica Broussard, my Judicial Assistant who was acting on my instructions, sent an email to the Crown Prosecutor, Alison Brown, requesting that the Crown and police look further into the peace bond allegations as it was "probably more than a peace bond."

16. Crown Prosecutor, Alison Brown, emailed the RCMP on August 29, 2017, inquiring whether Ms. Butlin had reported the sexual assault allegation to the RCMP. (Unknown to myself)

17. On August 30, 2017, the Accused and Ms. Butlin appeared in Truro Provincial Court to respond to the peace bond Application. During this proceeding I advised the Accused and Ms. Butlin that I had read the Peace Bond Application and that "on the face of it" it was a criminal offence, a sexual assault, and that I had forwarded the peace bond to the Crown Attorney's office and "The police should look into this to see, if in fact…"

18. Ms. Butlin told the Court she would be happy to accept a peace bond as long as the Accused "stays away." I directed the Accused to have no contact whatsoever with Ms. Butlin and adjourned the matter for two weeks until September 13, 2017, at 9:30 a.m. to obtain an update from the police. The Accused did not speak on the record but he did acknowledge my directions to stay away from Ms. Butlin. The Accused was not represented by counsel.

19. April Duggan states that in between the Court dates the Accused was drinking, not working, and that his life was falling apart. (Unknown to myself)

20. April Duggan states that when the Accused returned home after the September 13, 2017 court date that he became devastated. (Unknown to myself)

21. The transcript of the Court proceeding on September 13, 2017, indicates that the Crown had made inquiries with the police and that they had received a response which was conveyed to Ms. Butlin. The Crown indicated that another officer was going to look at the file so the matter was adjourned until October 4, 2017.

22. The transcript for September 13, 2017 shows the Accused acknowledging my direction to not have any contact with Ms. Butlin.

23. The RCMP Occurrence Details that were disclosed as part of the murder file indicated that RCMP Cst. Naime had reviewed the sexual assault investigation on August 30, 2017, and that he agreed with the conclusion that no criminal offence had been committed by the Accused. (Unknown by myself)

24. The RCMP Occurrence Details also disclosed that the file was reviewed a further time by RCMP Cpl. Wentzell on September 13, 2017, and that he had also concluded there were insufficient grounds to proceed with criminal charges, and that he had advised Ms. Butlin of this on September 14, 2017. (Unknown by myself)

25. Following the second peace bond adjournment on September 13, 2017, April Duggan says that the Applicant came home devastated and could not get beyond it. He started drinking heavily, had lost his license due to an impaired driving charge, and he could not run his mowing business nor maintain his regular job. The Accused had lost his wife and the allegations about him were in the community. April Duggan believed that he then "snapped". (Unknown to myself).

26. Dianne Cook, the Accused's sister, states in her Affidavit that the "Susie Butlin investigation" had really affected the Accused. She further asserts that the Accused thought he was going to Court for a peace bond and that it would be all done that day, and that he was very upset when I said that the matter needed to be investigated so it was not concluded that day. (Unknown to myself)

27. It is alleged that the first degree murder of Ms. Butlin, at the hands of the Accused, occurred during the evening of September 17, 2017.

[11] Defence submits that the Crown will allege that the adjournment of the peace bond by myself to allow further investigation of possible sexual assault charges against the Accused may have acted as motive for the Accused to form the intent to plan the murder of Ms. Butlin. The Crown denies this.

[12] The Crown disputes the factual allegations put forth by the Defence as follows:

1. That at no point in time did I "direct" that the Crown have the RCMP investigate any allegations made by the Deceased which were contained in her Peace Bond Application, and that I never "concluded" that there were grounds for criminally investigating the Accused regarding a sexual assault. No such language was ever used by myself; no such suggestions could have been inferred; and most significantly, that I did not have the capacity or jurisdiction to make such a purported direction;
2. That my decision to adjourn the Peace Bond Application did not contribute to the Deceased's death; and
3. That my words and actions never "constituted evidence" relevant to committal on the first degree murder Count.

[13] The Crown asserts that contrary allegations by the Defence are "artifices created in a transparent attempt to manufacture recusal grounds."

