

CANADA / JUDGMENT

Walker v. Kierans

2024 BCCA 118

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 118 Walker v. Kierans COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Walker v. Kierans, 2024 BCCA 118 Date: 20240328 Dockets: CA49417; CA49418 Docket: CA49417 Between: Kathleen Walker Appellant (Petitioner) And Margaret Mary Kierans, Public Guardian and Trustee of British Columbia, LArche Greater Vancouver, Community Living British Columbia, and Paul Kierans Respondents (Respondents)

- and - Docket: CA49418 Between: Kathleen Walker Appellant (Respondent) And Margaret Mary Kierans Respondent (Petitioner) And Public Guardian and Trustee of British Columbia Respondent (Respondent) Before: The Honourable Justice Skolrood On appeal from: An order of the Supreme Court of British Columbia, dated October 18, 2023 (Kierans (Re), 2023 BCSC 1841, Vancouver Dockets S220769 and S229990). The Appellant, appearing in person: K. Walker Counsel for the Respondent, Margaret Mary Kierans: Counsel for the Respondent, Public Guardian and Trustee of British Columbia: C.R. Dheensaw M.T. Wolf Place and Date of Hearing: Vancouver, British Columbia February 5, 2024 Place and Date of Judgment: Vancouver, British Columbia March 28, 2024 Summary: At the start of the hearing of the appellant's appeal, she requested that the judge recuse himself. The basis for the request was that the judge had made findings adverse to the appellant in unrelated litigation while the judge was a member of the Supreme Court of British Columbia. Held: Application dismissed. The appellant has not met the burden of establishing that an informed person, viewing the matter realistically and practically, would conclude that the judge was unable to decide the appeal fairly. Reasons for Judgment of the Honourable Justice Skolrood:

Introduction

- [1] At the outset of the hearing of this appeal, the appellant, Ms. Walker, requested that both Justice Voith and I recuse ourselves. While Ms. Walker did not file a formal notice of application, the division agreed to hear her application.
- [2] At the conclusion of Ms. Walker's submissions, her request was denied, with reasons to follow.

- [3] It is well established that a recusal application is to be decided by the judge to whom the application is directed. These are my reasons for declining to recuse myself. They are being released concurrently with Justice Voith's reasons addressing Ms. Walker's request that he recuse himself and with the reasons in her appeal.

Background

- [4] The present appeal is from a decision of Mr. Justice Basran rejecting Ms. Walker's application to be appointed committee of the person of her brother, Paul Kierans, pursuant to the Patient's Property Act, R.S.B.C. 1996, c. 349. Justice Basran's reasons are indexed at 2023 BCSC 1841. Justice Basran granted the application of Ms. Walker's sister, the respondent Margaret Mary Kierans, to appoint Ms. Kierans as committee of the person and of the estate of Paul Kierans.
- [5] Ms. Walker's recusal request is based upon my involvement as a judge of the Supreme Court of British Columbia in unrelated litigation involving Ms. Walker and the Law Society of British Columbia. On October 3, 2019, I made certain interim orders in that litigation (the "2019 Interim Orders"). Ms. Walker appealed those orders to this Court, which dismissed her appeal in reasons for judgment indexed at 2020 BCCA 178. Justice Grauer, for the Court, described the background to the appeal as follows:
- [1] On October 2, 2019, the appellant, Ms. Walker, and the respondent, the Law Society of British Columbia, commenced what was scheduled to be a three-day hearing of two chambers applications. The appellant was a former member of the Law Society, having practised law full-time from 1992 until she was injured in 2008. She continued to be a member until 2016.
- [2] The first application was the appellant's. She sought an order finding the Law Society in contempt of an earlier order pronounced by Madam Justice Russell in relation to attending a storage facility to inspect the appellant's files.
- [3] The second application was the Law Society's. It sought a vexatious litigant order against the appellant, pursuant to section 18 of the Supreme Court Act, RSBC 1996, c 443.
- [4] The hearing began on October 2, 2019, before Mr. Justice Skolrood. The appellant's application for a contempt citation proceeded first, and was completed but for the appellant's reply. The Law Society's vexatious litigant application was to proceed the following day.
- [5] But, on October 3, 2019, the appellant did not attend, for reasons I will return to. In the result, Skolrood J adjourned both applications generally, ordered a stay prohibiting the filing of any further materials on either application without leave, and enjoined the appellant from instituting any legal proceedings in the Supreme Court or the Provincial Court relating to the Law Society or its employees or former employees or representatives without leave. These prohibitions were made on an interim basis pending a full hearing of the

applications, to be reset before Skolrood J on the earliest available date after January 1, 2020.