The Law of Recusal

[14] Counsel all agree that this is a unique request by the Defence (to paraphrase the Crown it's an "unusual manifestation of a recusal claim") in that I am not being asked to recuse myself from presiding over the Accused's trial, but merely from the Accused's Preliminary Inquiry. If the Accused is committed to stand trial on these charges, his trial will be, according to his Election, in Supreme Court with a jury.

[15] The case law for recusal applications usually deals with the recusal of trial judges. I am being asked to recuse myself from presiding over the Accused's Preliminary Inquiry.

[16] It is clear that my role as a Preliminary Inquiry judge is significantly less involved than that of a trial judge in that my primary task is to determine whether there is sufficient evidence to commit the Accused to stand trial on the charged offences and, pursuant to s. 548, any other offences disclosed on the evidence.

[17] At a Preliminary Inquiry I do not make any findings of credibility of any of the witnesses. All inferences fall in favour of the Crown.

[18] The bias being claimed by Defence, whether it is unconscious or reasonably apprehended, is grounded upon my very limited prior dealings with the Accused. At no time in my limited interaction with the Accused did I make any adverse findings, rulings or dispositions of any sort as it relates to the Accused.

[19] The Defence claims that my actions in relation to the Accused were "unusual." This is incorrect. It is my usual practice, in preparing for arraignment day, to review all of the matters to be heard. As I have done previously in two other, separate and unrelated, matters, I raised with the Crown's office (prior to the matter coming to Court) whether the police and the Crown wished to look into the conduct being alleged by a Complainant in their Peace Bond Application. This was no different for the allegations by Ms. Butlin against the Accused. On the date that this matter initially came before me in Court, I, without objection, adjourned the Court proceeding to allow the further investigation. The Crown had also indicated that it wished for this further investigation to occur.

[20] I absolutely reject any characterizations of my actions by the Defence in referring this matter to the Crown and police for possible investigation as an "unusual" action by myself. I was acting in this matter as I am expected to act as a Provincial Court Judge. Before court I review all matters that will be coming before myself to ensure that there are no deficiencies as to wording, procedure, jurisdiction, etc., as well as looking for any other irregularities, or possible red flags.

Case Law on Recusals

[21] Defence are relying on two cases for their recusal application. The cases are ***R. v. Curragh Inc.*** [1997] SCJ 33, and ***Wewaykum Indian Band v. Canada***, 2003 SCC 45.

[22] The Crown and Defence acknowledge that ***Wewaykum Indian Band*** case is the governing and authoritative case as it relates to the recusal application. That

case related to the application for the recusal of a Supreme Court of Canada Justice from an appeal panel. As noted by the Crown, the only assistance that cases subsequent to ***Wewaykum Indian Band*** provide are to illustrate different applications of the "test" and legal principles to a wide range of fact scenarios that gave rise to recusal claims.

[23] To use the words of Justice Watt from ***R. v. Gushman***, [1994] O.J. No. 813 (Gen. Div.)

> …. It is trite that every allegation that judicial conduct gives rise to a reasonable apprehension of bias falls to be decided upon its own facts. It follows that a parade of authorities, parsing precedent in vain search of factual equivalent or reasonable facsimiles, is not to the purpose.

[24] The underlying principles and analysis apply to my situation solely as the Preliminary Inquiry judge. The legal principles and "test" set out in the ***Wewaykum Indian Band*** case are neither complex nor subject to any diverging streams of judicial interpretation.

[25] In ***Wewaykum Indian Band*** the Supreme Court of Canada addressed this issue when it was alleged that Justice Binnie had improperly served on a panel of the Supreme Court in which he delivered the decision dismissing an appeal by an Indian Band who had claimed exclusive entitlement to reserves on Vancouver Island. Following the Court's decision it was discovered that Justice Binnie had acted as Associate Deputy Minister of Justice at a time when the Band was bringing claims against the Federal Government. It was agreed that actual bias was not at issue, however the Bands involved sought an order setting aside the Supreme Court's judgement on the basis that Justice Binnie's involvement as Federal Associate Deputy Minister of Justice in the early stages of the claim gave rise to a reasonable apprehension of bias.

[26] The Court concluded that there was no reasonable apprehension of bias established and Justice Binnie was not disqualified from hearing the appeals or participating in the Judgement.

[27] In rendering its decision the Court provided a thorough analysis respecting the foundational principle of impartiality of the Courts. The unanimous decision of the Court stated as follows at paragraphs 57-68 **(emphasis added)**:

> 57 The motions brought by the parties require that we examine the circumstances of this case in light of the **well-settled, foundational principle of**

impartiality of courts of justice. There is no need to reaffirm here the importance of this principle, which has been a matter of renewed attention across the common law world over the past decade. **Simply put, public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.**

58 The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. Conversely, bias or prejudice has been defined 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.**

(***R. v. Bertram***, [1989] O.J. No. 2123 (QL) (H.C.), quoted by Cory J. in ***R. v. S. (R.D.),*** 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484, at para. 106.)

59 Viewed in this light, **"[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary"** (Canadian Judicial Council, Ethical Principles for Judges (1998), at p. 30). **It is the key to our judicial process, and must be presumed.** As was noted by L'Heureux-Dubé J. and McLachlin J. (as she then was) in S. (R.D.), supra, at para. 32, **the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.**

60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in Committee for Justice and Liberty v. National Energy Board, supra, at p. 394, is the reasonable apprehension of bias:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, **that test is "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."

61 We will return shortly to this standard, as it applies to the circumstances outlined in the factual background. Before doing that, it is necessary to clarify the relationship of this objective standard to two other factors: the subjective consideration of actual bias; and the notion of automatic disqualification re-emerging in recent English decisions.

B. Reasonable Apprehension of Bias and Actual Bias

62 Determining whether the judge brought or would bring prejudice into consideration as a matter of fact is rarely an issue. Of course, where this can be established, it will inevitably lead to the disqualification of the judge. But this said, **most arguments for disqualification typically begin with an acknowledgment by all parties that there was no actual bias, and move on to a consideration of the reasonable apprehension of bias.** Here, as in many cases, it is conceded by the parties that there was no actual bias on Binnie J.'s part, and his statement that he had no recollection of involvement is similarly accepted by all concerned. As submitted by the parties, his personal integrity is not in doubt, either in these appeals or in any appeal in which he has sat as a member of this Court. Nevertheless, it is said, the circumstances of the present case are such as to create a reasonable apprehension of bias on his part. Since the two propositions go hand in hand, to understand what is meant by reasonable apprehension of bias, it is helpful to consider what it means to say that disqualification is not argued on the basis of actual bias.

63 **Saying that there was "no actual bias" can mean one of three things: that actual bias need not be established because reasonable apprehension of bias can be viewed as a surrogate for it; that unconscious bias can exist, even where the judge is in good faith; or that the presence or absence of actual bias is not the relevant inquiry.** We take each in turn.

64 First, when parties say that there was no actual bias on the part of the judge, they may mean that the current standard for disqualification does not require that they prove it. In that sense, the "reasonable apprehension of bias" can be seen as a surrogate for actual bias, on the assumption that it may be unwise or unrealistic to require that kind of evidence. It is obviously impossible to determine the precise state of mind of an adjudicator (Cory J. in ***Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)***, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623, at p. 636). As stated by the English Court of Appeal in Locabail (U.K.), supra, at p. 472:

> The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.
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> Again, in the present instance, no one suggests that Binnie J. was consciously allowing extraneous influences to affect his mind. Consequently, it would appear that reasonable apprehension of bias is not invoked here as a surrogate for actual bias.

65 Second, **when parties say that there was no actual bias on the part of the judge, they may be conceding that the judge was acting in good faith, and was not consciously relying on inappropriate preconceptions, but was nevertheless unconsciously biased.** In ***R. v. Gough***, [1993] A.C. 646 (H.L.), at p. 665, quoting Devlin L.J. in The Queen v. Barnsley Licensing Justices, [1960] 2 Q.B. 167 (C.A.), Lord Goff reminded us that:

> Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit.
>
> As framed, **some of the arguments presented by the parties suggest that they are preoccupied that Binnie J. may have been unconsciously biased despite his good faith.**