- [6] In dismissing Ms. Walker's appeal, Grauer J.A. concluded:
- [61] In my view, the order pronounced below adjourning the applications at the appellant's request, and prohibiting her filing further materials on the applications without leave, or from commencing further proceedings against the Law Society without leave, on an interim basis pending the continuation of the applications, was one that the judge had the discretion to make notwithstanding the appellant's absence. The appellant has not demonstrated that the judge failed to exercise his discretion judicially, proceeded on a wrong principle, or was plainly wrong.
- [62] I consider that the judge balanced the rights of the appellant and the rights of the Law Society by allowing the adjournment to accommodate the appellant, while minimizing the Law Society's exposure to unnecessary costs through further filings or additional proceedings. No error has been demonstrated in that.
- [7] Following this Court's decision, the parties did not return before me to continue with the proceeding and I was never asked to, nor did I, determine the Law Society's vexatious litigant application.
- [8] Nonetheless, as I understood Ms. Walker's position on her recusal request, it is that I found her to be vexatious in the 2019 proceeding and that, as a result, I am biased against her and must therefore recuse myself from hearing her present appeal.

Legal Framework

- [9] In *Pereira v. Dexterra Group Inc.*, 2023 BCCA 201, Justice Griffin provided a thorough and helpful summary of the principles governing an application for recusal based upon actual or apprehended bias:
- [10] Judges are held to the highest standards of impartiality. The protection of the interests of the parties to a case and the administration of justice requires judges to be disqualified if they are biased or if there is a reasonable apprehension that they are biased: *R. v. Valente*, [1985] 2 S.C.R. 673, 1985 CanLII 25 (S.C.C.); *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484, 1997 CanLII 324 (S.C.C.); *Yukon Francophone School Board, Education Area No. 23 v. Yukon (Attorney General)*, 2015 SCC 25 [Yukon Francophone School Board]; *R. v. Anderson*, 2017 BCCA 154.
- [11] There is a strong presumption of judicial impartiality that is not easily displaced: *Yukon Francophone School Board* at para. 25. Judicial impartiality requires judges to approach each case with an open mind, free from inappropriate or undue assumptions: at para. 22.
- [12] The strong presumption that judges act impartially means that a party must meet a high burden to prove that a reasonable apprehension of bias exists. The longstanding test as repeated in *Yukon Francophone School Board* is:

- [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 Grandpré J. (dissenting))
- [13] The approach to this test is "inherently contextual and fact-specific": Yukon Francophone School Board at para. 26.
- [14] This Court has had occasion to consider the question of judges hearing multiple matters involving the same party. The mere fact that a judge has heard another proceeding involving the same party does not displace the presumption of judicial impartiality. In Jean Louis v. Jean Louis, 2021 BCCA 481, this Court held:
- [14] The fact that a judge heard another matter in the same proceeding or a related proceeding involving the same party or witness does not displace the presumption of judicial impartiality, including where the judge decided against that party: see Taylor Ventures Ltd. (Trustee of) v. Taylor, 2005 BCCA 350; Moshinsky-Helm v. Helm, 2021 ABCA 373; Klippenstein v. Manitoba Ombudsman, 2015 MBCA 15; Apotex Inc. v. Sanofi-Aventis Inc., 2008 FCA 394. Discussion
- [10] Respectfully, Ms. Walker's recusal request appears to be based upon a misapprehension of what occurred in the 2019 proceeding and of the scope of the 2019 Interim Orders. As Grauer J.A. found, no order was made declaring Ms. Walker to be a vexatious litigant. Rather, discretionary orders were made to preserve the status quo as a result of the adjournment necessitated by Ms. Walker's inability to continue with the hearing. Those orders did not require me to make any determination in respect of the Law Society's allegations underpinning the vexatious litigant application, and I did not do so.
- [11] Further, Ms. Walker's litigation with the Law Society is wholly unrelated to the matter in which this appeal has been brought. As held by this Court in Jean Louis v. Jean Louis, 2021 BCCA 481, the fact that a judge heard another matter involving the same party does not displace the presumption of judicial impartiality (at para. 14).
- [12] The threshold that an applicant must meet in order to establish actual or reasonably apprehended bias is high. Justice Griffin explained the rationale for the strict test in Pereira:
- [17] The strictness of the criteria required to show a reasonable apprehension of bias reveals that judges must necessarily not habitually yield to parties who want them to step down. Doing so would erode the administration of justice and damage the reputation of the judiciary. Judges have a duty to hear the cases assigned to them, which cannot be displaced by a party selecting one judge over another preferentially and without good reason. An additional danger of frequent recusals is that parties could use such motions strategically, which includes attempting to judge-shop or delay the proceedings: De Cotiis v. De Cotiis, 2004 BCSC

117 at paras. 10-11; Anderson at para. 16; Liskay v. Robinson, 2003 BCCA 506 at para. 53.

- [13] In order to meet that threshold, Ms. Walker must establish that an informed person, viewing the matter realistically and practically, and having thought through the matter, would conclude that it is more likely than not that I would be unable to decide Ms. Walker's appeal fairly, based upon my prior involvement in the 2019 proceeding: Pereira at para. 12.
- [14] Ms. Walker has not met her burden. Specifically, she has advanced no evidence nor any cogent argument to provide any basis upon which a reasonably informed person would conclude that I am unable to hear and determine her appeal fairly and objectively. While Ms. Walker's apparent discomfort is unfortunate, absent clear grounds for recusal, a litigant's preferences about the judge or judges who hear their case cannot be determinative.
- [15] For these reasons, I decline to recuse myself and I dismiss her application. "The Honourable Justice Skolrood"

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