66 Finally, when parties concede that there was no actual bias, they may be suggesting that looking for real bias is simply not the relevant inquiry. In the present case, as is most common, parties have relied on Lord Hewart C.J.'s aphorism that **"it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done"** (The King v. Sussex Justices, Ex-parte McCarthy, [1924] 1 K.B. 256, at p. 259). To put it differently, in cases where disqualification is argued, **the relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was.** In that sense, the reasonable apprehension of bias is not just a surrogate for unavailable evidence, or an evidentiary device to establish the likelihood of unconscious bias, but the manifestation of a broader preoccupation about the image of justice. As was said by Lord Goff in Gough, supra, at p. 659, "there is an overriding public interest that there should be confidence in the integrity of the administration of justice".

> 67 Of the three justifications for the objective standard of reasonable apprehension of bias, the last is the most demanding for the judicial system, because it countenances the possibility that justice might not be seen to be done, even where it is undoubtedly done – that is, it envisions the possibility that a decision-maker may be totally impartial in circumstances which nevertheless create a reasonable apprehension of bias, requiring his or her disqualification. **But, even where the principle is understood in these terms, the criterion of disqualification still goes to the judge's state of mind, albeit viewed from the objective perspective of the reasonable person.** The reasonable person is asked to imagine the decision-maker's state of mind, under the circumstances. In that sense, the oft-stated idea that "justice must be seen to be done", which was invoked by counsel for the bands, cannot be severed from the standard of reasonable apprehension of bias.
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> 68 We emphasize this aspect of the criterion of disqualification in Canadian law because another strand of this area of the law in the Commonwealth suggests that some circumstances of conflict of interest may be enough to justify disqualification, whether or not, from the perspective of the reasonable person, they could have any impact on the judge's mind. As we conclude in the next section, this line of argument is not helpful to counsel for the bands in the present case.

[28] Counsel for the Accused state that the question in this case is whether a reasonable, informed, and right minded member of the community, viewing the matter realistically and practically, and having thought the matter through, would conclude that it is more likely than not that I as the Preliminary Inquiry Judge, consciously, or unconsciously, would not decide issues fairly during the Preliminary Inquiry.

[29] Counsel for the Accused submit that there are three reasons why an informed person would be concerned about judicial impartiality in this case, as follows:

1. I may have to consider whether my own words and actions could constitute evidence that is relevant to the issue of committal on the charge of first degree murder;
2. Counsel alleges that I had previously concluded that there were grounds for investigating the Accused on the criminal charge of sexual assault and that I directed the police and the Crown to do so; and
3. That I may have to consider whether my actions in directing an adjournment of the peace bond hearing was a contributing factor to the death of the deceased since both Ms. Butlin and the Accused were

> prepared to agree to resolve the matter with a peace bond and her death occurred during the adjournment of the peace bond hearing.

[30] As a Provincial Court Judge, I cannot be held responsible for how people may act after appearing before myself in Court, whether they act positively, or negatively. These individuals who may act out, after I have treated them impartially and fairly, are solely responsible for their own behaviours and actions, and any resultant consequences that may be visited upon them.

[31] I cannot be held responsible for people acting on their displeasure or unhappiness to decisions made by myself when I am properly, and impartially, executing my duties as a Provincial Court Judge. The transcripts from the two peace bond appearances by the Accused may seem "unusual" to counsel for the Accused, but there was nothing unusual in what occurred on those two dates.

[32] In September 2016, I took my oath as a Provincial and Family Court Judge for the Province of Nova Scotia, and in that oath, which I took very seriously, I swore that "I will well do right to all manner of people after the laws of the Province of Nova Scotia **without fear, favour affection or ill will.**" (emphasis added). I have always abided by my oath.

[33] The mere fact that a judge previously encountered a litigant during unrelated prior litigation is **not** a basis for that judge's disqualification from subsequent litigation in any Canadian jurisdiction. Even if a judge in a prior case made an adverse credibility finding *vis-a-vis* a party, this alone does not automatically require recusal, and the question becomes whether the finding was expressed in terms that would raise a doubt in a reasonable person's mind as to the judge's impartiality in the subsequent unrelated proceeding.

[34] The transcripts of my two very limited interactions with the Accused do not show any findings of credibility, or otherwise. My limited interactions with the Accused were brief and uneventful. Prior to the peace bond application by Ms. Butlin I do not ever recall having had any interactions whatsoever with either the Accused or Ms. Butlin.

[35] The law is clear that a judge's prior involvement with a litigant in related or unrelated litigation is not, without more, a basis for recusal.

[36] The Crown provided some legal papers on the law of recusal and they summarized the two guiding principles for recusals as follows:

1. The threshold for a finding of judicial bias is high, and **there is a strong presumption of judicial impartiality that can only be displaced by "cogent/convincing" evidence;** and
2. With respect to a situation where a judge had prior involvement with a party in related or unrelated litigation, a reasonable apprehension of bias may be found to exist if the judge made prior adverse credibility finding against an Accused.

[37] The case of ***R. v. Noah 2010 NUCJ 22 (Nunavut Court of Justice)*** provides helpful guidance on the issue of recusals. The ***Noah*** case is not binding on myself but I do accept the legal premises on recusal enunciated by that Court.

[38] In that matter, the trial judge had presided over the Accused's Preliminary Inquiry and was set to preside over the Accused's trial as well. In that case Crown and Defence had jointly made the recusal application. The comments by the judge in ***Noah*** apply to recusal applications in general, and not just specifically to the situation that was facing the judge in that particular case. Kilpatrick J. made the following comments (emphasis added):

> 10 The arguments being advanced by Defence and Crown in this application, **if accepted, would have profound implications for the role of the Judiciary in Canada's legal system**. It would affect the way the judiciary makes its decisions. It would affect the way in which the Canadian public perceives judges and understands the constitutionally enshrined values of judicial impartiality and objectivity.
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> 14 …. The litigant may not understand the traditional role of the judiciary in Canada's legal system. **It is what the reasonable and right minded person might think about the issue that is important.** The Supreme Court of Canada explicitly incorporates considerations of both realism and practicality into the application of this objective.
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> **15 Judicial impartiality must be viewed within the context of the judge's special role in the adjudicative process however. No understanding of judicial impartiality can be complete without consideration of this larger context.**
>
> 23 Profound implications flow from the argument that a judicial officer exposed to evidence that is inadmissible or not otherwise properly before the court may taint the judge's later ability to try a defendant**. If the test for a reasonable apprehension of bias includes the barest possibility of unconscious bias, and nothing more, then the trial**

process that has been used for hundreds of years will be destroyed. If one applies the reasoning behind the applicant's argument to the judge hearing a voir dire, a judge who disbelieves the accused's evidence in a voir dire could not continue with the trial. The judge's later assessments of the evidence given at trial might be perceived by others as being tainted "unconsciously" by evidence heard in the voir dire. **This reasoning would effectively preclude any judge who performs a gatekeeping function from presiding at a trial involving the same parties and witnesses.**

24 If exposure to inadmissible evidence is sufficient to disqualify a judicial officer, then the experienced judicial officer who has previously presided over other trials involving the same accused, who may have found against the defendant's credibility in an earlier proceeding or who may have sentenced the defendant on other matters, could not preside over future trials because of the possibility of unconscious bias

26 **A defendant does not have an absolute right to be tried before a different judicial officer every time they proceed to trial. Such an expectation is unworkable. It forms no part of what a right thinking and informed member of the public, thinking realistically and practically, expects of the judiciary in this country.**

34 In the case of ***Roberts v. R***., 2003 SCC 45, [2003] 2 S.C.R. 259 (S.C.C.), the Supreme Court of Canada reiterated that **there was a strong presumption in favour of judicial impartiality and that the threshold for a finding of bias, whether real or apprehended is necessarily high.** There must be cogent grounds. Mere suspicion is not enough. **The Court found that it would not be in the public interest to have judges easily disqualified**…

37 In the case of ***R. v. Bolt***, [1995] A.J. No. 22, 26 W.C.B. (2d) 18 (Alta. C.A.), at pg.2, the Alberta Court of Appeal
had this to say:

> It is inevitable that there will be occasions when an experienced trial judge will have had some prior judicial contact with an accused. **We are confident that trial judges are capable of disabusing their minds of that fact in considering the guilt or innocence of the accused in relation to the specific charge before them. Unless real bias can be shown, such prior contact is not a factor in determining an appearance of bias.**

40 Subsequent to the Supreme Court of Canada's pronouncement of the test for bias in ***RDS*** and ***Wewaykum***, the jurisprudence in Canada continued to reflect the position taken by the earlier authorities in relation to the judicial officer's abilities to separate, segregate, and apply different types of information received by them as judges.

41 In ***R. v. Tremblay***, 2004 ABCA 102, 61 W.C.B. (2d) 307 (Alta. C.A.), the Alberta Court of Appeal dismissed an application for recusal on the basis of an earlier adjudication. **The Court found that no right minded, reasonable observer would be**

> **of the view that there was a reasonable apprehension of bias under these circumstances.** Similarly, in the case of ***R. v. Werner***, 2005 NWTCA 5, 205 C.C.C. (3d) 556 (N.W.T. C.A.), **the NWT Court of Appeal ruled that the mere fact that a judge has tried an accused before, even if the judge has found the accused's credibility wanting, does not give rise to a reasonable apprehension of bias. Similar rulings can be found in *R. v. J. (D.B.)* (2000), 149 C.C.C. (3d) 534, 2000 BCCA 616 (B.C. C.A.), *R. v. Kochan*, 2001 ABQB 346, 50 W.C.B. (2d) 18 (Alta. Q.B.), and *R. v. Truong*, 2000 ABQB 137, 48 W.C.B. (2d) 50 (Alta. Q.B.).**
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> 49 **The preliminary inquiry and the trial are two separate and distinct legal proceedings. The trial and preliminary inquiry have very different standards of proof. They have different tests for the admissibility of evidence. The contemporary preliminary inquiry is a focused one.** Evidence called at the preliminary inquiry may be restricted to certain issues or witnesses. The evidence received at the preliminary inquiry may not be admissible at trial. Even if a justice considering a no-evidence motion at trial could consider the evidence given at a preliminary inquiry, which is not the law, it would now be extremely dangerous to do so. Given the statutory amendments to the *Criminal Code* (*S.C.* 2002, C.13), the nature, quality and form of the evidence heard at the preliminary inquiry may be very different from that received in a trial environment…
>
> 55 **The proposition advanced by the applicant with respect to "the possibility" of unconscious bias finds no support in the jurisprudence. It is an assault upon judicial impartiality and undermines the very foundations of judicial objectivity that have been in place for hundreds of years.** There is nothing before me to suggest that a "reasonable, right thinking, and properly informed citizen, thinking realistically and practically, would find a real likelihood or real probability of bias" on the facts presented here. This is what is required to disqualify a judge. Nothing less will suffice.

Conclusion

[39] Has the Accused provided the cogent and compelling evidentiary basis necessary to displace the strong presumption of judicial independence that would give rise to a reasonable apprehension of bias justifying my recusal?

[40] The Accused is not suggesting any general bias on my part, nor any personal interest in the outcome of the Preliminary Inquiry which would amount to a disqualifying conflict. Certainly, none has been presented in any submissions. The Accused’s recusal application is based on the possibility of conscious or unconscious bias.

[41] The alleged disqualifying conflict cited by the Accused stems from my very limited involvement with Ms. Butlin's Peace Bond Application brought against the Accused. The Peace Bond Application was an unrelated proceeding where I did not make any adverse findings against the Accused. The transcripts from those hearings are before the Court.

[42] The test in this matter is whether a reasonable person would perceive or believe that I would not fairly and impartially, without bias, decide the matter of the Accused's committal to trial at the Preliminary Inquiry stage based on my very limited dealings with the Accused at the two brief appearances before me.

[43] The answer must be that a reasonably and properly informed person, who understands the principles and obligations of judicial impartiality, would realistically and practically conclude that I would not be biased, and that I would uphold and respect my judicial oath and decide the legal question of committal fairly and impartially.

[44] Or to paraphrase Lord Hewart, there is absolutely no doubt that justice would not only be done, but it would be seen to be done, in this matter if I remain as the judge for the Preliminary Inquiry.

[45] The application for my recusal from the Preliminary Inquiry for the Accused is denied.

Alain Bégin, JPC